IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

VICTOR N. MELNICHUK,

Defendant.

REPORT AND RECOMMENDATION

05-CR-175-C

REPORT

The grand jury has charged defendant Victor Melnichuk with importing and possessing fully automatic firearms based on allegations that Melnichuk smuggled two disassembled AK-47 assault rifles back to the United States from Iraq where Melnichuk had been stationed with his National Guard unit. Before the court is Melnichuk's motion to suppress most of the government's evidence on the ground that it was discovered as a result of an unreasonable search. Specifically, Melnichuk contends that Army investigators did not have probable cause to search his closed footlocker.[1]

The government disagrees, contending that there was probable cause to support the search, the Army investigators obtained sufficient authorization from the acting base commander, and that in any event, the good faith doctrine protects the seized evidence from suppression.

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[1] Melnichuk has withdrawn his motion to dismiss the indictment. *See* dkt. 25.

The government is correct. The search of Melnichuk's locker was reasonable. There is no basis to suppress the evidence.

On February 10, 2006, this court held an evidentiary hearing. Having heard and seen the witness testify, having reviewed all the exhibits submitted by the parties, (and having referred to the foundational allegations in the indictment), I find the following facts:

FACTS

Ft. McCoy is a United States Army base located in the Western District of Wisconsin. In April 2005, Colonel Danny Knolls was the Post Commander and Colonel Donald Lynde was the Staff Judge Advocate. Colonel Lynde worked for and answered to Colonel Knolls; he was not affiliated with, nor did he provide advice to Ft. McCoy's Criminal Investigation Division officers.

Ft. McCoy currently serves as a hub for deploying U.S. National Guard and Army Reserve units to Iraq and Afghanistan and then redeploying them back to this country. To facilitate deployment and redeployment Ft. McCoy provides large, walk-in shipping containers known as MILVANs that units load with their soldiers' footlockers, duffels, and other personal equipment. When a unit is redeployed to the states, it loads one or more MILVANs in its theater of operations, after which the MILVANs are sealed and shipped to Ft. McCoy. At Ft. McCoy assigned personnel unseal and unload the MILVANs with assistance from the locals and leave the MILVANs for use by the next unit to be deployed.

From about February 22, 2004 to February 20, 2005, the 682nd Engineering Battalion, a National Guard unit from Minnesota, was deployed to Iraq. Defendant Victor Melnichuk was a soldier in the 682nd Battalion. In anticipation of their redeployment, on January 23, 2005 soldiers in the 682nd loaded their personal gear into a MILVAN. That MILVAN was shipped to Ft. McCoy where it was unsealed and unloaded on April 27, 2005 under the direction of Sergeant First Class John Lomax and a civilian named Rosemary Backus.

Among the items removed from the MILVAN was a canvas bag of the sort used to carry a folding chair, which had the owner's name blacked out. When Backus moved the folding chair bag, she realized it was too heavy to contain a folding chair; she dumped out the contents, revealing a cluster of items tightly wrapped in black electrical tape and a pillow. Backus determined that the pillow from the bag also contained a hard object that had been sewn inside. Backus and Sergeant Lomax cut open the pillow and found more items taped with black electrical tape. They suspected that they had uncovered pieces of a contraband weapon. (Photographs of the taped objects confirm the reasonableness of this suspicion. *See* Gov. Exhs. 6 and 7). Although their instinct was to peel the tape to see what was inside, they realized it was time to notify law enforcement.

Backus and Sergeant Lomax called Ft. McCoy's police department which notified the base's Criminal Investigation Division. Special Agent in Charge Thomas Cook and Special Agent Brian Cummings responded to the office into which Sergeant Lomax and Backus had

brought the taped items. The agents immediately recognized the taped items as weapons that had been smuggled into the country. The agents saw the taped items arrayed on the table; it looked as if the parts were to two weapons, but nobody knew whether these parts were enough, without more, to assemble two complete and operable AK-47s. Apparently, it would take more than a month to obtain a qualified opinion on this point.

