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

UNITED STATES OF AMERICA,	)	Case No.: 1:99CV1193
	)	
Plaintiff,	)	
v.	)	JUDGE POLSTER
	)	
JOHN DEMJANJUK,	)	
(a/k/a Iwan Demjanjuk)	)	
	)	
Defendant.	)	

GOVERNMENT'S OPPOSITION TO DEFENDANT JOHN DEMJANJUK'S MOTION FOR RULE 60 RELIEF

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STATEMENT OF ARGUMENT

Demjanjuk's Rule 60 motion is without merit. This case involves neither extraordinary circumstances nor anything amounting to a miscarriage of justice. The documents at issue in this matter were speculative and based on incorrect assumptions, the prosecution team did not possess or know about the documents until after the denaturalization judgment, and, in any event, Demjanjuk was aware of the information contained in those materials and so was not denied the opportunity to use the information they contained in support of his defense. In light of the mountain of evidence establishing Demjanjuk's Nazi guard service, there was no possibility - let alone a reasonable probability -- that the documents at issue here could have affected the outcome of this case. Demjanjuk's Rule 60 motion should be rejected.

INTRODUCTION

John Demjanjuk seeks extraordinary relief from the denaturalization judgment entered against him on February 21, 2002, by then-Chief Judge Paul R. Matia, on the basis that the Government deliberately withheld documents that "prevented Mr. Demjanjuk from asserting a complete defense." Defendant's Memorandum ("Def. Mem.") at 22. Demjanjuk claims that had these internal FBI documents been in his possession, he might have been able to prevail in the case, that the United States committed fraud on the Court, and that the United States violated Brady v. Maryland, 373 U.S. 83 (1963) and its progeny. Demjanjuk thus argues he is entitled to relief under Federal Rule of Civil Procedure 60. That argument is completely without merit. The Cleveland FBI materials do not constitute Brady material because they were speculative; furthermore, they were not suppressed, and therefore he was not denied the opportunity to use the information they contain at trial, and there was no possibility – let alone a reasonable probability – that the Cleveland FBI materials could have affected the outcome of this case. Similarly, he cannot satisfy Rule 60's stringent requirements for this extraordinary relief, including a showing that there was fraud or other misconduct on the part of the United States which led to a "grave miscarriage of justice." Rather, Demjanjuk's motion is merely his latest attempt to re-litigate endlessly the same defenses this Court has already rejected.

Specifically, Demjanjuk alleges that the Government suppressed internal FBI documents created in the early 1980s. As is established *infra*, however, (1) the FBI materials set forth nothing more than the conjecture of two Cleveland counter-intelligence agents who were not involved in any investigation of any aspect of the Demjanjuk case, (2) the agents' theoretical concerns that the Soviets might have fabricated a Nazi document relied upon by the Government, and the bases for that speculation, were actually *disclosed* more than a quarter of a century ago by

one of the agents directly to Demjanjuk's then-counsel[1] (without, it should be noted, ever informing the Demjanjuk prosecution team of his concerns or of the fact that he had shared them with Demjanjuk's counsel), (3) Demjanjuk availed himself of the opportunity to interpose the "Soviet forgery" defense in the first series of U.S. proceedings, his subsequent Israeli trial, and in more limited fashion in this (second) denaturalization case; (4) the FBI materials reveal that the agents' speculation was based on indisputably inaccurate and incomplete information, including the demonstrably inaccurate premise that the Soviets possessed a motive to discredit Demjanjuk because he was an anti-Soviet "dissident" – indeed, an "outspoken" one – in the United States, (5) the FBI never examined the document in question and the agents were seemingly unaware that the document had been forensically tested, (6) by the time the second denaturalization case went to trial more than fifteen years later in a post-Soviet world, that document, the so-called Trawniki ID card, was just one item in a veritable mountain of documentary evidence from both ex-Soviet *and western* archives establishing Demjanjuk's wartime service to the Nazi SS, (7) by the second denaturalization trial in 2001, Demjanjuk largely abandoned his focus on the "KGB defense" in the wake of, *inter alia*, the failure of his expert forensic witnesses in the Israeli trial to cast any doubt on the authenticity of the Trawniki ID card and the unearthing of numerous additional Nazi-era German documents in ex-Soviet and western archives that both corroborated the Trawniki ID card and proved his Nazi guard service at Sobibor and other camps *independently* of the card, and (8) the FBI did not provide the materials in question to the

[1] Affidavit of Former FBI Agent Thomas Martin ("Martin Aff."), Exh. 1, ¶¶ 18-20.

Demjanjuk prosecution team[2] and the prosecution team was unaware of the document until after the judgment in this case.

"[P]ublic policy favor(s) finality of judgments and termination of litigation." Info-Hold Inc. v. Sound Merchandising Inc., 538 F.3d 448, 454 (6th Cir. 2008). As a result, in a civil proceeding such as this, Rule 60 provides relief only in extraordinary circumstances. Claiming that the Government withheld the FBI materials from the defense, and asserting that those actions constitute fraud on the court and a Brady violation, Demjanjuk seeks relief under both Rule 60(b) and Rule 60(d). The applicable provision of Rule 60(b) permits relief only within one year of judgment, or where there are "exceptional and extraordinary circumstances." McCurry ex rel. Turner v. Adventist Health System/Sunbelt, Inc., 298 F.3d 586, 595 (6th Cir. 2002). Similarly, Rule 60(d) is an extraordinary remedy that is available only to prevent "a grave miscarriage of justice." Mitchell v. Rees, 651 F.3d 593, 595 (6th Cir. June 30, 2011), and is granted only in cases "'of unusual and exceptional circumstances.'" Id. (quoting Rader v. Cliburn, 476 F.2d 182, 184 (6th Cir. 1973).) Because this case involves neither extraordinary circumstances nor anything amounting to a miscarriage of justice, Demjanjuk's motion must fail. Rather, Demjanjuk's Rule 60 Motion is the latest in a string of meritless legal maneuvers undertaken to escape the consequences of his service as a Nazi death camp and concentration camp guard and his subsequent immigration and naturalization fraud.

Chief among Demjanjuk's errors in the instant motion is his effort to conflate the captioned, second denaturalization action against him with his prior denaturalization case, hoping

[2] For ease of reference in this brief, prosecution team will refer to the relevant offices involved in the investigation and litigation of this action -- namely the Office of Special Investigations (OSI), the Office of International Affairs (OIA), the Criminal Division's Appellate Section, and the United States's Attorneys Office for the Northern District of Ohio.

that his acquittal in Israel on charges that he served as a guard at the Nazis' Treblinka extermination camp will somehow detract from this Court's careful, well-reasoned finding that he assisted the Nazis in murdering tens of thousands of men, women and children as a guard at the Sobibor extermination camp. The same finding was made by a German court earlier this year when Demjanjuk was convicted on charges of serving as an accessory in the murders of at least than 28,000 Jews at that very camp.[3]

The instant denaturalization case was a new civil action, filed by the government some fourteen months after the original denaturalization order was vacated. The Government did not allege in this case that Demjanjuk served at Treblinka. This case involved a different team of trial attorneys, as well as voluminous new documentary evidence, including documentation of western (i.e., non-Soviet) origin conclusively proving Demjanjuk's Nazi service. Further, despite Demjanjuk's many accusations, not a single judge reviewing this case – at the trial, appellate, and administrative levels – found that the Government committed any discovery violations or other abuses alleged by Demjanjuk.[4]

Demjanjuk now inaccurately characterizes and attempts to rely on the conjecture of Cleveland FBI counter-intelligence agents who never investigated his wartime activities or his immigration and naturalization – and who never examined the original of the wartime document about which they were speculating. Moreover, the agents' speculation about the possibility of

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[3] Notably, the FBI materials at issue here had no impact on the German court's decision. The key documents, as discussed below, were possessed by both the Munich trial court and Demjanjuk before the verdict was issued.

[4] Demjanjuk's misleadingly cites five pages of docket entries, (Def. Mem. at 12-17), which are almost all entirely innocuous, and most relate to the first, long-closed case. The twelve he cites from the instant matter are misleading in that they include Demjanjuk's motions for discovery enforcement but not the Court's denial of those motions.

Soviet forgery was not based on any significant facts not known to Demjanjuk's counsel at the time.

Demjanjuk incorrectly asserts that the prosecution team knowingly and deliberately withheld the FBI materials.[5] In fact, the prosecution team neither possessed nor was aware of the existence of the FBI materials at the time of trial and judgment in the captioned case. Furthermore, Demjanjuk claims that the Cleveland FBI agents' conjecturing about Soviet forgery became known to him only recently, when in fact, one of the agents states that he told Demjanjuk's attorney about his thoughts on the subject in 1985. Thus it was the defense that knew of the agents' concerns – back in the mid-1980s – rather than the prosecution team. Demjanjuk speculates that because he did not have a copy of the FBI memo in which an agent summarized his theory based on mistaken assumptions, he was precluded from presenting a defense of Soviet forgery, even though he has been making that very claim repeatedly, in many different forms, since the 1970s. Demjanjuk proffers the claim that had he presented the Cleveland FBI agents' speculations at trial, this Court not only would have admitted these memoranda, which seems unlikely, but also would have credited them and overlooked the abundant evidence, some of it from *western* archives, which proves that Demjanjuk was a Nazi guard at Sobibor and other camps.

[5] Despite the fact that discovery closed years ago in this case, DOJ voluntarily disclosed to Demjanjuk FBI materials from both the U.S. National Archives (NARA) and the Cleveland FBI field office, in redacted form. These materials will be produced again tomorrow, in largely unredacted form (the United States attempted to deliver them today, however the Public Defender's email server rejected the files as too large). In addition, the Government initiated a multi-agency search for additional material that might be relevant to the issues in this litigation. No new additional information that could be considered material was found, but the government does expect to provide a limited number of additional documents to the defense within the next week.

Moreover, Demjanjuk has not acted in a timely fashion in raising these arguments now, having filed his motion with this Court at least eighteen months after he first learned that the FBI materials existed and seventeen months after he was granted access by the Government to the vast majority of them.

DEMJANJUK'S NAZI SERVICE AND THE EVIDENCE PROVING IT

On February 21, 2002, this Court ruled that John Demjanjuk assisted in Nazi persecution and fraudulently procured his American citizenship by concealing and misrepresenting his wartime assistance to the Nazis. In a detailed and meticulously-supported decision, the Court held that Demjanjuk had served as an armed SS guard of civilians at several Nazi-operated camps during World War II and that Demjanjuk assisted in Nazi persecution, rendering him ineligible to enter the United States. United States v. Demjanjuk, No. 1:99CV1193, 2002 WL 544622 (N.D. Ohio Feb. 21, 2002).[6] In particular, the court found that Demjanjuk "contributed to the process by which thousands of Jews were murdered by asphyxiation with carbon monoxide" in the gas chambers at the Sobibor extermination center, in Nazi-occupied Poland. Id. at *8.

