QUESTIONS PRESENTED

I. DOES *WILLIAMSON'S* INTERPRETATION OF RULE 804(b)(3) PRECLUDE THE ADMISSIBILITY OF STATEMENTS IMPLICATING THE DEFENDANT WHERE THE STATEMENTS WERE MADE OUTSIDE OF A CUSTODIAL SETTING AND SUBJECT THE DECLARANT TO LIABILITY?

II. IS THERE A *PER SE* BAR AGAINST STATEMENTS ALLEGING CRIMINAL CONDUCT CONTAINED IN A PERSONAL LETTER WHERE THE WRITER LATER COMMITS SUICIDE AFTER BEING DIAGNOSED WITH A LIFE-THREATENING ILLNESS?

III. IS A DECLARANT'S FORWARD-LOOKING STATEMENT INDICATING AN INTENT TO MEET WITH A THIRD PARTY AND DISCUSS A MATTER ADMISSIBLE UNDER RULE 803(3) TO PROVE THAT THE MEETING TOOK PLACE AND THAT THE MATTER WAS DISCUSSED WHERE THE DECLARANT LATER SUBMITTED RECEIPTS FOR PLANE FARE, TAXI RIDES, AND HOTEL CORROBORATING THAT STATEMENT?

IV. DOES RULE 407 EXCLUDE AN INVESTIGATIVE REPORT CREATED AT THE DIRECTION OF A GOVERNMENT AGENCY OR INFORMATIONAL FINDINGS WITHIN AN INVESTIGATIVE REPORT THAT SUMMARIZE THE EXISTENCE OF A PRODUCT DEFECT BUT DO NOT PROPOSE ANY REMEDIAL MEAUSURES?

PARTIES TO THE PROCEEDING

Petitioner Stuart Slope and Respondent Under the Sea Toys, Inc. were plaintiff-appellant and defendant-appellee, respectively, below.

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STATEMENT OF THE CASE

a. Factual History

Stuart Slope was diagnosed on January 2, 2006, his fifth birthday, with irreversible brain damage caused by exposure to a rare toxin known as rH-12. R. 3. Stuart is seven years old and lives with his parents in Park Slope, Boerum. R. 1.

In or about March, 2005, the Defendant, Under the Sea Toys, Inc. ("Sea Toys"), entered into a contract with BFP Tattell, Inc. ("Tattell") to produce the Finn E. Shark plush toy ("Toy"). R. 2. Tattell manufactured the Toy in the nation of Legolia, and Sea Toys distributed the Toy in the United States. R. 2. Sea Toys distributed the Toy in connection with the children's movie, "Shark Attack." R. 2. In the summer of 2005, Stuart saw "Shark Attack" three times. R. 2.

In or about September, 2005, record numbers of Legolian children were diagnosed with brain-damage. R. 3. Legolian doctors determined that exposure to rH-12 caused the brain damage. R. 3. On September 30, 2005, the *Legolian Times* reported that the Legolian government had launched an investigation to determine the source of the rH-12 exposure. R. 3. The government concluded that the adhesive used to attach the Toy's eyes contained rH-12.

On October 2, 2005 Mimi Jussel ("MJ") read a *Legolian Times* article concerning the recent rise of brain-damage diagnoses in Legolian children. R. 24. MJ, now deceased, was the CEO of Tattell, the manufacturer of the Toy. R. 7. MJ's secretary, Jaffe Peetz ("Ms. Peetz") stated that it was "all over the papers that children in Legolia were being poisoned by a rare substance . . . ." R. 24. MJ "appeared very upset and summoned [Ms. Peetz] into her office." R. 24. MJ stated, "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 ("Mr. Ledbetter"), "to tell him what's going on." R. 24. Ms. Peetz "booked [MJ] a flight leaving October 2, 2005 and

returning on October 3, 2005" and "[MJ] submitted receipts for plane fare, taxi rides and a hotel for her trip." R. 24.

On October 10, 2005, MJ wrote an entry in her personal business journal. R. 22. The journal entry indicates that she met with the Legolian government regarding the recent sickness of Legolian children. R. 22. MJ wrote, "I told her, I knew – everybody here and in America knew – that there was rH-12 in that toy but we kept selling it anyway and we just sent a shipment to the U.S." R. 22. MJ wrote further that "[t]he 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.

On October 11, 2005, MJ wrote a letter to her daughter. R. 23. MJ wrote, "I am behind these sick children. I am the cause. I only wish I had done something sooner." She added, "…it is almost certain that I will go to prison." R. 23. MJ wrote further, "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. On a more personal note, she stated that "[m]y biggest fear is losing you, not being able to take care of you and be there for you , as a mother should." R. 23. She also expressed her intent "to be a role model, a good mother, and one day hopefully to be a grandmother." R. 23. MJ was later diagnosed with a life-threatening illness and committed suicide shortly thereafter. R. 10.

On October 20, 2005, the Consumer Product Safety Commission ("Commission") issued a directive to Sea Toys. R. 27. The directive exhibits the official agency seal and states that the Commission "has recently received numerous reports of toxic substances in children's toys manufactured abroad." R. 27. The directive states that manufacturers and distributors of children's toys were "on notice of the dangers of such toys" and that they "should conduct

appropriate investigations and take remedial action if there is *any* indication that their products pose serious health risks to consumers." R. 27. (emphasis added).

On January 16, 2006, Mr. Ledbetter received a Sea Toys internal memorandum titled "Investigation of Finn E. Shark plush toy." R. 25-6. The memo contains two sections: 1) "Informational Findings" and 2) "Recommendations." R. 25. The "Informational Findings" section states that the "findings substantiate information provided in October, 2005, concerning the etiology of brain damage in Legolian children." R. 25. The findings include that "the glue used as adhesive for the eyes on the Finn E. Shark contains rH-12" which, "if ingested, can cause brain damage in humans." R. 25. Further, children who were diagnosed with brain damage caused by rH-12 exposure "were also found in possession of a Finn E. Shark toy with eyes that had fallen off." R. 25. The "Recommendations" section proposes four actions: 1) immediately recall the Toy; 2) suspend all sales and distribution; 3) issue a warning concerning the risk of exposure to rH-12; and 4) if possible, issue individual warning letters. R. 25-6. Nearly three months later, Sea Toys issued a nationwide recall of Finn E. Shark on April 1, 2006.

In December 2005, the Slopes bought Stuart the Toy as a holiday gift. R. 2. Stuart carried the Toy everywhere and was observed licking its eyes. R. 2. A week later, the Slopes noticed that its eyes had fallen off. R. 3. By the end of the month, Stuart began exhibiting disturbing health and behavior problems. R. 2. Stuart began slurring his speech and experienced unconsciousness, headaches, confusion, dizziness, mood changes, and memory loss. R. 2. Stuart also suffered from vomiting, nausea, convulsions, seizures, extreme agitation, sleep problems, dismal school performance, and a loss of interest in his favorite toys and activities. R. 4.

On January 2, 2006, Stuart's fifth birthday, the Slopes brought Stuart to a doctor. Medical tests established conclusively that Stuart had been exposed to rH-12 and was suffering from

irreversible brain damage. R. 3. Stuart was recently enrolled in a special needs preschool and will require constant and continuing medical care for the rest of his life. R. 4. Stuart brings this action pursuant to Section 204 of the Boerum Tort Reform Act ("BTRA") for failure to warn. R. 3.

b. Procedural History

On April 14, 2006, the Petitioner filed a complaint against the Respondent in the Southern District of Boerum under 28 U.S.C. § 1332(a). R. 1-4. Petitioner alleged failure to warn or recall pursuant to BTRA § 204. R. 1-4. On July 10, 2006, the United States District Court for the Southern District of Boerum granted summary judgment in favor of the Respondent. R. 17. Petitioner timely filed for appeal and the Fourteenth Circuit Court of Appeals affirmed the District Court's grant of summary judgment in favor of Respondent. R. 28-45. The Supreme Court of the United States granted the Petitioner's petition for a writ of certiorari on October 1, 2007, and this appeal followed. R. 46-7.

