

No. 2007-117

IN THE
SUPREME COURT OF THE UNITED STATES

STUART SLOPE, by and through his parents
and legal guardians,
Stacy and Serina Slope,

Petitioner,

- against -

UNDER THE SEA TOYS, Inc.,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR PETITIONER

QUESTIONS PRESENTED

- 1) Under Federal Rule of Evidence 804(b)(3):
 - A) Does the interpretation of Federal Rule of Evidence 804(b)(3) in *Williamson v. United States*, 512 U.S. 594 (1994), preclude the admissibility in a civil case of a reliable collateral statement contained in the same narrative as statements that satisfy that rule's hearsay exception for declarations against interest?
 - B) Are statements acknowledging criminal conduct contained in a personal letter *per se* inadmissible in a civil case if, after sending it, the writer commits suicide?
- 2) Under Federal Rule of Evidence 803(3), does a declarant's hearsay statement that she intends to meet and discuss a matter with a business associate constitute evidence in a civil case that the meeting took place and that the matter was discussed?
- 3) Does the Federal Rule of Evidence 407 exclusion of "subsequent remedial measures:"
 - A) Apply to factual information in a post-injury report prepared by a distributor of a product, when the information supports a recommendation in that same report to recall the product?
 - B) Apply to measures undertaken at the direction of a government agency?

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BRIEF FOR PETITIONER

STATEMENT OF THE CASE

Around March, 2005, the Respondent, Under the Sea Toys (Sea Toys), entered into an agreement with BFP Tattel, Inc. (Tattel) to create “Finn E. Shark,” a plush toy released in connection with the movie “Shark Attack.” (R. 2). Under the agreement, Tattel would produce the toy and Sea Toys would have exclusive distribution of the toy in the United States. *Id.* Sea Toys began distributing the toy in May, 2005. *Id.*

Around December, 2005, the Petitioners, Stacy and Serina Slope, purchased the Finn E. Shark toy as a present for their son, Stuart. (R. 2). A few weeks after the toy was purchased, Stuart began exhibiting various symptoms including loss of consciousness, headaches, confusion, dizziness, mood swings, repeated vomiting, seizures, convulsions, and loss of coordination. *Id.* On January 2, 2006, Stuart received medical attention, undergoing a series of blood tests, brain scans and other diagnostic procedures that conclusively established that Stuart’s symptoms resulted from exposure to the toxin rH-12 and that the toxin had caused irreversible brain damage. *Id.*

Two months prior, on October 10, 2005, the CEO of Tattel, Mimi Jussel (Jussel), recorded in a business journal that she knew the Finn E. Shark toy contained the toxin rH-12 and that Sea Toys was also aware of the toxin’s presence. (R. 22). On October 11, 2005, Jussel wrote a letter to her daughter, admitting knowledge of the toxin and stating that she had told Sea Toys about the presence of rH-12. (R. 23). Shortly after, Jussel was diagnosed with a life-threatening illness and on October 18, 2005 Jussel committed suicide. (R. 10). On October 20, 2005, the Consumer Product Safety Commission issued a directive to all manufacturers and distributors of foreign-made toys, requiring investigation and remedial action for any toys posing a health risk to consumers. (R. 27).

On January 16, 2005, Sea Toys complied with the Commission's directive and compiled an internal memorandum concerning the Finn E. Shark toy. (R. 25). On April 1, 2006, Sea Toys recalled all Finn E. Shark toys in the United States. (R. 3).

The Petitioner's complaint alleged that Sea Toys violated § 204 of the Boerum Tort Reform Act for knowingly failing to warn or recall. (R. 3-4). In response, Sea Toys filed a motion for summary judgment. (R. 6). The Petitioner presented four pieces of evidence that Sea Toys conceded would prove that Sea Toys had knowledge of the health risks associated with the toy. (R. 7). These four pieces of evidence include: 1) the entry from Jussel's business journal; 2) the October 11, 2005 letter from Jussel to her daughter; 3) a deposition of Jaffe Peetz, Jussel's secretary, taken September 30, 2005; and 4) the internal memorandum issued on January 16, 2006 from Sea Toy's Internal Design and Research Department. (R. 22-26). After reviewing this evidence the District Court held each of these items to be inadmissible and granted the motion for summary judgment. (R. 21). The United States Court of Appeals for the Fourteenth Circuit affirmed the District Court's decision. (R. 39).

SUMMARY OF THE ARGUMENT

Williamson v. United States does not bar the admissibility of Exhibit A as a declaration against pecuniary interest under Rule 804(b)(3), as *Williamson* applies only to declarations against penal interest made while in a custodial setting. Even if *Williamson* applies, the statement at issue does not constitute an inadmissible collateral statement.

Exhibit B's admissibility as a declaration against penal interest is not barred by Jussel's suicide because Exhibit B does not constitute a suicide note. However, even if the exhibit is found to be a suicide note, Exhibit B is not *per se* inadmissible, and, in fact,

does meet the requirements for admissibility under Rule 804(b)(3). The admissibility of Exhibit B is not barred by *Williamson v. United States* as *Williamson* applies only to declarations against penal interest made while in a custodial setting.

Exhibit C is admissible because it contains two independent, proper and relevant assertions. These two assertions are both admissible under Rules 803(3) and 801 respectively. The plain language of Rule 803(3), the intent of the drafters, the rule's history, and an overwhelming number of jurisdictions all support using a *Hillmon* statement as evidence of a nondeclarant's conduct. The conduct, business receipts, and subsequent actions of Jussel also provide corroborating evidence that support admissibility of the exhibit under the minority test in *United States v. Best*.

Exhibit D is admissible because it contains relevant factual information demonstrating Sea Toys' knowledge of the defective product and is thus admissible under the Federal Rules of Evidence. Rule 407 does not apply to factual information contained in the informational section of a post-event report prepared by the distributor of a product, even if the report also contains a section recommending a recall of the product. Rule 407's exclusion of subsequent remedial measures also does not apply to measures undertaken at the direction of a government agency.

ARGUMENT

I. WILLIAMSON V. UNITED STATES DOES NOT BAR THE ADMISSIBILITY OF EXHIBIT A AS A DECLARATION AGAINST PECUNIARY INTEREST UNDER RULE 804(b)(3)

Failure to admit Exhibit A improperly excludes evidence that is relevant and proper under the Federal Rules of Evidence. At issue in Exhibit A is the statement "everybody here and in America knew" present within the larger declaration against

pecuniary interest. (R. 8). The Court should admit Exhibit A for two reasons: (1) *Williamson v. United States* only applies to declarations against penal interest made in a custodial setting; and (2) The statement at issue in Exhibit A does not constitute an inadmissible collateral statement under the *Williamson* analysis if *Williamson* does apply to declarations against pecuniary interest.