After Demjanjuk lost his appeals of that decision, he was ordered removed to Ukraine, Poland or Germany. Demjanjuk exhausted his avenues for appellate review of that order as well, and on May 11, 2009, more than seven years after Judge Matia issued his order, he was removed to Germany, where he had been charged with 28,060 counts of accessory to murder at the Sobibor camp. The German court convicted Demjanjuk on May 11, 2011. As German Judge Ralph Alt noted, at Sobibor Demjanjuk was "part of an organization with no other purpose but

[6] This Court also found that Demjanjuk committed immigration fraud independent of his Nazi service by telling immigration officials a different story of his wartime whereabouts than he tells today. Id. at *31.

mass murder . . . ." ("Demjanjuk Convicted for Role in Nazi Death Camp," *New York Times*, May 12, 2011.) A trainload of mostly children were among his victims; they were sent to the gas chambers almost immediately upon arrival. Id. The previous month, in April 2011, Judge Alt had denied Demjanjuk's motion to delay the trial on the basis of the FBI materials at issue here, ruling that the documents in the Associated Press ("AP") report "do[] not bring forth any concrete aspects that have not already been analyzed as part of the examination of the evidence." ("Judge Won't Suspend Demjanjuk Plea over FBI File," *Associated Press*, April 14, 2004.)

Even assuming the FBI documents could somehow qualify as suppressed Brady materials, which they were not, their materiality would have to be evaluated in the context of all other evidence against the defendant.[7] Montgomery v. Bobby, No. 07-3882, 2011 WL 3654383, *9 (6th Cir. 2011) (quoting Strickler v. Greene, 527 U.S. 263 (1999). Documents are material only where they undermine confidence in the judgment. Kyles v. Whitley, 574 U.S. 419, 434 (1995). Therefore, it is important to review the volume and the weight of the evidence on which this Court based its 2002 denaturalization decision. When viewed against that evidence, Demjanjuk's claim that the speculative FBI materials, based only on inaccurate assumptions, would have affected the outcome of the proceeding must be rejected. Overwhelming and essentially unchallenged expert evidence from scientists who actually examined the Trawniki card and presented their conclusions at the 2001 denaturalization trial established that the

[7] Although denaturalization is a civil proceeding, United States v. Dailide, 953 F. Supp. 192, 194 (N.D. Ohio 1997), the Sixth Circuit has held that "Brady should be extended to cover denaturalization and extradition cases where the government seeks denaturalization or extradition based on proof of alleged criminal activities of the party proceeded against." Demjanjuk v. Petrovsky, 10 F.3d 338, 353 (6th Cir. 1993.) The Sixth Circuit has since limited that holding, In re Extradition of Drayer, 190 F.3d 410, 414 (6th Cir. (Ohio),1999), cert. denied, 528 U.S. 1176 (2000).

Trawniki ID card (Government Exhibit to the 2001 denaturalization case, hereafter "GX" 3, Exh. 33) discussed in the FBI materials is authentic, and that it pertained to John Demjanjuk. Moreover, the Trawniki card is hardly the only evidence proving that Demjanjuk was a Nazi guard; six other authentic German wartime documents found in archives in four countries, including the Federal Republic of Germany, corroborated information about Demjanjuk found on the Trawniki card. Former Nazi guards also gave statements after the war identifying Demjanjuk as a fellow guard. In addition, in a March 1948 application for status as a Displaced Person, in a 1950 interview with U.S. immigration officials, and again on his 1951 U.S. visa application, Demjanjuk named the village of Sobibor as one of his wartime residences. (Application for Assistance (GX 1.5), Exh. 2; Visa Application (GX-3), Exh. 3).) As this Court found, Sobibor "was an obscure village, with roughly 1,000 occupants during World War II," Id. at *8, further noting that Demjanjuk's "various and inconsistent explanations" for this incriminating detail were "not credible." 2002 WL 544622, *17. This Court found that all of this, and other evidence, including an admission by Demjanjuk during the immigration process, conclusively established Demjanjuk's service as a Nazi guard.[8]

Given the volume and weight of the evidence proving his Nazi service, the FBI counter-intelligence agents' conjectures do not undermine confidence in Judge Matia's findings that Demjanjuk served the Nazis as a guard at the Sobibor extermination camp, and at the Majdanek and Flossenbürg concentration camps. Thus, far from representing a "grave miscarriage of justice," this Court's decision represents a just result in both the legal and moral senses of that

[8] While Demjanjuk denies that he spent any part of the war serving as a Nazi camp guard, he has never provided a consistent, historically plausible alternative explanation for his wartime whereabouts. 2002 WL 544622, *15.

word. The instant motion should be denied on this basis alone.

A. Demjanjuk's Trawniki ID Card was Authenticated

In the trial of this case, the Government adduced a wealth of evidence supporting its allegations regarding Demjanjuk's Nazi camp guard service. The Trawniki card was but one piece of that evidentiary showing and its authenticity was supported by extensive independent evidence, including both historical and forensic evidence. Judge Matia's Findings of Fact methodically lay out the proof, and the Government continues to rely on that detailed explanation of the facts. However, for the convenience of the Court, the Government briefly summarizes here the factual presentation made at trial by the Government regarding Demjanjuk's Nazi service.

The Trawniki identification card was the first piece of evidence which came to light following the end of World War II showing that Demjanjuk was a Nazi guard. It was captured by Soviet forces in about July 1944, when they overran the eastern part of Poland where the Nazi SS Trawniki Training Camp was located. (Trial Tr. 408, attached as Exh. B to Demjanjuk's Motion.) While Soviet authorities first presented the Trawniki card to U.S. law enforcement in connection with the first denaturalization case, they had been using information from the card since 1948 as part of their own efforts to locate and hold accountable Soviet citizens who assisted Nazi occupation authorities between 1941 and 1945. On August 31, 1948, the Soviet Ministry for State Security (MGB, precursor to the KGB) distributed a top secret wanted list throughout the USSR, with information regarding 100 suspected former Trawniki-trained guards. Demjanjuk's name was on that list, with specific personal information derived from the Trawniki card and two other Soviet-captured Nazi documents. Demjanjuk, 2002 WL 544622, *14. On July 29, 1952, the MGB distributed a second such list again naming Demjanjuk, with the same

wartime details, a reproduction of Demjanjuk's Trawniki card photograph, and his father's name. Id. The fact that the Soviets were still searching in the USSR for Demjanjuk in 1948 and 1952 shows that they were not aware that he was living in a Displaced Persons camp in Germany or attempting to immigrate to the United States. Thus, if the Trawniki card is a Soviet forgery designed to punish Demjanjuk for his supposed dissident activities in the United States, then this plot necessarily would have been hatched no later than 1948 – some four years *before* Demjanjuk immigrated to the United States in 1952. This Court rejected this far-fetched scenario: "the fact that the Soviets created and circulated the wanted list[s] shows that in 1948 [and 1952] they regarded the underlying captured German documents [which included the Trawniki card] to be authentic evidence of the wanted man's wartime activities." Id. at *14-15.

A wealth of historical evidence corroborates the authenticity of the Trawniki card, and every court that has examined it, in the United States, Israel, and Germany has found it to be authentic. As is summarized below, analysis of the information contained on the Trawniki card shows that it is consistent with all that is known about Demjanjuk, the history of the Trawniki camp, and others who served with Demjanjuk. It is also consistent with information contained on numerous other German wartime documents, including six documents expressly naming Demjanjuk, which were located in archives in four countries. Finally, the card includes highly personalized information about Demjanjuk that Soviet authorities probably could not have uncovered. For the theory of KGB forgery to be true, one would have to believe that the Soviets were preternaturally expert on the history of the Trawniki guard contingent as early as 1948, when they first used the card to implicate Demjanjuk and that they were able to somehow conform the information on the card with information that came to light from western archives decades later. Even more incredibly, the Soviet forgery theory requires that one accept the

astonishing coincidence that the MGB listed on its fake Trawniki card a posting to Sobibor – the very same place where Demjanjuk would admit to western immigration authorities in 1948 and 1951 that he had spent part of the war.

The other captured German documents naming Demjanjuk were found in four different archives in former Iron Curtain countries, and in an archive in what was then West Germany. With the exception of the Trawniki card, all were discovered *after* the collapse of the Soviet Union. It defies logic that the KGB would go to the trouble of creating masterful forgeries capable of withstanding historical and forensic analysis, but then hide them in archives scattered across Eastern Europe, hoping someone would stumble across them at some future date when the USSR might be dissolved, Demjanjuk might still be alive, and those archives would be opened up to Western researchers and investigators.[9] The conclusion this Court reached that the Trawniki card is not a forgery but instead is an authentic wartime document consistent with the historical record, is well supported. Demjanjuk, 2002 WL 544622, *2-4. Demjanjuk admits he was a Soviet soldier captured by the Germans at the battle of Kerch in the Summer of 1942. Id. at *4. Other former Trawniki guards captured at Kerch have stated that they arrived at Trawniki in approximately June 1942.

[9]Some others accused of assisting in Nazi persecution have raised Soviet forgery claims, and courts have recognized the absurdity of such allegations. See, e.g., United States v. Stelmokas, 100 F.3d 302, 313 (3d Cir. 1996) ("If anyone created the documents to injure Stelmokas, the fabricator most peculiarly placed the bulk of the documents in a location where they were not accessible to the public and from which, in fact, they were not released for decades."), cert. denied, 520 US. 1242 (1997); United States v. Lileikis, 929 F. Supp. 31, 38 (D. Mass. May 24, 1996) ("why would even the KGB go to the trouble of forging documents implicating Lileikis in war crimes, and then bar all access to its handiwork for some fifty years, while awaiting the collapse of the government whose evil intentions towards Lileikis it presumably sought to serve?".)

The Trawniki card records two deployments for Demjanjuk. The first was to an obscure SS Estate called Okzow on September 22, 1942. Id. at *5. The Trawniki card also reflects Demjanjuk's transfer to Sobibor effective March 27, 1943. (Proceedings to Transfer Guards from the Trawniki Training Camp to the SS Special Detachment in Sobibor (GX 5, Exh. 4.) A German transfer authorization ("roster") dated March 26, 1943 records the transfer of "Iwan Demianiuk" (which is a phonetically correct German spelling of Demjanjuk's Ukrainian Cyrillic name), along with Demjanjuk's date of birth, place of birth, and the identification number 1393, found in an archive in post-Soviet Russia.[10] This document *independent*ly established Demjanjuk's transfer to the Sobibor extermination camp (i.e. without regard to the Trawniki Card) Id. at *7. The roster is also consistent with the Trawniki personnel files of three men and the Trawniki ID cards of two others, all of which show their deployment to Sobibor effective March 27, 1943. (Expert Report, Charles W. Sydnor (GX 112, Exh. 5.) The March transfer of Demjanjuk to Sobibor is also consistent with a major exchange of Trawniki guards at Nazi extermination camps in March and April 1942. (GX 112, Exh. 5)[11]

Demjanjuk challenged the authenticity of the Trawniki card by presenting the testimony of Rudolf Reiss, a former SS non-commissioned officer who served in the Trawniki

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[10] This Court found that rather than suggesting forgery, minor inaccuracies such as different spellings of Demjanjuk's name were actually indicia of authenticity, because "if the Soviets had set out to create false documents, they would not have allowed the omissions and minor inaccuracies that occur in the trail of documents in this case." 2002 WL 544623 at *1.

