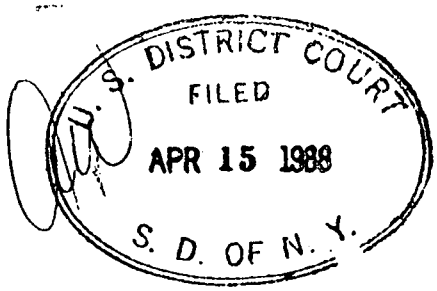
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK




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

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

Leon Silverman
Fried, Frank, Harris,
Shriver & Jacobson
One New York Plaza
New York, New York 10004
(212) 820-8080

Robert B. McCaw
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420

Attorneys for Ivan F. Boesky

April 15, 1988

TABLE OF AUTHORITIES

Cases — Page

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

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

On December 18, 1987, this Court sentenced Ivan F. Boesky to a term of three years in prison. Mr. Boesky began serving this sentence on March 23, 1988.

The Court imposed sentence after Mr. Boesky voluntarily approached the U.S. Attorney with a proffer of evidence and subsequently reached a settlement with both the U.S. Attorney and the Securities and Exchange Commission ("SEC"). That settlement had the following consequences: (1) Mr. Boesky pleaded guilty to an information charging that he conspired to make false filings with the SEC concerning ownership of securities of Fischbach Corporation; (2) he paid $50 million in personal funds to an escrow account to recompense those who have valid claims against him and the entities he managed; (3) he paid another $50 million in

personal assets as a civil penalty; (4) he consented to a civil injunction and an SEC administrative order that permanently bars him from the securities industry; and (5) he cooperated, and continues to cooperate, with the U.S. Attorney and the SEC.

Mr. Boesky now submits this Motion pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure for reduction of sentence as "a plea for leniency."[1/] Mr. Boesky recognizes and appreciates that the Court has already carefully and painstakingly considered his punishment. The Court's public statement at sentencing fully reflects that care. Mr. Boesky nevertheless prays that the Court will, in accordance with the purpose of Rule 35, reconsider the sentence imposed in light of developments since sentencing, the vital public interest in rewarding cooperation, and the dictates of justice and mercy.

The purpose of Rule 35 is:

> to give every convicted defendant a second round before the sentencing judge, and at the same time, it affords the judge an opportunity to reconsider the sentence in the light of any further information about the defendant or the case which may have been presented to him in the interim.[2/]

---

1/ United States v. Ellenbogen, 390 F.2d 537, 543 (2d Cir.), cert. denied, 393 U.S. 918 (1968) (quoting Poole v. United States, 250 F.2d 396, 401 (D.C. Cir. 1957)).

2/ Ellenbogen, 390 F.2d at 543; United States v. Jones, 444 F.2d 89, 90 (2d Cir. 1971); United States v. Friedman, No. 86 Cr. 591 (MJL) (S.D.N.Y. Oct. 14, 1987) (1987 U.S. Dist. LEXIS 9276); United States v. Morales, 498 F. Supp. 139, 142 (E.D.N.Y. 1980).

Rule 35 requires that any motion for sentence reduction be filed within 120 days of imposition of the original sentence, or in this case by April 18, 1988. While the Court need not act on the motion within the 120 day period, the Rule provides that "[t]he court shall determine the motion within a reasonable time."[3/] The reasonableness of a period of time generally depends on the circumstances.[4/]

The circumstances surrounding this Rule 35 Motion are extraordinary. As set forth in the Government's Sentencing Memorandum, Mr. Boesky's cooperation has triggered numerous governmental civil and criminal investigations. Although there have already been eleven criminal charges (four in the United States and seven in England), four guilty pleas, and nine completed SEC administrative and civil injunctive proceedings arising from Mr. Boesky's cooperation, additional major pending investigations triggered by his cooperation have not yet resulted in indictments or public proceedings (except as to John Mulheren, Jr., discussed below). As these pending investigations mature into criminal and

---

3/ Fed. R. Crim. P. 35(b).

4/ See, e.g., Fed. R. Crim. P. 35, Notes of Advisory Committee on Rules (1985 Amendment); United States v. DeMier, 671 F.2d 1200, 1207 (8th Cir. 1982); United States v. Smith, 650 F.2d 206, 209 (9th Cir. 1981) ("[W]e see no merit in adopting appellants' suggestion that delays of over six months be decreed prima facie unreasonable.").

civil charges, the extraordinary extent and value of Mr. Boesky's cooperation will become even more evident than it was at sentencing, or than it can be now.