This was the sixth incident of weapon-smuggling in a MILVAN that Agent Cook personally had investigated; in at least one of the previous cases, no additional weapon parts were found elsewhere in the van; apparently in the other searches, additional parts were recovered. In the course of his 18 years as a military investigator, Agent Cook had searched between 50 and 100 MILVANs for other types of contraband. In those cases where Agent Cook has found contraband either loose or in an unidentified container in the MILVAN, roughly 40-50% of the time (at a minimum) he subsequently discovered additional related contraband in a closed, identified container.

The agents interviewed SFC Lomax and Backus to learn the salient facts. Believing that an intrusive search of the closed foot lockers was necessary, and believing that he had probable cause to do so, Agent Cook contacted the post commander's office to obtain authorization to search. Because Colonel Knolls was absent, Colonel Lynde was the acting commander. Agent Cook telephoned Colonel Lynde to explain what the agents had discovered and what they wanted to do.

Agent Cook's request to search soldiers' private gear stowed in Army property on an Army base was governed by Rule 315, Military Rules of Evidence.[2] Rule 315 provides that a commander orally may authorize the search of a specified area for specified property upon determining that probable cause supports the request. According to Rule 315, probable cause to search exists "when there is a reasonable belief that the . . . property, or evidence sought is located in the place . . . to be searched." M.R. Ev. 315(f)(2). A commander may base his determination of probable cause on oral statements communicated telephonically. Rule 315 does not specifically require that the requesting agent's telephonic statement be sworn; pursuant to general Army orders and protocol, soldiers are obliged–and therefore presumed– to tell the truth when speaking to a senior commissioned officer.

The telephone conversation between Colonel Lynde and Agent Cook was quite long because Colonel Lynde had a lot of questions he wanted answered before he would grant authorization. Neither Colonel Lynde nor Agent Cook tape-recorded the telephone call.

It is not entirely clear from Agent Cook's suppression hearing testimony exactly how he framed the issue to Colonel Lynde. Given the length of their conversation, given Colonel Lynde's exploration of the issue by asking many questions, and given Agent Cook's penchant to provide prolix, overinclusive answers (a trait easily discernible from the hearing transcript and all the more apparent in person), I find that everything Agent Cook said to the lawyers

[2] The government submitted the rule's text as Exh. 8, which I have attached to this report and recommendation for the reader's convenience.

and the court during the suppression hearing he also relayed in some fashion to Colonel Lynde during their conversation.

Agent Cook reported that Sergeant Lomax and his workers had found a collection of weapons parts from inside the pillow and the chair bag, and that none of them could be certain whether or not these parts were sufficient to assemble one or two complete weapons, or whether in fact there were more weapons parts hidden elsewhere in the MILVAN. At that time, they simply did not know one way or the other whether other weapon parts were cached in some soldier's personal locker. Based on his personal experience, Agent Cook expressed his reasonable belief that if more weapons pieces were to be found, then they would be found in the footlockers taken from that MILVAN. Because they did not know whether or not they had recovered a full firearm (or more likely, two full firearms), Agent Cook opined that it was logical to conduct a thorough search to make sure that there were not additional weapon pieces cached in the footlockers. In the absence of a name on the chair bag, it was not possible to narrow the area to be searched to the property of a particular soldier.[3]

In response to Agent Cook's oral report, Colonel Lynde specifically authorized the agents to search all closed containers found within this MILVAN, limiting their search to items related to weapons or other contraband.

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[3] In Agent Cook's experience, soldiers who smuggle contraband back in unmarked bags usually put that bag near their own marked gear. That said, by the time the agents began their search, all the personal gear had been removed from the MILVAN so that it was impossible to tell near which footlocker or duffle bag the chair bag had been placed originally.

