

October Term 2007

In the Supreme Court of the United States

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Docket No. 07-117
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STUART SLOPE, BY AND THROUGH HIS PARENTS
AND LEGAL GUARDIANS,
STACY AND SERINA SLOPE,

Petitioner,

v.

UNDER THE SEA TOYS, INC.,

Respondent.

—————
*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT*

—————
BRIEF FOR THE PETITIONER
—————

QUESTIONS PRESENTED

1. Whether the holding in *Williamson v. United States* was a narrow ruling, which determines only the admissibility of statements collateral to declarations against penal interest in the context of a criminal case under Federal Rule of Evidence 804(b)(3).
2. Whether a statement against interest is robbed of its inherent reliability by the declarant's later act of suicide.
3. Whether the common law rule that the expressed intent of a declarant is admissible as evidence of the subsequent act of another was fully codified by Federal Rule of Evidence 803(3).
4. Whether the mere generation of a post-injury report is insufficient to constitute a "remedial measure" and, thus, undeserving of the protection of Rule 407, especially when that report was also involuntarily made.

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OPINIONS BELOW

The opinions below are unreported. They are, however, reproduced in the Record. The opinion and order of the United States District Court for the Southern District of Boerum appears in the Record at pages seventeen (17) through twenty-one (21). The opinion of the United States Court of Appeals for the Fourteenth Circuit is found in the Record at pages twenty-eight (28) through forty-five (45).

RELEVANT STATUTORY PROVISIONS

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

- A) **Exclusive Remedy.** Except as provided herein, no product liability action, including negligence, strict liability, breach of an implied warranty of merchantability, or any other claim based exclusively upon a manufacturing or design defect, may be brought against a distributor or commercial seller of a toy.
- B) **Failure to Warn.** One engaged in the business of selling or otherwise distributing toys is subject to liability for harm to persons or property caused by the seller's or distributor's failure to provide a warning after the time of sale or distribution of a toy if a reasonable person in the seller's position, including one having the knowledge possessed by the distributor or seller, would provide such a warning.
- C) **Failure to Recall.** One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's or distributor's failure to recall a toy after the time of sale or distribution if:
- 1) a reasonable person in the situation, including one having the knowledge possessed by the distributor or seller, would recall the product; or
 - 2) the seller or distributor undertakes to recall the toy but fails to act as a reasonable person in recalling the product.
- D) **No Punitive Damages.** In any action based upon this section, punitive damages may neither be sought, nor awarded. (Added L. 2004, ch. 1 [Boerum Tort Reform Act]).

Fed. R. Evid. 804. Hearsay Exceptions; Declarant Unavailable

....

(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, 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.

Fed. R. Evid. 803. 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.

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.

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STATEMENT OF THE CASE

Petitioner Stuart Slope (Petitioner) appeals the District Court's grant of summary judgment to Respondent Under the Sea Toys, Inc. (Respondent), which was affirmed by the Court of Appeals for the Fourteenth Circuit. (R. at 28). When the action was commenced, Petitioner was a five year old child and resident of Park Slope, Boerum and Respondent was a California corporation and the exclusive U.S. distributor of the Finn E. Shark toy. (R. at 28). The toy was manufactured by BFP Tattel, Inc. (Tattel), a Legolian corporation that is now dissolved and not a party to this suit. (R. at 28).

During the summer of 2005, Petitioner saw the hit movie "Shark Attack," starring Finn E. Shark, three times. (R. at 2). He received a plush Finn E. Shark toy as a holiday gift in December that same year. (R. at 2). Petitioner loved the toy so much that he carried it everywhere he went, maintaining continual contact with the toy, and was even observed licking the shark toy's eyes. (R. at 2). Within weeks of receiving the toy, the boy started exhibiting alarming signs of illness including: periods of unconsciousness, headaches, confusion, dizziness, sensory problems, mood changes, and memory, and concentration problems. (R. at 2). Stacy and Serina Slope, Petitioner's parents, sought medical attention for their son on January 2, 2006. (R. at 3). The doctors concluded that Slope had suffered irreversible brain damage as a result of being exposed to the rare rH-12 toxin. (R. at 3).

During the period between Petitioner watching "Shark Attack" and his parents buying the Finn E. Shark toy for him, Legolian doctors diagnosed record numbers of children with brain damage caused by rH-12. (R. at 3). By September 30, 2005, the Legolian government launched an investigation to ascertain the source of the rH-12 outbreak. (R. at 3). By the end of September 2005, CEO of Tattel Mimi Jussel (Jussel) was aware that Tattel was the sole

manufacturer of the toy containing the rH-12 toxin. (R. at 24). Respondent, the sole American distributor of the Finn E. Shark toy, became aware in October 2005, that its toy may contain the rH-12 toxin. (R. at 25). On January 16, 2006, Respondent issued a report containing the factual findings of its investigation into the presence of rH-12 in its Finn E. Shark toy. (R. at 25). Respondent recalled the toy on April 1, 2006. (R. at 13).

On April 14, 2006, Petitioner, filed a complaint in the Eastern District of Boerum claiming jurisdiction under 28 U.S.C. § 1332 for a violation of § 204 of the Boerum Tort Reform Act. (R. at 1, 3).