Thus, the Court will almost certainly have significantly more information relevant to this Motion when the pending investigations mature. The purposes of Rule 35 -- reconsideration of sentence in light of further information about the defendant or the case -- would be best served under the unique circumstances present here by withholding a ruling for a reasonable period of time. Accordingly, Mr. Boesky requests the Court to exercise its discretion to defer any ruling on this Rule 35 motion until approximately October 1988.[5/]

Whenever the Court rules, there are critical post-sentencing developments and potent reasons for sentence reduction. These developments and reasons -- to the extent now publicly known -- are set forth below.

---

5/ In requesting that the Court defer its decision on this Motion, Mr. Boesky nevertheless seeks a decision within a "reasonable time" as required by Rule 35. See Rule 35(b), and Notes of Advisory Committee on Rules (1985 Amendment).

## I. EVENTS SINCE SENTENCING JUSTIFY A REDUCTION OF SENTENCE.

### Ivan Boesky Has Continued His Extraordinary Cooperation.

At sentencing, the Court weighed Mr. Boesky's extraordinary and unprecedented pre-sentencing cooperation. The Court obviously could not consider any post-sentencing efforts to continue to assist the Government because it could not have known how extensive and helpful that cooperation would be. The Court now is in a position to weigh in part -- and give additional credit for -- Mr. Boesky's post-sentencing cooperation.

Ivan Boesky's unprecedented cooperation with the Government did not end upon sentencing. Sentenced on December 18, 1987, Mr. Boesky was back in debriefing sessions with the United States Attorney's office on December 23, 1987, and has attended more than a dozen other meetings since that date, with at least six different Assistant United States Attorneys, three different Special Agents of the IRS, and ten investigators from the SEC. Such sessions have included not only the investigative matters described in the Government's Sentencing Memorandum, but new topics, new transactions, new relationships, and new securities growing out of Mr. Boesky's earlier cooperation and other Governmental investigations. In addition, Mr. Boesky's counsel have assisted the United States Attorney's Office and the SEC in reviewing and taking joint custody of more than 700 file boxes of documents from the former Boesky offices.

The courts of this District have long recognized that a defendant should receive credit for helpful post-sentencing cooperation. See, e.g., 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). As the court stated in Del Toro, 405 F. Supp. at 1165, such post-sentencing efforts to assist the Government are relevant to the court's fresh determination of an appropriate sentence "if they either (a) bring results useful to the government or (b) show a contrition of spirit suggesting a reformed outlook." (Emphasis added.) Mr. Boesky's post-sentencing cooperation amply meets both justifications for sentence reduction.

Mr. Boesky's post-sentencing cooperation has been of great value to the Government. The number of meetings and the diversity of the Government personnel involved evidence the importance that the Government itself attaches to the information Mr. Boesky has continued to provide. In these meetings, Mr. Boesky answered all questions, explained specific transactions, and repeatedly volunteered information. Mr. Boesky, with the aid of his counsel, has also assisted the Government in its analysis and understanding of hundreds of documents critical to its criminal and civil investigations.

While this post-sentencing cooperation has frequently focused on the details and specifics of Mr. Boesky's pre-sentencing disclosures, it has also extended into new areas. Mr. Boesky has been asked, and has volunteered, information about topics, people, relationships, transactions, and securities that were not the subject of pre-sentence debriefing sessions. He has suggested new avenues of inquiry for Government investigators.

This cooperation, building upon Mr. Boesky's pre-sentencing cooperation, has borne fruit. According to newspaper accounts, in February 1988, the United States Attorney's Office advised counsel for John Mulheren, Jr., a general partner of Jamie Securities, that Mr. Mulheren was likely to be indicted in connection with transactions with Boesky entities. As discussed more fully below, Mr. Mulheren was subsequently arrested on federal felony charges of threatening federal witnesses, including Mr. Boesky.

On January 22, 1988, in connection with civil proceedings before Judge Pollack, the United States Attorney's Office advised a number of persons and entities that they were under investigation in connection with Boesky-related transactions.[6/] On February 16, 1988, in a bond prospectus, Drexel Burnham Lambert, Inc. ("Drexel") publicly acknowledged both that the SEC

---

6/ Transcript of Hearing at 58-59, In re Ivan F. Boesky Sec. Litig., No. M 21-45 MP (S.D.N.Y. January 22, 1988).