After Agent Cook received authorization to search but before actually undertaking the search, Agent Cummings itemized the weapon parts recovered from the chair bag and pillow:

2 upper receivers
2 folding stocks
2 recoil mechanisms
1 bolt
1 retainer pin set and spring
1 muzzle brake
1 bolt
2 pipes

See Gov. Exh. 12 at 1.

Then, based on Colonel Lynde's finding of probable cause and authorization to search, the agents began breaking locks and opening footlockers. In Victor Melnichuk's footlockers they found AK-47 parts wrapped in electrical tape, along with other arguable contraband such as an M-9 bayonet, an M-4/M-16 flash suppressor and one round of .50 caliber ammunition. Even after finding these items, the agents continued to open and search every closed container that had been shipped in that MILVAN in order to ensure that no one else had secreted weapons parts.

The agents submitted the seized items for fingerprint analysis. Some of the parts, including parts found in the chair bag and pillow, had Melnichuk's fingerprints on them. Later, on May 14, 2005, civilians found items dumped in a pond that eventually were routed to Agent Cook. These items were weapons parts from an AK-47 whose serial numbers matched the pieces found in the chair bag, pillow, and Melnichuk's footlocker. When all the parts were assembled, they produced two functional fully automatic AK-47 assault rifles.

ANALYSIS

I. Probable Cause

> The touchstone of Fourth Amendment inquiry is reasonableness, a standard measured in light of the totality of the circumstances and determined by balancing the degree to which a challenged action intrudes on an individual's privacy and the degree to which the action promotes a legitimate government interest. The reasonableness requirement, and the totality of the circumstances inquiry, extends to the manner in which a search is conducted.

Green v. Butler, 420 F.3d 689, 694-95 (7th Cir. 2005).

A starting point for the reasonableness inquiry is to set to one side any concerns over the procedural differences between M.R. Ev. 315 and F.R. Crim. Pro. 41, which governs the issuance of search warrants by federal district courts. Although military procedures are "decidedly different" from those employed by federal courts in the civilian community, the standards of Rule 315 are grounded in the Fourth Amendment and therefore constitutionally reasonable when applied correctly. *United States v. Chapman*, 954 F.2d 1352, 1367 & 1368-71 (7th Cir. 1992). Because Rule 315 employs the same totality of circumstances test routinely used by this court to analyze challenged searches, *see id. at* 1372, we can move directly to the probable cause analysis.

The Supreme Court has declined to define "probable cause" precisely, noting that it is a commonsense, nontechnical concept that deals with the factual and practical considerations of everyday life on which reasonable and prudent people, not legal technicians,

act. *Ornelas v. United States*, 517 U.S. 690, 695 (1996). Despite the lack of a firm definition, the Supreme Court tells us that probable cause to search exists

> where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found.

Id. at 696, citations omitted. Probable cause is a fluid concept that derives its substantive content from the particular context in which the standard is being assessed. *Id.*, citations omitted.

"Probable cause requires only a probability or a substantial chance of criminal activity, not an actual showing of such activity." *United States v. Roth*, 201 F.3d 888, 893 (7th Cir. 2000), *quoting Illinois v. Gates*, 462 U.S. 213, 244 (1983); *see also United States v. Ramirez*, 112 F.3d 849, 851-52 (7th Cir. 1997)("all that is required for a lawful search is *probable* cause to believe that the search will turn up evidence or fruits of crime, not certainty that it will") (emphasis in original). Although people often use "probable" to mean "more likely than not," probable cause does not require a showing that an event is more than 50% likely. *See United States v. Garcia,* 179 F.3d 265, 269 (5th Cir. 1999);*see also United States v. Funches*, 327 F.3d 582, 586 (7th Cir. 2003) (probable cause determination does not require resolution of conflicting evidence that preponderance of evidence standard requires); *Edmond v. Goldsmith*, 183 F.3d 659, 669 (7th Cir. 1999)(Easterbrook, J., dissenting) (probable cause exists somewhere below the 50% threshold).

