

No. 07-117

IN THE

SUPREME COURT OF THE UNITED STATES

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

Petitioner,

- against -

UNDER THE SEA TOYS, Inc.,

Respondent.

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

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BRIEF FOR PETITIONER

STUART SLOPE

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## QUESTIONS PRESENTED

- I. 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?
- II. 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?
- III. 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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## STATEMENT OF THE FACTS

Plaintiff is an infant, currently five years of age, diagnosed with irreversible brain damage as a result of his contact with the Finn E. Shark plush toy. R. 1. Plaintiff's parents bought him the toy in December 2005 as a holiday gift. R. 2. Plaintiff loved the toy so much he carried it everywhere he went. *Id.* Within weeks of giving him the toy, Plaintiff's parents noticed he was beginning to exhibit strange and alarming symptoms such as loss of consciousness, convulsions, confusion and violent mood swings. R. 29. Plaintiff's parents sought medical attention for their child in early January 2006. *Id.*

Plaintiff will suffer the following conditions for the remainder of his life: persistent headaches, repeated vomiting and nausea, convulsions and seizures, slurred speech, weakness and numbness in the extremities, loss of coordination, confusion and agitation, inconsistent sleeping patterns and inability to waken from sleep, poor school performance, loss of interest in favorite toys and activities. R. 1-2. Plaintiff was recently enrolled in a special needs pre-school. R. 1. Indeed, Plaintiff's health has been so ravaged that he is incapable of leading a normal life and will never be able to do so. R. 4.

The toy, which caused Plaintiff's current condition, was manufactured overseas in Legolia by Tattel and distributed exclusively in the United States by the Defendant Sea Toys. R. 28. Apparently, the manufacturer used a poisonous toxin rH-12 as an adhesive to attach the eyes of the shark. R. 30. Exposure to rH-12 causes brain damage in children. R. 3. Indeed, Tattel has gone out of business since a record number of children in Lagolia have been diagnosed with brain damage as a result of their interaction with the Finn S. Shark toy. R. 3.

In the United States, Plaintiff represents one member of the masses of children whose health and quality of life has been irreparably damaged because of Defendant Sea Toys' wide

distribution of this toy. *See* R. 25. Until the toy's introduction in December of 2005, there had been no cases of rH-12 in the United States for over fifty years. *Id.* However, since the toy's introduction, an increasing number of children have been diagnosed with brain damage caused by rH-12. *Id.* All children so diagnosed were found to possess Finn E. Shark toys with eyes that had fallen off. *Id.*

On April 14, 2006, Plaintiff's parents filed a complaint on his behalf in the Eastern District of Boerum under U.S.C. § 1332. R. 29. Plaintiff alleged that Defendant knowingly failed to warn of the dangers and risks associated with Finn E. Shark toy or to issue a timely recall of the toy, thus violating § 204 of the Boerum Tort Reform Act. *Id.* In the State of Boerum, § 204 is the only means by which the Plaintiff and any other children similarly afflicted may obtain relief. R. 6.

At the conclusion of discovery, Defendant filed motion for summary judgment on the ground that Plaintiff had not produced sufficient admissible evidence to defeat summary judgment. R. 6. The trial court determined that the only disputed issue was Defendant's knowledge or awareness of the product's dangers. R. 7. Plaintiff argued that four pieces of evidence, all of which Defendant objected to as inadmissible under the Federal Rules of Evidence, established Defendant's awareness of the hazardous nature of the toy. *Id.* Despite "what appears to be a grave and genuine injury to Plaintiff", R. 19, the trial court excluded all of the evidence and granted summary judgment.

First, trial court addressed the admissibility of statements Jussel made to her secretary, Jaffe Peetz, describing how, upon learning on September 30, 2005 that rH-12 was causing brain damage in children, Jussel asked him to book her an airplane ticket to California, adding, "[s]omething terrible has happened and I am going to meet with Troy Ledbetter [CEO of Sea

Toys] to tell him what's going on.” R. 24. Peetz confirmed that he indeed booked Jussel a flight leaving October 2, 2005 and returning on October 3, 2005 and that Jussel submitted receipts for plane fare, taxi rides and a hotel as proof of her trip. *Id.*

Defendant objected due to the fact that there is no proof the meeting with Ledbetter took place. R. 13. Defendant also objected that, even if there was proof the meeting took place, there was no way to prove what was said at the meeting. *Id.* Defendant argued that it was not the intention of Congress to codify *Hillmon* when it enacted Rule 803(3). *Id.*

Second, the court dealt with the admissibility of certain statements from a private entry in Jussel's personal business journal, dated October 10, 2005, in which Jussel described a meeting with an agent of the Legolian government. R. 22. In this meeting, she was asked whether she knew there was rH-12 in the Finn E. Shark toy. *Id.* As noted in the journal entry, she admitted to the Legolian government that she as well as everyone in America knew. *Id.* Defendant conceded that the journal entry exposed Jussel to civil liability. R. 8.

Defendant objected to the evidence on the ground that the statement, “everybody here and in America knew,” is collateral to a declaration against interest and therefore inadmissible under the Supreme Court's decision in *Williamson v. United States*, 512 U.S. 594 (1994). R. 8. *Williamson* was a criminal case which held that Rule 804(b)(3) does not allow admission of non-self inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory. *See Williamson*, 512 U.S. at 600-01. Plaintiff argued that *Williamson* dealt only with declarations against penal interest made to law enforcement officials in a custodial setting. R. 8. Therefore, its holding is inapplicable here in a civil suit where the statement in question is a declaration against pecuniary interest which the declarant made in a personal

setting. *Id.* However, the Court applied *Williamson* to the current case and excluded the statement because on the ground that it was inadmissible hearsay. R. 19.

Third, the court addressed the admissibility of a private apology letter Jussel wrote her daughter. This letter, dated October 11, 2005, confirms that Jussel in fact “went to California and told [Defendant] that there was rH-12 in the shark toys and that rH-12 had dangerous affects on children.” R. 23. Further, the letter exposes Jussel to criminal liability. *See id.* Sometime after she wrote this letter, Jussel learned she was terminally ill. R. 10. She committed suicide after receiving this news, one whole week after she wrote the letter. *Id.*

Defendant objected to the entire letter on the basis that its contents are unreliable solely because the writer happened to commit suicide after writing it. R. 10. Plaintiff argued that at least portions of the letter were admissible as declarations against penal interest because 1) the statements in the letter as plainly reliable, and 2) there was no evidence that Jussel was contemplating suicide when she wrote it. *Id.* The trial court found that statements made prior to suicide are *per se* inadmissible, and excluded the letter in its entirety on this basis alone. R. 19.

Fourth, the court addressed the admissibility of an internal report from Defendant’s Internal Design and Research Department to CEO Ledbetter. The report provided “informational findings” (*i.e.* “[F]indings substantiate information provided in October 2005 concerning the etiology of brain damage in Legolian children.”), as distinct from “recommendations” which detailed actions, or measures, the company should take to remedy the situation, such as immediate recall of the toy and the issuance of a warning about the risk of exposure to rH-12 from the toy. R. 25. The report was issued on January 16, 2006. R. 25-26. On October 20, 2005, the United States Consumer Product Safety Commission sent a directive to defendant instructing the company to investigate reports of poison in children’s toys. R. 27.

