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

UNITED STATES OF AMERICA,	:	Case No. 1:99CV1193
	:	
Plaintiff,	:	Judge Dan Aaron Polster
	:	
-vs-	:	**REPLY BRIEF OF JOHN DEMJANJUK IN SUPPORT OF MOTION TO RECONSIDER MEMORANDUM OF OPINION AND ORDER OF DECEMBER 20, 2011**
JOHN DEMJANJUK,	:	
Defendant.	:	

The government characterizes the motion to reconsider the Court's Memorandum of Opinion and Order of December 20, 2011 as "nothing more than an effort to prolong this litigation by any means necessary." Op. Br. at 1. The government knows that is not true. To the contrary, the defense has sought to prolong nothing, and has already said so in an earlier filing. *See* Brief of Deft. in Opp. to Govt. Motion for Extension of Time to File Response (ECF #227), at 1.

The government foists its discovery obligations upon Mr. Demjanjuk, now contending the defense lawyers were the ones responsible for interviewing individuals in the Ukraine to make sure the true culprit was identified. Op. Br. at 4. But the government knows that was its job. For all we know, the government may have undertaken that investigation in the Ukraine just as the defense's own investigator is doing. (It has never denied doing so.) But then why has the government not turned over all the information from that investigation? If two individuals named John Smith were

being investigated for bank robbery perpetrated by an individual believed to be named John Smith, surely the government would be obligated, especially under the broad *civil* rules of discovery, to produce all the information it has on its investigation of individuals named John Smith in conjunction with that bank robbery. The government asks why Mr. Demjanjuk "did not bring his information to the Court's attention in a timely manner." Op. Br. at 4. The pertinent question really is: Why didn't the government? In this regard, it is noteworthy that the government misconstrues what is stated in Def. Exh. E. The declaration of our investigator does *not* indicate Mr. Bondurak confirmed for the KGB that Ivan A. was not the Nazi guard they were seeking. The government adds words to the declaration that are not there to make the declaration support its position. *Compare* Deft. Exh. E, ¶¶ 18-20 and Op. Br. at 5.

The government then dodges its obligation to produce a statement of an interview of Ignat Danilchenko OSI itself requested in 1983 or 1984. *See* Deft. Exh. C. It never denies having requested the interview or that it took place then. Instead, the government claims it already produced all of Mr. Danilchenko statements it possessed. Op. Br. at 5, n.2. Then why is the 1983/1984 statement missing? Since OSI requested the interview, then OSI should know what happened to the resulting statement. The government hides behind a ruling of a German court denying an apparent motion to compel production of the statement? *See* Op. Br. at 6. But why is a ruling by a German court even relevant here, since we are considering the government's discovery obligations in a United States District Court under our country's federal civil rules?

The government calls "unremarkable" the sworn testimony of former OSI director Neal Sher that OSI routinely checked with the FBI when investigating Nazi war criminals. Op. Br. at 3. One time in August 1979 is routine?

If the government were comfortable with the assertions and declarations it placed before the Court, then it should have the confidence to submit those assertions and declarations to the scrutiny of cross-examination. The absence of the word "hearing" from its opposition brief — the heart of Mr. Demjanjuk's motion to reconsider — is telling. At a hearing, assertions that the Trawniki card was accessible by the defense and could have been tested by them would be challenged. At a hearing, Mr. Demjanjuk's prior counsel could explain how he did not learn about the contents of any secret documents in which the FBI questioned the card's authenticity. To the contrary, no one would acknowledge that others in the government in fact shared the same concerns about the card and the KGB's influence over our government's investigations of American citizens. At a hearing, we would learn why the FBI reached the conclusions it did about the card's authenticity. At a hearing, for the first time someone could be questioned about recently declassified documents that have never been subjected to any scrutiny of any kind.

The government instead has pulled back, allowing nothing to be challenged. That is not a just way to discover the truth, but instead reinforces the lack of trust in the ultimate disposition of this litigation.

For these reasons and for the reasons previously stated in its initial motion, Mr. Demjanjuk moves this Court to reconsider its December 20, 2011 ruling to prevent a manifest injustice.

Respectfully submitted,

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January 19, 2012

CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2012, a copy of the foregoing Reply Brief of John Demjanjuk in Support of Motion to Reconsider Memorandum of Opinion and Order of December 20, 2011 was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic receipt. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's system.

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