SUMMARY OF THE ARGUMENT

This case concerns the reckless actions of Sea Toys, a company that marketed and distributed a children's toy despite their knowledge that the toy contained a brain damage-causing toxin. Four highly probative and reliable statements establish that Sea Toys had knowledge of the toxin in October, 2005. The core principle of the justice system is the search for truth, and the Federal Rules of Evidence are not so rigid as to preclude highly probative and reliable evidence. This Court should reverse the holding of the Fourteenth Circuit for four reasons: 1) The Court's holding in *Williamson* does not exclude MJ's business journal nor MJ's letter to her daughter because both were made outside of a custodial setting; 2) MJ's business journal and letter to her daughter are reliable statements against interest admissible under

804(b)(3) despite her later suicide; 3) MJ's statement to her secretary is a forward-looking statement of intent admissible under 803(3); and 4) Rule 407 does not exclude Sea Toys' investigative report conducted at the direction of a government agency.

First, *Williamson* does not preclude MJ's personal business journal nor letter to her daughter because *Williamson* is limited to statements made while under police custody. *Williamson* found that statements implicating others made while under police custody are inherently unreliable because they are likely seeking to shift blame or curry favor with authorities. Because *Williamson* analyzed 804(b)(3) only as it applies to custodial statements, the Court's application of 804(b)(3) is limited to such statements. *Williamson* does not apply to MJ's personal business journal entry nor personal letter because both statements were made outside of a custodial setting. Additionally, MJ accepts full responsibility for the rH-12 exposure in both statements and is not seeking to shift blame to Sea Toys. Therefore, *Williamson* does not exclude MJ's business journal entry nor letter to her daughter.

Second, the statements implicating Sea Toys in both MJ's journal entry and letter are admissible under 804(b)(3) because the statements are self-inculpatory. Rule 804(b)(3) establishes that statements subjecting the declarant to liability are admissible. MJ's statement that "I knew – everybody here and in America knew – that there was rH-12 in that toy but we kept selling it anyway" subjects MJ to liability for knowingly selling a toy containing a dangerous toxin. Likewise, the statement "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" subjects MJ to liability because it demonstrates her knowledge of the toxin's presence in the toy. As such, both statements subject MJ to liability under BTRA § 204. Additionally, there is no *per se* bar against statements made prior to the declarant's suicide because federal courts have recently held such

statements admissible. Therefore, the statements implicating Sea Toys in the journal entry and letter are self-inculpatory and admissible under 804(b)(3).

Third, MJ's statement that she intended to meet with Sea Toys and inform them of rH-12's presence in the Toy is admissible under 803(3) because it is a forward-looking statement of intent. Rule 803(3) establishes that statements indicating the declarant's state of mind, intent, plan, or motive are admissible. The Hillmon Doctrine, upon which Rule 803(3) is founded, establishes that forward-looking statements offered to infer the conduct of a third party are admissible. MJ's statement "I am going to meet with Troy Ledbetter to tell him what's going on" demonstrates her intent to meet with Mr. Ledbetter to inform him of rH-12's presence in the Toy. As such, MJ's statement is admissible to infer the probability that Mr. Ledbetter met with MJ and discussed the presence of rH-12 in the Toy. Therefore, MJ's statement to her secretary is admissible under 803(3).

Fourth, Rule 407 does not exclude Sea Toys' investigative report. The investigative report in its entirety is admissible because it was created at the direction of a government agency. Alternatively, the informational findings section of the report alone is admissible because it is not a subsequent remedial measure. Rule 407 does not exclude remedial measures taken at the direction of a government agency. Additionally, Rule 407 only excludes evidence of subsequent remedial measures, measures that if taken previously would have made the accident less likely to occur. Sea Toys investigative report is admissible in its entirety because it was created in response to a Commission directive. The informational findings section is admissible because it merely summarizes the existence of rH-12 in the Toy and does not propose any remedial measures. Therefore, Rule 407 does not exclude Sea Toys' investigative report.

ARGUMENT

This Court should reverse the Fourteenth Circuit Court of Appeals and admit: 1) MJ's personal business journal entry; 2) MJ's personal letter to her daughter; 3) MJ's statement to her secretary; and 4) Sea Toys' investigative report of the Toy, because they are highly probative and reliable under the Federal Rules of Evidence.

The Federal Rules of Evidence ("Rules") admit only relevant and reliable evidence. Article VIII of the Rules addresses the reliability of hearsay, out of court statements offered to prove the truth of the matter asserted. *See* FED. R. EVID. 801(C), 802. The Rules generally exclude unreliable out of court statements. *Id.* However, the hearsay exceptions recognize that certain statements are inherently reliable and should therefore be admitted. *See Id.* at 802-807.

Article IV of the Rules addresses the relevancy of evidence. *Id.* at 401. Rule 407 generally excludes evidence of subsequent remedial measures. Subsequent remedial measures are "[w]hen, after an event, measures are taken which, if taken previously, would have made the event less likely to occur." *Id*. However, the rule contains broad exceptions to admit evidence where relevancy is established. *Id*.

This brief will establish: 1) MJ's personal business journal entry and personal letter to her daughter are admissible under Rule 804(b)(3) because the statements implicating Sea Toys were made in a non-custodial setting and subject MJ to liability; 2) MJ's personal letter written one week prior to her death is admissible under Rule 804(b)(3) because there is no *per se* bar against statements acknowledging criminal conduct where the writer later commits suicide; 3) MJ's statement to her secretary is admissible under Rule 803(3) because it is a forward-looking statement of her intent to fly to California and inform Sea Toys of rH-12's presence in the Toy; and 4) Rule 407 does not exclude Sea Toys' investigative report because it was an involuntary

response to a government agency directive, or, at a minimum does not exclude the informational findings section of the report because it merely summarizes the existence of rH-12 in the Toy.

V. *WILLIAMSON'S* INTERPRETATION OF RULE 804(b)(3) DOES NOT EXCLUDE MJ'S PERSONAL BUSINESS JOURNAL ENTRY OR PERSONAL LETTER TO HER DAUGHTER BECAUSE THEY WERE MADE OUTSIDE OF A CUSTODIAL SETTING AND SUBJECT MJ TO LIABILITY.

This Court should reverse the Fourteenth Circuit Court of Appeals because *Williamson's* interpretation of Rule 804(b)(3) does not exclude non-custodial statements that are self-inculpatory. *Williamson v. U.S.*, 512 U.S. 594, 603 (1994). Hearsay exception 804(b)(3) provides that a statement against interest is admissible. FED. R. EVID. 804(b)(3). A statement against interest has its own indicia of reliability where it would "so far subject the declarant to civil or criminal liability" that a reasonable person "would not make the statement unless believing it to be true." *Id*. Such self-inculpatory statements are reliable because a reasonable person is unlikely to fabricate a statement against his own interest. *Id.*

Rule 804(b)(3) admits statements against either penal or pecuniary interest. *Id.* In *Williamson*, the Court applied 804(b)(3) to the narrow circumstance of a statement against penal interest made in a criminal, custodial context. *Williamson*, 512 U.S. at 597. The argument below will establish that *Williamson's* interpretation of 804(b)(3) is limited to declarations against penal interest made in a criminal, custodial context and therefore does not apply to a personal journal nor a personal letter. Additionally, the argument will establish that even if *Williamson* applies, the statements implicating Sea Toys in the personal journal and the personal letter are admissible because they are self-inculpatory.

A. *Williamson's* Holding is Limited to Statements Against Penal Interest Made in a Custodial Setting That Likely Attempt to Shift Blame or Curry Favor With Authorities and Therefore Does Not Apply to MJ's Personal Business Journal Entry or Her Personal Letter to Her Daughter Because Both Statements Were Made Outside of Police Custody and Accept Full Responsibility for the rH-12 Outbreak.

