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3	FOR PUBLICATION	
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6	IN THE SUPERIOR COURT FOR THE	
7	COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS	
8	COMMONWEALTH OF THE NORTHERN) MARIANA ISLANDS,)	CRIMINAL CASE NO. 01-0373B
9	Plaintiff,)	ORDER GRANTING MOTION FOR DECLARATION OF FORFEITURE AND ORDER ISSUING A BENCH
10	v.)	
11	HYUN SU PARK,	WARRANT
12	Defendant.)	
13		
14	This matter came before the Court on April 16, 2004 at 9:00 A.M. on the Commonwealth's	
15	Motion for Declaration of Forfeiture. Defendant, Hyun Su Park ("Mr. Park"), opposes the motion	
16	The Commonwealth was represented by Assistant Attorney General Justin Wolloz. Park, who was	
17	not present at the hearing, was represented by Public Defender Masood Karimipour.	
18	BACKGROUND	
19	On August 20, 2001, an arrest warrant was issued and Mr. Park was taken into custody that	
20	same day. On August 21, 2001, Mr. Park was charged with theft in a two-count Information and	
21	bail was set at \$5,000. At the bail hearing on August 21, 2001, a Bail Order was filled out for Mr.	
22	Park showing \$5,000 as the amount of bail, and setting forth the terms and conditions of release.	
23	One such term stated that Mr. Park was to "return to court when required to do so." See Bail Order	
24	of August 21, 2001. Mr. Park's next court appearance, for arraignment, was set for September 10	
25	2001. Mr. Park signed the Bail Order acknowledging the terms and conditions which were set forth.	
26	Bail was posted for Mr. Park on August 24, 2001. Mr. Park failed to report for his September 10,	
27	2001 arraignment hearing (see Order, September 10, 2001) and a bench warrant was issued by the	
28	Superior Court for failure to appear. See Bench Warrant, September 10, 2001.	

The Commonwealth filed a *Motion for Declaration of Forfeiture* on July 11, 2003, pursuant to Rule 46(e) of the Commonwealth Rules of Criminal Procedure. It cited Mr. Park's failure to appear for his arraignment on September 10, 2001, as breach of a condition of his bail. On August 14, 2003, the Commonwealth submitted a *Report to the Court on Defendant's Status* ("Report"). Although the Labor & Immigration Identification System (LIIDS) has indicated that Mr. Park was on island, the Commonwealth had "reasonable information and belief presented by (former) defense counsel (that) the defendant was believed to have fled the CNMI sometime in 2001 and has not returned." *See* Report, August 15, 2003. Mr. Park's former counsel, Joe Bermudes, echoed that belief at a status conference on August 27, 2003.

Mr. Park's new counsel now states that Mr. Park is "currently incarcerated" and contends that forfeiture of bail "would be unconstitutional" because neither Mr. Park nor counsel has received a copy of the Commonwealth's motion for forfeiture and as such, he has not been given proper notice. See *Brief Regarding Forfeiture*, January 2, 2004. In his brief, Mr. Park asks the Court: 1) to dismiss the motion to forfeit bond on the grounds that Mr. Park has not been given proper notice; 2) for a jury trial on the question of whether Mr. Park has violated his bail bond; and 3) in the event that the Court denies the first two motions, Mr. Park seeks a full evidentiary hearing.

On April 16, 2004, a summary hearing was held to establish whether a full-fledged evidentiary hearing should be granted. Defense counsel was asked by the Court if it had any evidence to present as to Mr. Park's alleged incarceration and whereabouts and why the bail should not be forfeited. Defense counsel argued that more notice should have been given Mr. Park, that the money posted might not be his and that notice should be given in a newspaper in regards to the \$5,000 bail money. Defense counsel also argued that the prosecution had not fulfilled its burden of proof and should subpoena witnesses from the Department of Immigration and the Attorney General's Office to testify that Mr. Park is not in the CNMI and that the hospital and hotels should be queried as to his whereabouts.

After reviewing the briefs submitted, hearing the arguments of counsels and having fully considered the matters presented, the Court enters the following decision.

DISCUSSION

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

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

A. Notice

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

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

B. Jury Trial

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

C. Evidentiary Hearing

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

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

¹ The Commonwealth has provided the Court with conflicting information regarding Park's status. Park, 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** 2. 17 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/ KENNETH L. GOVENDO, Associate Judge 26 27

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