

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2007

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 CERIORARI TO THE
COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR RESPONDENT

February 29, 2008

Team # 15-R
Counsel for Respondent

QUESTIONS PRESENTED

- I. Under Federal Rule of Evidence 804(b)(3):
 - A. Does the interpretation of Federal Rule of Evidence 804(b)(3) preclude admissibility in a civil case of a collateral statement contained in the same narrative as statements that satisfy that rule's hearsay exceptions 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), can a declarant's state-of-mind hearsay testimony, regarding the declarant's intent to meet and discuss a matter with a third party, be admitted to show that the third party actually was present at the meeting and discussed that specific matter?
- III. Does the Federal Rule of Evidence 407 exclusion of "subsequent remedial measures:"
 - A. Apply to factual information that was used to recommend a remedial measure within a post-accident investigative report?
 - B. Apply when a voluntary remedial action was taken in response to a government directive that was given to all businesses within the industry?

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourteenth Circuit affirming the district court's decision is unreported and can be found at R. 28. The opinion of the United States District Court for the Southern District of Boerum granting Respondent's motion for summary judgment is unreported and can be found at R. 17.

STATUTORY PROVISIONS INVOLVED

The relevant Federal Rules of Evidence are set out in Appendix A.

STANDARD OF REVIEW

This is an appeal from the judgment of the United States Court of Appeals for the Fourteenth Circuit affirming the district court's order granting summary judgment for Respondent. The district court granted Respondent's motion for summary judgment on the ground that there was no admissible evidence proving Respondent's knowledge under § 204 of the Boerum Tort Reform Act. The district court's evidentiary rulings are subject to review for abuse of discretion. *General Electric v. Joiner*, 522 U.S. 136, 146 (1997). Questions of law are subject to *de novo* review. *Elder v. Holloway*, 510 U.S. 510, 516 (1994).

STATEMENT OF CASE

On April 14, 2006, Petitioner Stuart Slope's parents ("Slopes") filed a Complaint against Under the Sea Toys, Inc. ("Sea Toys") alleging that Sea Toys violated section 204 of the Boerum Tort Reform Act. (R. 1-4.) The Slopes asserted that Sea Toys failed to warn or recall a popular toy after it learned that the glue used in the toy contained the poisonous substance rH-12, which causes detrimental health effects. (R. 3-4.)

In March 2005, Sea Toys collaborated with BFP Tattel, Inc. ("Tattel"), located in the country of Legolia, to create the "Finn E. Shark" stuffed plush toy, which was released in connection with the movie "Shark Attack." (R. 2.) In September 2005, Legolian doctors began diagnosing children with brain damage caused by rH-12 exposure. (R. 3.) Shortly thereafter, the Legolian government launched an investigation to determine the source of the rH-12 outbreak. (R. 3.)

On September 30, 2005, the Legolian Times reported the Legolian government's investigation into the source of the toxin. (R. 3, R. 24.) Apparently after reading this article, Mimi Jussel, the late CEO of Tattel, summoned her secretary and said, "Book me a plane ticket

to California right away. Something terrible has happened and I am going to meet with Troy Ledbetter [the CEO of Sea Toys] to tell him what's going on." (R. 24.) Ms. Jussel's secretary booked a flight for Ms. Jussel that left on October 2, 2005 and returned on October 3, 2005. (R. 24.) Afterwards, Ms. Jussel submitted receipts for plane fare, taxi rides, and hotel to her secretary. (R. 24.)

On October 10, 2005, Ms. Jussel met with the Legolian government concerning the possibility of toxins in Tattel's products. (R. 22.) Ms. Jussel wrote in her personal business journal that day what she had told the Legolian Undersecretary of Commerce: "I knew- everybody here and in America knew- that there was rH-12 in that toy but we kept selling it anyway." (R. 22.) On October 11, 2005, one week before committing suicide, Ms. Jussel wrote a farewell letter to her daughter. (R. 23, R. 10.) In that letter Ms. Jussel wrote, "I am behind these sick children. I am the cause...I tried to stop the sickness from spreading. I went to California and told Sea Toys that there was rH-12 in the shark toys." (R. 23.) Ms. Jussel concluded the letter with, "Please forgive me. I had to tell you, I had to let you know. To hear it from anyone else would not be right." (R. 23.) Ms. Jussel was diagnosed the next day with a life-threatening illness. (R. 10.) Less than a week later, Ms. Jussel committed suicide. (R. 10.)

On October 20, 2005 the United States Consumer Product Safety Commission ("CPSC") issued a directive in response to the reports of toxic substances in children's toys manufactured abroad. (R. 27.) The directive stated, "Manufacturers and distributors of children's toys should conduct appropriate investigations and take remedial action if there is any indication that their products pose serious health risks to consumers." (R. 27.) In response to this directive Sea Toys undertook an internal investigation. Sea Toys issued an internal memorandum finding that the glue used as adhesive for the eyes of the Finn E. Shark toy, which was manufactured by Tattel,

contained rH-12. (R. 25.) In that report Sea Toys recommended immediate remedial action. (R. 25.) On April 1, 2006, Sea Toys issued a warning and recall of the Finn E. Shark toys that it had distributed in America. (R. 3, R. 25.) In January 2006, while Sea Toys was conducting its internal investigation, Tattel (the manufacturer of the Finn E. Shark toy) dissolved. (R. 3.)

The Slopes gave their son a Finn E. Shark toy as a holiday gift in December 2005. (R. 2.) Their son suffered irreversible brain damage as a result of exposure to rH-12. (R. 2.) On April 14, 2006, the Slopes filed suit against Sea Toys, but not the now defunct Tattel. (R. 6.) The trial court granted Sea Toys's motion for summary judgment, holding inadmissible all four items of evidence relied on by the Slopes to prove Sea Toys's knowledge of the presence of the toxin in the toy. (R. 17-21.) The Court of Appeals affirmed, (R. 28-39) and this Court certified for review on October 1, 2007.

SUMMARY OF THE ARGUMENT

The Slopes are attempting to admit four pieces of evidence to establish Sea Toys's knowledge of the dangerous condition of the Finn E. Shark toy, as required under the Boerum Tort Reform Act. Plaintiff's Exhibit A (R. 22) is a business journal entry of Ms. Jussel containing both a statement against her interest and a statement inculcating Sea Toys. Plaintiff's Exhibit B (R. 23) is a personal letter from Ms. Jussel to her daughter written one week before Ms. Jussel committed suicide. This letter contains both a statement against Ms. Jussel's interest and a statement inculcating Sea Toys. Plaintiff's Exhibit C (R. 24) is an excerpt from the deposition of Jaffe Peetz, the secretary to Ms. Jussel. In this deposition Mr. Peetz stated that Ms. Jussel told him that she intended to meet with the CEO of Sea Toys to tell him about the rH-12. Plaintiff's Exhibit D (R. 25-26) is an internal memorandum from Sea Toys containing both informational findings and recommendations concerning remedial measures that Sea Toys

should take in response to the presence of rH-12 in the Finn E. Shark toys. This investigation was undertaken by Sea Toys after the U.S. Consumer Product Safety Commission sent a notice (Plaintiff's Exhibit E) to all manufacturers, distributors, and sellers about the possible presence of toxic substances in the toys. (R. 27.)