[11] Surviving wartime documents show contingents being sent out from the Trawniki SS Training camp to the Sobibor, Belzec, Treblinka, and Auschwitz camps, all between March 17 and March 29, 1942. (GX 112, Exh. 5.) A Trawniki personnel file for one guard shows him being sent back to Trawniki from Sobibor on March 25, and postwar statements from four others state that they returned to Trawniki from Sobibor around that time, which is consistent with a rotation of the guard detachment there. (Id.) Two admitted Sobibor guards also identified Demjanjuk as a fellow Sobibor guard. One gave statements in 1949 and 1979 saying he remembered Demjanjuk, and another identified the photo on Demjanjuk's Trawniki card as a fellow Sobibor guard, although he could not recall Demjanjuk's name. (Id.)

administration section. Reiss had testified as a defense witness at Demjanjuk's deportation hearing in January, 1984, and later told Cleveland FBI Agent George Arruda that, *inter alia*, the rank shown on the card for Trawniki senior administrator Ernst Teufel was incorrect. (Sept. 11, 1984 memo from Arruda to Headquarters, Exh. 6.) Reiss was shown to be mistaken when the Government presented numerous other Trawniki identity cards just like Demjanjuk's, which together with other documents showed that Teufel was, in fact, promoted to the next higher rank shortly after he signed Demjanjuk's card. Demjanjuk, 2002 WL 544622, *3-4; Trial Tr. 433-34, Exh. B to Def. Mot. Thus, a key source for the FBI memo was a defense witness SS guard who Demjanjuk presented at trial, and whose testimony was discredited.

The notion that the KGB could have created a fake Trawniki card for Demjanjuk that is consistent with the tens of thousands of historical documents that comprise the record of Trawniki Training Camp and other Nazi camps (including Sobibor and Flossenbürg camp rosters that name him) defies credulity.[12]

B. Forensic Testing Authenticates the Trawniki Card

The FBI counter-intelligence agents' theory notwithstanding, Demjanjuk's Trawniki ID card is one of the most thoroughly forensically tested documents in legal history. It was first examined by document experts during Demjanjuk's first denaturalization proceeding. Gideon Epstein, a world-renowned handwriting expert, testified that the signatures of two Nazi SS officials on the card matched known exemplars. United States v. Demjanjuk, 518 F. Supp. 1362, 1367 (N.D. Ohio 1981), cert. denied, 459 U.S. 1036 (1982). In the instant matter, three

[12]Similarly absurd is the idea that the Soviets would have gone to the lengths required to do so in order to implicate someone like Demjanjuk, who in 1948, when the Soviets began using the key data from the Trawniki card, was an otherwise obscure Ukranian peasant whose whereabouts were unknown (indeed, for all the Soviets knew at that point, he could have been killed in the war).

document examiners testified that they had reviewed signatures on the card and tested its ink and paper and found nothing to suggest that the Trawniki card was inauthentic. This Court found those opinions to be reliable and credible.[13] Demjanjuk, 2002 WL 544622, *23. Indeed, this Court held that "the expert testimony of the document examiners is devastating to defendant's contentions" that the Trawniki card is inauthentic. Demjanjuk, 2002 WL 544623,*1.

Demjanjuk has never offered any credible forensic testimony challenging the Trawniki card's authenticity. At his original denaturalization trial, he presented no forensic evidence whatsoever, although the card was made available to the defense for testing. Demjanjuk, 518 F. Supp. at 1368, n.13. In his Israeli trial, the defense did present some witnesses trying to establish that the card was a forgery, but the witnesses were spectacularly unsuccessful, as described by Demjanjuk's Israeli defense counsel, Yoram Sheftel, in a book about his experiences in that trial.[14] In the instant denaturalization case, the defense tried to introduce the testimony from one of the witnesses regarding forgery, Julius Grant, and this Court found the testimony not credible. 2002 WL 544622, *2.

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[13] The Court found:

> The paper, inks, and typewriters used to create the documents were all in use in Europe on the dates shown on the various documents. The defects in the rubber stamps and typewriters are consistent from document to document, and the alignment of the stamp on the photograph and paper of the service identity pass (GX 3) shows that the photograph was indeed the one that was originally affixed to the pass.

Demjanjuk, 2002 WL 544623 at *1.

[14] Defending 'Ivan the Terrible': The Conspiracy to Convict John Demjanjuk (Washington, DC: Regnery, 1966.) at 154, 157, 159, 161-62, and 201-203. For example, defense expert William Flynn testified that there was no sure way to determine that the Trawniki document was authentic. Id. at 201. On cross examination, Flynn acknowledged that he had told a conference of document examiners the previous year that all the tests he conducted on the Trawniki card supported its authenticity. Israel Trial Tr. 10687-10716 (11/25/1987), Exh. 7.

The FBI agent's theory was premised on the assertion that the Soviets would prevent any forensic testing of the card. That theory, however, is fundamentally at odds with the facts of this case. Demjanjuk cannot plausibly argue that this Court would have found the FBI's speculation meaningful, in light of the expert forensic testimony which likely would have satisfied the agent's concerns about testing.

C. Six Other Wartime Documents and Other Evidence Establish John Demjanjuk's Nazi Guard Service

Even if this Court did somehow decide to credit the FBI counter-intelligence agents' hypothesis about Soviet forgery of the Trawniki card, the fact remains that there are six other German wartime documents which identify Demjanjuk, as well other evidence that not only corroborates the Trawniki card, but which also independently proves Demjanjuk's Nazi service.

The six other documents identifying Demjanjuk are (1) a January 20, 1943 disciplinary report stating that four guards – including Demjanjuk – left their camps without permission at the Majdanek SS concentration camp (GX 4, Exh. 8 hereto); (2) a March 26, 1943 transfer roster showing that Demjanjuk and other Trawniki-trained guards were posted to the Sobibor extermination camp (GX 5, Exh. 4); (3) an October 1, 1943 transfer roster showing that Demjanjuk and other Trawniki-trained guards were posted to the Flossenbürg SS concentration camp (GX 6, Exh.9); (4) a Flossenbürg weapons log with an entry dated April 1, 1944, showing that Demjanjuk (having the same "Trawniki number" assigned to him on the Trawniki card) was assigned a rifle (GX 7, Exh. 10); (5) an October 3, 1944 Flossenbürg duty roster for October 4, 1944 (GX 8, Exh. 11); and (6) an undated list of 117 men with their Trawniki ranks and identification numbers, found in a collection of Flossenbürg documents in the German Federal Archives (GX 9, Exh. 12.)

These six documents identify Demjanjuk by his surname, either as he now spells it or as a German phonetic spelling of it. Two – the Trawniki-to-Sobibor roster, and the Trawniki-to-Flossenbürg roster – also list his first name, as well as his birth date and birthplace. All but the Flossenbürg weapons log list the identification number 1393 Demjanjuk received at Trawniki. Among the most significant is the Flossenbürg weapons log – which is consistent with the others documents in that it identifies Demjanjuk as a "Wachmann," the rank assigned to Trawniki-trained guards, and shows Demjanjuk at Flossenbürg a few months after the transfer roster confirms he was sent there. This weapons log was found in an archive in *West Germany,* outside of Soviet control. Demjanjuk, 2002 WL 544622 at *8-9.

The documents naming Demjanjuk are corroborated by compelling additional evidence. The Sobibor transfer roster is consistent with Demjanjuk's statements to U.S. immigration officials that during much of the war he lived and worked in Sobibor, Poland, a previously virtually unknown village where the extermination camp was located. Likewise, a fellow Sobibor guard named Danilchenko recalled Demjanjuk to Soviet questioners in two postwar statements, credited by this Court as reliable, that Demjanjuk served at Sobibor; he also identified three photographs of Demjanjuk. 2002 WL 544622, *12-13. In his statements, Danilchenko also correctly recalled that Demjanjuk served with him at the Flossenbürg camp later in the war; the Flossenbürg duty roster for October 4, 1944, from West German archives, shows both men serving at that camp at that time. Danilchenko correctly recalled Demjanjuk's having received a blood-type tattoo, something that each Trawniki-trained guard at Flossenbürg received under his left biceps. Id. Demjanjuk admits receiving such a tattoo during the war and, as inculpatory, admits to excising it before immigration. Id. at *11.

D. Mistaken Identity and Other Red Herrings

In his continuing effort to re-litigate this case and rewrite history, many of the claims raised in Demjanjuk's current Rule 60 motion are the same ones already considered and rejected in Judge Matia's original opinions. For example, Demjanjuk attempts again to raise the "mistaken identity" defense his counsel argued at trial, emphasizing that one witness (Litvinenko) recalled that Demjanjuk had false metal teeth. (Def. Mem. at 29.) Judge Matia rejected this man's statements, pointing out that the Court was "unable to give any credibility to Litvinenko's description. Id. at *2. Nothing in the FBI documents now at issue makes Litvinenko's statement more credible, or makes any of the other defense arguments the Court has already rejected any less unavailing. Moreover, while Demjanjuk speculates that the Government is withholding additional documents which would show that Litvinenko is describing some other person named Ivan Demjanjuk, that is not the case. Demjanjuk's speculative claims that the Government has either deliberately or negligently failed to disclose relevant documents relating to his cousin Ivan Andreevich Demjanjuk and to Soviet investigative file number 1627 (Def. Mem. at 28) are another example of his attempt to use the discovery of the unrelated FBI materials to re-litigate his rejected defenses. At the denaturalization trial, Demjanjuk sought to convince the Court that his cousin was the man who had served the Nazis, possibly having stolen Demjanjuk's identity and pretending to be him. As the Court found, that claim cannot be reconciled with the evidence. 2002 WL 544622, *13-14.[15]

[15]Ivan Andreevich's personal information and physical description do not match those on the Trawniki card, while John Demjanjuk's do. 2002 WL 544622, *2. The photo on the Trawniki card was "indeed the one that was originally affixed to the pass," and Demjanjuk has acknowledged that the photo resembles him. 2002 WL 544623 *2. Demjanjuk did not present any evidence that the photograph resembled his cousin, and in fact Demjanjuk stated that Ivan Andreevich had "dark, blackish" hair. 2002 WL 544622 *2. Moreover, in 1969 the KGB searched for the Ivan Demjanjuk who had served the Nazis

Although Demjanjuk insinuates that the Government is aware of additional evidence relating to Ivan Andreevich and has failed to produce it, the United States turned over to Demjanjuk everything it possessed relating to that issue prior to the 2001 denaturalization trial. Further, the Court granted Demjanjuk's request to take discovery on this issue, including "the opportunity to obtain (if necessary with the assistance of the United States government) the contents of any criminal investigative files in the possession of the Ukrainian authorities relating to the defendant or to Ivan Andreievich Demjanjuk." (Mot. by deft to take discovery, docket #112, 114.) Nothing about the FBI documents relates at all to the Andreevich stolen identity theory, let alone makes it more plausible. Moreover, none of it provides a rationale for allowing Demjanjuk to suggest that he was not given a chance to explore the issue of Andreievich prior to and during trial.[16]

THE CLEVELAND FBI MATERIALS

A. Chronology of the Cleveland FBI's Interest in the Demjanjuk Case

The FBI documents at issue in Demjanjuk's motion (referred to throughout as the FBI materials), which date from 1981 to 1985, were created by counter-intelligence agents in the

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in the hometown listed for him in German wartime records, Dubovi Makharyntsi, and did not find him. Id. at *13. Ivan Andreevich was living in Dubovi Makharyntsi at that time; therefore, Andreevich was not the Nazi guard Ivan Demjanjuk. Id.

