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11 UNITED STATES DISTRICT COURT  
12 CENTRAL DISTRICT OF CALIFORNIA

13 FAIR HOUSING COUNCIL OF SAN )  
14 FERNANDO VALLEY; FAIR )  
15 HOUSING COUNCIL OF SAN )  
16 DIEGO, individually and on behalf of )  
17 the GENERAL PUBLIC, )

18 Plaintiffs,

19 v.

20 ROOMMATE.COM, LLC,

21 Defendant.

CASE NO. CV03-9386 PA (RZx)

**DEFENDANT'S OPPOSITION  
TO PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT**

[Filed concurrently with Defendant's  
Response to Plaintiffs' Separate  
Statement of Undisputed Facts and  
Conclusions of Law, Defendant's  
Evidentiary Objections,  
Supplemental Declarations of  
Timothy L. Alger and Bryan Peters,  
and Proposed Order]

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Place: Courtroom 15

Honorable Percy Anderson

Complaint filed: December 22, 2003  
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Note, Jennifer C. Chang, In Search of Fair Housing in Cyberspace: The  
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55 Stan. L. Rev. 969, 1001 (2002) ..... 10

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Reference Book - A Real Estate Guide, Ch. 24 at 506-07  
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26 Coalition Advocating Legal Housing Options v. City of Santa Monica,  
88 Cal. App. 4th 451, 105 Cal. Rptr. 2d 802 (2001) ..... 16  
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1 I.

2 **INTRODUCTION**

3 Plaintiff fair housing councils claim that they are entitled to summary  
4 judgment in their favor because defendant Roommate.com, LLC ("Roommate"),  
5 through its Internet-based roommate search service, Roommates.com  
6 ("Roommates.com" or "the Site"), "makes several unlawful inquiries into the  
7 personal characteristics of all persons looking for a place to live" and "makes and  
8 publishes discriminatory statements that indicate preferences based on race,  
9 religion, national origin, gender, familial status, age, sexual orientation, source of  
10 income, and disability, all in violation of fair housing laws." Plaintiffs, however,  
11 ignore the law and mischaracterize the facts.

12 First, plaintiffs make their claims against Roommate in total disregard of an  
13 unambiguous federal statute, the Communications Decency Act of 1996, 47  
14 U.S.C. § 230 ("CDA"), which immunizes interactive computer services from  
15 publisher liability for statements made by third parties. If plaintiffs have any  
16 claim here, it must be made against those who authored the preferential  
17 statements, not Roommate.

18 Second, plaintiffs' attack rests on an unconstitutional interpretation of the  
19 federal Fair Housing Act, 42 U.S.C. § 3604(c) ("FHA"), and the state Fair  
20 Employment and Housing Act, Cal. Govt. Code § 12955(c) ("FEHA"). Plaintiffs  
21 seek to impose liability for speech because of disfavored content. Plaintiffs seek  
22 to restrict speech about lawful activities--the preferential selection of roommates --  
23 even though the government lacks any compelling or substantial interest that  
24 might justify such controls. Further, the speech restriction sought by plaintiffs -- a  
25 prohibition on all preferential speech -- goes far beyond that which is necessary to  
26 achieve any government interest.

27 Third, plaintiffs attempt to saddle defendant with liability by claiming it is a  
28 "property manager" or "in the business of selling or renting dwellings." This

1 contention is made with no legal authority whatsoever, and no basis in fact.  
2 Roommate is merely a forum for speech among adults seeking compatible living  
3 partners, and represents no one in the management of rental properties or any  
4 transaction involving the sale or rental of homes.

5 Plaintiff's claims all fail under the law. They are barred by CDA and the  
6 First Amendment. Accordingly, plaintiffs' motion for summary judgment must be  
7 denied, and Roommate's motion for summary judgment should be granted.

8 **II.**

9 **BACKGROUND**

10 Roommate incorporates by reference Roommate's Memorandum of Points  
11 and Authorities in Support of its Motion for Summary Judgment, including the  
12 factual matters stated there, in Section II. Roommate also offers as evidence in  
13 opposition to plaintiffs' motion the previously filed Declaration of Bryan Peters  
14 filed in support of Roommates' Motion, as well as the Supplemental Declarations  
15 of Timothy L. Alger and Bryan Peters, filed concurrently, along with all of their  
16 supporting exhibits.

17 **III.**

18 **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT MUST**  
19 **BE DENIED BECAUSE PLAINTIFFS' CLAIMS ARE BARRED**  
20 **BY THE COMMUNICATIONS DECENCY ACT OF 1996**

21 Plaintiffs make the broad statement that "§ 3604(c) and §12955(c) apply to  
22 all housing including rooms for rent and shared living quarters," but plaintiffs fail  
23 to cite a single case supporting the application of these statutes to statements  
24 regarding roommates or a search service for roommates such as Roommates.com.<sup>1</sup>  
25

26 \_\_\_\_\_  
27 <sup>1</sup> For example, in Fair Housing Congress v. Weber, cited by plaintiffs on page  
28 sued an apartment landlord and manager for discrimination against families with

(continued...)



1 Plaintiffs further argue that the decisions in United States v. Hunter and  
2 Ragin v. New York Times establish that section 3604(c) applies to publishers of  
3 discriminatory statements originally made by third parties. (Memorandum of  
4 Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment  
5 "Pls. Mem." at 10.) Plaintiffs, however, make this statement in complete disregard  
6 of the CDA. Nowhere do plaintiffs acknowledge that there might be a distinction  
7 between newspapers and Internet website operators or service providers. Nor do  
8  
9

---

10  
11 <sup>1</sup> (...continued)

12 children in the rental of apartments in an apartment complex. *See Weber*, 993 F.  
13 Supp. 1286, 1288 (C.D. Cal. 1997). The plaintiffs in that case alleged that rules  
14 for conduct around the swimming pool and common areas unfairly targeted  
15 children and thus families with children. *See id.* at 1290-92. No shared living  
16 quarters were at issue in *Weber*.

