

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO**

Criminal Case No. 05-cr-00545-EWN

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. JOSEPH P. NACCHIO,

Defendant.

**REPLY BY THE UNITED STATES IN SUPPORT OF MOTION
FOR ISSUANCE OF SUBPOENA *DUCES TECUM* PURSUANT TO
RULE 17(c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE**

The United States of America, through its undersigned counsel, submits this reply in support of its request for a subpoena *duces tecum* to be issued to Harvey H. Hammer, M.D., P.A., for the complete medical file of David Nacchio, and states as follows:

As an initial matter, there is no merit in Defendant's suggestion that the United States was delinquent in filing this motion. *See* Docket No. 448 at 3. This can be seen from the following chronology:

- On July 12, 2007, defense counsel notified government counsel that they were considering submitting to Probation, by July 17, 2007, a supplemental statement by Dr. Hammer elaborating on issues relating to David Nacchio. Defense counsel indicated that if they decided to make this submission, the United States would be entitled to the records relating to David Nacchio's medical condition, and defense counsel would provide them to the United States *without* a subpoena.
- On the afternoon of July 18, 2007, defense counsel submitted to Probation a statement by Dr. Hammer regarding David Nacchio.
- On the morning of July 19, 2007, government counsel called defense counsel, seeking the records at issue. Defense counsel informed government counsel that they would not be providing the records to government counsel, as they did not

anticipate offering Dr. Hammer as a witness.

- On July 20, 2007, government counsel filed the instant motion.

This sequence of events shows that government counsel reasonably expected to receive the records last week, and promptly filed this motion upon being informed by defense counsel that contrary to their prior assurance, they would not be providing the records.

In any event, Defendant states that he has “no objection to producing these records to the Court to determine if it is appropriate for the government to have the records,” so long as the Court restricts the United States from making public reference to the contents of the records without prior Court permission. *See* Docket No. 448 at 4. Here, it is “appropriate for the government to have the records.” The records at issue are clearly relevant to Dr. Hammer’s opinions, which are offered in support of Defendant’s motion for downward departure, and the records at issue cannot be obtained without a subpoena. Defendant should not be able to use Dr. Hammer’s written statement in support of his arguments, while simultaneously denying the United States access to all of the underlying records based on the promise that Dr. Hammer is not expected to personally testify. This is an impermissible attempt to use Dr. Hammer as both a sword and a shield. Under these circumstances, the United States is entitled to a Rule 17 subpoena. *See United States v. Winner*, 641 F.2d 825, 833 (10th Cir. 1981) (ruling that Rule 17 subpoenas are “available for post-trial motions and sentencing” and should be granted if a movant shows that the materials sought are evidentiary and relevant, that the materials cannot otherwise be procured, that the movant needs to inspect the materials in advance in order to properly prepare for the post-trial motions or sentencing, and that the motion is made in good faith).

WHEREFORE, for the reasons stated above, the United States respectfully requests that the Court issue the subpoena *duces tecum* for the complete medical file of David Nacchio maintained by Dr. Hammer.

Respectfully submitted this 23rd day of July, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of July, 2007, I e-mailed this document to the following e-mail addresses:

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