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18 UNITED STATES DISTRICT COURT
19 CENTRAL DISTRICT OF CALIFORNIA

20 IN THE MATTER OF THE
21 EXTRADITION OF

No. CV 04-3886-ABC (PLA)

22 KYUNG JOON KIM, aka Kyungjoon Kim,
23 Kyung June Kim, Christopher Kim, or
24 Chris Kim

25 **OPINION AND ORDER Re: REQUEST FOR
26 DETENTION AND MOTION FOR BAIL**

27 Having considered all the briefing, evidence and oral argument presented to the Court, the
28 Court concludes as follows:

INTRODUCTION

29 Kyung Joon Kim ("Kim") is the subject of an arrest warrant originally issued on August 22,
30 2002, by a court in the Republic of Korea ("Korea"), based on pending criminal charges against
31 Kim for violating the Act on the Increased Punishment . . . of Specified Financial Crimes
32 (Embezzlement), Counterfeit or Alteration of Private Documents, Uttering Forged Private
33 Documents, and violations of the Securities and Exchange Act. Kim was arrested in this District
34 on May 27, 2004, pursuant to an extradition arrest warrant.

35 Kim made his first appearance on May 28, 2004, before Magistrate Judge Fernando M.
36 Olguin. Judge Olguin ordered that a detention hearing be held on June 7, 2004. On June 1,

1 2004, the United States, on behalf of the Republic of Korea, filed the formal request for Kim's
2 extradition. At that time, the matter was assigned to this Court for all purposes.

3 On June 7, 2004, the Court held a hearing on the government's request for detention. The
4 Court ordered further evidence and briefing, and continued the matter to June 29, 2004. The
5 hearing on the government's request for detention, and Kim's motion for bail, was held on that
6 date.

7 8 STATEMENT OF FACTS

9 Kim is a 38 year-old business man who, prior to being taken into custody, lived in Beverly
10 Hills, California. Kim came to the United States in 1975, is a United States citizen and has been
11 residing in Southern California without interruption since late 2001. Kim has an M.B.A. from the
12 Wharton School, and has been active in the local business community. He is married and has
13 a child, and has no criminal record.

14 On August 22, 2002, approximately 8 months after Kim arrived back in the United States
15 from a stay in Korea, an arrest warrant was issued in Korea that charged Kim with various crimes.
16 Specifically, Kim is charged with, among other things, counterfeiting passports, embezzling
17 company money, and manipulating stock prices. (Statement of Confirmation, ¶¶ 3.2.3-3.2.4).

18 19 DISCUSSION

20 I. STANDARD OF REVIEW.

21 "The primary concern in an international extradition matter is to deliver the extraditee to the
22 requesting nation." In re Extradition of Nacif-Borge, 829 F.Supp. 1210, 1213 (D. Nev. 1993).
23 Because of the "foreign relations interest of the United States in successfully returning persons
24 subject to criminal prosecution to the requesting country," it is well-settled that there is "a
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1 presumption against bail" in foreign extradition cases. Id. at 1214; Salerno v. United States, 878
2 F.2d 317 (9th Cir. 1989).¹

3 Due to these important foreign policy interests, courts have uniformly recognized that in
4 extradition matters, only "special circumstances" will justify release on bail. Salerno, 878 F.2d at
5 317. "The list of potential 'special circumstances' is not limited to those previously recognized in
6 published decisions . . . [and] the decision to grant bail and, consequently, the determination of
7 what constitutes a 'special circumstance,' is left to the sound discretion of the trial judge." In re
8 Extradition of Gonzales, 52 F.Supp.2d 725, 736 (W.D. La. 1999) (granting bail where court found
9 detainees had a reasonable likelihood of succeeding on the merits in the extradition proceeding
10 because of unreliability of eyewitnesses to the alleged crime); In re Extradition of Mainero, 950
11 F.Supp. 290, 294 (S.D. Cal. 1996) (what constitutes a special circumstance is adduced on a "case
12 by case basis").

