IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

RALPH GROEN,
Defendant.

Criminal No.: 1:16-cr-00683-KBF

The Honorable Katherine B. Forrest

THE UNITED STATES' SENTENCING SUBMISSION

DATED: January 27, 2017

Respectfully submitted,

s/ Rebecca D. Ryan
Rebecca D. Ryan, Trial Attorney
Samson O. Asiyanbi, Trial Attorney
U.S. Department of Justice, Antitrust Division
450 Fifth Street, NW, Suite 11300
Washington, DC 20530
Tel.: (202) 598-8005
Fax: (202) 305-4766

U.S. Department of Justice

Antitrust Division

Liberty Square Building

450 5th Street, N.W.
Washington, DC 20001

January 27, 2017

Honorable Katherine B. Forrest
United States District Judge
Southern District of New York
Daniel Patrick Moynihan Courthouse
500 Pearl Street
New York, New York 10007

Re: *United States v. Ralph Groen*, 1:16-cr-00683-KBF

Dear Judge Forrest:

The United States respectfully submits this letter in support of a United States Sentencing Guidelines ("Guidelines") minimum sentence of 15 months for Ralph Groen on February 3, 2017, for one count of obstructing an official proceeding in violation of 18 U.S.C. § 1512(c)(2). The parties agree that based on the advisory Guidelines, Defendant Groen's total offense level is 14 (15 to 21 months imprisonment and a fine range of $4,000 to $40,000). The U.S. Probation Department applied an additional enhancement under U.S.S.G. § 2J1.2(b)(3)(B), increasing the total offense level to 16 (21-27 months, $5,000 - $50,000). *See* Groen PSR ¶ 25, 77. However, for the reasons stated herein, the Government respectfully recommends that Your Honor impose a sentence within the Guidelines range at a total offense level of 14 for Defendant Groen.

I. Variance with the U.S. Probation Department's Guidelines Calculations

The U.S. Probation Department assessed Defendant Groen's conduct at a total offense level of 16 by including a two-point enhancement under U.S.S.G. § 2J1.2(b)(3)(B). That section provides a two-point enhancement, "[i]f the offense . . . (B) involved the selection of any essential or especially probative record, document, or tangible object, to destroy or alter." The parties agree that this enhancement has not been fully developed by the facts on the record and there is insufficient evidence to show by a preponderance of the evidence that the enhancement applies. The U.S. Probation Department accurately stated that the records Defendant Groen attempted to conceal and destroy were backup tapes that "contained information and emails that were relevant to both the Antitrust Division's pre-litigation and subsequent pre-trial civil discovery demands." *See* Groen PSR ¶ 11. However, Defendant Groen's conduct regarding the relevant and responsive materials is already addressed by the three-point enhancement for "substantial interference with the administration of justice" Accordingly the Government respectfully requests that the Court decline an additional two-point enhancement.

However, even if the Court finds the two-point enhancement applicable, the Court may "depart from a Guidelines sentence in order to give effect to a plea bargain if such a departure is warranted." *United States v. Fernandez*, 877 F.2d 1138, 1145 (2d Cir. 1989) (finding that a "district court presented with a plea agreement retains discretion to depart so long as the sentence that results reflects the seriousness of the crime and deters future misconduct"); *United States v. Paulino*, 873 F.2d 23, 25 (2d Cir. 1989) (determining that a departure downward to reflect cooperation with the government was justified).

II. Background of Investigation

During the relevant period, Defendant Ralph Groen worked as the Vice President and Director of Information Technology ("IT") for Coach USA Inc. ("Coach"). Defendant Groen was responsible for managing the IT functions of the company including overseeing all IT hardware, software, infrastructure projects, and providing support on internal systems. This included management responsibilities over the backup tape policies and processes. Defendant Groen also managed IT Department employees.