17 Similarly, United States v. Hunter and Ragin v. New York Times, involved  
18 lawsuits against newspapers for publishing advertisements that expressed racial  
19 preferences in the rental or sale of apartments and houses. *See Hunter*, 459 F.2d  
20 205, 209-10 (4th Cir. 1972); *Ragin*, 923 F.2d 995, 998-1000 (2d Cir. 1991). No  
21 shared living quarters were at issue in *Hunter* or *Ragin*. Finally, Housing Rights  
22 Center v. The Donald Sterling Corporation arose from accusations of  
23 discrimination against a landlord/property manager by tenants and prospective  
24 tenants in its buildings. *See Donald Sterling*, 274 F. Supp 2d 1129, 1132-35 (C.D.  
25 Cal. 2003). Again, no shared living quarters were at issue.

26 Plaintiffs also cite a journal article authored by Robert Schwemm.  
27 Conveniently, plaintiffs cite to a discrete portion of the Schwemm article that  
28 purportedly supports their position, while failing to admit that elsewhere in the  
article Schwemm supports defendant by expressing concern that 3604(c) is  
unconstitutional as applied to speech about lawful discriminatory conduct, and the  
provision might not survive the R.A.V. case. *See Robert G. Schwemm*,  
"Discriminatory Housing Statements and § 3604(c)," 29 Fordham Urb. L.J. 187,  
280-82 (acknowledging insufficient "fit" between the FHA's purpose and section  
3604(c) where the underlying activity is exempt from other FHA provisions), 287-  
289 (expressing concern that section 3604(c), as a regulation of speech, not  
conduct, does not survive R.A.V.). Plaintiffs also fail to disclose that Schwemm  
does not even discuss roommates or shared living quarters in his article.

1 plaintiffs acknowledge that this distinction was of such importance to Congress  
2 that it led to the passage of the CDA.

3  
4 **A. Interactive Computer Services Are Not Subject To Liability For**  
5 **Content Provided By Third Parties**

6 With the passage of the CDA, Congress immunized all interactive computer  
7 services from publisher liability arising from content supplied by third parties.

8 The CDA states: "No provider or user of an interactive computer service shall be  
9 treated as the publisher or speaker of any information provided by another  
10 information content provider." 47 U.S.C. § 230(c)(1). An "interactive computer  
11 service" is "any information service [or] system . . . that provides or enables  
12 computer access by multiple users to a computer server." *Id.* § 230(f)(2).

13 By withdrawing interactive services from republication liability, Congress  
14 sought to overrule Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710  
15 (N.Y. Sup. Ct. 1995) (in which Prodigy was found liable as a "publisher" of false  
16 information posted by the user of a financial bulletin board), while encouraging  
17 open discourse on the Internet. *See* 47 U.S.C. § 230(b)(1), (2) ("It is the policy of  
18 the United States . . . to promote the continued development of the Internet and  
19 other interactive computer services and other interactive media [and] to preserve the  
20 vibrant and competitive free market that presently exists for the Internet and other  
21 interactive computer services, unfettered by Federal or State regulation"). *See*  
22 Batzel v. Smith, 333 F.3d 1018, 1026-29 (9th Cir. 2003), *cert. denied*, 124 S. Ct.  
23 2812 (2004) (discussing the origin and goals of section 230).

24 Section 230 precludes liability wherever the complained-of content is posted  
25 by third parties and publication is an element of the plaintiff's claim. The provision  
26 "overrides the traditional treatment of publishers, distributors, and speakers under  
27 statutory and common law." Batzel, 333 F.3d at 1026; *accord* Carafano v.  
28 Metrosplash.com, Inc., 339 F.3d 1119, 1122-25 (9th Cir. 2003). "Under § 230(c),

1 . . . so long as a third party willingly provides the essential published content, the  
2 interactive computer service receives full immunity regardless of the specific  
3 editing or selection process." Carafano, 339 F.3d at 1124; *see also* Blumenthal v.  
4 Drudge, 992 F. Supp. 44, 49 (D.D.C. 1998) ("In view of this statutory language,  
5 plaintiff's argument that the *Washington Post* would be liable if it had done what  
6 AOL did here . . . has been rendered irrelevant by Congress.").

7 The courts have consistently interpreted the CDA with Congress' express  
8 goals in mind, while recognizing the impossible burden that would be imposed if  
9 interactive services were required to screen and control users' postings. *See* Zeran  
10 v. America Online, Inc. 129 F.3d 327, 330-31 (4th Cir. 1997) (quoted by Ninth  
11 Circuit with approval in Carafano, 339 F.3d at 1123-24), *cert. denied*, 524 U.S. 937  
12 (1998); *accord* Batzel, 333 F.3d at 1027-28 ("Making interactive computer services  
13 and their users liable for the speech of third parties would severely restrict the  
14 information available on the Internet. Section 230 therefore sought to prevent  
15 lawsuits from shutting down websites and other services on the Internet.").

16 **B. Plaintiffs' Claims Fall Within The Scope Of, And Are Barred By, The**  
17 **CDA.**

18 The immunity of section 230(c)(1) applies to every type of information  
19 service "that provides or enables computer access by multiple users to a computer  
20 server . . ." 47 U.S.C. § 230(f)(2). This broad sweep includes interactive websites  
21 such as Roommates.com. Through the Internet, many thousands of users are able to  
22 access and use a searchable database on Roommate's computer servers. (Response  
23 to Plaintiffs' Separate Statement ("RPSS") ¶¶ 53-63.) *See* Carafano v.  
24 Metrosplash.com, Inc., 207 F. Supp. 2d 1055, 1065-66 (C.D. Cal. 2002), *aff'd*, 339  
25 F.3d 1119 (9th Cir. 2003); Gentry v. eBay, Inc., 99 Cal. App. 4th 816, 831 n.7, 121  
26 Cal. Rptr. 2d 703 (2002); Schneider v. Amazon.com, Inc. 31 P.3d 37, 40 (Wash. Ct.  
27 App. 2001); *see also* Ben Ezra, Weinstein and Co., Inc. v. America Online, Inc.,  
28 206 F.3d 980, 983, 985 (10th Cir. 2000), *cert. denied*, 531 U.S. 824 (2000)

1 (§ 230(c) applied to searchable database of third-party stock quotes); Batzel, 333  
2 F.3d at 1030 & n.15 (rejecting argument that § 230(c) applied only to Internet  
3 service providers)).