Arguments on Respondent's Motion for Summary Judgment were heard in the district court on June 29, 2006. (R. at 5). Petitioner argued for the admission of four pieces of evidence, each of which, as Respondent conceded, would alone satisfy the knowledge element necessary for Petitioner's suit to proceed. (R. at 18). The first item, a business journal written by Jussel, was excluded because the district court found it did not meet the admissibility requirements of Rule 804(b)(3) as interpreted by the Supreme Court in *Williamson v. United States*. (R. at 19). The second item, a letter written by Jussel to her daughter, was excluded because the court found that her suicide a week after the writing of the letter made the declaration's against interest contained within inherently unreliable. (R. at 19). The third item, a portion of the deposition transcript of Jussel's former secretary, was excluded because a statement of intent could not be used to prove subsequent conduct of another under Rule 803(3). (R. at 20). The final item, an internal report from Respondent, was excluded because the report was deemed to be a "subsequent remedial measure, which are excluded from evidence by Rule 407. (R. at 20).

Respondent's Motion for Summary Judgment was granted on July 10, 2006 because Petitioner could not prove the essential element of knowledge. (R. at 17). This dismissal was

affirmed by the United States Court of Appeals for the Fourteenth Circuit on January 3, 2007. (R. at 39). Petitioner is now before this court on writ of certiorari from the Court of Appeals for the Fourteenth Circuit. (R. at 46).

SUMMARY OF THE ARGUMENT

The sole issue before this Court is whether it will refuse to condone the use of the Federal Rules of Evidence in a manner that hides the truth and brings about a miscarriage of justice, contrary to the express purpose of the Federal Rules. The District Court did just that when it excluded all four pieces of evidence offered by the Petitioner to meet the element of knowledge. The proper application of the Federal Rules of Evidence would admit all four pieces of evidence, and ensure a just resolution to the instant case. Because the courts below erroneously applied the Federal Rules of Evidence at issue, this Court should reverse those rulings and remand for further proceedings.

Exhibit B, the letter written by Jussel, shows her unmistakable intent to continue living. Seven days after writing the letter, Jussel committed suicide after being diagnosed with a life-threatening illness. Since Exhibit B was not written in contemplation of suicide, the admissibility of both it and Exhibit A are controlled by Federal Rule of Evidence 804(b)(3). The plain text of that Rule requires the admission of statements against interest, including collateral statements, unless the circumstances in which the declaration was made places it within the narrow holding of *Williamson v. United States*. The circumstances surrounding both Exhibits A and B do not place it within that holding, and, thus, it was reversible error for the District Court to exclude them.

Exhibit C makes clear Jussel's intent to inform the Respondent that its Finn E. Shark toys were poisoning children. Statements of present intent were competent to show the subsequent

actions of another at common law. Federal Rule 803(3) fully codified that common law rule. Therefore, the District Court's exclusion of Exhibit C was reversible error.

Exhibit D clearly shows the Respondent's knowledge of the danger posed by its Finn E. Shark toy. Neither factual information nor a written recommendation to perform an act has the potential to make anyone or anything safer. Therefore, such a document cannot fall within the protective mantle of Federal Rule of Evidence 407. Such a document is even less worthy of that protection when the document is generated pursuant to a government directive. Thus, the District Court's exclusion of Exhibit D must be reversed.

Therefore this Court should reverse the rulings of the lower courts and remand for further proceedings.

STANDARD OF REVIEW

The standard of review for evidentiary rulings is abuse of discretion. If, however, the district court applies the wrong legal rule, the standard is *de novo*. *Moss v. Ole S. Real Estate, Inc.*, 933 F.2d 1300, 1305-06 (5th Cir. 1991). Alternatively, this standard can be phrased as stating that an error of law is an abuse of discretion. *See United States v. Buck*, 324 F.3d 786, 791 (5th Cir. 2003) (noting that district court abuses discretion where decision to admit evidence is based on error of law).

ARGUMENT

I. The statements found in Jussel's business journal are admissible because their inherently reliable nature does not subject them to the particularized weaknesses that traditionally exclude hearsay statements.

In a personal business journal dated October 10, 2005, Jussel, CEO of Tattel, recounted a conversation between herself and Legolian officials in which she admitted knowledge that the Finn E. Shark toy produced by her company contained the dangerous toxin rH-12. In the entry

she stated: “I knew—everybody 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. We are going to lose so much business.” (R. at 22). This was undoubtedly a declaration against pecuniary interests that would expose her to civil liability and is admissible under the plain language of the hearsay exception found in Federal Rule of Evidence 804(b)(3). However, the statement also served to implicate the Respondent. The District Court, which was affirmed by the Fourteenth Circuit, mistakenly found that the statement implicating Respondent was an inadmissible collateral statement under the holding in *Williamson v. United States*. Because those rulings were erroneous, this Court should reverse and remand.

A. The plain language of the hearsay exception found in Federal Rule of Evidence 804(b)(3) would admit the statements in Jussel’s business journal.

Exhibit A was excluded despite its compliance with the unambiguous text of Rule 804(b)(3). The general prohibition on the admission of hearsay statements as evidence is based on the belief that out-of-court statements lack the safeguards that create an in-court statement’s reliability, such as an oath, perception of the gravity of court proceedings, and a chance to observe the witness. *Williamson v. United States*, 512 U.S. 594, 598-99 (1994). However, the Federal Rules of Evidence do recognize certain kinds of hearsay statements that are more likely to be reliable, and thus exceptions exist for these statements. *Id.* The statement-against-interest exception allows into evidence a statement that:

[A]t the time of its making [was] 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.

