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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FAIR HOUSING COUNCIL OF SAN FERNANDO VALLEY, et al., etc.,

Plaintiffs,

vs.

ROOMMATE.COM, LLC,

Defendant.

Case No. 03-CV-09386 PA (RZx)

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Hearing:
Date: October 20, 2008
Time: 1:30 p.m.
Room: Hon. Percy Anderson

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I. INTRODUCTION.

Defendant Roommate.Com, LLC ("Roommate")'s motion for summary judgment (Dkt. 122) should be denied. Plaintiffs have standing under the Fair Housing Act ("FHA") because they diverted scarce resources from other priorities to investigate and counteract Roommate's discrimination. *Fair Housing of Marin v. Combs*, 285 F.3d 899, 902-05 (9th Cir. 2002) (hereinafter "*FHM*"). Likewise, Roommate's arguments that the FHA does not apply to the rental of rooms, and that applying the FHA to room rental violates the right to intimate association must be rejected. The FHA applies to the rental of rooms. *United States v. Space Hunters*, 429 F.3d 416, 425-27 (2d Cir. 2005). The application of the FHA to the rental of rooms does not violate the right to intimate association. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 618-20 (1984).

In making the argument that applying the FHA to the rental of rooms violates the right to intimate association or offends certain HUD enforcement guidance, Roommate misconstrues what is at issue in this case. This case challenges the conduct of Roommate, a housing information vendor. It does not challenge the ultimate choices and decisions made by individual users of roommates.com in offering or picking rental opportunities. At issue here is Roommate's conduct, not that of its users. This case does not, for example, seek to hold an individual user liable for seeking to live only with persons of the same sex. Whether that decision is covered by the FHA turns on an intensive factual examination of the unique circumstances in which that particular rental opportunity is offered. 42 U.S.C. § 3603(b). Instead, this case asks, among other things, whether a housing information vendor, such as Roommate, may require homeseekers to disclose their protected class status, and then use that information to screen and steer those homeseekers. That conduct neither implicates intimate associations nor was addressed in the HUD enforcement guidance on which Roommate relies.[1]

[1]The scope of Roommate's motion for summary judgment is limited to plaintiffs' federal FHA claim. Roommate does not challenge plaintiffs' standing under the California Fair Employment and Housing Act (FEHA) or the Unruh Civil Rights Act. Nor does Roommate challenge the applicability of these state laws (continued...)

II. ARGUMENT.

A. THE COMMUNICATIONS DECENCY ACT (CDA), 47 U.S.C. §230(c)(1).

In Part III.A of its opening brief, Roommate invokes the CDA for the proposition that it cannot be liable for the additional comments section of its website, for unprompted searches conducted by users, or for "misuse" of the site, presumably meaning use of its site by individuals who are not renting shared housing. Plaintiffs acknowledge that the Ninth Circuit ruled that the "additional comments" section is covered by the CDA. Roommate's motion does not, however, establish that it is entitled to CDA immunity with respect to any of the remaining claims in this case.

First, five of the six theories of liability asserted by plaintiffs in this action do not treat Roommate as publisher or speaker of information provided by a third party. (See plaintiffs' inquiries, causing, steering, screening, and aiding claims, described in parts III.B, C, D, E, and G respectively of plaintiffs' summary judgment brief (Dkt. 118).) Roommates.com has no CDA immunity for any of these claims at all. With respect to these five claims, any question of "misuse" is therefore irrelevant. Any liability under these theories does not "aris[e] from content created by third parties," so CDA immunity does not apply. *Roommate*, 521 F.3d at 1162.

Second, plaintiffs have asserted one theory of liability that does treat Roommate as the publisher of content provided in part by third parties – i.e., for which liability does arise from content created in part by third parties. This is plaintiffs' publishing claim. (Dkt. 118, part III.F.) Roommate presumably is contending that it is not liable on this claim to the extent that the content at issue is produced by users who are not offering shared housing for rent. To prevail on this argument, Roommate must, at minimum, show that it does not "contribute materially to the alleged illegality" of the information. *FHC v. Roommate.Com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008) (en banc). Roommate has not attempted, let alone

[1](...continued)
to the rental of rooms or argue that these laws are unconstitutional. The Ninth Circuit reinstated plaintiffs' state-law claims in April. *FHC v. Roommate.Com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008) (en banc).

succeeded in making, any such showing, and cannot since it "contributes materially" to the challenged content by requiring disclosure of user's discriminatory preferences, and then generating profiles that publish those preferences. *See* Dkt. 118, at pp. 8-13. Accordingly, Roommate's claim of CDA immunity must be denied with respect to plaintiffs' sixth theory of liability as well.

Roommate's other contentions in Part III.A of its brief – that its users are not "landlords" and that roommates.com does not concern "commercial" activity – are rebutted elsewhere in this brief (see part D.3, below).

B. PLAINTIFFS HAVE STANDING UNDER THE FHA.

Roommate has attacked plaintiffs' standing to bring this case under the FHA. (Dkt. 122, pp. 5-8.) Roommate's attack is misplaced, because plaintiffs are aggrieved persons within the meaning of the FHA and have standing to bring this action on the basis of their concrete injuries.

Plaintiffs Fair Housing Council of the San Fernando Valley ("FHC/SFV") and Fair Housing Council of San Diego ("FHC/SD") are both nonprofit corporations that provide fair housing services in various parts of Southern California. (Plaintiffs' Statement of Genuine Issues of Material Fact, filed concurrently herewith [hereinafter ["SS Response"], at ¶ 19(a), (b).) Their missions are to promote fair housing, ensure equal housing opportunities for all, and eradicate all forms of illegal housing discrimination. (SS Response ¶ 19(a), (b).) They engage in a variety of programs and activities to further their missions, including fair housing counseling, community education and outreach, and investigative services such as monitoring and testing. (SS Response ¶ 19(a) ,(b).)

