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9 **UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

10 _____)
11 SINDEELOU THOMSON,)
12)
13 Plaintiff,)
14 v.)
15 JOHN T. DOOLITTLE,)
16 Defendant.)
_____)

Case No. 2:07-CV-01623-LEW-
GGH

**MEMORANDUM OF POINTS
AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS AND/OR
FOR SUMMARY JUDGMENT
OF DEFENDANT JOHN T.
DOOLITTLE**

DATE: September 21, 2007
TIME: 10:00 A.M.
CTRM: 9
Hon. Ronald S.W. Lew

17
18 Plaintiff SindeeLou Thomson is a constituent of defendant John T. Doolittle, U.S.
19 Representative for the 4th congressional district of California. Ms. Thomson originally filed this
20 suit in Placer County Superior Court, and we timely removed the action to this court on August
21 8, 2007 pursuant to 28 U.S.C. § 1446. In her complaint, Ms. Thomson alleges that the
22 Congressman violated California’s anti-spamming law because his congressional office sent her
23 an email on May 25, 2007. She seeks \$2,000 in damages.

24 For the reasons set forth below, this case is frivolous and should be summarily dismissed.

25 **Factual Background**

26 Congressman Doolittle’s office, like most Members’ offices, routinely sends franked
27

1 mail to constituents in the form of e-mails for the purpose of informing constituents about the
2 Congressman's and the House's official activities, proposed legislation, and the like. The e-
3 mails are sent using specialized software, and all such e-mails include opt-out information for
4 constituents who do not want to remain on the Congressman's e-mail list.

5 On May 25, 2007, Congressman Doolittle's office sent an official e-mail to the
6 Congressman's constituents to inform them of the passage of a Doolittle-sponsored amendment
7 which barred financial lenders from providing mortgages to illegal aliens. A copy of this e-mail
8 (the "Doolittle E-mail") is attached as Exhibit 1 to the Declaration of Dan Blankenburg (Aug. 15,
9 2007), attached hereto. The Doolittle E-mail was sent to the addresses
10 sindeelouthomson@netscape.net and rthomson916@earthlink.net. Both addresses are
11 registered in the tracking software used by the Congressman's office to Ronald Thomson, 1033
12 S. Bluff Dr., Roseville, CA 95678-1141. "1033 S. Bluff Dr." in Roseville, CA is the address
13 listed for Ms. Thomson on her complaint. It also appears from the tracking software that on
14 March 13, 2006, someone affirmatively *opted in to* receive e-mails from the Congressman's
15 office at the rthomson916@earthlink.net address, and that on June 6, 2007, someone
16 affirmatively *opted out not* to receive e-mail communications from the Congressman's office at
17 the sindeelouthomson@netscape.net address. No e-mails were sent by Congressman Doolittle's
18 office to the address sindeelouthomson@netscape.net after June 6, 2007. *See* Blankenburg
19 Declaration at ¶ 6.

20 In an effort to resolve this matter amicably, undersigned counsel spoke on Friday, August
21 10, 2007, with Ms. Thomson (who represented herself at the time), and on Monday, August 13,
22 2007, with Bari Nejadpour, Ms. Thomson's newly retained attorney. Although undersigned
23 counsel (i) explained that official e-mails from a congressional office do not constitute "spam"
24 within the meaning of the California statute; (ii) explained that the Congressman is protected by
25 the doctrine of sovereign immunity; and (iii) represented that Congressman Doolittle's office had
26 removed both the sindeelouthomson@netscape.net and the rthomson916@earthlink.net

1 addresses from Congressman Doolittle’s e-mail list, Mr. Nejadpour insisted that Ms. Thomson
2 wanted to have “her day in court.”