Fed. R. Evid. 804(b)(3) (emphasis added). “[F]rom the very beginning of this exception, it has been held that a declaration against interest is admissible, not only to prove the disserving fact

stated, but also to prove other facts contained in collateral statements connected with the disserving statement.” Bernard S. Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 Harv. L. Rev. 1, 57 (1944). Wigmore states that, because a declaration against interest is “made under circumstances fairly indicating declarant’s sincerity and accuracy,” the entire statement should be admitted into evidence. 5 John H. Wigmore, *Evidence in Trials at Common Law* § 1465, at 271 (3d ed. 1940).

In her business journal, Jussel stated that she told the Legolian Undersecretary of Commerce: “I knew—everybody 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. We are going to lose so much business.” (R. at 22). This admission, which showed her knowledge of the danger her company’s product posed, was clearly against her pecuniary interests, and served to open her to civil liability. Respondent has conceded as much. (R. at 8). Jussel was the CEO of Tattel and, therefore, would be capable of making accurate statements regarding the toy it produced and about her company’s relationship with Respondent. Because she opened herself up to civil liability, she could not avoid full liability for any harms caused. Thus, there was little incentive for her to lie, especially in a personal business journal that was never intended to be open to the public. By the plain language of Rule 804(b)(3) and the tradition that surrounds that Rule, this statement is a statement against the declarant’s interests and is therefore admissible under the Rule.

B. This Court’s narrow holding in *Williamson v. United States* extends only to statements against declarant’s criminal liability in the context of a criminal case and, as such, does not require exclusion of the statements made in Jussel’s business journal.

Exhibit A does not fit within the narrow factual setting found in *Williamson*, and, thus, *Williamson* does not control its admissibility. In *Williamson v. United States*, this Court was asked to determine whether an entire declaration that contains both self-inculpatory, and either

neutral or self-exculpatory collateral statements, is admissible under Rule 804(b)(3), or whether admissibility should be limited to the self-inculpatory statements alone. 512 U.S. 594. This Court chose the narrower rule: that only self-inculpatory statements should be admissible, even if contained within a broader narrative. *Id.* at 604, 610. However, the plain language this Court used in deciding *Williamson* makes clear that it intended *Williamson* to exclude collateral statements under 804(b)(3) only when attached to statements against penal interests that subject the declarant to exclusively criminal liability.

In *Williamson*, the declarant, Harris, was stopped and subsequently arrested for possession of a large amount of cocaine in his rental car. *Id.* at 596. During interviews, Harris told a DEA agent that he got the cocaine from an unidentified Cuban in Ft. Lauderdale, that the cocaine belonged to Williamson, and that it was going to be delivered that night to a particular dumpster. *Id.* The agent attempted to arrange a controlled delivery of the cocaine, to which Harris immediately took exception. *Id.* Harris stated that he had lied about the Cuban and the dumpster, but the real story was that he had been transporting the cocaine to Atlanta, with Williamson traveling in front of him in another rental car. *Id.* Harris also said that, after his car was stopped, Williamson turned around and drove past the location of the stop, where he could see Harris' car with its trunk open. *Id.* at 597. Based on this a controlled delivery would be pointless. *Id.* Harris refused to testify at Williamson's trial. *Id.* The district court ruled that, under Rule 804(b)(3), the agent could relate all of what Harris had said to him. *Id.* The Court of Appeals affirmed. *Id.* at 598.

Upon consideration by this Court, six Justices believed that a narrow definition of "statement" was mandated by the Rule. These Justices, however, split four to two in applying that narrow test to Harris' declarations. Justice O'Connor, writing for herself and Justice Scalia,

declared that some of Harris' confession would have been admissible under Rule 804(b)(3), specifically the directly self-inculpatory statements in isolation. They believed remand was required because the district court did no intensive examination as to what types of statements could and could not be admitted from the broader narrative. Justice Ginsburg, joined by Justices Blackmun, Stevens, and Souter, agreed that Rule 804(b)(3) does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory.

Unlike Justice O'Connor, Justice Ginsburg concluded that none of the statements made by Harris were inculpatory in any sense, because Harris' arguably inculpatory statements are too closely linked to his self-serving declarations to be trustworthy. Justice Ginsburg was also more skeptical about whether a post-custodial statement to a police officer could ever be self-inculpatory to the extent it implicated any person other than the declarant. Justice Ginsburg believed that the case should be remanded, but only to determine whether the admission of Harris' statements constituted harmless error.

Justice Kennedy, joined by Chief Justice Rehnquist and Justice Thomas, believed a broader meaning of the term "statement" was required. Kennedy interpreted Rule 804(b)(3) to require exclusion of a collateral self-serving statement; collateral neutral statements, though, would be admissible. Though he rejected the majority's argument, Kennedy still took a narrow view of the term "statement," and emphasized that hearsay would not be admissible under the Rule unless, in context, it was truly self-inculpatory, at least in part. While there was disagreement among the Justices in *Williamson*, it is clear that the majority of the Court has taken a narrow approach to statements offered under Rule 804(b)(3).

