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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re Application of DOW JONES & COMPANY, INC. Applicant.	Misc. No. 71
UNITED STATES OF AMERICA v. IVAN F. BOESKY, Defendant.	87 Cr. 378 (MEL)

MEMORANDUM OF LAW IN SUPPORT OF
APPLICATION OF DOW JONES & COMPANY, INC.

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Dow Jones & Company, Inc. ("Dow Jones"), publisher of The Wall Street Journal, submits this memorandum of law in support of its application to inspect and copy the plea agreement entered into between the Government and the defendant in United States v. Ivan F. Boesky, 87 Cr. 378 (MEL) and presented to this Court on April 23, 1987.*

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* For the information of the Court and counsel, Dow Jones is simultaneously making similar applications, on similar papers, in the cases of United States v. Martin A. Siegel, 86 Cr. 4413 (RJW), and United States v. Boyd Jeffries, 87 Cr. 339 (MEL).

PRELIMINARY STATEMENT

This is, for good reason, a celebrated case. This and related cases are, in the opinion of the editors of The Wall Street Journal, among the most important securities fraud prosecutions in the history of federal securities regulation. Sack Aff. ¶ 2.

The plea agreements entered into by the defendants in these cases have been the focus of great public interest. The public evaluation of those agreements is essential to the ability of the public to participate in the system of criminal justice.

> "The crucial prophylactic aspects of the administration of Justice cannot function in the dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner."

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571 (1980) (citation omitted).

> "People in an open society do not demand infallibility from their institions, but it is difficult for them to accept what they are prohibited from observing."

Id. at 572. "Public access is essential. . . if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice." Id. at 595 (Brennan, J., concurring).

Yet, in disregard of both the Federal Rules of Criminal Procedure, and the public's common law and constitutional right of access to judicial records and proceedings, those plea agreements have been sealed from public view without any finding of any kind to justify such secrecy.

I.

THE PLEA AGREEMENT WAS IMPROPERLY SEALED, AND MUST BE DISCLOSED PURSUANT TO F. R. CRIM. P. 11(e)(2)

Rule 11(e)(2) of the Federal Rules of Criminal Procedure provides that,

> "If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered."

In this case, a plea agreement was reached, and the defendant's plea was offered in open court on Arpil 23, 1987. The agreement was received in camera by the Court, however, without any showing whatsoever of "good cause." Sack Aff., Ex. A at 9-10.

This was a clear violation of the letter of Rule 11(e)(2). As the Advisory Committee Note to the Rule states, "Subdivision (e)(2) provides that the judge shall require the disclosure of any plea agreement in open court." 62 F.R.D. at 284 (1975) (emphasis added). As the House Judiciary Committee stated in recommending the new Rule, "There

must be a showing of good cause before the court can conduct such proceedings in camera." H. Rep. No. 94-247, 94th Cong., 1st Sess. 6-7, reprinted in 1975 U.S. Code Cong. & Admin. News 674, 678-79 (emphasis added). See also Blackledge v. Allison, 431 U.S. 63, 78 (1977) (verbatim transcription of plea agreement "commendable procedure"). Where there has been no showing, Rule 11(e)(2) requires public disclosure.

II.

DOW JONES HAS A RIGHT OF ACCESS TO THE PLEA AGREEMENT UNDER BOTH THE COMMON LAW AND THE FIRST AMENDMENT.

