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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 03-9386 PA (RZx)	Date	November 7, 2008
Title	Fair Housing Council of San Fernando Valley, et al. v. Roommate.com, LLC		

Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE	
Paul Songco	Not Reported	N/A
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: IN CHAMBERS

Before the Court are cross-motions for summary judgment filed by plaintiffs Fair Housing Council of San Fernando Valley and Fair Housing Council of San Diego ("Plaintiffs") (Docket No. 121) and defendant Roommate.com, LLC ("Roommate") (Docket No. 122).

Except for Roommate's argument that Plaintiffs lack standing, the parties arguments are similar to those raised in 2004 when they were first before the Court. Following that first round of motions for summary judgment, the Court ruled that Roommate was shielded from liability for violations of the Fair Housing Act ("FHA"), 42 U.S.C. §§ 3601-3619, by section 230 of the Communications Decency Act, 47 U.S.C. § 230. The Court declined to reach the statutory and First Amendment issues raised by Roommate. The Ninth Circuit, sitting en banc, affirmed in part, reversed in part, and remanded the action to this Court for consideration of the issues left unresolved in the earlier ruling. Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008). Upon receiving the Ninth Circuit's Mandate, the Court allowed the parties additional time for discovery and set a briefing schedule for the parties' renewed motions for summary judgment.

I. Factual Background

Roommate operates a website designed to match people renting out spare rooms with people looking for a place to live. Before subscribers can search listings or post housing opportunities on Roommate's website, they must create profiles, a process that requires them to answer a series of questions. In addition to requesting basic information — such as name, location and e-mail address — Roommate requires each subscriber to disclose his sex, sexual orientation and whether he would bring children to a household. Each subscriber must also describe his preferences in roommates with respect to the same three criteria. The site also encourages subscribers to provide "Additional Comments" describing themselves and their desired roommate in an open-ended essay.[1/] After a new subscriber

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[1/] It is these "Additional Comments" which the Ninth Circuit ruled were subject to the Communication Decency Act's immunity provision. The Ninth Circuit concluded, however, that none

SEND

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completes the application, Roommate assembles his answers into a "profile page." The profile page displays the subscriber's pseudonym, his description, and his preferences, as divulged through answers to Roommate's questions.

Subscribers can choose between two levels of service. Those using the site's free service level can create their own personal profile page, search the profiles of others and send personal e-mail messages. They can also receive periodic e-mails from Roommate, informing them of available housing opportunities matching their preferences. Subscribers who pay a monthly fee also gain the ability to read e-mails from other users, and to view other subscribers' "Additional Comments." At the time the parties first briefed their motions for summary judgment in 2004, Roommate received over 50,000 visits and 1,000,000 page views per day. Approximately 40,000 users were offering rooms for rent, 110,000 users were looking for a residence to share, and 24,000 users had paid for upgraded memberships.

Now that the issue of Communications Decency Act immunity has been resolved, Plaintiffs first argue that the questions Roommate poses to prospective subscribers during the registration process violate the FHA and the analogous California anti-discrimination laws. Plaintiffs allege that requiring subscribers to disclose their sex, family status and sexual orientation "indicates" an intent to discriminate against them, and thus violates both the FHA and state law.

Second, Plaintiffs contend that Roommate's development and display of subscribers' discriminatory preferences is unlawful. When Roommate publishes the "profile page" for each subscriber on its website, the page describes the client's personal information — such as his sex, sexual orientation and whether he has children — as well as the attributes of the housing situation he seeks. This content is drawn directly from the registration process. For example, Roommate requires subscribers to specify, using a drop-down menu provided by Roommate, whether they are "Male" or "Female" and then displays that information on the profile page. Roommate also requires subscribers who are listing available housing to disclose whether there are currently "Straight male(s)," "Gay male(s)," "Straight female(s)" or "Lesbian(s)" living in the dwelling. Subscribers who are seeking housing must make a selection from a drop-down menu, again provided by Roommate, to indicate whether they are willing to live with "Straight or gay" males, only with "Straight" males, only with "Gay" males or with "No males." Similarly, Roommate requires subscribers listing housing to disclose whether there are "Children present" or "Children not present" and requires housing seekers to say "I will live with children" or "I will not live with children." Roommate then displays these answers, along with other information, on the subscriber's profile page.