A. *Williamson v. United States* only applies to declarations against penal interest made in a custodial setting.

The Court should admit Exhibit A under Rule 804(b)(3) as a declaration against pecuniary interest since *Williamson v. United States* does not apply to this case. *Williamson v. United States* deals only with non-self inculpatory declarations against penal interest in a criminal prosecution made while in a custodial setting and the Court clearly focuses on only these statements in their opinion. 512 U.S. 594 (1994). The declarant in *Williamson* was arrested for carrying cocaine in his car, and during a police interrogation (after changing his story) implicated Williamson as the source of the cocaine. The court describes the rule for admissibility under 804(b)(3) as “statement[s] which...at the time of [their] making...so far tended to subject the declarant to...criminal liability...that a reasonable person in the declarant’s position would not have made the statement[s] unless believing [them] to be true.” *Id.* at 599. In addition, the Court, in discussing a concern of the dissent, described the focus of *Williamson* as being on “the against penal interest exception,” *Id.* at 602-03 (quoting Justice Kennedy’s dissent at 616). Every example of acceptable or unacceptable statements offered by the Court describes statements in the criminal context. *Williamson v. United States*, 512 U.S. 594 (1994). The Court expressly notes that “other parts of [Harris’s] confession, especially parts that implicated Williamson, did little to subject Harris himself to *criminal liability*.”

Id. at 604 (emphasis added). The entire focus of *Williamson* is regarding declarations against penal interest in the context of a criminal case. Later decisions that interpreted *Williamson* also relied on the premise that *Williamson* applied in a criminal prosecution context when statements were made while in a custodial setting. *See United States v. Roach*, 164 F.3d 403, 411 (8th Cir. 1998) (conspirator’s post arrest statement to agent about delivering methamphetamine to coconspirator was admissible in drug conspiracy prosecution as being against penal interest); *McClung v. Wal-Mart Stores, Inc., et al.*, 270 F.3d 1007, 1014 (6th Cir. 2001) (concerned admissibility of declaration against interest made during a guilty plea hearing). Accordingly, *Williamson* has no bearing on a declaration against pecuniary interest made by a declarant outside of a custodial setting in a situation that does not concern a criminal prosecution.

B. The statement at issue in Exhibit A does not constitute an inadmissible collateral statement under the *Williamson* analysis if *Williamson* does apply to declarations against pecuniary interest

The statement at issue in Exhibit A does not constitute an inadmissible collateral statement under the majority opinion’s *Williamson* analysis. If *Williamson v. United States* is applied to declarations against pecuniary interest (as *Chase v. Silverstein*, 260 F.3d 142, 147 (2d Cir. 2001) suggests) then under the *Williamson* majority opinion non-self-inculpatory collateral statements are inadmissible under Rule 804(b)(3). 512 U.S. 594, 600-01 (1994). Rule 804(b)(3) is read by the *Williamson* court to “not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory.” *Id.* This reading also holds true for collateral statements that are neutral as to interest. *Id.* at 600. Rule 804(b)(3) defines self-inculpatory statements as “statement[s] which...at the time of [their] making...so far

tended to subject the declarant to...liability that a reasonable person in the declarant's position would not have made the statement[s] unless believing [them] to be true." Fed. R. Evid. 804(b)(3). The *Williamson* court adopts this language to determine the self-inculpatory nature of a statement. 512 U.S. 594, 603-04 (1994). At issue in Exhibit A is the phrase "everybody here and in America knew," which is a part of the sentence "I told her, I knew – everybody here and in America knew – that there was rH-12 in that toy but we kept selling it anyway and we just sent a shipment to the U.S." (R. 22). Chief Judge Ritter and the Fourteenth Circuit found the statement "everybody here and in America knew" to be a non-self-inculpatory collateral statement within the larger self-inculpatory statement, and thus inadmissible under *Williamson*. (R. 19); (R. 33).

The statement at issue is self-inculpatory as to the declarant's pecuniary interest and thus admissible under *Williamson*. To be considered self-inculpatory and not a collateral statement, a statement must "at the time of its making...so far [tend] to subject the declarant to...liability that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." Fed. R. Evid. 804(b)(3); *Williamson v. United States*, 512 U.S. 594 (1994). Section 204 of the Boerum Tort Reform Act regarding Failure to Warn and Failure to Recall states that the sections apply to "one engaged in business of selling or otherwise distributing toys" that cause harm due to a failure to warn or a failure to recall. (R. 29 n.1). The declarant of this statement, Jussel, was the CEO of BFP Tattel, Inc. (creator of the Finn E. Shark toy), at the time this statement was made. If a lawsuit was filed against Tattel under § 204 of the Boerum Tort Reform Act the defendant could be a person engaged in the business of selling or otherwise distributing a toy that caused harm due to a failure to warn or a failure to recall.

This means that for the Finn E. Shark toy, the defendant could be anyone engaged in the business of selling or otherwise distributing that toy “here [in Legolia] and in America.” However, under the theory of respondeat superior, 27 Am. Jur. 2d Employment Relationship § 373 (2008), (that an employer can be held vicariously liable for an employee's tortious act against the person or property of a third party in the transaction of the employer's business) the actions of a Tattel or Sea Toys employee in Legolia or in America who negligently failed to warn or recall could be used to sue their company as a whole, making the company the defendant in such an action. See e.g., *Jackson v. Kimel*, 992 F.2d 1318 (4th Cir. 1993); *Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993); *Dairy Road Partners v. Island Ins. Co., Ltd.*, 992 P.2d 93 (Haw. 2000); *Brady v. Ralph Parsons Co.*, 520 A.2d 717 (Md. 1987); *Zimprich v. Broekel*, 519 N.W.2d 588 (N.D. 1994); *Osborne v. Lyles*, 587 N.E.2d 825 (Ohio St. 1992); *Baptist Memorial Hosp. System v. Sampson*, 969 S.W.2d 945 (Tex. 1998); *Giese v. Montgomery Ward, Inc.*, 331 N.W.2d 585 (Wis. 1983). Jussel (as the CEO of Tattel) could be subject to hefty liability if a lawsuit came to pass or if it was discovered that she knew of the presence of rH-12 in the toy and allowed the distribution to continue, which she admits in Exhibit A. (R. 22). Even if Tattel was not a defendant in a lawsuit, the company (and Jussel) could lose money simply from association with a defendant. Due to a lawsuit or connection to a lawsuit, Jussel could also be subject to termination by the Tattel board of directors (particularly if her actions caused serious harm to the company), thus losing her annual income and any additional income that results from such a position. As such, her statement “everybody here and in America knew - that there was rH-12 in that toy” is

against her pecuniary interest, both in her capacity as CEO of Tattel, and in her own personal capacity.

