UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| UNITED STATES OF AMERICA,<br>Plaintiff,<br>v.<br>IVAN F. BOESKY,<br>Defendant. | ) | 87 CR 378 (MEL) |

**DEFENDANT'S SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR REDUCTION OF SENTENCE PURSUANT TO RULE 35(b)**

Ivan F. Boesky renews, and requests a prompt resolution of, his pending motion for reduction of sentence pursuant to Rule 35(b).1/ For the reasons set forth below and in the original Rule 35 Motion, Mr. Boesky requests that his sentence be reduced to the time he has served -- approximately twelve months.

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1/ The motion was filed April 15, 1988, but Mr. Boesky requested the Court to defer action on the motion until at least October 1988 so that the fruits of Mr. Boesky's cooperation might become more apparent. See United States v. Ellenbogen, 390 F.2d 537, 543 (2d Cir.), cert. denied, 393 U.S. 918 (1968); United States v. Friedman, No. 86 Cr. 591 (MJL) (S.D.N.Y. Oct. 14, 1987) (1987 U.S. Dist. LEXIS 9276).

## I. THE PUBLIC BENEFITS FROM MR. BOESKY'S UNPRECEDENTED COOPERATION ARE NOW DRAMATICALLY CLEAR.

The true fruits of Ivan Boesky's unsurpassed cooperation with the Government are now -- for the first time -- dramatically, fully, and publicly known. As the Court recognized at sentencing it was impossible for the public or the press to understand the incalculable value of Mr. Boesky's cooperation because the secrecy of the grand jury process precluded any public recitation of the value of the information that he had provided to the government.2/ Public "blood lust" was brought to bear on the sentencing process and could not be effectively countered, at least in public, with the social and law enforcement benefits of early, thorough, and extensive cooperation. Now, however, the public and the Court can see most of the benefits of Mr. Boesky's cooperation. The public and the Court can see that he was to a significant extent a follower in a larger criminal conspiracy organized and operated by Drexel Burnham Lambert, Inc. ("Drexel") and its High Yield Bond Department, in which "Drexel unlawfully used [Mr. Boesky] to manipulate securities prices, to obtain unlawful profits by 'insider trading'. . ., and unlawfully to facilitate merger and

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2/ Transcript of Presentence Conference, at 12, 14, in United States v. Ivan F. Boesky, No. 87 Cr. 378 (MEL) (S.D.N.Y. Dec. 3, 1987).

acquisition activities,"3/ all "at the direction, and for the benefit of," Drexel.4/

The Drexel Agreement to Plead Guilty.

The recent agreement by Drexel Burnham Lambert, Inc., one of the Nation's leading investments banking firms, to plead guilty to multiple felony counts of securities and mail fraud and to pay $650 million in criminal and civil penalties and disgorgement, and the March 29, 1989, indictment charging Michael Milken with racketeering, mail fraud and securities fraud and seeking $1.8 billion in forfeitures, provide the most dramatic examples of the fruits of Mr. Boesky's cooperation.

As the Court is aware from the United States Attorney's original sentencing memorandum, Mr. Boesky provided the government with extensive and specific information concerning criminal violations of the securities laws, mail and wire fraud statutes, anti-racketeering laws, and other federal statutes by Michael Milken and other senior officials of Drexel. When the press reported investigations into these disclosures, Drexel mounted one

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3/ Information in United States v. Drexel Burnham Lambert, Inc., No. 89 Cr. 0041, at ¶ 5 (S.D.N.Y. 1988).

4/ Id. at ¶ 4. See also Indictment in United States v. Milken, No. 89 Cr. 41 (KBW), at ¶ 21 (S.D.N.Y. 1989).

of the most vitriolic public relations campaigns in history to discredit Mr. Boesky and avoid criminal prosecution.5/

In press releases, planted news stories, and letters to customers, Congress, and national opinion leaders, Drexel vilified Mr. Boesky. Drexel's September 7, 1988, letter to thousands of its customers typifies this campaign:

> "We want to comment on the SEC's civil suit against Drexel Burnham and four of our employees. . . .
>
> A thorough examination of the SEC complaint shows that the charges rely almost entirely on accusations by convicted felon Ivan Boesky. The most telling aspect of this action is that, after an almost two year investigation which we understand to be the most exhaustive in SEC history, the SEC essentially has charged nothing beyond what

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5/ See, e.g., N.Y. Times, Jan. 27, 1988, at D1, col. 6 (Drexel said that "all public accounts of the investigations that have linked Drexel to possible wrongdoing were based on information 'furnished by the convicted felon Boesky'"); National Law Journal, Feb. 8, 1988, at 3, col. 1 ("Drexel responded angrily to the latest reports . . . referring to Ivan F. Boesky . . . as 'convicted felon Boesky'"); Wash. Post, June 8, 1988, at A1 (a Drexel spokesman said "the principal source of the charges [against Drexel] is Ivan Boesky, a convicted felon and admitted liar"); Wash. Post, June 9, 1988, at C3 (Drexel issued a public statement calling Boesky "a convicted felon and admitted liar"); National Law Journal, June 20, 1988, at 9, col. 1 (Drexel has issued "repeated reminders that all accusations against it arise 'from convicted felon' Ivan F. Boesky"); Financial Times, June 23, 1988, at V ("Drexel . . . says it knows nothing of any wrongdoing and complains bitterly that the case depends on the evidence of a convicted felon"); Christian Science Monitor, Sept. 9, 1988, at 1 (a noted securities lawyer stated "Drexel lawyers will argue that Boesky is a convicted felon . . ." if the SEC case goes to trial); Financial Times, Sept. 10, 1988, at I20, (Drexel sought to discredit the SEC's case against it "on the ground that it rests entirely on evidence from Mr. Boesky, a convicted felon").