3 **ARGUMENT**

4 **I. Ms. Thomson Fails to State a Claim.**

5 The Cal. Bus. & Prof. Code §§ 17529.2(a), 17529.4(1) makes it unlawful for “a person
6 or entity . . . [to] initiate or advertise in an unsolicited commercial e-mail advertisement.”
7 “Commercial e-mail advertisement” is defined as “any electronic mail message initiated for the
8 purpose of advertising or promoting the lease, sale, rental, gift offer, or other disposition of any
9 property, goods, services, or extension of credit.” Cal. Bus. & Prof. Code § 17529.1(c). Ms.
10 Thomson’s complaint fails to provide information about the offending e-mail she allegedly
11 received on May 25, 2007 sufficient to suggest that it falls within the purview of that statute. For
12 this reason alone, Ms. Thomson has failed to state a claim and her complaint must be dismissed
13 pursuant to Fed.R.Civ.P. 12(b)(6). *See Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1995, 1964-65
14 (2007) (complaint must be dismissed for failure to state a claim if plaintiff fails to provide more
15 than “labels and conclusions, and a formulaic recitation of the facts. . . . Factual allegations must
16 be enough to raise a right to relief above the speculative level.”).

17 Accordingly, Ms. Thomson’s complaint must be dismissed for failure to state a claim.

18
19 **II. The Complaint Must Be Dismissed for Lack of Subject Matter Jurisdiction Because
20 Congressman Doolittle is Immune from Suit.**

21 Ms. Thomson is plainly suing Congressman Doolittle for actions taken in his official
22 capacity. The official duties of Members of Congress extend well beyond purely legislative
23 activities, and include such activities as preparing newsletters to constituents, issuing news
24 releases, making speeches outside Congress, and giving interviews to the press. *See, e.g., U.S. v.*
25 *Brewster*, 408 U.S. 501, 512 (1972). Indeed, *Williams v. U.S.*, 71 F.3d 502, 507 (5th Cir. 1995),
26 held that “a primary obligation of a Member of Congress in a representative democracy is to

1 serve and respond to his or her constituents.” Communicating with constituents through
2 newsletters and the like is thus a normal and routine part of a Member’s representational duties.
3 *See also Operation Rescue Nat’l v. U.S.*, 975 F. Supp 92, 107 (D. Mass 1997), *aff’d*, 147 F.3d
4 68 (1st Cir. 1998).

5 For actions taken in an official capacity, Congressman Doolittle is protected by the
6 doctrine of sovereign immunity. *See generally Keener v. Congress of the United States*, 467
7 F.2d 952, 953 (5th Cir. 1972) (sovereign immunity applies to the legislative branch). *See also*
8 *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) (“[R]elief sought nominally against a[] [government]
9 officer is in fact against the sovereign if the decree would operate against the latter.”). Sovereign
10 immunity is a bar to the exercise of jurisdiction by this Court absent an “unequivocally
11 expressed” waiver of that immunity. *See U.S. v. King*, 395 U.S. 1, 4 (1969). Here, the
12 complaint does not recite a specific statutory waiver of sovereign immunity, and we are not
13 aware of any.

14 Accordingly, Ms. Thomson’s complaint must be dismissed for lack of subject matter
15 jurisdiction.

16 **III. Congressman Doolittle Is Entitled to Summary Judgment.**

17 To the extent Ms. Thomson’s complaint centers on the Doolittle E-mail, which was sent
18 on May 25, 2007, the date cited in the complaint, the Congressman is entitled to summary
19 judgment under Rule 56.

20 First, the Doolittle E-mail, on its face, does not constitute a “commercial e-mail
21 advertisement” within the meaning of the California statute.

22 Second, the Doolittle E-mail does constitute “franked mail” which is specifically
23 authorized by federal law. “Franked mail” is mail transmitted under the signature of Members of
24 Congress, among others, without prepayment of postage. 39 U.S.C. § 3201(3), (4). The franked
25 mail statute is intended “to assist and expedite the conduct of the official business, activities, and
26

1 duties of the Congress of the United States,” *id.* § 3210(a)(1),¹ by permitting the ready
2 dissemination of, among other things, “the usual and customary congressional newsletter or
3 press release . . . ; reports on public and official actions taken by Members of Congress; and
4 discussions of proposed or pending legislation or governmental actions and the positions of the
5 Members of Congress on, and arguments for or against, such matters.” *Id.* § 3210(a)(3)(B).