The FHA allows "[a]n aggrieved person" to commence a civil action. 42 U.S.C. §3613(a)(1)(A). An "aggrieved person" includes any person who "claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur." *Id.* §3602(i). A "person" includes, among others, an individual, corporation, or association. *Id.* §3602(d). The Supreme Court has consistently held that the definition of aggrieved person in the FHA

reflects "a congressional intention to define standing as broadly as is permitted by Article III of the Constitution." *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972). The sole requirement for plaintiffs to sue under the FHA is the Article III minima of injury in fact: that the plaintiff alleges that as a result of defendant's actions, it has suffered a distinct and palpable injury. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982). It is well-settled that fair housing organizations, like plaintiffs in this case, have standing to sue to the extent that they suffer injuries proximately caused by a defendant's unlawful conduct. *FHM*, 285 F.3d at 902-05; *Smith v. Pacific Prop. and Dev. Corp.*, 358 F.3d 1097, 1104-06 (9th Cir. 2004). Those types of injuries are generally referred to as diversion of resources and frustration of mission. *FHM*, 285 F.3d at 902-05; *Smith*, 358 F.3d at 1104-06. The evidence submitted by plaintiffs establishes the requisite injury, showing both a diversion of the agencies' scarce resources and frustration of their missions.

1. Plaintiffs Diverted Scarce Resources to Investigate and Counteract the Practices of Roommate's Website, Roommates.com.

In *FHM*, the plaintiff fair housing organization established standing at the merits phase of the litigation because the record demonstrated that the organization had diverted resources from other priorities and activities to investigate and counteract the defendant's discrimination. *Id.* at 905. The organization established standing based on staff time expended in connection with investigating the existence and extent of defendant's discriminatory practices and conducting education and outreach aimed at counteracting defendant's discriminatory housing practices. *Id.* The plaintiff fair housing organizations here did the same and similar activities.

The evidence in this case establishes that plaintiffs have devoted scarce resources to investigate and counteract Roommate's discrimination, at the expense of other programs and activities. Plaintiff FHC/SFV was injured when it:

(1) Devoted significant resources in terms of staff time to investigating the existence and extent of discrimination by roommates.com, diverting the organization's scarce resources from other activities and programs (SS Response ¶ 19(c)).

(2) Devoted significant resources to counteract the harmful effects of discrimination by roommates.com by engaging in activities in direct response to Roommate's discrimination, such as: (a) distributing education and outreach literature to 64 media and advertising entities, including newspapers and radio stations, to provide information regarding the unlawfulness of discriminatory advertising; (b) reallocating scarce resources from normal activities to address discriminatory advertising; (c) revising training materials to place a greater emphasis on discriminatory advertising, consequently placing less emphasis on other important subjects; (d) creating a new education and outreach brochure to emphasize discriminatory advertising; and, (e) distributing education and outreach literature to more than 100 media and real estate professionals to provide information about the unlawfulness of discriminatory advertising (SS Response ¶ 19(d)).

Similarly, plaintiff FHC/SD was injured when it diverted its resources away from other activities to address the conduct of roommates.com. As a direct result of roommates.com's unlawful conduct, FHC/SD:

(1) Devoted significant resources in terms of staff time to identifying the existence and extent of discrimination by roommates.com in its service area, diverting scarce resources from the organization's other programs and activities, including its normal education and outreach activities (SS Response ¶ 19(e)); and,

(2) Devoted significant resources to counteract the harmful effects of roommates.com's discrimination, at the expense of other education and outreach activities, by engaging in activities such as (a) focusing on issues related to discrimination on the Internet at FHC/SD's annual Law and Litigation Conference, to the exclusion of other subjects; (b) increasing the number of education and outreach presentations to members of the community and revising the scope of these presentations to devote greater time and resources to the subject of discriminatory advertising and discrimination on the Internet, at the expense of other activities and subjects; and (c) focusing on the application of fair housing on the Internet, at the expense of other subjects, in connection with education/outreach presentations to housing providers (SS Response ¶ 19(f)).

2. Roommate Injured Plaintiffs When it Frustrated their Missions.

As explained above, FHC/SFV and FHC/SD have a mission of ensuring equal housing opportunities to all and eradicating all forms of illegal housing discrimination in their service areas. (SS Response ¶ 19(a), (b).) Roommate's website, which, by design, operates to limit housing opportunities on the basis of protected characteristics including sexual orientation and familial status, frustrates that mission. *See Smith*, 358 F.3d at 1105 (holding that any violation of the disability access provisions of the fair housing laws frustrated the mission of the organizational plaintiff, whose mission was to eradicate discrimination against persons with disabilities). Plaintiffs' missions are frustrated as long as Roommate's website operates in a discriminatory manner. *See Baltimore Neighborhoods, Inc. v. LOB, Inc.*, 92 F. Supp. 2d 456, 465 (D. Md. 2000) (award based on injury that will continue as long as housing violates disability access provisions of the FHA). The FHA authorizes an entry of injunctive relief to plaintiffs to remedy that violation. 42 U.S.C. §3613(c)(1), and plaintiffs seek that remedy. (Dkt. 10.) Plaintiffs' showing of injury supports its standing to obtain injunctive relief. *See Florida State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1165-66 (11th Cir. 2008) (organization made sufficient showing of injury to confer standing to seek injunctive relief where challenged statute would have required diversion of its resources in the future).

Furthermore, to remedy the frustration of their missions, plaintiffs seek to recover damages for time and money they will spend in the future to monitor defendant's compliance with any consent decree or court order, and to educate the community about the fair housing laws as they apply to room rentals and internet advertising. (SS Response ¶ 19(g), (h).) These are precisely the types of damages that other courts have permitted plaintiffs to recover as a component of damages, and that have served to confer standing, in other fair housing cases. *See, e.g.*, *Chicago v. Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d 1086 (7th Cir. 1992) (affirming award of damages for future monitoring); *HRC v. Krug*, 564 F. Supp. 2d 1138, 1148-49 (C.D. Cal. 2007) (awarding frustration of mission damages for future monitoring and education); *Milsap v. Cornerstone Res. Mgmt., Inc.*, 2008 WL

1994840, at *4 (S.D. Fla. May 5, 2008) (past and projected future expenditures conferred standing).

3. Roommate Relies on Case Law that Is Inapplicable and Inapposite.

Roommate relies extensively on *FHC v. Montgomery Newspapers*, 141 F.3d 71 (3d Cir. 1998). In *FHM*, however, the Ninth Circuit expressly rejected the defendant's attempt to use the *Montgomery Newspapers* decision to deny the standing of a fair housing organization which, like the plaintiffs here, had diverted resources from other activities to investigate and counteract the defendant's discrimination. 285 F.3d at 903.