13 "Special circumstances must be extraordinary and not factors applicable to all defendants
14 facing extradition." Mainero, 950 F.Supp. at 294. "However, there need not be one overriding
15 circumstance justifying an extraditee's release on bail. Rather, the cumulation of several factors
16 can constitute special circumstances that justify bail in extradition proceedings." In re Extradition
17 of Morales, 906 F.Supp. 1368, 1373 (S.D. Cal. 1995); Nacif-Borge, 829 F.Supp. at 1216 (citing
18 United States v. Taitz, 130 F.R.D. 442 (S.D. Cal. 1990)); see In re Extradition of Molnar, 182
19 F.Supp.2d 684, 689 (N.D. Ill. 2002) (bail was warranted even though individual factors did not
20 constitute special circumstances).

21 "The person facing the extradition hearing has the burden of establishing 'special
22 circumstances.'" Morales, 906 F.Supp. at 1373. Once special circumstances are shown, the
23 person must also demonstrate that he or she will not flee or pose a danger to any other person
24 or to the community. Id.; Nacif-Borge, 829 F.Supp. at 1215.

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27 ¹ The Court agrees with the government's assessment that United States v. Parretti, 122 F.3d
28 758 (9th Cir. 1997), withdrawn by 143 F.3d 508 (9th Cir. 1998), which Kim argues invalidated the
presumption against bail, is not the law in this Circuit.

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1 II. SPECIAL CIRCUMSTANCES.

2 Kim has put forth multiple grounds that he contends constitute special circumstances. The
3 Court concludes that they do not warrant bail, either individually or collectively.

4 **A. Availability of Bail in Extraditing Country**

5 The court notes a split of authority as to whether the availability of bail in the foreign country
6 constitutes a special circumstance. Compare Nacif-Borge, 829 F.Supp. at 1220-1221 and
7 Morales, 906 F.Supp. at 1374, with In re Extradition of Siegmund, 887 F.Supp. 1383, 1386-87 (D.
8 Nev. 1995), and Matter of Extradition of Rouvier, 839 F.Supp. 537, 540-41 (N.D. Ill. 1993). The
9 court concludes that the better reasoned cases are those that rejected the availability of bail as
10 a special circumstance. The court is persuaded that the availability of bail is not, in itself, a
11 special circumstance because in many, if not most, instances, bail would be available in the
12 extraditing country for the charged offense. See Rouvier, 839 F.Supp. at 540-41 (“most
13 extraditees would be entitled to bail [and] [t]his directly contradicts Supreme Court and federal
14 appellate court decisions which conclude bail is the exception rather than the rule”). Granting an
15 extraditee bail in the United States because the underlying offense isailable in the foreign
16 country is unworkable and would undermine the special circumstances requirement. As one court
17 put it:

18 [C]ourts [would be forced] to make searching reviews of foreign laws to
19 determine whether bail is appropriate for a given defendant in a given
20 country for a given offense. That would be an undesirable practice: it might
21 well be unworkable, and, if applied widely, it could eviscerate, at least with
22 respect to requesting countries whose domestic practice, like our own,
23 strongly favors bail, the doctrine set out by the Supreme Court that bail is the
24 exception, not the rule, in international extradition cases.

22 Siegmund, 887 F.Supp. at 1386-87.

23 In this case, bail has not actually been set by the court in Korea, nor has it been shown that
24 bail would be a certainty. Although Kim has presented declarations of an attorney and a retired
25 judge in Korea that Kim would be “eligible for discretionary bail” if he were arrested on these
26 charges in Korea, the decision to release a defendant on bail is still “within the full discretion of
27 the court.” Declaration of Kap-You Kim (attached to Opposition), at ¶ 6; Declaration of Bong Soo
28 Kang (attached to Supplemental Opposition). On the other hand, the government has submitted

1 a declaration² from a prosecutor with the Korean Ministry of Justice indicating that Kim would not
2 be entitled to bail in South Korea in light of the "nature and gravity" of the charges. (See
3 declaration of John E. Lee, Ex. A.) Thus, it is not at all clear that Kim would be released on bail
4 in Korea in light of the current charges. Instead, this Court would need to conduct a "searching
5 review[]" of the laws of Korea to determine whether the charged offenses would be bailable in
6 Korea as applied to Kim, an unworkable and impractical task. The Court's determination in this
7 regard is consistent with the United States' position in Siegmund that Nacif-Borge -- the case that
8 established the availability of bail as a special circumstance -- "stands for the proposition that a
9 special circumstance exists only if the extraditee in fact *would* be admitted to bail in the requesting
10 country." 887 F.Supp. at 1386 (italics in original) (the Nacif-Borge court noted that the extraditee
11 there had presented evidence that he "would receive bail" in the requesting country. Id. at 1221
12 (emphasis added)). Here, while Kim has convinced the Court that bail may be available to him
13 in Korea, it is unclear if in fact he would be admitted to bail. Accordingly, as "the concern in an
14 international extradition case is not to mirror the internal bail practices of the requesting country,
15 but, rather, to deliver the extraditee to that country" (Siegmund, 887 F.Supp. at 1387), the Court
16 does not find that the evidence presented on this issue amounts to a special circumstance in this
17 case.