Finally, according to Plaintiffs, Roommate, through its search and matching systems, itself uses this information to channel subscribers away from listings where the individual offering housing has expressed preferences that are not compatible with the subscriber's answers. Specifically, Roommate

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of Roommate's other features or conduct were entitled to immunity.

designed its search system to steer users based on the preferences and personal characteristics that Roommate prompts its users to provide. Similarly, the matching or filtering process which Roommate created and uses limits the available listings forwarded to subscribers based on the responses Roommate elicits from its users.

II. Discussion

Plaintiffs' Motion for Partial Summary Judgment seeks to establish that Roommate is liable for violating the FHA, the California Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code § 12955, and the Unruh Civil Rights Act, Cal. Civ. Code § 51(b).[2/] Roommate's Motion for Summary Judgment argues that Plaintiffs lack standing to pursue their FHA claim, that the FHA does not apply to "shared living arrangements," including the housing decisions of roommates, and that to enforce the FHA in situations involving shared living arrangements would violate the United States Constitution.[3/]

A. Standing

Roommate did not challenge Plaintiffs' standing in its original 2004 Motion for Summary Judgment. Now, however, based on the discovery it conducted in 2004, Roommate contends that Plaintiffs have not established that they have suffered actual injury or diversion of resources to establish standing to bring their FHA claim. Organizations such as Plaintiffs have standing to sue to enforce the FHA if the defendant's "practices have perceptibly impaired [their] ability to provide counseling and referral services for low- and moderate-income homeseekers . . . . Such concrete and demonstrable injury to the organization's activities — with the consequent drain on the organization's resources — constitutes far more than simply a setback to the organization's abstract social interest." Havens Realty Corp. v. Coleman, 455 U.S. 363, 379, 102 S. Ct. 1114, 1124, 71 L. Ed. 2d 214 (1982). Here, Plaintiffs have testified that they devoted dozens of hours to investigating Roommate's alleged violations of the FHA prior to commencing this litigation, dedicated training and educational resources to countering the effects of Roommate's policies, and suffered injury to their ability to carry out their purpose. These

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[2/] Plaintiffs have not moved for summary judgment on their claims for unfair business practices or negligence. Plaintiffs' Motion also does not seek summary judgment on the issue of damages.

[3/] Roommate's Motion did not address the merits of Plaintiffs' state law claims. Instead, Roommate suggested that if the Court granted its Motion with respect to the FHA claim, the Court should decline to exercise supplemental jurisdiction over Plaintiffs' remaining claims. At oral argument, however, Roommate argued for the first time that Plaintiffs lacked standing to pursue their Unruh Civil Rights Act claim. The Court therefore allowed the parties to submit additional briefing on the issue of an organization's standing to pursue an Unruh Act claim.

SEND

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facts are sufficient to establish Plaintiffs' standing to bring their claims. See Fair Housing of Marin v. Combs, 285 F.3d 899, 905 (9th Cir. 2002).