The plain language of *Williamson* makes clear that this Court’s holding only extends to declarations against a declarant’s penal interests. The very first statement in *Williamson* indicates that this Court intended only to “clarify the scope of the hearsay exception for statements against *penal interest*” for Federal Rule of Evidence 804(b)(3). *Williamson*, 512 U.S. at 596 (emphasis added). Each time the majority quotes 804(b)(3), it edits the language of the statute down to refer only to “criminal liability” or “penal interests.” *E.g., id.* at 599, 603, 606-07 (multiple individual references on each page). This Court did so even though the language of the statute specifically refers to “civil liability” and “pecuniary interests” as well. Fed. R. Evid. 804(b)(3). In fact, the word “civil” only appears once and the word “pecuniary” only appears twice in the entire opinion, only in the concurring opinion of the three Justices who did not agree with the majority, and only when Justice Kennedy is simply quoting 804(b)(3) in its entirety. *Id.* at 611. This Court never seriously discussed these interests, nor specifically mentions them again. No less than ten times, this Court gave illustrative examples to help convey the types of statements it was discussing. Every single example given by this Court was in the criminal context, such as “yes, I killed X,” “I was robbing the bank on Friday morning,” or “I hid the gun in Joe’s apartment.” *E.g., id.* at 603, 606-07, 611-12, 616-18 (multiple individual examples on each page in the range). There are several instances where a Justice will give the hearsay exception they are discussing a shorthand name. All of those shorthand references to the exception indicate that the Justices thought they were only discussing penal interests and criminal liability, such as Scalia’s “statement-against-penal-interest exception” or Ginsburg’s “the exception for statements against penal interest.” *E.g., id.* at 605, 607, 616.

This Court’s central reason for narrowing the definition of “statement” and for limiting admissibility only to directly self-inculpatory statements is also a strong indicator that

Williamson only extends to statements against penal interests. This Court’s primary concern in the analysis of *Williamson* is the fear that criminal defendants will shift blame with collateral statements that are included within a generally self-inculpatory narrative. The Justices make reference to their fears of this problem throughout the *Williamson* opinion. *E.g., id.* at 601, 603, 607-09, 619 (multiple references within each range). As Scalia stated, “the Court recognizes the untrustworthiness of statements implicating other persons. A person *arrested* in incriminating circumstances has a strong incentive to shift blame or downplay his role in comparison to that of others, in hopes of receiving a shorter sentence and leniency in exchange for cooperation.” *Id.* at 607-08 (emphasis added). Obviously, the language of these statements, which refer to criminal defendants and arrest situations, indicate that the Justices were only contemplating a criminal context for these declarations. There is, however, also the fact that the concept of blame shifting, in order to reduce penalties, generally *only* occurs in the criminal, and not in the civil, context. This makes clear the *Williamson* holding was meant to extend solely to declarations against penal interests.

C. The statements found in Jussel’s business journal are admissible because statements collateral to statements against pecuniary interests in civil cases were not touched by this Court’s holding in *Williamson v. United States* and are inherently reliable, unlike statements made against penal interests.

Statements collateral to a statement against pecuniary interest are more reliable because they do not present the same blame-shifting concerns this Court struggled with in *Williamson*. The District Court excluded the statements in Plaintiff’s Exhibit A, because it believed that, though it was a declaration against interest, it contained collateral statements that implicate the responsibility of another party, making the statements violative of this Court’s ruling in *Williamson v. United States*. (R. at 19). *Williamson*, however, only applies to statements against

penal interests. Since the statements in Jussel's business journal were against her pecuniary interest, they were inherently reliable and were impermissibly excluded by the District Court.

As discussed above, *supra* Part I.B, based purely on the language of this Court, the holding in *Williamson* only extends to statements against penal interests. The reason for the holding of the Justices writing in *Williamson* was an overriding fear about the reliability of any statements made by an arrestee that are not directly self-inculpatory being admitted into evidence. This fear stemmed from a belief that, in the context of statements against penal interests, criminals have a strong interest to shift blame from themselves to others in order to reduce any penalties they might face for their crimes. *Williamson*, 512 U.S. at 601. This Court believed that statements collateral to a criminal's self-inculpatory statements were extremely dangerous, since "one of the most effective ways to lie is to mix falsehood with the truth, especially truth that seems particularly persuasive because of its self-inculpatory nature." *Id.* at 599-600. But statements against pecuniary interests and statements collateral to them, such as those from Jussel's business journal, do not share the same kinds of weaknesses that made this Court wary of the reliability of statements in the penal interest context.

Statements against pecuniary interest do not remotely involve situations like those found in the facts of *Williamson*. When dealing with statements made against pecuniary interests we are not dealing with a criminal suspect that is, while cowering in the face of the custodial police interrogations, inculpatory himself because he was essentially caught "red-handed," but at the same time desperately attempting to lessen his own liability by implicating others in collateral statements. In the context of civil liability, the general rule is that those at fault for causing some harm to a plaintiff are jointly and severally liable for that harm, meaning that each defendant is liable for the entire amount of damages regardless of who the plaintiff chooses to sue. 32A Am.