18 B. Medical Condition

19 The Ninth Circuit in Salerno gave three examples of conditions that could warrant a finding
20 of special circumstances justifying bail in an extradition case. One of them is a serious
21 deterioration of health while incarcerated. Id. at 317. In United States v. Taitz, 130 F.R.D. 442
22 (S.D. Cal. 1990), the extraditee suffered from allergic reactions to corn and corn sweeteners,
23 which were common substances in the food at the facility where he was being held. He also had
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25 ² Kim's evidentiary objections to the government's declarations concerning the availability
26 of bail in Korea are **denied**. Federal Rule of Evidence 1101(d)(3) provides that the Rules of
27 Evidence do not apply in "[p]roceedings for extradition or . . . proceedings with respect to release
28 on bail." The Court reasons that they also do not apply when determining release on bail in an
extradition matter. The Court has considered the objections, however, in determining the weight
to be given to these declarations.

1 an allergic reaction to the soap that was used to wash the clothes at the facility. These were
2 found to be special circumstances which, in combination with other factors, warranted bail. On
3 the other hand, the extraditee in Nacif-Borge had only one kidney, which required that he
4 maintain a special diet consisting of fruit, vegetables, and low fat. He also had to avoid certain
5 foods, and required daily exercise and sufficient liquids to maintain good health. As his condition
6 was not debilitating and was easily controlled, the court concluded that he had not "provided
7 sufficient detail of his condition or needs to convince this court by clear and convincing evidence
8 that the severity of his condition comprises a special circumstance warranting release on bail."
9 Nacif-Borge, at 1217.³ Finally, the extraditee in Rouvier, 839 F.Supp. at 542 n.9, who was
10 diagnosed with a "potentially serious" heart condition and had been treated by a physician with
11 prescription medications, did not show that his condition was serious enough to qualify as a
12 special circumstance, as it had not deteriorated and could be controlled with medications that
13 were being provided in custody.

14 Here, Kim has presented evidence of a back problem⁴ that he asserts could worsen if he
15 is incarcerated during these extradition proceedings. He presented the declaration of a general
16 practitioner who has treated Kim since 2001 for lower back pain. Kim has been prescribed the
17 anti-inflammatory Vioxx, and has been examined by orthopedic physicians. His pain allegedly is
18 increasing in severity, and will worsen "[w]ithout proper treatment and absent daily administration
19 of his medication." There is no evidence, however, that Kim consulted with an orthopedic
20 surgeon, or scheduled any surgery prior to his arrest. (See Declaration of Dr. George C. In,
21 attached to Supplemental Opposition.)

22 Dr. Ilan Tamir, an orthopaedic surgeon, recently examined Kim, and advised that he may
23 need epidural steroid injections, and "possible surgical intervention," but a repeat MRI study
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25 ³ The Nacif-Borge court noted that documented medical evidence from a physician would be
26 required for an adequate showing. Id.

27 ⁴ Kim had originally also offered evidence of an eye condition that he contended was a basis
28 for granting bail. By stipulation dated June 29, 2004, the parties withdrew this issue and the
supporting documentation from the Court's consideration.