Exhibit A was properly excluded as hearsay. Exhibit A does not qualify for admission under the hearsay exception rule for statements against interest for three reasons: (1) the plain language of Rule 804(b)(3), as interpreted by the Supreme Court in *Williamson v. U.S.*, 512 U.S. 594 (1994), allows only for the admission of statements against the *declarant's* interest; (2) in the alternative, if collateral statements inculcating third parties are admissible, only those statements that are "so far contrary" to the declarant's interest are admissible; and (3) to allow an exception for collateral statements would undermine the purpose of the hearsay rule.

Exhibit B was properly excluded as hearsay. Exhibit B does not qualify for admission as a statement against interest under Rule 804(b)(3) because the declarant made the statement in anticipation of suicide. A statement inculcating the declarant cannot practically be against the declarant's interest when the declarant knows she will not be subjected to the legal consequences of her statements.

Exhibit C was properly excluded as hearsay. Exhibit C cannot fall under the hearsay exception of Rule 803(3) because the most natural reading of the rule shows that a declarant's statement of intent cannot be used as circumstantial evidence against a third party. This interpretation is reinforced by the Notes of the House Committee on the Judiciary, which clearly limit the scope of Rule 803(3) to the declarant. Furthermore, the language of the House Committee should not be superseded by the ambiguous Advisory Committee Notes to Rule 803.

Finally, Exhibit D was properly excluded under Rule 407, “Subsequent Remedial Measures.” Factual information in an investigative report that recommends remedial measures is a “means to an end” to the remedial measure, falling squarely within the definition of a “measure” as used within the Rule. Furthermore, prohibiting the admission of this factual information enhances the public’s safety- the sole policy that Rule 407 embraces. These results are not changed when the remedial measures are voluntarily undertaken in response to an industry-wide government directive, such as Plaintiff’s Exhibit E. (R. 27.) Preventing the application of Rule 407 to voluntary business and government cooperation would undermine the purpose of the rule.

For these reasons, this Court should affirm the Fourteenth Circuit. The Circuit court was correct in holding that the four pieces of evidence that the Slopes relied on to establish Sea Toys’s knowledge of the dangerous condition of the toy under the failure to warn statute were inadmissible.

ARGUMENT

I. This Court Should Hold That, Under Federal Rule of Evidence 804(b)(3), Ms. Jussel’s Statements Inculpatng Sea Toys Are Not Admissible Because The Rule Does Not Permit The Admission of Collateral Statements; In Addition Ms. Jussel’s Declarations Against Interest Made In Anticipation of Suicide Are Inadmissible Since She Was Able To Avoid the Legal Consequences Of Such Declarations.

The Slopes are attempting to admit into evidence Plaintiff’s Exhibit A (R. 22) and Plaintiff’s Exhibit B (R. 23). Both items of evidence are inadmissible as hearsay evidence. The Slopes argue that both items may be admitted under Federal Rule of Evidence 804(b)(3) as statements against interest. However, Rule 804(b)(3) does not allow the admission of statements that are collateral to declarations against interest. In addition, the rule does not allow the

admission of statements against interest if the declarant knows that she is able to avoid the legal consequences of her statements.

A. This Court should hold that statements that are collateral to declarations against interest are inadmissible under the hearsay rule.

The Slopes are attempting to admit Plaintiff's Exhibit A (R. 22) to show that Sea Toys had knowledge of the presence of rH-12 in the Finn E. Shark toy. The Slopes concede that Plaintiff's Exhibit A constitutes hearsay. The Slopes argue, however, that the entire narrative of Plaintiff's Exhibit A is admissible under Rule 804(b)(3) because it contains only one statement that is against the declarant's interest. The Slopes' argument is that this one statement lends reliability to the entire narrative to allow its entire admission. The district court held that Plaintiff's Exhibit A was inadmissible. This decision was correct for three reasons: (1) under the plain language of 804(b)(3), only those statements that are directly against the *declarant's* interest are admissible; (2) in the alternative, if a statement inculcating a third party is admissible, it may only be admitted if it is "so far contrary" to the declarant's interest; and (3) allowing an exception for collateral statements would undermine the purpose of the hearsay rule.

1. Under the plain language of statute, as previously interpreted by this Court, only statements that are directly against the declarant's interest are admissible.

Under the plain language¹ of the Federal Rules of Evidence only those statements that are directly against the *declarant's* interest may be admitted into evidence. Federal Rule of Evidence Rule 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Federal Rule of Evidence 802 states, "hearsay is not admissible except as provided by

¹ Because the Rules of Evidence "are a legislative enactment, we turn to the 'traditional tools of statutory construction.'" *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 (1988) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987)).

these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.” Federal Rule of Evidence 804(b)(3) allows an exception to the hearsay rule for statements that are against the declarant’s interest:

(b) **Hearsay Exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: (3) **Statement Against Interest.** A statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability,...that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true.

Federal Rule of Evidence 801(a)(1) defines a “statement” as “an oral or written assertion.” The Supreme Court determined the meaning of the word “statement,” as used in Rule 804(b)(3), in *Williamson v. U.S.*, 512 U.S. 594 (1994). In *Williamson*, the declarant confessed to DEA agents during interrogation, inculcating both himself and the defendant. *Id.* at 596-597. Thus, this Court was faced with the question of whether the hearsay exception applied to a single declaration or remark or to an entire report or narrative. *Id.* at 599.

To answer this question, this Court looked to the plain language of the rule. *Id.* The Court adopted a narrow meaning for “statement,” defining it as “a single declaration or remark.” *Id.* (citing Webster’s Third New International Dictionary 2229, defn. 2(b) (1961)). Applying this definition to the statutory text of the rule, only single declarations or remarks that are against the declarant’s interest are admissible under the hearsay exception. Single statements that are not contrary to the declarant’s interest do not qualify under the hearsay exception. Thus, when one sentence contains multiple “statements,” a court should analyze those “statements” separately. *See U.S. v. Porter*, 881, F.2d 878, 883 (10th Cir. 1989) (“To the extent that a statement not against the declarant’s interest is severable from other statements satisfying 804(b)(3), such statement should be excluded.”)