Williamson's application of 804(b)(3) is limited to statements against penal interest made in a custodial setting. In *Williamson*, during a custodial interrogation a declarant made statements to a federal agent implicating himself and the defendant in a drug-trafficking scheme. *Williamson*, 512 U.S. at 597. Rule 804(b)(3) recognizes that certain circumstances provide a guaranty of reliability. FED. R. EVID. 804(b)(3). Accordingly, the Court reasoned that whether a statement is reliable "can only be answered in light of all of the surrounding circumstances." *Id.* at 604. Examining the particular surrounding circumstances of the declarant's statement, namely a custodial, criminal setting, the Court stated that "[t]he arrest statements of a codefendant have traditionally been viewed with special suspicion." *Id.* at 601 (quoting *Lee v. Illinois*, 476, 541 U.S. 530 (1986)); *See also Crawford v. Washington*, 541 U.S. 36, 55 (2004)(holding that arrest statements of codefendant implicating defendant are barred by the Sixth Amendment Confrontation Clause). Accordingly, the Court held that the statement implicating the defendant made in a custodial setting was inherently unreliable and therefore inadmissible under 804(b)(3). *Id.* at 605. Because the Court considered only the reliability of statements made in a custodial setting, the holding is limited to custodial statements.

Williamson's core concern with custodial statements implicating third parties is that they are likely seeking to "shift blame or curry favor" with authorities and therefore are unreliable. *Id.* at 603. The Court reasoned that criminal suspects in custody have motivation to blame third parties in the hopes of either deflecting liability or "receiving a shorter sentence and leniency in exchange for cooperation." *Id*. at 607. The Court stated that a declarant in custody "has a strong

incentive to shift blame or downplay his own role in comparison with that of others ....” *Id.* Therefore, a custodial statement implicating the defendant is inherently suspect and “less credible than ordinary hearsay evidence.” *Id* at 601. *Compare with U.S. v. Curry*, 977 F.2d 1042, (7th Cir. 1992)(holding that statement to a personal acquaintance was not seeking to shift blame or curry favor). Accordingly, *Williamson's* holding is limited to statements seeking to “shift blame or curry favor.” *Id.* at 603.

Williamson's holding is limited to statements made in a criminal setting because *Williamson's* hypotheticals, applying the Court's interpretation of 804(b)(3) to facts outside the case, are exclusively in a criminal context. *Id.* at 603. The Court introduced a series of hypotheticals stating “there are many circumstances in which Rule 804(b)(3) does allow the admission of statements that inculpate a *criminal* defendant.” *Id.* (emphasis added). The hypotheticals addressed statements: 1) admitting to murder; 2) admitting to robbery; 3) describing the location of a murder weapon to police; and 4) providing police with details of a crime. *Id.* The Court summarizes by stating that the question is always “whether the statement is sufficiently against the declarant's *penal* interest.” *Id.* (emphasis added). Because the Court, in illustrating the impact of its interpretation of 804(b)(3), used hypotheticals exclusively in a criminal context, the Court's application of 804(b)(3) should be limited to the criminal context.

Williamson's application of 804(b)(3) does not apply to either: 1) MJ's personal business journal entry; or 2) MJ's personal letter to her daughter.

3. *Williamson* does not apply to MJ's personal business journal entry because it contains statements against only her pecuniary interest, was made outside of a custodial setting, and accepts full responsibility for the rH-12 exposure.

Williamson does not apply to MJ's personal business journal entry for three reasons: 1) the journal contains statements against her pecuniary rather than penal interest; 2) the journal

entry was not written in a custodial setting; and 3) the statement implicating Sea Toys does not shift blame to Sea Toys or curry favor with authorities. R. 22. MJ's statement that "I knew – everybody here and in America knew – that there was rH-12 in that toy but we kept selling it anyway" exposes herself and Sea Toys to civil liability. R. 22. The journal entry is against only MJ's pecuniary interest as evidenced by her statement that "[t]he 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. Because *Williamson* concerns declarations against penal interest, *Williamson* does not preclude MJ's business journal entry. Additionally, *Williamson's* interpretation of 804(b)(3) does not apply to MJ's personal business journal entry because the journal entry was not written in a custodial setting. R. 22. Here, the circumstances addressed in *Williamson* do not exist. MJ was not under arrest or under police interrogation when she made her journal entry. R. 1-47. MJ wrote the statements in her personal business journal. R. 22. Because MJ's personal business journal entry was against her pecuniary interest and was not made in a custodial setting, the circumstances are different and *Williamson* does not apply. R. 22.

Williamson's application of 804(b)(3) does not apply to MJ's personal business journal entry because it is not an attempt to shift blame or curry favor with authorities and therefore does not implicate *Williamson*'s core concerns of unreliability. The entry reads "I knew – everybody here and in America knew – that there was rH-12 in that toy but we kept selling it anyway." R. 22. MJ's statement subjects her to civil liability equal to that of Sea Toys and therefore is not an attempt to shift blame to Sea Toys. R. 22. Although MJ's journal was a business journal, it was personal. R. 22. Accordingly, it is reasonable to assume that the journal was intended for MJ's use alone. R. 22. There is no indication that MJ was writing to law enforcement officers or any

authority investigating the Toy, and therefore MJ was not seeking to curry favor with authorities. R. 1-47. Because her statements do not attempt to shift blame or curry favor, *Williamson's* core concerns of unreliability are not present and therefore *Williamson* does not apply.

4. *Williamson* does not apply to MJ's personal letter to her daughter because it was written outside of a custodial setting and accepts full responsibility for the rH-12 exposure.

Williamson does not apply to MJ's personal letter to her daughter for two reasons: 1) the letter was not written in a custodial setting; and 2) the statements do not seek to shift blame to Sea Toys or curry favor with authorities. R. 23. MJ's personal letter to her daughter was not written in a custodial setting. R. 23. MJ was not under arrest or under police interrogation when she wrote the letter. R. 1-47. Instead, the letter was intended only for her daughter. R. 23. Because MJ's personal letter to her daughter was not made in a custodial setting, the circumstances in *Williamson* do not exist and therefore *Williamson* does not apply. R. 23.

Williamson's application of 804(b)(3) does not apply to MJ's personal letter because the letter is not an attempt to shift blame or curry favor with authorities. R. 23. MJ wrote a letter to her daughter accepting full responsibility for the rH-12 exposure and asking her daughter to "find it in [her] heart to forgive me." R. 23. First, the letter does not attempt to curry favor with the authorities because MJ is writing to her daughter. R. 23. Second, the letter does not seek to shift blame because MJ does not downplay her role in comparison with that of Sea Toys. R. 23. Although the letter implicates Sea Toys in stating "I . . . told Sea Toys there was rH-12 in the shark toys," MJ accepts full blame for the rH-12 exposure by writing "I am behind these sick children. I am the cause." R. 23. Because MJ accepts full blame for the rH-12 exposure in the letter to her daughter, it is not an attempt to shift blame or curry favor. *Williamson's* core concerns of unreliability are not present and therefore *Williamson* does not apply.

B. This Court Should Interpret *Williamson*'s Holding as Applying Only to Statements Made in a Custodial Setting Because a Broader Application is Contrary to the Rule's History and Text.

It would be improper to apply *Williamson's* interpretation of Rule 804(b)(3) to exclude collateral statements made outside of a criminal, custodial context for two reasons: 1) the legislative history of the Rule supports a non-restrictive application; and 2) the text of the Rule supports the admission of inculpatory collateral statements.

The legislative history of Rule 804(b)(3) reflects a non-restrictive application, therefore applying *Williamson's* holding to exclude statements made outside of a criminal, custodial setting would be improper. Rule 804(b)(3) contemplates the admission of collateral statements: "From the very beginning of this exception, it has been held that a declaration against interest is admissible…to prove other facts contained in a collateral statement." Bernard S. Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule,* 58 HARV. L. REV. 1, 57 (1944). In drafting Rule 804(b)(3), Congress rejected a proposed provision that would have excluded all confessions of codefendants implicating the accused in a criminal case. FED. R. EVID. 804 advisory committee's note. Congress refused to limit the Rule's scope, stating that the Rule "expands to the full logical limit." *Id*. The Advisory Committee Notes state:

> Ordinarily the third party confession is thought of in terms of exculpating the accused, but this is by no means always or necessarily the case: it may include statements implicating him, and under the general theory of declarations against interest they would admissible as related statements.

Id.; *Citing Bruton v. U.S.*, 389 U.S. 818 (1968)(where codefendants' confessions implicating the accused were admitted). Because the legislative history supports a non-restrictive application of the Rule, it would be improper to extend *Williamson's* holding to exclude collateral statements made outside of a criminal, custodial context.