Staff had recommended an enforcement proceeding against Drexel and senior Drexel officials and that Drexel and its senior officials are subjects of a federal grand jury investigation.7/

In connection with the United Kingdom proceedings related to the Guinness takeover of Distillers, there have also been important post-sentencing developments. Mr. Parnes, arrested in the United States after having fled the United Kingdom, has now waived extradition and agreed to return voluntarily to the United Kingdom.8/ On March 11, 1988, the United Kingdom Government arrested Lord Spens, former head of corporate finance of the investment banking firm of Henry Ansbacher. On April 7, 1988, the United Kingdom Government arrested David Mayhew, a senior official of the venerable English brokerage firm of Cazenove and Co.9/ Lord Spens and Mr. Mayhew were respectively the sixth and seventh persons charged in the Guinness investigation originally triggered by Mr. Boesky's revelations to the United States Government.10/ The United Kingdom High Court sustained the Takeover Panel, which, acting on information obtained as a result of Mr. Boesky's disclosures, had ordered Guinness to

---

7/ Wall St. J., February 22, 1988, at 2, col. 3.

8/ Wall St. J., March 24, 1988, at 27, col. 4.

9/ Wall St. J., April 8, 1988, at 14, col. 2.

10/ Financial Times, March 11, 1988, at 20, col. 1; The Sunday Times, March 13, 1988, at D3, col. 1.

pay certain former Distillers' shareholders more than 100 million pounds ($186 million).[11/] Finally, the press reports that the United Kingdom is about to indict and seek to extradite Thomas Ward, an American lawyer who formerly served as a Guinness director and advisor.[12/]

These concrete events in the four-month period since Mr. Boesky's sentencing provide additional evidence, not available at the time of sentencing, of the extraordinary value of both Mr. Boesky's pre- and post-sentencing cooperation. They provide a strong basis for sentence reduction.

**The Heavy Price Paid By Mr. Boesky For His Cooperation Has Dramatically Increased.**

Before sentencing, Ivan Boesky had already paid a heavy price for his decision to cooperate with the Government. During fifteen months of pre-sentencing cooperation, the press vilified both Mr. Boesky's wrongful conduct and his cooperation. He was often ridiculed on national television. His cooperation made him anathema to many of his former friends and social and business acquaintances. Such verbal attacks, as serious and as punishing as they have been, pale in comparison to the price Mr. Boesky has paid for his cooperation since his sentencing.

---

11/ Wall St. J., March 30, 1988, at 15, col. 6.

12/ Wall St. J., March 23, 1988, at 23, col. 4.

On February 18, 1988, shortly after learning that the United States Attorney's Office was seriously pursuing criminal charges against him, John Mulheren, Jr., allegedly set out to kill Mr. Boesky and Michael Davidoff, the former head stock trader for the Boesky entities. As the United States Attorney advised the Court at sentencing, Mr. Boesky had implicated Mr. Mulheren in illegal conduct.[13/] On the afternoon of February 18, 1988, following a debriefing session, Mr. Boesky and his counsel were requested to remain in the United States Attorney's Office because that Office had been advised that Mr. Mulheren had left his house with a loaded assault rifle, with the intent to kill at least one of the witnesses against him. Fortunately, the New Jersey police stopped Mr. Mulheren and seized his loaded weapons -- two pistols, a shotgun, and a .233 Israeli Galil assault rifle -- before he could carry out his intentions.[14/] Mr. Mulheren reportedly then told police that he was after Mr. Boesky and Mr. Davidoff. A Monmouth County, N.J. prosecutor, later said: "There was no doubt he would do something drastic. He was trying to kill them."[15/]

---

13/ Government's Memorandum with Regard to the Sentencing of Ivan F. Boesky at 17-18, United States v. Boesky, 87 Cr. 378 (MEL) (S.D.N.Y. December 14, 1987).

14/ The police reportedly were tipped off by Mr. Mulheren's wife earlier that afternoon. Mr. Mulheren had gone to Mr. Davidoff's house earlier that morning, but, fortunately, Mr. Davidoff was not home. N.Y. Times, February 20, 1988, at 1, col. 1.

15/ Wall St. J., February 22, 1988, at 1, col. 1.

The U.S. Attorney's Office considered the threat against Mr. Boesky to be of the utmost seriousness. That Office took a number of public and private steps to protect Mr. Boesky's safety. The Government vigorously opposed Mulheren's release from jail because he had made a "cool and rational decision to attempt to murder Federal witnesses."16/

Mr. Mulheren's actions speak volumes—about the drastic price that Mr. Boesky has paid for his cooperation -- cooperation that was, and is, essential to the Government in rooting out securities crimes.

Mr. Mulheren's actions -- combined with other contemporaneous events -- created justifiably grave personal safety concerns. Mr. Mulheren acted at a time when other subjects of the United States Attorney's Boesky-related investigations had Mr. Boesky under physical surveillance. As the United States Attorney's Office is aware, persons hired by other investigatory subjects watched Mr. Boesky's movements from telephone-equipped cars, followed him on the streets, questioned other patrons at establishments he utilized, and harassed him in various other ways.