In *Montgomery Newspapers*, the Third Circuit held that the fair housing organization lacked standing on the basis of efforts undertaken to counteract the effects of the newspaper's discrimination because the organization simply failed to show that it had actually undertaken any such efforts, and offered only vague speculation that it would undertake such efforts in the future. 141 F.3d at 77-78. In this case, by contrast, plaintiffs have offered specific evidence of concrete steps that they have already taken to counteract the discriminatory effects of Roommate's discrimination, and have explained in detail how these efforts have caused their organizations to divert resources from other activities and priorities (SS Response ¶ 19(d), (f)). As in *FHM*, this case bears no relationship to *Montgomery Newspapers*.

The Third Circuit also held that the fair housing organization lacked standing on the basis of its investigation into defendant's conduct because the organization failed to show that it actually undertook any investigation *as a result of* the newspaper's discrimination. *Id.* at 78. The claimed investigation – scanning newspapers for the presence of discriminatory advertisements – was an activity in which the organization would have engaged irrespective of the discrimination challenged in the lawsuit. *Id.* In this case, by contrast, as a direct result of discrimination by roommates.com, plaintiffs were forced to divert resources from other programs and activities to investigate roommates.com to determine whether and to what extent roommates.com engaged in discriminatory practices (SS Response ¶ 19(c), (e)). This investigation would not have occurred *but for*

roommates.com's discrimination. In this case, as in *FHM*, plaintiffs' investigation confers standing.

While the Third Circuit held that the fair housing organization could not establish standing on the basis of litigation expenses alone, *id*. at 78-80, the Ninth Circuit made clear in *FHM*, that a fair housing organization's diversion of resources to investigate and counteract alleged discrimination are *not* litigation expenses. 285 F.3d at 905. As in *FHM*, plaintiffs rely on its diversion of resources to investigate and counteract Roommate's discrimination, actions unrelated to litigation. Plaintiffs therefore have standing.

Finally, Roommate's attempt to undercut plaintiffs' standing by arguing that plaintiffs have not submitted evidence of any particular individuals who have been the victims of Roommate's discriminatory practices is misplaced. First, as in *FHM* and *Havens*, plaintiffs assert standing based on *their own* injuries, not injuries of others. There is no legal requirement for plaintiffs to identify other victims. Second, plaintiffs have produced evidence of particular individuals who have been the victims of Roommate's discriminatory practices. (SS Response ¶ 20.)

C. THE FHA APPLIES TO THE RENTAL OF ROOMS.

Roommate argues as a matter of statutory interpretation that the FHA does not apply to the transactions proposed on roommates.com because they involve shared living quarters. (Dkt. 122, pp. 8-16.) As a preliminary matter, Roommate has not shown by any evidence that its website, in fact, is used only by persons who will share a residence. (SS Response ¶ 1.) In any event, Roommate's argument cannot be sustained because the FHA unquestionably applies to the rental of rooms. *See Space Hunters, Inc.*, 429 F. 3d 424-25.

1. The FHA Applies to the Rental of Rooms.

a. Statutory Language. The language of the FHA unambiguously indicates that the FHA applies to the rental of rooms. The Act prohibits discrimination in connection with the rental of "dwellings," 42 U.S.C. §3604(a)-(f), which the Act defines as any space intended to be occupied as a residence: "'Dwelling' means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one

or more families." *Id.* §3602(b); *see id.* §3602(c) ("'Family' includes a single individual."). Rooms rented as a person's residence are "dwellings" and are therefore subject to the Act.

Section 3603(b)(2) also demonstrates that the FHA applies to rooms. This provision, known as the Mrs. Murphy exemption, provides that certain prohibitions of the FHA do not apply to "rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence." 42 U.S.C. § 3603(b)(2). This explicitly *limited* exemption from the FHA carved out for the rental of certain rooms compels the conclusion that the FHA applies generally to the rental of rooms.[2] If, as Roommate contends, the FHA does not apply to rooms, the limited exemption for rooms becomes meaningless and superfluous. *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) ("Under accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.").

b. Legislative History. Notwithstanding Roommate's claim to the contrary (Dkt. 122, pp. 10-11), the FHA's legislative history abounds with statements demonstrating Congress's understanding that the FHA applies to the rental of rooms. The FHA's chief sponsor, Walter Mondale, told the Senate that the Act prohibits selecting roomers on the basis of protected status: "insofar as a homeowner honestly chooses a *roomer* on the basis of personal friendship, or because he is a relative, for example, he would not violate the Act. The act forbids refusals only on the basis of 'race, color, religion or national origin.'" 114 Cong. Rec. 2273 (1968) (emphasis added). (Congress later added sex, familial status, and disability to the statuses protected by the FHA.) In addition, in connection with

[2]To fall within the exemption, the person offering the room for rent must show that he or she owns and occupies the housing in question, *Marya v. Slakey*, 190 F. Supp. 2d 95, 104 (D. Mass. 2001); *Guider v. Bauer*, 865 F. Supp. 492, 494-96 (N.D. Ill. 1994), and does not rent more than four rooms. 42 U.S.C. §3603(b)(2). The exemption does not permit the housing provider to make or place discriminatory statements or advertisements in connection with the rental. *Id.* §3603(b), 3604(c). Nor can the housing provider carry out his or her discriminatory design through the use of a real estate agent. *Id.* §3605.

congressional debate over the Mrs. Murphy exemption, Congress repeatedly manifested its explicit understanding that the exemption provided only a *limited* exemption for the rental of rooms. Senator Mondale, for example, stated that the Mrs. Murphy exemption "exempts the rental or lease of a room or rooms" from the Act, but only with respect to "owner-occupied" housing. 114 Cong. Rec. 2495 (1968). Senator Stennis stated that the Mrs. Murphy exemption "applies only to owners" and "would not protect a person who was himself renting or leasing his home and taking in boarders." 114 Cong. Rec. 3345 (1968). Representative Corman stated that the Mrs. Murphy exception covered only "rooms or units in an owner-occupied dwelling." 114 Cong. Rec. 9600 (1968).

Indeed, Congress consciously resisted efforts to broaden the Mrs. Murphy exemption to cover the rental of rooms generally. Although Senator Robert Byrd offered an amendment to exempt the rental of rooms from the FHA, 114 Cong. Rec. 4965 (1968) (amendment No. 581) (exempting the sale or rental by a person of any "dwelling owned or rented by such person"), the amendment was not adopted. Although conservative senators such as Byrd and Stennis sought to extend the Mrs. Murphy exemption to allow discrimination generally in the rental of rooms, Congress consciously and explicitly rejected these efforts to weaken the bill.

c. HUD Regulations. The official HUD regulations interpreting the FHA agree that the FHA applies to room rentals. HUD is the agency charged with implementing the FHA and with promulgating formal regulations interpreting the Act. Accordingly, courts owe substantial deference to HUD's FHA regulations. *Meyer v. Holley*, 537 U.S. 280, 287-88 (2003).