> Boesky alleged in 1986 when he was bargaining for leniency. . . .
>
> The linchpin in the complaint is Boesky's payment of a $5.3 million fee to Drexel Burnham in March 1986. The evidence indicates that this fee was payment for normal corporate finance, research and other advisory services furnished to the Boesky organization prior to March 1986.
>
> Indeed, Ivan Boesky's allegations must be viewed in the context in which they were made: Boesky was desperate to settle with the SEC and to minimize his own punishment by accusing others. We are particularly eager to confront Ivan Boesky in the fair and open forum of a court to demonstrate that his charges are false."6/

It is now clear that the only falsehoods were Drexel's lies -- repeated ad nauseam in a desperate attempt to discredit Mr. Boesky and avoid the consequences of the most systematic and massive securities fraud in history. At every turn, the real evidence verified the truth of Mr. Boesky's 1986 disclosures to the Government. The SEC investigated Mr. Boesky's disclosures and charged Drexel with 76 counts of securities law violations. The United States Attorney and the Department of Justice concluded that unprecedented criminal racketeering charges against a major Wall Street investment banking firm were fully justified. Drexel -- after unrelenting vilification of Mr. Boesky for more than two years -- ultimately concluded that a jury would not

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6/ Letter from Drexel Burnham Lambert to Customers (Sept. 7, 1988), attached as Exhibit A (emphasis added).

believe Drexel and agreed to plead guilty.7/ Drexel agreed to plead guilty -- not to one felony count -- but to six felony counts.8/ Drexel agreed -- not to a $50 million fine and penalty -- but to a $300 million fine and penalty.9/ Drexel agreed -- not to $50 million in disgorgement -- but to $350 million in disgorgement.10/ Drexel also agreed to terminate its association with Michael Milken ("Milken") and withhold more than $100 million of 1988 compensation from him, and to withhold half of Lowell Milken's 1988 compensation and place him on an unpaid

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7/ Frederick H. Joseph, the Chief Executive Officer of Drexel and the President of The Drexel Burnham Lambert Group, Inc. (the "Drexel Group") stated in an affidavit to the Southern District of New York that the Drexel Group's Board of Directors had ratified the Plea Agreement between Drexel and the government and that the "Board's vote was taken after much thought and deliberation . . . [and] reflects the Board's determination that Drexel was not in a position to dispute the Government's charges . . . ." Affidavit of Frederick H. Joseph, at ¶¶ 2, 3 in United States v. Drexel Burnham Lambert, Inc., No. 89 Cr. 0041 (KMW) (S.D.N.Y. Feb. 28, 1989).

8/ The Information to which Drexel agreed to plead guilty charges that from early 1984 the Drexel High Yield Department had a secret arrangement with the Boesky Organization pursuant to which the Boesky Organization "bought and sold securities at the direction, and for the benefit, of . . . [Drexel] without disclosing the true ownership of such securities as required by law." The Information also charged that the Drexel High Yield Department and the Boesky Organization "kept a running tally of the trades . . . and periodically met to reconcile profits and losses," and that the $5.3 million payment by the Boesky Organization to Drexel in March 1986 was "to balance [this] unlawful account." Information in United States v. Drexel Burnham Lambert Inc., No. 89 Cr. 0041, at 2-4. Contrast Drexel letter to Customers, quoted above and attached as Exhibit A.

9/ Plea Agreement Between U.S. Attorney's Office and Drexel Burnham Lambert, Inc., at ¶ 2 (Jan. 24, 1989).

10/ Id.

leave of absence when he was indicted.11/ Michael Milken, Lowell Milken, and Bruce Newberg have now been indicted in a racketeering indictment of unprecedented scope, charging multiple conspiracies extending far beyond Ivan Boesky and seeking $1.8 billion in forfeitures.12/

The Drexel case, which a former U.S. Attorney called "the blockbuster case of all time,"13/ would never have been discovered, let alone successfully prosecuted, without Ivan Boesky's cooperation. He provided the information that initiated the Government's investigation.14/ He helped the Government

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11/ Id. at ¶ 5. Drexel's agreement with the United States Attorney also requires it to settle the charges made by the SEC. Negotiations toward that end are now underway.

12/ The Milken indictment charges the Milken brothers and Newberg with multiple conspiracies to conceal Drexel's ownership of securities by causing the securities to be secretly purchased or sold through affiliates of Boesky or Princeton/Newport for the purpose of gaining secret and unlawful advantages and profits in corporate takeover contests, trading on inside information, manipulating the price of securities on public trading markets, rigging public offerings, defrauding the United States of taxes, and other crimes for the personal aggrandizement of the Drexel High Yield Bond Department and the individual defendants. The indictment seeks $1.845 billion in forfeitures. United States v. Milken, No. 89 Cr. 41 (KBW) (S.D.N.Y. 1989).

13/ Business Week, November 28, 1988, at 160.