In this case, the Slopes are attempting to introduce Plaintiff's Exhibit A to prove that Sea Toys had knowledge that the Finn E. Shark toy contained rH-12. This exhibit is an entry from the personal business journal of Ms. Jussel, written shortly after her interview with the Legolian Undersecretary of Commerce. Ms. Jussel wrote, "I told her, I knew – everybody here and in America knew – that there was rH-12 in that toy." (R. 22.) This sentence contains two "statements" as defined by the Supreme Court in *Williamson*. The first statement is "I knew that there was rH-12 in that toy." This statement is against Ms. Jussel's pecuniary interest because it subjects her to civil liability.² The second "statement" is that "everybody in America knew that there was rH-12 in that toy." This statement is not directly against Ms. Jussel's pecuniary interest and thus is not admissible under the text of the statute. Because this statement is separate from Ms. Jussel's declaration against interest, it is not admissible under Rule 804(b)(3), which only permits the admission of those statements against the *declarant's* interest. For this reason, the district court was correct in holding that Exhibit A was inadmissible, and the decision of the Court of Appeals should be affirmed.

2. In the alternative, if a collateral statement and a declaration against interest cannot be separated, only those statements that are "so far contrary" to the declarant's interest are admissible.

In the alternative, if a collateral statement cannot be separated from a declaration against interest, a court should apply the same standard as it does to declarations against interests. A court should look to the complete circumstances surrounding the statement to deem if it is "so far contrary" to the declarant's interest as to render it reliable, and thus admissible under the hearsay exception. "The question under Rule 804(b)(3) is always whether the statement was sufficiently

² Plaintiff's Exhibit A shows that Ms. Jussel knew that this statement was against her pecuniary interest. After writing the statement in question Ms. Jussel wrote, "The company is going down the tubes, my pension and stock options will be worthless, and my savings and home will have to go to pay the victims, all because I knew and did nothing." (R. 22.)

against the declarant's...interest 'that a reasonable person in the declarant's position would not have made the statement unless believing it to be true,' and this question can only be answered in light of all the surrounding circumstances." *Williamson* at 603-604 (citations omitted). Only when a statement is "so far contrary" to the declarant's interest is the statement sufficiently reliable to qualify it for admission under the hearsay exception.

For a statement to be "so far contrary" to the declarant's interest to make it reliable, there must be no risk that the declarant could receive any possible benefit from the statement. For this reason, a declaration against interest that also inculcates a third party is inadmissible under the hearsay exception when it is made to a government official while the official is acting in an authoritative capacity. A government official acting in an authoritative capacity has the power to impose civil and/or criminal penalties against the declarant, therefore making the statements made by the declarant to that official unreliable. This Court has consistently "viewed an accomplice's statements that shift or spread the blame...as falling outside the realm of those 'hearsay exception[s] [that are] so trustworthy that adversarial testing can be expected to add little to [the statements'] reliability.'" *Lilly v. Virginia*, 527 U.S. 116, 133 (1999) (citations omitted). Therefore, any statements made by a declarant, to an authoritative government official, that spread or shift civil and/or criminal penalties, are excluded under the hearsay rule.

In addition, though not conclusive, the Advisory Committee Notes to Rule 804(b)(3) are instructive. *See Williamson* at 602 (where this court evaluated the Notes to Rule 804(b)(3) without deciding amount of weight to give them). The Committee Notes acknowledge that statements made in a custodial setting are unreliable and do not satisfy the exception requirement that statements be "so far contrary" to the declarant's interest. "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 against interest...On the other hand the same words spoken under different circumstances, to an acquaintance, would have no difficulty in qualifying.” FED. R. EVID. 804 advisory committee’s note.

Several courts have adopted the position that statements inculcating both the declarant and a third party, that are made to a government official while the official is acting in an authoritative capacity, are not sufficiently reliable to be admissible under the hearsay exception. *See, e.g., U.S. v. Barone*, 114 F.3d 1284, 1295-1296 (1st Cir. 1997) (a statement inculcating both the declarant and the defendant may be sufficiently reliable as to be admissible where the statement is made in a noncustodial setting to an ally, rather than to law enforcement; and where the circumstances surrounding that portion of the statement that inculcates the defendant provide no reason to suspect that that portion of the statement is any less trustworthy than the portion that inculcates declarant); *Latine v. Mann*, 25 F.3d 1162, 1167 (2d Cir. 1994) (a major consideration in determining reliability of hearsay testimony is whether declarant attempted to minimize his exposure by including defendant in his comments to police); *U.S. v. Li*, 856 F.Supp. 411, 418 (N.D. Ill. 1994) (an inculpatory statement of a codefendant is presumptively unreliable).

In the case at hand, Ms. Jussel’s statement was not “so far contrary” to her interest as to make it sufficiently reliable. Ms. Jussel’s statement – “I knew – everybody here and in America knew – that there was rH-12 in that toy.” (R. 22.) – was made to the Legolian Undersecretary of Commerce. Although this was not a true custodial setting, the same motives and risks were present, particularly since the Legolian Undersecretary of Commerce was acting in an authoritative capacity. It is possible that Ms. Jussel was attempting to curry favor with an official of the Legolian government. Ms. Jussel could have been hoping to receive a deal from the government that would limit her liability in exchange for her testimony against Sea Toys.

Additionally, Ms. Jussel's statement inculcating Sea Toys "spread the blame" to the extent that any fines or future civil damages could have been shifted to Sea Toys, effectively reducing the exposure to liability of Tattel and Ms. Jussel. Because Ms. Jussel's statement inculcating Sea Toys is not as far against her interest as if she had not mentioned Sea Toys, the statement is not sufficiently reliable to qualify for admission under Rule 804(b)(3). For this reason the decision of the Court of Appeals should be affirmed.

3. Allowing an exception to the hearsay rule for collateral statements would undermine the purpose of the hearsay rule.

Allowing an exception to the hearsay rule for collateral statements to declarations against interest would undermine the purpose of the hearsay rule. In *Williamson*, this Court stated, "We see no reason why collateral statements, even ones that are neutral as to interest, should be treated any differently from other hearsay statements that are generally excluded." *Williamson*, 512 U.S. at 600. "Nothing in the text of Rule 804(b)(3) or the general theory of the hearsay Rules suggests that admissibility should turn on whether a statement is collateral to a self-inculpatory statement." *Id.*

There are four recognized risks to admitting hearsay testimony into evidence- the risk of misperception, the risk of failed memory, the risk of insincerity, and the risk of narrative ambiguity. See Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948). The Supreme Court in *Williamson* recognized these risks and the methods for minimizing these risks:

The hearsay rule, Fed.Rule Evid. 802, is premised on the theory that out-of-court statements are subject to particular hazards. The declarant might be lying; he might have misperceived the events which he relates; he might have faulty memory; his words might be misunderstood or taken out of context by the listener. And the ways in which these dangers are minimized for in-court statements- the oath, the witness' awareness of the gravity of the proceedings, the jury's ability to observe the witness' demeanor, and most

importantly, the right of the opponent to cross-examine- are generally absent for things said out of court.