Applying the language of *Williamson* and Rule 804(b)(3) to the statement at issue in Exhibit A, it is clear that the statement “so far tended to subject the declarant to...liability that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true.” 512 U.S. 594, 603-04 (1994). Jussel, if sued for rH-12 poisoning, would likely be facing a heavy claim of damages, as the \$25,000,000 claim in the Plaintiff’s complaint against Sea Toys clearly demonstrates. (R. 4). As such, this statement is admissible under Rule 804(b)(3) and *Williamson* (even against Sea Toys) as it is clearly against the Jussel’s pecuniary interest. Under *Williamson*, “by showing that the declarant knew something, a self-inculpatory statement can in some situations help the jury infer that his confederates knew it as well.” 512 U.S. 594, 603-04 (1994). Thus, even though the statement (as a declaration against pecuniary interest) only implicates the declarant and members of her company associated with the creation, sale or distribution of the toy, the statement is admissible at trial against Sea Toys and the jury can consider that statement in reaching an inference that Sea Toys was aware of the dangers of rH-12 and also failed to warn or recall. See *Id.*

II. JUSSEL’S SUICIDE DOES NOT BAR THE ADMISSIBILITY OF EXHIBIT B AS A DECLARATION AGAINST PENAL INTEREST UNDER RULE 804(b)(3); EXHIBIT B IS NOT INADMISSIBLE UNDER THE COLLATERAL STATEMENTS RULE OF WILLIAMSON

Failure to admit Exhibit B improperly excludes evidence that is relevant and proper under the Federal Rules of Evidence. The Court should admit Exhibit B for four reasons: (1) Exhibit B does not constitute a suicide note and its admissibility under Rule

804(b)(3) is not affected by Jussel's subsequent suicide; (2) Even if Exhibit B is deemed a suicide note it is not *per se* inadmissible; (3) Exhibit B meets the Rule 803(b)(4) requirements for admissibility; and (4) Exhibit B is not barred as a collateral statement by the Supreme Court's decision in *Williamson*.

A. Exhibit B does not constitute a suicide note and its admissibility under Rule 804(3) is not affected by Jussel's subsequent suicide

The Court should admit Exhibit B because the exhibit is not a suicide note and is thus not precluded under 804(b)(3) due to the suicide of the declarant. Chief Judge Ritter held that Exhibit B is *per se* "inadmissible due to the inherent unreliability of statements made prior to suicide." (R. 19). The majority opinion of the Fourteenth Circuit modifies this ruling, stating that "statements made in a suicide note or shortly before committing suicide are unreliable by their very nature." (R. 34). The Court's holding is that the statements are unreliable by their very nature if the statement is made in a suicide note or shortly before the declarant commits suicide.

Exhibit B, the letter written by Jussel, is not a suicide note. While it is undisputed that the declarant, Jussel, committed suicide (R. 11) Exhibit B itself contains no reference to the declarant's eventual suicide. (R. 23). The language used in Exhibit B expresses remorse for the declarant's actions and includes statements of the declarant's hopes and fears. *Id.* The declarant states she is "heartbroken, defeated, despairing," however, this language does not suggest that the declarant is contemplating suicide. *Id.* Rather, the declarant is simply describing her emotions in the context of her guilt over her role in the rH-12 sickness. The declarant also states that "all I ever wanted was to...one day hopefully be a grandmother" and "[m]y biggest fear is losing you, not being able to take

care of you and be there for you, as a mother should.” *Id.* These statements, taken in the complete context of the letter, make no sense if Exhibit B is a suicide note.

Exhibit B was also not written close enough to the declarant’s suicide to have its reliability effected. The declarant wrote the letter on October 11, 2005, postmarked it the same day, and did not commit suicide until a week later, on October 18, 2005. (R. 9-10). The language in Exhibit B in no way suggests that the declarant was contemplating suicide on October 11. During oral argument, counsel for the defendant identified no language in the letter that would suggest the contrary. *Id.* It is uncontested that during the period after Jussel wrote Exhibit B she was diagnosed with a life-threatening illness. *Id.* at 10. Up until this diagnosis, the statements made in Exhibit B were both against the declarant’s interest and reliable. As the letter had already been sent, its contents could not have been affected by the revelation of Jussel’s illness, and thus its reliability cannot have been affected by the suicidal actions that resulted from the diagnosis. Of particular note, it was only after the diagnosis of Jussel’s illness that her “biggest fear” (“losing you; not being able to take care of you and be there for you, as a mother should”) was realized; Jussel also recognized that her hope of being a grandmother would not occur. (R. 23).

As Exhibit B does not constitute a suicide note and because its contents were not made shortly before the declarant committed suicide, the statements in Exhibit B are not unreliable by their very nature.

B. Exhibit B , even if deemed a suicide note, is not *per se* inadmissible

Even if Exhibit B is deemed a suicide note, or is found to have been written shortly before the declarant’s suicide, the Court should reject the test of the Fourteenth Circuit and hold that Exhibit B not be deemed *per se* inadmissible. The Fourteenth

Circuit provide two grounds for the *per se* inadmissibility of a declaration against interest made in a suicide note: (1) that these declarations do not carry the same reliability as a normal declaration against penal interest; and (2) that the contemplation of suicide permits one “to rewrite one’s own history.” (R. 34) (quoting *United States v. Angleton*, 269 F. Supp. 2d 878, 890 (S.D. Tex 2003)). It is also important to note that part of Exhibit B (which the defendant claims is *per se* inadmissible due to unreliability) is also found in Exhibit A, written the day before Exhibit B, and to which opposing counsel has raised no concerns except for the statement “everybody here and in America knew.” (R. 9). Opposing counsel actually conceded that such a meeting took place and conceded the authenticity of Exhibit A. (R. 7); (R. 9). Also, opposing counsel has never claimed that the parental affections and remorse expressed in paragraphs one and four are not genuine.

Suicide notes have not been deemed *per se* inadmissible. The admissibility of suicide notes depends on whether those notes meet the relevant hearsay requirements, rather than a blanket claim of *per se* inadmissibility due to unreliability. In *State v. Satterfield*, a suicide note was held admissible under the dying declaration exception. 457 S.E.2d 440, 448 (W.Va. 1995). Similarly, in *Commonwealth v. Antoini*, 69 A.2d 436, 438 (Pa. Super. 1949) and *State v. Hodge*, 655 S.W.2d 738, 742 (Mo.Ct.App. 1983) suicide notes were not admissible since the declarant was not the victim of a homicide, and thus the suicide note failed the admissibility requirements of a dying declaration. In *United States v. Lemonakis*, 585 F.2d 941, 957 n.24 (D.C Cir. 1973), a suicide note was held inadmissible as a declaration against interest and a dying declaration because the note failed the exculpatory corroboration requirement and imminent death requirement respectively. In *United States v. Angleton*, the suicide note at issues was inadmissible

because it failed Rule 804(b)(3)'s exculpatory corroboration requirement. 269 F.Supp.2d 878, 890 (2003). The suicide note at issue in *United States v. Crowder* was held inadmissible as not being against the declarant's interest. 848 F.Supp. 780, 781-82 (M.D.Tenn. 1994). A suicide note that might exculpate a defendant was held admissible in a bastardy proceeding. *Brennan v. State*, 134 A. 148, 151 (Md. 1926). Suicide notes were not deemed *per se* inadmissible due to unreliability; rather, the suicide note was subjected to the specific hearsay requirements for admissibility as a means to determine its reliability. As such, Exhibit B, even if deemed a suicide note, is not *per se* inadmissible for unreliability and must instead be subjected to the standard admissibility requirements of a Rule 804(b)(3) declaration against interest.

