THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JACK BEAM and RENEE BEAM, Plaintiffs, v. MATTHEW S. PETERSEN, FEDERAL ELECTION COMMISSION CHAIRMAN, Defendant.	Civil No. 07cv1227 Judge Rebecca R. Pallmeyer Magistrate Judge Cole DEFENDANT'S REPLY IN SUPPORT OF MOTION TO STRIKE JURY DEMAND

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO STRIKE PLAINTIFFS' JURY DEMAND

The plaintiffs have failed to counter the showing by the Federal Election Commission ("Commission" or "FEC") that they have no constitutional or statutory right to a jury trial. Indeed, their opposition ("Pls' Opp. Mot. Strike") (Doc. No. 177), filed May 4, 2010, supports rather than undermines the Commission's motion. The plaintiffs do not deny that the Seventh Amendment's right to a jury trial is inapplicable to suits against the United States. *See* FEC Memorandum in Support of Its Motion to Strike Plaintiffs' Jury Demand at 2 ("Mem. Mot. Strike"). Nor do plaintiffs dispute that the statute under which they are suing the Commission — the Right to Financial Privacy Act ("RFPA"), 12 U.S.C. §§ 3401-3422 — contains no express provision for a jury trial. *See* Mem. Mot. Strike at 4-6. The plaintiffs cite no case that was tried to a jury where the government was the defendant and allegedly violated the RFPA. And they do not discuss sovereign immunity, although that doctrine is the key to determining whether and how a

litigant may sue the United States government. Therefore, the Court should strike plaintiffs' jury demand.

Instead of addressing the binding precedent that governs this motion, plaintiffs rely entirely on *Lorillard v. Pons*, 434 U.S. 575 (1978), and the dissent in *Lehman v. Nakshian*, 453 U.S. 156 (1981). But contrary to the plaintiffs' assertion, *Lorillard* does not "control" the present case. Pls' Opp. Mot. Strike at 5. *Lorillard* involved the Seventh Amendment, not sovereign immunity or the RFPA. The case was brought by a former employee against a private employer for lost wages under the Age Discrimination in Employment Act ("ADEA"). The Supreme Court held that the employee had a right to choose a jury trial although the ADEA contained no provision expressly granting that right in such a case; the structure of the ADEA, the Court concluded, supported the inference that Congress intended for employees to have the right. In holding that the parties' ADEA lost-wages controversy could be tried to a jury, the Court noted that the statute provided for "legal" relief, a "term of art" that triggers the Seventh Amendment's right to jury trial. 434 U.S. at 583. As the Commission has explained, however, and as the plaintiffs do not dispute, the Seventh Amendment does not apply in civil actions against the federal government. *See* Mem. Mot. Strike at 2; *supra* p. 1. Thus, whether the RFPA contains a comparable term of art or provides for "legal" relief is irrelevant.

The Court in *Lorillard* also found that Congress based the ADEA provisions at issue on the Fair Labor Standards Act, which courts had uniformly held allowed for jury trials. Congress did not base the RFPA on a different statute that allowed for jury trials. Rather, Congress enacted the RFPA in response to a Supreme Court decision holding that a bank customer has no constitutionally protected privacy interest in his bank records.

See, e.g., Chao v. Community Trust Co., 474 F.3d 75, 83 (3d Cir. 2007); *Sornberger v. First Midwest Bank,* 278 F. Supp. 2d 935, 941 (C.D. Ill. 2002).

As the Commission explained (Mem. Mot. Strike at 4-6), *Lehman* is the leading case on sovereign immunity and the right to a jury trial in suits against the federal government. The majority opinion in that Supreme Court case, not the dissent upon which plaintiffs rely, is dispositive here and requires that the FEC's motion be granted. In *Lehman,* a federal employee sued the Navy Department under later-added provisions of the ADEA prohibiting age discrimination by the federal government. The Supreme Court held that Congress, in amending the statute, did not grant a right to jury trial to federal employees suing the government. The Court distinguished *Lorillard,* which, it stated, "has little relevance here." 453 U.S. at 162 n.10, 163-64. And the Court explained that where the government has waived its sovereign immunity to suit, the courts presume that Congress conditioned that waiver on the plaintiff's relinquishing any claim to a jury trial. *Id.* at 161; *see also id.* at 168-69.