14/ Gary Lynch, the Director of the Division of Enforcement of the SEC, told a congressional panel: "[I]t was Ivan Boesky's cooperation that initially pointed us in this direction to uncover the facts that led to the filing of the [SEC's civil] complaint" against Drexel and others. Public Briefing to the Telecommunications and Finance Subcommittee of the House Energy and Commerce Committee Regarding: Insider Trading, 100th Cong., 2d Sess. (Sept. 9, 1988) at [Lexis p. 14] (testimony by David (continued...)

understand the complicated financial transactions involved. He was unquestionably the key witness. And the certainty that he would testify fully at a criminal trial placed a heavy and continuing strain on the targets of the investigation, which contributed to the decisions of several Drexel employees to cooperate and provide evidence against Drexel,15/ and thus led to the successful resolution of the case against Drexel and the unprecedented indictment of Milken.

The Drexel guilty plea, and the Milken indictment, will undoubtedly have an enormously positive effect on our securities markets. The magnitude of the penalties paid by Drexel, and sought from Milken, and the increased certainty that even sophisticated and wealthy financial firms can be successfully prosecuted, will do as much as anything can to deter others from

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14/ (...continued)
Ruder, Chairman, SEC, and Gary Lynch, Director, SEC Division of Enforcement) [hereinafter, "Congressional Briefing"].

15/ At least four Drexel employees reached agreements to cooperate. Cary Maultasch, a senior Drexel trader who worked for Milken, reached an agreement with the SEC and the U.S. Attorney's Office. Under the agreement, the Government agreed to postpone any decision whether to charge Mr. Maultasch with a single count of failing to keep accurate books and records in return for his cooperation against Drexel and other Drexel employees. Wall St. J., Dec. 7, 1988, at A3, col. 1. On December 7, 1988, Terren S. Peizer, a trader in Drexel's high yield bond department, also agreed to cooperate in exchange for a grant of immunity. N.Y. Times, Dec. 10, 1988, at 37, col. 4. In October 1988, James Dahl, a Drexel bond salesman, was also given immunity in return for his promise to cooperate. Wall St. J., Oct. 5, 1988, at A3, col. 1. Finally, in early 1987, Charles Thurnher, an accounting executive in Drexel's High Yield Bond Dept., also reportedly reached an agreement to cooperate. N.Y. Times, Apr. 27, 1987 at D1, col. 3.

engaging in securities fraud. Moreover, the Drexel case and the information provided by Mr. Boesky has led, and will continue to lead, to closer scrutiny of the activities of financial firms. As former United States Attorney Rudolph Giuliani has noted, the information provided by Mr. Boesky about the criminal activities of Drexel and others "has given the Government . . . a window on the rampant criminal conduct that has permeated the securities industry in the 1980's" which "is at the heart of [a] substantial amount of market activity by established securities industry professionals."16/ Similarly, United States Attorney Benito Romano attributed the Milken indictment in large part to Boesky's cooperation and emphasized that with Mr. Boesky's cooperation his office had embarked on "the most intensive criminal securities fraud investigation ever undertaken by the federal government[,]" which "uncovered substantial fraud in a very significant segment of the American financial community."17/

Other Cases and Investigations.

If the Drexel and Milken criminal cases were the sole benefits from Ivan Boesky's cooperation, his cooperation would merit exceptional credit. But the Drexel and Milken cases are only two of many criminal and civil cases and on-going

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16/ Government's Memorandum With Regard to the Sentencing of Ivan F. Boesky at 24.

17/ Press Release, dated March 29, 1989, from the Office of the United States Attorney for the Southern District of New York.

investigations made possible by his efforts. Since sentencing alone, Mr. Boesky's cooperation with the Government has directly and indirectly led to a total of 9 indictments against 19 defendants, 1 civil action filed by the SEC against 9 defendants, and 5 other publicly announced civil and criminal investigations.18/ The following summary describes the civil and criminal charges and investigations that have resulted directly or indirectly from information provided by Mr. Boesky and that have been made public since the date of sentencing.19/

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18/ Ivan Boesky's cooperation has thus led to a total of 15 indictments, approximately 10 civil actions filed by the SEC, and at least 7 ongoing civil and criminal investigations.

19/ Ivan Boesky's cooperation bore tremendous fruit before sentencing as well. As noted in Defendant's Memorandum on Sentencing at 12-16, the voluminous quantity and extraordinary quality of the information he provided directly resulted in criminal convictions of, and SEC civil injunctions against, Martin A. Siegel, former head of the Kidder, Peabody & Co., Inc., Mergers and Acquisitions Department (United States v. Martin A. Siegel, No. 87 Cr. 118 (S.D.N.Y.); SEC Lit. Rel. No. 11354 (Feb. 13, 1987)); Boyd L. Jefferies, head of Jefferies & Co., Inc. (United States v. Boyd L. Jefferies, No. 87 Cr. 339 (S.D.N.Y. Apr. 16, 1987); SEC Lit. Rel. No. 11370 (Mar. 19, 1987)); and Michael Davidoff (United States v. Michael Davidoff, No. 87 Cr. 78 (S.D.N.Y.); SEC Lit. Rel. No. 11390 (Apr. 7, 1987)). In addition, the information he provided directly resulted in an SEC civil injunction against, and the payment of approximately $25.2 million in civil penalties and disgorgement by, Kidder, Peabody & Co., Inc. (SEC v. Kidder, Peabody & Co., No. 87 Civ. 3869 (S.D.N.Y. June 4, 1987)), and triggered criminal investigations of Robert Freeman of Goldman, Sachs & Co., Richard B. Wigton of Kidder, Peabody & Co., and Timothy Tabor, formerly of Merrill Lynch, Pierce, Fenner & Smith, Inc.