The concern of rewriting history is also not present. It is important to note that the language cited by the Fourteenth Circuit derives originally from a dissenting opinion in *State v. Satterfield*. 457 S.E.2d 440, 456 (W.Va. 1995). The majority of the court found the suicide note in question to be admissible under the dying declaration exception to the hearsay rule, after it was determined that the note met all the requirements for admissibility. *Id.* at 511. The court in *Angleton* states that for a declaration against penal interest to be admissible under Rule 804(b)(3), the declaration must satisfy the three requirements of admissibility, one of which being corroboration indicating trustworthiness. *United States v. Angleton*, 269 F. Supp. 2d 878, 889 (S.D. Tex 2003). In *Angleton*, the court uses the Satterfield "rewriting history" language, not to state that suicide notes are *per se* inadmissible, but rather as grounds to support the reasons for the exculpatory corroboration requirement of Rule 804(b)(3). *Id.* at 890. This requirement of trustworthy corroboration would eliminate any concerns that the declarant is attempting

to rewrite history. The Fourteenth Circuit's concern simply requires that a suicide note meet the standard admissibility requirements of a Rule 804(b)(3) declaration against interest, but does not establish suicide notes as *per se* inadmissible.

C. Exhibit B meets the Rule 804(b)(3) requirements for admissibility

Exhibit B meets the requirements of admissibility for a declaration against penal interest under Rule 804(b)(3). A statement made by an unavailable declarant is admissible as a declaration against penal interest under Rule 804(b)(3) if it is “[a] statement which...at the time of its making...so far tended to subject the declarant to...criminal liability...that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true.” *United States v. Jordan*, 509 F.3d 191, 202 (4th Cir. 2007). According to *Jordan*, these are the only necessary requirements to determine admissibility of a declaration against penal interest. *Id.* A corroborating circumstances requirement is not necessary because Rule 804(b)(3) makes clear that “corroborating circumstances are only required if the statement ‘is offered to exculpate the accused.’” *Id.* at n.6 (quoting Fed. R. Evid. 804(b)(3)). The Court in *United States v. Layton* also addresses the requirements of a declaration against penal interest. 720 F.2d 548, 559 (9th Cir. 1983). The Court states that three requirements must be met before a declaration against penal interest is admissible to *exculpate* a defendant: “(1) the declarant must be unavailable, (2) the statement must tend to subject the declarant to criminal liability such that a reasonable person in the declarant’s position would not have made the statement unless he believed it to be true, and (3) there must be corroborating circumstances which indicate the trustworthiness of the statement.” *Id.* (emphasis added). Only the first two factors are required when evidence is offered to inculcate a defendant,

as the Ninth Circuit has “not passed upon whether the third requirement only applies to exculpatory statements” and does not reach that question in the case. *Id.* However, in *State v. Kiewert*, 605 A.2d 1031, 1037 (N.H. 1992), the Court states that ““courts have interpreted [803(b)(4)] as implicitly imposing a similar requirement [“corroborating circumstance clearly indicat[ing] the trustworthiness of the statement”] (quoting Fed. R. Evid. 804(b)(3)) where the government uses the hearsay to *inculcate* [the defendant].”” *United States v. Seeley*, 892 F.2d 1, 2 (1st Cir. 1989); *see, e.g., United States v. Casamento*, 887 F.2d 1141, 1170 (2d Cir. 1989); *United States v. Boyce*, 849 F.2d 833, 836 (3d Cir. 1988); *United States v. Alvarez*, 584 F.2d 694, 700-01 (5th Cir. 1978) (holding that “the draftsmen of the new rules left to the courts the task of delineating prerequisites to the admissibility of inculpatory against-interest hearsay,” and that admissibility requires “corroborating circumstances that ‘clearly indicate the trustworthiness of the statement’”); *United States v. Riley*, 657 F.2d 1377, 1382-83 (8th Cir. 1981); *United States v. Harrell*, 788 F.2d 1524, 1526 (11th Cir. 1986).

If only the first two prongs of the test are required, then Exhibit B clearly qualifies as a declaration against penal interest under Rule 804(b)(3). Jussel is unavailable due to her death through suicide, therefore Exhibit B clearly satisfied the first prong of 804(b)(3) admissibility. The second prong, that the statement is against the declarant’s penal interest, is also satisfied. At the District Court, Chief Judge Ritter stated clearly that “[i]n the letter, [Jussel] makes declarations against her penal interest....” (R.19). Additionally, the majority opinion of the Fourteenth Circuit admits the same, describing Exhibit B as “a letter written by Jussel...undisputedly a declaration against her penal interest.” (R. 31). Exhibit B makes clear that Jussel recognizes her statements are declarations against her

penal interest; Jussel states “Now that everyone knows, it is almost certain I will go to prison – as I learned after talking to my attorney....” (R. 23).

Exhibit B will still qualify as a declaration against penal interest under Rule 804(b)(3) if the third prong of the test is required. The declaration at issue in Exhibit B has “sufficient corroborating circumstances indicat[ing] the trustworthiness of the statement.” Fed. R. Evid. 804(b)(3). Jussel had a clear incentive to speak truthfully to her daughter because the purpose of her letter was to explain the situation behind the rH-12 poisonings and to ask for forgiveness for her part in the tragedy. (R. 23); *see United States v. Casamento*, 887 F.2d 1141, 1170 (2d Cir. 1989); *United States v. Boyce*, 849 F.2d 833, 836 (3d Cir. 1988). The declarant’s purpose in seeking forgiveness would not be served by lying about the events to the person from whom she is seeking forgiveness. Also, “‘the traditional surety of reliability’ of the out of court declarant is ‘the statement’s contravention of the declarant’s interest.’” *United States v. Fields*, 871 F.2d 188, 192 (1st Cir. 1989) (quoting *United States v. Alvarez*, 584 F.2d 694, 701 (5th Cir. 1978)). This view of corroboration is echoed in *Williamson v. United States*, that “[t]he question under Rule 804(b)(3) is always whether the statement was sufficiently against the declarant’s penal interest ‘that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true,’” based upon a totality of the circumstances determination. 512 U.S. 594, 603-04 (1994). Exhibit B is clearly against the declarant’s interest; this is acknowledged by the declarant herself (“I am behind these sick children, I am the cause.”), by Chief Judge Ritter (“[i]n the letter, [Jussel] makes declarations against her penal interest....”), and by Judges Perce and Gordon (“undisputedly a declaration against her penal interest.”). (R. 23); (R. 31). In addition, a circumstance that

provides considerable assurance of a statement's reliability is that it was made to a close acquaintance. *Chambers v. Mississippi*, 410 U.S. 284, 300 (1973). That Exhibit B is a letter from a mother, the declarant, to her daughter, adds additional assurance as to the veracity of Exhibit B.