By relying heavily on the dissent in *Lehman, see* Pls' Opp. Mot. Strike at 2-4, plaintiffs implicitly concede that the majority opinion forecloses their jury argument. In the 29 years since *Lehman,* the courts have unanimously recognized that the decision rests on the sovereign immunity doctrine. As the Ninth Circuit has noted, "*Lehman* discussed the right to a jury trial in a broad, general sense." *KLK, Inc. v. United States Dep't of the Interior,* 35 F.3d 454, 456 n.3 (9th Cir. 1994). Its "holding is not limited to cases under the [ADEA] . . . or factually identical scenarios." *Id.* (citing illustrative cases). *See also* Mem. Mot. Strike at 5. Most notably, *Lehman* held that, "[s]ince there is no generally applicable jury trial right that attaches when the United States consents to

suit, the accepted principles of sovereign immunity require that a jury trial right be clearly provided in the legislation creating the cause of action." 453 U.S. at 162 n.9.

Congress has amended the RFPA many times since the appearance of the *Lehman* decision almost 30 years ago.[1] During this period, lower court cases have applied *Lehman* in a variety of statutory contexts, and other cases have emphasized the strict construction of statutory language that is required when there is any claimed waiver of sovereign immunity, including one that would provide a right to a jury trial. In amending the RFPA, Congress is presumed to have legislated against the backdrop of these judicial decisions. Indeed, the Supreme Court "normally assume[s] that, when Congress enacts statutes, it is aware of relevant judicial precedent." *Merck & Co., Inc. v. Reynolds,* __ S. Ct. __, 2010 WL 1655827, at *11 (April 27, 2010).[2] But none of the amendments to the RFPA granted plaintiffs the right to a jury trial.[3] The plaintiffs here have not cited and cannot cite any language in the RFPA or its legislative history to rebut this longstanding

---

[1] *See, e.g.*, Pub. L. No. 99-570, 100 Stat. 3207-21 (1986); Pub. L. No. 100-690, 102 Stat. 4357, 4358 (1988); Pub. L. No. 101-73, 103 Stat. 438, 496-498 (1989); Pub. L. No. 101-647, 104 Stat. 4791, 4908 (1990); Pub. L. No. 102-242, 105 Stat. 2375 (1991); Pub. L. No. 102-550, 106 Stat. 4059, 4066, 4088 (1992); Pub. L. No. 102-568, 106 Stat. 4342 (1992); Pub. L. No. 106-102, 113 Stat. 1475 (1999); Pub. L. No. 108-177, 117 Stat. 2628 (2003); Pub. L. No. 109-455, 120 Stat. 3381 (2006); Pub. L. No. 110-289, 122 Stat. 2792 (2008).

[2] *See also, e.g., Abuelhawa v. United States,* 129 S. Ct. 2102, 2106 (2009) ("As we have said many times, we presume legislatures act with case law in mind."); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991) (Congress is presumed to "legislate[ ] with knowledge of [the courts'] basic rules of statutory construction."); *United States v. Martin,* 128 F.3d 1188, 1192 (7th Cir. 1997) ("Courts always considered the Government a 'victim' under the [Victim and Witness Protection Act] and we can presume that Congress was aware of this interpretation when it enacted the 1996 amendments.").

[3] In contrast, shortly after the Supreme Court decided *Lorillard,* Congress amended the ADEA to provide explicitly for a jury trial option in suits against private employers. Pub. L. No. 95-256, § 4(a)(2), 92 Stat. 190, 191 (Apr. 6, 1978); 29 U.S.C. § 626(c)(2).

judicial assumption. *See, e.g., Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988) ("In the absence of affirmative evidence in the language or history of the statute, we are unwilling to assume that Congress was ignorant of the substantial number of States providing additional workers' compensation awards when a state safety regulation was violated by the employer.").

CONCLUSION

As decisions of the Supreme Court, the Seventh Circuit, and other courts show, the plaintiffs have no constitutional or statutory right to a jury trial in their suit against the Commission for allegedly violating the Right to Financial Privacy Act. Therefore, this Court should grant the Commission's motion to strike the plaintiffs' jury demand.

Respectfully submitted,

Thomasenia P. Duncan
General Counsel

David Kolker
Associate General Counsel

Harry J. Summers
Assistant General Counsel

Benjamin A. Streeter III
Attorney

/s/ Holly J. Baker
Holly J. Baker
Attorney

May 18, 2010

FOR THE DEFENDANT
FEDERAL ELECTION COMMISSION
AND ITS CHAIRMAN

999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650