UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

-against-

16-Cr-683 (KBF)

RALPH GROEN,

Defendant.
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DEFENDANT'S SENTENCING SUBMISSION

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January 20, 2017

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Hon. Katherine B. Forrest
United States District Judge
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: United States v. Ralph Groen, 16-Cr-683 (KBF)

Dear Judge Forrest:

On October 14, 2016, pursuant to a plea agreement with the government, Ralph Groen was arraigned and pled guilty to a one count information, charging him with obstructing an official proceeding in violation of 18 U.S.C. § 1512(c)(2). He is scheduled to be sentenced by Your Honor on February 3, 2017. The parties agree that Mr. Groen's total offense level under the sentencing guidelines is 14, that his criminal history category is I because he has no criminal record, and that his corresponding advisory range of imprisonment is therefore 15-21 months. *See* PSR at ¶2. The Probation Department, on the other hand, assesses Mr. Groen an additional two-point enhancement under USSG § 2J1.2(b)(3)(B), thereby raising Mr. Groen's advisory guideline range to 21-27 months. *See* PSR at ¶¶25, 70. For the reasons that follow, including Mr. Groen's spotless background, the circumstances of the offense, and Mr. Groen's lack of obstructive motivation, I urge the Court to impose a non-custodial sentence. Such a sentence would be sufficient, but not greater than necessary to satisfy the aims of sentencing set forth in 18 U.S.C. § 3553(a).

Objection to the Probation Department's Guideline Calculation

In the Presentence Report, the Probation Department adds a two-point enhancement, pursuant to USSG § 2J1.2(b)(3)(B), on the theory that the offense involved the selection of an "essential or especially probative record, document, or tangible object." This enhancement was specifically not included in the plea agreement between the parties, and Mr. Groen objects to its addition. As the Court is aware, the

government has the burden of establishing a factual basis for any sentencing enhancements. The government has no intention of seeking this enhancement, or proving its application at a hearing. The facts as set forth in the offense conduct section of the report do not, without more, establish that the offense involved "essential" or "*especially* probative" records or documents. Indeed, the Probation Department's sole rationale for including this enhancement is that the records at issue were ones "specifically requested during the course of litigation." *See* PSR at p. 20. The Probation Department has offered no support for the notion that records are "essential or especially probative" simply by virtue of having been including in broad discovery requests. Nor does the government make such a claim. Accordingly, the Court should reject the Probation Department's assessment and determine that Mr. Groen's final offense level is 14, with a corresponding advisory guideline range of imprisonment of 15-21 months.

Personal Background

Ralph Groen, now fifty years old, was born in the Netherlands, although his parents soon thereafter emigrated to Canada in search of better educational and employment opportunities. Mr. Groen and his two younger sisters were raised in a solidly working class and religious household in Winnipeg. His father, who supported the family through his job as a meter reader at a utility company, was an elder and deacon at their church. His mother was a homemaker, and made sure that the three children and the household were well taken care of. The family had little excess money, but Mr. Groen's parents ensured that the children did not lack for basic necessities. Education and religious values were important, and all three children, unlike their parents, were college educated.

Mr. Groen attended college in Canada, majoring in computer engineering. After receiving his Bachelor's degree, he began working in computer-related fields. By 1994, he had obtained a position in the United States as a regional director of information technology at Laidlaw Education Services, a national school bus company. He remained at Laidlaw for over ten years. During that time, Mr. Groen married and divorced, and then found his life partner, Lisa Ryan, with whom he has remained in an intimate relationship since 1997. *See* Letter from Lisa Ryan, Exhibit A.

In 2005, Lisa Ryan found employment with Cisco Systems in Raleigh, North Carolina, and the couple moved to Raleigh and bought a house. Around the same time, Mr. Groen was offered a lucrative position at Coach USA as director of Coach's IT department. Coach USA's headquarters were in Paramus, NJ, however, and Mr. Groen therefore commuted between Raleigh and New Jersey every week for almost ten years.

Mr. Groen remained at Coach USA until 2014, when he was terminated because of the circumstances underlying this case. After several months of unemployment, Mr.