In making probable cause determinations, law enforcement agents are entitled to draw reasonable inferences from the facts before them, based on their training and experience. *Funches*, 327 F.3d at 586. As the court noted in *Funches*, a drug case,

> Such expertise is highly significant because . . . officers assigned to specialized areas of enforcement become familiar with the methods of those engaged in particular types of criminal activity, giving them an ability to detect unlawful activity where laymen might not.

Id.

Similarly (although not identically), one reason to trust the reasonableness of a military search authorized by a commander pursuant to M.R. EV. 315 is because a military commander often has contextual information apart from that presented by the requesting agent that informs his decision. *See Chapman*, 954 F.2d at 1370.

Against this backdrop, Melnichuk challenges the existence of probable cause to search his footlockers. Particularly in his reply brief, Melnichuk points to Agent Cook's diffuse and sometimes apparently self-contradictory testimony about what he told Colonel Lynde and argues that this abstruse account obviates any claim of probable cause to search. Melnichuk also challenges Agent Cook's experience in these matters, claiming that the small number of MILVAN weapon searches in which he has participated does not establish that he had a basis to offer opinions on these matters.[4]

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[4] Melnichuk suggests that this court ignore Agent Cook's experience with previous MILVAN searches because they must have violated the Fourth Amendment just like the instant search did, and therefore are subject to the exclusionary rule. Such speculative bootstrapping might make for a lively pub debate, but it is too chimeral to merit serious consideration in this report. Further, even if this court were to assume that Agent Cook gained his experience during questionable searches, Melnichuk has no standing to object to Agent Cook's alleged violation of someone else's Fourth Amendment rights. *See Rakas v. Illinois*, 439 U.S. 128, 134 (1978).

It is indisputable that Agent Cook divagates when he talks, but having heard and seen him testify and having considered his testimony as a whole, I have concluded that Agent Cook's garrulousness caused him–likely *compelled* him–to convey all salient facts to Colonel Lynde, that there was no genuine self-contradiction in his report, and that he had sufficient expertise to offer opinions upon which Colonel Lynde justifiably could rely. Further, although Colonel Lynde was not the full-time Post Commander, he could draw upon his own experience as a military attorney who served as Colonel Knolls' advisor. Agent Cook's report of weapons smuggling in a MILVAN used by a redeployed battalion embraced topics with which any senior officer at Ft. McCoy would have been familiar.

Whether all this buildup culminates in probable cause would be a closer question in the absence of Agent Cummings' part-count after Colonel Lynde authorized the search but before the agents executed it. Agent Cook testified that at the time he sought and obtained search authorization, he did not know whether the weapon parts already recovered were enough to make complete weapons. Agent Cummings' list reveals that parts were missing: although there were two receivers, two stocks, two recoil mechanisms two pipes and two bolts (although he listed them separately), there was only one retainer pin set and one muzzle brake. Where were the others? Probably in some soldier's footlocker or duffel. This sufficed to render the search constitutionally reasonable even though the agents learned this information after Colonel Lynde already had authorized the search.[5]

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[5] Given Agent Cook's admitted lack of memory regarding many events commemorated in the written reports, I draw no adverse factual inferences from his failure to testify about this point during the suppression hearing. Further, Fourth Amendment reasonableness is determined objectively, *see United States v. Garcia*, 376 F.3d 648, 651 (7th Cir. 2004), and at least one agent knew before the search began that the pieces recovered so far would make only 1¾ firearms.