1 should first be performed. Kim requires anti-inflammatory medications. (Declaration of Ilan Tamir,
2 Ex. B.) Dr. Tamir testified at the hearing that Kim's 2001 MRI revealed a disc protrusion that he
3 would classify as "moderately severe" or "severe." A further MRI is needed to determine what
4 type of treatment would be appropriate for Kim at this time. He believes that the new MRI would
5 most likely show the protrusion to be the same as or worse than it was in 2001 (a 60% chance),
6 and would also show additional pathology. After the MRI is performed, Dr. Tamir would refer Kim
7 to a neurologist for electrodiagnostic testing to determine which nerve roots are inflamed.
8 Assuming Kim's protrusion is the same as or worse than it was in 2001, he would then decide the
9 next course of treatment, which could be conservative, or involve epidural injections, or surgery.
10 He would not be critical of any surgeon who operated on Kim based on the 2001 MRI. The anti-
11 inflammatory medications known as Cox-II inhibitors have less side effects than Motrin.
12 Piroxicam, which is also an anti-inflammatory, is used for arthritis. It is not a "normal" medicine
13 for disc problems.

14 Kim was also examined by Dr. S. Andrew Schwartz, an orthopedist, on June 16, 2004. Dr.
15 Schwartz noted that Kim has suffered from low back and leg pain since 2001, that an MRI had
16 been taken in 2001, and he has been treated with Vioxx. Although Kim indicated that surgery was
17 recommended, none had been performed up to the time of his arrest. The MRI shows a large
18 disc protrusion at the L4-5 level, with degenerative disc disease. Dr. Schwartz believed that Kim
19 showed "an extreme effort to mislead" Dr. Schwartz during his examination. While this physician's
20 tone in his declaration appears to be anything but impartial, he does recommend a repeat MRI
21 to determine if the bulge has improved, and that Kim receive 50 milligrams of Vioxx daily, a firm
22 mattress on a plywood board, and a chair with a back. He does not recommend surgery. (Reply,
23 Schwartz Declaration, Ex. 2.) Dr. Schwartz testified at the hearing that he is 95% certain that a
24 repeat MRI would show that the disc protrusion revealed on the 2001 MRI is smaller today, as this
25 condition recedes over time. He recommends that an MRI be taken, and that Kim use a hard
26 mattress and a supportive chair, i.e., a chair with a back. He believes that Vioxx is an excellent
27 anti-inflammatory, and that it and the other Cox II inhibitors are better than Motrin and ibuprofen,
28 as they are better tolerated. If the MRI reveals a disc protrusion, he would recommend an

1 exercise program and a more powerful anti-inflammatory. If that did not work, he may try an
2 epidural injection. Based on the reports he has seen, he does not believe that Kim is a surgical
3 candidate. He sees no need for a neurological examination to be performed, as Kim's reflexes
4 were normal and he has no atrophy. He does not believe that Piroxicam and Acetaminophen
5 would "attack" Kim's problem, and would only provide temporary relief. Motrin causes stomach
6 problems, however.

7 Dr. Alexander Sinavsky, employed by the Bureau of Prisons, asserts that Kim's medical
8 problems can be managed at the Metropolitan Detention Center or any other Bureau of Prisons
9 facility. (Reply, Sinavsky Declaration, ¶ 8.) He testified at the hearing that Kim was given Motrin
10 for his back pain upon arrival at the MDC. His medications were later switched to Piroxicam and
11 Acetaminophen, an anti-inflammatory and a pain reliever. Dr. Sinavsky needs approval to
12 dispense Vioxx. On the one previous occasion he requested approval for Vioxx for an inmate,
13 approval was denied. He has not sought approval of Vioxx for Kim, and believes that other anti-
14 inflammatories are just as effective as Vioxx.

15 Dr. Sinavsky agrees that Kim needs an MRI, but wants to have x-rays of Kim's lower back
16 taken first. Those x-rays have been ordered, and will be taken in approximately ten days. He also
17 agrees that a neurological examination should be performed. A month may pass before Kim is
18 seen by a neurologist, but he does not believe there is any danger in the delay. If, as a result of
19 further testing, it is determined that Kim requires back surgery, the approval of the United States
20 Marshal service would be needed, as Kim is in their custody. Dr. Sinavsky also agrees with a
21 recommendation for a mattress, but foam mattresses are not available at the Metropolitan
22 Detention Center because of the risk of fire. A hard board for under Kim's mattress can be
23 arranged.