Jur. 2d *Federal Courts* § 1026 (2007). This means that, regardless of what collateral statements might also be made, the admission by the declarant that he is civilly liable for some harm means the declarant is now responsible for the entire amount of damages. The plaintiff could choose to sue only the declarant for the entire amount of damages; it would be up to the declarant to seek contribution from other responsible parties. Moreover, even death does not remove that liability. See 59 Am. Jur. 2d *Parties* § 334 (2007) (“[A] defendant named in a complaint who dies after the complaint was filed was in existence at the time of the action and substitution may be available even if the defendant died before being served with process.”) (citing Fed. R. Civ. P. 25(a)(1)); 31 Am. Jur. 2d *Executors & Administrators* § 551 (2007) (Among other things for which an estate [are] . . . torts of the decedent.”). The absence of the ability to effectively shift blame in the civil context removes the overriding reason why this Court found statements collateral to declarations against penal interests so unreliable. Regardless of whether a party that has admitted pecuniary responsibility for a harm later implicates others, it can be solely liable for the damages. Undoubtedly, this is something of which a sophisticated corporate defendant, such as Respondent, would be aware.

Because the plain language of Federal Rule of Evidence 804(b)(3) would allow the admission of statements against pecuniary interests, and the holding of the Supreme Court in *Williamson v. United States* does not contemplate the exclusion of statements collateral to statements against pecuniary interests, the District Court erred in holding that statements found in Jussel’s business journal were inadmissible.

II. The letter written by Jussel to her daughter is admissible, because it was not a suicide letter and is not subject to the particularized weaknesses that traditionally exclude hearsay statements.

The District Court erred in excluding statements found in a personal letter written by Jussel to her Daughter in early October of 2005. In the letter, Jussel made declarations against her penal interests, believing she would be held criminally liable for the harm her company's toys caused. (R. at 23). She also went on to say that she informed Respondent of the danger posed by the product. (R. at 23). The district court excluded the letter because, as a result of Jussel's suicide a week after the letter was sent, it incorrectly characterized the letter as a suicide letter, therefore making it inherently unreliable. (R. at 19). The district court failed to address the further argument by the defendant that the letter was inadmissible under the holding in *Williamson v. United States*, discussed *supra* Part I. The plain language of the letter and intervening circumstances in Jussel's life demonstrate the letter was not a suicide letter. Furthermore, statements against penal interests used in civil cases are not excluded by the holding in *Williamson*, especially statements of the type found in the letter, which have a high degree of inherent reliability.

A. The District Court erred in excluding statements made in Jussel's letter to her daughter because it incorrectly characterized the letter as a suicide letter.

The letter written by Jussel was not a suicide letter. The District Court incorrectly characterized the letter written by Jussel to her daughter in October of 2005 as one written in contemplation of suicide. Therefore, the court believed the statement against penal interest contained therein was inherently unreliable. (R. at 19). But a fair reading of this letter can only lead to the conclusion that it was simply an open and heartfelt personal letter from a mother to a daughter, regarding a very troubling issue. The letter does not even hint at the contemplation of suicide. In fact, the letter contemplates the future, one in which Jussel is alive. As Jussel states in the letter, her desire in life is to love her daughter, be a role model and a good mother to her, and "one day hopefully be a grandmother." (R. at 23). Also, Jussel makes it clear in the letter

that her “biggest fear is losing [her daughter], not being able to take care of [her] and be there for [her], as mother should.” (R. at 23). It is utterly counterintuitive to believe that an individual whose greatest fear was losing the chance to be with her child would choose suicide as the solution. That statement makes far more sense when viewed in the context that Jussel intended to live and be there for her daughter, but understood that the mistakes she was now candidly admitting to her daughter might make it very difficult.

Bolstering the argument that this letter was not a suicide letter are the events that occurred after the writing of the letter. Jussel did not commit suicide for seven days after she wrote the letter. During that intervening period, Jussel was diagnosed with a life-threatening illness. (R. at 10). If temporal proximity of a life-threatening illness has any bearing on an individual’s choice to commit suicide, as common sense would tell us it does, then it is far more likely that Jussel committed suicide because of her diagnosis, rather than the events involving her company’s product. The gap in time of seven days, alone, is sufficient to cast this letter as just that, a letter, and not a suicide note. The intervening fact of Jussel’s newly discovered life-threatening illness only serves to support this conclusion.

The Petitioner recognizes, as the District Court and the Fourteenth Circuit did, the long-standing distaste for admitting declarations against interest made before or in anticipation of suicide. (R. at 34). As the Court of Appeals made clear, declarations of this type do not carry the normal reliability safeguard that normal declarations against interest carry, since the fact that the declarant knows he will not face the consequences of his statements, the impending liability attached to those statements no longer guarantees trustworthiness. Note, *The Judicial Interpretation of Suicide*, 105 U. Pa. L. Rev. 391, 404-05 (1957). Allowing statements of this type does open the door to a declarant being able to “rewrite” their own history. *United States v.*

Angleton, 269 F. Supp. 2d 878, 890 (S.D. Tex. 2003). These fears, however, simply do not apply to the letter written by Jussel, since it was not a letter written in contemplation of suicide.

B. The statements made in the letter written by Jussel to her daughter are admissible under the hearsay exception found in Federal Rule of Evidence 804(b)(3).