[16] Demjanjuk misrepresents Government expert historian Charles Sydnor's testimony, claiming he stated that "there is a Soviet-era investigation file card for an Ivan Andreeyich Demjanjuk for service at Trawniki, and this is not the John Demjanjuk in this case." (Def. Mem. at 28.) In fact, Dr. Sydnor was merely shown a defense exhibit, a card on which Soviet investigators wrote "Ivan Dem'yanyuk," and the words "year of birth 1918-1919" and "Travniki, Lyublin, L'vov," citing a "statement of Litvinenko" as the evident source. Tr. at 609-10, 2002 WL 544622, *12. In a second handwriting, someone else had written on the card the patronymic "Andreevich" and the information "1920, born, resident of the village of Dubovye Makharintsy, Kazatin Rayon, Vinnitsa Oblast." Id. Dr. Sydnor testified he had never seen any evidence that an Ivan Demjanjuk with the patronymic "Andreevich" had ever served at Trawniki, Trial Tr. at 609-10, Exh. B to Def. Mot., and this Court found that Ivan Andreevich Demjanjuk was not the man who served the Nazis. 2002 WL 544622, *13-14.

Cleveland FBI Field Office who, aside from these writings, never worked on any FBI matter involving allegations that the Soviet Union had forged documents for use in American legal proceedings, or on any investigation of an individual alleged to be involved in Nazi persecution. Affidavits of Thomas Martin, ¶¶ 21-22, Exh. 1 and George Arruda, ("Arruda Aff.") at ¶¶ 19-20, Exh. 13. Moreover, they were written without examining any of the evidence and were prepared following meetings with persons working on behalf of the Demjanjuk defense. As is discussed below, none of the materials generated by the Cleveland FBI were provided by the FBI to the prosecution team. They were, however, discussed with the defense.

In 1981, having noticed press accounts of concerns voiced by some members of the Cleveland Ukrainian community regarding use of evidence from the Soviet Union in the Demjanjuk case, then FBI Special Agent Thomas Martin (Martin) became interested in the Demjanjuk case shortly after he began working in Cleveland in 1981. (Martin Aff. ¶ 4, Exh. 1.) There is nothing unusual about this; curiosity and theorization are what FBI counter-intelligence agents were trained to do during the Cold War. Agent Martin prepared a March 16, 1981 memo seeking permission from FBI headquarters to examine press coverage of the Demjanjuk case and develop contacts in the Ukrainian community to investigate the nature and extent of possible Soviet penetration of Ukrainian-American affairs and the claims reported in the press that the KGB was furnishing fake documents in the Demjanjuk trial. (Id.)

FBI headquarters responded by advising Cleveland that the Soviet Union had provided documentary evidence in U.S. courts since the Nuremberg trials against persons accused of Nazi collaboration and explained that the Federal Rules of Evidence governed authentication procedures for such foreign documents. Cleveland FBI was instructed to close the matter due to

an absence of probable cause to believe that the evidence was not authentic:

> *Because of an absence of probable cause to believe that the documentary evidence furnished by the Soviet Government in the Demjanjuk matter has been falsified, Cleveland is directed to close captioned investigation. Your proposal to review press coverage in the Demjanjuk trial to obtain names of individuals in the Ukrainian emigre community in Cleveland for possible development as assets should be limited to individuals who may have knowledge of KGB attempts to penetrate the Ukrainian emigre community. . . .Until the Demjanjuk matter is adjudicated, you are directed not to develop individuals as assets who have been witnesses in the Demjanjuk trial or to make inquiries in the Ukrainian community regarding Demjanjuk.*

(March 27, 1981 FBI Headquarters memo to Cleveland FBI, Exh. 15, emphasis added.)

In April 1984, however, Demjanjuk defense counsel Mark O'Connor began contacting FBI officials in an effort to persuade the Bureau to investigate the defense allegation that Chief District Judge Battisti and the Demjanjuk prosecutors had participated in the Soviet KGB's perpetration of a fraud on the court by utilizing the Trawniki card as evidence.[17]

Spurred by contacts with the defense, agents in the Cleveland office showed a renewed interest in the Demjanjuk matter. In August 1984, they received a letter from Jerome Brentar (Brentar) who was described by Demjanjuk's attorney Mark O'Connor as "the key figure"[18] on the defense team. Brentar also was a witness for Demjanjuk. Brentar's letter referred to the Nazi annihilation of millions of civilians as "the so-called Nazi Holocaust" and stated that, as a "concerned citizen," he was writing to prevent the misuse of federal funds by "self styled investigators" at OSI who were relying on evidence fabricated by the KGB. (Aug. 27, 1984 letter

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[17] O'Connor raised these same allegations with the immigration court. (See May 10, 1984 O'Connor letter to Judge Angelilli, Exh. 16.) Judge Angelilli rejected these claims based on the denaturalization record and ordered Demjanjuk deported. In re Demjanjuk, A08 237 417 at 8, 9 (Immigration Court, Cleveland, May 23 1984.)

[18] "Demjanjuk's Defender: Backer Spends Thousands to Clear Him" *Cleveland Plain Dealer* (May 1, 1985) at 10A.

from Brentar to Cleveland FBI, Exh. 17.) Brentar attached materials including an article entitled "The Strange Case of John Demjanjuk" which referred to OSI as an "unnatural appendage of" DOJ "acting on behalf of Israel," and pages from a 1982 edition of the Congressional Record concerning OSI with "The Lie and Hate Record" handwritten across the top. (Attachments to Exh. 17.)

On August 31, 1984, Brentar met with Cleveland FBI Special Agent George Arruda (Arruda) at the field office to complain about OSI and its use of evidence obtained from the Soviet Union against Demjanjuk. (Sept. 4, 1984 memo from Cleveland Special Agent in Charge (SAC) to FBI Director at 1-2, Exh. 18.) The memo reporting the meeting to FBI headquarters noted that Brentar, who "stated that he has worked on behalf of Demjanjuk" complained that the Trawniki card was "never inspected by the U.S. Government for authenticity" and that OSI was "squandering the public's money." Id. The material sent by Brentar was attached to the memo, which requested guidance regarding whether Brentar should be re-interviewed. (Id. at 2; Exh. 18.)

On September 10, 1984, Brentar made a second visit to the Cleveland FBI office, this time bringing with him Demjanjuk defense witness and former Trawniki camp SS-man Rudolf Reiss (Reiss) to summarize Reiss' recent testimony at the Demjanjuk removal hearing regarding his view that the Trawniki card was forged. A September 11, 1984 memo from the Cleveland FBI Special Agent in Charge (SAC) to headquarters, drafted by Arruda, summarized the allegations by Reiss and Brentar that OSI used falsified evidence against Demjanjuk. (Memo from Agent Arruda to Headquarters, Exh. 5; Arruda Aff. ¶ 15, Exh. 13.) The memo did not

recount that Reiss and Brentar basically had come to the FBI to repeat, unsworn and absent cross-examination, the same information they were using in the defense of Demjanjuk in court.

FBI Headquarters responded by memo dated January 8, 1985, notifying the Cleveland FBI office that their prior communications regarding Demjanjuk had been provided to FBI Executive Agencies Unit (EAU) Chief Storm Watkins (Watkins) and that Cleveland should close the counterintelligence file opened regarding the Demjanjuk case. Headquarters indicated that Watkins, Washington FBI liaison with other federal agencies, would decide whether any of the information concerning the Demjanjuk case was suitable for dissemination to OSI:

> *any further information....should be furnished to EAU Chief Storm Watkins for a determination as to its suitability for transmission to OSI. Cleveland should close captioned 105-file and submit future communications concerning the deportation proceedings involving John Demjanjuk under the appropriate caption, to the attention of EAU Chief Storm Watkins, RMD.*

(Jan. 8, 1985 FBI memo to SAC, Cleveland, Exh. 19.)

On January 24, 1985, Agent Arruda telephoned EAU Chief Watkins to advise him *not* to share with OSI the information reported by the Cleveland office regarding the Demjanjuk case because of Brentar's and Reiss's complaints of OSI wrongdoing in conjunction with the KGB:

> *This writer advised Watkins that the Cleveland case on Demjanjuk was not for OSI consumption since complaints received at the Cleveland Office indicated KGB handling of evidence in the Demjanjuk trial and other wrongdoing that could possibly warrant a 105 [counter-intelligence] case.*

(Jan. 25, 1985 file memo to Martin from Arruda Exh. 20, emphasis added.) Arruda advised that he planned to send another memo, and that Watkins could advise OSI about it. (Id.) In other words, the Cleveland counter-intelligence agents were specifically asking that the prosecution team not be provided certain information. On March 4, 1985, Martin authored a cover memo ("airtel") and a memo which were sent to Watkins from the Cleveland FBI SAC regarding the

Demjanjuk prosecution. (Id. ¶ 10.) The airtel inaccurately characterizes Demjanjuk, without support, as a "prominent" "anti-Soviet" "outspoken dissident." The airtel then states:

> *Cleveland opines that the captioned matter, like other similar matters, could easily have been initiated and controlled by the Soviet Intelligence Service KGB as a means of intimidating Soviet emigres by effectively silencing Soviet dissidents who speak out against the Soviet regime...and that any sign of dissident activity will result in harsh measures being brought to bear against them, even though they are in the U.S.*

(Mar. 4, 1985 airtel from Cleveland SAC to FBI Director through EAU Record Management Division Chief Storm Watkins at 1, Exh. 21, emphasis added) The airtel stated that "no further investigation of this matter is anticipated at Cleveland." (Id. at 2.)

The forwarded memorandum, captioned "John Demjanjuk, Foreign Counterintelligence-Russia," states that "Investigation at Cleveland" has "strongly indicated the following scenario, involving Soviet utilization of the USDJ Office of Special Investigations to effect Soviet purposes." The memo sets forth a seven-part "scenario" (*infra*) and concludes:

> *Cleveland opines that the instant matter is an extension of Soviet 'Active Measures' activities conducted by Line PR of the First Directorate, KGB designed to demonstrate that long arm of the KGB, in monitoring the activities of Soviet emigre dissidents, especially those actively engaged in anti-Soviet organizations or public expression.*

(Mar. 4, 1985 Letterhead Memorandum, Exh. 22 at 3.) Agent Martin has explained that the use of the phrase "Cleveland Opines" was *not* meant to convey a final conclusion: "'Opines' is a word I used frequently in my writing as an FBI Special Agent. The use of that word did not reflect that I had reached a conclusion regarding KGB activity with regard to the Demjanjuk case in general or the Trawniki card in particular, and the phase 'Cleveland opines' was not intended to indicate that the Cleveland FBI office had reached any such conclusions." Martin Aff. ¶ 14, Exh. 1. Again, theorization is within of a counter-intelligence agent's purview.