B. Scope of Plaintiffs' FHA Claim

Plaintiffs' FHA claim seeks to make Roommate liable for making unlawful inquiries into the personal characteristics of people looking for a place to live, publishing the results of those inquiries, and then filtering the information to match users based on those personal characteristics. In addition to its specific references to violations of § 3604(c) for publishing discriminatory statements, the First Amended Complaint made more general references to the entirety of the FHA. See First Amended Complaint, ¶ 52 (alleging that Roommate "violated the federal Fair Housing Amendments Act, 42 U.S.C. §§ 3601-3619 . . . ."). Although Roommate objects to the expanded scope of Plaintiffs' factual allegations concerning its prompting of discriminatory responses, as well as its search and matching functions, those issues were addressed in both the initial summary judgment briefing in 2004, the briefing on appeal, and again in the renewed motions for summary judgment. See Roommate.com, 521 F.3d at 1165 n.16 ("Roommate argues that Councils waived the argument that the questionnaire violated the FHA by failing to properly raise it in the district court. But under our liberal pleading standard, it was sufficient for Councils to allege that Roommate 'encourages' subscribers to state discriminatory preferences."). The parties have conducted discovery concerning each of these issues, and the briefing on the current motions for summary judgment addresses each of the issues. Moreover, the Ninth Circuit discussed at length Roommate's prompting of its users for information and its searching and matching functions based on that information. Id. at 1167, 1169-70. The Court therefore concludes that all three facets of Roommate's activities — its prompting, publishing, and matching — are fairly presented in this action.

C. Applicability of the FHA to Shared Living Arrangements

The FHA prohibits certain forms of discrimination on the basis of "race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604. Specifically, the FHA makes it unlawful:

> To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

42 U.S.C. § 3604(c). Similarly, the FHA prohibits the refusal "to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a

dwelling to any person because of race, color, religion, sex, familial status, or national origin. 42 U.S.C. § 3604(a).[4/]

Roommate argues that the FHA does not apply to roommate situations or to advertisements posted by individuals looking to find roommates. According to Roommate, no court has applied the FHA to an individual's choice of a roommate, the legislative history does not support an interpretation of the FHA which applies it to shared living arrangements, and the Department of Housing and Urban Development ("HUD") has never interpreted the FHA to prohibit the publication of otherwise discriminatory advertisements if those advertisements involve roommates. In relying on legislative history and agency interpretations, Roommate apparently assumes that the language of the FHA is ambiguous.

The FHA applies to the rental or sale of a "dwelling." The FHA defines "dwelling" as "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families . . . ." 42 U.S.C. § 3602(b). The FHA further defines "family" to include "a single individual." 42 U.S.C. § 3602(c). Based on the plain language of the statute, when individuals agree to become roommates, that agreement literally involves the rental of a "portion" of a building or structure "which is occupied as, or designed or intended for occupancy as, a residence by one or more families . . . ." To hold otherwise would ignore the intent of Congress in passing the FHA "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601; see also United States v. Gilbert, 813 F.2d 1523, 1526-27 (9th Cir. 1987) ("The Supreme Court has observed that this expansive approach is carried throughout the Act, and that the Act as a whole is 'broad and inclusive' and should be given 'generous construction.'") (quoting Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209, 212, 93 S. Ct. 364, 366-67, 368, 34 L. Ed. 2d 415 (1972)).

As both parties acknowledge, the only exception to the expansive scope of the FHA's application to "dwellings," the so-called "Mrs. Murphy" exception, does not apply to the vast majority of Roommate's users. The Mrs. Murphy exception prevents the application of § 3604 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

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[4/] Although not mentioned by the parties, Roommate's conduct also potentially violates § 3604(d), which makes it unlawful to "represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available." However, because § 3604(d) was not addressed by the parties, it does not form a basis of the Court's ruling.

living quarters as his residence." 42 U.S.C. § 3603(b)(2).[5/] Because nearly all of Roommate's users are not "owners," the Mrs. Murphy exception does not apply.