D. Exhibit B is not barred by the Supreme Court's decision in *Williamson*

Exhibit B does not constitute an inadmissible collateral statement under *Williamson*. The Court in *Williamson v. United States* was concerned with the non-self inculpatory declarations against penal interest made in criminal prosecutions while in a custodial setting. 512 U.S. 594 (1994). Later decisions that interpreted *Williamson* also relied on the premise that *Williamson* applied in a criminal prosecution context, particularly to statements made while in a custodial setting. *See United States v. Roach*, 164 F.3d 403, 411 (8th Cir. 1998) (conspirator's post arrest statement to agent about delivering methamphetamine to coconspirator was admissible in drug conspiracy prosecution as being against penal interest); *McClung v. Wal-Mart Stores, Inc., et al.*, 270 F.3d 1007, 1014 (6th Cir. 2001) (concerned admissibility of declaration against interest made during a guilty plea hearing). Exhibit B is a letter written by a mother to her daughter outside of a custodial setting, and is thus outside the scope of *Williamson*.

Even if the Court determines that *Williamson* is applicable to Exhibit B, the statement in dispute, "I went to California and told Sea Toys that there was rH-12 in the shark toys and that rH-12 had dangerous effects on children," is against Jussel's penal interest. (R. 23). The Court in *Williamson* made clear that "whether a statement is self-inculpatory or not can only be determined by viewing it in context. Even statements that are on their face neutral may actually be against the declarant's interest." 512 U.S. 594,

603 (1994). This statement (that Jussel knew rH-12 was in the shark toys and had dangerous effects on children) is the exact reason Exhibit B is against the declarant's penal interest. (R. 23). This sentence clearly subjects the declarant to criminal liability, even if, in addition, it would allow the jury to reach the determination that Sea Toys knew of the rH-12 dangers as well. By showing "that the declarant knew something, a self-inculpatory statement can in some situations help the jury infer that his confederates knew it as well." *Williamson v. United States*, 512 U.S. 594, 603 (1994). The statement at issue in Exhibit B is therefore admissible under *Williamson* and should thus be admitted into evidence.

III. EXHIBIT C CONTAINS TWO INDEPENDENT RELEVANT ASSERTIONS ADMISSIBLE UNDER THE FEDERAL RULES; RULE 303(3) CODIFIED THE RULE OF *HILLMON* AND THERE IS SUFFICIENT CORROBORATING EVIDENCE TO SUPPORT ADMISSIBILITY

Failure to admit Exhibit C improperly excludes evidence that is relevant and proper under the Federal Rules of Evidence. The Court should admit Exhibit C for one of three reasons: (1) Exhibit C contains two different assertions a direct, internal assertion and an indirect, external assertion both assertions are proper relevant evidence under the Federal Rules; (2) Rule 803(3) codified the rule of *Hillmon*, which permits admitting such a statement, and; (3) the evidence that Jussel flew to California, stayed in a hotel and rode in taxis provides independent corroborating evidence sufficient to add reliability to the evidence.

- A. Exhibit C contains a direct, internal assertion and an indirect, external assertion both of which are admissible types of evidence under Rules 803(3) and 801 respectively**

The Court should admit Exhibit C because the exhibit contains two independent proper and relevant assertions. Those two assertions combine and produce a statement that would permit a trier of fact to infer that Jussel intended to meet with Ledbetter and she took affirmative steps to do so. The statements of an unavailable declarant expressing her present intention to meet with another person in the immediate future are admissible and allow the trier of fact to reasonably infer that the declarant's intention was carried out. *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285, 295-96 (1892); *United States v. Pheaster*, 544 F.2d 353, 377-80 (9th Cir. 1976); *State v. Santangelo*, 205 Conn. 578, 593 (Conn. 1987). In *Pheaster* the Court permitted the trier of fact to use the declarant's statement that, "[he was] going to meet Angelo in the parking lot to get a pound of grass," as evidence that Angelo was in the parking lot to meet with the declarant. *Pheaster*, 544 F.2d at 377. The facts of *Pheaster* mirror those of Exhibit C. Immediately after Jussel read an article breaking the news about rH-12 she told her assistant to "[b]ook me a ticket to California right away. Something terrible has happened and I am going to meet with Troy Ledbetter to tell him what's going on." (R. 23). Jussel's statement echoes the statement in *Pheaster* and the Court should admit it as proof that she intended to meet with Ledbetter. In addition, the statement is relevant as to whether Ledbetter actually met with Jussel.

Exhibit C contains two independent assertions, one of which is hearsay and admissible and one of which is non-hearsay and admissible. Forward-looking statements of intent offered as proof of the declarant's state of mind are internal, direct assertions and properly admitted under Fed. R. Evid. 803(3). *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285, 295-96 (1892). Forward-looking statements of intent offered as proof of

conduct for another person may be indirect, external assertions, which the Federal Rules classify as not hearsay. *See e.g., United States v. Zenni*, 492 F. Supp. 464 (E.D. Ky. 1980) (categorizing phone calls attempting to place bets as indirect assertions that the place receiving the calls was a betting establishment and non-hearsay). The assertion, “I am going to meet with [Ledbetter] to tell him what’s going on,” contains a direct, internal statement and an indirect, external statement manifesting a belief about Ledbetter – that Jussel believes that she will be able to tell Ledbetter that rH-12 poisons children. *See* Glen Weissenberger, *Hearsay Puzzles: An Essay on Federal Evidence Rule 803(3)*, 64 Temp. L. R. 145, 162 (1991). The direct, internal assertion on Jussel’s intent to meet with Ledbetter falls squarely within the *Hillmon* holding and the narrowest reading of Rule 803(3). *United States v. Jenkins*, 570 F.2d 840, 843 (4th Cir. 1978) (holding that a trier of fact may only use a *Hillmon* statement as evidence of the declarant’s future conduct and not others); *see also* H.R. Rep. No. 650, 93d Cong., 1st Sess. 13-14 (1973). The indirect, external assertion that Jussel believes she will be able to meet with Ledbetter to tell him about the effects of rH-12 is a classic implied assertion of belief, which the federal rules of evidence categorize as non-hearsay. Fed. R. Evid. 801; Weissenberger, 64 Temp. L. R. at 162-65 (citing *United States v. Zenni* as an example).