Consistent with the language and legislative history, HUD's regulations unambiguously provide that, with the exception of the Mrs. Murphy exemption, the FHA applies to the rental of rooms. The applicable HUD regulations are 24 C.F.R. §§100.20 (defining dwelling as any space to be occupied as a residence by one or more individuals) and 100.10(c)(2) (providing a *limited* exemption for the rental of rooms). HUD has stated:

> Section 100.10...contains the *limited* exemption from the applicability of the provisions of the Fair Housing Act, other than the prohibitions against discriminatory advertising, for the sale or rental of certain single family houses by an owner and *for rentals of rooms* in dwellings *in which the owner also occupies a room* (Mrs. Murphy housing).

53 Fed. Reg. 44995 (Nov. 7, 1988) (emphasis added), *accord* 54 Fed. Reg. 3237 (Jan. 23, 1989). HUD has made clear that term "dwellings," as defined in §3602(b) of the FHA and §100.20 of the regulations, includes situations "in which sleeping accommodations are provided but toileting or cooking facilities are shared by occupants of more than one room or portion of the dwelling." 54 Fed. Reg. 3244 (Jan. 23, 1989).

d. Case Law and Administrative Decisions. Case law and administrative decisions also confirm that the FHA applies to the rental of rooms, except to the extent the Mrs. Murphy exemption applies. Federal judicial decisions and HUD administrative decisions interpreting the FHA have uniformly held that the FHA applies to the rental of rooms. In addition, a number of state courts and administrative agencies have applied state and local fair housing laws that are comparable to the FHA to the rental of rooms. Indeed, plaintiffs are aware of no decision – judicial or administrative, federal or state – holding the FHA does not apply to the rental of rooms.

i. Federal Case Law. The Second Circuit's recent decision in *United States v. Space Hunters*, 429 F.3d 416 (2d Cir. 2005), is squarely analogous to the instant case. The defendant, a housing information vendor offering services in connection with the rental of rooms, argued that it was not liable under the FHA because any alleged discrimination "pertains to the rental of rooms in private homes." *Id.* at 423 n.4. The Second Circuit disagreed. The court held that the defendant was subject to the FHA except to the extent that it could establish that its challenged conduct concerned rooms falling within the Mrs. Murphy exemption – a showing it had failed to make. *Id.* at 425-27 & n.6; *see also Marya*, 190 F. Supp. 2d at 104 (applying the FHA to rental of a room in a house consisting of six roomers who had separate bedrooms but shared common areas).

Roommate offers no case law to the contrary. *Seniors Civil Liberties Association v. Kemp*, 965 F.2d 1030, 1036 (11th Cir. 1992), cited by Roommate (Dkt. 122, p. 14-15), does not hold that the FHA does not apply to the rental of rooms. The decision, in fact, offers absolutely no analysis on the scope of the FHA at all. The other decision cited by Roommate, *Wilson v. Glenwood Intermountain Properties*, 876 F. Supp. 1231, 1243 (D. Utah 1995), *vacated by* 98 F.3d 590 (10th Cir. 1996), says even less about the application of the FHA to the rental of rooms. The court in *Wilson* held that, to the extent that the FHA's prohibition on sex discrimination conflicts with Title IX's authorization of that same discrimination in connection with university housing, Title IX would trump the FHA. The court's conclusion on this point is dubious, but this Court need not resolve that issue here. The instant case does not involve university housing and does not present a conflict between the FHA and Title IX. Accordingly, *Wilson* is not pertinent to this case. In addition, the decision has been vacated and is therefore of no precedential value.

ii. *HUD ALJ Decisions*. HUD's administrative decisions also confirm that the FHA applies to the rental of rooms. In *HUD v. Fung*, 2008 WL 366380 (HUD ALJ Jan 31, 2008), for example, an owner rented out rooms to three roomers. The roomers had private bedrooms but shared common areas, including a kitchen and bathroom. *Id.* at *3. The owner refused to rent one of the rooms to an African-American woman, claiming that it was lawful to discriminate in connection with shared housing. *Id.* at *8. The HUD ALJ disagreed, holding that the landlord violated the FHA by refusing to rent to room to the woman because of her race. *Id.* at *10. *Fung* is not alone. A number of HUD decisions have applied the FHA to the rental of rooms. In *HUD v. Roberts*, 2001 WL 56376 (HUD ALJ Jan. 19, 2001), for example, the ALJ found an FHA violation in connection with the rental of a room. In *HUD v. Lake Country Publications*, 1994 WL 271082 (HUD ALJ Jan. 26, 1994), HUD entered a charge of discrimination in connection with a "classified advertisement for the rental of a 'room with kitchen privileges.'" In *HUD v. Williams*, 442796, at *2 (HUD ALJ Mar. 22, 1991), the ALJ found an FHA violation in connection with the rental of a room with a shared bath. Like HUD's regulations, these HUD ALJ

decisions are entitled to deference from the courts. *Harris v. Itzhaki*, 183 F.3d 1043, 1052 (9th Cir. 1999) (holding that courts owe deference to interpretations of the Act made in HUD's adjudicative proceedings). Plaintiffs are unaware of, and Roommate fails to cite to, any HUD decision holding that the FHA does not apply to the rental of rooms.

iii. *State Judicial and Administrative Decisions*. State judicial and administrative adjudications draw the same conclusion. *See DFEH v. Desantis*, FEHC Dec. No. 02-12, 2002 WL 1313078 at 4-6 (Cal. FEHC 2002) (California Fair Employment and Housing Commission held that FEHA applies to the rentals of rooms, except to the extent that FEHA's version of the Mrs. Murphy exemption applies); *Voris v. Washington State Human Rights Commission*, 704 P.2d 632, 634 (Wash. Ct. App. 1985) (owner violated the state fair housing law by discriminating on the basis of race "in the renting of a room in her private home); *State ex rel Sprague v. City of Madison*, 205 Wis.2d 110, 555 N.W.2d 409 (table), 1996 WL 544099, *2-3 (Wis. App. Sept. 26, 1996) (individuals violated the Madison fair housing ordinance by refusing to rent a room in their house to a woman because of her sexual orientation).[3]

e. HUD Guidance. In 1989, HUD issued a regulation stating that it would not pursue an administrative enforcement action with respect to an advertisement expressing a preference based on sex where the housing involved shared living quarters and the preference was designed to maintain single-sex living quarters. See 54 Fed. Reg. 3309 (Jan. 23, 1989), proposing what became 24 C.F.R. §109.20(b)(5). HUD removed this regulation from the Code of Federal Regulations in 1996. In the same vein, Assistant Secretary for Fair Housing and Equal Opportunity Roberta Achtenberg issued a memorandum, cited by Roommate, providing internal guidance to HUD regarding processing administrative complaints.