In March 2009, Coach, through its subsidiary, Gray Line, entered into the Twin America LLC joint venture with its primary competitor in New York City. On December 11, 2012, the Antitrust Division of the United States Department of Justice ("Antitrust Division") and the State of New York filed a civil complaint in the United States District Court for the Southern District of New York, challenging the formation of Twin America LLC as a violation of federal and state antitrust laws. On August 21, 2009, Defendant Groen received the first preservation letter that stated:

> Any automatic deletion or cleanup process must be disabled. Any accessible backup tapes must be identified, preserved and retained. All relevant information that is not typically backed up should be backed up as soon as possible upon receipt of this letter.[1]

On February 22, 2013, Coach issued another preservation reminder to its management. The preservation reminder stated:

> Please continue to preserve (*i.e.* do not delete, destroy, alter, or conceal) all documents (including e-mails and other electronic documents) relating to (i) Twin America, LLC; (ii) Gray Line New York Tours, Inc.; (iii) Gray Line Twin, LLC; (iv) CitySights New York LLC; (v) CitySights Daily LLC; (vi) CitySights LLC; and (vii) any related persons or entities. If you are in doubt as to whether a document should be retained, you should err on the side of retention.[2]

On April 28, 2014, an anonymous email was sent to Judge Andrew L. Carter, who was presiding over the civil litigation in the Southern District of New York, about hidden backup tapes that had not been produced to the Antitrust Division during fact discovery. The email was sent almost four months after fact discovery closed in the case. In response, Judge Carter

[1] Attachment A, COACH-DISC-0055365.
[2] Attachment B, COACH-DISC-0015461.

notified the parties and reopened discovery for the limited purpose of addressing these allegations regarding obstruction.

For over a year, the Antitrust Division engaged in additional discovery relating to the alleged obstruction. During this discovery period, the Antitrust Division's civil staff working on the Twin America LLC litigation contacted two former Coach employees, Subordinate A and Subordinate B. They learned that Subordinate A was storing 87 end-of-month backup tapes in his attic. Subordinate A turned the tapes over to the Antitrust Division, who then worked with Coach and a vendor to index and recover the content of the tapes. The tapes contained information and emails that were relevant and responsive to both the Antitrust Division's pre-litigation CID and subsequent pre-trial civil discovery demands.

III. Defendant Groen's Criminal Conduct

Defendant Groen's Sentencing Submission understates his conduct and role in facilitating obstruction of a federal investigation and litigation. A comprehensive account of Defendant Groen's conduct demonstrates that the Government's sentencing recommendation of 15 months imprisonment is warranted.

During civil discovery, Antitrust Division staff learned that potentially-relevant email accounts of certain Gray Line executives may have been deleted due to a conversion to a new email system. On May 23, 2013, during a meet and confer on this issue, Coach, through counsel, represented to the Antitrust Division that it did not have the relevant emails on any backup tapes. Defendant Groen was the source of Coach's representation. In a series of emails between Defendant Groen and Coach's outside counsel on February 20, 2013, subsequently produced by Coach, Groen falsely stated that "we discontinued the use of backup tapes in the fall of 2012" and that "all tapes, including the financial system tapes would only contain data from 30 days back at the very most." Following the meeting, the Antitrust Division served a second document request on Coach specifically seeking the company's backup policies and procedures.

Several days later, on May 30 or 31, 2013, Defendant Groen and two of his subordinates, Subordinate C and Subordinate D, discussed the availability of older emails, and Subordinate C reminded Defendant Groen that those emails would be available on end-of-month backup tapes held at an offsite storage facility. Subordinate C offered to get those emails from the backup tapes, which he said went back to 2009. Subordinate C later told the Government that Coach routinely performed three types of backups, (1) daily and (2) weekly backups, which were rotated on a 30-day basis, and (3) end-of-month backups, which were routinely sent to offsite storage for indefinite retention. As the head of IT, Defendant Groen should have known this information throughout the relevant period or, at a minimum, could have easily obtained it from his subordinates who performed the routine backup tasks.

Two days later, on June 5, Coach received the Antitrust Division's second document request seeking the additional information about its backup policies and procedures. That same day, Defendant Groen directed Subordinates C and D, to recall the end-of-month backup tapes from offsite storage and conceal them. Subordinate C followed these orders and retrieved 87 end-of-month backup tapes from offsite storage and hid them in an IT department supply closet. At Defendant Groen and/or Subordinate D's orders, Subordinate C also altered the spreadsheet

used for tracking the end-of-month tapes in order to destroy any evidence that the backup tapes ever existed. Fortunately, Subordinate C made a copy of the original spreadsheet, which was later produced to the Antitrust Division during the obstruction investigation.