4 Further, plaintiffs seek to impose liability on Roommate as a publisher.  
5 (First Amended Complaint "FAC" ¶¶ 16-32, 43, 52; Pls. Mem. at 14-15.) Section  
6 230(c) "precludes courts from entertaining claims that would place a computer  
7 service provider in a publisher's role." Zeran, 129 F.3d at 330. The publisher's role  
8 includes the decisions "to publish, withdraw, postpone or alter content." *Id.*  
9 Claims of *all kinds* that seek to impose liability for failure to remove a third-party  
10 posting are barred. See Schneider, 31 P.3d at 464 (CDA extends to all civil claims  
11 involving publisher liability for third-party content); Carafano, 339 F.3d at 1123,  
12 1125 (dismissing defamation, invasion of privacy, and negligence claims); Noah v.  
13 AOL Time Warner, Inc., 261 F. Supp. 2d 532 (E.D. Va. 2003) (dismissing civil  
14 rights claim under CDA), *aff'd*, 2004 WL 602711 (4th Cir. 2004).

15 Regardless of how they dress their claims in their Memorandum, plaintiffs  
16 are seeking to recover from Roommate for the publication of third-party content.  
17 Plaintiffs complain about the preferences expressed by *users*; no claim is made as to  
18 any expression of preference by Roommate. The choices made and the language  
19 used in creating a profile -- indeed, the decision to post *anything* on  
20 Roommates.com -- is made by third parties, and does not involve any authorship by  
21 Roommate. See Gentry, 99 Cal. App. 4th at 834 (representations on auction  
22 website were made by users; categorization and compilation of postings did not  
23 abrogate immunity).

24 Moreover, Roommate is not an "information content provider" in respect to  
25 the statements that are the subject of this lawsuit. Plaintiffs seek to impose liability  
26 on the notion that Roommate creates content with its questionnaire (FAC ¶ 11-13;  
27 Pls. Mem. at 4-5, 11-12), but the Ninth Circuit has already rejected this theory. The  
28 collection, formatting, and manipulation of information does not transform

ibid

1 statements made by a third party into content created by the service. Carafano, 339  
2 F.3d at 1124-25. The Ninth Circuit in Carafano approved the use of standardized  
3 answers that can be readily searched on a database; many services such as  
4 Roommate would be cumbersome or unusable if they simply provided a "blank  
5 slate" for users, without consistent data and search terms. *See id.*

6 The Ninth Circuit also made clear in Carafano that the fact that an interactive  
7 computer service provides *some* content on its site does not abrogate the immunity:  
8 "... [T]he statute precludes treatment as a publisher or speaker for "any  
9 information provided by *another* information content provider." *Id.* at 1125  
10 (quoting Gentry, 99 Cal. App. 4th at 833 n.11); *accord* Novak v. Overture Servs.,  
11 Inc., 309 F. Supp. 2d 446, 452-53 (E.D.N.Y. 2004). Roommate indicates no  
12 preference and excludes no adult from its service. Rather, the preferences (if any)  
13 are of Roommate's users.

14 This lawsuit is about the statements of third parties in a forum designed  
15 merely to facilitate the matching of compatible living partners. It is the users who  
16 create the profiles and select the information in the profiles. Roommate is not the  
17 "content provider" of the complained-of statements, and is therefore immune from  
18 any liability for those statements.

19 **C. Plaintiffs' Mischaracterizations of Roommate's Functions Do Not Take**  
20 **Plaintiffs' Claims Outside the Immunity Provided by the CDA**

21 Plaintiffs contend that defendant is doing three things that violate the fair  
22 housing laws: (1) defendant *is demanding* prohibited screening disclosures from  
23 renters; (2) defendant *is causing* its members who have places available to rent to  
24 make many of these statements; and (3) defendant *is allowing* the publishing of  
25 numerous statements that show blatant preferences. (Pls. Mem. at 11.) Plaintiffs,  
26 however, wholly misstate Roommate's role in formatting and arranging information  
27 provided by its members.

28

1 By portraying Roommate's actions as "screening the renters" and "forcing the  
2 renter to answer a lot of questions about themselves before they can become a  
3 member" (Pls. Mem. at 12), plaintiffs attempt to label Roommate as a property  
4 manager (which it is not, as discussed below) and the author of the information  
5 provided by its members so the CDA's immunity for information provided by third  
6 parties does not apply.

7 What plaintiffs call screening, however, is really the personal profile process  
8 that all members of Roommates.com must complete, whether they are seeking  
9 roommates or have a place for a roommate. (Defendant's Memorandum of Points  
10 and Authorities in Support of its Motion for Summary Judgment "Defs. Mem." at 2-  
11 4; RPSS ¶ ¶ 64.) As discussed in Roommate's moving papers, all members  
12 complete a personal profile to allow the computer to match roommates with specific  
13 search criteria provided by other members. (Defs. Mem. at 2-4; RPSS ¶ ¶ 64.)  
14 While members seeking roommates complete questions regarding their gender,  
15 sexual orientation, pets, cleanliness etc., members with places available answer  
16 similar questions regarding their households. (Defs. Mem at 2-4; RPSS ¶ ¶ 65-69.)  
17 No one, however, is denied access to Roommates.com on the basis of his or her  
18 answers to these questions. Any subsequent culling down or selection based on  
19 gender, sexual orientation, pets, cleanliness etc., is done by members of  
20 Roommates.com who later *may, but do not have to*, select roommate preferences  
21 before the computer provides matches. (The default on the preference pages is no  
22 preference.) And this selection process by users seeking roommates is perfectly  
23 lawful, as plaintiff must concede. (RPSS ¶ 95) (Deposition of Diana Bruno --  
24 Rough Transcript) ("Bruno Tr.") at 126:6-128:8) (people who live together may  
25 make their choice of roommates based on discriminatory factors). Any person who  
26 chooses to make roommate selections based on the information collected in the  
27 questionnaire has a right to do so, for such actions are embodied in the substantive  
28

1 due process right of intimate association, as discussed below and in Roommate's  
2 Motion at Section V(B)(2)(a).

3 Plaintiffs also claim that Roommate forces persons who have a place  
4 available to rent to select and make discriminatory statements. Here, plaintiffs  
5 simply misstate the facts by portraying the selection of criteria for matching  
6 roommates as mandatory. In fact, the user completing a member profile is not  
7 required to exhibit preferences and the default for all questions on the "My  
8 Roommate Preferences" pages of Roommates.com for both those seeking  
9 roommates and those providing rooms is no preference. (Defs. Mem. at 2-3; RPSS  
10 ¶¶ 64, 66-69.)