The March 4 memo lists seven factors that ostensibly support this possibility, which are based on the incorrect assumptions that Demjanjuk was an outspoken anti-Soviet dissident and that the Trawniki card had not been forensically tested. (Martin Aff. ¶ 8, Exh. 1; Arruda Aff. ¶ 17, Exh. 13.) Each of the memo's seven factors is premised on an inaccurate assumption, a lack of information, or a misunderstanding of how the case against Demjanjuk had proceeded. These flaws are explained in a chart with the relevant record citations attached as Exh. 23. Martin's information was derived from press accounts, from his background knowledge of Soviet practices involving dissidents, and from memos generated by Agent Arruda following discussions with a member of Demjanjuk's defense team (Brentar) and defense witnesses (Brentar and Reiss). (Martin Aff. ¶¶ 8-12, Exh. 1.) Martin did no independent investigation, interviewed no witnesses, and reviewed no documents before developing the seven factors. (Martin Aff. ¶¶ 11-12, Exh. 1; Arruda Aff. ¶¶ 15-16, Exh. 13.)[19]

Although the cover airtel states that the attached memo was "to be discussed with USDJ, Office of Special Investigations, in coordination with INTD/CI-IA and Executive Agencies Unit (EAU)," neither the airtel nor the Attached memo was ever provided by the FBI to the prosecution team, nor were they obtained by the prosecution team at any time before Demjanjuk was denaturalized, for the second time, in February 2002. (Affidavit of Storm Watkins, ("Watkins Aff.") ¶ 3, Exh. 24; Martin Aff. ¶ 7, Exh. 1; Affidavit of Jonathan Drimmer ("Drimmer Aff.") ¶¶ 6-9, Exh. 25; Affidavit of Neal Sher ("Sher Aff.") ¶¶ 11-12, Exh. 26; Affidavit of Eli Rosenbaum ("Rosenbaum Aff.") ¶ 16, Exh. 27.) The airtel also recommends that

[19] The lack of investigation into this matter was not surprising given that FBI Headquarters had twice directed Cleveland counterintelligence agents not to pursue any investigation of the Demjanjuk matter. (March 27, 1981 FBI Headquarters memo to Cleveland FBI, Exh. 15; Jan. 8, 1985 FBI memo to SAC, Cleveland, Exh. 19.)

Watkins arrange a meeting with OSI to suggest, among other things, that OSI "compare handwriting and fingerprints on 'anonymous letters'" and "to obtain originals or copies of Soviet documents introduced as 'evidence'...in an attempt to prevent the USDJ from becoming a tool of the KGB." No such meeting ever occurred, nor was OSI otherwise contacted by anyone at the FBI to convey the concerns of the two Cleveland Agents. (Watkins Aff. ¶ 7, Exh. 24; Martin Aff. ¶ 7, Exh. 1; Drimmer Aff. ¶¶ 6-7, Exh. 25; Sher Aff. ¶ 11-12, Exh. 26.) Had OSI been contacted, or had the agents been aware of the published 1981 decision denaturalizing Demjanjuk, they would have learned that the original Soviet-provided card had been examined by the Court and the parties and forensically tested, and that the Demjanjuk prosecution had not been initiated as the result of any "anonymous" letters. Demjanjuk, 518 F. Supp. at 1366-68.

Agent Martin's support for the March 4, 1985 airtel and Memo was derived from press accounts of the trial, from information he obtained from Special Agent Arruda, who worked for him, and from background knowledge of targeting of Soviet dissidents overseas. (Martin Aff. ¶¶ 9, 11-12, Exh. 1.) Agent Arruda's knowledge of this matter was based upon his interview of Brentar and Reiss. (Arruda Aff. ¶¶ 4, 15-16, Exh. 13.) Neither Agent conducted any investigation into the evidence against Demjanjuk. (*Id*. ¶ 16; Martin Aff. ¶¶ 11-12, Exh. 1.) They reached no conclusion regarding the authenticity of the Trawniki card. (Martin Aff. ¶ 13, Exh. 1 ; Arruda Aff. ¶ 18, Exh. 13.) Neither Martin nor Arruda ever worked with OSI, the Criminal Division, the U.S. Attorney's Office, or any other organization on any investigation of alleged involvement in Nazi persecution during World War II. (Martin Aff. ¶ 21, Exh. 1; Arruda Aff. ¶ 19, Exh. 13.) Neither of them ever worked on any FBI matter involving allegations that the Soviet Union had forged documents for use in American legal proceedings, other than the

activities described herein. (Martin Aff. ¶ 22, Exh. 1; Arruda Aff. ¶ 20, Exh. 13.) Finally, neither Agent Martin nor Agent Arruda is aware of any investigation by the FBI of Demjanjuk's wartime activities or his immigration to the United States. (Martin Aff. ¶ 16, Exh. 1; Arruda Aff. ¶ 5, Exh. 13.)

As set out in his attached affidavit, Martin today recalls that around the time he wrote the March 1985 airtel and memo he received a telephone call from an attorney working for Demjanjuk, whom he believes was Mark O'Connor. Martin expressed to the Demjanjuk attorney the substance of what he had written in the March memo, including the concerns regarding possible KGB forgery of the Trawniki card, and he urged the attorney to have the card forensically tested to ensure its authenticity. (Martin Aff. ¶¶ 18-20, Exh. 1.)

On March 22, 1985, less than three weeks after Martin submitted the March memo and airtel, Demjanjuk counsel O'Connor contacted the FBI again, this time forwarding affidavits submitted in the deportation litigation, "in the event the serious subject matter involved is deemed to be within the jurisdiction of the Federal Bureau of Investigation." (Mar. 22, 1985 letter from O'Connor to Oliver Revell, Exh. 28.)

In response to a September 1985 O'Connor letter to the FBI asking about the status of an "eighteen month investigation of OSI based upon the allegations raised in prior letters," Assistant FBI Director Clarke advised him that the Demjanjuk extradition matter was being handled by DOJ's Office of International Affairs (OIA) and that any further questions should be

sent directly to OIA.[20] Many of the O'Connor letters to the FBI were forwarded by FBI, contemporaneously, to the Criminal Division.[21]

B. How DOJ Learned of and Obtained the FBI Materials

As is described below, between 2000 and 2002, some 4,100 files containing approximately 360,000 pages of documents, including copies of FBI Demjanjuk materials, were sent by FBI Headquarters to the National Archives and Record Administration (NARA) pursuant to the Nazi War Crimes Disclosure Act (NWCDA). After they were processed, these documents, along with many other documents deposited at NARA under the NWCDA, were made available for review by OSI in the summer of 2002. A physical copy of the documents was not given to OSI and OSI did not have possession of the FBI materials until 2009, at which time Demjanjuk had already been removed to Germany.[22]

Between 2000 and 2002, the FBI substantially declassified and transferred to NARA some 4,100 files containing over 360,000 pages pertaining to known or possible "Nazi war criminals." This transfer of previously classified material was made pursuant to the NWCDA

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[20] O'Connor letter to Revell, September 11, 1985, Exh. 29 ; Clarke letter to O'Connor October 25, 1985, Exh. 30.

[21] Letters sent by O'Connor to FBI Director William Webster were forwarded to the attention of OSI through the Assistant Attorney General for the Criminal Division, OSI's supervising authority. O'Connor April 26, 1984 letter to FBI Director Webster; O'Connor April 26, 1984 letter to Soviet Ambassador to the U.S.; O'Connor May 8, 1984 letter to FBI Director Webster; May 18, 1984 Memo from FBI Director to Assistant Attorney General, Criminal Division, Attn: OSI; Assistant Attorney General Memo responding to May 18, 1984 Memo from FBI Director (Exh. 31.)

[22] Demjanjuk's attorneys became aware of and were given access to the FBI materials around this time. On December 31, 2009, Demjanjuk's defense attorney John Broadley contacted OSI and asked for access to these materials, identified by file number. Less than two weeks later, on January 14, 2010, OSI Director Eli Rosenbaum advised NARA that he was waiving the statutory exclusion for these materials and that they could be made available for public release. On January 15, 2010, Rosenbaum e-mailed Broadley that he (or any member of the public) could view these files at NARA. (Rosenbaum Aff. ¶ 15, Exh. 27.)

which requires that the U.S. Government "locate, identify, inventory, recommend for declassification, and make available to the public . . . all Nazi war criminal records." The NWCDA expressly excludes from release any records belonging to OSI or pertaining to any current or former subject of an OSI investigation, inquiry or prosecution. 5 U.S.C. 552 note, 112 Stat. 1859 (Oct. 8, 1998), *as amended* Pub.L. 109-5 §§ 1, 803(d) 119 Stat. 19 (March 25, 2005).

OSI Senior Historian Steven B. Rogers was tasked by OSI with reviewing the voluminous records sent to NARA by federal agencies pursuant to the NWCDA to identify those that potentially fell within the statutory exclusion. On or about July 11, 2002, Rogers received inventories from NARA indexing all 4,100 FBI file transfers. The inventories included references to three files having the title "John Demjanjuk." (Affidavit of Steven Rogers ("Rogers Aff,.") ¶ 5 Exh. 32.) On July 16, 2002, Rogers submitted to NARA a list of 186 FBI files listed in the inventories that required review, including three files entitled "John Demjanjuk."

Between August 22-28, 2002, Rogers reviewed approximately 77 of the 186 FBI files at NARA, including three entitled "John Demjanjuk." Rogers' notes on the file containing the Cleveland FBI March 1985 memos stated: "*The large bulky dossier contains records concerned with the investigation of O'Connor's allegations that fraud had been committed in the Government's case against Subject as a result of Soviet disinformation. There is also material dealing with the Defense's claim of new evidence information available concerning the authenticity of the Trawniki card."* (Exh. 1 attached to Rogers Aff. ¶6 , Exh. 32.) Because Rogers was not and had not been part of the Demjanjuk prosecution team, he did not realize that the materials were not already in OSI's possession and were not known to the prosecution team. Id. at ¶7. Rogers' notes on all the files he reviewed were forwarded to his supervisor, OSI Chief

Historian Dr. Elizabeth White, with a copy to . (Rogers Aff. 6 , Exh. 32.) On October 16, 2002, Dr. White e-mailed NARA, identifying those FBI files, including those pertaining to Demjanjuk, that were statutorily excluded from release because they fell under the OSI exclusion to the NWCDA. OSI Director Rosenbaum was copied on this e-mail. Rogers had not been asked, and could not reasonably be expected to, compare the contents of every document in every file at NARA with the OSI file of every former or current OSI subject

OSI did not view the FBI Demjanjuk files held at NARA again until after the publication of a story in FOCUS, a German on-line magazine, on or about May 29, 2009, about "secret" FBI files on Demjanjuk that were located at NARA. Shortly thereafter, in early to mid-June 2009, Rogers was sent by OSI to NARA to obtain digital photographs of the FBI Demjanjuk files to send for review by the German prosecutor in the Demjanjuk criminal case, Dr. Hans-Joachim Lutz. Rogers put the copies on 2 CD-Rom discs and gave the disks to OSI Director Eli Rosenbaum. Rosenbaum cursorily looked at some of the print-outs of those digital images and believed that the documents contained only a mixture of public domain materials (such as a reported decision and newspaper articles) and long since discredited and public claims made by Demjanjuk's counsel Mark O'Connor and Demjanjuk supporters that the Trawniki ID card was a KGB forgery. On June 23, 2009, OSI sent the disks to the U.S. Consulate in Munich for review by prosecutor Lutz. On July 1, 2009, Rosenbaum received an e-mail from Lutz confirming that he had reviewed the documents on the CDs. (Rosenbaum Aff. ¶ ¶10, 11, 12, Exh. 27.)

C. Demjanjuk's Access to the FBI Materials in January 2010

On December 31, 2009, Demjanjuk's Washington attorney, John Broadley, contacted Rosenbaum asking for help in gaining access to the FBI Demjanjuk files at NARA, which he identified by file numbers. His e-mail stated: "*We need to review all three files in connection with the on-going prosecution of Mr. Demjanjuk in Germany . . . .This matter is rather urgent in light of the on-going proceedings so I would like to hear from you as soon as possible after the holiday.*" (Rosenbaum Aff. ¶ 15, Exh. 27 .) Rosenbaum replied by e-mail the same day, advising that he would look into the matter. (Rosenbaum Aff. ¶¶ 13, 14, 15 Exh. 27 and attached email printout.) Two weeks later, on January 14, 2010, Rosenbaum advised NARA that OSI had no objection to the release of the FBI Demjanjuk files and that OSI accordingly waived the applicable statutory exclusion for those OSI-related records. On January 15, 2010, Rosenbaum notified Demjanjuk attorney Broadley by e-mail that OSI had waived the statutory exclusion for the FBI Demjanjuk files that Broadley requested and that he should "contact NARA directly to arrange for access to the documents." Id. Broadley responded on January 28, 2010 by e-mail and confirmed receipt of the e-mail. (Rosenbaum Aff. ¶ 15, Exh. 27.) No further communication was received from Demjanjuk attorney Broadley regarding the NARA files. (Rosenbaum Aff. ¶ 15, Exh. 27.)