Plaintiff argued for the introduction of the informational findings portion of the report. R. 13-14. Defendant objected to the introduction of the report on the grounds that it is a subsequent remedial measure excluded from introduction into evidence under Rule 407. R. 15. Alternately, plaintiff argued the report should not be included in the Rule 407 exception because it was not voluntary but instead was ordered by the government. R. 14-15. Defendant argues that the plain language of Rule 407 does not distinguish between voluntary and involuntary measures.

Plaintiff appealed to the United States Court of Appeals for the Fourteenth Circuit. R. 28. The Appellate Court affirmed, holding that: (1) under *Williamson*, all statements collateral to a declaration against pecuniary interest are inadmissible in civil cases and therefore, the collateral statements in Jussel's journal entry ("undisputably, a declaration against [Jussel's] pecuniary interest and exposing her to civil liability") was inadmissible, R. 32-33; (2) declarations against interest made in a suicide letter or note, or otherwise within a short time before suicide, are *per se* inadmissible under 804(b)(3), and therefore the letter ("undisputedly, a declaration against [Jussel's] penal interest") was inadmissible, R. 34; (3) contrary to the holding in *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285 (1892)— which permitted the introduction of declarations of intent of one person to prove the actions of another— under 803(3), declarations of one person's intent are no longer admissible to prove the conduct of another, R. 34-35; (4) (a) under 407, post-injury reports are entirely inadmissible as a policy matter, even if they contain informational findings distinct from recommended actions, and (b) that the plain language of 407 does not allow the admission of subsequent remedial measures, even if they are undertaken involuntarily at the direction of a government agency and, in the alternative, that even if there

was such an exception, it would not apply in this case because a government directive is not a “mandatory request”. R. 37-39.

Consequently, Plaintiff petitioned for a writ of certiorari to the United States Court of Appeals for the Fourteenth Circuit. R. 46. This Court granted the petition on October 1, 2007 to address all four evidentiary issues. *Id.*

## **SUMMARY OF ARGUMENT**

### **POINT I**

The court below erred in holding that *Williamson v. United States*, 512 U.S. 594 (1994) precluded the admissibility of a statement contained in Tattel CEO Jussel’s private journal entry. *Williamson* was a criminal case dealing only with statements collateral to declarations against penal interest, and even then, exclusively when they were produced in a custodial setting. It held that the Federal Rule of Evidence 804(b)(3)’s hearsay exception for statements against interest does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory.

Contrary to the court’s finding, *Williamson* does not apply here because the statement at issue was 1) produced in the civil context in a private setting; and 2) within a narrative against the declarant’s pecuniary interest. Indeed, *Williamson*’s holding is specific to the special concerns pertaining to reliability of statements made by a criminal defendant during a custodial interrogation. The holding also does not extend to declarations against pecuniary interest because civil liability does not motivate the declarant to lie or misrepresent information in the way that criminal liability does. Accordingly, the court below improperly applied *Williamson* when it excluded the statement at issue, which arose in a civil context in a personal setting, and solely implicated pecuniary interests.

## POINT II

The court below erred in holding that a statement is *per se* inadmissible under Federal Rule of Evidence 804(b)(3) if a declarant commits suicide a short time after making it. Statements of a declarant who later commits suicide are 1) admissible if they were sufficiently against the declarant's penal interest when made; and 2) may only be excluded if the declarant knew she was going to commit suicide when she made them.

The proper question to decide admissibility under Rule 804(b)(3) is always whether, in light of all the surrounding circumstances, 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.'" *Williamson*, 512 U.S. at 603-04. Here, even though Jussel committed suicide after she wrote the letter, the surrounding circumstances indicate that the contents of the letter were sufficiently against Jussel's interest. Further, the only time suicide casts doubt on a declarant's reliability is if the declarant was actually contemplating it when she made her statements. There is simply no evidence that Jussel was actually contemplating suicide when she wrote the letter. Thus, in light of all these surrounding circumstances, the contents of the letter are reliable and admissible under Rule 804(b)(3).

## POINT III

The court below erred in excluding Mimi Jussel's statement to her secretary that she was going to meet with Troy Ledbetter to tell him about the rH-12 poisoning. Under Rule 803(3), statements pertaining to the declarant's state of mind constitute exceptions to the hearsay rule. FED. R. EVID. 803(3). A declarant's hearsay statement that she intends to meet and discuss a matter with a business associate constitutes evidence in a civil case that the meeting took place and that the matter was discussed.

Declarations of future intent are admissible to infer that a third party implicated in the declarant's future plans did also engage in the plans. Contrary to the majority opinion, Congress intended to incorporate *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285 (1892), when it codified Rule 803(3). *U.S. v. Pheaster*, 544 F.2d 353, 379-80 (9th Cir. 1976) (citing the Advisory Committee on the Proposed Rules Note to Paragraph (3), 28 U.S.C.A. at 585). The lower court erred in relying solely on the Report of the House Committee. Not only is there no indication how the Senate felt on the issue, In additiono, the Advisory Committee on the Proposed Rules stated, contrary to the House Committee, that it intended to fully codify *Hillmon*.

In addition, case law supports this interpretation. Some courts allow the admission of a statement that a deceased planned to meet another if there are indications that the statement was reliable and trustworthy. In this case, the circumstances surrounding the statement Mimi Jussel made to her secretary indicate that it was both reliable and trustworthy. There was no reason for her to tell her secretary this if it wasn't true. Jussel's plane ticket to California indicates that she did in fact take the trip, and there is no reason to believe she did not meet with Mr. Ledbetter and tell him about the poison.

The court erred in not admitting this piece of evidence. The jury should have been permitted to consider the evidence. The circumstances surrounding the statement should be made known to the jury and, at that point, the jury can determine what weight to give to this piece of evidence.

#### **POINT IV**

The court also erred in refusing to admit the post-injury report. The Rule 407 exclusion of subsequent remedial measures does not apply to investigations and factual information. Because the internal report prepared by the defendant contains two sections, "informational

findings” and “recommendations,” there is no reason to exclude the informational findings from evidence. That is contrary to the purpose of Rule 407, which is to encourage parties to make repairs when needed.

Information findings do not rise to the level of subsequent remedial measures because they are not repairs. This information will not result in added safety and was not contemplated under Rule 407. In addition, the plain language of Rule 407 does not require exclusion of subsequent remedial measures when offered to prove knowledge. Accordingly, even if the court finds that the informational findings section constitutes a subsequent remedial measure, Rule 407 does not prohibit its introduction.

#### **POINT V**

The court also erred in refusing to admit the report because it was prepared at the direction of a government agency. Rule 407 only applies to voluntary measures, not those taken involuntarily at the direction of the government. A government directive instructed the toy company to investigate for possible poison. Therefore, the entire report, even if considered a subsequent remedial measure, may be admitted into evidence. Rule 407 was enacted to encourage social responsibility, and a company that acts at the direction of the government is not acting according to Rule 407.