The storage closet used to hide the tapes was adjacent to Subordinate B's desk. Later that summer, during Coach's semi-annual "IT clean-up day," Subordinate B found the boxes of end-of-month backup tapes in the closet. He was surprised because it was inconsistent with industry practice to store such material in a damp closet where sensitive electronic media could be exposed to destructive moisture. Subordinate B asked Defendant Groen what should be done with the backup tapes stored in the closet, and Defendant Groen directed him to place the tapes in a bin marked for offsite destruction.

Instead of following orders, Subordinate B removed the tapes from Coach's premises and put them in the trunk of a car owned by Subordinate A. Subordinate A took the tapes into his house, where they were recovered by the Antitrust Division.

In addition to concealing and attempting to destroy the tapes, the United States also asked for copies of Coach's policies regarding the use and retention of backup media. Coach's outside counsel referred this request to Defendant Groen, who repeatedly told outside counsel that only one responsive document existed. In reliance on his representation, Coach produced a PDF titled *Off Site Backup Procedure* to the Division. Defendant Groen's representation was, however, false. In 2014, during re-opened discovery, Coach in fact produced other backup policy and procedure documents, including relevant policies discussing end-of-month backup tapes. Importantly, the *Off Site Backup Procedure* document that Coach originally produced appears to have been doctored, removing two paragraphs discussing end-of-month backup tape procedures.

In addition to the false and misleading statements given to outside counsel, on September 12, 2013, before any of these issues came to light, Defendant Groen testified as Coach's representative at a 30(b)(6) deposition relating to various IT issues. During that deposition, Defendant Groen falsely testified that for both email and non-email files, backup tapes at Coach were recycled every 30 days (meaning there were no end-of-month backups or any ability to recover files that were not still on the server and older than 30 days).

Defendant Groen's own account of the underlying facts further underscore the importance of imposing a Guidelines sentence in this case.

> The [preservation] notice directed company personnel to preserve, and not 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 pates 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. Dkt. 10 at 4.

This passage demonstrates a disturbing level of apathy by the Vice President and Director of IT of a sizeable company that was under pre-merger review and investigation. He was the company representative that was most responsible for the IT system, which was the primary system of records and of preservation and the system that serves as the backstop to any intentional or inadvertent deletion of data by end-user employees. This reality places a higher burden on the head of IT to be attentive to preservation obligations and to take affirmative steps, where necessary, to prevent the loss of data at the systems level. It is apparent that Defendant Groen did not take that obligation seriously in the first place, and that apathy was a significant factor in the original error that led to the series of criminal acts to obstruct justice.

IV. Applicable Law

A sentencing court is required to "consider the Guidelines 'sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant,' the pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims." *United States v. Booker*, 543 U.S. at 260 (internal citations omitted). While the Sentencing Guidelines are not mandatory, they nevertheless play a critical role in the federal sentencing process. *United States v. Booker*, 543 U.S. 220, 252 (2005); s*ee also United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005) ("[I]t is important to bear in mind that *Booker*/*Fanfan* and Section 3553(a) do more than render the Guidelines a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge."). Indeed, the applicable Sentencing Guidelines range "will be a benchmark or a point of reference or departure" when considering a particular sentence to impose. *United States v. Rubenstein*, 403 F.3d 93, 98-99 (2d Cir. 2005).

Apart from the Sentencing Guidelines, as the Court is well aware, the other factors set forth in 18 U.S.C § 3553(a) must be considered. Section 3553(a) directs the Court to impose a sentence "sufficient, but not greater than necessary" to comply with the purposes set forth in 3553(a)(2), which are:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner[.]

In determining the particular sentence to impose, Section 3553(a) further directs the Court to consider: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the statutory purposes noted above; (3) the kinds of sentences available; (4)

the kinds of sentences and the sentencing range as set forth in the Sentencing Guidelines; (5) the Sentencing Guidelines policy statements; (6) the need to avoid unwarranted sentencing disparities; and (7) the need to provide restitution to any victims of the offense.