In *Zenni*, the defendant ran an illegal betting operation out of his house. Federal agents listened to phone calls that came into the house and heard unknown declarants make statements like, “Put five dollars on Speed King’s nose.” The Court held that the statements were not a direct statement that Zenni’s residence was a betting establishment. *Zenni*, 492 F. Supp. at 469. The Court continued and held that because the declarant did not intend to make such an assertion the declarations were indirect assertions about the

residence and thus were not hearsay. *Id.* Jussel’s assertion of belief that she will “tell Ledbetter what is going on” is not a direct assertion that Ledbetter has actual knowledge of the dangers of rH-12. Rather the clause is an indirect assertion about Ledbetter’s knowledge and Rule 801 governs the admissibility. *See id.*; Weissenberger, 64 Temp. L. R. at 147-52.

An indirect assertion of conduct external to the declarant is more likely to be accurate evidence than a direct hearsay statement about the same conduct. Fed. R. Evid. 801(a) comment subdivision (a) (1975); *see also* C. McCormick, *McCormick on Evidence* § 250, at 739 (3d ed. 1984). In cases of indirect, external assertions the actor’s actions speak louder than words. 4 J. Weinstein & M. Berger, *Weinstein’s Evidence* ¶ 801(a)[01], 801-58 (1988). Jussel not only stated her belief, but she also boarded a plane, flew to California and stayed overnight. These actions are all circumstantial evidence that corroborates her belief that she would tell Ledbetter about the dangers of rH-12. Each part of her statement to Peetz (the internal, direct assertion and the external, indirect assertion) are admissible pieces of evidence under rule 803(3) and relevant to the case.¹

B. The plain language of Rule 803(3), the drafter’s intent, the rule’s history, and an overwhelming number of jurisdictions support using a *Hillmon* statement as evidence of a nondeclarant’s conduct

The Court must admit Exhibit C as evidence of Ledbetter’s knowledge because Rule 803(3) codified the rule of *Hillmon* and permits state-of-mind declarations to show the future conduct of a nondeclarant. Rule 803(3) has codified the *Hillmon* doctrine because the text is clear, the notes of the drafters are clear, the rule has lasted for over a

¹ Jussel’s statement that she will tell Ledbetter what is going on is an indirect statement of Ledbetter’s knowledge. However, even in cases when the statement is not manifestly indirect the statement is still admissible under Rule 803(3) and Rule 801, but the Court must resolve the question on admissibility under Rule 403, which would require this Court to remand to the lower court for consideration of that question as it was not raised or answered previously. Weissenberger, 64 Temp. L. R. at 164,

century and an overwhelming majority of jurisdictions have adopted the rule. *Coy v. Renico*, 414 F. Supp. 2d 744, 770 (E.D. Mich. 2006). The plain language of Rule 803(3) does not limit the use of the evidence to only the declarant. Fed. R. Evid. 803(3) (“A statement of the declarant’s then existing state of mind...intent, plan, [or] motive...to prove the fact remembered or believe[d] *unless*...it relates to the declarant’s will.”) (emphasis added). As long as the declarant does not make a statement of memory and the evidence proves anything other than a fact relating to the declarant’s will, the text of the rule does not preclude use of the evidence. Fed. R. Evid. 803(3). As a matter of interpretation that should end the inquiry. *See Renico*, 414 F. Supp. 2d 744, at n.13.

The Rule’s drafters specifically state that the rule of *Hillmon* survives the adoption of the Federal Rules of Evidence, “[t]he rule of [*Hillmon*]...is of course, left undisturbed.” Note to Paragraph (3), 28 U.S.C.A. at 585. The plain language should govern and the intent of the drafters, while not binding, should persuade, especially more than the contrary House Committee Report, “which, as far as we know, not even the full committee, much less the full [House], much less the full [Senate], and much much much less the President who signed the bill, agreed with.” *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004) (Scalia, J., concurring in the judgment). The one report can hardly uproot the established *Hillmon* doctrine in light of its “continued, widespread application following the enactment of Rule 803(3).” *Renico*, 414 F. Supp. 2d 744, at n.13 (citing 28 jurisdictions that have permitted *Hillmon* statements to establish the future conduct of a nondeclarant).

A decision to preclude *Hillmon* statements from establishing the conduct of a nondeclarant goes against the majority rule and would greatly distinguish Rule 803(3)

from its state analogues. “An overwhelming majority of jurisdictions,” at least 28, permit *Hillmon* statements to establish the conduct of a nondeclarant and only three have reached the opposite. *People v. Chambers*, 125 A.2d 88, 512 N.Y.S.2d 89, 91 (N.Y. App. Div. 1984); *Renico*, 414 F. Supp. 2d, at 769-70. The federal circuits have divided but have never adopted a blanket exclusion. *See Renico*, 414 F. Supp. 2d, at 769. Only the Fourth Circuit has adopted a restrictive approach, but even its rule permits the use of *Hillmon* statement if it is admissible for any valid reason. *United States v. Jenkins*, 579 F.2d 840, 844 (4th Cir. 1978). The Second Circuit permits the use of such statements with corroborating evidence (*United States v. Best*, 219 F.3d 192, 198-99 (2d Cir. 2000)) and the Ninth Circuit relies on its decision in *Pheaster* to admit *Hillmon* statements to show the future conduct of a nondeclarant under Rule 803(3). *United States v. Astorga-Torres*, 682 F.2d 1331, 1335-36 (9th Cir. 1982). The continued reliance on *Pheaster* and the overwhelming support of the doctrine in state evidence decisions demonstrate that Rule 803(3) incorporated the *Hillmon* doctrine and supports use of evidence like Exhibit C to prove the conduct of a nondeclarant.

C. Jussel’s conduct, business receipts and subsequent actions provided corroborating evidence that support admissibility under the minority test in *United States v. Best*.

Alternatively, the evidence that Jussel boarded a plane, flew to California and stayed overnight provide independent corroborating evidence sufficient to admit Exhibit C. When independent evidence connects the declarant’s statement with the non-declarant’s activities, a declarant’s out-of-court statement is admissible as evidence against a person other than the declarant. *United States v. Best*, 219 F.3d 192, 198 (2d Cir. 2000). In *Best*, the government had a witness testify that his supervisor told the

witness that he (the supervisor) would talk to the defendant about the fraudulent practices of the company. *Id.* at 197. The government produced evidence of a phone call between the supervisor and the defendant (but not the contents of the call), the witness's testimony, and several company documents contemporaneous with the phone call that suggested fraud. *Id.* at 197-98. The Court held that circumstantial evidence may provide the corroboration necessary to prove the nature of the transaction. *Id.* at 199. Jussel had just finished reading a news story about rH-12 poisoning and immediately told her assistant to book her a flight to California. (R. 24). She flew to California, stayed in a hotel and while there is no direct evidence of a meeting, Jussel's statement, the front-page story and her business receipts provide ample circumstantial evidence that a meeting took place. Even with the corroborating evidence the Court should admit the evidence on the earlier two basis because a corroborating evidence test has no basis in the language of Rule 803(3). *See United States v. Cicale*, 691 F.2d 95, 103-05 (2d Cir. 1982) (announcing the new test but not relying on the text of Rule 803(3) to formulate it).