It was not until April 2011, when former OSI Director Neal Sher informed Rosenbaum that an Associated Press reporter had provided him with copies of some FBI documents, that Rosenbaum became aware that Cleveland FBI personnel had expressed concerns about some of the evidence used against Demjanjuk by the prosecution team in the 1980s or had created documents memorializing these concerns. (Rosenbaum Aff. ¶16 Exh. 27.)

D. The Prosecution Team Did Not Possess or Have Reason to Know of the FBI Materials During this Denaturalization Case

As is set out above, the documents at the heart of the "discovery lapse" alleged by Demjanjuk were merely speculative theories of counter-intelligence agents in the Cleveland Field Office whose information was derived primarily from the claims of the Demjanjuk defense team, newspaper accounts of the case, and general knowledge of KGB tactics employed against "outspoken dissidents." The FBI did not provide copies of the FBI materials to anyone on the prosecution team,[23] nor did the FBI contact OSI or otherwise notify anyone on the prosecution team of the existence of these memos. Neither the agents who wrote the memos nor the FBI personnel in Washington to whom they were addressed shared the materials with the prosecution team, or even discussed the matter with the prosecution team as they had done with the defense. (Martin Aff. ¶ 7, Exh. 1; Watkins Aff. ¶ 3, Exh. 24.)[24] Moreover, because the FBI did not assist OSI with investigative work and the FBI was not part of the prosecution team, the prosecution team had no reason to suppose that Cleveland FBI agents had developed such concerns or had generated such materials. Had the prosecution team known of the agents' concerns or the existence of the materials they created, it would have instituted a thorough investigation into the

[23]Martin stated that he once told an OSI investigator who was working at the Cleveland office about his concerns regarding the Trawniki Card and suggested that OSI have the card forensically tested. (Martin Aff. ¶7, Exh. 1.) Former OSI Director Sher recalls that an OSI investigator was present very briefly at the Cleveland field office in 1981 for the purpose of using FBI equipment to copy video-recorded depositions in the Demjanjuk litigation. (Sher Aff. ¶ 9, Exh. 26.) OSI records do not contain any report or other memorialization of a conversation by an OSI employee with Agent Martin or anyone at FBI. Given the circumstances, including that the card was being forensically tested, any OSI employee who had such a conversation may reasonably have believed that a casual conversation of this nature with an FBI agent who had nothing to do with the case was not significant.

[24]In 2011, after the initiation of this litigation, representatives from the USAO went to the Cleveland FBI office and made copies of their files pertaining to Demjanjuk. Those copies were provided to the defense on May 27, 2011.

basis for the theories contained in the FBI materials and sought to interview the FBI agents who held those concerns, as it did in 1989, when a similar situation arose during OSI's denaturalization action against Hungarian Nazi propagandist Ferenc Koreh. (Sher Aff. ¶ 15, Exh. 26.)

Although Demjanjuk asserts that it is "inconceivable" that OSI was unaware of the FBI materials, there are several reasons that the prosecution team had no basis even to suppose that FBI agents in Cleveland harbored concerns or had created documents discussing the Justice Department's case against Demjanjuk.

First, the FBI had not acted as part of the prosecution team at any time in the Demjanjuk litigation. As OSI brought civil, not criminal denaturalization and removal actions, the FBI was not a part of the office's litigation team and did not investigate Demjanjuk or any other suspected Nazi perpetrators in the United States on behalf of OSI.[25] (Sher Aff. ¶ 6, Exh. 26; Rosenbaum Aff. ¶ 3, Exh. 23; Drimmer Aff. ¶ 5, Exh. 25.)

Second, as per its standard practice, in August 1979, prior to the start of the first Demjanjuk denaturalization trial, OSI checked with the FBI and with other U.S. agencies seeking any records pertaining to Demjanjuk, and had received a response that the FBI possessed no records on John Demjanjuk.[26] (Sher Aff. ¶ 5, Exh. 26.) Because OSI knew that it had not subsequently partnered with the FBI on this case, the prosecution team had no basis to suppose

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[25]When OSI required forensic testing of documents, it turned to a government agency forensic lab at Secret Service, the former Immigration and Naturalization Service, or FBI. (Sher Aff. ¶ 6, Exh. 26; Rosenbaum Aff. ¶ 3, Exh. 27; Drimmer Aff. ¶ 5, Exh. 25.)

[26]Upon its creation in 1979, OSI instituted an agency records check system whereby, in every investigation, records requests were sent to U.S. agencies, including the FBI, that might have documents relevant to each investigative subject's wartime activities, immigration and naturalization, or criminal history. (Sher Aff. ¶ 4 Exh. 26; Rosenbaum Aff. ¶ 11 Exh. 27.)

that counter-intelligence agents at the Cleveland FBI office had, since the initiation of the first denaturalization case, created documents theorizing that the prosecution team might be relying on forged documents or that anyone at FBI had once harbored concerns about the Justice Department's case. Thus, subsequent checks were not made. (Rosenbaum Aff. ¶ 11, Exh. 27; Drimmer Aff. ¶ 5, Exh. 25.) In any event, ironically the defense team was in fact privy to the information at the time.

ARGUMENT

Demjanjuk asks this Court to overturn its 2002 order finding he assisted the Nazis in persecution and mass murder. Denaturalization is a civil proceeding; therefore, in order to prevail, Demjanjuk must proceed under Fed. R. Civ. P. 60(d)[27], and prove by clear and convincing evidence "unusual and exceptional circumstances" giving rise to a "grave miscarriage of justice,'" Mitchell, 651 F.3d at 595. Demjanjuk's discovery, some eighteen months ago, that there are documents setting forth non-material information he has possessed for decades does not meet this "stringent" and "demanding standard," and his motion should be denied. Id.

A. Demjanjuk is Not Entitled to Relief Under Rule 60(d)

"[P]ublic policy favor(s) finality of judgments and termination of litigation." Info-Hold Inc., 538 F.3d at 454. Therefore, relief from judgment under Rule 60 is an extraordinary remedy very rarely granted, since "equitable considerations often prevail over considerations of finality of judgments in granting relief from a judgment within one year; the finality of judgment prevails thereafter." Alabi v. Homecomings Financial LLC, No. 09-4757, 2011 WL 4398140, *5 (N.D. Ill., Sept. 21, 2011.). Rule (d)(1) permits a court to "entertain an independent action to relieve a

[27] Demjanjuk is also invoking Rule 60(b). As discussed infra, his claims are time-barred under Rule 60(b), and Rule 60(d) is the only avenue for relief available to him.

party from a judgment, order or proceeding," while Rule 60(d)(3) allows a court to "set aside a judgment for fraud on the court." Fed. R. Civ. P. 60(d)(1) and (d)(3.)

An independent action under Rule 60(d)(1) is "'available only to prevent a grave miscarriage of justice,'" Mitchell, 651 F.3d at 595, and is granted only in cases "'of unusual and exceptional circumstances.'" Id. Like other circuits, the Sixth Circuit has held that the standard of a "grave miscarriage of justice" is a "stringent" and "demanding" one. Id. In order to demonstrate that this is a case of "unusual and exceptional circumstances," Demjanjuk must provee the following elements:

> (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law.

Barrett v. Sec'y of Health & Human Servs., 840 F.2d 1259, 1263 (6th Cir. 1987) (citing 11 C. Wright & A. Miller, FEDERAL PRACTICE & PROCEDURE § 2868, at 238 (1973).)

To show fraud on the court under Rule 60(d)(3), Demjanjuk must demonstrate conduct:

> (1) by an officer of the court; (2) directed to the "judicial machinery" itself; (3) which was intentionally false, willfully blind to the truth, or in reckless disregard of the truth; (4) which was a positive averment or concealment when under a duty to disclose; and (5) which deceived the court.

Carter v. Anderson, 585 F.3d 1007, 1011 (6th Cir. 2009), cert. denied, – U.S. –, 130 S. Ct. 3423 (2010). It is Demjanjuk's burden to show fraud on the court by clear and convincing evidence. Id.

Fraud on the court, under Rule 60(d)(3), is "interpreted narrowly," and because it is directed only to fraud that seriously affects the integrity of the judicial process, it does not involve witness perjury, for example, but rather is limited to "circumstances in which, for example, a judge or juror has been bribed, a bogus document is inserted in the record, or improper influence has been exerted upon the court or an attorney so that the integrity of the court and its ability to function is directly impinged." Morawski v. United States Dept. of Agric., No. 09-14568, 2010 WL 2663201, *7 (E.D. Mich. July 2, 2010.) See also 7 J. Moore & J. Lucas, MOORE'S FEDERAL PRACTICE, ¶ 60.33 (2d ed. 1978) ("Fraud upon the court should . . . embrace only that species of fraud which does or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication . . . .".)

Demjanjuk does not differentiate between Rule 60(d)(1) and (d)(3) in his motion, citing both in his request for the extraordinary remedy he seeks. Regardless, the facts of this case fail to demonstrate either a "grave miscarriage of justice" to justify an independent action or a subversion of the judicial process to permit this Court to set aside the judgment for fraud on the court.

In no way do the facts here constitute the "unusual and exceptional circumstances" required under Rule 60(d)(1) to disturb the judgment after the passage of many years and to depart "from rigid adherence to the doctrine of res judicata." United States v. Beggerly, 524 U.S. 38, 46 (1998)[28]. Demjanjuk cannot reasonably claim that this Court's meticulously supported denaturalization judgment "ought not, in equity and good conscience . . be enforced," based on a

[28] Beggerly discusses independent actions under Rule 60(b); Rule 60(b) was subsequently reorganized, and such claims now are covered under Rule 60(d)(1).

document reflecting non-material information he has known about for over twenty-five years. Barrett, 840 F.2d at 1263. Nor can he demonstrate that these documents would have assisted him in mounting "a good defense" to the overwhelming forensic evidence this court deemed "devastating to [his] contentions" that the Trawniki card is inauthentic, Demjanjuk, 2002 WL 544623,*1, much less in mounting such a defense to the other evidence that independently established his Nazi guard service at Sobibor and other Nazi camps.