Williamson's holding should be limited to custodial statements because the plain meaning of Rule 804(b)(3)'s text suggests a non-restrictive application. "If Congress had wanted to take a restrictive approach to whether a statement is against penal interest, it would not have chosen 'the broadly worded phrase "tended to subject"' in Rule 804(b)(3)." *U.S. v. Benveniste*, 564 F.2d 335, 341 (9th Cir. 1977). Also, the phrases "at the time of its making" and "a reasonable person *in the declarant's position*" demonstrate the importance of viewing each statement in light of all the surrounding circumstances. FED. R. EVID. 804(b)(3)(emphasis added).

> Whether a statement is in fact against interest must be determined from the circumstances of each case. Thus 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, e.g., to an acquaintance, would have no difficulty in qualifying.

FED. R. EVID. 804(b)(3) advisory committee's note.

Additionally, the text of Rule 804(b)(3) implies that statements that *exculpate* the defendant are less reliable and require additional "corroborating circumstances [that] clearly indicate the trustworthiness of the statement." FED. R. EVID. 804(b)(3). The text does not require additional corroborating circumstances for statements that *inculpate* the defendant. *Id.* In requiring "corroborating circumstances" solely for statements that exculpate the defendant, the text of Rule 804(b)(3) supports a more lenient approach toward statements that inculpate the defendant. *Id.* Because the Rule's text encourages a less restrictive application toward inculpatory statements and stresses the importance of evaluating all surrounding circumstances, it would be improper to extend *Williamson's* holding to exclude collateral statements made outside of the criminal, custodial context.

C. <u>The Statements Implicating Sea Toys in MJ's Personal Business Journal Entry and Personal Letter to Her Daughter are Self-Inculpatory and Therefore Admissible Under *Williamson's* Interpretation of Rule 804(b)(3).</u>

Even if the *Williamson* holding applies to statements made outside of a custodial setting, *Williamson* does not exclude MJ's personal business journal entry or MJ's personal letter to her daughter because the statements are self-inculpatory. First, self-inculpatory collateral statements are admissible. *Williamson*, 512 U.S. at 603. A statement is self-inculpatory when it "tend[s] to subject the declarant to civil or criminal liability." FED. RULE EVID. 804(b)(3). In *Williamson*, an arrested accomplice made statements implicating both himself and the defendant. *Williamson*, 512 U.S. at 597. The Court stated that collateral statements, statements implicating others, are admissible "if they are truly self-inculpatory, rather than merely attempts to shift blame or curry favor." *Id.* at 603. However, the Court provided that collateral statements are not self-inculpatory if they "[do] little to subject [the declarant] to criminal liability." *Id.* at 604. The Court remanded to determine whether the statements were self-inculpatory, instructing the lower court to view a statement in its "context," and further providing that it is "a fact-intensive inquiry, which would require careful examination of all the circumstances surrounding the criminal activity involved…." *Id.* at 603, 604. Therefore, if a statement's surrounding circumstances establish that the statement subjects the declarant to liability, then it is self-inculpatory and admissible.

Second, collateral statements are self-inculpatory when they implicate the declarant and defendant equally for the same wrongful conduct. *U.S. v. Jordan*, 509 F.3d 191 (4th Cir. 2007). In *Jordan*, a declarant revealed to a personal friend that she had participated in a drug transaction with the defendants that resulted in the murder of a drug courier. *Id.* at 200. The court noted that confessions "may be admissible if they are truly self-inculpatory, rather than merely attempts to shift blame or curry favor." *Id.* at 202 (quoting *Williamson*, 512 U.S. at 603.) The court found the

statements were self-inculpatory, noting "[h]ere, although [declarant's] statements . . . inculpated [defendant], they also subjected [declarant] to criminal liability for a drug conspiracy and, by extension, for . . . murder." *Id.* at 203. Accordingly, the court held the statements were admissible under 804(b)(3). *Id.; See also State v. Martinez-Rodriguez*, 33 P.3rd 267, 277 (N.M. 2002), *cert. denied,* 535 U.S. 937 (U.S. March 18, 2002)(No. 01-7656)(where note from codefendant stating "the four of us are equally guilty" was not an attempt to shift blame or curry favor)(abrogated on other grounds by *Crawford v. U.S.*, 541 U.S. 36, 51 (2004)).

Third, collateral statements are self-inculpatory when they describe acts that the declarant and defendant committed jointly. *U.S. v. Saget*, 377 F.3d 223, 230 (2nd Cir. 2004). In *Saget*, a declarant made statements to a confidential informant implicating himself and the defendant in stating "we drove [the guns] down." *Id.* at 231. The court found the declarant's statements were self-inculpatory because they "were descriptions of acts that he and [the defendant] had jointly committed." *Id.* at 230. The court found that because the statements described jointly committed acts, the declarant "[did] not appear to have been attempting to shift criminal culpability from himself to [defendant]." *Id.* at 230. The court held the statements were admissible. *Id.* at 231.

Fourth, statements to acquaintances are ordinarily not made to shift blame or curry favor with authorities. *U.S. v. Curry*, 977 F.2d 1042 (7th Cir. 1992). In *Curry*, the declarant made statements to a friend implicating the defendant. *Id.* at 1055. The declarant stated that he sold marijuana for the defendant and that the defendant was "hiding marijuana from him." *Id.* The court found that "the statements by [declarant] to [his friend] were not made in an attempt to curry favor with law enforcement officers but were made to an acquaintance." *Id.* at 1056. Accordingly, the court held that the statements were admissible. *Id.; See also Jordan*, 509 F.3d at

203 (where statement to friend in an "effort to relieve [oneself] of guilt" is not seeking to shift blame or curry favor).

3. MJ's statement in her personal business journal entry implicating Sea Toys exposes MJ to liability, equally implicates MJ and Sea Toys, and describes a jointly committed act.

First, MJ's personal business journal entry statement that "I knew – everybody here and in America knew – that there was rH-12 in that toy but we kept selling it anyway" is self-inculpatory because it subjects MJ to civil liability under BTRA § 204. R. 22. The statement reveals that MJ knew there was rH-12 in the Toy and took part in "selling it anyway." R. 22. The statement is not an attempt to shift blame because MJ does not lessen her exposure to liability by implicating "everybody here and in America." R. 22. Additionally, MJ does not mention Sea Toys by name. R. 22. The statement is not an attempt to curry favor with authorities because MJ wrote the statement in her personal journal and not to a law enforcement officer. R. 22. Therefore, MJ's statement implicating Sea Toys is self-inculpatory and admissible.

Second, MJ's personal journal entry statement implicating Sea Toys is self-inculpatory because she implicates herself and Sea Toys equally. Like the statements in *Jordan* that implicated both the defendant and the declarant equally, MJ's statement implicates both herself and Sea Toys equally under BTRA § 204 for knowingly selling a harmful children's toy. R. 22. Like in *Jordan*, this Court should hold that MJ's statements are self-inculpatory because they implicate both herself and Sea Toys equally for the same wrongful conduct and do not attempt to shift blame or curry favor with authorities. R. 22.

Third, MJ's journal entry statement implicating Sea Toys is self-inculpatory because it describes acts that MJ and Sea Toys committed jointly. R. 22. Like the declarant's statement "we drove [the guns] down" in *Saget*, MJ's statement "I knew – everybody here and in America

knew – that there was rH-12 in that toy but *we kept selling it anyway*" describes MJ and Sea Toys' joint act of knowingly selling a harmful children's toy. R. 22 (emphasis added). Because MJ was the CEO of Tattel, the manufacturer of the Toy, and Sea Toys distributed the Toy, the act of "selling it anyway" required action by both MJ and Sea Toys. R. 2, 7, 22. Like in *Saget*, MJ's statement describing a joint act is self-inculpatory and thus admissible.

4. MJ's statement in her personal letter implicating Sea Toys exposes MJ to liability, equally implicates MJ and Sea Toys, and was written to her daughter.

First, MJ's statement implicating Sea Toys in the context of a personal letter to her daughter is self-inculpatory because it subjects MJ to liability under BTRA § 204 and criminal liability. R. 23. The statement "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" reveals that MJ had knowledge that the Toy contained a dangerous toxin. R. 23. Earlier stating "I am behind these sick chidren" and "I am the cause" provides context for her later statement and demonstrates that it subjects her to liability. R. 23.