The Court therefore concludes that the language of the FHA unambiguously applies to situations involving shared living arrangements such as those sought by Roommate's users. Because the language of the FHA is not ambiguous, Roommate's reliance on legislative history and HUD's interpretation of the statute is misplaced. In interpreting a provision, a court looks "'first to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain the intent of Congress.'" Yang v. Cal. Dept. of Soc. Servs., 183 F.3d 953, 958 (9th Cir. 1999) (quoting United States v. Hockings, 129 F.3d 1069, 1071 (9th Cir. 1997)); see also United States v. Gonzales, 520 U.S. 1, 6, 117 S. Ct. 1032, 1035, 137 L. Ed. 2d 132 (1997) ("Given the straightforward statutory command, there is no reason to resort to legislative history. Indeed, far from clarifying the statute, the legislative history only muddies the waters."); Leisnoi, Inc. v. Stratman, 154 F.3d 1062, 1070 (9th Cir. 1998) ("Reliance on [legislative] history is particularly suspect when it is inconsistent with the ordinary understanding of the words in the statute and an otherwise reasonable agency interpretation."). "If the provision is ambiguous, we consult the legislative history. Where Congressional intent remains unclear, "'courts should defer to a reasonable agency interpretation of a statutory scheme the agency is entrusted to administer.'" Id. (quoting Cal-Almond, Inc. v. United States, 14 F.3d 429, 448 (9th Cir. 1993)).[6/]

The Court further concludes that Roommate's prompting of its users to provide information about their personal characteristics, the publication of those personal characteristics, and its search and matching services which have the effect of limiting the availability of "dwellings" based on an individual's gender, sexual orientation, or familial status, violate the FHA. Specifically, in prompting its users to provide information about their personal characteristics, publishing those personal characteristics, and matching potential roommates with available dwellings based on those

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[5/] The Mrs. Murphy exception does not provide an exemption to claims brought under § 3604(c). See 42 U.S.C. § 3603(b) (noting that the exception applies to "section 3604 of this title (other than subsection (c))").

[6/] The legislative history cited by Roommate does not, in the Court's view, provide any information concerning the intent of Congress to either limit or expand the application of the FHA to shared living arrangements such as those contemplated by Roommate's users. Additionally, the agency interpretation upon which Roommate relies, Code of Federal Regulations, 24 C.F.R. § 109.20 was withdrawn. Similarly, the January 9, 1995 memorandum from Roberta Achtenberg, the Assistant Secretary for Fair Housing and Equal Opportunity, was never published in the Federal Register and appears to be more concerned with prioritizing the instances of discrimination HUD will investigate than it does interpreting the FHA. These agency interpretations are therefore not entitled to deference. See Chevron v. Natural Res. Defense Council, 467 U.S. 837, 844-45, 104 S. Ct. 2778, 2782-83, 81 L. Ed. 2d 694 (1984).

SEND

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characteristics, Roommate has "otherwise ma[de] unavailable or den[ied] . . . a dwelling" based on sex or familial status and made, printed published, "or cause[d] to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination." 42 U.S.C. §§ 3604(a), (c); see also Roommate, 521 F.3d at 1167 n.21 ("Other circuits have held that it is unlawful for housing intermediaries to 'screen' prospective housing applicants on the basis of race, even if the preferences arise with landlords.") (citing Jeanty v. McKey & Pogue, Inc., 496 F.2d 1119, 1120-21 (7th Cir. 1974)).

D. Roommate's Constitutional Arguments

Roommate contends that even if the language of the FHA could be construed to apply to shared living arrangements such as those contemplated by its users, the Court should nevertheless adopt a narrower statutory construction to avoid infringing on its users' rights to "intimate association" and its own First Amendment free speech rights. Importantly, however, Plaintiffs are not attempting to impose FHA liability on Roommate's users for their individual, and sometimes discriminatory, roommate preferences. The Court therefore has no reason to determine if the FHA's application to shared living arrangements might be unconstitutional if applied, for instance, to prohibit individuals from deciding that they would only share an apartment with members of the same sex. Instead, Plaintiffs are attempting to apply the FHA to Roommate, a commercial provider of roommate matching services which prompts users to provide information concerning personal characteristics, publishes that information, and automatically "screens" or "steers" possible matches based on its users' responses.