---

16/ N.Y. Times, March 6, 1988, at A44, col. 1 (quoting AUSA Robert Gage). Mulheren is currently being held at the Carrier Foundation, a private psychiatric clinic. N.Y. Times, March 11, 1988, at D1, col. 1.

Mr. Mulheren's actions, against the background of nearly-constant physical surveillance of Mr. Boesky by strangers whose intentions could not be ascertained, justifiably aroused grave personal safety concerns. Although the United States Attorney's Office took steps to reassure Mr. Boesky, these events added dramatically to the psychological cost of cooperation. Yet, throughout this period, Mr. Boesky continued to meet regularly with Government investigators.

Ivan Boesky does not suggest that the threat on his life eliminates the need for any further punishment. It does highlight the increased emotional strain imposed on Mr. Boesky and his family as a result of his cooperation, and it is therefore an important post-sentencing factor to be weighed in reassessing the length of Mr. Boesky's incarceration.

**Mr. Boesky's Continued Cooperation in the Face of Danger Reaffirms His Private Contrition.**

At sentencing, this Court quoted an Assistant United States Attorney concerning Mr. Boesky's attitude: "There is private contrition, there is model cooperation, there is all of that in spades."[17/] The extensiveness of Mr. Boesky's post-sentencing cooperation in the face of threats of bodily injury and his continued serious pursuit of religious studies since sentencing

---

17/ Transcript of Sentencing at 38, United States v. Boesky, 87 Cr. 378 (MEL) (S.D.N.Y. December 18, 1987).

reaffirm the Court's assessment of his determination to atone and redirect his life. Every piece of evidence before the Court demonstrates that Mr. Boesky deeply regrets his past conduct and is doing everything humanly possible both to rectify that conduct and to manifest his deeply felt desire to again be a productive member of society. No one can seriously suggest that Mr. Boesky will ever be before this or any other criminal court again. The experience has been too painful, too devastating, and too much in contrast to the normal pattern of his life for him ever to repeat such wrongdoing.

**Subsequent Sentences Imposed By Other Courts Support Sentence Reduction.**

At sentencing, the Court considered Mr. Boesky's sentence in light of the sentences imposed in related or similar cases in the Southern District of New York. Since December 18, 1987, courts in the Southern District and elsewhere have imposed more lenient sentences that support reduction of the three-year prison term imposed on Mr. Boesky.[18/]

---

18/ The Southern District of New York has recognized that reducing or eliminating any disparity in sentences is an important purpose of Rule 35. See, e.g., United States v. Rubinson, 426 F. Supp. 266, 267 (S.D.N.Y. 1976) (reducing defendant Rubinson's sentence on the basis of a reduction of sentence subsequently granted another defendant, even though Rubinson refused to cooperate with the Government).

Judge Stewart sentenced Peter Brant to serve only 120 weekends in jail.[19/] Brant, formerly a highly-compensated registered representative at Kidder Peabody, pleaded guilty to one conspiracy and two securities fraud counts for his participation in a scheme to trade in the securities of at least 24 issuers on the basis of non-public information obtained from R. Foster Winans of the Wall Street Journal. Judge Stewart stated that Brant was "obviously guilty of very substantial crimes," and regarded him as "at least as guilty as Mr. Winans, perhaps more so,"[20/] but gave him substantial credit for his cooperation. Brant's cooperation, while extensive, was certainly not as unprecedented, or as valuable, as Mr. Boesky's cooperation.[21/]

On March 11, 1988, this Court sentenced Charles Atkins to only two years in prison, plus probation and community service.[22/] Mr. Atkins was convicted by a jury after a long and

---

19/ United States v. Brant, 84 Cr. 470 (CES) (S.D.N.Y.).

20/ N.Y. Times, February 27, 1988, at A37, col. 3.

21/ The Government credited Brant with "critical and substantial" cooperation in two major cases. Government's Sentencing Memorandum at 5, United States v. Brant, 84 Cr. 470 (CES) (S.D.N.Y. February 22, 1988). By contrast Mr. Boesky has assisted in obtaining three convictions and initiating more than a dozen investigations in the United States and in instituting seven pending criminal cases in the United Kingdom.