Failure to admit Exhibit C violates Rules 803(3) and 801 because it contains evidence that is both relevant and proper. The two statements, one of intent and one of belief are independent of one another and Rules 803(3) and 801 support their admission. The holding and history of *Hillmon* read with the plain language of Rule 803(3) support admission as well. In the alternative there is sufficient corroborating evidence to pass the test of *United States v. Best*, a test that the plain language of the rule does not support.

IV. EXHIBIT D CONTAINS RELEVANT AND ADMISSIBLE FACTUAL INFORMATION DEMONSTRATING RESPONDENT'S KNOWLEDGE OF THE DEFECTIVE PRODUCT

Exhibit D is admissible under the Federal Rules of Evidence and is not barred by Rule 407's exclusion of subsequent remedial measures for two reasons: (1) The "Informational Findings" section of the report contains exclusively factual, objective information and does not recommend or make reference to any corrective actions or remedial measures; and (2) The Respondent compiled the report solely because a government directive commanded the Respondent to take such action. Consequently, these actions are beyond the scope of Rule 407 and exhibit D is admissible.

A. Federal Rule of Evidence 407 does not apply to factual information contained in the informational section, of a post-event report prepared by the distributor of a product, even if the report also contains a section recommending a recall of the product.

The "Informational Findings" section of Respondent's internal memorandum constitutes a post-event report, not a subsequent remedial measure. (R. 25-26).

Consequently, the prohibition by Federal Rule of Evidence 407 on subsequent remedial measures does not apply and the "Informational Findings" section is admissible.

Federal Rule of Evidence 407 does not apply to post-event reports and investigations. *Misener v. GM*, 924 F. Supp. 130, 133 (U.S. Dist. 1996); *Rocky Mountain Helicopters, Inc. v. Bell Helicopters, Textron*, 805 F.2d 907, 919 (10th Cir. 1986). As clearly stated and understood on its face, Rule 407 prohibits the admission of subsequent remedial measures "to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction." Fed. R. Evid. 407.

However, a post event report is not a remedial measure and it is not governed by Rule 407. *Brazos River Authority v. GE Ionics Inc.*, 469 F.3d 416, 431 (5th Cir. 2006); *Fasanaro v. Mooney Aircraft Corp.*, 687 F. Supp. 482, 486-487 (N.D. Cal. 1988).

The purpose behind Rule 407 and the general prohibition against admission of evidence pertaining to subsequent remedial measures is to encourage a potentially liable party to rectify a possibly dangerous situation or product without fear that such precautionary action will condemn that party or imply admission of liability. Public policy considerations demand encouraging action, by those in the best position to take action, that will alleviate or remove potentially dangerous conditions. Without the protection of Rule 407, a party might hesitate to render aid or avoid taking protective actions at all once an accident or injury has occurred. Subsequent remedial measures might be avoided altogether for fear that the party's good deed might not go unpunished, or out of concern that taking the time to fix a defective condition might implicate that party as responsible for the existence of the defective condition.

Rule 407 motivates an individual or party to take remedial action by suspending any potential negative consequences that may result from taking such action. Understanding the reasoning behind Rule 407 induces greater clarity as to why a post-event report is not a remedial measure, and why, therefore, Rule 407 does not apply to post-event reports. *Brazos River Authority v. GE Ionics Inc.*, 469 F.3d 416, 431 (5th Cir. 2006). The goal is not only to encourage actions that promote safety, but to keep unfavorable legal implications from discouraging an individual or party from fixing a hazardous product or situation. To promote this goal, Rule 407 excludes any evidence of measures taken that if taken before the injury would have made the harm less likely to occur. Fed. R. Evid. 407. With this understanding, if the action taken by the individual or party following the injury does not tend to rectify, remedy, or fix the dangerous condition or situation, then the purposes for granting protection under Rule 407 are absent.

Furthermore, if the reason for granting protection (encouraging remedial action) is absent, then the actions taken by the party or individual, although subsequent to the harm, are not protected and therefore admissible.

Examples of these types of post-event actions that did not tend to rectify, remedy or fix the dangerous condition or situation include reports, investigations and tests. See *Fasanaro v. Mooney* 687 F. Supp 482, 487 (N.D. Cal. 1988); *Misener v. GM*, 924 F. Supp. 130, 133 (U.S. Dist. 1996). In *Fasanaro*, the Defendant performed investigative tests to determine whether or not an airplane design was faulty. F. Supp 482, 487 (N.D. Cal. 1988). The court acknowledged that post-event tests may implicate some of the public policy considerations underlying Rule 407, but held that including such investigative tests within Rule 407 would extend that rule beyond its boundaries. *Id.* The court reasoned that post-event tests will not by themselves result in increased safety; rather, only if defective conditions are uncovered by those tests will the goal of increased safety be furthered. In short, the court in *Fasanaro* held that “By its terms, Rule 407 includes only the actual remedial measures themselves and not the initial steps toward ascertaining whether any remedial measures are called for.” *Id.* Similar to an investigative test, an informative report or investigation that only seeks to ascertain or establish facts does not call for or take action to remedy a situation or condition.

The “Informational Findings” section of Sea Toys’ internal memorandum can best be described as a report or investigation. This section was written by the Internal Design and Research division of Sea Toys’ corporation and it was written regarding the investigation of Sea Toys’ product. (R. 25-26). Furthermore, the text of the document, particularly the “Informative Findings” section, is clearly written to Sea Toys’ CEO in an

effort to apprise him of existing circumstances and conditions. *Id.* The purpose of the “Internal Findings” section was not a call to action. This section did not give recommendations or proposals to remedy the problems, rather it simply established objective facts. Although it may be contended that the establishment of these facts constituted an initial step in the direction of remedial action, the scope of Rule 407 includes only the actual remedial measures themselves. Fed. R. Evid. 407. It does not include the initial steps taken to determine whether remedial measures are necessary. *Id.* Establishing facts in a memorandum that demonstrate the existence of a defective condition in Sea Toys’ product might lead to a decision to take remedial measures, but they are not remedial measures by themselves.