Not only has Demjanjuk failed to demonstrate the "grave miscarriage of justice" required under Rule 60(b)(1), but he also cannot meet the Rule's mandate that he show "absence of fault or negligence on the part of the defendant." Barrett, 840 F.2d at 1263. Demjanjuk has merely averred that if the FBI memo had been produced during discovery in the second denaturalization proceeding, he would have been able to seek "further discovery" and his defense somehow "would have been more persuasive, more powerful, and more pointed than the one he was able to put on." (Def. Mem. at 32, 38.) Yet in this denatualization proceeding, Demjanjuk *did* litigate the claim that the Trawniki card was forged. More significantly, he (unlike the prosecution team) knew that Agent Martin had concerns about the authenticity of the card (Martin Aff. ¶ 18, Exh. 1), because his attorney was told this by Agent Martin himself. Thus, Demjanjuk knew – as far back as 1985 – the very information contained in the FBI memo, yet he apparently decided not to pursue it. Throughout the two years between the filing of this action and the trial before Judge Matia, he had the ability to seek the "further discovery" he now claims he was unable to pursue. Even if he was unaware that Agent Martin had put his concerns about Soviet forgery into writing, Demjanjuk could have deposed Agent Martin, or called him as a witness at trial, but he chose not

do so. Thus, if Demjanjuk failed to present a more "persuasive," "powerful" and "pointed" defense, the fault is entirely his.

Demjanjuk similarly fails to meet his burden to prove that there was fraud on the court. In asserting his claim under Rule 60(d)(3), Demjanjuk cites liberally to Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993), cert. denied sub nom. Rison v. Demjanjuk, 513 U.S. 914 (1994), and a "past history of fraud on the court," (Def. Mem. at 25), to posit that the "one plausible conclusion [is] that the government intentionally withheld these materials [the FBI memoranda]." (Def. Mem. at 23.) Yet, the facts here are substantially and significantly different from the facts in Petrovsky, and they show neither an intentional fraud nor a reckless disregard of the truth. Carter, 585 at 1011.

In Petrovsky, the Sixth Circuit found that the materials that the prosecutors should have produced were *all in the possession of the prosecutors,* who had these documents *prior to trial*. 10 F.3d at 350. Moreover, the Sixth Circuit found in that case that the attorneys involved in preparing and trying the case either read the materials (and did not realize their significance) or should have, but did not, read some of the materials. By contrast, no one on the prosecution team in this proceeding had the Cleveland FBI memos in their possession, knew about their existence, or knew about the concerns of the FBI agents until 2009, well after the conclusion of the second denaturalization trial and after Demjanjuk had been removed to Germany. (Drimmer Aff. ¶ 7, Exh. 25; Sher Aff. ¶ 12, Exh. 26; Rosenbaum Aff. ¶ 16, Exh. 27).

Moreover, while the non-produced documents at issue in Petrovsky included non-disclosed statements of former Treblinka death camp guards "tending to show that a person other than Demjanjuk was in fact 'Ivan the Terrible,' 10 F. 3d at 345, the FBI materials at issue here

reported only speculation about the possibility of KGB forgery in Demjanjuk's case -- a possibility of which Demjanjuk's counsel was already aware, and which conflicted with the mountain of evidence disproving the forgery hypothesis.

Neither do the facts here reflect a "reckless disregard" for the truth on the part of the prosecution team. Demjanjuk asserts that OSI *should have* been aware of the FBI memoranda because they were "authored by the government's main investigatory agency in a branch office situated in the very town where the proceedings against Mr. Demjanjuk unfolded." The FBI is the general DOJ investigatory agency in criminal cases. However it has never been the investigatory agency on any OSI Nazi case, or on the Demjanjuk case in particular. . (Martin Aff. ¶ ¶ 5-6, Exh. 1; Arruda Aff., ¶ ¶ 4-5, Exh. 13.) The FBI was *not* part of the prosecution team, and it never expressed any concerns about the evidence in the Demjanjuk case to the trial team. (Drimmer Aff. ¶5, Exh. 25; Sher Aff. ¶6, Exh. 26; Rosenbaum Aff. ¶3, Exh. 27.)

Moreover, as Demjanjuk himself states (Def. Mem. at 30), FBI Headquarters ordered the Cleveland field office to close the matter – four years prior to the drafting of the March 1985 airtel and memo – for lack of probable cause to believe that the evidence had been forged. (Mar. 27, 1981 memo, Exh. 15.) In 1985, two months before FBI Headquarters received the March memo from Cleveland, Headquarters instructed the Cleveland FBI office for a second time to close the matter. (Jan. 8, 1985 memo, Exh. 19.) Given that the FBI was not involved in the investigation or prosecution of the Government's case against Demjanjuk and that the FBI never forwarded any of the FBI materials or otherwise relayed the concerns of the Cleveland agents to the prosecution team (or to anyone at OSI, OIA, or the U.S. Attorneys Office in Cleveland for that matter), the prosecution team simply had no reason to suspect that the Cleveland FBI office

might possess documents regarding Demjanjuk. DOJ attorneys did not act in reckless disregard of the truth, nor did they engage in egregious conduct that perverts the judicial machinery. Accordingly, the FBI materials were not suppressed, Demjanjuk cannot show fraud on the court, and this Court should not set aside the denaturalization order.

B. Demjanjuk is Not Entitled to Relief Under Rule 60(b)

In addition to Rule 60(d), Demjanjuk seeks to vacate his denaturalization under Rule 60(b). However, the subsection that is arguably applicable in this instance is 60(b)(3), and he cannot meet the one-year time limit it imposes.

1. Demjanjuk's Motion Should Have Been Brought Under Rule 60(b)(3), and Is Time-Barred Under That Provision

Demjanjuk claims the United States failed to produce to him materials it was obligated to provide in discovery. This allegation falls squarely within Rule 60(b)(3), which covers fraud and discovery violations as justification for vacating a judgment .[29] See, e.g., Abrahamsen v. Trans-State Exp., Inc., 92 F.3d 425, 428 (6th Cir. 1996) (failure to disclose discoverable materials can constitute fraud within purview of 60(b)(3)); see also, Beggerly, 524 U.S.at 46 (government's failure to provide relevant information is actionable under Rule 60(b)(3)); Info-Hold Inc., 538 F.3d at 456 ("fraud" for purposes of Rule 60(b)(3), is "the knowing misrepresentation of a material fact, or concealment of the same, when there is a duty to disclose, done to induce another to act to his or her detriment."); Walburn v. Lockheed Martin Utility

[29] In Petrovsky, 10 F.3d at 338, the court refers to 60(b)(6) while discussing allegations of fraud on the court; however, the specific language cited from Rule 60 was subsequently moved to section 60(d) and is no longer part of 60(b). See Mitchell, 651 F.3d at 595 n.2, ("Rule 60 was 'restyled' in 2007 such that the former Part (b) has been separated into Parts (b), (c), (d), and (e.) The language was not altered; the exact language of the current Part (d) was formerly contained in Part (b.)".) The former 60(b) language now contained in section 60(d) is commonly referred to as a "savings clause, which allows a judgment to be attacked regardless of the passage of time. Id. at 595 n. 2.

Services, Inc., No. 10-3419, 2011 WL 3677938, *2 (6th Cir.) (treating failure to produce discoverable materials under 60(b)(3).)[30]

Claims under Rule 60(b)(3) must be brought within one year of judgment. Fed. R. Civ. P. 60(c)(1.) Demjanjuk brings his claim more than seven years after this Court ordered him denaturalized. Because his claim is properly raised under 60(b)(3), and because he did not meet that rule's one-year limit, his claim under Rule 60(b) is time-barred.

2. Demjanjuk Is Not Entitled to Relief Under Rule 60(b)(6)

To avoid Rule 60(b)(3)'s time limit, Demjanjuk attempts to proceed under Rule 60(b)(6), which covers "any other reason that justifies relief" and which is subject to a less stringent, "reasonable time" standard. Olle v. Henry & Wright Corp., 910 F.2d 357, 365 (6th Cir. 1990.) However, Rule 60(b)(6) applies "only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule." McCurry, 298 F.3d at 595 (6th Cir. 2002), and it should be used only "when 'something more' than one of the first five grounds is present." Hopper v. Euclid Manor Nursing Home, Inc., 867 F.2d 291, 294 (6th Cir. 1989.) The fact that Demjanjuk's 60(b)(3) claim is time-barred does not constitute the "exceptional and extraordinary circumstances" required to proceed under Rule 60(b)(6.) McCurry, 298 F.3d at 595. Because Demjanjuk's claim clearly falls within the scope of 60(b)(3), he is precluded from bringing it under 60(b)(6.) Id.

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[30] D'Ambrosio v. Bagley, 688 F. Supp. 2d 709 (N.D. Ohio 2010), cited by Demjanjuk, is inapposite, as in that case the Court found extraordinary relief entitling the habeas plaintiff to dismissal of the charges against him under Rule 60(b)(6) only when a key witness died just before the retrial previously ordered by the Court.

Even if Demjanjuk could proceed under Rule 60(b)(6), he cannot meet its "reasonable time" requirement. As is discussed above, Demjanjuk implies that he was unaware of the FBI files before the AP news story was published in April 2011. In fact he has known about and had access to the actual files since early 2010, and he has been aware of their substantive content since the mid-1980s. Demjanjuk's U.S. counsel told the Government that he considered these materials important as early as December 2009, when he claimed to need them "urgently" for the German criminal trial. Yet Demjanjuk waited over eighteen months, until July 2011, after he benefitted from media reporting of the files, to file his motion for relief under Rule 60(b)(6.) Such a delay cannot satisfy the "reasonable time" requirement of Rule 60(b)(6), and Demjanjuk's claim is therefore time-barred.

C. The Government Did Not Violate *Brady*

Demjanjuk's claim that the United States failed to meet its obligations under Brady, resulting in fraud on the court, has no basis in law or fact. Brady imposes a duty on the Government to disclose to a defendant evidence that is both favorable to him and material to his guilt or punishment. Kyles, 514 U.S. at 419. Evidence is material only if there is a reasonable probability that it would have changed the outcome of the trial. Montgomery v. , 2011 WL 3654383, *9.

There was no Brady violation in the instant matter, because (1) Demjanjuk has been aware of the essential points contained in the FBI materials since at least the mid-1980s; (2) the Government's prosecution team was not aware of the FBI materials during the trial and did not learn of them until after the denaturalization judgment had been entered; and (3) the materials in the FBI files ultimately would not be favorable to Demjanjuk, because they are speculative, based

on erroneous information and are unpersuasive in the face of the overwhelming evidence that Demjanjuk lied to U.S. immigration officials to conceal his service as a Nazi camp guard.

1. As Demjanjuk Possessed the Essential Facts Regarding the FBI Materials Well in Advance of His 2001 Trial, He Was Not Precluded from Taking Advantage of Whatever Exculpatory Value They Had

"Brady is concerned only with cases in which the government possesses information that defendant does not have." United States v. Cottage, 307 F.3d 494, 500 (6th Cir. 2002.) Therefore, "the government's failure to disclose potentially exculpatory information does not violate Brady 'where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information or where the evidence is available to defendant from another source.'" Id. (quoting United States v. Clark, 928 F.2d 733, 738 (6th Cir.1991.) If the defendant already possesses the information or knows the essential facts permitting him to take advantage of the information, then the government has no disclosure obligation. Carter v. Bell, 218 F.3d 581, 601 (6th Cir. 2000); United States v. Mullins, 22 F.3d 1365 (6th Cir. 1994.)

While the prosecution team was not aware of the FBI materials before trial, Demjanjuk's defense team had known about their content for decades. He certainly was not precluded from taking advantage of whatever exculpatory value they had, because he could have called Agent Martin as a witness to testify about the concerns he expressed in the March 1985 memo. Even without Agent Martin, Demjanjuk did raise the Soviet forgery issue at trial; indeed, this Court specifically addressed his claims in its opinion. Demjanjuk, 2002 WL 544623,*14-15. Neither Agent Martin's testimony, nor the FBI materials reflecting his views, would have overcome the overwhelming evidence which this Court recognized as "devastating" to any claim that the Trawniki card was not authentic. Id. at *1.