1. The SEC Civil Complaint Against Michael Milken and Others.

As a direct result of Mr. Boesky's cooperation, on September 7, 1988, the SEC filed a civil complaint against Drexel, Milken, Lowell Milken, Cary Maultasch, Victor Posner, and four other individuals and corporations. The complaint, which raises 76 separate claims against one or more of the defendants, alleges that the defendants "devised and carried out a fraudulent scheme involving insider trading, stock manipulation, fraud on Drexel's own clients, failure to disclose beneficial ownership of securities as required, and numerous other violations of the securities laws." Lit. Rel. No. 11859 at 1 (Sept. 7, 1988). See also SEC v. Drexel Burnham Lambert Inc., 88 Civ. 6209 (MP) (S.D.N.Y.). Although Drexel has indicated an intention to settle with the SEC, the complaint is still pending against Milken and the other defendants.

2. Indictment of Princeton/Newport Officials.

Information provided to the Government by Mr. Boesky led tangentially to the first indictment of securities industry officials on criminal racketeering charges in history.20/ On August 4, 1988, a federal grand jury in the Southern District of New York returned a thirty-five count indictment against five principals of Princeton/Newport Partners L.P, and a former trader in Drexel, Inc's high yield bond department. The indictment charged the defendants with securities and wire and mail fraud, as well as with violations of the federal racketeering statute ("RICO"). United States v. Regan, 88 Cr. 517 (S.D.N.Y.). Although Drexel was not named as a defendant, "the indictment . . . asserts that the racketeering conspiracy was between the Princeton/Newport officers and Drexel itself." N.Y. Times, August 5, 1988, at A1, col. 3. A sixty-eight count superseding indictment was returned on January 19, 1989, charging "a number of additional acts of racketeering and mail and wire fraud, . . . securities fraud in connection with public offerings by Drexel[,] and previously uncharged violations of the tax laws . . . ." U.S. Attorney's Office Press Release, Jan. 19, 1989. On October 18, 1988, Princeton/Newport posted a $14

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20/ Wall St. J., October 19, 1988, at A17, col. 5.

million bond to secure assets the Government could seize if the defendants are convicted on the RICO counts.21/ In a related case, Lisa Jones, an assistant trader working for Bruce Newberg at Drexel, was convicted of 5 counts of perjury and 2 counts of obstruction of justice. United States v. Lisa Jones, 88 Cr. 824 (LBS) (S.D.N.Y.).

3. Indictment of GAF Corp. and James Sherwin.

Information provided by Mr. Boesky led indirectly to the indictment of GAF Corp. and James Sherwin. On July 6, 1988, a federal grand jury in the Southern District of New York indicted GAF Corporation, two of its subsidiaries, and James T. Sherwin, GAF's vice-chairman. United States v. GAF Corp., 88 Cr. 0415 (S.D.N.Y.). The ten count indictment, which includes charges of conspiracy, securities violations, and mail and wire fraud, alleges that the defendants created a scheme to manipulate the price of Union Carbide.22/ On January 10, 1989, in the first criminal trial of GAF and Mr. Sherwin, Judge Mary Johnson Lowe declared a mistrial.23/ On March 22, 1989, the court declared a second mistrial as a result of a hung jury. The government immediately announced that it would try the case again.24/

4. Indictment of Guinness plc Officials.

Information provided by Mr. Boesky to the United States Government and to the U.K. Government led directly to the consolidated 107-count criminal indictment of Ernest Saunders, former Chairman of Guinness; Gerald Ronson, a U.K. financier; Roger Seelig, former Director of Morgan Greenfell; Sir Jack Lyons, formerly associated with Bain & Co. of Boston, Mass.; Lord Spens; David Mayhew,

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21/ On December 7, 1988, Princeton/Newport announced plans to liquidate the firm because many of the firm's unindicted investors had withdrawn their capital. Wall St. J., December 8, 1988, at A3, col. 2; N.Y. Times, December 9, 1988, at D5, col. 4.

22/ Wall St. J., July 15, 1988, at 33, col. 1; N.Y. Times, December 12, 1988, at D3, col. 3; Wall St. J., December 9, 1988, at A2, col. 3.

23/ Wall St. J., January 11, 1989, at A3, col. 1.

24/ Wall St. J., March 23, 1989, at A3, col. 2.

associated with Cazenove, formerly Guinness' U.K. stock broker; and Anthony Parnes, a former London stock broker, arraigned in and voluntarily returned from the United States. The U.K. Government anticipates a trial in 1989.25/

5. Indictment of Salim B. Lewis and S.B. Lewis & Co.

Information provided by Mr. Boesky led indirectly to the indictment of Salim B. Lewis and S.B. Lewis & Co. Salim B. Lewis ("Lewis") and S.B. Lewis & Co. were indicted on November 3, 1988, on twenty-two counts, including charges of stock manipulation, conspiracy, and mail and wire fraud. United States v. Salim B. Lewis, 88 Cr. 802 (MJL) (S.D.N.Y. November 3, 1988). More specifically, the indictment alleges that Lewis conspired to manipulate upward the price of Fireman's Fund Corp. stock on May 8, 1986, which was the day American Express Co. was to price an offering of Fireman's Fund stock.26/ The indictment further alleges that one of the "objects of the conspiracy [was] . . . to ensure that American Express maximized the proceeds it received from the Fireman's Fund secondary offering by manipulating upward the closing price of Fireman's Fund common stock . . . ."27/