11 Finally, plaintiffs claim that Roommate allows the publishing (or, indeed,  
12 publishes itself) statements about race, religion, color, and national origin. As  
13 noted in Roommate's Motion, at no point in the personal profile questionnaire or  
14 membership process are users prompted for information regarding race, religion,  
15 color, or national origin. (Defs. Mem. at 2-4; RPSS ¶¶ 70.) Some users do use the  
16 "Additional Comments" pages to include additional information about themselves  
17 or their residence in the "Additional Comments" section of the questionnaire, which  
18 may be viewed as part of the user's profile by paying members. As discussed above  
19 and in the moving papers, Site users provide such information, not Roommate, and  
20 these users are responsible for all content they upload or post. Roommate does not  
21 prompt discriminatory statements in the "Additional Comments," and it does not  
22 review or edit the text of users' profiles. The comments of users are part of a true  
23 "open forum." (Defs. Mem. at 2-4; RPSS ¶¶ 71.)

24 **D. The CDA's Immunity Precludes Liability Under The FHA.**

25 Section 230(e) provides that "No cause of action may be brought and no  
26 liability may be imposed under any State or local law that is inconsistent with this  
27 section." 47 U.S.C. § 230(e)(3). Exempted are federal criminal statutes,  
28 intellectual property law, state laws that are *consistent* with section 230, and the

1 Electronic Communications Privacy Act of 1986. 47 U.S.C. § 230(e)(1)-(4). The  
2 FHA is not among this list of exemptions.

3 Plaintiffs argue that nothing in the CDA or in the cases interpreting the CDA  
4 shows that Congress intended for it to trump the fair housing laws. (Pls. Mem at  
5 16.) In support of this proposition, plaintiffs rely solely on a note by a law student.<sup>2</sup>  
6 Plaintiffs further contend that Congress's silence "suggests Congress did not intend  
7 for the fair advertising mandates to be abrogated." (Pls. Mem. at 16.) Plaintiffs'  
8 reasoning is erroneous and disregards a fundamental tenet of statutory  
9 interpretation: Where Congress explicitly enumerates exceptions in the text of the  
10 statute, additional exceptions are not to be implied in the absence of contrary  
11 legislative intent. *See Noah*, 261 F. Supp. 2d at 532.

12 Plaintiffs also assert, with no legal authority whatsoever, that the CDA  
13 "immunizes websites for tort liability in obscenity and defamation cases" (Pls.  
14 Mem. at 16) and it can thus co-exist with the much broader "Fair Housing Act  
15 which creates liability and protection for and from certain civil rights violations."  
16 (Pls. Mem. at 16-17.) The many CDA cases cited in the moving papers establish  
17 that the immunity reaches *all* claims other than those expressly exempted. Indeed,  
18 it is not even a close call here, where "publication" is an express element of a claim  
19 under section 3406(c) and section 12955(c).

20 Finally, plaintiffs conclude that even if there would be immunity under the  
21 CDA from the fair housing laws, such immunity does not apply in this case because  
22 Roommates.com is a "crucial intermediary" in a housing transaction. Plaintiffs base  
23 this conclusion on the fact that a "person looking for a place to live must pay to be a  
24 member and get matched with a landlord." (Pls. Mem. at 17).

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25  
26 <sup>2</sup> *See Note, Jennifer C. Chang, In Search of Fair Housing in Cyberspace: The*  
27 *Implications of the Communications Decency Act for Fair Housing on the*  
28 *Internet*, 55 Stan. L. Rev. 969, 1001 (2002). The author posits a narrow view of  
"publisher" liability that has been rejected by every federal court, both before and  
after the publication of the article.



1 This is nonsense. Both those who are looking for places to live, and those  
2 who have homes to share, can use a wide variety of means to find each other.  
3 Roommates.com is just one of many such websites, and people are free to  
4 communicate by newspaper, local advertising circular, word of mouth, and notices  
5 posted on bulletin boards at work, school, place of worship, or the local grocery  
6 store. Roommate has nothing to do with any transaction; it is not a real estate agent  
7 with an exclusive listing, and it is not an owner or property manager. It merely  
8 provides a forum for people to communicate about a common interest (shared  
9 homes), and is no different from countless other interactive websites that enable  
10 people to find dates, pets, old school chums, distant relatives, or fellow fans of  
11 Elvis or Beanie Babies.

12 Roommate is immune from liability under the CDA, and plaintiffs' summary  
13 judgment motion must be denied.

14  
15 IV.

16 **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT MUST**  
17 **BE DENIED BECAUSE PLAINTIFFS' CLAIMS ARE BARRED**  
18 **BY THE FIRST AMENDMENT**

19 Plaintiffs' claims also are barred by the First Amendment to the United States  
20 Constitution because they seek to impose liability under statutes that regulate  
21 speech on the basis of content and viewpoint. Moreover, *even if* the postings on  
22 Roommates.com are considered commercial speech (and they are not), plaintiffs'  
23 claims do not meet the requirements of Central Hudson Gas & Elec. Corp. v. Public  
24 Serv. Comm., 447 U.S. 557 (1980), and they are invalid for that reason as well.

25 A. **Plaintiffs' Interpretation of FHA and FEHA Is Unconstitutional**

26 The FHA makes it unlawful to publish "any notice, statement, or  
27 advertisement, with respect to the sale or rental of a dwelling that indicates any  
28 preference, limitation, or discrimination based on race, color, religion, sex,

1 handicap, familial status, or national origin, or an intention to make any such  
2 preference, limitation, or discrimination." 42 U.S.C. § 3604(c) (emphasis added).  
3 The FEHA has a nearly identical provision, with the additional categories of  
4 "sexual orientation," "marital status," "ancestry, and "disability." Cal. Govt. Code  
5 § 12955(c).<sup>3</sup>

6 During the 36 years since the FHA was enacted, the United States Supreme  
7 Court has developed exacting standards by which any regulation of speech must be  
8 judged. "[A]bove all else, the First Amendment means that government has no  
9 power to restrict expression because of its message, its ideas, its subject matter, or  
10 its content." Police Dept. of the City of Chicago v. Mosley, 408 U.S. 92, 95 (1972)  
11 (striking down ordinance prohibiting demonstrations near schools except peaceful  
12 labor picketing); *see also* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992);  
13 Boos v. Barry, 485 U.S. 312, 319-21 (1988); Smolla & Nimmer on Freedom of  
14 Speech (2004) § 3:3 ("When the government's purpose is disagreement with the  
15 message, the regulation is obviously content-based.").