22/ Transcript of Sentencing at 26, United States v. Atkins, et al., SS 87 Cr. 246 (MEL) (March 11, 1988).

expensive trial on 27 counts of conspiracy to commit tax fraud, substantive tax fraud, and aiding and abetting tax fraud, involving hundreds of millions of dollars in phony tax losses -- the largest tax fraud conviction ever in this District.[23/] The Government got no cooperation from Mr. Atkins. On the contrary, the Government accused Mr. Atkins of perjury at every turn, including his trial testimony before this Court.[24/] Mr. Atkins made no effort to recompense the victims of his crimes. On the contrary, the Government accused him of perjury for the purpose of concealing the fraudulent conveyance of his assets to his wife.[25/]

The Government itself recognized the "comparisons and contrasts" between the Boesky and Atkins cases. The Government found "the actual dollar amount of injury to the Government ... higher [in the Atkins case] than in the Boesky case."[26/] The Government also recognized that "[u]nlike Atkins ... Boesky admitted his guilt, agreed to cooperate with the Government, and sought to make amends for his crimes."[27/] The Government's

---

23/ Government's Memorandum Concerning Sentencing at 41, United States v. Atkins, SS 87 Cr. 246 (MEL) (S.D.N.Y. February 26, 1988).

24/ Id. at 38, 40, 41.

25/ Id. at 37-38.

26/ Id. at 41.

27/ Id.

Atkins Sentencing Memorandum cannot be read otherwise than to acknowledge that Boesky should be treated more leniently -- much more leniently -- than Atkins. We urge the Court to reconsider in light of the Atkins sentence the credit that Mr. Boesky should receive for his cooperation, his acknowledged contrition, and for his responsible steps to provide for restitution to persons who may have valid claims.

Even more disparate was Judge Spellman's sentence of Victor Posner -- the corporate raider who allegedly used the stock involved in the Boesky guilty plea to acquire control of, and loot, Fischbach Corporation[28/] -- to five years probation, 5,000 hours of community service, charitable contributions, and disgorgement of the back taxes with interest and penalties.[29/] Posner fought charges of federal income tax evasion through trial, conviction, and successful appeal, before pleading no contest (over the Government's objection) to ten counts of tax

---

28/ Verified Complaint, Rubin v. Posner, No. 87-378 (D. Del.); Second Amended Complaints, Carpenters Pension Trust for Southern California v. Bernard, No. CV-86-6533-R (JRx) (C.D. Cal.) and Carpenters Health & Welfare Trust for Southern California v. Bernard, No. CV-86-7471-R (JRx) (C.D. Cal.).

29/ United States v. Posner, 82-352-CR-SPELLMAN (S.D. Fla.); Wall St. J., February 16, 1988, at 10, col. 2.

fraud. Posner never cooperated. The Government urged a jail sentence,[30] and has challenged the legality of the sentence.[31]

The comparison between the Boesky and Posner sentences does not reflect well on our judicial system. Posner was caught, indicted, prosecuted, convicted, appealed, and faced retrial. He took full advantage of every delay available in the criminal process. He cost the taxpayers hundreds of thousands, if not millions, of dollars in investigatory and litigation time and energy. He never contributed his knowledge to aid the Government in any way. In the end, he paid little more than he legally owed. He was sentenced to community service.

Mr. Boesky, by contrast, squarely faced the consequences of his wrongful acts. He voluntarily contacted the United States Attorney's Office. He saved the Government hundreds of thousands, if not millions, of dollars in investigatory and litigation resources. He voluntarily disgorged virtually his entire net worth, including $50 million in escrow for claimants and $50 million in assets as a penalty to the United States.

---

30/ Transcript of Sentencing at 13, 17, United States v. Posner, 82-352-CR-SPELLMAN (S.D. Fla. February 12, 1988).

31/ United States' Motion to Vacate Sentence as Illegal and to Reschedule Sentencing of Defendant, United States v. Posner, 82-352-CR-SPELLMAN (S.D. Fla. April 4, 1988).

He has already assisted the Government in obtaining the convictions of significant members of the investment community, including Boyd Jefferies and Martin Siegel. He assisted the Government in securing civil injunctive relief and administrative sanctions against Kidder Peabody, Jefferies & Co., and others. He has given the United States Government information that has triggered numerous other pending criminal and civil investigations. He assisted the United Kingdom in initiating an investigation that has, to date, resulted in seven arrests and a judicially approved takeover panel order that Guinnness pay more than 100 million pounds ($186 million) to certain former Distillers' shareholders.

The disparities in sentences between Boesky, on the one hand, and Brant, Atkins and Posner, on the other hand -- unless corrected on this Rule 35 Motion -- have an apparent unfairness and are likely to have unfortunate consequences. First, the disparities can only encourage future wrongdoers to fight the Government at every turn and tie up limited enforcement resources. Potential defendants in future situations simply will not be able to conclude that the criminal system rewards cooperation sufficiently to overcome the disadvantages that inevitably result from acknowledging past misconduct. Second, the disparities between the Boesky and particularly the Atkins sentences suggest that the judicial system offers little reward to those who take substantial steps to remedy the financial

consequences of their wrongs through early cooperation and voluntary disgorgement.