Second, MJ's statement in her personal letter to her daughter implicating Sea Toys is self-inculpatory because she implicates herself and Sea Toys equally. R. 23. Like the statements in *Jordan* that implicated both the defendant and the declarant equally, MJ's statement implicates both herself and Sea Toys equally for knowledge of rH-12's presence in the Toy. R. 23. Like in *Jordan*, this Court should hold that MJ's statements are self-inculpatory because they implicate both herself and Sea Toys equally for the same wrongful conduct and do not attempt to shift blame or curry favor with authorities. R. 23

Third, MJ's collateral statement implicating Sea Toys is not seeking to shift blame or curry favor with authorities and is therefore self-inculpatory because the statement is contained

in a personal letter from MJ to her daughter. R. 23. Like in *Curry*, MJ's statement implicating Sea Toys is not seeking to shift blame or curry favor because it was made in a personal letter to an acquaintance, her daughter. R. 23. Additionally, like in *Jordan*, the letter is seeking to relieve MJ of guilt and not to minimize her culpability. R. 23. Because her letter did not attempt to shift blame or curry favor, it is self-inculpatory and admissible. Therefore, *Williamson* does not exclude MJ's personal journal entry or personal letter.

II. THERE IS NO *PER SE* BAR AGAINST STATEMENTS ACKNOWLEDGING CRIMINAL CONDUCT WHERE THE DECLARANT LATER COMMITS SUICIDE BECAUSE FEDERAL COURTS HAVE HELD SUCH STATEMENTS ADMISSIBLE.

There is no per se bar against out-of-court statements alleging criminal conduct where the declarant subsequently commits suicide. Statements satisfying 804(b)(3) are admissible even where the declarant commits suicide thereafter. *Jordan*, 509 F.3d at 203. In *Jordan*, the declarant made statements to a close personal friend revealing the declarant's and the accused's involvement in drug-trafficking and murder. *Id.* at 193. The declarant was incarcerated for unrelated matters and committed suicide later that year. *Id.* at 202. The court held that the statement was an admissible statement against interest despite the fact that the declarant later committed suicide. *Id.; See also U.S. v. Layton*, 720 F.2d 548, 559 (9th Cir. 1983)(holding that statements of religious cult leader made immediately prior to mass suicide were admissible as statements against his penal interest).

Suicide notes that allege criminal conduct are subject to additional judicial scrutiny under 804(b)(3). *The Judicial Interpretation of Suicide*, 105 U. Pa. L. Rev. 391, 402 (1957). Individuals who commit suicide "frequently leave notes explaining the events which induced their self-destruction." *Id.* Suicide notes are unreliable because the declarant is likely aware that they will not suffer the full repercussions of their statements. *Id*. However, a personal letter that happens to

be written prior to the declarant's suicide for reasons not contemplated in the letter, is not a suicide note and should not be subject to the same concerns of unreliability. *See Id.* In *Jordan*, the Court recognized that the declarant committed suicide shortly after being incarcerated for matters unrelated to her prior statements. *Jordan*, 509 F.3d at 191. The fact that court admitted the declarant's statements implies that they were sufficiently reliable despite the declarant's subsequent suicide. *See Id*. Therefore, there is no *per se* bar against such statements.

MJ's letter to her daughter satisfies 804(b)(3) as a statement against interest and is admissible despite her subsequent suicide. Like the *Jordan* declarant's statement to a personal friend admitting her involvement in drug trafficking and murder, MJ's personal letter to her daughter admitted her failure to timely warn consumers about rH-12's presence in the Toy. Because the court held that the declarant's statements in *Jordan* were self-inculpatory and admissible despite her suicide, this Court should hold that MJ's statement is self-inculpatory and admissible despite her suicide. Therefore there is no per se bar against admitting statements against penal interest where the declarant subsequently commits suicide.

MJ's letter to her daughter was not a suicide note and therefore is not subject to additional judicial scrutiny. The letter was not a suicide note for two reasons. First there is no indication that MJ was contemplating suicide at the time she wrote the letter because she expressed a desire to continue living by stating "my biggest fear is losing you, not being able to take care of you and be there for you, as a mother should," and "one day hopefully to be a grandmother." R. 23. Second, MJ was diagnosed with a life-threatening illness after writing the letter and this diagnosis likely precipitated her suicide. R. 10. Like the declarant's incarceration for unrelated matters in *Jordan,* this diagnosis is evidence of an intervening cause of MJ's suicide. Therefore, MJ's letter to her daughter was merely that, a letter, and not a suicide note

which would subject it to heightened judicial scrutiny. Because federal courts have admitted statements against interest where the declarant later commits suicide, there is no *per se* bar to such statements.

III. MJ'S STATEMENT THAT SHE INTENDED TO FLY TO CALIFORNIA AND INFORM MR. LEDBETTER THAT THE TOY CONTAINED rH-12 IS A FORWARD-LOOKING STATEMENT OF INTENT ADMISSIBLE UNDER RULE 803(3) AND THE HILLMON DOCTRINE.

MJ's forward-looking statement that she intended to fly to California to meet with Mr. Ledbetter and inform him of rH-12 in the Toy is admissible under 803(3) and the Hillmon Doctrine to prove that the meeting took place and that the matter was discussed. The state of mind hearsay exception, Federal Rule of Evidence 803(3), admits evidence of an "existing emotional, mental, or physical condition." FED. R. EVID. 803(3). This includes 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) …." *Id.* In the seminal case of *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285 (1892), a letter which stated a decedent's intent to travel and meet a third party was offered to prove that the decedent did in fact travel and meet with the third party. *Hillmon*, 145 U.S. at 296. *Hillmon's* holding, later named the "Hillmon Doctrine," asserts that forward-looking statements of intent, which are offered for the purpose of showing conduct in conformity with that intent, are admissible. *Id.* at 299. Additionally, this doctrine allows statements of intent to be offered for the purpose of inferring the conduct of a third-party. *U.S. v. Pheaster*, 544 F.2d 353, 377 (9th Cir. 1976).

Despite this Court's warning in *Shepard v. U.S.*, 290 U.S. 93 (1933), against backward-looking statements inferring the conduct of another, the Court's holding did not disrupt the Hillmon Doctrine's application to forward-looking statements. FED. R. EVID. 803(3), advisory committee's note. The 803(3) Advisory Committee Notes state that the dicta in *Shepard* left the

Hillmon Doctrine "undisturbed." *Id.* Further, the Advisory Committee defined the Hillmon Doctrine as "one which uses evidence of an intended act as proof that the particular act was carried out." *Id.* As a result, the Hillmon Doctrine still allows the admission of forward-looking statements of intent offered to infer the conduct of third parties. *See Id.* For example, in *People v. Alcalde*, 24 Cal. 2d 177 (1944), the California Supreme Court affirmed a murder conviction based largely on the victim's statement that she planned to meet with the defendant on the night of the murder. *Alcalde,* 24 Cal. 2d at 187. The court admitted the statement to support the inference that the defendant met with the victim on the night of the murder. *Id.* The holding in *Alcalde* was a notable interpretation of the Hillmon Doctrine because it had a significant impact on the drafting of the California Evidence Code which, in turn, was influential on the authors of the Federal Rules of Evidence. FED. R. EVID. 803(3) advisory committee's note.

A forward-looking statement of intent to meet with a third party is admissible as evidence that such a meeting took place. *Pheaster*, 544 F.2d at 383. In *Pheaster*, a kidnapping victim told friends that he was going to meet the defendant in a parking lot. *Id.* at 375. The court in *Pheaster* recognized the fundamental difference between inferring the performance of an act that requires only the declarant and inferring the performance of an act that requires more than one person, namely the defendant. *Id.* at 377. The court stated that "[t]he fact that the cooperation of another party is necessary if the intended act is to be performed adds another important contingency, but the difference is one of degree rather than kind." *Id*. The court added that,

> The possible unreliability of the inference to be drawn from the present intention is a matter going to the weight of the evidence which might be argued to the trier of fact, but it should not be a ground for completely excluding the admittedly relevant evidence.