Because the District Court excluded the letter written by Jussel due to the court's incorrect characterization of it as a letter written in contemplation of suicide, it did not address the admissibility of the statements against penal interest contained under the exception to the hearsay rule found in Rule 804(b)(3) and *Williamson's* interpretation thereof. Since the above argument makes it clear that the letter was not written in contemplation of suicide, *supra* Part II.A, Petitioner contends that Exhibit B is admissible in its entirety, because it neither offends the language of 804(b)(3) nor falls within the factual circumstances which would make *Williamson* apposite. Therefore, the District Court and the Fourteenth Circuit should be reversed.

The letter written by Jussel contained the statements:

I am behind these sick children. I am the cause. I only wish I had done something sooner. 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 and that rH-12 had dangerous effects on children. I told them as soon as I knew. But it is too late, was too late.

(R. at 23). Following those statements, Jussel acknowledged that, after talking to her attorney and Legolian government officials, she was facing an all but certain prison term. (R. at 23). Jussel's statements are clearly statements against her penal interests; a point conceded by the Respondent. (R. at 12). As noted above, *infra*, part I.A, the plain language of 804(b)(3) and tradition surrounding the exception at common law would not exclude any of these statements.

The statements in Jussel's letter to her daughter do not fall within the *Williamson* holding. In *Williamson*, this Court found the more conservative commentaries of McCormick, discussing the

common law exception for statements against declarant's interests, highly influential when making its decision. *Williamson*, 512 U.S. at 602. McCormick understood that the view of declarations against interest at common law, generally, was that disserving statements should always be allowed, but self-serving statements should generally be excluded. *Id.* However, McCormick also makes clear that the common law of England never allowed in statements against penal interests, regardless of the situation, and American common law only allowed statements against penal interests to be admitted into civil cases when that statement opened the defendant to civil liability because the crime admitted to was also a tort. C. McCormick, *Law of Evidence* § 278, pp. 673-74 (2d ed. 1972). Also, at common law, the whole of statements against pecuniary interests, including collateral statements, were generally admissible without concern. *Id.* § 277, pp. 671-72. When Congress enacted the Federal Rules of Evidence, the plain language found in 804(b)(3) virtually disregarded the common law, opening Pandora's Box and allowing in all forms of statements against penal and pecuniary interests. With its holding in *Williamson*, this Court was repairing that damage. The *Williamson* Court formulated a new rule for allowing statements against penal interest to be admitted in criminal cases, but retained the flavor of McCormick's explication of the common law by requiring that only disserving statements be admitted in that context. The arguments brought forth by Petitioner in Parts I and II of this brief fit perfectly into the framework this Court established in *Williamson*. The entire business journal entry at issue in Part I—its disserving and collateral statements—should be admitted because it is a statement purely against pecuniary interest in a civil case. The statements in the letter at issue here in Part II, inculpatory and collateral, should be admitted because, while they are statements against penal interest, they are being used in a civil case and the crime being admitted to was

also an independent tort. Boerum Tort Reform Act § 204. Since those statements should have been admitted, the District Court erred in excluding them.

C. The factual circumstances surrounding the statements made in Jussel’s letter make them inherently reliable.

Exhibit B should have been admitted, because none of the circumstances causing concern for the *Williamson* Court exist in this case. As the previous argument indicates, the statements found in Jussel’s letter would have been admissible at common law. Petitioner, however, recognizes that, regardless of common law notions of admissibility, the *Williamson* Court had serious misgivings about the reliability of statements regarding criminal liability, because it believed the very nature of those statements was unreliable, because arrestees have a strong incentive to shift blame to others in order to reduce their own liability. As Justice Scalia precisely stated: “[A] person *arrested* in incriminating circumstances has a strong incentive to shift blame or downplay his role in comparison to that of others, in hopes of receiving a shorter sentence and leniency in exchange for cooperation.” *Williamson*, 512 U.S. at 607-08.

Williamson does not control the admissibility of Exhibit B, because the facts in this case are entirely different. As the *Williamson* Court noted, the determination of whether collateral statements are admitted should be a “fact-intensive inquiry, which would require careful examination of all the circumstances surrounding the criminal activity involved.” *Id.* at 604. As the Advisory Committee on Rule 804(b)(3) made clear,

[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 qualifying.

Fed. R. Evid. Rule 804(b)(3) advisory committee’s note. One circuit has stated: “*Williamson* does not mean that the trial judge must always parse the statement and let in only the inculpatory

part.” *United States v. Paguio*, 114 F.3d 928, 934 (9th Cir. 1997). For that court, *Williamson* “means that the statement must be examined in context, to see whether as a matter of common sense the portion at issue was against interest and would not have been made by a reasonable person unless he believed it to be true.” *Id.* At some times this inquiry would call for exclusion, and at other times it would not. *Id.*

The facts of the instant case call for admission. In cases like *Williamson*, courts are dealing with admitted criminals, in custodial interrogation settings, in the context of criminal cases. That situation is the exact context in which a criminal would be most likely to blame shift, as this Court feared in *Williamson*. In the current case, Jussel knew she was most likely going to face some sort of criminal penalty, but she was by no means a criminal in the sense of *Williamson*: an individual caught red-handed by police in the commission of a very serious crime from which there could be little doubt he would face serious penalties. 512 U.S. at 596-97. Jussel’s declaration against her penal interests took place in a private and heartfelt letter to her daughter, in which Jussel was hoping to inform her daughter of a situation that could be extremely hurtful and embarrassing. Jussel’s admission was freely made under circumstances that indicate no incentive to lie. The admissions that come from circumstances like those found in *Williamson*, on the other hand, are made in the context of intense custodial interrogations by police, where a criminal has every reason to lie in the hopes of saving himself. To ignore the vast differences between the facts in the current case and cases like *Williamson*, choosing instead to apply a blanket rule, is to ignore the inquiry as to reliability that was the foundation of the *Williamson* opinion and the Federal Rules of Evidence as a whole.