Because Demjanjuk was in possession of the essential facts in the FBI materials well in advance of trial, and because any failure to take advantage of those materials was his own decision, he cannot satisfy his burden to show a violation of his rights under Brady. Cottage, 307 F.3d at 500.

2. The Evidence was Not Suppressed, as the Prosecution Team Neither Possessed Nor was Aware of the FBI Materials at the Time of Trial

Brady applies only to materials in the prosecution's possession at the time of trial. United States v. Bibby, 752 F.2d 1116, 1125 (6th Cir. 1985), cert. denied, 475 U.S. 1010 (1986.) There is no Brady violation if the prosecution team first learns of allegedly exculpatory evidence after trial. United States v. Jones, 399 F.3d 640, 646-47 (6th Cir. 2005), cert. denied, 546 U.S. 863 (2005.)[31] The members of the Demjanjuk prosecution team first learned of the FBI concerns no earlier than April 2011, when the AP story appeared in the newspaper. (Drimmer Aff. ¶ 7, Exh. 25; Sher Aff. ¶ 12, Exh. 26; Rosenbaum Aff. ¶ 16, Exh. 27.) A historian at OSI who was not a member of the Demjanjuk trial team arguably learned of the FBI materials' existence on July 11, 2002, when NARA sent him a list of files that had been transferred there. (Rogers Aff. ¶ 6, Exh. 32; Rosenbaum Aff. ¶ 7, Exh. 27.) Although the circumstances of the OSI historian's 2002 review of materials under the NWDCA do not support a conclusion that DOJ did or reasonably should have known of the contents of the materials there, even assuming that knowledge is imputed, the information was obtained after the trial and the denaturalization judgment.

[31] Brady does not apply to materials discovered by the prosecution team after trial. Under those circumstances, a defendant may pursue the matter through post-judgment remedies. Jones, 399 F.3d at 646-47 (affirming district court's refusal to grant new trial under Brady where evidence of misconduct by investigating police officers not discovered until after trial.)

While the FBI is a government agency, its knowledge of the materials cannot be imputed to OSI or the USAO, because the FBI was not part of the prosecution team. "The purpose of Brady and its progeny is not to require the prosecutor to search out exculpatory evidence but rather to divulge whatever exculpatory evidence he already has." Bibby, 752 F.2d at 1125. "It is well-settled that if a member of the prosecution team has knowledge of Brady material, such knowledge is imputed to the prosecutors." Avila v. Quarterman, 560 F.3d 299, 307 (5th Cir.), cert. denied, 130 S. Ct. 536 (2009.) However, "there are limits on the imputation of knowledge from one arm of the Government to prosecutors." United States v. Webster, 392 F. 3d 787, 798 n.20 (5th Cir. 2004) (internal quotations, citations, and brackets omitted.) "Exactly who constitutes a member of the prosecution team" is analyzed by looking at the extent of the "interaction and cooperation" between the government entities. United States v. Cutno, No. 09-30004, 2011 WL 2533814, *2 (5th Cir. 2011) (quoting Avila, 560 F.3d at 308.) It is clear, however, that "Kyles cannot 'be read as imposing a duty on the prosecutor's office to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue.'" United States v. Merlino, 349 F.3d 144, 154 (3d Cir. 2003) (quoting United States v. Morris, 80 F.3d 1151, 1169 (7th Cir. 1996)). See also United States v. Pelullo, 399 F.3d 197, 216 (3d Cir. 2005) (prosecutors did not have constructive knowledge of information known to the Pension and Welfare Benefits Administration as the result of a separate civil lawsuit, because while the PWBA is part of the Department of Labor, which is the larger agency responsible for investigating the offense at issue, the PWBA was not part of the "prosecution team"), cert. denied, 546 U.S. 1137 (2006); United States v. Velte, 331 F.3d 673, 680 (9th Cir. 2003) (in forest fire case, prosecutor not required to turn over humidity

reports from government-owned weather station because the weather station was not "acting on the government's behalf" during the investigation), cert. denied, 541 U.S. 912 (2004); United States v. Locascio, 6 F.3d 924, 949-50 (2d Cir. 1993) (refusing to impute knowledge to the prosecutors simply because other government agents who were not on the prosecution team had information), cert. denied, 511 U.S. 1070 (1994.)

The FBI had no involvement in any Justice Department investigation of Demjanjuk's wartime activities, his immigration to the United States, or his naturalization as an American citizen. (Martin Aff. ¶ ¶ 5-6, Exh. 1; Arruda Aff., ¶ ¶ 4-5, Exh. 13; Drimmer Aff. ¶ 5, Exh. 25; Sher Aff. ¶ 6, Exh. 26; Rosenbaum Aff. ¶ 3, Exh. 27.)) As noted above, the FBI Cleveland office and FBI Headquarters were uninvolved in the prosecution of Demjanjuk and did not act on OSI's behalf in any aspect of the litigation. Because no member of the prosecution team was aware of the FBI materials prior to the judgment in this case, Brady is inapplicable.

3. Demjanjuk Has Not Shown a Reasonable Probablity that Possession of the FBI Materials at the Time of Trial Would Have Altered the Decision

Even if Demjanjuk could establish that the FBI materials were in the prosecution team's possession and that he did not already know of the essential information they contain, there could be no Brady violation because the information is not material. "Prejudice (or materiality) in the Brady context is a difficult test to meet. . . ." Jamison v. Collins, 291 F.3d 380, 388 (6th Cir. 2002.) While a defendant need not prove that he "would more likely than not have received a different verdict with the evidence" at issue, Kyles, 514 U.S. at 434, "[i]n order to establish prejudice, 'the nondisclosure [must be] so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.'" Montgomery, WL 3654383, *9 (quoting Strickler v. Greene, 527 U.S. 263 (1999.) A "reasonable probability" equates to a

showing that the government's suppression of evidence "undermines confidence in the outcome of the trial." Kyles, 514 U.S. at 434. This test is certainly not met where the Government fails to turn over merely "speculative information." United States v. Agurs, 427 U.S. 97, 109 n.16 (1976) (quoting Giles v. Maryland, 386 U.S. 66, 98 (1967) (Fortas concurring).)

In assessing the probability that the evidence would have produced a different outcome, it is the "obligation of a reviewing court to consider the totality of the evidence—and not merely exculpatory facts in isolation . . . ." Montgomery, 2011 WL 3654383 at *10. Thus, a court examines the evidence "collectively, not item by item." Brooks v. Tenn., 626 F.3d 878, 892 (6th Cir. 2010) (quoting Kyles, 514 U.S. at 436.) This means a court must review "not just the mitigation evidence [the defense] could have presented, but also the [other] evidence that almost certainly would have come in with it," including evidence which undermines the supposed Brady material. Montgomery, 2011 WL 3654383 at *10 (quoting Wong v. Belmontes, – U.S. –, 130 S. Ct. 383, 386 (2009).)

As was discussed above, the government presented overwhelming evidence at Demjanjuk's 2001 denaturalization trial, not only that he served as a guard at the Sobibor extermination camp and the Majdanek and Flossenbürg concentration camps, but also that the Trawniki card, which by 2001 was just one of several documents establishing this service, was authentic. Thus, even if the Court weighed anew the question of the authenticity of the Trawniki card, the fact remains that there are six other documents which provide corroboration and are enough, even without the Trawniki card, to prove Demjanjuk's wartime service as a Nazi guard. Viewed in the context of the evidence in its entirety, the 1980s speculations on which Demjanjuk

relies are at best inconsequential and at worst risible. They certainly do not undermine confidence in this Court's denaturalization order.

Even without this corroborating collateral documentation, the FBI materials would not have produced a different outcome regarding Demjanjuk's wartime service. The Cleveland FBI memo is simply conjecture that the Demjanjuk prosecution "could easily have been" initiated and controlled by the KGB, based on the fundamental and demonstrably erroneous premise that Demjanjuk was a prominent anti-Soviet emigre dissident, and thus a logical target for the KGB. In fact, Demjanjuk never engaged in any "dissident"or anti-Soviet activity in this country, prior to the original denaturalization case, *as he has acknowledged*.[32] Moreover, Martin admits that his March memo was not based on independent investigation but on his sense that the violent conduct committed by "Ivan the Terrible" was at odds with newspaper accounts of Demjanjuk's character, on his impressions, gathered from monitoring press accounts of the trials as well as on his experience as an agent, and on and his (erroneous) belief that no one had been allowed to examine the original document. (Martin Aff . ¶ 9, Exh. 1.) Demjanjuk cannot make even a colorable claim that these opinions would have altered the outcome of his trial.

Finally, the FBI materials would not have prevented this Court's denaturalization of Demjanjuk because of the independent finding that Demjanjuk's citizenship should be revoked

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[32] In Israel, Demjanjuk admitted that he was not an outspoken activist against the USSR. Isr. Trial Transcript, July 30, 1987 at 7260-7261. He stated that he was not afraid of the Soviets after coming to the USA, "because I didn't say anything against them." He became afraid of them, he further testified, only after the complaint was filed against him in 1977. (Isr.Tr. pp. 7260-7261 (Exh. 34).) In his February 20, 1980 deposition in the first denaturalization case, Demjanjuk admitted that he did not belong to any anti-Communist or Ukrainian nationalist organizations in the United States and when asked why the Soviets would have publicized the fact that he had served as Nazi concentration camp guard, he said it was because the Soviets had been paying his mother a pension based on the false belief that her son had died in the war. (Feb. 20, 1980 Demjanjuk Depo., Exh. 35 at 84-85.)

based on his admitted misrepresentations on his visa. Even if Demjanjuk had told immigration officials the story he tells today – namely that his visa application was incorrect because he had served in two German sponsored military units – this Court found that he would have been denied a visa, making his entry to the United States unlawful and his naturalization illegally procured and subject to revocation. 2002 WL 544622, *31.

The Demjanjuk defense was aware since 1985 of the concerns of the Cleveland agents, the prosecution team did not know about them until years after trial, and in any event, the FBI materials would not have been likely to produce a different outcome. Therefore, Demjanjuk's assertion that the Government violated its Brady obligations must fail.

CONCLUSION

Convicted in Germany as an accessory to at least 28,000 murders, John Demjanjuk comes before this Court casting himself as the victim -- of government misconduct and a "miscarriage of justice" that led to his 2002 denaturalization. That claim is nothing if not brazen. The facts are that John Demjanjuk was a guard at a Nazi extermination camp (and at Nazi concentration camps) where he helped to murder thousands of innocent men, women and children. In the legal proceedings that began in 1999 and culminated in his removal to Germany a decade later, he has received more and fairer process from this nation than he could possibly have received from any other legal system in the history of humankind. The facts are that he has been aware for at least 25 years of the information contained in the "newly discovered" memoranda written by Cleveland FBI counter-intelligence agents. The facts are that the speculations set forth in those materials are based largely on inaccurate information generated by the defense team itself, not by

any independent investigation. The federal judicial system gives litigants the right to file motions. It does not give them the power to re-write history. Demjanjuk's Rule 60 motion should be denied.

Dated: October 18, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2011, I electronically filed the foregoing Government's Opposition to Defendant John Demjanjuk's Motion for Rule 60 Relief with the Clerk of the Court using the CM/ECF system which will send notification to the attorneys of record for Defendant:

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