The public disclosure mandated by Rule 11(e)(2) is strongly rooted in the common law and in the Constitution. "It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978). This right is recognized by the common law, id.; In re Application of National Broadcasting Company, 635 F.2d 945 (2d Cir. 1980). Indeed, the right is of sufficient weight to create a presumption of access. Nixon, supra, 435 U.S. at 602; In re Application of NBC, supra, 635 F.2d at 950. In the only reported case known by counsel to consider a claim of access to a plea agreement since the enactment of Rule 11(e)(2), the court held that the common law right recognized in Nixon was

directly implicated. United States v. Hickey, 767 F.2d 705, 708 (10th Cir.), cert. denied, 106 S.Ct. 576 (1985).*

The public right of access to the criminal law enforcement process has constitutional underpinnings as well. As a matter of First Amendment law, criminal trials are presumptively public. Press-Enterprise Co. v. Superior Court, 106 S. Ct. 2735, 2740 (1986) ("Press- Enterprise II"); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Richmond Newspapers, Inc., supra. Where there is a guilty plea, the plea agreement process constitutes a complete substitute for the trial. See, e.g., Kercheval v. United States, 274 U.S. 220, 223 (1927). The same considerations that require a trial to be public under these cases also require the plea proceeding to be public. The plea agreement, which, as reflected in Rule 11, is an integral part of the plea process, is as subject to the presumption of openness as it would be if it were part of a criminal trial.

The Supreme Court has recently articulated a two-part test for determining whether the First Amendment right of

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* In Hickey, access was nonetheless denied. In that case, however, a compelling interest in maintaining secrecy had been established. The defendant, who had entered into the plea agreement, was enrolled in the witness protection program of the United States Marshall's Service. 767 F.2d at 706. There was reason to believe, based on an extraordinary record of multiple grisly murders, that disclosure of the plea agreement to the death-row inmate who had demanded it might lead to physical endangerment of the defendant. Here, of course, no physical threat to the defendant as a result of the agreement's release was asserted by the United States Attorney or is conceivable.

access attaches to a particular aspect of the criminal law process: 1) "whether the place and process has historically been open to the public" and 2) "whether public access plays a significant positive role in the functioning of the particular process in question." Press-Enterprise II, supra, 106 S. Ct. at 2740.

The specific historical inquiry called for here, see, e.g., Press Enterprise II, supra, 106 S.Ct. at 2241-43 (history of openness of preliminary hearings under California law), is simpler than in most access situations. The official recognition and regulation of plea agreements dates back only to the enactment of Rule 11(e)(2) in 1975. Since then, the Rule has continuously required that plea agreements shall, in the normal course, be disclosed on the record in open court.

More important, the "significant positive role" of public access in this process is clear. See authorities discussed in Point I, supra. In attempting to assess the performance of public officers -- Federal Judges, the United States Attorney and his Assistants -- the public has a particular and pressing interest in knowing what deals have been struck with persons who have admitted, and are, in effect, being convicted of, charges of serious criminal wrongdoing. Thus, both aspects of the Press-Enterprise II test are met.

In such a case, the presumption of access which arises,

> "may be overcome only by an overriding interest based on findings that closure is

> essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."

Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984) ("Press-Enterprise I"). Here, of course, there were no findings whatsoever before the plea agreement was sealed, and no articulation of any interest in sealing, whether "overriding" or otherwise. The Constitution, as interpreted by the Supreme Court, prohibits sealing under these circumstances.

The right of access thus applies here, would vindicate an essential public interest -- that in effective oversight of key government officials -- and is not overridden by any asserted interest of either the Government or the defendant.

CONCLUSION

For the reasons set forth above, the Application should be granted, and Dow Jones & Company, Inc. permitted to inspect and copy the plea agreement herein.

Dated: New York, New York
June 4, 1987

Respectfully submitted,

GIBSON, DUNN & CRUTCHER

By: _____
A Member of the Firm

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CERTIFICATE OF SERVICE

The undersigned attorney for applicant Dow Jones & Company, Inc. hereby certifies that, on June 4, 1987, he caused a copy of the Application herein and the foregoing Memorandum of Law of Applicant Dow Jones & Company, Inc. in Support of its Application to be delivered to the office of the United States Attorney for the Southern District of New York and to Fried, Frank, Harris, Shriver & Jacobson, One New York Plaza, New York, New York 10004, attorneys for the defendant herein.

RICHARD J. TOFEL