Apart from this, Melnichuk (and the government) do not directly ask or answer this question: even if the parts recovered from the chair bag *had* assembled into two complete AK-47s, how likely was it that the smuggler(s) had secreted a third, fourth or fifth AK-47 more securely elsewhere in the MILVAN? In Agent Cook's experience, 40 to 50% of the time that he found loose contraband in a MILVAN, he also found contraband cached in a closed container. These odds are favorable enough to meet the less-than-a-preponderance probable cause threshold.[6]

Finally, although it is not necessary to the analysis, there is a nagging reasonableness concern that does not fit neatly into one of the standard analytical categories. *Cf. New Jersey v. T.L.O.,* 469 U.S. 325, 341 (1985)("We have in a number of cases recognized the legality of searches and seizures based on suspicions that, although 'reasonable,' do not rise to the level of probable cause"). What Backus and SFC Lomax found in that chair bag were pieces of the most notorious assault rifle on the planet, a handheld military weapon with extraordinary killing power.[7] Even if this had been a closer call on probable cause, would it actually have been unreasonable for a military commander to have erred on the side of

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[6] Melnichuk's analogy to civilian searches, *see* dkt. 24 at 6, does not adequately capture the circumstances of Agent Cook's experience with MILVANs. This is a closer proffer: in a particular veteran police officer's experience during 50 to 100 previous searches of buses crossing an international border with all passenger suitcases sealed in a luggage compartment, 40 to 50% of the times when this agent finds a kilo of cocaine on the floor of the compartment, he subsequently finds at least one more kilo of cocaine in a suitcase within 20 feet of that first kilo.

[7] For a dark overview, listen to Nicholas Cage's ode to the AK-47 in *Lord of War*.

assuring that there were no other machine gun parts in that MILVAN? As the Court noted in *T.L.O.*,

> Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard.

469 U.S. at 341.

Perhaps this is where the military culture and protocols discussed in *United States v. Chapman, supra*, come into play, but probably not: with constitutional rights, sometimes uncomfortable tradeoffs must be made between public safety and personal liberty, so that what may be routine and necessary on a military base does not translate successfully into a civilian criminal prosecution. This is a variation of Melnichuk's argument in his opening brief, dkt. 24, at 7 (which I dismissed *supra* at n.4 as speculative on the facts presented here). The concern here doesn't fit under the traditional public safety exception because there was no temporal exigency, and this exception is used to excuse the failure to obtain a warrant. *See, e.g., United States v. Salava*, 978 F.2d 320, 324-25 (7th Cir. 1992). Here, Agent Cook obtained the military equivalent of a warrant and I have found that probable cause supported that warrant. The question, which need not be answered in this case, is whether arms-smuggling by soldiers presents a public safety threat significant enough to support adoption of a standard allowing searches of closed containers belonging to redeployed troops on something less than probable cause.

In any event, authorizing the search of the MILVAN was the publicly responsible decision for Colonel Lynde to make to under any circumstance, even if it might have resulted in the suppression of evidence.

II. The Good Faith Doctrine

Even if there were no probable cause to search the soldiers' lockers, suppression is unwarranted. In *United States v. Leon,* 468 U.S. 897, 926 (1984) the Court held that:

> In a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall.
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> * * *
>
> We have . . . concluded that the preference for warrants is most appropriately effectuated by according great deference to a magistrate's determination. Deference to the magistrate, however, is not boundless.

Having so stated, the Court then held that

> In the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause.

Id. at 926.

Such determinations must be made on a case-by-case basis with suppression ordered "only in those unusual cases in which exclusion will further the purpose of the exclusionary rule." 468 U.S. at 918. When the officer's reliance on the warrant is objectively reasonable, excluding the evidence will not further the ends of the exclusionary rule because it is

> painfully apparent that the officer is acting as a reasonable officer would and should act in similar circumstances. . . . This is particularly true . . . when an officer acting with objective good faith has obtained a search warrant from a judge . . . and acted within its scope. . . . Once the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law. Penalizing the officer for the [court's] error rather than his own cannot logically contribute to the deterrence of Fourth Amendment violations.

Id. at 920-21, internal quotations omitted.

The Court noted the types of circumstances that would tend to show a lack of objective good faith reliance on a warrant, including reliance on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or reliance on a warrant so facially deficient that the officer could not reasonably presume it to be valid. *Id*. at 923. The Court observed that "when officers have acted pursuant to a warrant, the prosecution should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time." *Id*. at 924. *See also Arizona v. Evans*, 514 U.S. 1, 11-12 (1995)(reaffirming the Supreme Court's reluctance to suppress evidence obtained in good faith but in violation of a defendant's Fourth Amendment rights).