Id. Accordingly, the court held the victim's statements of intent to meet the defendant admissible, and thus, allowed the jury to infer the probability that the defendant met the victim in

the parking lot. *Id. See also U.S. v. Houlihan*, 871 F.Supp. 1495 (D. Mass. 1994)(holding statement of victim's intention to meet defendant on evening of victim's murder was admissible against defendant).

MJ's statement to her secretary is admissible as evidence that MJ flew to California and informed Mr. Ledbetter of rH-12's presence in the Toy because it is a forward-looking statement of intent to meet with a third party. MJ stated to her secretary, "Book me a plane ticket to California right away. Something terrible has happened and I am going to meet with Troy Ledbetter to tell him what's going on." R. 24. Following the holdings in *Hillmon* and *Pheaster*, MJ's statement is admissible as offered to prove that her meeting with Mr. Ledbetter took place and that the matter of rH-12 in the Toy was discussed. R. 24. The statements are admissible for the purpose of allowing the jury to determine the probability that Mr. Ledbetter met with MJ and discussed the presence of rH-12 in the Toy. R. 24. Further, this notion is supported by corroborating evidence in Ms. Peetz's deposition that MJ "submitted receipts for plane fare, taxi rides and a hotel for her trip." R. 24. Therefore, MJ's statement is admissible for the purpose of proving that MJ met with Mr. Ledbetter and informed him of rH-12's presence in the Toy. R. 24.

IV. RULE 407: 1) DOES NOT PRECLUDE EVIDENCE OF REMEDIAL RECOMMENDATIONS UNDERTAKEN AT THE DIRECTION OF A GOVERNMENT AGENCY; AND 2) APPLIES ONLY TO "MEASURES" AND DOES NOT APPLY TO INFORMATIONAL FINDINGS CONDUCTED TO DETERMINE THE EXISTENCE OF A PRODUCT DEFECT.

Federal Rule of Evidence 407 does not exclude Sea Toys' investigative report created the direction of the Commission, or, at a minimum does not exclude the informational findings in the report. R. 25-27. Rule 407 governs the admissibility of subsequent remedial measures. FED. R. EVID. 407. A subsequent remedial measure is an action taken after an injury-causing event that "if taken previously, would have made the injury or harm less likely to occur". *Id*. The Rule

excludes these measures when offered to prove negligence or culpable conduct in connection with an injury-causing event. *Id.*

The purpose of Rule 407 is to "encourage post-accident repairs or safety precautions in the interest of public safety." *Kenny v. S.E. Penn. Trans. Auth.*, 581 F.2d 351, 351 (3rd Cir. 1978). A policy reason for excluding evidence of subsequent remedial measures is to encourage "tort feasors to take steps to remedy hazardous conditions in their control." *Herndon v. Piper Aircraft Corp.*, 716 F.2d 1322, 1327 (10th Cir. 1983). The Rule rests on the assumption that allowing evidence of subsequent remedial measures would deter businesses from taking future safety measures. *Id.*

Courts regularly reject 407 policy arguments for a variety of reasons. First, courts argue "it is unrealistic to think a tort-feasor would risk innumerable additional lawsuits by foregoing necessary design changes simply to avoid the possible use of those modifications as evidence by persons who have already been injured." *Id.* Second, that "insurers would not tolerate their insured manufacturers refusing to take remedial measures." *Id.* Third, that "[g]overnment agencies, as well as juries contemplating punitive damage claims, would also be unlikely to approve of such callous behavior. *Id.* Lastly, that "there is no evidence which shows that manufacturers even know about the evidentiary rule or change their behavior because of it." *Id.*

Sea Toys is regulated by the Consumer Product Safety Act ("CPSA") because it distributes toys to consumers in the United States. 15 U.S.C.A. § 2052(a)(1). The CPSA established the Commission and vested the agency with broad powers to protect consumers from unreasonable risks of death, injury, or serious illness associated with use or exposure to consumer product. *See id.* § 2051. Specifically the CPSA vests the agency with the power to

collect information on accidents related to consumer products, establish important safety standards for consumer products, and enforce compliance with those safety standards. *See id*.

Under the CPSA, a distributor who fails to conduct an appropriate investigation after receiving notice of a possible product hazard is subject to statutory penalties. *See id.* § 2064(b). The CPSA requires every distributor of a product, who obtains reliable information of a defect that may create a substantial product hazard, to immediately inform the Commission. *Id*. A product defect that creates a substantial risk of injury to the public is a 'substantial product hazard'. *Id* at 2064(a). The distributor must determine if the information reasonably supports a conclusion that the product poses a substantial threat requiring notification. Statement of Enforcement Policy on Substantial Product Hazard Reports, Fed. Reg. 13,820 (Consumer Prod. Safety Comm'n. April 6, 1984). Failure to report a substantial product hazard to the Commission may result in statutory penalties. *Id*.

First, the argument below will establish that Rule 407 does not apply to an involuntary investigative report conducted at the direction of a government agency and therefore does not exclude Sea Toys' investigation of the Toy conducted at the direction of the Commission. Second, the argument will establish that Rule 407 does not exclude informational findings conducted to determine the existence of a product defect and therefore does not exclude Sea Toys' informational findings regarding the Toy.

B. Sea Toys' Investigative Report Was an Involuntary Response to a Specific Agency Directive and Therefore Not Contrary to Rule 407's Underlying Social Policy of Encouraging Responsible Behavior.

First, remedial measures taken in response to government directives requiring remedial measures are involuntary and therefore admissible under Rule 407. *Piper Aircraft Corp.*, 716 F.2d at 1331. In *Piper Aircraft*, the manufacturer of an aircraft issued a service bulletin

notifying owners of a structural defect more than one year after a fatal crash. *Id.* at 1326-27. The court found that the service bulletin was prompted by an FAA Airworthiness Directive that "describe[d] unsafe conditions and set forth mandatory precautions that must be taken in order to operate the affected aircraft." *Id.* at 1331. The court reasoned that "[w]here a superior authority requires a tort feasor to make post-accident repairs, the policy of encouraging voluntary repairs which underlies Rule 407 has no force — a tort feasor cannot be discouraged from voluntarily making repairs if he *must* make repairs in any case." *Id*. The court held that both the service bulletin and the government directive were admissible. *Id*.

Second, subsequent remedial measures are admissible when taken to avoid potential statutory penalties. *Farner v. Paccar Inc.,* 562 F.2d 518, 527 (8th Cir. 1977). In *Farner,* the plaintiff brought a wrongful death suit against a tractor manufacturer alleging failure to give decedent timely warning of an unsafe condition. *Id.* at 522. The plaintiff introduced evidence of a recall letter that warned tractor owners of a potentially dangerous design defect. *Id.* at 523. Failure to issue a recall letter was a violation of the National Traffic and Motor Vehicle Safety Act and could result in statutory penalties. *Id*. The court held that issuing a recall letter to avoid potential statutory penalties was an involuntary remedial measure. *Id*. The court also held that admitting an involuntary recall letter would not deter manufacturers from taking future measures to remedy defects because failure to do so could result in statutory penalties. *Id*.

Remedial measures taken in anticipation of government mandates are involuntary and therefore admissible. *Rozier v. Ford Motor Co.,* 573 F.2d 1332, 1340 (5th Cir. 1978). In *Rozier*, a plaintiff brought suit against the manufacturer of a vehicle, alleging that the negligent design of the fuel tank caused a fatality. *Id.* at 1337. The plaintiff attempted to introduce into evidence an internal report addressing proposed fuel tank design changes. *Id.* at 1340. The court found that

the report was prepared in "anticipation of a revised National Highway Traffic Safety Administration Rule." *Id*. The court held that Rule 407's social policy of "encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety" does not justify excluding evidence of proposed remedial measures created in anticipation of future agency requirements. *Id.* at 1343 (*citing* FED. R. EVID. 407 advisory committee's note).