In light of *Booker*, the Second Circuit has instructed that district courts should engage in a three-step sentencing procedure. *See Crosby*, 397 F.3d at 103. First, the Court must determine the applicable Sentencing Guidelines range, and in so doing, "the sentencing judge will be entitled to find all of the facts that the Guidelines make relevant to the determination of a Guidelines sentence and all of the facts relevant to the determination of a non-Guidelines sentence." *Crosby*, 397 F.3d at 112. Second, the Court must consider whether a departure from that Guidelines range is appropriate. *Id*. Third, the Court must consider the Guidelines range, "along with all of the factors listed in Section 3553(a)," and determine the sentence to impose. *Id*. at 113.

V. Sentencing Recommendation for Groen

For the reasons set forth below, each of the relevant Section 3553(a) factors strongly support a sentence for Defendant Groen within the Guidelines range of 15 to 21 months imprisonment and the fine range of $4,000 to $40,000. The United States recommends the Guidelines minimum sentence of 15 months imprisonment.

(a) Calculation of the Advisory Sentencing Guidelines Range

The Government and Defendant Groen agree that the *U.S.S.G. Guidelines Manual* (Nov. 2014), the version in effect at the time of conduct, should apply here. Plea Agreement, ¶8.[3] In the Plea Agreement, the Government and Defendant Groen stipulated and agreed that the advisory Sentencing Guidelines offense level for the crimes committed by Defendant Groen is level 14 (15 to 21 months' imprisonment and a fine range of $4,000 to $40,000), which was calculated as follows:

(a) Pursuant to U.S.S.G. § 2J1.2, the base offense level for the charged conspiracy is 14.

(b) There is no reduction under § 2X1.1(b)(1) for an attempt, because the defendant completed all the acts the defendant believed necessary for successful completion of the substantive offense.

(c) Pursuant to U.S.S.G. § 2J1.2(b)(2), an additional three-level (3) increase is appropriate because Defendant Groen's obstruction of justice involved the "substantial interference with the administration of justice." At the time of

[3] Pursuant to U.S.S.G. § 1B1.11(b)(1), "[i]f the court determines that the use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the *ex post facto* clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed." *See also United States v. Paccione*, 949 F.2d 1183, 1204 (2d Cir.1991); U.S.S.G. § 1B1.11(b)(2) ("The Guidelines Manual in effect on a particular date shall be applied in its entirety. The court shall not apply, for example, one guideline section from one edition of the Guidelines Manual and another guideline section from a different edition of the Guidelines Manual."). Because the 2016 Guidelines provides for a greater punishment, specifically a larger fine range, the November 2014 Guidelines Manual applies. *See also* U.S.S.G. § 5E1.2(h)(1) ("For offenses committed prior to November 1, 2015, use the applicable fine guideline range that was set forth in the version of § 5E1.2(c) that was in effect on November 1, 2014").

the offense, Defendant Groen's employer, Coach USA, was involved in Twin America merger litigation with the Antitrust Division. Coach USA and Defendant Groen were under document retention and preservation orders. However, contrary to those orders, Defendant Groen actively withheld and attempted to destroy materials that were relevant and responsive to the Antitrust Division's discovery demands. After Defendant Groen's obstructive conduct was revealed, Judge Carter of the Twin America LLC litigation re-opened discovery. The Antitrust Division and Coach engaged in a review 87 backup tapes that Defendant Groen attempted to destroy. All of this conduct constitutes "the unnecessary expenditure of substantial governmental or court resources" as provided in the Commentary for the three-point enhancement.

(d) Pursuant to U.S.S.G. § 3E1.1(a), a two-level reduction is warranted because Defendant Groen pleaded guilty by September 13, 2016 and demonstrated acceptance of responsibility through his allocution and subsequent conduct prior to the imposition of a sentence. Furthermore, an additional one-level reduction is warranted, pursuant to U.S.S.G. §3E1.1(b), because Defendant Groen gave notice of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the Court to allocate its resources efficiently.

Plea Agreement, ¶ 9.

The U.S. Probation Department has calculated Defendant Groen's offense level and has concluded that the appropriate offense level for Defendant Groen is a level 16. *See* Groen PSR, ¶ 25. However, as noted above, the Government does not believe the additional two-point enhancement is warranted by the facts of this case.