6 In the House of Representatives, the Commission on Congressional Mailing Standards
7 (“Franking Commission”) is tasked with prescribing rules to ensure compliance by Members of
8 the House with the requirements of the franking statute. *See* 39 U.S.C. 3210(6)(D). The
9 Franking Commission, among other things, reviews mass mailings that Members intend to send
10 under their frank to ensure compliance with the franking statute. *See* Franking Commission,
11 “About the Commission,” available on-line at
12 http://cha.house.gov/index.php?option=com_content&task=view&id=169&Itemid=37.

13 Moreover, current Franking Commission policy treats certain e-mail communications by
14 Members of the House as “franked mail” for this purpose. *See* Franking Commission, “Updated
15 E-mail Policy Related to Subscriber Lists,” available on-line at
16 http://cha.house.gov/index.php?option=com_content&task=view&id=172&Itemid=37. Under
17 this policy, House Members who send e-mail communications to constituents who have
18 individually subscribed to an e-mail list are “strongly encouraged” to obtain in advance a
19 Franking Commission advisory opinion to ensure compliance with franking content regulations,
20

21 ¹ “[O]fficial business, activities, and duties” is broadly defined to encompasses:

22 all matters which directly or indirectly pertain to the legislative
23 process or to any congressional representative functions generally,
24 or to the functioning, working, or operating of the Congress and
25 the performance of official duties in connection therewith, and
26 shall include, but not be limited to, the conveying information to
27 the public

28 39 U.S.C. § 3210(a)(2).

1 while Members who send e-mail communications to constituents who have not individually
2 subscribed to an e-mail list are required to obtain in advance such a Franking Commission
3 advisory opinion. *Id.*

4 In this case, Congressman Doolittle’s office did obtain an advance opinion from the
5 Franking Commission that the Doolittle E-mail constituted “frankable” mail under 39 U.S.C. §
6 3210(a)(3)(B). *See* Blankenburg Declaration at ¶ 5, and Exhibits 2, 3.

7 Franked mail, by definition, does not advertise or promote services or goods within the
8 meaning of the California statute and therefore does not meet the definition of “commercial e-
9 mail advertisement,” *i.e.*, “spam,” under California law.²

10 Accordingly, to the extent Ms. Thomson’s complaint centers on the Doolittle E-mail, the
11 Congressman is entitled to a summary judgment.

12 **CONCLUSION**

13 For all the foregoing reasons, Congressman Doolittle’s Motion to Dismiss and/or for
14 Summary Judgment should be granted.

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16 Respectfully submitted,

17 GERALDINE R. GENNET
18 General Counsel
19 KERRY W. KIRCHER
20 Deputy General Counsel

21 /s/ Christine Davenport
22 CHRISTINE DAVENPORT
23 Assistant Counsel

24 Counsel for Defendant John T. Doolittle

25 August 15, 2007

26 ² If the California statute purported to cover franked mail – which it does not – it would
27 obviously run afoul of the Supremacy Clause of the Constitution. U.S. Const. art. VI.

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2 **CERTIFICATE OF SERVICE**

3 I certify that on August 15, 2007, I served one copy of the Memorandum of Points and
4 Authorities in Support of Motion to Dismiss and/or for Summary Judgment of Defendant John T.

5 Doolittle, by first-class mail, on:

6 SindeeLou Thomson
7 P.O. Box 1495
8 Roseville, CA 95678

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10 1033 South Bluff Drive
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12 Bari Nejadpour, Esq.
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16 /s/ Christine Davenport
17 CHRISTINE DAVENPORT
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