The statements contained in Exhibit B were improperly excluded by the District Court. The lone fact that Jussel committed suicide a week after writing the letter does not change the fact

that, at the time written, Jussel was clearly contemplating further life. Her statements in the letter, then, were not deprived of their against-interest status by her later conduct. The circumstances surrounding Jussel's letter are easily distinguished from those in *Williamson*, which makes that case inapposite to Exhibit B's admissibility. For these reasons, the District Court erred as a matter of law, and, accordingly, this Court should reverse both the District Court and the Fourteenth Circuit.

III. Jaffe Peetz's deposition testimony regarding Jussel's intent to travel to California and meet with Respondent to discuss the dangers of the shark toy was admissible to show Respondent's knowledge of that defect.

The District Court erred as a matter of law by excluding Exhibit C, because Rule 803(3) codified the reasoning in *Mutual Life Insurance Co. of N.Y. v. Hillmon*. That case held that a declarant's statement of his then existing intent is admissible as proof of another's conduct. In the case *sub judice*, the Petitioner sought to introduce Jussel's out-of-court statement of her intent to travel to California to meet with the Respondent's CEO and discuss the problems arising from rH-12 as evidence. This testimony makes the likelihood of both the occurrence of that meeting and its content more probable. That factual scenario falls squarely within the *Hillmon* doctrine, which was fully codified in Rule 803(3). Therefore, this Court should reverse the District Court's exclusion of Exhibit C.

A. Peetz's testimony would have been admissible under the common law state of mind exception to the hearsay rule.

Exhibit C would have been unquestionably admissible at common law as it stood prior to the enactment of the Federal Rules of Evidence. For over one hundred years, this Court's decision in *Mutual Life Ins. Co of N.Y. v. Hillmon* has represented "the starting point" for courts analyzing statements of intention used to prove subsequent acts. 4 J. Weinstein's Evidence ¶ 803(3)[04], at 803-116 (1988). In that case, there was a factual dispute over the identification of a body.

Mutual Life Ins. Co. of N.Y. v. Hillmon, 145 U.S. 285 (1892). Mrs. Hillmon claimed that the body belonged to her dead husband and thereafter demanded that Mutual Life Insurance pay the proceeds of her husband's insurance policy. *Id.* at 294. Defending against this claim, the insurance company contested that the alleged body of Mr. Hillmon was actually the body of Frederick Walters, thereby asserting no obligation to pay existed. *Id.* at 294-95. The insurance company attempted to introduce certain statements from letters written by Walters, which illuminated his intent to accompany Hillmon out of Wichita, so that the jury could infer from this evidence that Walters actually left Wichita with Hillmon. *Id.* at 295-96.

This Court held that the letters were admissible as proof that Walters had the intention of going away and did in fact go away with Hillmon. *Id.* at 296. Moreover, this Court opined that after a declarant's death, there "can hardly be any other way of proving" his intent other than by using the state of mind of the declarant at the "very time and under circumstances precluding a suspicion of misrepresentation." *Id.* at 295. Accordingly, this Court held: "'Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence Such declarations are regarded as verbal acts and are as competent as any other testimony, when relevant to the issues.'" *Id.* at 296 (quoting *Insurance Co. v. Mosley*, 75 U.S. (8 Wall.) 397, 404, 405 (1869)).

In the instant case, the facts are nearly identical to those presented in *Hillmon*. Jussel read the cover story addressing the rH-12 outbreak in Legolia on September 30, 2005. (R. at 24). After reading the story, Jussel related to her secretary, Jaffe Peetz, her intention to go to California to meet with Troy Ledbetter to tell him "what's going on." (R. at 24). Under the reasoning in *Hillmon*, Jussel's statement of her then present intent to meet with Ledbetter would have been admissible at common law as evidence that Jussel both met with Ledbetter and

discussed the rH-12 defect. The question then becomes whether Rule 803(3) codified the common law state of mind exception to the hearsay rule.

B. The *Hillmon* doctrine was codified in Federal Rule of Evidence 803(3).

The plain text of Rule 803(3) codified the common law state of mind exception to the hearsay rule, which included the *Hillmon* doctrine. That Rule provides that “[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)” is an exception to the hearsay rule. Fed. R. Evid. 803(3) (emphasis added). The Petitioner acknowledges there is conflicting legislative history behind Rule 803(3): the Advisory Committee intended to leave the *Hillmon* doctrine undisturbed while the House Judiciary Committee sought to limit 803(3) to proving acts of the declarant only. Fed. R. Evid. 803(3) advisory committee’s note; H.R. Rep. No. 93-650, at 13-14 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7075, 5087. This conflict, though, makes clear the reason behind this Court’s distrust of legislative history. *Exxon Mobile Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (“As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material.”). In this case, Petitioner proffered Peetz’s deposition testimony, which recounted Jussel’s statement: “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. at 24). That statement is, on its face, a declaration of Jussel’s “then existing . . . intent.” Fed. R. Evid. 803(3). That statement, then, is per se admissible, because it falls squarely within the text of the Rule.