16 The Supreme Court applies "strict scrutiny" to content-based speech  
17 regulations, and this analysis inevitably leads to a finding of unconstitutionality.  
18 *See* Simon & Schuster, Inc. v. Members of the New York State Crime Victims  
19 Board, 502 U.S. 105, 120-21 (1991); Consolidated Edison Co. v. Public Service  
20 Comm., 447 U.S. 530, 536 (1980). That must be the result here, as well. The  
21

22 <sup>3</sup> Plaintiffs' claims alleging violation of the Unruh Civil Rights Act, violation  
23 of Business & Professions Code § 17200, and for negligence fail for the same  
24 reasons as the FHA and FEHA, because they also seek to impose liability for  
25 speech based on content. Plaintiffs offer no factual basis for these claims that is  
26 different than their FHA and FEHA claims. The Unruh Act, section 17200, and  
27 negligence claims also fail because, if they are somehow interpreted to reach  
28 speech relating to housing, they are void for vagueness. It is impossible to know  
what statements are permitted or not permitted. *See* Reno v. American Civil  
Liberties Union, 521 U.S. 844, 874, 884-85 (1997); Board of Airport Comm'rs v.  
Jews for Jesus, Inc., 482 U.S. 569, 576 (1987).

1 government does not have a compelling interest in controlling speech relating to the  
2 search for and selection of roommates. Individuals have the right to freely select  
3 those with whom they choose to live. (See Section IV(B)(1), *infra*.) The  
4 interpretation urged by plaintiffs merely *interferes* with the exercise of that right.  
5 Any assertion by plaintiffs that there is a compelling interest in restricting offensive  
6 speech or speech that perpetuates stereotypes (*i.e.*, an interest that justifies  
7 restricting speech that is separate from the discriminatory selection of roommates)  
8 also fails. The Supreme Court has held repeatedly that "in the public debate our  
9 citizens must tolerate insulting, even outrageous, speech . . . . A 'dignity'  
10 standard . . . is so inherently subjective that it would be inconsistent with 'our  
11 longstanding refusal to punish speech because the speech in question may have an  
12 adverse emotional impact on the audience.'" Boos, 485 U.S. at 322. Moreover,  
13 even if the government had some interest, such as restricting offensive speech,  
14 <sup>obviously those of individual</sup> section 3604(c) and section 12955(c) are not narrowly tailored to achieve that  
15 interest; as interpreted by plaintiffs, the provisions prohibit a broad sweep of  
16 protected speech, including the private, one-on-one communications of those  
17 considering rooming together.

18 The Constitution's rejection of content-based regulations extends even to  
19 categories of speech that can be forbidden altogether. See R.A.V., 505 U.S. at 380  
20 (striking down hate-speech statute because it was limited to certain subject matter,  
21 including race and religion). Sections 3604(c) and 12955(c) undoubtedly evince a  
22 "special hostility towards the particular biases . . . singled out." *Id.* at 395. Neither  
23 forbids a statement indicating a preference to rent or sell to Democrats, senior  
24 citizens, pet owners, college students, cigarette smokers, or those who are gainfully  
25 employed. Even if it is assumed for argument's sake that the governmental interest  
26 here is diversity in housing, that interest may be advanced by alternatives that do  
27 not run afoul of the First Amendment. Here, the FHA and the FEHA silence certain  
28 disfavored categories of speech, while leaving all other preferential speech about

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1 housing unrestricted. This violates the Constitution, even where the government  
2 has good intentions.<sup>4</sup> See Texas v. Johnson, 491 U.S. 397, 414, 418 (1989).

3 **B. The Roommate.com Postings Are Not Commercial Speech, but Even If**  
4 **They Are, the Restrictions Urged by Plaintiffs Are Unconstitutional**

5 The postings on Roommates.com do not merely "propose a commercial  
6 transaction," resulting in reduced protection under the First Amendment's  
7 commercial speech doctrine. City of Cincinnati v. Discovery Network, Inc., 507  
8 U.S. 410, 423 (1993); see also Riley v. National Fed. of the Blind, 487 U.S. 781,  
9 795-96 (1988) (speech with commercial aspects is still fully protected where  
10 intertwined with informative speech). The right to post on the site is free. (RPSS ¶  
11 ¶ 58, 86.) Although users indicate a desire to share the expenses of a residence,  
12 those costs are a small fraction of the information in a Roommates.com posting.  
13 Users describe themselves, their interests, their characteristics (messy, clean), their  
14 schedules, and the homes they hope to share. (RPSS ¶ 64-70.) If economic motive  
15 was the sole reason for the postings, users would not be interested in disclosing all  
16 this personal information to others. Users are looking for people with whom they  
17 can comfortably and safely share living quarters.

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19  
20 <sup>4</sup> See Brown v. California Dept. of Transportation, 321 F.3d 1217, 1223-25  
21 (9th Cir. 2003) (rejecting policy that allows display of flags along state highways  
22 and forbidding all other signs and banners); see also Boy Scouts of Am. v. Dale,  
23 530 U.S. 640, 661 (2000) (approving Boy Scouts' exclusion of homosexuals under  
24 right of expressive association; the law "is not free to interfere with speech for no  
25 better reason than promoting an approved message or discouraging a disfavored  
26 one, however enlightened either purpose may strike the government"); Collin v.  
27 Smith, 578 F.2d 1197, 1205-06 (7th Cir. 1978) (striking down ordinance  
28 restricting march by Nationalist Socialist Party of America in heavily Jewish  
community; "That the effective exercise of First Amendment rights may undercut  
a given government's policy on some issue is, indeed, one of the purposes of those  
rights. *No distinction is constitutionally admissible that turns on the intrinsic  
justice of the particular policy in issue.*" (emphasis added)).