Applying the FHA to Roommate — the only issue before the Court — simply does not implicate or impair the constitutionally protected right to intimate association, even assuming such a right exists and encompasses an individual's otherwise discriminatory roommate preference. The potential impairment of an individual's right to intimate association through application of the FHA to a discriminatory roommate preference is relevant, however, to Plaintiffs' claims in this action to the limited extent that such a preference must be considered "lawful" to avoid violating that individual's constitutional rights. As Roommate observes, the lawfulness of an individual's otherwise discriminatory roommate preference is relevant to the FHA's ability to limit the publication of statements indicating a discriminatory preference without violating the First Amendment. Accordingly, for purposes of assessing the constitutionality of imposing liability on Roommate, the Court will assume that the right to intimate association includes the right of an individual to discriminate in the selection of a roommate.

As an initial matter, although Roommate's publication of the discriminatory preferences of some of its users clearly implicates Roommate's free speech rights, it is far less obvious that Roommate's prompting of its users to provide personal characteristics in order to use its service, or its use of that information in its search and matching functions, is "speech" protected by the First Amendment.

Instead, those functions performed by Roommate, and the questions it prompts its users to answer, could be considered mere conduct rather than either speech or a communicative act expressing a viewpoint to which the First Amendment applies. See Spence v. Washington, 418 U.S. 405, 415, 94 S. Ct. 2727, 2732, 41 L. Ed. 2d 842 (1974) (finding that the First Amendment's protection for speech includes conduct which communicates that is "direct" and "likely to be understood" by its audience). However, even if Roommate's prompts for discriminatory information, searches, and matches could be considered speech, it would be, like Roommate's publication of its users' discriminatory preferences, speech of a commercial nature.

"Although commercial speech is protected by the First Amendment, not all regulation of such speech is unconstitutional." Thompson v. W. States Med. Ctr., 535 U.S. 357, 367, 122 S. Ct. 1497, 1503-04, 152 L. Ed. 2d 563 (2002). In Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980), the Supreme Court articulated a test for determining whether a particular limitation on commercial speech is constitutionally permissible:

> Under that test we ask as a threshold matter whether the commercial speech concerns unlawful activity or is misleading. If so, then the speech is not protected by the First Amendment. If the speech concerns lawful activity and is not misleading, however, we next ask "whether the asserted governmental interest is substantial." If it is, then we "determine whether the regulation directly advances the governmental interest asserted," and, finally, "whether it is not more extensive than is necessary to serve that interest." Each of these latter three inquiries must be answered in the affirmative for the regulation to be found constitutional.

Thompson, 535 U.S. at 367, 122 S. Ct. at 1504, 152 L. Ed. 2d 563 (quoting Central Hudson, 447 U.S. at 566, 100 S. Ct. at 2351, 65 L. Ed. 2d 341).

The courts that have addressed the issue have upheld the FHA against First Amendment challenges. See, e.g., Ragin v. New York Times Co., 923 F.2d 995, 1002-03 (2d Cir. 1991); United States v. Hunter, 459 F.2d 205, 211-13 (4th Cir. 1972). Both of those cases, however, are of potentially limited persuasiveness. Ragin, for instance, dealt with the publication of discriminatory advertisements that did not implicate the right of intimate association and which that court determined were not otherwise lawful. Hunter was issued in 1972, eight years before the Supreme Court's decision in Central Hudson, and therefore did not engage in the appropriate First Amendment commercial speech analysis. See Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 668 (7th Cir. 2008) (cautioning that "any rule that forbids truthful advertising of a transaction that would be substantively lawful encounters serious problems under the first amendment").