#### **ARGUMENT**

All four questions before the court today involve questions of law. Accordingly, *de novo* standard of review applies to each. *Elder v. Holloway*, 510 U.S. 510, 516 (1994).

#### **POINT I**

**WILLIAMSON DOES NOT PRECLUDE THE ADMISSIBILITY IN CIVIL CASES OF RELIABLE COLLATERAL STATEMENTS CONTAINED WITHIN THE SAME**

**NARRATIVE AS STATEMENT THAT SATISFY RULE 804(B)(3)'S HEARSAY  
EXCEPTION FOR DECLARATIONS AGAINST INTEREST.**

The court below erred in granting summary judgment for Defendant when it found that a statement contained in Tattel CEO Jussel's private journal entry was inadmissible hearsay. The statement at issue, "everybody here and in America knew," is evidence that as early as October, 2005, two months before a poisonous toy was distributed in the United States, Defendant knew about the presence of the toxin rH-12 in its toy. R. 8. This statement, which implicated the Defendant as a responsible party in a widespread poisoning of children, was couched within a general narrative that exposed Jussel to civil liability. *Id.*

The statement is admissible because the entire journal entry qualifies under Rule 804(b)(3)'s hearsay exception for declarations against pecuniary interest. Rule 804(b)(3) provides that when a declarant is unavailable to testify, "[a] statement which was at the time of its making so far contrary to the declarant's pecuniary. . . interest, or so far tended to subject the declarant to civil. . . liability. . . that a reasonable person would not have made [it] unless believing it to be true," is admissible.

Here, the declarant Jussel is unavailable to testify since she is now deceased, R. 10; FED. R. EVID. 804(a)(4). Further, Defendant conceded that the contents of the journal exposed Jussel to civil liability. R. 8. Thus, the entire journal entry, including the statement implicating the Defendant, is admissible as a declaration against Jussel's pecuniary interest.

The ruling of the below was based upon a misapplication of *Williamson v. United States*, 512 U.S. 594 (1994). *Williamson* was a criminal case addressing only statements collateral to declarations against penal interest. Further, it exclusively dealt with statements a declarant made to law enforcement officers in a custodial setting. Thus, contrary to the court's finding,

*Williamson* does not apply here because the statement at issue was 1) produced in the civil context in a private setting; and 2) within a narrative against the declarant's pecuniary interest.

- A. Since *Williamson* only applies to collateral statements within declarations made to law enforcement officials while in custody, it does not preclude the admissibility Jussel's statement, which was produced in the civil context in a personal setting.

A reliable collateral statement is admissible under Federal Rule of Evidence 804(b)(3) unless the evidence arises in the criminal context in a custodial setting. *See Williamson v. United States*, 512 U.S. 594 (1994). In *Williamson*, which was a criminal case where the declarant's statements were a result of custodial interrogation, the Supreme Court defined the scope of Rule 804(b)(3) when the declarant's statements both subject the declarant to criminal liability and inculcate the defendant. Solely due to this criminal context, the Court applied the narrowest definition of "statement" to Rule 804(b)(3), holding that the rule did not allow admission of non-self-inculpatory statements even if they are made within a broader narrative that is generally self-inculpatory. Accordingly, the holding in *Williamson* is limited to address special concerns raised in criminal cases, which, as discussed below, do not apply in civil cases.

In *Williamson*, the court premised its opinion on the notion that collateral statements in the criminal context are presumptively unreliable, or in some way less credible than ordinary hearsay evidence. *See Williamson*, 512 U.S. at 601. This basis for the court's opinion is evidenced by the language the court used when justifying the exclusion of collateral statements in criminal cases. *Williamson*, 512 U.S. at 601 ("The arrest statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence.") (citations omitted).

These concerns specific to the criminal context have been articulated by other courts applying *Williamson*. See, e.g., *Lilly v. Virginia*, 527 U.S. 116, 137-38 (1999) (finding that the presumption of unreliability that attaches to an accomplices' confession that shifts or spreads the blame cannot be effectively rebutted when the government was involved with the statement's production); *United States v. Bradshaw*, 281 F.3d 278 (1st Cir. 2002) (excluding declarant's statement in criminal trial because the tendered statement "represented a 'sophisticated and subtle' effort by declarant . . . to avoid criminal responsibility on the precise charges lodged against [him]."); *Vincent v. Seabold*, 226 F.3d 681, 687 (6th Cir. 2000) ("Because the declarant in *Williamson* implicated the defendant while in police custody and after already having confessed to the crime, the Court concluded that naming the defendant did little to implicate the declarant any further and was probably an effort to secure a lesser punishment through cooperation."); *United States v. Boyce*, 849 F.2d 833, 836 (3d Cir. 1988) (holding that a statement given in custody was not reliable because circumstances indicated that it may have been "motivated by a desire to curry favor").

This presumption of unreliability, militating against the admissibility of collateral statements, is simply not present in civil cases. Indeed, Rule 804(b)(3) only requires corroboration for statements arising in the context of a criminal case. FED. R. EVID. 804(b)(3) ("A statement tending to expose the declarant to criminal liability and offered to exculpate the accused, is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.") By contrast, declarations against interest are freely admissible without any requirement of corroboration. FED. R. EVID. 804(b)(3).

Accordingly, *Williamson* should not be extended to exclude highly probative evidence in the civil context where, unlike in the criminal context, the evidence is not patently unreliable. In

*Williamson*, the Court reasoned, “that a statement is collateral to a self-inculpatory statement says nothing at all about the collateral statement’s reliability.” Even so, this does not preclude the admissibility of collateral statements that are reliable; it merely justifies the rule excluding collateral statements produced in a custodial setting. The fact that declarations in the civil context, as compared to ones arising in the criminal context, are inherently more reliable renders collateral statements in the civil context sufficiently reliable and admissible.

This is especially true when the declarations were made in a personal context as opposed to a custodial setting. “A statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as a statement against interest.” Advisory Committee’s Notes to Rule 804(b)(3). “On the other hand, the same words spoken under different circumstances, *e.g.*, to an acquaintance, would have no difficulty in qualifying.” *Id.*

Here, the journal entry in question clearly falls in the latter category. By stark contrast to the custodial setting in *Williamson*, Jussel wrote in a private journal meant for her eyes only. *See* R. 22. Jussel had no motivation to lie to herself or otherwise present the information in a way to shift blame or curry favor. Admittedly, Jussel’s statement, “everybody here and in America knew,” would not have been admissible if made while in custody because, like other criminal defendants in that setting, she would be strongly motivated to spread the blame or curry favor with law enforcement officials. However, under the disparate circumstances of this case, where Jussel wrote privately in her personal business journal, it is highly unlikely she lied or otherwise misrepresented the information to herself. Therefore, the evidence is reliable and admissible under *Williamson*.

- B. Even if the court is inclined to apply *Williamson* to civil cases, the holding in *Williamson* is specific to declarations against penal interest and therefore, Jussel’s reliable collateral

statements within a broader declaration against her pecuniary interest are still admissible under Rule 804(b)(3).