**The Public Has a Strong Interest in Rewarding Ivan Boesky's Cooperation.**

The intrusions and threats of physical violence, discussed above, demonstrate more clearly than words that the cost of Mr. Boesky's pre- and post-sentencing cooperation has become monstrously high, and that future defendants -- to society's detriment -- may be far less likely to follow Mr. Boesky's example of unprecedented, outstanding, model cooperation.

No one would dispute that the public has a keen interest in ensuring that the Government have available to it every reasonable means of detecting, apprehending, and convicting violators of the law. One vitally important tool used to promote that interest is the practice of rewarding defendants who cooperate with Government officials in their investigations of illegal activities. As Judge Friendly stated: "[T]he ability to offer leniency in return for cooperation is an indispensable tool of law enforcement." United States v. Ross, 719 F.2d 615, 623 (2d Cir. 1983) (concurring and dissenting).

The ability of criminal and civil securities enforcement authorities to secure cooperation is a matter of substantial current public concern, especially since many securities crimes are nearly impossible to detect or prove without the

cooperation of one of the participants. In February 1988, two months after this Court sentenced Boesky, the Director of the SEC Division of Enforcement acknowledged that severe insider-trading penalties were damaging new cases and convincing some people that "its better to hunker down than cooperate."[32/] In March 1988, SEC Chairman Ruder advised a Congressional Committee that the Commission would likely need more enforcement resources to handle "large fraud cases" because it was "much more resource-intensive to litigate a major securities fraud case than to engage in the investigative phase and reach agreement."[33/]

By offering leniency to defendants in return for cooperation, society receives two benefits. First, it receives the direct benefit of the particular defendant's cooperation. Second, it benefits because future defendants, assured that their cooperation truly will be rewarded, are encouraged to cooperate fully. This second benefit, though less direct, is no less important. If experience teaches future defendants they can do as well by stonewalling as by cooperating, few will be willing to

---

32/ Gary Lynch, the SEC Director of the Division of Enforcement, recently stated that the SEC was "getting less cooperation. More people are asserting their Fifth Amendment privilege and not cooperating, so we're not being able to ask basic questions . . . . [I]t does make it more difficult to put together information in an investigation." The Wall Street Journal Report, (Dow Jones and Company, Inc., television broadcast, Feb. 21, 1988) (transcript #282, at 3).

33/ N.Y. Times, March 25, 1988, at D14, col. 3.

tolerate the vilification and abuse -- or even the risk of physical harm -- suffered by those who do cooperate fully.

Both of these societal benefits are particularly important in this case. First, society has unquestionably benefitted from Ivan Boesky's efforts to aid the Government's investigations. Those efforts, which went far beyond the proffer upon which his cooperation agreements were based, included the identification of numerous other wrongdoers, many of whom would not have been detected absent his cooperation. The publicly known direct benefits from his cooperation have been tremendous: more than nineteen criminal and civil cases, including four convictions in the United States, seven pending indictments (in the United Kingdom), nine completed SEC administrative and civil injunctive proceedings, and over $134 million in disgorgements and civil penalties in this Country and $186 million in the United Kingdom. Other benefits, the full extent of which have not emerged, undoubtedly will follow.

Second, future defendants, in deciding whether to cooperate immediately and fully, before and after sentencing, will likely be influenced by this Court's decision whether to reward Mr. Boesky's cooperation. Few in this society can have missed the publicity surrounding this case or the disparagement of Mr. Boesky that has resulted not just from his wrongdoing but also from his cooperation. And few can have missed the threat on

his life that resulted from his cooperation. Precisely because many defendants make decisions about how fully to cooperate based at least in part on their perceptions of the costs and benefits from such cooperation, this publicity -- and the publicity given the disposition of this Motion -- will likely affect the decisions of future defendants and their counsel.

## II. IVAN BOESKY BEGS THE COURT TO RECONSIDER ITS DECISION.

Ivan Boesky's singular post-sentencing cooperation, the increased costs associated with that cooperation, subsequent sentences in other cases, and the vital public interest in encouraging others to cooperate, constitute sufficient grounds for the Court to grant his sentence reduction Motion. But, even apart from these post-sentencing developments, Mr. Boesky pleads with the Court to reconsider its decision to impose a three-year sentence.

### Ivan Boesky Has Been Punished Severely For His Misconduct.

Ivan Boesky has paid an awesome price for his wrongful conduct. Although that price does not excuse his guilt, or obviate the need for incarceration, justice and fairness dictate that the penalties beyond jail-time be taken into account in assessing the magnitude of his incarceration.