(b) There is No Basis for a Departure Based on Defendant Groen's Motivations

Defendant Groen has moved for a non-custodial sentence based on the "non-obstructive motivation behind Mr. Groen's conduct" [Dkt. 10 at 8] presumably under U.S.S.G. § 5K2.20. Defendant Groen's argument overlooks the fact that he took multiple obstructive steps which substantially interfered with a federal merger investigation. This type of obstructive conduct is highly problematic and deserves adequate punishment.

Guidelines Section 5K2.20 "Aberrant Behavior" provides that a downward departure may be warranted in an exceptional case if the defendant committed single criminal act[4] that was

[4] The definition of aberrant conduct in Section 5K2.20 encompasses actions broader than a "single act," but is still limited to offenses that meet the additional criteria outlined. *See* U.S.S.G. Suppl. to App. C at 79 ("The Commission intends that the phrases 'single criminal occurrence' and 'single criminal transaction' will be somewhat broader than 'single act' "); *United States v. Gonzalez*, 281 F.3d 38, 46 (2d Cir. 2002) (explaining the Commission clarified that the departure for a "single act of aberrant behavior" means "a single criminal occurrence or transaction committed without significant planning, of limited duration, and displaying a marked deviation from a law-abiding life."); *United States v. Grandmaison*, 77 F.3d 555, 562–64 (1st Cir.1996) ("[T]he Commission intended the word 'single' to refer to the crime committed and not to the various acts involved.").

(1) was committed without significant planning; (2) was of limited duration; and (3) represents a marked deviation by the defendant from an otherwise law-abiding life. In making this determination, the Court may consider the defendants (A) mental and emotional conditions; (B) employment record; (C) record of prior good works; (D) motivation for committing the offense; and (E) efforts to mitigate the effects of the offense. U.S.S.G. § 5K2.20, Application Note 2. The Government does not believe that Defendant Groen's explanation – that he obstructed justice to save face – supports a significant departure from the Guidelines.

Defendant Groen makes no attempt to argue that the conduct in the instant offense was "singular" in nature, because it is not. Rather, he references that he "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." Dkt. 10 at 6. Additionally, Defendant Groen makes no arguments that his conduct did not involve any "significant planning" on his part or is of a "limited duration" as required by the application of this departure.

To the contrary, the Defendant Groen engaged in a pattern of obstructive conduct involving at least five distinct instances of willfully obstructive actions over the course of several months. First, in May 2013, in emails between Defendant Groen and Coach's outside counsel, Defendant Groen falsely stated that "we discontinued the use of backup tapes in the fall of 2012" and that "all tapes, including the financial system tapes would only contain data from 30 days back at the very most." Based on Defendant Groen's representations, Coach informed to the Antitrust Division during civil discovery that it did not have the relevant emails on any backup tapes. Second, several days later, after a discussion with subordinates regarding the actual existence of such backup tapes, Defendant Groen directed his subordinates to recall such end-of-month backup tapes and conceal them. Third, later in the summer of 2013, Defendant Groen directed yet another subordinate to take the backup tapes, which had been stored in a closet, and place them in a bin marked for offsite destruction. Fourth, in addition to the backup tape concealment, Defendant Groen falsely and misleadingly informed Coach's outside counsel that additional backup policies did not exist, while providing a copy that he had doctored to remove the paragraphs describing Coach's routine practice of end-of-month backup. Finally, on September 12, 2013, before any of these issues came to light, Defendant Groen testified as Coach's 30(b)(6) deposition witness falsely stating that for both email and non-email files, backup tapes at Coach were recycled every 30 days (meaning there were no end-of-month backups or any ability to recover files that were not still on the server and older than 30 days).

Furthermore, the ongoing nature of Defendant Groen's conduct also demonstrates that it involved significant planning, thereby removing it from the aberrant conduct contemplated under Section 5K2.20. While the Government does not dispute that Defendant Groen's original action may have stemmed from a desire to cover a mistake, an avoidable mistake no less, as highlighted above, Defendant Groen took successive steps to cover up each preceding criminal act. These successive cover ups required significant planning and, but for a whistleblower, would have been successful. Even more problematic, Defendant Groen did not undertake all of the obstructive conduct himself. Rather he involved at least four of his subordinates, who were under his direction and supervision, to engage in carrying out his obstructive plans.