Williamson at 598.

A statement by a declarant that “the light was red,” when neutral to the declarant’s interest, would be inadmissible under the hearsay rule. The reason that the statement is inadmissible is because the four recognized risks are not minimized to any extent. However, if the declarant were talking about when he ran a red light, then the statement would be sufficiently against the declarant’s interest to be admissible. In this context, the risk of insincerity is minimized to the extent that the statement can be safely assumed to be reliable.

In this case, Ms. Jussel’s statement that “I knew – everybody here and in America knew – there was rH-12 in that toy,” (R. 22.) as it applies to Sea Toys, is just as inadmissible as a declarant who says, “The light was red.” The statement only minimizes the risk of insincerity when it is applied against Ms. Jussel because “reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true.” *Williamson* at 599. However, none of the risks associated with the hearsay rule are minimized when applying Ms. Jussel’s statement to Sea Toys. If anything, the risk of insincerity is even greater. Ms. Jussel’s statement was made to the Legolian Undersecretary of Commerce. Ms. Jussel could have been attempting to shift part of the blame for the incident to Sea Toys, in effect minimizing her exposure to liability. In addition there is the risk that Ms. Jussel was looking for favorable treatment in exchange for testifying. If Ms. Jussel’s statement about Sea Toys can be deemed admissible when none of the risks associated with hearsay are minimized, then there is no justification for prohibiting general hearsay statements, such as “the light was red,” from being admitted. For these reasons, the decision of the Court of Appeals should be affirmed.

B. This Court should hold that, under Federal Rule of Evidence 804(b)(3), declarations against interest made in anticipation of the declarant's suicide are not sufficiently reliable to be admissible.

Federal Rule of Evidence 804(b)(3) allows hearsay statements that are against the interest of the declarant to be admitted into evidence. *See supra* Part I.A.1. “The rationale of the hearsay exception for statements against interest is that people seldom ‘make statements which are damaging to themselves unless satisfied for good reason that they are true.’” *Williamson*, 512 U.S. at 611 (citations omitted). Generally, to qualify for admission under this exception, the statement must subject the declarant to liability in a “real and tangible way.” *United States v. Monaco*, 735 F.2d 1173, 1176 (9th Cir.1984). It is insufficient that a statement “possibly could” or “maybe might” lead to criminal liability. *United States v. Butler*, 71 F.3d 243, 253 (7th Cir.1995). Thus a statement against interest is only sufficiently against interest if it subjects the declarant to the legal consequences that flow from the statement.

A statement against interest made by a declarant in anticipation of committing suicide is not sufficiently against the interest of the declarant to qualify for admission under the hearsay exception. A statement against interest is only against interest if it subjects the declarant to civil or criminal liability. “The penal interest ‘is an interest of no moment to a dead man.’” *U.S. v. Angelton*, 269 F.Supp.2d 878 (S.D. Tex. 2003). *See also, U.S. v. Crowder*, 848 F.Supp. 780, 781-782 (M.D. Tenn. 1994) (statements by a terminally ill patient were not sufficiently against interest where the declarant knew he would not live long enough to be held accountable either criminally or civilly as a result of his statements). A declarant who makes a statement against interest, and is able to avoid the legal consequences of her statement through the taking of her own life, has not “damaged” herself in a “real and tangible way” by making the statement. “When [the] declarant knows that he will not be present to respond to prosecution or civil suit,

impending liability cannot be considered a motivating impetus ensuring trustworthiness.” *Note, The Judicial Interpretation of Suicide*, 105 U. PA. L. REV. 391, 404 (1957).

The District Court for the Southern District of Texas considered the issue in *U.S. v. Angleton*, 269 F.Supp.2d at 878. In *Angleton*, the defendant’s brother wrote five handwritten notes prior to committing suicide that confessed to committing the murder for which his brother was on trial. *Id.* at 881-882. The court ruled that the notes did not fall into the hearsay exception for a declaration against interest because “the statements would not, as a practical matter, subject [the declarant] to criminal liability.” *Id.* at 889.

In the case at hand, the Slopes are attempting to admit Plaintiff’s Exhibit B into evidence. This exhibit is a letter that Ms. Jussel wrote to her daughter just one week before committing suicide. (R. 23.) This letter contains a statement against Ms. Jussel’s interest – “I am behind these sick children” – beside a statement inculcating Sea Toys – “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.” (R. 23.) Even though the letter does not state, “I am going to kill myself,” it is clear from the tone and language of the rest of the letter that Ms. Jussel was anticipating suicide at the time she wrote the letter. The first paragraph of the letter reads as if it is the last words that Ms. Jussel will ever write to her daughter. Ms. Jussel wrote “The only thing I ever wanted for you was a happy and healthy life. All I ever wanted was to prepare you as best I could, to love you, to be a role model, a good mother, and one day hopefully to be a grandmother.” (R. 23.) The most significant language in this passage is the past tense form of the verb- “wanted.” This is evidence that Ms. Jussel intended to commit suicide and knew that her daughter would be reading the letter after she had passed away. If Ms. Jussel were not going to commit suicide,

then it is safe to assume that she would have written in the present tense- “The only thing I *want* for you is a happy and healthy life.”

Furthermore, the letter ends with the lines “Please forgive me. I had to tell you, I had to let you know. To hear it from anyone else would not be right. Please find it in your heart to forgive me. Love always and forever, Mother.” (R. 23.) These lines are evidence of Ms. Jussel’s intention to commit suicide. These lines imply that this letter was the last chance that Ms. Jussel would have to explain the rH-12 incident to her daughter. The final line – “Love always and forever” – implies that Ms. Jussel will never again converse with her daughter. Taken together with the fact that Ms. Jussel committed suicide just one week after writing this letter, it is clear that Ms. Jussel was saying goodbye to her daughter “forever.”

For these reasons it is clear that Ms. Jussel was anticipating suicide at the time of writing the letter that the Slopes are seeking to admit into evidence. Ms. Jussel’s statements against interest are therefore not sufficiently against interest to qualify for admission under the hearsay exception. Only those statements that subject the declarant to legal consequences are sufficiently reliable for admission under the hearsay exception. A declarant who is able to avoid these consequences through suicide is not persuaded to the point of complete honesty by the threat of criminal prosecution or civil liability. When Ms. Jussel wrote this letter she knew that she would not be alive to face the legal consequences. Therefore, Ms. Jussel’s statements against interest do not carry the same weight of reliability as they would of have, had she known that she would have to face the consequences of those statements.” Because Ms. Jussel’s statements in Plaintiff’s Exhibit B are not sufficiently against interest they do not qualify for admission under the hearsay exception. Therefore the decision of the Court of Appeals should be affirmed.

