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**FOR PUBLICATION**

**IN THE SUPERIOR COURT  
FOR THE  
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

COMMONWEALTH OF THE NORTHERN )  
MARIANA ISLANDS, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
HYUN SU PARK, )  
 )  
Defendant. )  
\_\_\_\_\_ )

**CRIMINAL CASE NO. 01-0373B**

**ORDER GRANTING MOTION FOR  
DECLARATION OF FORFEITURE  
AND ORDER ISSUING A BENCH  
WARRANT**

This matter came before the Court on April 16, 2004 at 9:00 A.M. on the Commonwealth’s *Motion for Declaration of Forfeiture*. Defendant, Hyun Su Park (“Mr. Park”), opposes the motion. The Commonwealth was represented by Assistant Attorney General Justin Wolloz. Park, who was not present at the hearing, was represented by Public Defender Masood Karimipour.

**BACKGROUND**

On August 20, 2001, an arrest warrant was issued and Mr. Park was taken into custody that same day. On August 21, 2001, Mr. Park was charged with theft in a two-count Information and bail was set at \$5,000. At the bail hearing on August 21, 2001, a Bail Order was filled out for Mr. Park showing \$5,000 as the amount of bail, and setting forth the terms and conditions of release. One such term stated that Mr. Park was to “return to court when required to do so.” *See Bail Order* of August 21, 2001. Mr. Park’s next court appearance, for arraignment, was set for September 10, 2001. Mr. Park signed the Bail Order acknowledging the terms and conditions which were set forth. Bail was posted for Mr. Park on August 24, 2001. Mr. Park failed to report for his September 10, 2001 arraignment hearing (see Order, September 10, 2001) and a bench warrant was issued by the Superior Court for failure to appear. *See Bench Warrant*, September 10, 2001.



1           A bail bond is a contract between the government and the defendant and his surety, the  
2 forfeiture of which results in the surety becoming the government’s debtor. *United States v.*  
3 *Plechner*, 577 F.2d 596, 598 (9th Cir. 1978) The language of the bond contract is strictly construed  
4 in accordance with the terms contained therein. *United States v. Marquez*, 564 F.2d 379, 380 (10th  
5 Cir. 1977) “If there is a breach of condition of a bond, the court *shall* declare a forfeiture of the bail.”  
6 Com. R. Crim. P. 46(e)(1) (emphasis added). The word “shall” in the language of the rule makes  
7 bond forfeiture mandatory under the rule for breach of condition. Probable cause to believe a  
8 defendant breached a condition of probation is sufficient to warrant forfeiture of the bond. *United*  
9 *States v. Quintana*, 525 F. Supp. 917, 919 (D. Colo. 1981) (applying FED. R. CRIM. P. 46(f)(1), the  
10 counterpart of Com. R. Crim. P. 46(e)).

11           The matter pending before this Court is a breach of a condition of the bond. The record  
12 clearly states that Mr. Park was to appear before the Court on September 10, 2001, and just as  
13 clearly, the record reflects that Mr. Park failed to appear. *See Bench Warrant* (September 10, 2001).  
14 Therefore, by the terms of Rule 46(e)(1), forfeiture is mandatory. However, prior to the entry of  
15 default “[t]he court may direct that a forfeiture be set aside, upon such conditions as the court may  
16 impose, if it appears that justice does not require the enforcement of the forfeiture.” Com. R. Crim.  
17 P. 46(e)(2)

18           **A.     Notice**

19           Mr. Park first asks this Court to consider denying forfeiture of bail on the grounds that he  
20 was not given proper notice. The Court rejects this argument. In the first instance, Mr. Park was  
21 put on notice to appear before the Court in the Bail Order dated August 21, 2001. The Order, which  
22 was signed by Mr. Park, stated the date and time of his next appearance. This Court notes that “a  
23 defendant who is released on bail has a general obligation to keep in touch with his attorney and the  
24 court, as well as being present at the court proceedings against him.” *United States v. Lujan*, 589  
25 F. 2d 436, 438 (9th Cir. 1978).