[3]Roommate's citation to a 1976 opinion of the Washington State Attorney General concluding that the state fair housing law did not apply to the rental of rooms has no bearing here. (Dkt. 122, at p. 15.) The Washington state courts have held that the Washington state fair housing law applies to room rentals. *Voris*, 704 P.2d at 634.

Roommate mischaracterizes the 1989 guidance and the Achtenberg memorandum. First, the 1989 guidance and Achtenberg memo do not *interpret* the FHA. Nor do they apply in any respect to private civil actions brought to enforce the FHA, such as the instant case. The 1989 guidance and Achtenberg memorandum are nothing more than a statement of administrative guidance, explaining what types of administrative complaints HUD, in the exercise of its discretion, will and will not pursue in connection with its internal complaint process. *See* 54 Fed. Reg. 3309 (setting forth the 1989 guidance) ("This part describes the matters the Department will review in evaluating compliance with the Fair Housing Act in connection with investigations of complaints alleging discriminatory housing practices involving advertising."); Achtenberg Memorandum ("The purpose of this memorandum is to provide guidance on the procedures for the acceptance and investigation of allegations of discrimination under Section 804(c) of the Fair Housing Act involving the publication of real estate advertisements.") *See Voris*, 704 P.2d at 636 (commission's ruling that it would not enforce the state fair housing law against persons who discriminated on the basis of sex in connection with the rental of shared living quarters "only amounts to a voluntary, self-imposed limitation of the Commission's power to enforce [the law]"). Of course, even if such guidance were an interpretation of the FHA, it would not be entitled to deference because it was either removed from the Code of Federal Regulations or, in the case of the Achtenberg Memorandum, was never published in the Code.

Second, the 1989 guidance and Achtenberg memorandum did not consider, let alone address, the conduct at issue in this case: A housing information vendor that requires disclosure of protected class status as a condition of service, and then uses that information to steer and screen its users. There is simply no reasonable way to contort the 1989 guidance and Achtenberg memorandum as providing cover for Roommate's own conduct.

Third, the 1989 guidance refers to only one protected classification – sex. This guidance does not, as Roommate claims (Dkt. 122, p. 12), indicate that "HUD has construed the FHA as not reaching shared living arrangements." On the contrary, the 1989 guidance strongly supports plaintiffs' contention that the FHA applies to the rental of rooms. By

singling out sex and not providing for any similar limits on enforcement for race, religion, national origin, disability, and familial status, the 1989 guidance indicates that HUD will enforce the advertising regulations as applied to shared housing on the basis of every protected classification other than sex. *See Williams v. Babbitt*, 115 F.3d 657, 667 n.1 (9th Cir. 1997) (the expression of one thing is the exclusion of others). Nothing in the 1989 guidance suggests that HUD would not enforce the advertising guidelines in connection with discrimination on the basis of race, familial status, or any other basis. As for the Achtenberg memo, its thrust is whether certain neutral terms should be construed to be discriminatory – not that roommate decisions are exempt from the FHA.

f. Other Arguments by Roommate. Roommate's brief discusses the Civil Rights Act of 1964 (Dkt. 122, p. 10). It is unclear how the 1964 Act is relevant here. The 1964 Act, like the FHA, provides a *limited* exemption for the rental of rooms – applicable to owner-occupiers who do not rent more than a few rooms, and says nothing about housing information vendors that require users to disclose their protected class status and then use that information to screen and steer. 42 U.S.C. §§2000a(b)(1).

Roommate's brief also discusses Title IX, which prohibits sex discrimination by educational institutions (Dkt. 122, p. 11). Roommate wants this Court to make an inference from the fact that Congress, when it enacted Title IX in 1972, failed to include language exempting university housing from the FHA's sex discrimination provisions. In fact, the FHA did not prohibit sex discrimination until 1974. Robert G. Schwemm, *Housing Discrimination Law and Litigation* §11C:1 (2008). Roommate's argument is therefore factually incorrect and legally nonsensical.

Roommate's argument about 45 C.F.R. §86.32 (Dkt. 122, p. 11) is similarly flawed. Roommate describes §86.32 as a "HUD" regulation and then asks how HUD could have had the administrative authority to enact this regulation if it conflicts with the FHA. Inasmuch as §86.32 is a HHS regulation rather than a HUD regulation, Roommate's argument is factually and legally untenable.

2. The FHA Applies to Roommates.com Because the Site Concerns the Rental of Rooms and Roommate Has Made No Showing that the Mrs. Murphy Exemption Applies.

The FHA applies to Roommate because it is an housing information vendor creating and distributing information about the rental of dwellings. Under the FHA, to rent "includes to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant." 42 U.S.C. §3602(e). It is undisputed that the transactions proposed on roommates.com involve the granting of the right to occupy residential premises not owned by homeseekers in exchange for the payment of a monthly rent. (Plaintiffs' Separate Statement of Uncontroverted Facts and Conclusions of Law [Dkt. 119] [hereinafter "Fact"], Fact 4, 7, 11, 13, 20, 21, 49, 50, 54, 141-173, 180, 190.) Indeed, Roommate has repeatedly admitted that its business concerns providing information about the rental of rooms. (Fact 4, 7, 141, 143, 144.)

Roommate, moreover, has made no showing that it is exempt under the Mrs. Murphy exemption. The Mrs. Murphy exemption is an affirmative defense. *Space Hunters*, 429 F.3d at 425-26; *Singleton v. Gendason*, 545 F.2d 1224, 1226 (9th Cir. 1976). Whether the exemption applies "is a 'highly fact-dependent inquir[y],'" turning on the size of the dwelling and whether it is owner-occupied. *Space Hunters*, 429 F.3d at 426 n.6 (quoting *Hogar Agua y Vida en el Desierto, Inc. v. Suarez-Medina*, 36 F.3d 177, 182 n.4 (1st Cir. 1994)). It is to be construed narrowly. *United States v. City of Hayward*, 36 F.3d 832, 837 (9th Cir. 1994). For example, in *Space Hunters*, the appellate court rejected the district court's reliance on the affidavit of the defendant, a housing information vendor, that "all the rooms Space Hunters advertises fall within the 'Mrs. Murphy' exemption." 429 F.3d at 426 n.6. Here, Roommate has raised no argument (or adduced any evidence) that any – let alone all – of the transactions proposed on roommates.com fall within this exemption. (Fact 181-182.)[4]

[4]Of course, for discrimination to be lawful, the transaction must be exempt from all applicable fair housing (continued...)