II. This Court Should Not Allow Plaintiff's Exhibit C To Constitute Evidence Of Sea Toys's Knowledge Of A Dangerous Condition Because The Plain Language And Legislative History Of Rule 803(3) Show That Congress Did Not Want To Allow A Declarant's Statement Of Intent To Be Used As Circumstantial Evidence Of A Third Party's Actions.

This case presents the issue of whether a declarant's state of mind of an intention to travel and meet with a third party to discuss a matter can be used as circumstantial evidence that the third party acted in conformity with the declarant's stated intention. Federal Rule of Evidence 803(3), the "state-of-mind exception," provides that:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (3) *Then existing mental, emotional, or physical condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of a declarant's will.

FED. R. EVID. 803(3).

The "state-of-mind exception" to the hearsay rule originated from the United States Supreme Court decision of *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 295 (1892). In *Hillmon*, this Court held that a declarant's statement of intent was admissible as circumstantial evidence of the declarant's future conduct. *Id.* (hereinafter referred to as the "declarant only view.") Additionally, the *Hillmon* Court stated, in *dicta*, that the declarant's statement of intent to travel with a defendant/third party was circumstantial evidence of the future conduct of that defendant/third party.³ *Id.* at 295-296. (hereinafter referred to as the "third-party view."). After this decision, this Court, as well as legal scholars, recognized the dangers inherent in allowing a

³ The holding of *Hillmon* was limited to showing that a statement of intent by a declarant was admissible to show that the declarant acted in conformity with that statement. However, this Court stated in *dicta* that the letters "made it more probable both that he did go, and that he went with Hillmon, (*emphasis added*) than if there had been no proof of such intention. *Hillmon*, 145 U.S. at 295-296.

declarant's statement of intent to be used as evidence against a third party. *See Shepard v. United States*, 290 U.S. 96, 104 (1933) (where this Court stated, in *dicta*, that it did not approve of "declarations as proof of an act committed by someone else"); Maguire, *The Hillmon Case-Thirty Three Years After*, 38 Harvard L. Rev. 709, 717-719 (1925) (stating that a declaration as to what one person intended to do cannot safely lead to the conclusion of what another actually did).

Since the enactment of the Federal Rules of Evidence, this subject has led to a three way split of opinion among the circuits on whether the "third-party view" has been left intact after the codification of Rule 803(3). The First and Fourth Circuits have ruled in favor of the "declarant only view." *See Gual Morales v. Hernandez Vega*, 579 F.2d 677, 680 (1st Cir. 1978); *United States v. Jenkins*, 579 F.2d 840, 843 (4th Cir. 1978). In comparison, the Second and Ninth Circuits have ruled in favor of the "third-party view." *See United States v. Astorga-Torres*, 682 F.2d 1331 (9th Cir. 1982); *United States v. Sperling*, 726 F.2d 69 (2d Cir.), cert denied, 467 U.S. 1243 (1984). The third split occurs among those courts that allow the "third-party view." These courts are divided on whether independent and corroborating evidence is necessary to allow the declarant's state of mind to be used as circumstantial evidence of a third party's future conduct. *See Astorga-Torres*, 682 F.2d at 1335-1336 (holding that independent evidence is not necessary); *United States v. Cicale*, 691 F.2d 95, 103 (2d. Cir. 1982) (holding that independent evidence is necessary), (cert. denied, 460 U.S. 1082 (1983)).

When interpreting the Federal Rules of Evidence, this Court has recognized that because the rules "are a legislative enactment, we turn to the 'traditional tools of statutory construction.'" *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 (1988) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987)). Nevertheless, this Court has held that the common law backdrop serves

as an aid to interpreting the scope of the Federal Rules of Evidence. *United States v. Abel*, 469 U.S. 45, 52 (1984).

When Federal Rule of Evidence 803(3) is considered using these principles, it is clear that the Slopes cannot use Jussel's statement of intent to prove that Ledbetter, and therefore Sea Toys, knew of the dangerous condition of the Finn E. Shark as required under the failure to warn/recall statute. This Court should affirm the Fourteenth Circuit finding that Rule 803(3) did not codify the "third-party view" of the *Hillmon* doctrine for three reasons: (1) because the rule fails to incorporate any language similar to the "third-party view;" (2) because the Notes of the House Committee on the Judiciary reaffirm such an interpretation; and (3) because the Advisory Committee notes are inconclusive as to Congressional intent.

A. Rule 803(3) should not be interpreted to include the "third-party view" because the rule fails to incorporate any language regarding a third party, and because the legislative history shows an intent to adopt the "declarant only view."

This Court looks to the plain meaning of the text when a Federal Rule of Evidence is silent regarding whether the rule incorporates a common law evidence principle. *See Tome v. United States*, 513 U.S. 150, 156-157 (1995) (determining whether the common law temporal requirement attached to 801(d)(1)(B) after enactment of the Rules); *Bourjaily v. United States*, 483 U.S. 171, 178 (1987) (determining whether common law bootstrapping of evidence attached to rule 801(d)(2)(E) after enactment of the rules).

If the text of the rule is similar to language of common law precedent, then an interpretation that adopts the pre-codified common law principle is proper. *See Tome*, 513 U.S. at 160. In *Tome*, a case where the pre-codified common law principle was adopted, the respondent was accused and convicted of sexual assault upon his daughter after the government produced witnesses confirming the daughter's testimony of abuse. *Id.* at 153-154. The

government offered the statements as admissible hearsay under Rule 801(d)(1)(B) on the theory that the statements rebutted the charge that the daughter had a motive to fabricate her testimony. *Id.* Thus, the issue was whether the language of “recent fabrication or improper influence or motive” within the rule required the statements be made before the motive to fabricate (the common law pre-motive requirement). *Id.* at 156. In holding that the rule codified the common law pre-motive requirement, this Court reasoned in part that that the language of the rule bore close similarity to the language used in common law cases stating: “Rule 801(d)(1)(B) employs the precise language- rebut[ting] . . . charges[s] . . . of recent fabrication or improper influence or motive –consistently used in the panoply of pre-1975 decisions.” *Id.* at 159. *See also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 588-589 (1993) (where the pre-codified common law principle was not adopted in Rule 702 because the words “general acceptance” were not present in the text of the rule or its drafting history). *C.f. United States v. Mezzanatto*, 513 U.S. 196, 200-201 (1995) (holding that even though the language of Rule 410 did not mention waiver, the pre-codified common law principle of waiver was implicitly present in the language of the rule due to the broad context of statutory and constitutional provisions that allow a defendant to waive his rights—making waived statements an unlisted exception to inadmissibility).