Sea Toys' investigation of a possible product hazard and recommended remedial measures was involuntary and therefore admissible. R. 25-6. First, Sea Toys' investigative report is admissible because it was created in response to a Commission Directive instructing distributors to take remedial action. R. 27. The Directive, issued on October 20, 2005, instructs distributors of foreign-manufactured toys to conduct "appropriate investigations and take remedial actions if there is *any indication* that their products pose serious health risks to consumers." R. 27 (emphasis added). The report notes that Sea Toys received notice in October 2005 of rH-12 in the Toy and therefore the directive compelled Sea Toys' investigation. R. 25. Because the court held in *Piper Aircraft* that remedial measures taken in response to an FAA Directive were involuntary and thus admissible, Sea Toys' investigative report taken in response to a Commission Directive was involuntary and thus admissible. R. 25-7.

Second, Sea Toys' investigation was involuntary and therefore admissible because it was conducted to avoid potential penalties under the CPSA. R. 25-6. The CPSA requires distributors to notify the Commission when they receive notice that a substantial product hazard exists. The CPSA provides that where a distributor "obtains information which reasonably supports the conclusion that the product …contains a defect which could create a substantial product hazard" they are required to notify the Commission. 15 U.S.C.A. § 2064(b). Whether the information available compels notification, is a "determination that a [distributor] must first make."

Statement of Enforcement Policy on Substantial Product Hazard Reports, Fed. Reg. 13,820 (Consumer Prod. Safety Comm'n. April 6, 1984). Due to the potential threat to public safety, "the Commission intends to vigorously pursue civil penalties against firms that violate the reporting requirements." *Id*. Sea Toys received notice about a possible product safety hazard that caused brain damage in children. R. 25. Under the CPSA, failure to report a toy that caused brain damage in children would likely result in civil penalties. Sea Toys conducted its investigation to "substantiate information provided in October, 2005 … concerning the etiology of brain damage in Legolian children" R.25. Because the court held in *Farner* that remedial actions taken to avoid penalties are involuntary and admissible, Sea Toys' investigation conducted to avoid penalties was involuntary and admissible. R. 25.

Third, Sea Toys' investigative report was likely created in anticipation of a Commission mandate and therefore is involuntary and admissible. R. 25-7. The Commission's Directive issued on October 20, 2005 to all manufacturers, distributors and sellers of children's toys, establishes that the Commission has received "numerous reports of toxic substances in children's toys manufactured abroad." R. 27. The Directive further instructs distributors to investigate and "take remedial action if there is any indication that their products pose serious health risks to consumers." R. 25. Therefore, it is reasonable to assume that Sea Toys conducted the investigation in anticipation of Commission mandate requiring the action. Because the court held in *Rozier* that proposed fuel tank designs were admissible because they were prepared in anticipation of agency requirements, Sea Toys' investigative report, prepared in response to a Commission Directive that suggested a future Commission mandate, was therefore involuntary and admissible.

C. The Informational Findings of Sea Toys' Investigative Report are Admissible Because They Merely Summarize the Existence of a Product Defect in the Toy and Therefore are Not Remedial Measures.

Rule 407 only excludes subsequent remedial measures and therefore does not apply to Sea Toys informational findings summarizing the presence of rH-12 in the Toy. R. 25. Rule 407 only excludes post-accident actions that, if taken prior, would have made the accident less likely to occur. FED. R. EVID. 407.

There are four reasons why Sea Toys informational findings are admissible. First, post-accident informational findings are not subsequent remedial measures because, if compiled prior, they would not have made the harm suffered more or less likely to occur. *Prentiss & Carlisle Co. v. Koehring-Waterous Div. of Timberjack, Inc.,* 972 F.2d 6, 9 (1st Cir. 1992). In *Prentiss & Carlisle,* the manufacturer of a timber-cutting machine that caught fire conducted an investigation to determine the cause. *Id.* The investigation produced an inter-office memo revealing informational findings that a malfunctioning circuit caused the fire. *Id.* The inter-office memo contained the manufacturer's "analysis of the problem, without mentioning any remedial measures suggested." *Id.* The court determined that Rule 407 "prohibits evidence of … subsequent remedial measures, not evidence of a party's analysis of its product." *Id.* The court held that the informational findings concerning the cause of the fire were admissible, reasoning that an investigation to determine the existence of a product defect would not have made the fire more or less likely to occur. *Id.* at 9-10.

Second, post-accident informational findings contained in the same report as proposed remedial measures are admissible so long as the court excludes evidence of the proposed remedial measures. *Rocky Mountain Helicopters, Inc. v. Bell Helicopters*, 805 F.2d 907, 918 (10th Cir. 1986). In *Rocky Mountain Helicopters*, a helicopter manufacturer investigated the

cause of a fatal helicopter crash. *Id*. The investigation produced a report containing both a summary of structural tests determining the cause of the crash, as well as proposed design changes. *Id*. The court stated "Rule 407 does not read so broadly as to exclude post-accident tests or reports." *Id*. The court held that the informational findings from the structural tests were admissible so long as all references to proposed design changes were excluded. *Id.* at 919.

Third, factual findings revealing a product defect that result in specific remedial measures are not remedial measures within the meaning of Rule 407. *Fasanaro v. Mooney Aircraft Corp.,* 687 F.Supp. 482, 487 (N.D. Cal. 1988). In *Fasanaro*, a plane manufacturer investigating a plane crash conducted tests to determine the cause of the accident. *Id*. at 483. The test results led to six specific remedial measures to improve the safety of the particular aircraft. *Id*. The court held that, although the tests' factual findings resulted in remedial measures, the test results themselves were not remedial measures. *Id.* at 487. The court stated: "Rule 407 includes only the actual remedial measures themselves not the initial steps toward ascertaining whether any remedial measures are called for." *Id*. Accordingly, the court admitted the test results. *Id*.

Fourth, the probative value of factual findings contained in post-accident investigative reports outweighs the potential danger of discouraging such investigations. *Westmoreland v. CBS Inc.,* 601 F.Supp. 66, 67 (10th Cir. 1984). In *Westmoreland*, CBS conducted an internal investigation in response to public criticism of a controversial TV show. *Id*. The court considered whether factual findings contained in the investigative report were admissible. *Id*. CBS argued that admitting the report would defeat the purpose of Rule 407 of encouraging "self-examination and self policing." *Id*. The court found that the report contained the "best and most accurate sources of evidence and information," which were not readily available elsewhere. *Id.* at 68. The court admitted the factual findings, reasoning that the immediate danger of depriving the "injured

claimant" of highly probative evidence outweighed the social policies underlying Rule 407 – potentially discouraging CBS from taking remedial measures in the future. *Id*.

Sea Toys' informational findings which reveal the Toy contained rH-12 is not a remedial measure within Rule 407. R. 25. First, the findings alone would not have made Stuart Slope's exposure to rH-12 more or less likely to occur. R. 25. The informational findings established that the glue used to attach the Toy's eyes contained rH-12, a brain damage causing toxin. R. 25. The findings suggested a causal link between possession of the Toy and recent diagnoses of rH-12 exposure. R. 25. The report substantiated information received in October 2005 concerning the cause of brain damage in children of Legolia, the location of the manufacturer of the Toy. R. 2, 25. Like the investigation of the timber-cutting machine in response to a fire in *Prentiss & Carlisle*, the investigation of the Toy was taken in response to notice concerning foreign children with brain damage. R. 25. Like the investigation to determine whether a possible equipment defect caused the fire in *Prentiss & Carlisle*, Sea Toys' investigation determined whether rH-12 was present in the Toy and whether the Toy caused rH-12 exposure. R. 25. Because the court held that Rule 407 did not exclude investigative documents in *Prentiss & Carlisle*, Rule 407 does not exclude the Sea Toys' informational findings.

Second, the informational findings section pertains to the existence of a product defect in the Toy and is separate from a section containing remedial recommendations. R. 25-6. The investigation of the Toy contains one section titled "Informational Findings" and another section titled "Recommendations." R. 25-6. The informational findings section contains facts that positively identify rH-12 in the Toy, while the recommendations section contains four proposed remedial measures. R. 25-6. The informational findings section does not contain any recommendations for remedial measures. R. 25. Like the defendant company's report on stress

tests addressing the existence of a dangerous structural defect in *Rocky Mountain Helicopters*, Sea Toys' investigation addresses the existence of rH-12 in the Toy. R. 25. Like the stress test results which were separate from the proposed structural design changes in *Rocky Mountain Helicopter*, the informational findings are separate from the remedial recommendations. R. 25-6. Because the court held in *Rocky Mountain Helicopter* that post-accident tests to determine the existence of a defect are admissible where evidence of design changes were properly excluded, the informational findings summarizing the existence of rH-12 in the Toy are admissible because the recommendations section is separate and can be properly excluded. R. 25-6.