The mere fact that Sea Toys reduced these factual conclusions to writing does not by itself make the harm or injury any less likely to occur. Composing a collection of objective facts about the safety of the product as Sea Toys did here does not tend to rectify, remedy, or fix the dangerous condition. A collection of data and relevant facts is similar to the investigative tests performed in *Fasanaro*, in that the purpose was to determine whether or not a problem existed. If no problem existed, then naturally remedial action would be unnecessary. However, where a problem does exist and the necessity to take remedial action is apparent, those subsequent steps will be afforded the protection of Rule 407 because those subsequent steps will make the alleged defect less hazardous. However, because writing down facts does not make anything more or less hazardous, nor does it support any of the purposes for Rule 407 or any of the policy considerations behind Rule 407, the rule, and the protection granted by that rule, does not apply.

For these reasons the “Informational Findings” section of Sea Toys’ internal memorandum is not a subsequent remedial measure and does not fall within the scope of Federal Rule of Evidence 407. The “Internal Findings” section is, as the name suggests, findings. It is a report. Although this data was compiled after the harm took place, it is beyond the scope of Rule 407 as these findings do not remedy or attempt to remedy anything. Consequently, Rule 407 does not apply to the “Internal Findings” section and that section of Sea Toys’ investigative report is admissible.

B. Federal Rule of Evidence 407’s exclusion of “subsequent remedial measures” does not apply to measures undertaken at the direction of a government agency.

Sea Toys’ entire internal memorandum including both the “Informational Findings” section and the “Recommendations” section constitutes an action that was taken solely at the direction of a government agency and is admissible evidence as it is not protected by Federal Rule of Evidence 407 as a subsequent remedial measure.

When a remedial measure is undertaken not out of any sense of altruism or social responsibility, but instead because the remedial measure is required by a government agency or other higher authority, the reasons for invoking the Rule 407 exclusion are non-existent and exclusion of evidence of such remedial actions is inappropriate. *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1343 (5th Cir. 1978). Federal Rule of Evidence 407 serves an important and distinct purpose: “The rule of exclusion is based on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.” *Id.* Additionally, courts have interpreted Rule 407 as having a common-sense rationale as well as a social justification “that people who take post-accident safety measures are doing exactly what good citizens should do.”

Wilkinson v. Carnival Cruise Lines, Inc., 920 F.2d 1560, 1569 (11th Cir. 1991). Courts do not want to invoke punishment or sanctions for admirable, exemplary behavior. *Id.*

The reasoning behind the existence of Rule 407 is clear: Courts want to encourage, or at least keep from discouraging, individuals and companies from making efforts to produce safe products, repair defective products, and maintain an overall sense of social responsibility that keeps in mind the safety needs of the public. Consequently, when an individual or company makes decisions that comport with these notions of safety and social responsibility, that person or company is rewarded by not having their responsible, safety-oriented actions held against them. However, when an individual or company is forced or coerced into taking action that furthers consumer safety, and but for the coercion from a higher power forcing the safety precaution the individual or company would have done nothing to improve safety, the policy justifications behind Rule 407 are non-existent and Rule 407 does not apply.

There are, of course, situations where a producer of goods takes safety precautions or remedial action that simply happen to coincide with a mandate from a higher power, such as a government authority. Under such circumstances that producer may legitimately claim that regardless of the existence of the government requirements he acted independently—willfully complying with the government directive. In such a scenario the social responsibility reasoning behind Rule 407 remains intact and the law would avoid punishing such praiseworthy behavior even when that behavior coincidentally complies with an authoritative command. *Id.* Under the facts of this case, however, there exists a different scenario.

Because Sea Toys' memorandum was an involuntary response to the directive, it is not afforded protection under Rule 407. Sea Toys did not take action that would further public safety out of altruism or out of a sense of social responsibility; rather, Sea Toys issued its internal memorandum consisting of "Informational Finding" and "Recommendations" as an involuntary, non-coincidental response to a government mandate. (R. 27). Sea Toys contends that the internal memorandum, which contains a list of recommendations, is protected under Rule 407 as a subsequent remedial measure. The memorandum was indeed compiled subsequent to the harm, but it was also written subsequent to and as a direct result of a directive from the Consumer Product Safety Commission.

As the factual allegations stated in the record indicate, Sea Toys learned that the product contained the dangerous toxin, rH-12 around October, 2005. On October 20, 2005 the Consumer Product Safety Commission issued a directive to all manufacturers and distributors of children's toys that sternly recommended investigation of the potential presence of toxic substances for all foreign-manufactured toys. *Id.* The directive also requested that manufacturers and distributors of children's toys take remedial action if these investigations show that the products pose health risks to consumers. *Id.* It was nearly three months later, on January 16, 2006 that the internal memorandum was sent to Respondent company's CEO. There is absolutely no evidence that Sea Toys performed this investigation or took any action out of social responsibility. There is no evidence that Sea Toys was doing anything other than involuntarily complying with a specific mandate from the Consumer Product Safety Commission. Because Sea Toys did not take action out of social responsibility, or desire to be a good citizen, the reason for excluding these

actions by invoking Rule 407 are non-existent. When it is shown that a company such as Sea Toys would not take action without the government mandate, there is a noticeable absence of praiseworthy behavior. Because Rule 407 is designed to protect praiseworthy behavior, where none exists, the rule is inapplicable.

Sea Toy's internal memorandum was not motivated by a sense of social responsibility. The memorandum was an involuntary response to a mandate issued by the Consumer Product Safety Commission. As a result, Sea Toys' internal memorandum is not protected by Rule 407 and the memorandum is therefore admissible.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Fourteenth Circuit Court of Appeals and hold that Petitioner's Exhibits A, B, C, and D are admissible under the Federal Rules of Evidence.

APPENDIX

Boerum Tort Reform Act, Section 204

§ 204. Limitation on the Liability of the Distributor or Seller of a Toy for Harm Caused by the Failure to Warn or Recall

- A) Exclusive Remedy. Except as provided herein, no product liability action, including negligence, strict liability, breach of an implied warranty of merchantability, or any other claim based exclusively upon a manufacturing or design defect, may be brought against a distributor or commercial seller of a toy.

- B) Failure to Warn. One engaged in the business of selling or otherwise distributing toys is subject to liability for harm to persons or property caused by the seller's or distributor's failure to provide a warning after the time of sale or distribution of a toy if a reasonable person in the seller's position, including one having the knowledge possessed by the distributor or seller, would provide such a warning.

- C) Failure to Recall. One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's or distributor's failure to recall a toy after the time of sale or distribution if:
 - 1) a reasonable person in the situation, including one having the knowledge possessed by the distributor or seller, would recall the product; or
 - 2) the seller or distributor undertakes to recall the toy but fails to act as a reasonable person in recalling the product.

- D) No Punitive Damages. In any action based upon this section, punitive damages may neither be sought, nor awarded. (Added L. 2004, ch. 1 [Boerum Tort Reform Act]).