Reliable collateral statements within a general narrative that is against the declarant's pecuniary interest are admissible under Rule 804(b)(3). *Williamson* limited its holding to collateral statements within declarations against penal interest, *Williamson v. United States*, 512 U.S. 594, 596 (1994) (“In this case we clarify the scope of the hearsay exception for statements against *penal* interest.”) (emphasis added), and does not bar collateral statements within declarations against pecuniary interest. “[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.” *Williamson*, 512 U.S. at 603-04 (emphasis added). Further, “this question can only be answered in light of all surrounding circumstances.” *Id.*

Here, the journal entry at issue is a declaration against pecuniary interest. Defendant has conceded the writing contains information that exposed Jussel to civil liability. R. 8. Therefore, since the entry related solely to Jussel's pecuniary interest, not to her penal interest, it is admissible under *Williamson*.

As aptly stated by Justice Julio from the court below, “[g]iven the vast difference between declarations against penal interest and declarations against pecuniary interest, it is too great a stretch to extend *Williamson* to declarations against penal interest.” R. 40. For one thing, “[i]mplicating others in the civil context does not ordinarily reduce the penalties that may be levied against the declarant, nor does it reduce the likelihood that the suit will be brought.” *Id.*

Accordingly, courts, even ones who have applied the *Williamson* rule in civil cases, have limited its application to situations when a declarant's statement involved penal interest. *See, e.g. United States v. Mendoza*, 85 F.3d 1347, 1351 (8th Cir. 1996) (“In *Williamson v. United*

*States*, 512 U.S. 594 (1994), the Supreme Court addressed the manner in which courts should resolve the against-penal-interest determination under Rule 804(b)(3).”); *McClung v. Wal-Mart Stores Inc.*, 270 F.3d 1007 (6th Cir. 2001) (applying *Williamson* to statements against declarant’s penal interest in premises liability action); *Schimpf v. Gerald, Inc.*, 52 F.Supp.2d 976, 985-86 (E.D.Wis. 1999) (applying *Williamson* to declaration against penal interest in a case involving alleged securities fraud); *Ciccarelli v. Gichner Sys. Group, Inc.*, 862 F.Supp. 1293, 1298 and n. 3 (M.D.Pa. 1994) (applying *Williamson* to declaration against penal interest in case involving alleged ERISA violation); *De Jager Constr., Inc. v. Schleininger*, 938 F.Supp. 446, 447 n. 3 (W.D.Mich. 1996) (applying *Williamson* to declaration against penal interest in case involving action arising under Racketeer Influenced and Corrupt Organizations Act); *Kettenbach v. Demoulas*, 901 F.Supp. 486, 500 n. 14 (D.Mass. 1995) (applying *Williamson* to declaration against penal interest in civil suit).

Indeed, it is particularly telling that today, fourteen years after *Williamson* was decided, only one circuit has extended the rule to include statements against pecuniary interest.

*Silverstein v. Chase*, 260 F.3d 142, 147 (2d Cir. 2001). *Silverstein*, however, is distinguishable from the current case. In *Silverstein*, the collateral statements were blatantly unreliable under Rule 804(b)(3) with respect to what they were offered to prove.

*Silverstein* involved the admissibility of a document intended to transfer securities interests of two brothers, Edward and Marvin Silverstein, to their sister Rita Silverstein in satisfaction of a debt. Though Marvin’s name appears throughout the document and is typed under the signature line, Marvin never signed the document. In fact, Marvin did not show up on the day that both brothers were supposed to sign the document, a clear sign that he did not intend to make this transfer. Edward, on the other hand, did sign the document.

Under those facts, the Court held that the statements within the document, which did not adversely affect the declarant, Edward, were not admissible under Rule 804(b)(3) to prove that Marvin also relinquished his interest in the property. However, in that particular context, the collateral statements in question were in fact “less credible than ordinary hearsay evidence.” *See Williamson*, 512 U.S. at 601. In effect, the *Silverstein* court excluded the collateral statements for the same reason that the court excluded them in *Williamson*: the statements in questions were patently unreliable.

Here, on the other hand, the evidence is highly probative and demonstrably reliable and therefore should not be excluded. The statement at issue, “everyone here and in America knew”, establishes that Defendant knew about the hazardous nature of its toy two months before it distributed it to children. Given that this evidence suffices to establish the element of knowledge, which is the only disputed issue on Defendant summary judgment motion, R. 7, the Plaintiff’s case hangs upon its admission.

Further, the statement’s reliability is manifest. Three other pieces of evidence verify its accuracy. First, at her deposition, Jussel’s secretary, Jaffe Peetz, testified that Jussel asked her to book a flight to California during the first week of October 2005 so that she could tell Defendant about the rH-12. R. 24. Further, Peetz confirmed that Jussel went to California that week, as evidenced by her submission of receipts for travel and hotel costs. *Id.* Second, in a letter Jussel wrote to her daughter dated October 11, 2005, Jussel asserted that by that time, she had already been to California and “told [Defendant] that there was rH-12 in the shark toys and that rH-12 had dangerous affects on children.” R. 23. Finally, in a self-prepared report, Defendant Sea Toys admits it had received information about the dangerous nature of the toy back in October of 2005. R. 24.

Thus, the reliability of the collateral statements in question have been amply demonstrated by other evidence. And, as discussed above, this evidence is crucial to Plaintiff's case. Accordingly, because *Williamson* does not apply to declarations against pecuniary interest, the evidence is admissible.

## POINT II

### STATEMENTS ACKNOWLEDGING CRIMINAL CONDUCT IN A PERSONAL LETTER ARE NOT INADMISSIBLE SOLELY BECAUSE THE WRITER COMMITS SUICIDE AFTER WRITING IT.

The court below erred in granting Defendant's summary judgment motion when it excluded a letter Jussel wrote to her daughter solely because the declarant happened to commit suicide after she wrote it. Like Jussel's journal entry, this letter also contained evidence that demonstrates that Defendant knew that the toy shark contained rH-12 back in October 2005. R. 23. The letter is admissible under Rule 804(b)(3) because it contains clear declarations against Jussel's penal interest.

The court's decision below was based on a misapplication of the existing law. Contrary to the Court's finding, the mere fact of suicide is not sufficient to exclude probative evidence because statements of a declarant who later commits suicide are 1) admissible if they were sufficiently against the declarant's penal interest when made; and 2) may only be excluded if the declarant knew she was going to commit suicide when she made them.

- A. Notwithstanding her suicide, Jussel's statements are admissible because they were sufficiently against her penal interest when made in light of all surrounding circumstances.

Out-of-court statements are admissible under Rule 804(b)(3) if they are sufficiently against the declarant's interest. *Williamson*, 512 U.S. 594, 603-04. The question of whether a

statement is sufficiently against the declarant's interest can only be answered "in light of all the surrounding circumstances." *Id.* Accordingly, though the fact of suicide is a circumstance to consider, out-of-court statements made before the declarant committed suicide are admissible as long as other surrounding circumstances indicate that the statements are sufficiently against the declarant's interest.