With respect to the Central Hudson factors, the Court has no difficulty concluding that the government's interest in preventing housing discrimination is "substantial." The FHA's prohibition

against making, printing, or publishing "any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin" also satisfies the second Central Hudson factor by "directly advancing" the government's interest in preventing housing discrimination. As the Ninth Circuit stated, "it is Roommate that forces users to express a preference and Roommate that forces users to disclose the information that can form the basis of discrimination by others. Thus, Roommate makes discrimination both possible and respectable." Roommate, 521 F.3d at 1170 n.26. Finally, the Court concludes that the FHA's limitations on commercial speech are not more extensive than necessary. Specifically, failing to prohibit explicitly discriminatory advertising for housing when it involved otherwise lawful discrimination, such as housing opportunities falling within the Mrs. Murphy exception, would drastically undermine the FHA's goals of reducing and preventing housing discrimination by communicating the message that housing discrimination is permissible. Particularly because it can be so difficult to determine if an advertisement relates to a housing opportunity that is exempt from the FHA, the prohibition against all discriminatory housing is "not more extensive than is necessary to serve that interest." See Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirier, Inc., 943 F.2d 644, 653 (6th Cir. 1991) ("[T]he construction we give to section 3604(c) serves substantially the purposes sought to be achieved by the FHA without seriously burdening publishers. To be sure, publishers remain liable for publishing an advertisement that is obviously discriminatory . . . or for intending to discriminate through the publication of advertisements.").

The Court therefore concludes that imposing liability against Roommate for its violations of the FHA is not unconstitutional.

E. Plaintiffs' FEHA and Unruh Civil Rights Act Claims

In language very similar to the FHA's limitations on discriminatory housing practices, FEHA makes it unlawful:

> For any person to make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a housing accommodation that indicates any preference, limitation, or discrimination based on race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, source of income, or disability or an intention to make that preference, limitation, or discrimination.

Cal. Gov't Code § 12955(c). If anything, liability under FEHA is broader than under the FHA. See Cal. Gov't Code § 12955(g) (making it unlawful for "any person to aid, abet, incite, compel, or coerce the doing of any of the acts or practices declared unlawful in this section, or to attempt to do so"). Because the Court has determined that Roommate is liable for violating the FHA, and liability under FEHA is at least as broad, the Court concludes that Roommate is also liable for violating FEHA. See Rodriguez v.

SEND

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Airborne Express, 265 F.3d 890, 896 n.4 (9th Cir. 2001) ("We may look to federal authority regarding Title VII and similar civil rights statutes when interpreting analogous statutory provisions of FEHA.").

Liability for discrimination under the Unruh Civil Rights Act is similarly expansive. See Cal. Civ. Code § 51(b) ("All persons with the jurisdiction of this state are free and equal and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."). However, as Plaintiffs admit in their supplemental brief concerning their standing to bring an Unruh Act claim, the Unruh Act does not create a private right of action. Instead, Plaintiffs supplemental brief argues that pursuant to California Government Code section 12948, a violation of the Unruh Act is also a violation of FEHA. Plaintiffs are, in effect, attempting to recharacterize their Unruh Act claim as a FEHA claim. The Court notes, however, that the First Amended Complaint contains a separate claim alleging a violation of the Unruh Act. As Plaintiffs now admit, there is no private right of action to bring that claim as it is alleged in the First Amended Complaint. Roommate is therefore entitled to summary judgment on that claim.[7/]

CONCLUSION

For all of the foregoing reasons, the Court grants in part, and denies in part, Plaintiffs' Motion for Partial Summary Judgment. The Court concludes that Roommate is liable for violating the FHA and FEHA. Roommate's Motion for Summary Judgment is denied except with respect to Plaintiffs' Unruh Act claim. Plaintiffs lack standing to pursue that claim.

IT IS SO ORDERED.

[7/] Because the Court has already concluded that Roommate has violated FEHA without referring to FEHA's incorporation of the Unruh Act, the Court need not address Plaintiffs' supplemental argument that a violation of the Unruh Act is also a violation of FEHA. The Court notes, however, that neither the First Amended Complaint nor any of Plaintiffs' prior arguments or briefing ever suggested that they viewed the Unruh Act claim as part of their second claim for relief alleging a violation of FEHA.