D. APPLICATION OF THE FHA TO THE RENTAL OF ROOMS DOES NOT VIOLATE THE RIGHT OF INTIMATE ASSOCIATION.

Roommate's argument that applying the FHA to the rental of rooms violates the right of intimate association (Dkt. 122, pp. 17-23) is flawed for three reasons. First, the conduct challenged here – the discriminatory conducted of a housing information provider – does not implicate intimate association. Second, Roommate lacks standing to assert the associational rights of its users. Third, the freedom of intimate association does not include a right to discriminate in the rental of rooms. The commercial relationship between a landlord or proprietor who rents a room to a tenant or lodger is not an intimate one.

1. The First Amendment Does Not Apply to Roommate's Own Conduct.

The right of association does not protect Roommate's own conduct. The right of association, no matter how broadly construed, does not create a right for a housing information provider to demand disclosure of its users' protected status or to limit users' access to housing opportunities on the basis of those disclosures. There is nothing in the act of demanding users to publicly disclose their protected status, or in the act of steering or screening users based on their status, that implicates intimate association. Prohibiting Roommate from committing these discriminatory housing practices does not impair individuals' housing choices in any way. The ability of individuals to form intimate associations does not depend on Roommate's right to discriminate. Even if certain individuals in limited circumstances may be exempt from certain prohibitions under the FHA, that possibility does not immunize Roommate for its own discriminatory conduct. Indeed, it is Roommate that limits a person's ability to associate by requiring her to answer

[4](...continued)
laws, federal, state, and local. Within California, to lawfully discriminate in connection with the rental of rooms, one must establish, at minimum, each of the following: (1) the proposed rental involves a "single-family house"; (2) the housing provider rents out no more than one room; (3) the housing provider does not make any discriminatory statements or publish any discriminatory advertisements, (4) the housing provider owns and occupies the housing being rented; and (5) the housing provider does not discriminate on the basis of race, religion, or national origin. Cal. Gov't Code §12927(c)(2)(A), 42 U.S.C. §§1982, 3603(b)(2). These exemptions are affirmative defenses, *Space Hunters*, 429 F.3d at 425-26, which Roommate has the burden of raising and proving. Roommate has raised no argument that these exemptions apply to any of its users.

discriminatory questions in order to participate in the housing market, and by limiting access to housing choices. *Roommate*, 521 F. 3d at 1166 ("This is no different from a real estate broker in real life saying, 'Tell me whether you're Jewish or you can find yourself another broker.'")

2. Roommate Lacks Standing to Assert Constitutional Rights of the Customers who Are the Victims of its Discriminatory Practices.

Roommate lacks standing to assert the associational rights of its users. *See Warth v. Seldin*, 422 U.S. 490, 499 (1975) (no third-party standing); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 237 (1990) (questioning whether motel owners had standing to assert the intimate association rights of the motel's patrons).

Roommate's attempt to cure this defect by claiming "representational standing" (Dkt. 122, p. 20) cannot succeed. The Ninth Circuit held in *Fleck and Associates, Inc. v. Phoenix*, 471 F.3d 1100, 1106 (9th Cir. 2006), that representational standing is limited to organizations created to express the collective views and protect the collective interests of their members. Businesses which call their customers "members" do not enjoy representational standing because their customers join the businesses' membership rolls to obtain access to the businesses' goods and services rather than to express a collective viewpoint or protect a collective interest. In *Fleck*, for example, a sex club lacked representational standing to challenge a city ordinance prohibiting such clubs on behalf of the club's "members" (customers who paid a membership fee) because the club's "members" were "merely customers." *Id.* There was no evidence "that its customers in any way have come together to form an organization for their mutual aid and benefit." *Id.* The same is true here. Roommate's "members" are mere customers of roommates.com. They join roommates.com for the limited, short-lived purpose of employing the website's services to locate housing or roomers, not to express views or protect a collective interest. Accordingly, *Fleck* precludes Roommate's standing.

Conferring third-party standing on Roommate, moreover, would violate every principle of the standing doctrine. Roommate is in no position to represent the interests of

its customers because Roommate's interests in this litigation are *adverse* to that of its customers. Roommate's customers are the *victims* of the practices that Roommate is here defending. As shown by the evidence submitted in Plaintiffs' Statement of Genuine Issues of Material Fact, Roommate's customers – or at least a substantial number of them – would rather not have to disclose their sexual orientation and other personal information as a condition to obtaining access to Roommate's database of available housing. They would prefer not to be prompted to express discriminatory preferences. And they would rather not be steered and screened on the basis of their sexual orientation or other protected status. (SS Response ¶ 20.)

3. The Right of Intimate Association Does Not Include the Right to Discriminate in the Rental of Rooms.

Even if Roommate could establish standing to assert the constitutional rights of others, its argument fails on the merits. The freedom of intimate association protects only relationships "'that attend the creation and sustenance of a family' and similar 'highly personal relationships.'" *IDK, Inc. v. Clark County*, 836 F.2d 1185, 1193 (9th Cir. 1988) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618-19 (1984)). A number of considerations inform the conclusion that the freedom of intimate association cannot be stretched to cover the rental of rooms, as argued by Roommate.