As noted in the previous section, there was no actual warrant and there was no judicial official, but for Fourth Amendment reasonableness purposes, we may analogize the military's procedures to civilian procedures. Melnichuk tersely contends otherwise but does not support his pro-forma protest with any case law or argument. The record establishes that

Agent Cook and Colonel Lynde carefully followed the procedures of Rule 315, and that Colonel Lynde did not abandon his role as a neutral decisionmaker.

With similar terseness in his opening brief, Melnichuk contends that the evidence available to Agent Cook was so scanty that he could not reasonably have relied on Colonel Lynde's authorization to search. As a corollary to this, Melnichuk argues that Agent Cook's previous successes in MILVAN searches should be stricken from consideration because they were unreasonable. But, as previously noted, this is mere speculation that Melnichuk does not even have standing to raise. Melnichuk does a much more thorough job parsing the evidence in his reply brief, but to no avail. Melnichuk's main two points are first, that Agent Cook's impenetrable testimony makes it unclear what he actually had found in past MILVAN searches, and second, these past searches were unconstitutional because they were based on hunches and suspicions, not probable cause.

Dealing with the second point first, Melnichuk has no standing to complain about previous searches, and his complaints are mere speculation in any event. Dealing with the first point, there is no denying that Agent Cook's answers to many questions at the suppression hearing were unclear. Even so, a discernible and consistent theme emerges: In his long service with Army CID, Agent Cook has searched scores of MILVANs (including a handful for firearms) and 40 to 50% of the time that he finds loose contraband, he then finds additional contraband in that MILVAN in a closed container. Having relayed this information to Colonel Lynde, it was reasonable for Agent Cook then to rely on the resulting

authorization to search even if such authorization later were to be deemed incorrect. A search success ratio approaching 50/50 in a relatively large group of analogous searches hardly can be considered a bare bones evidentiary proffer. Under the circumstances, there really was nothing else Agent Cook could have, or should have, done.

III. Inevitable Discovery

The government argues that if this court were to suppress the evidence seized during the MILVAN search, then pursuant to the inevitable discovery doctrine the government still should be allowed to use at trial the weapons parts recovered from the chair bag, pillow and pond, as well as the fingerprint analysis linking Melnichuk to some of these items. *See, e.g., United States v. Cherry*, 436 F.3d 769, 772 (7th Cir. 2006) (government must prove by a preponderance that agents would have found the challenged evidence through lawful means). Melnichuk disagrees in part, contending that Army CID never would have sought finger print exemplars from him had it not found weapons parts in his footlockers.

If the court rejects my recommendation to deny suppression, then the government loses on this point as well: the record is not sufficiently developed on the fingerprint dispute for this court to deem the fingerprint evidence admissible. I infer that Army CID obtained a set of prints from Melnichuk after the search, and that the Army did not have Melnichuk's prints on file before this. If these inferences are correct, and if CID had not been able to link Melnichuk to the loose weapons parts, then in what fashion would this investigation have

proceeded? Several logical paths suggest themselves, but none is in evidence, so the government has not met its burden of persuasion.

Therefore, unless the court sees the need (and is willing) to supplement the record on this point (which 28 U.S.C. § 636(b)(1)(B) allows), there is no basis to conclude that the government inevitably would have matched Melnichuk's fingerprints to the prints lifted from the weapons parts recovered from the chair bag and the pond.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendant Victor Melnichuk's motion to suppress evidence.

Entered this 2nd day of March, 2006.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

March 2, 2006

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Re: United States v. Victor N. Melnichuk
Case No. 05-CR-175-C

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before March 13, 2006, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by March 13, 2006, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable Barbara B. Crabb, District Judge