6. Investigations of Robert Harris and Seligmann Harris & Company.

Information provided by Mr. Boesky led directly to the London Stock Exchange charges against Robert Harris and Seligmann, Harris & Company. On November 15, 1988, the London International Stock Exchange charged Robert Harris, a senior partner at the London brokerage firm of Seligmann Harris & Company, with participating in a conspiracy to "park" stocks (i.e., holding securities secretly for another entity to evade

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25/ Letter from Jeraine Olson, Assistant Director of the Serious Fraud Office of the United Kingdom Government, to United States District Judge Morris Lasker (Dec. 2, 1988).

26/ Indictment in United States v. Salim B. Lewis, No. 88 Cr. 802, at ¶ 5.

27/ Id. at ¶ 7.

restrictions on holdings).28/ Mr. Harris' alleged role in the stock parking scheme is also the subject of a federal grand jury investigation in the Southern District of New York.29/

7. Criminal Charges Against Paul Bilzerian.

As a result of information provided by Mr. Boesky about the criminal activities of Boyd L. Jefferies, Jefferies plead guilty to two counts of securities violations. Jefferies, in turn, provided information that led to the indictment of Paul A. Bilzerian on 12 counts of conspiracy, false statements, and securities fraud. United States v. Paul A. Bilzerian, 88-Crim. 0962 (S.D.N.Y. Dec. 21, 1988). The indictment charges that Mr. Bilzerian conspired to make, and did make, false statements to the SEC concerning his accumulations of, and the sources of funds to purchase, the securities of Cluett Peabody & Co., Inc., H.H. Robertson Company, Hammermill Paper Company, and Armco Steel.

8. Investigation of Paul Bilzerian and Edward J. DeBartolo, Sr.

Ivan Boesky provided information about Boyd Jefferies who, in turn, provided information that led to the publicly announced SEC investigation of allegations that Edward J. DeBartolo, Sr., helped Paul Bilzerian secretly accumulate large positions in the stock of certain takeover targets.30/ The SEC has also publicly asserted in papers filed in federal court that the alleged scheme involved purchases of stock through Boyd L. Jefferies,31/ secret loans from Mr. DeBartolo to Mr. Bilzerian,32/ and profit-sharing agreements

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28/ N.Y. Times, November 16, 1988, at D1, col. 4.

29/ N.Y. Times, November 18, 1988, at D5, col. 3.

30/ National Law Journal, August 8, 1988, at 50, col. 1; N.Y. Times, June 28, 1988, at D9, col. 1; N.Y. Times, May 14, 1988, at 37, col. 3.

31/ National Law Journal, August 8, 1988, at 50, col. 1; N.Y. Times, June 28, 1988, at D9, col. 1.

32/ Wall St. J., May 13, 1988, at 3, col. 2.

between DeBartolo and Bilzerian.33/ Edward J. DeBartolo, Jr., and the Edward J. DeBartolo Corp. are also reportedly under investigation.34/

9. SEC and Grand Jury Investigations of Spear Leeds & Kellogg.

According to newspaper accounts, the SEC and the United States Attorney are investigating Spear Leeds & Kellogg as part of the SEC's inquiry into illegal stock-parking arrangements based upon information provided by Mr. Boesky.35/ To date, the firm has not been charged with civil or criminal charges.

10. Continuing Investigation of John Mulheren.

In early 1988, the Government's investigation of John Mulheren became public. Mr. Mulheren, who was arrested in February on federal felony charges for allegedly threatening Mr. Boesky's life,36/ has been under investigation for more than a year for his alleged involvement in stock parking.37/

Other Recent Developments.

Other positive developments have occurred since sentencing that demonstrate the benefits from Ivan Boesky's cooperation. His exposure of the systemic flaws in the

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33/ Id.; Wall St. J., May 16, 1988, at 5, col. 2.

34/ National Law Journal, August 8, 1988, at 50, col. 1.

35/ Wall St. J., January 14, 1988, at 3, col. 1.

36/ N.Y. Times, February 20, 1988, at 1, col. 1. As discussed more fully in the original Rule 35 memorandum, Mr. Mulheren allegedly set out on February 18, 1988, armed with four guns, to kill Mr. Boesky and Michael Davidoff, the former head stock trader for the Boesky entities. See Defendant's Memorandum of Law in Support of Motion for Reduction of Sentence Pursuant to Rule 35(b) at 10.