1 Indeed, the preferences expressed in the profiles run *counter* to the users'  
2 economic interests, because they *limit* the potential matches. This simply is not a  
3 case of "I will sell you X at the Y price." Virginia State Board of Pharmacy v.  
4 Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976); *see also*  
5 Bigelow v. Virginia, 421 U.S. 809, 818 (1975) ("The existence of 'commercial  
6 activity, in itself, is no justification for narrowing the protection of expression  
7 secured by the First Amendment."); *compare* Pittsburgh Press Co. v. Pittsburgh  
8 Comm. on Human Relations, 413 U.S. 376, 385 (1973) (gender-based  
9 advertisements were "no more than a proposal of possible employment").

10 In any event, the restrictions urged by plaintiffs are unconstitutional even  
11 under the commercial speech doctrine. In Central Hudson, the Supreme Court  
12 formulated a four-part analysis for determining whether a regulation of commercial  
13 speech passes constitutional muster. First, the court must determine as a threshold  
14 matter whether the commercial speech is protected by the First Amendment -- *i.e.*,  
15 whether the commercial speech concerns lawful activity and is not misleading.  
16 Second, the court must determine whether the government has a substantial interest  
17 in regulating the expression. Third, the court must determine whether the  
18 regulation directly advances the governmental interest. Fourth, the court must  
19 determine whether the regulation is no more extensive than necessary to serve the  
20 governmental interest. *See* Central Hudson, 447 U.S. at 566. The interpretation of  
21 the FHA and the FEHA urged by plaintiffs fails even the intermediate scrutiny of  
22 Central Hudson.

23 **1. The postings do not involve illegal activity.**

24 Selection of roommates is protected by the substantive due process right of  
25 intimate association, which permits people to freely choose those with whom they  
26 live and socialize. *See* Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472 (2003)  
27 (striking down a Texas statute making it a crime for two persons of the same sex to  
28 engage in certain sexual conduct); Moore v. City of East Cleveland, 431 U.S. 494

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1 (1977) (striking down a city ordinance that restricted which relatives qualified as  
2 "family" under the housing code).

3 This right of intimate association includes the right to exclude. Although it  
4 rejected the Jaycees' claim that they were exempt from a state nondiscrimination  
5 statute, the Supreme Court in Roberts v. United States Jaycees, 468 U.S. 609  
6 (1984), recognized that adults may select (or exclude) other adults in highly  
7 personal relationships without government interference. "[F]reedom of association  
8 receives protection as a fundamental element of personal liberty." *Id.* at 618-19.  
9 Such relationships involve the "distinctively personal aspects of one's life. . . .  
10 [T]hey are distinguished by such attributes as relative smallness, a high degree of  
11 selectivity in decisions to begin and maintain the affiliation, and seclusion from  
12 others in critical aspects of the relationship." *Id.* at 620.<sup>5</sup>

13 It is beyond dispute that roommate relationships meet these criteria, and  
14 people are entitled to create a household without government interference. These  
15 are relationships of two, three, or four people who choose to share kitchen,  
16 bathroom, and living areas not just for economic reasons, but also because they  
17 have compatible lifestyles. The postings on Roommates.com clearly involve lawful  
18 activity.

19 Additionally, the FHA and FEHA were never intended to control roommate  
20 selection. First, the plain language of the FHA indicates that Congress intended the  
21 prohibition against discrimination to apply to the typical landlord-tenant  
22 relationship and the sale of real property, and not to the selection of someone who  
23

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24 <sup>5</sup> The California Constitution also recognizes a right of privacy that includes  
25 the right to share living quarters with any other person without interference by the  
26 government. *See* California Const., Art. I, § 1; City of Santa Barbara v. Adamson,  
27 Cal.3d 123, 164 Cal. Rptr. 539 (1980) (reversing preliminary injunction against  
28 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 will share one's intimate living space. Although they have been on the books for  
2 decades, Roommate has not found any reported court decision applying section  
3 3406(c) or section 12955(c) to speech relating to the selection of roommates.<sup>6</sup>

4 Second, the goal of the FHA is to eliminate discrimination in housing and to  
5 promote diverse communities. Trafficante v. Metropolitan Life Ins. Co., 409 U.S.  
6 205, 211 (1972); Housing Opportunities Made Equal v. Cincinnati Enquirer, 943 F.  
7 2d 644, 652 (6th Cir. 1991). Suppressing the speech of those who wish to *share*  
8 their homes does not further this purpose. Many people become roommates so they  
9 can live in a residence or community that they could not afford if they lived alone.  
10 Making such cohabitation more difficult burdens the efforts of members of  
11 historically repressed groups to associate and perpetuates homogeneity in the more  
12 desirable locales.

13 Third, the "Mrs. Murphy exemption" suggests that Congress did not intend to  
14 include roommate selection within the FHA. The "Mrs. Murphy exemption"  
15 provides that if a dwelling has four or fewer units and the owner lives in one of the  
16 units, the owner is exempt from the FHA's non-discrimination provisions. 42  
17 U.S.C. § 3603(b). The policy underlying the exemption is, if anything, *more*  
18 applicable to a roommate situation. The selection of a person to share one's own  
19  
20

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21 <sup>6</sup> The Washington State Attorney General addressed an anti-discrimination law  
22 similar to the FHA and the FEHA, and concluded that it is lawful for "a person to  
23 discriminate on the basis of sex, age or religion in selecting a roommate with  
24 whom to share living quarters, or for a person to specify in an advertisement for a  
25 roommate that the roommate must be of a particular sex, age or religion, or for a  
26 newspaper to publish an advertisement for a roommate when the advertisement  
27 contains such specification." 1976 Op. Wash. A.G. 17, at 1, 1976 WL 168501.  
28 "'One of the societal values which is deserving of recognition, in our view, is the  
basic freedom to control one's life by choosing the sex of persons with whom one  
lives.'" *Id.* at 4-5. The Attorney General went on to conclude that "since the  
conduct advertised is legal so also, logically, should the advertisement itself be."  
*Id.* at 9.

1 living quarters must be one of the most intimate, personal decisions one can make,  
2 and is more deserving of protection than the right to select your neighbors.<sup>7</sup>

3 **2. Government lacks a substantial interest.**

4 Because preferential roommate selection is lawful, the government does not  
5 have a substantial interest in controlling speech about it. *See Texas v. Johnson*, 491  
6 U.S. 397, 412, 418 (1989); *R.A.V.*, 505 U.S. at 414 (White, J., concurring); *see also*  
7 Robert G. Schwemm, "Discriminatory Housing Statements and § 3604(c)," 29  
8 *Fordham Urb. L.J.* 187, 287-289 (expressing concern that section 3604(c), as a  
9 regulation of speech, not conduct, does not survive *R.A.V.*).

