

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
HONORABLE MARCIA S. KRIEGER**

Criminal Action No. 05-cr-00545-MSK

UNITED STATES OF AMERICA

Plaintiff,

v.

JOSEPH P. NACCHIO,

Defendant.

**DEFENDANT'S NOTICE OF INTENT TO WAIVE HIS RIGHT TO BE PRESENT AT
RESENTENCING**

Defendant Joseph P. Nacchio respectfully submits notice of his intent to waive his right to be present at any resentencing hearings, including the hearing set for April 21 and 22, and June 24. Nacchio states as follows:¹

1. Consistent with this Court's statements at the February 18, 2010 scheduling hearing, Federal Rule of Criminal Procedure 43 permits Nacchio to knowingly and voluntarily waive his right to be physically present at his sentencing. Transcript of Scheduling Hearing, February 18, 2010, at 17 (noting that Nacchio has "a constitutional right to be present for both [sentencing hearings] or to waive his appearance if he chooses"). Federal Rule of Criminal Procedure 43(a) states in relevant part that "[u]nless this rule ... provides otherwise, the

¹ The undersigned has spoken directly with Mr. Nacchio about the subject matter of this motion.

defendant must be present at ... sentencing.” Subsection (c) of the Rule, titled Waiving Continued Presence, provides that “[a] defendant who was initially present at trial, ... waives the right to be present under the following circumstances: in a noncapital case, when the defendant is voluntarily absent during sentencing.” Fed. R. Crim. P. 43(c)(1)(B). Under the Rule, the effect of the waiver is that sentencing “may proceed to completion ... during the defendant’s absence.” Fed. R. Crim. P. 43(c)(2).

2. The Tenth Circuit (consistent with other courts) has held that Rule 43(c) authorizes a defendant to knowingly and voluntarily waive his right to be present at sentencing. *See United States v. Jurado-Lara*, 287 Fed.Appx. 704 (10th Cir. 2008) (“The rights afforded by Rule 43 and due process ... can be waived with the express or implied consent of the accused.”); *United States v. Arrous*, 320 F.3d 355, 360 (2d Cir. 2003) (“The current rule arises out of respect for a *defendant’s* right to be present at a sentencing proceeding, to allocute, and to respond to the definitive decision of the sentencing judge.”) (emphasis added); *United States v. Alvarez-Pineda*, 258 F.3d 1230, 1241 n. 8 (10th Cir. 2001) (citing then Fed. R. Crim. P. 43(b), which is now Fed. R. Crim. P. 43(c) for the proposition that “[a] defendant in a non-capital case can waive this right” and “a disruptive defendant can forfeit this right”); *United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001) (voluntariness requires knowing and understanding the waiver); *United States v. Sealand*, 91 F.3d 160, 1996 WL 408368, at *15 (10th Cir. 1996) (defendant “knowingly and voluntarily waived his right to be present during the sentencing hearing”); *United States v. Edmonson*, 962 F.2d 1535, 1543 (10th Cir. 1992) (noting that “the Court is of the opinion that a Defendant’s presence at trial may be waived” under Rule 43); *United States v. Ammar*, 919 F.2d 13, 17 (3rd Cir. 1990) (district court could properly resentence defendant in

absentia because “[t]hat decision is up to the petitioner.”) (internal quotation marks omitted); *Larson v. Tansy*, 911 F.2d 392, 396-97 (10th Cir. 1990); *United States v. Fontanez*, 878 F.2d 33, 35 (2d Cir. 1989) (holding that “[d]espite the constitutional and statutory dimensions of a defendant’s right to be present, the right may be waived”). Accordingly, Nacchio hereby knowingly and voluntarily waives his right to be present at any court proceedings conducted in connection with resentencing.

3. To the extent that the government objects to Nacchio’s knowing and voluntary waiver of his right to be present, this Court should overrule any such objection. Tenth Circuit case law plainly permits Nacchio to waive his rights. Moreover, some courts have suggested that the government lacks standing to object to a defendant’s knowing and voluntary waiver of the right to be present at sentencing. *See United States v. Saenz*, 429 F. Supp. 2d 1109 (N.D. Iowa 2006) (holding that the right to be present during criminal proceedings, pursuant to the Due Process Clause and Federal Rule of Criminal Procedure 43, belongs to the defendant, expressing skepticism and doubt that “the government even has standing to complain that the sentence must be imposed with the defendant personally present,” and noting that the “government’s motion [wa]s, at the very least, mean spirited, and at worst, ... motivated by a punitive intent,” and denying the motion); *United States v. Nielson*, No. CR03-4078-MWB, 2006 WL 1192936 *4 (N.D. Iowa May 4, 2006) (noting that “it is plain that the right [to be present under Rule 43] belongs to the defendant” and stating that “[t]he court will not impose upon the defendant the onerous and unnecessary burdens of returning to this forum for the imposition of sentence in open court, when he has expressly waived his presence at the imposition of sentence”).

Additionally, the Department of Justice has not objected to a defendant's waiver of his right to be present at sentencing in other resentencings where the defendant is incarcerated outside the jurisdiction. *See e.g., United States v. Rigas*, No. 02 Cr. 1236, 2008 WL 2544654 *1 (S.D.N.Y June 24, 2008) (noting that John and Timothy Rigas both waived the right to be physically present and the government posed no objection). There is no reason to treat Nacchio differently. Accordingly, this Court should not permit any objection from the government.

4. Nacchio understands that by waiving his physical appearance, he agrees that this Court may impose a sentence upon him as if he were physically present for resentencing.

5. Nacchio understands that, by waiving his physical appearance at resentencing, he is waiving certain rights that he has pursuant to Rule 43 of the Federal Rules of Criminal Procedure that relate to his physical appearance at sentencing, including his right to have the Court address him in person, to appear physically to speak or present any information to the Court in mitigation of the sentence, or to have the Court advise him in person of his right to appeal.

6. Nacchio agrees that he will not file a direct appeal based on, nor litigate under Title 28, United States Code, Section 2255, Section 2241, and/or litigate in any other manner, any claim that relates to his physical non-appearance at any court proceedings conducted in connection with resentencing.

7. Mr. Nacchio is willing to execute whatever document the Court deems appropriate to reflect his knowing and voluntary waiver.

Respectfully submitted this 3rd day of March, 2010.

s/ Sean M. Berkowitz
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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of March 2010, I electronically filed the foregoing **DEFENDANT'S NOTICE OF INTENT TO HIS WAIVE RIGHT TO BE PRESENT AT RESENTENCING** with the Clerk of the Court using the Court's CM/ECF system, which will send notification of the filing to the following:

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