1           The Commonwealth asserts that it has put forth a good faith effort to locate Mr. Park.<sup>1</sup> The  
2 Commonwealth should not, and does not, have to prove actual notice to the defendant since “in  
3 many cases, such as the present where the defendant remains a fugitive, it would place an extremely  
4 difficult burden on the government.” *Id.* On the facts of the present case, the Court is convinced that  
5 the notice given to Mr. Park was reasonable.

6           **B. Jury Trial**

7           Secondly, Mr. Park moves this Court for a civil “jury trial to determine whether or not he  
8 breached the condition of his bond as alleged by the government’s motion.” Defendant’s *Brief*  
9 *Regarding Forfeiture* (“Brief”). The “decision whether to set aside or remit a forfeiture rests within  
10 the sound discretion of the [] court and will be reversed only if the court acted arbitrarily or  
11 capriciously.” *United States v. Gutierrez*, 771 F.2d. 1001, 1003 (7th Cir. 1985). The Court is within  
12 its discretion to decide whether Mr. Park has violated the terms and conditions of his bail agreement.  
13 Using the preponderance of the evidence standard as a guide, the Court is convinced that Mr. Park  
14 has violated his bail conditions and denies the request for jury trial.

15           **C. Evidentiary Hearing**

16           Finally, Mr. Park requests that, in the event the Court denies the previous motions, he be  
17 granted an evidentiary hearing on the forfeiture motion. Mr. Park argues that “the government’s  
18 motion disregards the question of set-aside and provides no reasons why justice requires that the  
19 Court enter judgment on the forfeiture.” Brief. Mr. Park goes on further to assert “the burden  
20 should be on the government to demonstrate why justice requires enforcement.” *Id.*

21           The Court does not agree. A court’s decision on a surety’s request for a hearing on a  
22 forfeiture motion is discretionary. *Gutierrez*, 771 F.2d at 1003; *United States v. Roher*, 706 F.2d  
23 725, 727 (5th Cir. 1983). Furthermore, in a forfeiture proceeding, the burden is on the *defendant*  
24 to provide the court with a satisfactory explanation for his nonappearance. The defendant must also  
25 be prepared to argue how the interests of justice will be served by remission, and conversely how

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27           <sup>1</sup> The Commonwealth has provided the Court with conflicting information regarding Park’s status. Park,  
28 through his counsel, has alleged that he has been incarcerated, and for that reason unavailable. The Court requests that  
defense counsel substantiate information before offering it to Court.

1 forfeiture will render injustice. Notwithstanding Mr. Park's burden, the Court does not find that this  
2 case warrants an evidentiary hearing.

3 The Court notes that in using its discretion, a summary hearing was held on April 16, 2004.  
4 Both the Commonwealth and the defense presented arguments on the issue of whether a more  
5 extensive evidentiary hearing should be held. *See supra*. The Court found defense counsel's  
6 arguments and suggestions to be without merit.

### 7 CONCLUSION

8 "In most cases, the setting aside of a forfeiture or its remission while the defendant is still  
9 at large would undermine the purpose of bail bonds, i.e., to insure the presence of the accused."  
10 *Gutierrez*, 771 F.2d at 1004; *United States v. Velez*, 693 F.2d 1081, 1084 n.7 (11th Cir. 1982);  
11 *United States v. Skipper*, 633 F.2d 1177, 1180 (5th Cir. 1981). In the instant case, Mr. Park was on  
12 notice to return for his September 10, 2001 arraignment and did not appear. The defense has not  
13 offered one valid reason for his nonappearance and the prosecution has adequately met its burden  
14 of proof. Accordingly, this Court finds no reason why forfeiture should not be granted.

15 Accordingly, **IT IS ORDERED:**

- 16 1. The Commonwealth's Motion for Forfeiture is **GRANTED**
- 17 2. Defendant's Motion to Dismiss is **DENIED**
- 18 3. Defendant's Motion for Jury Trial is **DENIED**
- 19 4. Defendant's Motion for further evidentiary hearing is **DENIED**
- 20 5. The Bench Warrant issued on September 10, 2001 is still in effect and shall be  
21 executed at any time. The Bail amount shall remain at \$5,000 cash.

22  
23 **ENTERED** this 30th day of April 2004.

24  
25 /s/  
26 KENNETH L. GOVENDO, Associate Judge