

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

Criminal Action No. 05-cr-00545-EWN

UNITED STATES OF AMERICA

Plaintiff,

v.

JOSEPH P. NACCHIO,

Defendant.

**RESPONSE BY JOSEPH P. NACCHIO TO THE MOTION BY THE UNITED
STATES FOR ISSUANCE OF SUBPOENA *DUCES TECUM* PURSUANT TO
RULE 17(c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE**

Mr. Nacchio, by and through his undersigned counsel, files this response to the government's Motion for Issuance of a Subpoena *Duces Tecum* Pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure ("Motion for 17(c) Subpoena").

BACKGROUND

On July 6, 2007, Mr. Nacchio filed a Motion for a Downward Departure based, in part, on the extraordinary circumstances concerning the effect that a lengthy period of incarceration will have on the health of David Nacchio ("David"). The details of the motion focused on the potentially catastrophic

effect that Mr. Nacchio's imposed separation from his son David would have on David.

The issue was first raised with the Department of Probation prior to completion of the initial Presentence Report, which included a letter submitted by David's psychiatrist, Dr. Harvey Hammer, describing David's condition and the critical importance of emotional support from his father. This issue was addressed in the Report, which was submitted to the parties on or about June 22, 2007, and a copy of Dr. Hammer's letter was attached as an exhibit. Due to the extreme sensitivity of the issue, the details in support of Mr. Nacchio's Downward Departure Motion were submitted privately to the U.S. Probation Department, the government, and the Court on July 6, 2007, in response to the Presentence Report.

Mr. Nacchio has consistently stressed the sensitive nature of this issue, and the need to keep as much as possible about David's condition and treatment confidential. In a second letter submitted on July 18, 2007, Dr. Hammer stated that David was becoming increasingly disturbed by the amount of public information about his condition and treatment. Dr. Hammer has expressed grave concerns about the possible impact of a public debate concerning, or public dissemination about David. Dr. Hammer, however, offered to make himself available to provide testimony if the Court requested.

In response to the July 16, 2007 letter of Dr. Hammer, the government inquired of us whether Mr. Nacchio intended to call Dr. Hammer as a witness

during the sentencing proceeding. The government was informed that Mr. Nacchio had no intention of calling Dr. Hammer unless the Court indicated a need for additional information, in which case Dr. Hammer would be made available. The government was advised that if Dr. Hammer was called as a witness then Dr. Hammer's records of his treatment of David would be provided to the government. We further advised the government that there was no reason to produce the records if Dr. Hammer was not called as a witness.¹

At approximately 5:30 p.m. (MDT) on Friday, July 20, 2007, a week prior to the sentencing proceeding, and at least three weeks after the government was made aware of the likelihood of a downward departure motion and receipt of Dr. Hammer's report, the government filed a Motion For Issuance of a Subpoena *Duces Tecum* Pursuant to Rule 17(c) requesting that Dr. Hammer's records be produced by 9:00 a.m. Wednesday, July 25, 2007. The government offered no explanation about whether it intends to use the documents and if so, how it intends to use them in the event that Dr. Hammer is not called as a witness. Mr. Nacchio does not intend to offer the records as evidence.

It does not appear that the government has a right to the records if Dr. Hammer does not testify.²

¹ During the trial Mr. Nacchio and the government agreed to a stipulation that provided minimal information to the jury concerning David, as a means of keeping the actual records private. This stipulation accommodated the government's interest in avoiding a sympathetic reaction from the jury and the interests of David's parents in keeping as much of the detail as private as possible.

² Fed. R. Crim. P. 17(c) may not be used as a discovery device. See e.g., *Bowman Dairy v. United States*, 341 U.S. 214, 220 (1951); *United States v. Hart*, 826 F. Supp. 380, 382 (D. Colo. 1993). The purpose of Rule 17(c) is to expedite complex trials by providing a time and place

MR. NACCHIO'S PROPOSAL

However, Mr. Nacchio has no objection to producing these records to the Court to determine if it is appropriate for the government to have the records. If the Court determines that that they should be produced to the government, we respectfully request, in order to best protect David Nacchio's health and welfare, the Court issue an Order restricting the government from filing any public motion or making any public reference regarding the records or their contents without permission of the Court, and require the government to initially raise privately any issue identified from a review of the records.

Respectfully submitted this 23rd day of July, 2007.

s/Herbert J. Stern
Herbert J. Stern
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before trial for the production and inspection of specific materials that the parties intend to offer into evidence. *United States v. Nixon*, 418 U.S. 683, 698-00 (1974).

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of July 2007, a true and correct copy of the foregoing **RESPONSE BY JOSEPH P. NACCHIO TO THE MOTION BY THE UNITED STATES FOR ISSUANCE OF SUBPOENA *DUCES TECUM* PURSUANT TO RULE 17(c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE** was served on the following via email and the USDC CM/ECF system:

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s/Mark Rufolo
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