37/ N.Y. Times, August 12, 1988, at D6, col. 5.

regulatory environment -- flaws that went well beyond his involvement in any wrongdoing -- substantially contributed to the passage in November 1988 of the Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677 (1988).38/ Moreover, the insider trading abuses revealed by Mr. Boesky were cited by public interest groups and others to block efforts in the preceding session of Congress to weaken the RICO statute.39/ And many brokerage firms have instituted tough new measures designed to prevent insider trading and other violations. Former United States Attorney Rudolph Giuliani aptly summarized these benefits from Mr. Boesky's cooperation:

> "[Ivan Boesky's cooperation has] done a second thing that I think we should focus on for a moment. We are reexamining in a very detailed way in the media and universities, in law schools, business schools and in Congress the ethics of the financial community. And there have been changes in the way the financial community operates. Without Dennis Levine and Ivan Boesky's cooperation, none of that would occur."40/

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38/ This law imposed upon broker-dealers and investment advisers an explicit requirement to establish, maintain and enforce written policies and procedures, reasonably designed to prevent the misuse of non-public material information, increased the penalties upon controlling persons of insider traders, amended the Insider Trading Sanctions Act to remove ambiguities, granted authority to the SEC to pay bounties for information concerning insider trading violations, increased criminal penalties for insider trading, and created an express private right of action for damages in favor of persons trading contemporaneously with insider traders. The law also increased the SEC authority in cooperating with foreign securities authorities.

39/ See L.A. Times, November 28, 1988, Business Section, at 1, col. 5; Christian Science Monitor, April 21, 1988, Business Section, at 10.

40/ The MacNeil/Lehrer NewsHour, (Educational Broadcasting and GWETA television broadcast, Dec. 18, 1987).

These concrete events and developments, in addition to the events described in the original Rule 35 Memorandum, provide dramatic evidence of the exceptional value of Mr. Boesky's pre- and post-sentencing cooperation. Because these events and developments were not fully known either to the Court or the public at the time of sentencing, they constitute a strong basis for reduction of sentence.

## II. IVAN BOESKY HAS DEMONSTRATED HIS CONTRITION BY CONTINUING HIS EXTENSIVE COOPERATION WITH GOVERNMENTAL AUTHORITIES.

Ivan Boesky's unprecedented cooperation did not cease upon sentencing or upon the filing of the Rule 35 Motion. The Court thus has not had an opportunity to consider -- and give appropriate credit for -- Mr. Boesky's extensive and substantial post-sentencing cooperation.

Mr. Boesky's post-sentencing cooperation has been extensive and vital to several major governmental investigations. Within five days after his sentencing on December 18, 1987, Mr. Boesky was back in the United States Attorney's Office providing additional information relevant to that office's investigation of criminal activity in the Nation's securities and financial markets.

Since sentencing alone, he has attended meetings with at least nine Assistant United States Attorneys on nearly two dozen occasions, twelve of the meetings occurring after the original Rule 35 Memorandum was filed. In addition, Mr. Boesky has had numerous meetings with Special Agents of the Internal Revenue Service and Postal Inspectors. He also testified before the grand juries investigating the activities of Drexel, Michael Milken, Lowell Milken, Steven and Victor Posner, John Mulheren—and others.41/

Ivan Boesky has also attended meetings with at least ten investigators from the SEC, providing additional information pivotal to a 76-count civil complaint filed by the SEC against Drexel, the Milkens, the Posners, and others. He has continued his extensive cooperation with the British Government's investigation of the activities of Guinness plc, the largest securities investigation in British history. Since sentencing, he has met with inspectors from the United Kingdom's Office of Serious Fraud, as reflected in communications from that Office directly to the Court.42/

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41/ Ivan Boesky has also made every effort to ensure that investigators have access to all potentially relevant documents. Since sentencing, Mr. Boesky's counsel have assisted both the U.S. Attorney's Office and the SEC in taking joint custody of, and organizing, more than 700 file boxes of documents.

42/ *See* Letter from Jeraine Olson, Associate Director of the Serious Fraud Office of the United Kingdom Government, to United States District Judge Morris Lasker, dated December 2, 1988.

These tangible examples of Mr. Boesky's post-sentencing cooperation provide dramatic evidence of his undoubted contrition. Although cynics may suggest that he has cooperated only to fulfill his agreements with the U.S. Attorney's Office and the SEC, his cooperation has extended far beyond that necessary to meet those obligations. Indeed -- as the letter from the British authorities makes clear and as the U.S. Attorney's Office and the SEC will attest -- Mr. Boesky has done everything within his power, both before and after sentencing, to assist the Government. He has devoted himself to full unstinting cooperation with the on-going investigations. Such unprecedented, model cooperation, both before and after sentencing, provides a compelling justification for sentence reduction.43/

## III. THE HEAVY PRICE PAID BY MR. BOESKY HAS BECOME EVEN GREATER AND MORE EVIDENT.

The original Rule 35 Memorandum described the grave burdens imposed on Ivan Boesky, including a serious threat on his life, because of his decision to cooperate with the Government and the notoriety surrounding his case. Since that memorandum was filed, those burdens have increased and become more evident.

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43/ Cf. United States v. Potamitis, 609 F. Supp. 881 (S.D.N.Y. 1985) (reducing sentence on basis of "belated" and "minimal" post-sentencing cooperation); United States v. Del Toro, 405 F. Supp. 1163 (S.D.N.Y. 1975).

**Ivan Boesky Is Being Treated More Harshly Than Other Prisoners.**

Ivan Boesky has been, and very likely will be in the future, denied programs and other opportunities routinely available to other prisoners. For example, in October 1988 and January 1989 the United States Attorney's Office requested that Mr. Boesky attend several meetings in New York with a number of Assistant United States Attorneys. Mr. Boesky, through the U.S. Attorney's office, requested that he be given a legal furlough, i.e., released under Bureau of Prisons' community supervision, during the period of these meetings. Mr. Boesky's conduct at the Lompoc federal prison camp had been exemplary and thus supported a furlough. Although the Bureau of Prisons has full authority to grant such furloughs,44/ and they are routinely granted to prisoners being interviewed by the U.S. Attorney's Office, Mr. Boesky's requests were denied. Instead, he was required to travel in the custody of federal marshals (sometimes in hand cuffs) and housed by them in a federal custodial facility. Other prisoners similarly situated have been granted furloughs.