Groen was able to secure a position at Alphanumeric Systems, Inc., in Raleigh as a project manager. Although his salary is half of what he earned at Coach USA, Mr. Groen and Ms. Ryan are happy that he no longer needs to commute so far to work. They are deeply concerned, however, that he will lose this position due to the conviction in this case.

Mr. Groen and Ms. Ryan have no children of their own. However, by all accounts he is a doting uncle to his nieces. His longtime friend, Sue Hailstone, in her letter to the Court, also notes that he is wonderfully "patient and loving in dealing with children, my own introverted child included." *See* Letter from Sue Hailstone, Exhibit B; *see also* Letter from Mr. Groen's parents; Exhibit C. In addition, Mr. Groen is universally described as having integrity, a strong sense of family commitment, and being extremely responsible, helpful and respectful. According to Lisa Ryan, Mr. Groen is "a good citizen and valuable member of the community. He supports local charitable causes and small businesses. He's a good neighbor, and generously shares his time and skills to help others when asked." *See* Exhibit A. It is fair to say that Ralph Groen has lived a successful, productive life, without blemishes, and is considered to be a loving, kind, and generous member of his community. I therefore urge the Court to consider Mr. Groen's background and character in determining a just and fair sentence.

Circumstances of the Offense

As noted, Ralph Groen became the director of Information Technology (IT) at Coach USA in 2005. In that capacity, he managed the IT Department staff and oversaw IT projects. As IT director, Mr. Groen was concerned with big picture technology issues affecting the company, including how the company would handle any potential system-wide crash, or some kind of catastrophic systems failure. In case of a crash, employees had to be able to retrieve their emails, documents, and files. The procedure in place from the time Mr. Groen arrived at Coach USA, and continued during his tenure, was a daily backup system, wherein the entire system was backed up nightly, and stored on removable tapes. Those tapes were then sent out to an outside storage facility and kept there for 30 days. After 30 days, the tapes were retrieved and re-used. This kind of backup system – which was consistent with industry practice – ensured that at most, a day's worth of files, emails, and documents would be lost in case of a crash. Since it was extraordinarily unlikely that the system would remain offline for more than one day, let alone one month, following a crash, daily backups maintained for 30 days were more than sufficient to ensure the preservation of files important to the company.

As IT director, Mr. Groen was concerned about the preservation of company databases, financial files, and saved emails. Although it was conceivable that an employee might accidentally erase an email and then ask to have it restored more than 30 days later, such an occurrence was not a priority for Mr. Groen, or the company

more generally. The daily backup provided all the security necessary in order to restore the system following a crash.

In addition to the daily backups, Coach USA also conducted sporadic monthly backups – wherein the entire system was copied once a month onto a tape that was then placed in storage indefinitely. This system, which was not always practiced consistently, had been in place well before Mr. Groen arrived at Coach USA, and essentially duplicated the daily backups. The mechanics of these backup systems, and how they were maintained, did not play a prominent role in Mr. Groen's weekly or monthly responsibilities. His staff was in charge of backups, and Mr. Groen simply wanted to be assured that no more than a day would be lost in case of a catastrophic systems failure.

In 2009, Coach USA was investigated by the Justice Department and New York State for a potential civil anti-trust violation. Accordingly, outside counsel for Coach USA issued a litigation hold or preservation notice to Coach USA's management, including Mr. Groen. The notice directed company personnel to preserve, and not to destroy, any communications, documents, or electronic data relevant to the investigation. As IT director, Mr. Groen played no role whatsoever in the Twin America merger, and thus had no connection or interest in the anti-trust investigation. Although he, like everyone else in senior management, signed the preservation notice, he did not consider it to have special significance to him or the IT department. In his interpretation, the notice required personnel not to delete emails or files. He did not interpret the notice to require the IT department to maintain backups indefinitely. As a result, the system in place at that time continued without interruption. Daily backups were done, the tapes were kept for 30 days and then recycled. Moreover, in early 2010, following a review of his department's backup procedures, Mr. Groen directed his staff to stop doing monthly backups. He considered them to be unnecessarily duplicative and a waste of resources. Unbeknownst to him, his staff continued to make sporadic monthly backups.