The Southern District of New York has recognized that the loss of a professional license alone, even by a defendant who shows no remorse, is a sufficient reason to grant a reduction of sentence. In United States v. Doe, 53 F.R.D. 361 (S.D.N.Y. 1971), the defendant, an Internal Revenue agent, was convicted on eight counts charging him with bribery, conspiracy to commit bribery, aiding and abetting bribery, and failing to report violations of the internal revenue laws, all over a substantial

> license, its actual forfeiture invariably produces a crushing effect on him.

Id.

Even a cursory comparison of the two cases amply establishes that the reasons to reduce Mr. Boesky's sentence are far more compelling. Ivan Boesky has lost his means of livelihood for the last twenty years. In connection with his plea agreements, he agreed to a permanent ban on his participation in the securities industry. He also agreed to forfeit his license to practice law and thus has been voluntarily disbarred from the Michigan State Bar. Mr. Boesky's loss of his bar license and his banishment from the securities industry are at least as severe as a loss of a CPA license alone. And there are simply no countervailing factors here such as failure to cooperate and lack of remorse.

Moreover, Ivan Boesky has suffered substantially in a number of other ways. He paid $100 million -- $50 million to an escrow fund and $50 million in civil penalties -- of his personal assets. His investment in his former business is now worthless. His legal expenses and potential liability in numerous civil actions claiming hundreds of millions of dollars in damages make personal bankruptcy all too likely.[34/] In short, Ivan Boesky has

---

34/ Ivan Boesky is a defendant in 21 private civil lawsuits -- two of which have been filed since sentencing -- claiming losses, restitution, treble damages, punitive damages, attorneys' fees, and costs far in excess of $1.7 billion.

paid dearly for his unlawful conduct. See Defendant's Memorandum on Sentencing at 23-26.

**Ivan Boesky Has Much To Contribute To His Family and to Society.**

Throughout his life, Ivan Boesky has demonstrated a strong desire and ability to contribute positively to his family, friends and employees, as well as to educational, religious, medical and cultural organizations, and society at large. His contributions, detailed in his Sentencing Memorandum and in the many letters from those he has helped, copies of which are attached to that Memorandum, reflect a life-long record of helping other people. Although those contributions need not be repeated here, we reemphasize the point so that the Court will have in mind the complete picture of Mr. Boesky as it reconsiders his sentence. See Defendant's Memorandum on Sentencing at 27-38.

Mr. Boesky should receive credit for his many contributions to his family and to society. He made mistakes; admittedly, grave ones. But those mistakes must be considered in light of the balance of his life. And it would be senseless if those mistakes caused his family and the community to be deprived, for a lengthy period, of the substantial assistance that he has always brought -- and always will bring -- to those groups.

**Ivan Boesky's Conduct Since His Plea Agreement Reflects His Genuine Remorse.**

Ivan Boesky's actions since his early decision to cooperate profoundly demonstrate that he has repented and that he strives to recompense those whom he may have injured. First, his extraordinary decision to cooperate before he had been arrested or indicted, and at a time when he could easily have litigated for years and might have prevailed, itself speaks clearly of his determination to make amends for his wrongful conduct.

Second, only one who strongly desires to repudiate his aberrant behavior could cooperate so fully and so intensely. Third, he has also done everything within his power to repay those arguably injured by his conduct. Among other things, he placed $50 million of his personal assets in an escrow account to pay valid claims against him and the entities he controlled. He also worked diligently to protect investors in the Boesky enterprises by assisting a settlement of $640 million in indebtedness owed by his principal arbitrage partnership. As a result of the settlement, the main arbitrage partnership now holds approximately $303 million in cash equivalents to repay investors (other than Mr. Boesky) who invested roughly $320 million. The liquidating partner of that partnership recently proposed an immediate distribution -- which even after paying the wholly undeserving Guinness $29 million -- would immediately make all the innocent investors 86 percent whole by their own calculation

and still leave a reserve sufficient to satisfy the remainder of their claims.[35/] Consequently, subject to the disposition of future claims, there is a reasonable possibility that the innocent investors will remain whole.

In short, Mr. Boesky is truly remorseful and repentant. He fully recognizes that his conduct was wrong and that he has deeply hurt many people, particularly those closest to him. Although he cannot undo his misconduct, he can and intends to make amends by applying his skills and talents to bettering his community. He pleads with the Court for an opportunity to commence that process as quickly as possible.

**Ivan Boesky Respectfully Urges The Court To Reconsider Its Application of The Four Purposes of Sentencing.**

At sentencing, the Court noted that it is perhaps universally agreed that there are four purposes of sentencing: (1) to impose punishment or retribution proportional to the offense; (2) to rehabilitate the offender; (3) to deter the individual from committing another offense; and (4) to deter the general public from committing such offenses by warning of the seriousness of the offense.[36/] These four purposes do not on

---

35/ Letter from the Liquidating Partner to the limited partners of CX Partners, L.P. (formerly Ivan F. Boesky & Co., L.P.) dated March 4, 1988, at 2.