Finally, Defendant Groen's conduct was not limited in duration. As described above, Defendant Groen's initial obstructive conduct occurred in May 2013 and actively continued through at least September 2013. *See United States v. Barbato*, No. 00 CR. 1028 (SWK), 2002 WL 31556376, at *3–4 (S.D.N.Y. Nov. 15, 2002) (finding conduct not limited in duration where defendant gave a confidential witness money on two occasions, first in June 1998 and then again in August 1998 and continued to make threats for return of the money for a year). The full extent of his obstruction did not come to light until well over a year later.

Therefore, because Defendant Groen's acts consisted of more than a single transaction or occurrence, required more than minimal planning, and were of an extended duration, the Court should deny Defendant Groen's request for a downward departure based upon aberrant behavior and his self-serving motivations.

(c) The §3553(a) Factors Strongly Support a Sentence within the Advisory Guidelines Range and, as such, a Variance is Not Warranted

1. Nature and Circumstances of Groen's Felony Offense

Defendant Groen's conduct obstructed the civil merger investigation process and subsequent Twin America LLC litigation. His conduct was in direct violation of multiple document retention demands issued by the Antitrust Division and preservation notices issued by his employer. As highlighted above, Defendant Groen was solely responsible for directing the obstruction of the Government's investigation. In doing so, Defendant Groen corrupted at least three subordinate employees, who he managed and oversaw, by instructing them to conceal and destroy backup tapes. As a result of his obstructive conduct, the Antitrust Division moved to reopen discovery in the Twin America LLC litigation; served additional document requests and interrogatories; noticed four additional depositions of Coach USA IT employees; obtained the approximately 87 backup tapes and worked with a vendor to process the tapes; conducted further searches and reviewed additional computer tapes; and expended approximately 1,350 hours of attorney labor and 600 hours of paralegal labor. Joint Status Report Regarding Reopened Limited Discovery, *United States v. Twin America, LLC, et al.*, No. 12-cv-8989 (ALC), Dkt. 83, 6/30/2014. As a result of Defendant Groen's conduct, Coach incurred untold amount in defending against a criminal obstruction investigation and paid $250,000 in civil penalties.

Accordingly, the Government respectfully submits that the nature and circumstances of Defendant Groen's offense clearly warrant a sentence of 15 months, which is at the bottom of the Guidelines range.

2. History and Characteristics of the Defendant

The Government adopts the Probation Sentencing Report's account of Defendant Groen's personal history and characteristics. The Government does not believe that any of the factors presented in the PSR warrant a downward departure, however.

3. The Need to Afford Adequate Deterrence

One of the most important factors that this Court must consider in imposing a sentence under Section 3553(a) is the need for the sentence to "afford adequate deterrence to criminal conduct." 18 U.S.C. § 3553(a)(2)(B). Here, the need for adequate deterrence is particularly compelling, where the obstructive conduct impeded a key governmental function with broad consumer and economic impact, namely, a pre-merger review and merger litigation.

That Defendant Groen acted without an "obstructive motive" and was simply trying to save face is not mitigating because the effect on governmental process was equally detrimental, if not worse. Obstruction of this kind is uniquely harmful because it is difficult to verify, other than reliance on the defendant's own words, that he was merely acting to save face. The Government consequently embarked on an extensive investigation to confirm that the conspiracy was not broader. The Government reviewed more documents, deposed more witnesses, and obtained more attorney proffers, among other things, to be satisfied that its investigation was exhaustive. Defendant Groen's conduct also adversely affected innocent executives at Coach, who remained under suspicion for several months, until the Government completed its investigation.

A probationary sentence, as Defendant Groen calls for, would be woefully inadequate and downplay Defendant Groen's central role in an obstruction that involved four other people. To save himself from "personal embarrassment and humiliation" for having failed to confirm easily verifiable information before making false representations to his company and their outside counsel, Defendant Groen ensnared his subordinates in his crimes, jeopardized their livelihood, and exposed them to criminal prosecution. Giving the main actor and the only beneficiary of the obstruction, however pointless the benefit may have been, a probationary sentence would send the wrong message to him and to his accomplices and undermine the critical goal of imposing a sentence that "afford[s] adequate deterrence to criminal conduct."