Indeed, the mere fact that a declarant committed suicide after making a statement has never been the sole basis for exclusion. While some courts have expressed concern over the reliability of such statements, they decided admissibility under Rule 804(b)(3) in light of all the surrounding circumstances. *See, United States v. Jordan*, 509 F.3d 191 (4th Cir. 2007) (statements made by co-conspirator to friend prior to her suicide were admissible at defendant's trial because the statements fell under the hearsay exception for statements against penal interest); *but see United States v. Angleton*, 269 F.Supp.2d 878 (S.D. Tex. 2003) (statements made prior to suicide were not sufficiently against interest under Rule 804(b)(3) to be admissible because there were no corroborating circumstances indicating trustworthiness); *United States v. Lemonakis*, 485 F.2d 941, 957 n.24 (D.C. Cir. 1973) (statements made before the declarant committed suicide were not admissible as statements against interest because there was no corroboration)

The lower court's reliance on *Angleton*—for the proposition that the fact of suicide suffices to exclude highly probative evidence—is misplaced. In *Angleton*, the Court decided the admissibility of several notes, written shortly before the declarant's suicide. *Angleton*, 269 F.Supp.2d at 881. While the *Angleton* court considered contemplation of suicide as a factor, the decision was not grounded on the fact that the declarant committed suicide shortly after writing the notes. Rather, the court excluded the evidence because it was not sufficiently against the

declarant's penal interest "in light of all the surrounding circumstances." *Angleton*, 269 F.Supp.2d at 890. Thus, consistent with *Williamson* and *Angleton*, the proper question to ask when determining admissibility is whether, in light of all the surrounding circumstances, 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.'" *Williamson*, 512 U.S. at 603-04.

Under this standard, there is no question that the statements are sufficiently against Jussel's penal interest to be admissible. Jussel confessed, "I am behind these sick children. I am the cause. I only wish I had done something sooner." R. 23. And, even though she implicated Sea Toys by confirming that she in fact went to California and told them about the rH-12, she assumed all of the responsibility for what has happened by adding that by the time she told them, it "was too late." *Id.* Unquestionably, her confession—that she knowingly sold children toxic toys—exposed her to serious criminal liability. Jussel acknowledged this herself in the letter, "it is almost certain I will go to prison." *Id.* Certainly, she would not have assumed such full responsibility for what has happened to the children unless she believed this to be true.

Further, one factor present in *Angleton*, not present in the current case, compels a different outcome. In *Angleton*, the notes in question were exculpatory as to a criminal defendant, unlike here, where the letter is inculpatory as to a civil defendant. *Angleton*, 269 F.Supp.2d at 890. As the *Angleton* court aptly noted, Rule 804(b)(3) sets forth a higher standard of reliability for the admission of statements that are offered to exculpate a criminal defendant, as opposed to ones offered to inculcate him or, like here, inculcate a civil defendant; only the first of the three must be corroborated. *Id.* Applying this higher standard of reliability, the *Angleton* court excluded the evidence because the "[d]efendant offer[ed] no evidence to corroborate the

exculpatory statements made in the notes that clearly indicates the trustworthiness of the statements.” *Id.*

By contrast, the applicability of a lower standard of reliability in the current case militates in favor of admissibility. Indeed, ample corroboration exists in this case even though, as explained above, Rule 804(b)(3) does not require corroboration unless the declarant exculpates a criminal defendant. There are three pieces of evidence, apart from Jussel’s letter to her daughter, that confirm that Defendant knew about the rH-12 in its toys in October of 2005. First, Jussel indicated in her personal business journal, dated October 10, 2005 that everybody in America knew, including the Defendant. R. 22. Second, Jussel’s secretary, Jaffe Peetz, testified when she was deposed that Jussel asked her to arrange a trip to California so that she could meet with Troy Ledbetter, CEO of Defendant Sea Toys, to “tell him what’s going on”, referring to the presence of rH-12 in the toys. R. 24. Peetz also confirmed that Jussel went to California based on Jussel’s submission of receipts from the trip. *Id.* Lastly, a report prepared by the Defendant reveals that Defendant received information about the effects of rH-12 on children in October of 2005. R. 25. Thus, given the lower standard of reliability required under 804(b)(3) in civil cases, the fact that the letter is amply corroborated by other evidence renders the statements sufficiently reliable and admissible.

B. Jussel’s letter is admissible under Rule 804(b)(3) as against her penal interest because there is no evidence that she was in fact contemplating suicide when she wrote it.

Suicide notes are not rendered less reliable as statements against interest unless “the declarant *knows* that he will not be present for prosecution or civil suit” for it is only then “impending liability cannot be considered a motivating impetus ensuring trustworthiness.” *Note, Judicial Interpretation of Suicide*, 105 U. PA. L. Rev. 391, 404-05 (emphasis added); *see also United States v. Angleton*, 269 F.Supp.2d 878 (S.D. Tex. 2003) (declarant’s statements did not

qualify as statements against interest where the defendant contended declarant committed suicide in arguing the statements also qualified as dying declarations, which requires that the statements be made in the belief of imminent death)<sup>1</sup>; *United States v. Crowder*, 848 F.Supp. 780, 781-82 (M.D.Tenn. 1994) (statements made by terminally ill patient were not statements against interest because defendant *knew* he would likely not live long enough to suffer criminal or civil consequences from his statements) (emphasis added).

Here, we do not concede in any way that Jussel's letter to her daughter was written in contemplation of suicide. Indeed, the only evidence that the letter was written in contemplation of suicide is the fact of the suicide itself. A sounder interpretation of the contents of the letter is that it is Jussel's sincere confession and apology to her daughter. Not only does she make no mention of suicide or thoughts of suicide, Jussel predicts that, "it is almost certain [she] will go to prison." R. 23. Judging from the tone of the letter, when she asks for her daughter's forgiveness, it is because she will be deserting her by going to prison, not because she intends to kill herself. *See id.*

Accordingly, even if the Court accepts that contemplation of suicide is a factor in deciding admissibility of the letter, there is simply no evidence that Jussel was in fact contemplating suicide when she wrote it. Indeed, it was after she wrote this letter that she learned she was terminally ill, R. 10, which likely inspired her suicide. Thus, the fact of her suicide, one whole week after she wrote the letter, R. 10, does nothing to take away from the reliability of the letter as a statement against her penal interest; The letter is admissible.

### **POINT III**

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<sup>1</sup> "In arguing that the jail notes qualify as dying declarations, defendant contends that the notes were written just before Roger Angleton's suicide. . . Defendant's argument that the jail notes were written in the belief of imminent death is inconsistent with the argument that the notes are against penal interest." *Angleton*, 269 F.Supp.2d at 889.