Years passed. In late 2012 and early 2013, Mr. Groen was questioned by outside counsel with respect to a bankruptcy proceeding related to Coach America, a subsidiary, and assisted in providing a response to interrogatories by the New York Attorney General concerning Coach USA's backup practices. In both instances, Mr. Groen stated that only daily backups were conducted, with tapes being recycled every 30 days. He did not mention monthly backups – primarily because he no longer considered them to be relevant. They had never been of concern to him because they seemed to be an antiquated and unnecessarily duplicative system, and, in any event, he believed that the practice had been discontinued three years earlier. In May 2013, Mr. Groen gave the same answer to Covington & Burling in response to a DOJ discovery request – information Covington lawyers then conveyed to the Justice Department.

Then, at the end of May and beginning of June 2013, Ralph Groen made a series of devastating decisions that he regrets to this day and that ultimately caused him to stand before this Court for sentencing. At that time, Mr. Groen was talking with a couple members of his staff about the Twin America litigation and the company's responsibility to provide certain information to the government. One of the staffers told Mr. Groen that the information might be available on the monthly backup tapes, which, he said, were still being maintained in storage. Mr. Groen was utterly dumbfounded. He had no idea that the monthly backups were still being made, and he immediately thought about the fact that for the past several months, he had told various legal parties that only daily copies were made and no monthly backups existed. As one of the staffers, who later cooperated with the Justice Department's investigation, confirmed, Mr. Groen became extremely angry and told his staffers that he had been providing the wrong information to legal inquiries, and that he, and the entire IT department would be "held in contempt."

Ralph Groen faced a choice. He could own up to his mistake, contact outside counsel, explain his error, and the reasons behind it, seek to withdraw whatever documents may have been filed in Bankruptcy Court and try to remedy the situation. That choice would cause him significant personal embarrassment and humiliation. Admitting to such a mistake might be seen as weakness and cause him to lose respect within the IT Department. Perhaps it would have ramifications for his job.

A second choice was to try to cover up the mistake. To simply make his answers to the lawyers and the Bankruptcy judge "true." To Ralph Groen, the daily vs. monthly backup issue did not seem particularly important. He was not steeped in the intricacies of the litigation. He was not a lawyer and familiar with the legal significance of "obstruction." The choice to cover up at the time seemed to be the easier decision – one that would cause the least personal embarrassment.

Unfortunately, Mr. Groen made the wrong decision. Even worse, although not uncommon, he then doubled down on his initial cover-up, embarking on a series of actions – doctoring documents, failing to be truthful in a deposition, providing false information to outside counsel – that led to the instant case. However, Mr. Groen's subsequent conduct all stemmed from, and was to a certain degree the natural consequence, of the original decision not to admit a mistake, but to try to cover up that mistake. That decision constituted a massive error of judgment, a significant deviation of his moral compass, long honed since his days of attending his father's church. And ultimately this decision resulted in the arrest and criminal conviction – along with all the attendant consequences – of an otherwise law-abiding, hard-working, and responsible man who never imagined that he would find himself before a judge, awaiting sentencing.

Mr. Groen, of course, now painfully understands the absolute wrong-headedness of his conduct. Worst of all, he appreciates now how utterly pointless it all was. He

recognizes that it is, in fact, highly unlikely that he would have suffered any negative consequences if he had simply owned up to his mistake and tried to remedy it. Yet by covering up his mistake, he caused the Justice Department to suspect – not unreasonably – that he must have been instructed by his superiors, who, unlike him, actually had a stake in the anti-trust litigation, to bury the backup tapes. For more than a year the Justice Department investigated the IT department, trying to determine whether the obstruction, the intentional removal of backup tapes, was directly related to an effort to hide what was contained on those tapes. The suspicion made sense. Why would the director of IT ask staff to destroy monthly backup tapes, doctor documents to suggest that no such tapes existed, and to lie in a deposition about the existence of these tapes – unless there was a concerted effort to try to hide damaging information? No other explanation really made sense.