First, the freedom of intimate association encompasses only those fundamental substantive due process rights already protected by the right to privacy. *Fleisher v. City of Signal Hill*, 829 F.2d 1491, 1500 (9th Cir. 1987). Second, every time the Supreme Court has considered an "intimate association" argument, it has rejected it. *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003); *FW/PBS, Inc.*, 493 U.S. at 237; *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989); *Roberts*, 468 U.S. at 621-22; *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 546 (1987). Third, the list of fundamental rights protected by the substantive due process right to privacy (and, by extension, protected by the freedom of intimate association) is short, including only "marriage, procreation, contraception, family relationships, child rearing, and education." *Lawrence v. Texas*, 539 U.S. 558, 574 (2003)

(finding in the Constitution's protection of liberty a non-fundamental right to engage in enduring sexual relationships). Fourth, heeding the Supreme Court's counsel, the Ninth Circuit has adopted an exceedingly narrow interpretation of the freedom of intimate association. *See, e.g., National Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1050 (9th Cir. 2000) (hereinafter *"NAAP"*) (holding that the relationship between psychoanalyst and client was not protected by the right of intimate association and stating that "these relationships simply do not rise to the level of a fundamental right"); *IDK, Inc.*, 836 F.2d at 1193 (holding that the sexual relationship between escort and client is not an intimate association).

The Supreme Court has never extended the right of intimate association beyond highly personal relationships involving the family. Even if the right extends beyond family relationships, moreover, it clearly does not extend to the opposite end of the spectrum – *commercial* relationships. The Court made this clear in *Roberts*, where it stated that the right of intimate association imposed absolutely no constraints on the state's rights to regulate the "choice of fellow employees." 468 U.S. at 620. Indeed, the Ninth Circuit has repeatedly stated that a relationship – such as those at issue in this case – that lasts only so long as one person is willing to pay the other cannot be an intimate one. *IDK, Inc.*, 836 F.2d at 1193; *NAAP*, 228 F.3d at 1050; *see also Roberts*, 468 U.S. at 634 (O'Connor, J., concurring) ("[T]he State is free to impose any rational regulation on the commercial transaction itself. The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State."). In addition, the Supreme Court has explicitly held that, whereas regulation of the family implicates fundamental rights, laws limiting the freedom of "unrelated individuals" to live with persons of their choosing – such as those at issue in this case – are subject to mere rational basis review. *Moore v. City of East Cleveland*, 431 U.S. 494, 498 (1977); *accord Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-8 (1974) (same).

The Ninth Circuit has recognized five factors to be considered in determining whether a particular association can claim the protection of the right of intimate association: "the

group's size, its congeniality, its duration, the purposes for which it was formed, and the selectivity in choosing participants." *IDK, Inc.*, 836 F.2d at 1193. None of these factors weighs in favor of creating a right to discriminate in the rental of rooms.

a. The Group's Size. A small group is not necessarily intimate. *See IDK, Inc.*, 836 F.2d at 1193 (an escort and client were not intimates even though they were just two persons – "the smallest possible association"); *NAAP*, 228 F.3d at 1050 (relationship with one's psychoanalyst not intimate even though it involves only two persons). This factor does not support Roommate's argument.

b. The Congeniality of the Group. The transactions proposed on roommates.com involve relationships that are (1) commercial, (2) subject to pervasive government regulation, and (3) lacking in indicia of intimacy.

i. Commerciality. Roommate admits that the transactions proposed on roommates.com involve "rooms for rent." (Fact 4, 49, 50, 141-146.) It is undisputed that the essence of these transactions is the exchange of "rent" for the right to occupy residential premises, a commercial activity. Fact 163 (housing providers specify "Monthly rent" – the "Dollar amount you will *charge* monthly *for* rental"); Fact 169 (housing providers specify "Monthly fee" – the "Dollar amount you will *charge* monthly *for* space"). Homeseekers pay "rent" (Fact 150, 152, 155-157, 163, 169, 180) and a "deposit" (Fact 164, 170) and assume legally binding long-term financial obligations to continue to pay rent under a lease or an otherwise binding rental agreement (Fact 151, 153, 158-161, 165, 171-173).

ii. Pervasive Government Regulation. The transactions proposed on roommate.com are also the subject of pervasive government regulation. *See* Cal. Civ. Code §1940 (providing that the regulations in Civ. Code §§1940-1954 apply to both tenancies and lodgings).[5] These statutes regulate every aspect of the provider-homeseeker relationship,

[5]From a legal standpoint, the rental of rooms creates one of two types of relationships – a landlord-tenant relationship or a proprietor-lodger relationship. Room rentals have often been characterized as lodgings rather than tenancies, though there is good reason to question that result, inasmuch as roomers ordinarily acquire the right to exclusive possession of at least a portion of the demised premises. *See generally* Rest. 2d Prop. §1.2; Milton R. Friedman & Patrick A. Randolph, Jr., Friedman on Leases §37:3 (2008). The (continued...)

such as maintenance of the premises, habitability, rent, rights of entry, termination, notices, security deposits, and application fees. Cal. Civ. Code §§1940-1954. For a summary of Civ. Code §§1940-1954, see Declaration of Christopher Brancart, filed herewith, exhibit 18.

iii. *Lacking in Indicia of Intimacy*. The transactions proposed on roommates.com, moreover, do not involve the most intimate setting – the bedroom. Only 1.8% of the housing offered on roommates.com involves sharing a bedroom (Fact 174). Indeed, half of the housing listed on roommates.com does not even involve the sharing of a bathroom (Fact 175).

The listings on roommates.com themselves demonstrate that users of roommates.com are not looking for "deep attachments and commitments" or a high level of congeniality: "I'm Independent, have my own life and am generally low maintenance." (Fact 184.) "I am looking for a responsible person who minds there [sic] own business." (Fact 183.) "I'd like someone who likes to keep to him/herself, doesn't cook much and has a busy schedule. Would like for the person to feel we can be housemates and help each other out if needed but no need to socialize together or try to be friends." (Fact 185.) "I'm looking for someone who won't come to me for rent money and will respect people's space and belongings. Not a lot needed, just some responsibility and consideration." (Fact 186.) Indeed, many of the housing providers offering housing on roommates.com are not even looking for a homeseeker with whom they will reside. (Fact 176-179.)

The relationship attendant to the rental of rooms is simply less intimate than those already found not to be protected by the freedom of intimate association. *E.g.*, *IDK, Inc.*, 836 F.2d at 1193 (sexual intimacy between escort and client); *NAAP*, 228 F.3d at 1050 (sharing secrets and emotional thoughts with psychoanalyst).