**UNDER FEDERAL RULE OF EVIDENCE 803(3), A DECLARANT’S HEARSAY STATEMENT THAT SHE INTENDS TO MEET AND DISCUSS A MATTER WITH A BUSINESS ASSOCIATE CONSTITUTES EVIDENCE IN A CIVIL CASE THAT THE MEETING TOOK PLACE AND THAT THE MATTER WAS DISCUSSED.**

The court below erred in excluding Mimi Jussel’s statement to her secretary that she was going to meet with Troy Ledbetter to tell him about the rH-12 poisoning. Under Rule 803(3), statements pertaining to the declarant’s state of mind constitute exceptions to the hearsay rule. FED. R. EVID. 803(3). Contrary to the majority opinion, Congress intended to incorporate *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285 (1892), when it codified Rule 803(3). *U.S. v. Pheaster*, 544 F.2d 353, 379-80 (citing the Advisory Committee on the Proposed Rules Note to Paragraph (3), 28 U.S.C.A. at 585). Statements such as the one excluded by the court and objected to by the defendant should be admitted and evaluated for weight by the jury.

- A. Declarations of future intent are admissible to infer that a third party implicated in the declarant’s future plans did also engage in the plans.

The lower court erred in refusing to admit the statement made by Mimi Jussel to her secretary that she planned to go to the office of the CEO of Under the Sea Toys, Troy Ledbetter, and “tell him what’s going on.” R. 24. The *Hillmon* doctrine deals with a “declarant’s statement of his intention to do something with another person” and “requires that the trier of fact infer from the state of mind of the declarant the probability of a particular act not only by the declarant but also by the other person.” *United States v. Pheaster*, 544 F.2d 353, 376 (9th Cir. 1976); *see also Coy v. Renico*, 414 F.Supp.2d 744, 764 (E.D. Mich. 2006) (“...relevant state of mind evidence is admissible under Rule 803(3) even if the declarant’s state of mind itself is not at issue in the case”).

*1. Congress intended to incorporate Hillmon when it codified Rule 803(3).*

In support of its holding that Congress did not intend to incorporate the *Hillmon* doctrine when it codified Rule 803(3), the lower court incorrectly relied on the Report of the House Committee on the Judiciary. R. at 36. Although the court was correct in stating that this report sought to limit the *Hillmon* doctrine, it ignores the fact that there is no proof that the Senate Committee shared the same view. See R. at 43 (Julio, J., dissenting). In addition, the Advisory Committee on the Proposed Rules signaled its intention to fully codify the *Hillmon* doctrine in accordance with the common law. See *U.S. v. Pheaster*, 544 F.2d 353, 379-80 (citing the Advisory Committee on the Proposed Rules Note to Paragraph (3), 28 U.S.C.A. at 585) (“[t]he rule of *Mutual Life Ins. Co. v. Hillmon* (citation omitted) allowing evidence of intention as tending to prove the doing of the act intended is, of course, left undisturbed”).

2. *Case law supports admitting state of mind evidence under Rule 803(3) grounds in accordance with the holding in Mutual Life Ins. Co. v. Hillmon.*

There are a number of objections to the *Hillmon* doctrine. The strongest objection to the incorporation of the *Hillmon* doctrine in the Rule 803(3) exception to the hearsay rule has been in the criminal context when a decedent’s statement that he planned to meet the defendant is offered against a defendant to prove that the two met and that the defendant used this opportunity to kill the decedent. *People v. Chambers*, 125 A.D.2d 88, 91 (N.Y. App. Div. 1987). The New York case *People v. Malizia* evaluated these arguments and permitted the *Hillmon* incorporation into the exception. *People v. Malizia*, 92 A.D.2d 154, 160 (N.Y. App. Div. 1983) (citing *People v. Alcalde*, 24 Cal.2d 177, 187-88 (Cal. 1944)) (finding the evidence admissible “where the statement is made under circumstances that make it probable that the expressed intent was a serious one, and that it was realistically likely that such a meeting would in fact take place”).

In addition to holding that this evidence could come in, the *Malizia* court developed a test to reduce potential prejudice to the defendant. *Chambers*, 125 A.D.2d at 92 (citing *Malizia*, 92

A.D.2d at 160). The court will allow admission of a statement of a deceased that the deceased planned to meet another if “the statement is made under circumstances that make it probable that the expressed intent was a serious one, and that it was realistically likely that such a meeting would in fact take place.” *Malizia*, 92 A.D.2d. at 160. Using the reasoning set out in *Malizia*, the *Chambers* court will permit these kinds of statements when they “contain these strong indicia of reliability and trustworthiness....” *Chambers*, 125 A.D.2d at 92.

Case law supports allowing statements such as these under the 803(3) exception due to the logical implications of making a statement. *Id.* at 94 (citing *Malizia*, 92 A.D.2d at 160).

The reasons for admitting such statements nevertheless are that they are often expressed under circumstances virtually assuring their verity, that they may be the only means available of resolving the issue at hand and that everyday experience supports the view that people are often likely to meet with those whom, in the normal course of events, they say they are going to meet.

*Id.*; see also *Hunter v. State*, 40 N.J.L. 495 (N.J. 1878) (finding a statement of whom someone was traveling with was equally admissible to the fact that they were traveling at all because “[i]f it is legitimate to show by a man’s own declaration that he left his home to be gone a week, or for a certain destination, which seems uncontestable, why may it not be proved in the same way that a designated person was to bear him company?”). Using the logic of the *Hunter* case, the statement made by Jussel to her secretary should be admitted.

The circumstances surrounding the statement Mimi Jussel made to her secretary indicate the trustworthiness of her statement. There was no reason for Jussel to lie to her secretary and say that she intended to say something in a meeting with Troy Ledbetter if she did not plan to do so. Jussel was speaking to her secretary and made an immediate outcry of what she planned to do after reading a particularly troubling story in the newspaper. See R. 24. In addition, as the defense concedes, the plane ticket proves that Jussel did in fact travel to California. R. 13.

There is no reason to think that she took a significant trip for a particular purpose but did not accomplish the purpose for which she took the trip.

Interestingly, case law does distinguish between statements based on the degree of control the speaker had over the situation. In the *Chambers* case, the court found that the facts did not support a finding that the meeting did actually take place, because of the double-hearsay nature of the statements. *Chambers*, 125 A.D.2d at 96. The deceased told someone what the defendant had said to her – there is no way to know if the defendant was serious when he told the deceased he planned to meet her. *See id.* (“...when the occurrence of the meeting necessarily depended in its entirety on defendant’s motivations, actions and intent, which are unknown under these facts, there is also no plausible manner of calculating whether the meeting was realistically likely to occur”).

Here, the facts are easily distinguished, as the statement that the deceased was going to have the meeting was made directly to the secretary who was in a place to evaluate and testify to the trustworthiness of the statement as well as the surrounding circumstances. R. 24. The defendant argues that it is “not logical to infer that Sea Toys had knowledge simply because Ms. Jussel intended to meet with Mr. Ledbetter.” R. 13. However, this is exactly what the *Hillmon* doctrine is designed to address. *See Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 299-300 (1892). In the Slope case, the deceased who made the statement was the active actor with regard to the meeting and it is not unreasonable to infer that the meeting took place when the speaker made a reliable and trustworthy statement that the meeting was going to occur and when the circumstances do not indicate that the speaker had any reason to lie. In fact, it was in the speaker’s best interest to make sure that her secretary knew how to contact her in case of a business related emergency.