Rule 803(3) should be interpreted to not allow evidence of the actions of third parties because the rule does not contain any language incorporating the full reach of the *Hillmon* doctrine. Like *Daubert* and *Tome*, the text of the rule does not track any common law language that allows a statement of intent by a declarant to apply to a “third party.” Because the rule does not mention a third-party, the most natural reading the rule is that a declarant’s state-of-mind can

only be used as evidence of the declarant’s actions.⁴ If Congress wished for the rule to apply to third parties, it could have clearly drafted a rule containing some type of language referencing a third party. Rather, the language of the rule, referencing only the declarant, shows that the legislature intended that Rule 803(3) only apply to the declarant. This is reinforced by the Notes of the House Committee on the Judiciary, which explicitly state: “the Committee intends that Rule 803(3) be construed to limit the doctrine of . . . Hillmon . . . so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person.” H.R. REP. NO. 650 at 13-14 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7059-7061.

The Slopes try to defeat this interpretation in three ways. First, they claim that the history of *Hillmon* is well settled, and that this principle should be read within the rule absent express language to the contrary. However, this argument should be rejected because it ignores the principles set out in *Daubert* and *Tome*. Specifically, the length of time is not a determinant of whether the rule is codifying a pre-existing common law concept. This is proved by *Daubert*, which failed to incorporate a common law concept that existed for 70 years prior to the adoption of the federal rules. *Daubert*, U.S. 579 at 585. Furthermore, the “third-party view” is not an interpretation which gathered well recognized and widespread support before the codification of the Federal Rules. Rather, it has been controversial—subject to attacks regarding its reliability and prejudice. Finally, the silence of the third party cannot be read into the rule because unlike

⁴ The present dispute is remarkably similar to the United States Bankruptcy case of *Hartford Underwriters Insurance Co. v. Union Planers Bank, N.A.*, 530 U.S. 1, (2000). In *Hartford*, the petitioners sought to interpret U.S.C. § 506(c), which allowed “[t]he trustee” to recover property from a secured claim, to include parties other than the trustee—arguing that the language of the rule did not explicitly limit this ability to only the trustee. This Court rejected this interpretation because the “most natural reading” of the statute was that it only applied to the “trustee,” and that the pre-code practice of allowing parties other than trustee was not sufficiently widespread or recognized to overcome this natural reading of the bankruptcy code provision.

Mezzanatto, the principle in dispute is not well settled across many other statutory and constitutional provisions.

The second way that the Slopes are attempting to defeat this interpretation is by stating that their case is actually analogous to the concepts of *Tome*, arguing that the Advisory Committee Notes clearly state that the *Hillmon* doctrine is left “undisturbed.” FED. R. EVID. 803 advisory committee’s note. However, this argument should be rejected because, as discussed *infra*, a close look to the language of the Advisory Committee Note shows that the notes are at worst ambiguous, and at best adopt the “declarant only view.”

Thirdly, the Slopes argue that the authority of the Notes of the House Committee on the Judiciary are questionable because: (1) the Advisory Committee Note advocates the “third-party view”; and (2) because the Senate’s silence indicates that the “declarant only view” was only a suggestion, which was not adopted by the Congress. However, this argument should be rejected because the language of the Advisory Committee is ambiguous on whether it adopts the “declarant only view” or “third-party view.” Thus, it is illogical to rely on the Advisory Committee Note, which is ambiguous, when the Notes of the House Committee on the Judiciary are unambiguous. Rather, if any outside material is to be used in interpreting Rule 803(3), it should be the unambiguous Notes of the House Committee on the Judiciary, which advocate the “declarant only view.”⁵ Additionally, the Senate’s silence on the issue should not diminish the significance of the language of the House Committee on the Judiciary because within the realm of the Federal Rules of Evidence, the Senate’s silence on the issue indicates that they accepted

⁵ Even if this Court wishes to not use legislative history, *Sea Toys* still prevails because as stated *supra*, the most natural reading of the rule is that statements of intent by declarant can only be used as evidence of the declarant’s future conduct.

the House's interpretation of the rule.⁶ This is true because a look to other Federal Rules of Evidence shows that the Senate voiced its disapproval when it disagreed with the House. *See Beech Aircraft Corp.*, 488 U.S. at 165 (discussing the how the Senate Committee responded when the House Committee Note advocated a narrow interpretation of the phrase "factual finding" within Rule 803(8)(C)). In fact, in the very next rule, 803(4), the Senate voiced its concern over the scope of the rule as advocated by the House, even though the Senate did not advocate any change in the language of the rule. SEN. REP. NO. 93-1277 at 21-22 (1974) *reprinted in* 1974 U.S.C.C.A.N. 7051, 7073-7074. Thus, it is appropriate to infer that the Senate would have voiced its disapproval to the Houses' interpretation, even though not advocating any change to the wording of Rule 803(3). *See Kiesel, One Person's Thoughts, Another Persons Acts: How the Federal Circuits Interpret the Hillmon Doctrine*, 33 CATH. U. L. REV. 699 (1984).

Overall, this Court should affirm the holding of the Court of Appeals for the Fourteenth Circuit because the lack of language referring to a "third party" within the rule lends itself to an interpretation in accordance with the "third-party view," which is reinforced by the Notes of the House Committee on the Judiciary.

B. Deference to the Advisory Committee Note of Rule 803(3) is inappropriate in this case because the Note is ambiguous.

This Court has looked to the Advisory Committee Notes in analyzing ambiguous language within the Federal Rules of Evidence. *See, e.g., Huddleston v. United States*, 485 U.S. 681, 688 (1988). However, Advisory Committee Notes are not useful when subject to two different interpretations. *See Williamson*, 512 U.S. at 602. In *Williamson*, this Court analyzed

⁶ Sea Toys acknowledges that looking to congressional silence can, in certain situations, be misleading. However, it is useful in this situation- in light of this Court analyzing the Senate's silence in the context of the Federal Rules of Evidence in previous situations, and the ambiguous nature of the Advisory Committee Note.

the Advisory Committee note after the government argued that the notes interpreted the word “statement” broadly. *Id.* at 601. However, this Court rejected the broad interpretation stating that “the language[of the note] . . . [was] not particularly clear . . . and the Advisory Committee’s endorsement of the position taken by Dean McCormick’s treatise-points the other way . . .” *Id.* at 602. *See also United States v. Salerno*, 505 U.S. 317, 320 (1992) (where respondents argued that the hearsay exception of Rule 804(b)(1) was not limited to testimony made under a “similar motive” because the Advisory Committee Note only required that there be previous “testimony,”— with this Court rejecting that argument because the notes reference to “testimony” could only be referring to the requirement that an oath be taken). *Compare Tome*, 513 U.S. at 162 (upholding common law interpretation because the Advisory Committee Notes clearly did not wish to eliminate the pre-motive requirement).