24 The Court concludes that Kim has not presented sufficient evidence that the severity of his
25 medical condition is a special circumstance warranting bail. No physician is recommending that
26 back surgery be performed at this time. Indeed, Kim had sought back treatment for nearly three
27 years but postponed surgery until recently, without giving a specific reason for the severe increase
28 in pain or the sudden need for surgery. No follow-up to the 2001 MRI was taken before Kim's

1 arrest to determine his current condition. This delay suggests that surgery is not urgent. The
2 evidence has established that even if surgery is ultimately required, it may be available to him in
3 custody. The physicians concur that Kim requires daily anti-inflammatory medication, but none
4 have stated that Vioxx is the only acceptable medication. Anti-inflammatory medication is
5 available in custody and is currently being provided to Kim (first Motrin, then Piroxicam).⁵ Further,
6 Dr. Sinavsky has indicated that x-rays of Kim's back will take place within ten days, at which time
7 he will be referred for an MRI and to a neurosurgeon. No physician has indicated that more is
8 required at this time. Thus, the Court finds that Kim's back condition can be addressed
9 adequately while incarcerated, and his ailments do not require immediate attention, unavailable
10 in custody, to prevent the deterioration of his health. Kim's condition is not a "health emergency"
11 which can only be addressed while on bail (Matter of Extradition of Hamilton-Byrne, 831 F. Supp.
12 287, 291 (S.D.N.Y. 1993)). While Kim's health problems "may, indeed, be serious," they are not
13 a special circumstance, as they are not unique and can be handled in custody. Id.⁶

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19 ⁵ The evidence is that anti-inflammatories such as Motrin are as effective as the Cox-II
20 inhibitors, and that the advantage of the Cox-II inhibitors is that they are not as hard on the
21 stomach. The Court does not believe that Kim's stomach distress from appropriate medication
is sufficient to constitute a special circumstance.

22 ⁶ The Court has reviewed the other claims of "special circumstances" set forth by Kim, and
23 the cases he cites in support. The Court does not believe that the purely economic nature of the
24 alleged offenses, the fact that the complexity of the charged offenses could result in a lengthy
25 extradition process, the need for Kim to defend himself in pending civil litigation, the low risk of
26 potential foreign policy "embarrassment" from flight, Kim's lack of prior record, or community
27 support, constitute special circumstances -- either singly or in combination -- warranting Kim's
28 release on bail. These circumstances are common to many potential extraditees. Kim has not
shown that he will be incapable of defending himself from civil litigation while in custody, or that
the number of charges involved in this matter or the anticipated length of time these proceedings
may take makes this case atypical. He has not shown -- nor can he at this stage -- that the case
has been subject to unusual (or any) delay. While these factors would be considered in
determining whether Kim poses a flight risk, the Court does not reach this issue as special
circumstances are not present.

1 CONCLUSION

2 "The bail decision in an extradition case serves the same purpose as does the bail decision
3 in a criminal case. In both, the judge is deciding whether a person will be imprisoned, or will enjoy
4 the blessings of liberty, while awaiting a further judicial proceeding." Matter of Requested
5 Extradition of Kirby, 106 F.3d 855, 860 (9th Cir. 1996), as amended (Feb. 27, 1997). "While there
6 is a presumption against bail in foreign extradition cases, a court may grant bail where special
7 circumstances exist and where the person facing extradition poses no risk of flight or danger."
8 Morales, 906 F.Supp. at 1377. Here, the Court finds that there are no special circumstances at
9 this time justifying Kim's release on bail. As such, the Court need not address the issue of flight
10 risk, since without special circumstances bail is not available. See, e.g., Taitz, 130 F.R.D. at 444.

11 Accordingly, the government's Request for Detention is **granted**, and Kim's Motion for Bail
12 is **denied**. Kim is ordered detained during the pendency of these extradition proceedings. The
13 Court will, however, consistent with the evidence presented by the parties, consider issuing an
14 order to the Metropolitan Detention Center that Kim receive a hard mattress and a board to be
15 placed under the mattress, and a chair with a back; that he be scheduled for an MRI and
16 neurological examination once x-rays of his back are completed; and that he receive appropriate
17 anti-inflammatory medication. The parties shall present a joint proposed order for the Court's
18 consideration in this regard **no later than July 6, 2004**.

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21 DATED: July 1 , 2004

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23 _____
24 PAUL L. ABRAMS
25 UNITED STATES MAGISTRATE JUDGE
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