10 **3. No substantial interest is advanced or "directly linked."**

11 Punishing publication of preferential roommate postings does not directly  
12 advance, and is not "directly linked" to any governmental interest. Even if it  
13 assumed that the government's interest in regulating speech about roommate  
14 selection is fostering diversity, muzzling speech does not directly advance that  
15 interest, because, as stated above, it actually impedes economic upward movement  
16 and diversity and there certainly is no evidence that it results, actually, in diverse  
17 communities. While it makes sense to conclude that nondiscrimination in housing  
18 sales leads to more diverse neighborhoods, it does not follow that restrictions on  
19 roommate advertising does, particularly given the fact that people can lawfully  
20 make roommate selections based on preferences. The necessary "fit" under *Central*  
21 *Hudson* is lacking where the regulation impedes the flow of truthful, lawful  
22 information because government paternalistically fears the impact on recipients.  
23 *Virginia State Board of Pharmacy*, 425 U.S. at 773; *Linmark Assocs. v. Township*  
24 *of Willingboro*, 431 U.S. 85, 96-97 (1977); *see also* Schwemm, *supra*, 29 *Fordham*  
25

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26 <sup>7</sup> The right of individuals to exclude when selecting roommates distinguishes  
27 this case from *Ragin v. New York Times Co.*, 923 F.2d 995 (2d Cir. 1991). There,  
28 the court found that the preferential advertising was unprotected speech because it  
related to *illegal* activity in the sale and rental of homes. *Id.* at 1002-03.



1 Urb. L.J. at 280-82 (acknowledging insufficient "fit" between the FHA's purpose  
2 and section 3604(c) where the underlying activity is exempt from other FHA  
3 provisions).

4       **4. The restriction urged by plaintiffs is more extensive than necessary**  
5       **to serve the governmental interest.**

6       Sections 3604(c) and 12955(c) go far beyond what is necessary to serve any  
7 substantial governmental interest. They impede a broad sweep of protected speech:  
8 The statutes are not limited to public advertisements; they reach any "notice" or  
9 "statement," and this necessarily includes the thousands of "roommail"  
10 communications among Roommate.com's users. Indeed, Roommate's servers now  
11 hold 1.3 million messages. (RPSS ¶ 60.) What plaintiffs want to do is turn  
12 Roommate and other interactive computer services into "the government's  
13 policemen in enforcing section 3604(c)." Housing Opportunities, 943 F.2d at 653.

14       "If the First Amendment means anything, it means that regulating speech  
15 must be a last -- not first -- resort." Thompson v. Western States Medical Ctr., 535  
16 U.S. 357, 372 (2002). Where the government can "achieve its interests in a manner  
17 that . . . restricts less speech, the Government must do so." *Id.* at 371. Here, the  
18 governmental interest in ensuring access to housing for protected classes is  
19 adequately achieved by enforcing the provisions of the FHA and the FEHA that  
20 prohibit discrimination. Other alternatives include educational advertising, and the  
21 government and fair housing organizations certainly may offer their own placement  
22 services for those whom they believe are disadvantaged in the housing market.

23       In sum, then, the interpretation of the FHA and FEHA urged by plaintiffs is  
24 unconstitutional as a content-based regulation of speech. Plaintiffs' claims also fail  
25 under even the more relaxed commercial speech doctrine, because they seek to  
26 impose an unjustified, excessive regulation of speech about lawful matters.

27  
28

1 V.

2 **ROOMMATE IS NOT A PROPERTY**

3 **MANAGER OR IN THE BUSINESS OF SELLING REAL ESTATE**

4 Despite the obvious fact that Roommate merely operates a roommate search  
5 website, plaintiffs attempt to circumvent the immunity provided by the CDA by  
6 arguing that Roommate is acting as a "property manager who screens persons based  
7 on age, sexual orientation, familial status, and gender."<sup>8</sup> (Pls. Mem. at 12.)

8 Plaintiffs even go so far as to claim that Roommate is subject to independent  
9 liability because it is "in the business of selling or renting dwellings." (Pls. Mem.  
10 at 12-13.) Plaintiffs are incorrect on both accounts.

11 **A. Roommate Is Not A Property Manager**

12 According to plaintiffs, Roommate is a property manager because it provides  
13 its users with a "so-called 'lifestyle' questionnaire [which is] a type of screening  
14 service provided by property managers." (Plaintiffs' Undisputed Fact 10.)

15 Plaintiffs provide no authority for this definition save for the declaration of their  
16 own witness, Diana Bruno, who offers no foundation for this claim. Plaintiffs'  
17 apparent contention that Roommate is a property manager ignores the common  
18 understanding of "property manager" as a person or entity actively involved in the  
19 operations of some sort of building or other real property. See Reference Book - A  
20 Real Estate Guide, Ch. 24 at 506-07 (California Dept. of Real Estate 2000),  
21 available at <http://www.dre.ca.gov/reftoc.htm> (RPSS ¶ 97).<sup>9</sup>

22 \_\_\_\_\_  
23 <sup>8</sup> Plaintiffs likely try to force Roommate's actions under this rubric, in part, in  
24 an attempt to benefit from the holding of Donald Sterling Corp. in which  
25 defendant property manager was preliminarily enjoined from asking tenants their  
26 national origin or place of birth on an application for a garage remote control  
27 device. See Donald Sterling Corp., 274 F. Supp 2d at 1141-43. It is noteworthy  
28 that Donald Sterling Corp. does not even mention the CDA.

<sup>9</sup> In a section entitled, "Specific Duties of the Property Manager," the reference  
(continued...)

1           Moreover, plaintiffs' own declarant, Ms. Bruno, acknowledged at deposition  
2 that Roommate is not a property manager. (RPSS ¶ 96 (Bruno Tr. at 135:7-9.) (Q.  
3 "Is it the contention of the Fair Housing Council that roommates.com is a property  
4 manager?" A. "No. That is not my contention.") Plaintiffs have used her  
5 declaration out of context to support an argument that she does not endorse.