B. The statement should be permitted into evidence because the circumstances surrounding the statement go to the weight of the evidence, not the admissibility. The lower court erred in excluding evidence of the statement made by Jussel to her secretary of her intent to travel to California and tell Troy Ledbetter about the poison. Even if the court believed the statement was unreliable, the weight to give to a piece of evidence is left to the jury, not the court, to decide. *See People v. Malizia*.

Another objection to the *Hillmon* doctrine deals with its reliability, the argument being that “a considerable contingency is added to the fulfillment of the act in requiring the other person's cooperation....” *Chambers*, 125 A.D.2d at 92-93 (citing *Pheaster*, 544 F.2d at 376; *Malizia*, 92 A.D.2d at 160.) The court in *Malizia* found that this contingency did not go to the admissibility of the statement, but instead to the weight of the evidence. *Chambers*, 125 A.D.2d at 93. The court explained that reliability and trustworthiness must be met, and the statement must have sufficient probative value so as to outweigh any extreme prejudice to the defendant. *Id.*

The court below in the Slope case should not have deemed the statement made by Mimi Jussel to her secretary inadmissible based on the fact that the court considered statements of that kind unreliable. The “possibility of unreliable inferences drawn from a statement of present intent to perform a future act affects the weight, not the relevancy, of the evidence.” *U.S. v. Baker*, No. 96-50512, 1997 WL 345825, at \*1 (9th Cir. June 23, 1997) (citing *Pheaster*, 544 F.2d at 377 n.14). The court was incorrect to prohibit this evidence. It should have been admitted and the jury should have determined what weight to give to the statement.

#### **POINT IV**

**THE FEDERAL RULE OF EVIDENCE 407 EXCLUSION OF “SUBSEQUENT  
REMEDIAL MEASURES” DOES NOT APPLY TO THE FACTUAL INFORMATION IN  
A POST-INJURY REPORT.**

Rule 407 is limited to the exclusion of evidence of subsequent remedial measures. FED. R. EVID. 407. Investigations and factual information do not constitute subsequent remedial measures and should not be excluded from evidence based on this evidentiary rule. *Brazos River Authority v. GE Tonics, Inc.*, 469 F.3d 416, 431 (5th Cir. 2006). Rule 407 is a policy rule, enacted to encourage social responsibility by encouraging a party to take measures to fix products without having those measures used against a defendant in court. FED. R. EVID. 407 advisory committee’s notes.

This policy does not extend to investigations to find out what is wrong with a particular product. *Prentiss & Carlisle Co. v. Koehring-Waterous Div. of Timberjack, Inc.*, 972 F.2d 6, 9 (1st Cir. 1992). Even if the court does believe that the factual information constitutes a subsequent remedial measure, the report is still admissible because the plain language of Rule 407 does not prohibit the introduction of subsequent remedial measures when offered to prove knowledge of a product defect.

- A. Federal rule of evidence 407 does not require exclusion of factual information included in a post-injury report.

Rule 407 does not prohibit evidence of defendant’s analysis of its product; the Rule only prohibits evidence of subsequent remedial measures. FED. R. EVID. 407. Case law supports the introduction of a party’s analysis of their product, even when that analysis leads the defendant to take subsequent remedial measures. *Prentiss*, 972 F.2d at 9.

In a warranty action, employees of the defendant went to the scene of a fire to investigate the cause. *Id.* The investigations were detailed in some documents which shared the same

conclusion as to the cause of the fire. *Id.* These documents included an interoffice memo and a letter to customers detailing the cause of the fire and telling them what steps to take to prevent the type of fire from happening again. *Id.* The district court permitted the introduction of redacted portions of the documents because they did not mention any remedial measures and instead only dealt with the defendant's analysis of the situation. *Id.* at 9-10. In admitting the redacted documents, the district court found that "an analysis of the problem was not a 'measure' within the meaning of the rule..." *Id.* at 10; *see also Misener v. G.M.*, 924 F.Supp. 130, 132 (post event tests do not qualify for exclusion under Rule 407 because they are investigative as opposed to remedial); *Brazos River Authority*, 469 F.3d at 430 (the text of rule 407 does not prohibit a party's product analysis and "[t]he fact that the analysis may often result in remedial measures being taken (as occurred here) does not mean that evidence of the analysis may not be admitted").

The court also permitted introduction of a post-accident test in a case where the defendant objected to its introduction by arguing that it was a remedial measure based on the fact that "if conducted before the accident, [it] would have made the accident less likely to occur and hence the test itself was a remedial measure." *Rocky Mountain Helicopters, Inc. v. Bell Helicopters Textron*, 805 F.2d 907, 918 (10th Cir. 1986). The court rejected this argument and distinguished between remedial measures and investigations of a product. *Id.* at 918.

It would strain the spirit of the remedial measure prohibition in Rule 407 to extend its shield to evidence contained in post-event tests or reports. It might be possible in rare situations to characterize such reports as 'measures' which, if conducted previously, would reduce the likelihood of the occurrence. Yet it is usually sounder to recognize that such tests are conducted for the purpose of investigating the occurrence to discover what might have gone wrong or right. Remedial measures are those actions taken to remedy any flaws or failures indicated by the test.

*Id.* The court noted that it did exclude evidence of a product redesign suggested by the tests, as this redesign (as opposed to the test which suggested it) did constitute a remedial measure. *Id.*

The court below in this case should have taken a similar approach. The report can be divided into two parts; the first is the factual investigation part and the second is the subsequent remedial measure. R. 25-26. Using the analysis set forth above, there is no reason to exclude that portion of the report which is investigative. That portion of the report investigated what went wrong and, although it led to a suggestion of a subsequent remedial measure, cannot in itself be considered a subsequent remedial measure. *Rocky Mountain*, 805 F.2d at 918. It should not be excluded under Rule 407.

B. The policy considerations underlying rule 407 do not cover the factual information in a post-injury report because such information will not result in added safety.

Even if the court does not find that the plain language of rule 407 permits the introduction of investigative portions of post-accident reports, this portion may still be admitted into evidence because policy considerations do not equate factual information with subsequent remedial measures. FED. R. EVID. 407 advisory committee's notes.

Rule 407 was developed in order to encourage subsequent remedial measures to be taken. *Id.* Public policy was at the heart of the creation of the rule. *Id.* Investigations and product analysis do not fall under this policy. *Brazos River Authority*, 469 F.3d at 431. The changes which are generally exempt from introduction are those post-accident measures which would have made the event less likely to occur. *Fasanaro v. Mooney Aircraft Corp.*, 687 F.Supp. 482, 487 (N.D. Cal. 1988).

Under this analysis, investigations cannot be considered to fall under the scope of Rule 407 protection. *See Brazos River Authority*, 469 F.3d at 431 (finding that excluding a report was an error because it would have applied Rule 407 to investigations, "which by themselves do not

make the accident less likely to occur...”); *Fasanaro*, 687 F.Supp. at 487 (holding that “...Rule 407 includes only the actual remedial measure themselves and not the initial steps toward ascertaining whether any remedial measures are called for”).