36/ Transcript of Sentencing at 36, United States v. Boesky, No. 87 Cr. 378 (MEL) (S.D.N.Y. December 18, 1987).

their face acknowledge the vital societal importance of cooperation to effective law enforcement, and accordingly, as the Court recognized at sentencing, should be evaluated so as to credit cooperation.

Ivan Boesky respectfully suggests that, if the Court reapplies the four purposes of sentencing, with appropriate adjustment for the vital importance of cooperation, it will be persuaded that those purposes -- and the balancing of public and individual interests those purposes reflect -- warrant a reduction of his sentence. At least two of those four purposes -- to rehabilitate the offender and to deter the individual from committing another offense -- unquestionably do not support a term of imprisonment for Mr. Boesky. As the Court recognized in its sentencing statement, "there is no need in this case to impose sentence for the purpose of rehabilitation" because "every item of evidence establishes with a high degree of assurance that Mr. Boesky is not today the man he was at the time of his offenses."[37/] Similarly, "[if] there was ever a case in which there was reason to believe that the offender himself will not repeat his offence or resort to future criminal behavior, this is it."[38/]

---

37/ Id. at 37.

38/ Id. at 38.

Ivan Boesky respectfully suggests that the other two purposes -- proportional punishment and general deterrence -- do not support a three-year prison term, given his pre- and post-sentencing cooperation. Concerning the need for proportional punishment, the Court stated: "Mr. Boesky's offense cannot go unpunished. Its scope was too great, its influence too profound, its seriousness too substantial merely to forgive and forget."[39/] No one, least of all Ivan Boesky, would disagree with the Court's statement. But he does respectfully urge the Court to give full credit to the significant punishments he has already incurred, including the forfeiture of $100 million, his banishment from the securities industry, the loss of his bar license, and his ostracism from both former friends and the community at large. Cooperation -- especially at the risk of constant surveillance and threat of bodily harm -- is also punishing. Such punishments, though extra-judicial, will affect him for the rest of his life and should be weighed in the balance when determining the appropriate sentence.

Concerning the need to deter others from committing similar offenses, the Court stated that "[s]ome kind of message must be sent to the business community that such activities cannot be wholly repaired simply by repaying people after the fact."[40/] No concerned citizen, including Mr. Boesky, would

---

39/ Id. at 37.

40/ Id. at 39.

disagree. But, again, he does not ask the Court to forgo all incarceration. He does, however, request that the Court consider, in determining the length of prison term necessary to deter others, that he has indeed been punished in a number of well-publicized ways. If a more lenient term of incarceration, together with ostracism from the community, the payment of $100 million in personal assets, the banishment from his business for life, is not sufficient to deter others from repeating Mr. Boesky's mistakes, it is unlikely that any punishment will be. Moreover, his unstinting cooperation -- both before and after sentencing -- should weigh heavily in favor of leniency in applying the deterrence factor. Mr. Boesky's highly-publicized cooperation -- including surreptitious taping at the Government's request -- and additional convictions and investigations stemming from his cooperation have powerful deterrent effects.

## III. IVAN BOESKY PLEADS FOR COMPASSION.

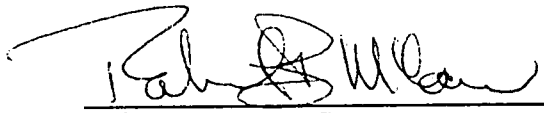
Ivan Boesky does not ask the Court for special treatment or favor. On the contrary, he merely begs the Court to treat him as it treats any other defendant who is a first offender; who has demonstrated contrition and remorse; who -- even after imposition of sentence and in the face of a threat to his life -- has continued to cooperate with the Government to an extraordinary extent; who had been severely punished already through the loss of his source of livelihood, of a professional license, and of his public reputation; who had used virtually all of his assets to make restitution to those who may be found to have been injured by his conduct; and who had demonstrated a life-long desire and ability to help the community through public service and charitable activities.

Ivan Boesky publicly admitted his guilt. He is ashamed of his past conduct. He simply begs the Court for compassion and the earliest possible opportunity to resume his role as a productive member of society.

Respectfully submitted,

Leon Silverman

Leon Silverman
Fried, Frank, Harris,
Shriver & Jacobson
One New York Plaza
New York, New York 10004
(212) 820-8080



Robert B. McCaw
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Attorneys for Ivan F. Boesky

April 15, 1988