Third, Sea Toys' informational findings are admissible because they merely establish the need for subsequent remedial measures, and do not propose any specific remedial actions. R. 25. Like the documents summarizing testing conducted by the defendant company in *Fasanaro* that determined the existence of a defect, the document summarizing Sea Toys' investigation of the Toy determined the existence of rH-12. R. 25. Like the testing in *Fasanaro* that revealed the need for remedial measures, including recommendations to owners concerning operational dangers, the Sea Toys' informational findings revealed the need for remedial measures, including notifying owners of the Toy of possible dangers associated with exposure to rH-12. R. 25. Because the court held in *Fasanaro* that Rule 407 does not exclude facts pertaining to the existence of a product defect, even where the findings result in remedial measures, Rule 407 does not exclude the facts addressing the existence of a toxin in the Toy, even though the findings resulted in remedial recommendations. R. 25-6.

Fourth, the facts contained within the informational findings section of Sea Toys' investigative report are highly probative and outweigh any danger of deterring Sea Toys from conducting future investigations. R. 25. Like the internal investigation conducted by CBS in

response to public criticism of a highly controversial TV show in *Westmoreland*, Sea Toys conducted an internal investigation in response to notice of a possible toxin in the Toy. R. 25. The court found in *Westmoreland* that the internal investigation contained highly probative information not readily available to the injured claimant. Similarly, Sea Toys' internal investigation contains probative information establishing: 1) the existence of rH-12 in the Toy; 2) exposure to rH-12 causes brain damage; and 3) the company received notice in October, 2005 of similar cases occurring in Legolia, the location of the Toy's manufacturer. R. 25. These facts are highly probative, not readily available elsewhere, and go directly to the core of brain damaged Stuart Slope's claim under BTRA § 204. R. 1-47. Because the court held in *Westmoreland* that the policy concerns of depriving a litigant of a highly probative internal investigation outweighed the social policy of encouraging responsible behavior underlying Rule 407, the policy concerns of depriving brain-damaged Stuart Slope of the highly probative internal investigation outweighs any social policy concerns underlying Rule 407. R. 25. Thus, Rule 407 does not exclude Sea Toys' investigative report.

CONCLUSION

For all of the above reasons, this Court should reverse the Fourteenth Circuit Court of Appeals and find in favor of Petitioner, Stuart Slope.

APPENDIX

UNITED STATES CONSTITUTION

U.S. Const. amend. VI
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

FEDERAL STATUTES

28 U.S.C. § 1332(a)
Diversity of Citizenship; Amount in Controversy; Costs
(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;
(2) citizens of a State and citizens or subjects of a foreign state;
(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
(4) a foreign state, defined in section 1603 (a) of this title, as plaintiff and citizens of a State or of different States. For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

15 U.S.C.A. § 2051
Congressional Findings and Declaration of Purpose
(a) The Congress finds that—

(1) an unacceptable number of consumer products which present unreasonable risks of injury are distributed in commerce;
(2) complexities of consumer products and the diverse nature and abilities of consumers using them frequently result in an inability of users to anticipate risks and to safeguard themselves adequately;
(3) the public should be protected against unreasonable risks of injury associated with consumer products;
(4) control by State and local governments of unreasonable risks of injury associated with consumer products is inadequate and may be burdensome to manufacturers;
(5) existing Federal authority to protect consumers from exposure to consumer products presenting unreasonable risks of injury is inadequate; and
(6) regulation of consumer products the distribution or use of which affects interstate or foreign commerce is necessary to carry out this chapter.

(b) The purposes of this chapter are—

(1) to protect the public against unreasonable risks of injury associated with consumer products;
(2) to assist consumers in evaluating the comparative safety of consumer products;
(3) to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations; and
(4) to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries.

15 U.S.C.A. § 2052(a)(1)

(a) For purposes of this chapter:

(1) The term "consumer product" means any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise; but such term does not include--

(A) any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer,
(B) tobacco and tobacco products,
(C) motor vehicles or motor vehicle equipment (as defined by section 30102(a)(6) and (7) of Title 49),
(D) pesticides (as defined by the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C.A. § 136 et seq.]),
(E) any article which, if sold by the manufacturer, producer, or importer, would be subject to the tax imposed by section 4181 of the Internal Revenue Code of 1986 [26 U.S.C.A. § 4181] (determined without regard to any exemptions from such tax provided by section 4182 or 4221, or any other provision of such Code), or any component of any such article,
(F) aircraft, aircraft engines, propellers, or appliances (as defined in section 40102(a) of Title 49),
(G) boats which could be subjected to safety regulation under chapter 43 of Title 46; vessels, and appurtenances to vessels (other than such boats), which could be subjected to safety regulation under title 52 of the Revised Statutes or other marine safety statutes administered by the department in which the Coast Guard is operating; and equipment (including associated equipment, as defined in section 2101(1) of Title 46) to the extent that a risk of injury associated with the use of such equipment on boats or vessels could be eliminated or reduced by actions taken under any statute referred to in this subparagraph,
(H) drugs, devices, or cosmetics (as such terms are defined in sections 201(g), (h), and (i) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C.A. § 321(g), (h), and (i)]), or
(I) food. The term "food", as used in this subparagraph means all "food", as defined in section 201(f) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C.A. § 321(f)], including poultry and poultry products (as defined in

sections 4(e) and (f) of the Poultry Products Inspection Act [21 U.S.C.A. § 453(e) and (f)]), meat, meat food products (as defined in section 1(j) of the Federal Meat Inspection Act [21 U.S.C.A. § 601(j)]), and eggs and egg products (as defined in section 4 of the Egg Products Inspection Act [21 U.S.C.A. § 1033]).

Such term includes any mechanical device which carries or conveys passengers along, around, or over a fixed or restricted route or course or within a defined area for the purpose of giving its passengers amusement, which is customarily controlled or directed by an individual who is employed for that purpose and who is not a consumer with respect to such device, and which is not permanently fixed to a site. Such term does not include such a device which is permanently fixed to a site. Except for the regulation under this chapter or the Federal Hazardous Substances Act [15 U.S.C.A. § 1261 et seq.] of fireworks devices or any substance intended for use as a component of any such device, the Commission shall have no authority under the functions transferred pursuant to section 2079 of this title to regulate any product or article described in subparagraph (E) of this paragraph or described, without regard to quantity, in section 845(a)(5) of Title 18. See sections 2079(d) and 2080 of this title, for other limitations on Commission's authority to regulate certain consumer products.

15 U.S.C.A. § 2064(a), (b)

Substantial Product Hazards

(a) “Substantial product hazard” defined

For purposes of this section, the term “substantial product hazard” means—

(1) a failure to comply with an applicable consumer product safety rule which creates a substantial risk of injury to the public, or

(2) a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public.

(b) Noncompliance with applicable consumer product safety rules; product defects; notice to Commission by manufacturer, distributor, or retailer

Every manufacturer of a consumer product distributed in commerce, and every distributor and retailer of such product, who obtains information which reasonably supports the conclusion that such product—

(1) fails to comply with an applicable consumer product safety rule or with a voluntary consumer product safety standard upon which the Commission has relied under section 2058 of this title;

(2) contains a defect which could create a substantial product hazard described in subsection (a)(2) of this section; or

(3) creates an unreasonable risk of serious injury or death,

shall immediately inform the Commission of such failure to comply, of such defect, or of such risk, unless such manufacturer, distributor, or retailer has actual knowledge that the Commission has been adequately informed of such defect, failure to comply, or such risk.

FEDERAL RULES OF EVIDENCE

FED. R. EVID. 401

Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

FED. R. EVID. 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.

FED. R. EVID. 801(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.

FED. R. EVID. 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.

FED. R. EVID. 803(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.

FED. R. EVID. 804(B)(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.