Similarly, Mr. Boesky has been told by officials at the Lompoc federal prison camp, the federal prison where he is incarcerated, that he may be denied access to early release programs, such as placement in a work furlough program through a

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44/ *See* 28 C.F.R. § 570.32(a)(6)-(8) (1988).

community treatment center, half-way house, or house arrest. These programs, which are designed to ease a prisoner's transition from prison back to life on the outside, are routinely available to other prisoners. For example, Dennis Levine -- who was convicted of and received a two-year sentence for insider trading -- was released nearly a year early to a work furlough program at a half-way house in the New York area.45/ Mr. Levine was released from the half-way house two months later.46/

Mr. Boesky will not be denied access to these programs because he is ineligible for them. Nor has his prison conduct been other than exemplary. He has been denied, and likely will continue to be denied prison benefits routinely available to other prisoners solely because of the notoriety that surrounds him; notoriety that in large measure is attributable to his well-publicized cooperation with the Government and the smear campaign orchestrated by Drexel and Milken for the past 2 1/2 years.47/ This extra-judicial punishment is neither deserved nor in the social interest, and is an important factor that the Court should consider in reassessing the appropriate length of Mr. Boesky's sentence.

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45/ N.Y. Times, July 6, 1988, at D18, col. 5.

46/ N.Y. Times, September 10, 1988, at 34, col. 5.

47/ It is unfair that the very success of Ivan Boesky's cooperation, which has resulted in a continuous stream of highly-publicized criminal and civil cases, serves to keep alive his notoriety and thus, as discussed above, reduces his chances for early release.

Moreover, the Court should understand that Mr. Boesky has almost no chance of early release through parole. The Parole Commission will almost certainly give Mr. Boesky an offense severity rating of "Category Six,"48/ and a salient factor score of 10.49/ Under the parole guidelines, the "customary range of time to be served before release" for a prisoner with that combination of scores is 40 to 52 months.50/ Because Mr. Boesky's sentence is for 36 months, well under the parole guideline term, his chances of parole are virtually nil. In ruling on Mr. Boesky's Rule 35 Motion, the Court should thus recognize that, if his pre- and post-sentencing cooperation is to be rewarded, this Court must do it.

**Ivan Boesky Is Verbally Abused And Vilified By Other Inmates Because Of His Cooperation With The Government.**

The sentencing memorandum and the original Rule 35 Memorandum described the verbal taunting and vilification Mr. Boesky received in the press, on television programs, and in nationally syndicated cartoon strips. That form of abuse has continued, heightened in large measure by Drexel's massive public relations blitz against Boesky. But, from the beginning of his

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48/ 28 C.F.R. § 2.20 at Ch. 3, Subch. G., 363(a) (1988).

49/ *Id.* at § 2.20(e).

50/ *Id.* at §§ 2.20 and 2.20(b).

incarceration in federal prison, the abuse has become more direct, more unavoidable.

Ivan Boesky hoped to serve his sentence quietly and in peace. But many of the other inmates at the federal prison, determined that he be punished for having cooperated with the Government, have tried to increase the severity of his sentence. They have branded him a "rat." At best, they ostracize him. At worst, they heap verbal abuse on him, degrading his name and his cooperation in an often vicious manner. A "flyer" recently attached to a bulletin board at the Lompoc federal prison camp typifies the treatment he receives. Bearing a likeness of him and personally denigrating him and his cooperation, the flyer reports that "three axioms guide" his life:

> "1. If you don't want to do the time <u>drop a dime</u>;
>
> 2. If you don't want to go to the pen <u>send a friend</u>;
>
> 3. If you want out today <u>work with the D.A.</u>"

Exhibit B, attached hereto (emphasis in original).

Such vilification and ostracism is not an isolated occurrence. Every time the press reports another development arising from Mr. Boesky's cooperation and every time Mr. Boesky is moved to or from the Lompoc facility to cooperate in an on-going

governmental investigation (such movements cannot be concealed from other inmates) the cycle of vilification repeats itself.

Ivan Boesky has reacted to this abuse as calmly as he can. He tries to avoid trouble by not eating in the prison cafeteria. He eats most of his meals alone in his dormitory. But he cannot escape mistreatment; the psychological toll is great. This type of unmerited punishment -- punishment directly caused by his cooperation -- is a significant post-sentencing factor that provides a compelling basis for reduction of sentence.

## IV. THE PUBLIC HAS A COMPELLING INTEREST IN REWARDING MR. BOESKY'S COOPERATION.

The above discussion makes clear that Ivan Boesky's early decision to cooperate with the Government has borne tremendous fruit and thus has been of great benefit to society. Unfortunately, as predicted in the original Rule 35 Memorandum, many potential targets of governmental investigations have learned the wrong lesson from his cooperation and the results it has achieved. They have learned that the benefits to cooperating defendants are too uncertain, and that refusing to cooperate costs little while delaying perhaps for years any criminal or civil charges. A rapidly increasing number of targets of governmental investigations of securities fraud -- and their attorneys -- thus conclude that stone-walling is the best approach, that cooperating

with the Government does not pay off in the end.51/ Ivan Boesky's Rule 35 Motion provides the Court with an opportunity to reverse that trend by sending a clear message that early and extensive cooperation will be rewarded.