The Advisory Committee Note is not useful in interpreting the meaning of Rule 803(3) because it is subject to two different interpretations, and therefore ambiguous. The Slopes try to use the Advisory Committee Notes to establish that the rule should be interpreted to apply to third parties. Specifically, they rely on the language: “The rule of [Hillmon,]. . . allowing evidence of intention as tending to prove the doing of the act intended, is, of course, left undisturbed.” FED. R. EVID. 803 advisory committee’s note. Thus, the argument is that because *Hillmon* allowed a statement to be used against a third party, this aspect is left “undisturbed” in Rule 803(3). However, reliance on the language “*Hillmon*” within the note to prove the “third-party view” is misguided because *Hillmon* only referred to using a declarant’s statement of intent against a third party in *dicta*. Rather, the accepted holding of *Hillmon* is that a declarant’s statement of intent can be used as evidence of the declarant’s future conduct. Furthermore, a close analysis of the language within the Note shows that it does not stand for the proposition

that a declarant's statement of intent is admissible against a third party. Specifically, the Note states that the rule allows evidence "to prove the doing of the act intended . . ." FED. R. EVID. 803 advisory committee's note. However, the text of Rule 803(3) only refers to statements of the "declarant'[s]" state of mind. *See* FED. R. EVID. 803(3). Therefore, the "act intended" referenced in the Advisory Committee Note is a reference to the act intended by the declarant, and the declarant only. This interpretation is reinforced by the language "of course" used within the Note. This phrase indicates that the Advisory Committee considered this principle well settled. However, the "declarant only view" is the only portion of the *Hillmon* doctrine that has not been subject to vigorous debate. When these factors are considered together, the rational conclusion is that the "declarant only view" is left "undisturbed" by the rule.

Unlike the Advisory Committee language in *Tome*, the Advisory Committee language here does not clearly establish an intent to adopt the full reach of the common law. Rather, the language of the Advisory Committee Note is at least ambiguous as it is subject to an interpretation that it is referring to the limited, non-controversial, and accepted holding of *Hillmon*. Because of this, the language of the Advisory Committee is similar to *Salerno* because it could be referring to the "declarant only view."

Therefore, this Court should affirm the holding of the Fourteenth Circuit as the ambiguous Advisory Committee Notes cannot be used to overcome an interpretation guided by the standards that this Court has set.

III. This Court Should Not Allow Plaintiff's Exhibit D To Be Used As Proof Of Sea Toys's Knowledge Of The Dangerous Condition Because Allowing Factual Information That Leads To A Remedial Measure To Fall Under The Protection Of The Rule Is Consistent With The Natural Language Of The Rule, As Well As The Policy Of Enhancing The Public's Safety.

This case presents issues of whether Rule 407, “Subsequent Remedial Measures,” allows: (1) factual information contained in a post accident investigative report, which recommends a remedial action, to be excluded from the protection of the rule; and (2) whether an exception to the rule exists for voluntary remedial measures taken after a broad-based government “directive,” which suggested that companies investigate their toy products. Rule 407 provides:

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, or defect in a product, a defect in a product’s design, or need for a warning or instruction . . .

FED. R. EVID. 407. The Advisory Committee Note states the policy behind this rule:

The rule rest on two grounds. (1) The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence (2) The other, and more impressive, ground from exclusion rests on a social policy of 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 note.

When interpreting the Federal Rules of Evidence, the plain meaning controls. *See supra* note 1. However, this Court has also recognized the unique nature of the rules and looked to other interpretive guidelines. *See Williamson*, 512 U.S at 599 (1994) (using the principle inherent within language of the rule as an interpretive guideline); *Beech Aircraft Corp.*, 488 U.S. at 447 (using the Advisory Committee Notes as in interpretive guide).

When Rule 407 is interpreted using these principles, it is clear that the Slopes cannot use the Sea Toys Internal Memorandum to prove that the company knew of the dangerous condition of the Finn E. Shark as required under the failure to warn/recall statute. This Court should affirm the Fourteenth Circuit finding that the internal memorandum falls under the protection of Rule

407 for the following reasons: (1) because gathering factual information is a means to an end in the remedial process, falling under the definition of “measure” as used within Rule 407; (2) because allowing the factual information in a remedial measure to be protected under the rule best accomplishes the underlying policy of encouraging safer products; and (3) because excluding voluntary remedial measures taken after a government directive encourages a successful relationship between government and business—resulting in increased consumer safety.

A. This Court should not allow factual information within a memorandum calling for remedial action to be excluded from the rule because the policy of the rule is best carried out by including factual information which leads to the remedial measure.

If the disputed language is not clear on its face, then this Court looks to the principle behind the rule to help discern a meaning. *See Williamson*, 512 U.S. at 599. In *Williamson*, the Court sought to determine whether an entire confession or only specific statements of it fell within an exception to hearsay covered under Rule 804(b)(3). In its analysis, the Court noted the commonsense principle inherent within the rule that people do not make self-inculpatory statements unless they believe them to be true. *Id.* However, equally important, was that the best way to lie was to mix falsehood with truth. *Id.* In holding for a narrow interpretation, this Court reasoned in part that “[a]lthough the text of the rule does not directly resolve the matter, the principle behind the Rule, so far as it is discernable from the text, points clearly to the narrower reading.” *Id.*

This Court will consider the policy inherent within the rule, or Advisory Committee Note, in its interpretation so long as those policies are unambiguous. *See Salerno*, 505 U.S. at 322. In *Salerno*, the appellant sought to introduce transcripts from earlier grand jury testimony to rehabilitate his courtroom testimony. *Id.* at 319-320. However, the transcripts were denied by

the District Court under the hearsay exception of 804(b)(1) because the statement were not made with a “similar motive” as the rule required. *Id.* at 320. The Court of Appeals reversed, holding that the rule was in affect to preserve a policy of “adversarial fairness.” In reversing, this Court reasoned that nothing within the language of the Rule or its Advisory Committee Notes indicated a policy of “adversarial fairness.” *Id.* at 322. *See Also Beech Aircraft Corp.*, 488 U.S. at 447 (holding that interpretation of “reports . . . setting forth factual findings,” as specified in the exception to hearsay rule 803(8) also allowed opinions contained within the report because the text of Advisory Committee was clear).

Factual information within an investigative report that contains remedial measures should be included to fall within the protection of Rule 407 because it best reflects the social policy of promoting safety inherent within the text of the rule and the Advisory Committee Notes. The Slopes seek a narrow interpretation of the phrase “measures [that] are taken that, if taken previously, would have made the injury or harm less likely to occur.” FED. R. EVID. 407 advisory committee’s note. Specifically, they argue that facts contained in an investigative report do not fall under the rule because the factual information does not make the accident or event less likely to occur. *See Brazos River Authority v. GE Ionics, Inc.*, 469 F.3d 416, 431 (5th Cir. 2006).. However, this narrow view incorrectly interprets what is meant by the word “measure[s],” as used in Rule 407. In fact, the definition of “measure” is “an *action* taken as a means to end.” (emphasis added) *The American Heritage Dictionary* 776 (2nd ed. 1985). Thus, subsequent measures would include actions (the processes of finding factual information) that are a means to an end in accomplishing the remedial act..