But the Justice Department, despite its best efforts, never found a shred of evidence of a conspiracy. And it did not find one because no such conspiracy existed. Yes, there was a cover-up, but not the kind the Justice Department was expecting to find. It was one individual's cover-up of his own meaningless mistake, an effort to avoid personal embarrassment that spiraled drastically out of control. If Mr. Groen had, indeed, been part of a conspiracy to hide important evidence from the Justice Department with the hope of improving Coach USA's litigation position, this would be a very different case. This would be a case with real obstructive motive, a case for which the obstruction statute was precisely designed. Here, in contrast, Ralph Groen's criminal intent was his knowledge that by covering up and being untruthful he was acting unlawfully – but it was not done with the intent to obstruct the litigation, even if it may have had that effect.[1]

18 U.S.C. § 3553(a)

In light of these circumstances, the question for the Court is whether Mr. Groen must go to prison for his error in judgment. It was unquestionably a serious error in judgment. But he has also already suffered significant ramifications as a result of this mistake. He lost his profitable and respected position at Coach USA. He will almost certainly lose his current job (which pays half of the salary he received at Coach USA), and is unlikely to find decent employment in his chosen profession in the future. He will be supervised and his movement will be restricted. He will experience the embarrassment and humiliation of being a federal felon, knowing that anyone who

[1] As set forth the in the PSR, a significant number of monthly backup tapes were eventually recovered because one of Mr. Groen's staffers hid them in his attic rather than destroy them. *See* PSR at¶ 15. Those tapes were later thoroughly analyzed by all of the parties. In late 2015, the Justice Department and New York State settled their lawsuit with Coach USA. *See USA v. Twin America LLC*, 12-Cv-8989 (ALC). As the Court is aware, unlike private parties, the Justice Department generally settles anti-trust lawsuits only when such a settlement is deemed to be in the public interest.

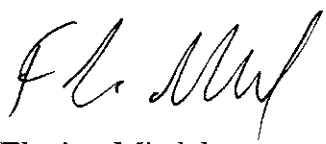
Googles his name will know more about him than he has been willing to admit to anyone but his closest confidantes. These are all grave consequences for a fifty-year-old man, with a spotless record, whose motivation was not to hide important evidence, disrupt a significant legal case, or assist his superiors in covering up some anti-trust related misconduct, but who, instead, committed these acts with the misguided intent to save himself from embarrassment.

The government, of course, is concerned with deterrence. People in positions similar to Mr. Groen's must be deterred from obstructing an investigation, regardless of their motivation. To be sure, even if the motivation is purely personal, obstruction has far reaching consequences, and the Justice Department's decision to prosecute even under these relatively mild circumstances served an important purpose of deterrence. However, general deterrence is achieved by the fact that Mr. Groen was arrested and prosecuted. The message has been sent that it is not ok to cover up, mislead, lie in the context of a legal proceeding; that you will be prosecuted. Mr. Groen understands that purpose. Indeed, when he was told that he would be prosecuted, despite his obvious disappointment, he immediately accepted responsibility, voluntarily surrendered and agreed to plead guilty at the first court date, and did not cause the Justice Department or the Court to expend valuable resources.

But in this case, prison is not required to drive this point home. Mr. Groen appreciates his misconduct better than anyone. And he accepts the collateral consequences described above. The Court must fashion a fair and just sentence that not only takes into account the deterrent effect of a sentence, but also the circumstances of the offense and the defendant's background and character. Ralph Groen is a good man who made a mistake. His misconduct here clearly represented an aberration in an otherwise productive and impeccable life. As Lisa Ryan says, "as my life partner and best friend, Ralph is the positive constant in my life. He is a better person than I am . . . I'm very lucky to know him and grateful for our time together." Exhibit A.

Accordingly, I sincerely urge the Court to consider all of the facts in this case – in particular the non-obstructive motivation behind Mr. Groen's conduct – and to determine that a non-custodial sentence is fair and just.

Respectfully submitted,



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