The dramatically increasing reluctance of targets of investigations to cooperate does not bode well for the enforcement of federal securities laws. Insider trading and other securities frauds often involve extremely complex schemes that are nearly impossible to prosecute without a cooperating witness. As Gary Lynch, the Director of the SEC's Division of Enforcement, told a congressional panel:

> "[T]o detect this kind of fraudulent scheme, one usually has to have the cooperation of someone who participated in the scheme. And, without that kind of cooperation, the scheme could never even be detected, let alone prosecuted."52/

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51/ There is no question that fewer targets of investigations choose to cooperate today than before Mr. Boesky approached the Government. David Ruder, the Chairman of the SEC, told a congressional panel, "We're finding a very great increase in the willingness of defendants to litigate instead of settling cases. We are finding vigorous defense in these areas." Congressional Briefing, supra note 14, at [LEXIS p. 9]; See also Nathanial C. Nash, "Securities Prosecutions Meet Resistance by the Regulated," N.Y. Times, May 29, 1988, at Sec.4, p.4, col. 1. Gary Lynch, the Director of the SEC's Division of Enforcement, has noted that attorneys recently have increasingly advised their clients to assert the Fifth Amendment, stating "It's happening in all sorts of cases." National Law Journal, August 8, 1988, at 1, col. 2.

52/ Congressional Briefing, supra note 14, at [LEXIS p. 18].

A decrease in the number of cooperating witnesses thus not only inevitably means that fewer violators will be tried for their crimes. It also means that the violators will continue their fraudulent schemes. The fruits from Ivan Boesky's cooperation proves the point, as former United States Attorney Rudolph Giuliani publicly acknowledged:

> "There are many people who would love to have [had] Ivan Boesky not cooperate and instead have us spend two years trying to prosecute [him]. We may have won, we may have lost, but an awful lot of people would be still carrying on the frauds they were carrying on before he cooperated."53/

Moreover, the increasing number of targets who refuse to cooperate with the Government places a greater burden on already strained prosecutorial resources. The result is that investigators and prosecutors are significantly less able to detect and punish other violators and other types of violations. The stark contrast between Mr. Boesky's cooperation and Drexel's stone-walling illustrates the point well. Ivan Boesky's cooperation saved the government years of effort and millions of dollars in both his own prosecution and in other cases spurred by his cooperation. On the other hand, Drexel, before agreeing to settle, forced the Government to wage an intense two-year battle, thus causing the Government to divert tremendous amounts of scarce financial resources and large numbers of personnel to the

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53/ The MacNeil/Lehrer NewsHour, (Educational Broadcasting and GWETA television broadcast, Dec. 18, 1987).

investigation.54/ Milken continues to contest his indictment on racketeering charges and the SEC complaint against him. Chairman Ruder candidly told Congress that, "when we get into costly, complicated litigation like [the Drexel case], we can staff ourselves to handle [the] litigation, but it inevitably will mean that we will not be able to handle other kinds of activities."55/

In short, society has a large stake in assuring that the Government is able to secure cooperation in its investigation of securities violations. That interest is best protected by sending a message to defendants that the costs and benefits of cooperation outweigh fighting the Government tooth and nail. Precisely because likely defendants in securities cases are and will be wholly familiar with the disposition of this Motion, this Court's decision will undoubtedly have a profound impact on those who in the future must weigh the costs and benefits of cooperation.

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54/ This problem is exacerbated by the fact that Drexel and other violators of the securities laws often have tremendous financial resources with which to fight Government investigations. Indeed, Drexel reportedly had set aside a legal defense fund of over $700 million, Wall St. J., December 14, 1988, at A3, col. 1, more than five times the entire operating budget of the SEC ($135 million in fiscal 1988). Congressional Briefing, supra note 14, at [LEXIS p. 11].

55/ Congressional Briefing, supra note 14, at [LEXIS p. 12].

## V. IVAN BOESKY AGAIN PLEADS FOR COMPASSION.

Ivan Boesky recognizes the Court once again is faced with the responsibility of assessing a fair sentence in a publicly charged environment. Now that the veil of grand jury secrecy has been lifted, the court should once again balance all factors including his additional cooperation and reassess his sentence. Numerous factors in this new balancing support sentence reduction. The Court and the public can see the full benefits of his cooperation. The Court and the public can see that he was a follower in the larger Drexel conspiracy. The Court and the public can see that Mr. Boesky's circumstances have changed. He has served more than a full year in prison. His life has been threatened. He has continued his unprecedented cooperation.

Moreover, Mr. Boesky respectfully urges the Court, as it makes its decision, to remember the other significant punishments already imposed: the $100 million he paid in penalties and to an escrow account, which represents virtually his entire net worth; the loss of his livelihood; his overwhelming public humiliation; and, of course, the vicious and unfair punishments he has received because of his decision to make amends for his conduct by helping the Government.

Ivan Boesky stands before the Court a changed man. He is still ashamed of his past conduct. He is contrite. He asks the Court for compassion as it considers his plea for the earliest possible opportunity to reenter society, rejoin his family, and continue his process of redemption.

Respectfully submitted,

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