6           In any event, no amount of argument by plaintiffs can turn Roommate into  
7 something it is not. Roommate is a family run business that operates a website  
8 with computer servers in Mesa, Arizona. (RPSS ¶ 53-61.) No Roommate  
9 employee visits the rooms, apartments, or homes described in postings by users on  
:10

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11           <sup>9</sup> (...continued)

12 book lists the following duties a property manager must perform. None of them  
13 are performed by Roommate. (RPSS ¶¶ 94, 98.)

14 1. Establish the rental schedule that will bring the highest yield consistent with  
15 good economics.

16 2. Merchandise the space and collect the rent.

17 3. Create and supervise maintenance schedules and repairs.

18 4. If applicable, insure independent contractor status.

19 5. Set up payroll system for all employees.

20 6. Develop a tenant/resident relations policy.

21 7. Supervise employees and develop employee policies, including an Injury  
22 Prevention Plan.

23 8. Maintain proper records and make regular reports to the owner.

24 9. Qualify and investigate a prospective tenant's credit.

25 10. Prepare and execute leases.

26 11. Obtain decorating specifications and secure estimates.

27 12. Hire, instruct, and maintain satisfactory personnel to staff the building(s).

28 13. Audit and pay bills.

14. Advertise and publicize vacancies through selected media and broker lists.

15. Recommend alterations and modernization as the market dictates.

16. Inspect vacant space frequently.

17. Keep abreast of the times and competitive market conditions.

18. Obtain and pay insurance premiums and taxes.

19. Be knowledgeable about and comply with applicable Federal, State and local  
laws.

Id. at 506-07.

1 Roommates.com. (RPSS ¶ 87.) No Roommate employee speaks with Site users to  
2 discuss the operations of the building where the members live. (RPSS ¶ 88.)  
3 Roommate does not have a financial interest in real property owned by users of its  
4 Site. (RPSS ¶ 89.) Roommate is not employed by landlords or users of its Site to  
5 manage buildings or houses (or screen prospective tenants for that matter). (RPSS  
6 ¶ 90.) Roommate does not screen the postings of any user, whether the user is  
7 offering to share a home or looking for a home to share. (RPSS ¶ 91.) Roommate  
8 is not involved in any decisionmaking by any person regarding postings on the site  
9 or regarding the sharing of homes. (RPSS ¶ 92.) Roommate is not involved in the  
10 sale or rental of dwellings. (RPSS ¶ 93.)

11 Plaintiffs make much of the fact that Roommate "takes membership money."  
12 (Pls. Mem at 11.) But plaintiffs ignore several crucial facts: (1) Roommates.com  
13 users may use the Site without paying; (2) some users choose to pay to upgrade  
14 their memberships so that they can take advantage of more advanced feature of the  
15 Site; (3) users who do pay "membership money" are paying, not for property  
16 management services, as plaintiffs allege, but for time on the service. (RPSS ¶ 94.)  
17 Paid membership in Roommates.com is similar to having a subscription to a  
18 newspaper. Roommate is no more a property manager than is the Los Angeles  
19 Times.

20 **B. Roommate Is Not "In the Business of Selling or Renting Dwellings"**

21 In a last-ditch effort to impose liability on Roommate, plaintiffs argue that  
22 Roommate is "in the business of selling or renting dwellings," but Roommate does  
23 not even fit within plaintiffs' own definition of that phrase. Plaintiff relies on the  
24 Fair Housing Act's definition of "[being] in the business of selling or renting  
25 dwellings," which requires that Roommate "participate[] as an agent" in certain real  
26 estate transactions. 42 U.S.C. § 3603(c) Plaintiffs fail to define a real estate agent  
27 or to provide any reason why Roommate qualifies as an agent. (Pls. Mem. at 13.)  
28

1 This omission is revealing. In fact, California law excludes from the  
2 definition of real estate agent a person who merely provides listings of housing  
3 available for rent. See Anderson v. Dept. of Real Estate, 93 Cal. App. 3d 696,  
4 701-03, 155 Cal. Rptr. 307 (1979) (requiring real estate agent license to sell circular  
5 of apartment listings was overbroad regulation of commercial speech in violation of  
6 First Amendment). Anderson held that a real estate agent license cannot be  
7 required to sell a circular of apartment listings. It follows that a party who merely  
8 engages in that activity is not a real estate agent. Accordingly, Roommate is not  
9 acting as a real estate agent and it is not "in the business of selling or renting  
10 dwellings."

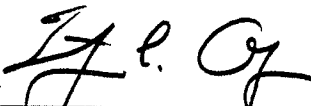
11 VI.

12 **CONCLUSION**

13 For the forgoing reasons, Roommate respectfully requests that the Court  
14 grant summary judgment in its favor, and dismiss the action in its entirety.

15  
16 DATED: August 27, 2004

17 QUINN EMANUEL URQUHART OLIVER &  
18 HEDGES, LLP

19 By   
20 Timothy L. Alger  
21 Attorneys for Defendant  
22 Roommates.com, LLC  
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28

**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: 865 S. Figueroa Street, 10th Floor, Los Angeles, California 90017.

On August 27, 2004, I served the foregoing document(s) described as: **DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** on the interested party(ies) in this action by placing a true copy thereof enclosed in a sealed envelope, addressed as follows:

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

  X   **BY MAIL**

\_\_\_\_\_ \*I deposited such envelope in the mail at \_\_\_\_\_, California.

\_\_\_\_\_ The envelope was mailed with postage thereon fully prepaid.

\_\_\_\_\_ I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

  X   **BY PERSONAL SERVICE** I caused to be delivered such envelope by hand to the offices of the addressee.

\_\_\_\_\_ **BY TELECOPIER** By transmitting the above listed document(s) to the fax number(s) set forth on this date.

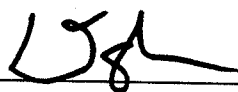
\_\_\_\_\_ **BY FEDERAL EXPRESS** by placing the document(s) listed above in such envelope for deposit with **FEDERAL EXPRESS** to be delivered via priority overnight service to the persons at the addresses set forth above.

Executed on August 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.

\_\_\_\_\_  
DAVID CLARK  
Type or Print Name

\_\_\_\_\_  
  
Signature