4. Application of the Sentencing Guidelines

The Sentencing Guidelines represent the considered judgment of the United States Sentencing Commission, a body of experts drawn from all areas of the legal profession, and specifically created to determine the appropriate sentence in particular types of cases. As Judge Lynch has recognized, it is important for "rational judges [to] seek guidance . . . in the collective judgment of their peers and of institutions that have sought to develop a logical structure for guiding their discretion, such as the Sentencing Commission." *United States v. Emmenegger,* 329 F. Supp. 2d 416, 426 (S.D.N.Y. 2004); *See also id.* (acknowledging the significance of the Guidelines "as an advisory system of principles that both (1) sets a general level of severity of sentences deemed appropriate by a judicious body of politically-responsible experts, and (2) creates a methodology and enumerates factors to be applied to assess the seriousness of criminal conduct and the severity of an offender's criminal record"). Both the *Booker* and *Crosby* Courts stressed the continuing significance of the Guidelines under the new sentencing framework.

The Sentencing Commission wrote the Guidelines to "carry out these same § 3553(a) objectives," resulting in "a set of Guidelines that seek to embody the § 3553(a) considerations, both in principle and in practice." *Rita v. United States*, 551 U.S. 338, 349 (2007). Moreover, "[t]he Guidelines as written reflect the fact that the Sentencing Commission examined tens of

thousands of sentences and worked with the help of many others in the law enforcement community over a long period of time in an effort to fulfill this statutory mandate." *Rita*, 127 S. Ct. at 2464. *See also, United States v. Cooper*, 437 F.3d 324, 331 n.10 (3d Cir. 2006) ("The federal sentencing guidelines represent the collective determination of three governmental bodies – Congress, the Judiciary, and the Sentencing Commission – as to the appropriate punishments for a wide range of criminal conduct.").

In this case, the sentence called for by the Sentencing Guidelines is obviously a significant marker of the seriousness of the offense committed by Defendant Groen.

(d) The Appropriate Sentence for Defendant Groen

Defendant Groen's obstructive conduct was serious and warrants a term of imprisonment. While Defendant Groen has faced other natural consequences of his actions – such as losing his job – such reaction falls short of adequate punishment and appropriate deterrence.

Defendant Groen suggests the loss of "his profitable and respected position at Coach USA" is punishment enough and that the likelihood of losing "his current job (which pays half of the salary he received at Coach USA)" should militate against any sentence that includes imprisonment. These are collateral consequences of his own actions that should have little, if any, bearing on punishment. While the Government is not indifferent to Defendant Groen's concern about the loss of jobs, this is a reality in white collar cases. That reality does not merit any special treatment or consideration, lest white collar defendants are left with the impression that loss of job is the worst that could happen if they engage in this type of conduct. Defendant Groen misused his respected position at Coach to obstruct an investigation and litigation and should not be able to benefit from the inevitable loss of the job as punishment at all, let alone adequate punishment, for his many mistakes and criminal cover ups.

Furthermore, Defendant Groen's criminal conduct resulted in harm to numerous entities and individuals, including at least one of his subordinates who he involved in the obstructive conduct and who was subsequently fired, another employee who faced extended time on disciplinary leave, other employees who had no role in the offense but had to endure the anxieties of being subjects in a federal criminal investigation, and his employer who suffered reputational damage, expended significant resources, and ultimately settled the law enforcement action brought by the Antitrust Division and New York attorney general. Defendant Groen's background and work history only favor a guidelines sentence at the low end of the range, not probation.

Accordingly, the Government respectfully requests that Your Honor sentence Defendant Groen to a term of imprisonment of 15 months, at the low end of Guidelines range of 15 to 21 months imprisonment, and impose a fine within the Guidelines range of $4,000 to $40,000 in

order to reflect the seriousness of the offense, promote respect for the law, provide just and fair punishment, and deter others from committing similar crimes. Such a sentence would be "sufficient, but not greater than necessary" to comply with the purposes of sentencing.

Respectfully submitted,

/s/ Rebecca Ryan

Rebecca D. Ryan
Samson O. Asiyanbi
Trial Attorneys
Antitrust Division

cc: Florian Miedel (Counsel for Ralph Groen)