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[5](...continued)
lodging/tenancy distinction is of no importance here. Whether they are characterized as lodgings or tenancies, room rentals are subject to the same comprehensive set of regulations. *See* Cal. Civ. Code §1940 (providing that the regulations in Civ. Code §§1940-1954 apply to both tenancies and lodgings); California Practice Guide: Landlord-Tenant 2:42 (2008) (same).

c. Duration of the Relationship. Room rentals may last a few weeks or months or even a year or more. For the most part, however, they are not long-term. A relationship that lasts only so long as one person is willing to pay the other is not an intimate one. *IDK, Inc.*, 836 F.2d at 1193; *NAAP*, 228 F.3d at 1050. The relationships at issue in this case involve only the rental of rooms; the relationship necessarily is a commercial one, and it lasts only as long as a roomer continues to pay rent.

d. The purpose for which the relationship was formed. As explained, the rental of rooms is a commercial relationship.

e. The selectivity in choosing participants. *Roberts* describes a continuum between those relationships clearly protected by the right of intimate association (choosing someone to marry) and those clearly not protected by any such right (choosing coworkers). 468 U.S. at 620. Indisputably, in terms of selectivity, selecting a roomer is comparable to choosing a coworker rather than a spouse. One is no more choosy in renting out rooms than one is in selecting a sexual partner (*IDK, Inc.*), or a psychoanalyst (*NAAP*).

In sum, the rental of rooms on a commercial basis does not, by itself, create the kind of intimacy protected by the Constitution. What the Ninth Circuit said in *IDK* is equally applicable here. The relationship at issue here:

> possess[es] few, if any, of the aspects of an intimate association. It lasts for a short period and only as long as the [roomer] is willing to pay the fee. [The participants do] not claim to be involved in procreation, raising and educating children, cohabitation with relatives, or the other activities of family life. While the relationship between them involved some level of intimacy, it lacked "deep attachments or commitments." In sum, these were "not the ties that have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs.

IDK, Inc., 836 F.2d at 1193 (quoting *Roberts*, 468 U.S. at 618-19).

It is therefore not surprising that every court to have considered the matter has concluded that the application of fair housing laws to the rental of rooms is constitutional. *Voris*, 704 P.2d at 636 (rejecting defendant's argument "that her right to choose the people

with whom she will share her home outweighs the state's interest in preventing discrimination" because "[w]here one opens one's home to the public by engaging in the rental of rooms therein for monetary gain, one must be deemed to have voluntarily subordinated personal privacy rights" to the state's compelling interest in eradicating discrimination); *Sprague*, 555 N.W.2d 409, 1996 WL 544099, at *3 (rejecting defendants' argument that applying the fair housing ordinance to the rental of rooms violates the right to privacy, association, or expression because they "gave up their unqualified right to such constitutional protection when they rented housing for profit"). No decision is contrary.

Roommate's brief, rather than addressing the pertinent Ninth Circuit authorities addressing associations between two people, focuses on a series of cases involving private clubs. The private club cases, however, involve altogether different fact patterns than the cases discussed above and have no bearing on the analysis here because they involve *social* rather than commercial relationships.

Finally, even if Roommate could establish that the right of intimate association applied to the relationship between landlords/proprietors and tenants/lodgers in connection with the rental of rooms, Roommate's claim would fail because this litigation has no "direct and substantial" influence on the exercise of that right. *Flaskamp v. Dearborn Pub. Sch.*, 385 F.3d 935, 942 (6th Cir. 2004) (regulations that do not directly and substantially affect rights of association warrant only rational basis review). This action does not challenge any individual's rental decision. It challenges only the right of a large housing information vendor controlling 40,000 housing listings to require individuals to participate in a discriminatory system in order to look for or post housing. Any connection between the challenged conduct – compelling homeseekers to disclose their protected status and providing users with different housing opportunities based on their status – and the ability of users to ultimately pick who they live with is tenuous at best.

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E. APPLYING THE FHA TO THE RENTAL OF ROOMS DOES NOT INFRINGE FIRST AMENDMENT RIGHTS.

Roommate's argument that the FHA infringes their users' rights to receive and convey information (Dkt. 122, pp. 24-25) is without merit. Individuals do not have a constitutional right to "obtain...information" (Dkt. 122, p. 24) from other persons when it entails compelling others persons' speech. It is unlawful to demand that homeseekers disclose their age, sex, sexual orientation, occupation, and familial status as a condition to participating in the housing market (Dkt. 118, Part III.B), and nothing in the First Amendment makes these demands less unlawful. Nor is there an unrestricted constitutional right to "share information" (Dkt. 122, p. 24). The constitutionality of the FHA's advertising provisions – which prohibit "sharing" one's discriminatory preferences in connection with the rental of housing – has been clearly established for over 30 years. *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 1002-05 (2d Cir. 1991) (citing *Cent. Hudson Gas v. Pub. Serv. Comm'n*, 447 U.S. 557, 563-64, 566 (1980), and *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973)); *United States v. Hunter*, 459 F.2d 205, 211-13 (4th Cir. 1972).

III. CONCLUSION.

For the foregoing reasons, Roommate's motion for summary judgment should be denied.

Respectfully submitted,

DATED: September 29, 2008.

/s/ Christopher Brancart
BRANCART & BRANCART
Christopher Brancart
Elizabeth Brancart
Liza Cristol-Deman
Michael Evans
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

On September 29, 2008 I served a true and correct copy of the following documents entitled:

(1) PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; (2) DECLARATION OF CHRISTOPHER BRANCART IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; EXHIBITS 1 THROUGH 18; (3) PLAINTIFFS' STATEMENT OF GENUINE ISSUES OF MATERIAL FACT IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; (4) MEMORANDUM IN SUPPORT OF PLAINTIFFS' EVIDENTIARY OBJECTIONS TO DEFENDANT'S SEPARATE STATEMENT OF UNCONTROVERTED FACTS

upon the following person(s):

Mr. Timothy L. Alger
Quinn, Emanuel, Urquhart, Oliver & Hedges
865 South Figueroa Street, 10th Floor
Los Angeles, CA 90017

X	**BY ELECTRONIC MAIL:** By transmitting the above document(s) to the email address of the person designated above, or by electronically filing the documents on the Court's ECF system.
	BY MAIL: By placing a copy thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States mail at Loma Mar, California, addressed as set forth above.
	BY HAND DELIVERY: By causing such document(s) to be delivered by hand to the above person(s) at the address(es) set forth above.
	BY THIRD-PARTY COMMERCIAL CARRIER (OVERNIGHT DELIVERY): By delivering a copy thereof to a third-party commercial carrier, addressed as set forth above, for delivery on the next business day.
	BY FACSIMILE: By transmitting the above document(s) to the facsimile number(s) of the addressee(s) designated above.

I certify that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on September 29, 2008, Loma Mar, California.

/s/ Christopher Brancart
Christopher Brancart