The lower court erred in holding that no part of the post-injury report should be admitted because of policy considerations. The majority offers no support for this proposition. *See* R. 37-38. The reason set forth for excluding this evidence is that it would set “a dangerous precedent.” R. 38. Setting a dangerous precedent cannot be the only reason for denying a plaintiff access to the courts. Extending the scope of Rule 407 beyond Congress’ intentions serves only to protect companies from all product defects. The policy behind excluding evidence of subsequent remedial measures is grounded in “encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.” FED. R. EVID. 407 advisory committee’s notes. Investigations do not result in added safety and cannot be considered subsequent remedial measures for purposes of Rule 407. *Fasanaro*, 687 F.Supp. at 487. Based on the underlying policy of Rule 407, the factual portion of the post-injury report should not have been excluded.

C. The plain language of rule 407 does not require exclusion of evidence of subsequent remedial measures when offered to prove knowledge.

Even if the court finds that the investigative information cannot be separated from the subsequent remedial measures, the entire report can still be admitted into evidence to prove knowledge. The court below erred in prohibiting the introduction of the post-accident report because the plain language of Rule 407 does not require exclusion of evidence of subsequent remedial measures when offered to prove knowledge. FED. R. EVID. 407.

Rule 407 states that:

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible 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. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

*Id.* Plaintiff does not seek to introduce the report for any of the reasons prohibited by the plain language of rule 407. *See* R. 13-14. Plaintiff seeks to introduce the report as proof that the defendant had knowledge of the problem with its product. R. 14. The rule specifically states that evidence of subsequent remedial measures do not have to be excluded when offered to prove something other than what is prohibited by the rule. FED. R. EVID. 407.

Case law supports this interpretation of the rule. In *Rozier v. Ford Motor Co.*, 573 F.2d 1332 (9th Cir. 1978), the court found that a document which discussed alternative fuel tank designs could be admitted. *Id.* at 1343. While the court did not think the document qualified as a subsequent remedial measure, it found that, even if it was considered a subsequent remedial measure, it could still be introduced into evidence because Rule 407 allows the introduction of subsequent remedial measures to prove knowledge. *Id.* The court found that this evidence could be admitted to prove “knowledge of the dangerous condition.” *Id.* The court stated that, to allow Rule 407 to operate in a way that excluded evidence that was not contemplated by the rule “would effectively ‘turn the blade inward.’” *Id.*

Plaintiffs in the Slope case seek to introduce evidence in the factual portion of the post-accident report to prove that the defendant had knowledge of the dangerous condition. R. 14. This purpose is not prohibited by the plain language of Rule 407. FED. R. EVID. 407. The court erred in excluding this evidence. The factual portions of the post-accident report should be admitted.

## **POINT V**

**THE FEDERAL RULE OF EVIDENCE 407 EXCLUSION OF “SUBSEQUENT  
REMEDIAL MEASURES” DOES NOT APPLY TO MEASURES UNDERTAKEN AT  
THE DIRECTION OF A GOVERNMENT AGENCY.**

Even if the court finds that the factual information contained in the post-injury report constitutes a subsequent remedial measure, the lower court still erred in excluding the report on Rule 407 grounds. Rule 407 does not apply to measures undertaken at the direction of a government agency. *See, e.g., Rozier*, 573 F.2d at 1334. A report issued after a government directive sent to Under the Sea Toys that outlined steps they should take cannot be considered a “voluntary” act. Therefore, excluding the report does not follow with the stated policy of Rule 407 to encourage social responsibility. *See* FED. R. EVID. 407. The report should be admitted into evidence.

Case law supports allowing the introduction of evidence of subsequent remedial measures when these measures are required by a government authority. *See Rozier*, 573 F.2d at 1343 (pointing to the policy underlying Rule 407, to encourage people to take steps to increase safety, as a reason to allow the introduction of a subsequent remedial measure that was “to be required in any event by a superior authority, the National Highway Traffic Safety Administration”). Another case cited to Fifth and Tenth circuit decisions for the holding that Rule 407 does not apply in cases where the social policy is not the driving force behind the measure. *Gilanian v. City of Boston*, 431 F.Supp.2d 172 (D. Mass. 2006) (citing *Rozier*, 573 F.2d at 1343 and *Underwriters at Lloyd’s London v. OSCA, Inc.*, No. 03-20398, 2006 WL 941794 (5th Cir. Apr. 12, 2006)) (“[I]t is altogether less clear, however, that the Rule requires exclusion of policy changes made not in response to a sense of social responsibility or a desire to remedy an injury, but rather in response to the dictates of a higher authority”).

The facts of the Slope case are easily compared to the facts in these cases. Under the Sea Toys did not act out of a sense of social responsibility; in fact, the toy company waited for over two months after receiving a directive from the United States Consumer Product Safety Commission to issue a report of their factual findings. *See* R. 25-27. Throughout this period, a number of children, including Stuart Slope, purchased the Finn E. Shark toy and suffered irreparable brain damage. *See* R. 3-4. Because Under the Sea Toys did not act out of a sense of social responsibility, because Under the Sea Toys did not attempt to protect the children fallen ill due to its product until they were mandated to do so, they should not be entitled to the shield of Rule 407. The Rule was designed to encourage companies to address problems with their products and fix them before too many people were injured. The Rule was not designed to protect these companies from socially irresponsible behavior until they were caught by the government and ordered to take steps to remedy their product.

The court below incorrectly relied on *HDM Flugservice GmbH v. Parker Hannifin Corp.*, 332 F.3d 1025 (6th Cir. 2003), in finding that the report was not an involuntary remedial measure. *Id.* at 1034. The lower court stated that “...if the government merely provides a directive or set of guidelines with which the defendant cooperates, then the action cannot be deemed involuntary.” R. at 38 (citing *HDM* at 1034). The language in the case cited does not support the proposition relied on by the court. *See HDM* at 1034. In that case, the defendant had sent a request to the government agency asking the agency to review and approve a bulletin “in the interest of safety.” *Id.* The court notes that there is no indication this was mandated by the government agency. *Id.* Contrary to the lower court’s opinion, the *HDM* court does not set out a test for determining whether an action was voluntary or not, and, more importantly, does not hold that a government directive cannot be deemed involuntary. *See id.*

In the Slope case, a government agency *did* issue a directive. R. 27. The government directive informed toy producers of the suspected poisoning of children due to toys and instructed them to “conduct appropriate investigations and take remedial action.” R. at 27. It is difficult to see how the defendant can argue that they could have ignored a directive by an agency of the United States Federal Government. Defendant involuntarily reacted to a government directive. Because there is no compelling policy interest in excluding evidence of subsequent remedial measures that were not undertaken voluntarily, the lower court erred in excluding the post-injury report from evidence.

### **CONCLUSION**

For the reasons stated above, the ruling of the court below should be overturned and the plaintiff should be permitted to introduce the stated pieces of evidence.