Like *Beechcraft*, this interpretation is based on the policy expressly stated within the Advisory Committee Note: that excluding subsequent remedial measures from evidence

encourages actors to take steps to improve safety. Additionally, like *Williamson*, the interpretation is based on the common sense notion behind the rule that actors must have sufficient factual information on which to base their conclusions. Thus, the most logical interpretation is one that keeps these policies in mind, including the fact finding process as a means to an end for the remedial measure.

Interpreting the rule to not include factual information within the remedial report would: (1) force parties into making subsequent remedial measures without a close examination of the facts; and/or (2) would encourage companies to manipulate and hide factual information on which the remedial measure is based on. These options actually result in a decrease in the public's safety. Therefore, Rule 407 should be interpreted to include factual information within the investigative report recommending a remedial measure because it best enhances the public's safety.

Finally, excluding the factual information in situations such as this is analogous to work product performed in anticipation of litigation, which this Court has excluded from the reach of the opposing party absent undue hardship. *Hickman v. Taylor*, 329 U.S. 495 (1987). Thus, excluding the factual information in the remedial measure not only furthers the social policy of furthering public safety, but furthers the discovery policies that this Court has embraced.

Therefore, this Court should affirm the holding that Rule 407 includes the factual information within an investigative report which recommends remedial measures because allowing such information best carries out the social policy of enhancing public safety.

B. The Sea Toys Internal Memorandum should not be excluded from the protection of Rule 407 because the measures were taken voluntarily, furthering the policy objective of enhancing public safety.

The Slopes seek to use the policy justification offered *supra*, and argue that a government mandated remedial measure cannot fall under Rule 407 because the government action caused the enhanced public safety, and not the policy of Rule 407. *See Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1343 (5th Cir. 1978). However, such an argument should be rejected for two reasons: (1) because the CPSC Report was not mandatory, and therefore was not the cause of Sea Toys enhancing the public's safety; and (2) because voluntary government cooperation furthers the policy objective of enhanced safety.

1. The CPSC Report was not mandatory upon Sea Toys and cannot be shown to be the cause of Sea Toys's subsequent remedial measures.

In the alternative, the Slopes seek to use the policy expressed in the Advisory Committee Note to state that government directed remedial action should not fall under the rule because the government, and not the protection of the rule, caused the remedial action. However, this argument is conditioned on the government making the remedial measure mandatory for the company. In the instant case, there is no evidence that suggests that the remedial measure was involuntarily taken because of a government mandate. Rather, it appears that this directive was a notification to manufacturers and distributors of a possible problem with toys produced overseas. (R. 27.) The directive merely suggested that companies should conduct investigations. (R. 27.) Because Sea Toys's compliance was voluntary, it is impossible to show whether the remedial measure was taken because of the CPSC, or because Sea Toys sought to enhance the safety of its consumers. In the absence of such proof, it is proper to allow the voluntary actions of Sea Toys to fall under the protection of Rule 407 because it furthers the policy interest of enhancing protection for consumers.

A close look to the directive shows that this was not a mandatory directive. First, the directive is for all "manufacturers, distributors, and Sellers of Children's Toys." (R. 27.)

Additionally, the directive states that the directive concerns “children’s toys manufactured abroad.” (R. 27.) These broad statements and recommendations by the CPSC were not directed specifically at Sea Toys. Rather, such directives were meant to put all manufactures on notice of a possible problem. Such a broad directive illustrates the line drawing problems that the Slopes’s unwritten exception creates. If a directive such as this forces the subsequent remedial measures taken by a company to be excluded from Rule 407, then one must ask what measures taken by a company wouldn’t be excluded from the rule. Common sense knowledge of the practices of the business world reveal that manufacturers and distributors constantly receive updates and directives from the CPSC, as well as other agencies. Thus, allowing such a broad government directive to exclude remedial measures taken after such a directive would cause this unwritten exception to swallow the entire protection of the rule.

Because the action taken by Sea Toys was voluntary, this Court should affirm the holding of the Fourteenth Circuit and allow the remedial measure taken by Sea Toys to be held inadmissible. Such a holding furthers the policy objectives of the rule and avoids the difficult problems of distinguishing between a voluntary and involuntary measure.

2. Voluntary remedial measures made in response to government agency directives cannot be excluded from Rule 407 because a voluntary government/business relationship furthers the clear policy within the rule of enhancing public safety.

A voluntary remedial action taken in response to a government directive should not be excluded from the protection of the Rule 407 because voluntarily government cooperation allows for safer consumer products. This is true because government agencies, like the CPSC, use voluntary cooperation as the primary means of accomplishing their goal of public safety. In fact, the primary method that the CPSC assumes in achieving its goals is “developing voluntary

standards within industry.”⁷ This type of relationship is not uncommon, and is used by a variety of government agencies to create a “voluntary, cooperative, and problem-solving relationship.”⁸ Allowing such voluntary measures to be turned around and subsequently used against these entities would curtail the cooperative relationship of business and government. The business community would no longer be a partner, forcing agencies such as the CPSC into mandatory enforcement. This would cause a hostile relationship between the parties, resulting in decreased the public safety. Additionally, mandatory enforcement could only be done after clear evidence of a dangerous situation, causing delays and leading to a decrease in consumer safety.

Therefore, this Court should affirm the decision of the Fourteenth Circuit and allow the remedial measure taken by Sea Toys to fall within Rule 407 because it conforms with the normal practices that businesses and government use in providing safer products.

CONCLUSION

For the foregoing reasons, we ask this Court to AFFIRM the decision of the Fourteenth Circuit Court of Appeals.

Respectfully Submitted,

Dated: February 29, 2008

Counsel for Respondent

⁷ Found at US Consumer Product Safety Commission official website at <http://www.cpsc.gov/about/faq.html> -- February 8, 2008.

⁸ United States Department of Labor, State Incentives: Promoting Voluntary Compliance, found in the OSHPSA 2001 Report at http://www.osha.gov/dcsp/osp/oshspa/2001_report/state_incentives.html -- February 21, 2008.

APPENDIX A

28 U.S.C. Federal Rules of Evidence Rule 407. Subsequent Remedial Measures

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.

28 U.S.C. Federal Rules of Evidence Rule 801. Definitions

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

28 U.S.C. Federal Rules of Evidence Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

28 U.S.C. Federal Rules of Evidence Rule 803(3). Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness...

(3) Then Existing Mental, Emotional, or Physical Condition.

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

28 U.S.C. Federal Rules of Evidence 804. Hearsay Exceptions; Declarant Unavailable

(b) Hearsay Exeptions.

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(3) Statement Against Interest.

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. 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.