Moreover, the Ninth Circuit has repeatedly concluded that Rule 803(3) fully codified the state of mind exception to the hearsay rule, including the *Hillmon* doctrine. In *United States v. Pheaster*, the Ninth Circuit was confronted by an out-of-court statement of a deceased victim,

which indicated the victim was going to meet with the accused that evening to receive a pound of marijuana. 544 F.2d 353, 375 (9th Cir. 1976). The Ninth Circuit affirmed the trial court's admission of the declarant's then existing intent as proof of the accused's conduct, holding that these statements, and similar statements, are admissible under the firmly rooted "state of mind" exception to the hearsay rule in accordance with *Hillmon*. *Id.* at 380. That court explained that 803(3) encompassed and codified *Hillmon* by referencing the Advisory Committee Notes and by discounting the House Report. *Id.* at 379. Interestingly, the trial being reviewed on appeal had taken place prior to the 1975 adoption of the Federal Rules. While the Federal Rules did not control the trial itself, the Ninth Circuit explicitly stated that it was looking to Rule 803(3) "for any light that [it] may shed on the status of the common law at the time of the trial." *Id.* at 379. That light led the court to affirm the trial court's admission of the testimony against the accused. The result in *Pheaster* has been followed by subsequent Ninth Circuit decisions such as the holding in *United States v. Astorga-Torres*, 682 F.2d 1331, 1335-56 (9th Cir. 1982), and *Terrovona v. Kincheloe*, 852 F.2d 424, 427 (9th Cir. 1994).

This Court must conclude that the lower courts erred and the statements contained in Exhibit C are admissible as a matter of law, under the reasoning contained in *Pheaster*. Exhibit C makes crystal clear Jussel's intent to go to California to meet with Ledbetter and apprise him of the impending and costly rH-12 disaster. (R. at 24). Therefore this Court should hold that Exhibit C is admissible, because it fits within the plain language of 803(3), which fully codified the *Hillmon* doctrine.

C. Exhibit C is admissible even under other courts' limited inclusion of the *Hillmon* doctrine into Rule 803(3).

Even under the rubrics of limited admissibility adopted by some of the other Circuit Courts, Exhibit C would be admitted. The Second Circuit has adopted a more middle-of-the-road

approach to admitting *Hillmon* type statements. That circuit allows the admission of *Hillmon* statements under Rule 803(3) if there is independent evidence connecting the declarant's statement with the non-declarant's subsequent conduct. *United States v. Best*, 219 F.3d 192, 198 (2d Cir. 2000) (following *United States v. Delvecchio*, 816 F.2d 859, 863 (2d Cir. 1987)).

In this case, since a district court is not bound by the rules of evidence when determining whether to admit a piece of evidence, Fed. R. Evid. 104(a), the District Court should have considered corroborating independent evidence contained in Exhibits A, B, D, and E. The information contained in every Exhibit bolsters the conclusion that the meeting between Troy Ledbetter and Jussel, as it is described by Exhibit C, took place. First, Jussel's personal business journal, Exhibit A, indicates that Respondent—the sole distributor in the U.S.—knew that there was rH-12 in the Finn E. Shark toy no later than the October 10, 2005. (R. at 22). Jussel's consistent statements that Respondent knew about the rH-12 toxin corroborates the statements made in Exhibit C. Second, Jussel's personal letter to her daughter dated October 11, 2005, asserts that she 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. at 23). This statement directly substantiates Jussel's statements contained in Exhibit C that she intended to go to California to meet with Ledbetter. Third, the U.S. Consumer Product Safety Commission Directive, dated October 20, 2005, indicates that someone in America had been apprised of the dangers posed by rH-12 to the American toy market. (R. at 27). Exhibit E fails to contradict and indeed provides some support that American toy distributors were aware, as early as October 2005, of possible rH-12 dangers posed to children by their toys. Finally, and of the utmost importance, Exhibit D, respondent's own internal memorandum states, as a finding of fact, that the investigation “substantiate[s] information provided in October, 2005, concerning the etiology of brain damage in Legolian

children.” (R. at 25). This lone statement is an admission by Respondent that someone informed the company in October 2005 that children in Legolia exposed to a toxin contained in the same Finn E. Shark toy the company was distributing in the U.S., were getting brain damage from the product. This report is precisely the type of corroborating, substantiating, supporting, and confirming evidence the Second Circuit requires for *Hillmon* statements to be admitted. Under the Second Circuit’s test, then, Exhibit C is admissible.

Even if this Court adopts the most restrictive approach any circuit has taken when addressing the issue of *Hillmon*’s inclusion within 803(3), the statements contained in Exhibit C would still be admissible. The only other circuit to address this question is the Fourth Circuit. That circuit, in *United States v. Jenkins*, held that although, in the court’s opinion, *Hillmon* was not codified by 803(3), such statements remained admissible when offered for some other valid reason, such as showing why the declarant acted as she did. 579 F.2d 840, 843 (4th Cir. 1978). That court went on to hold that the jury would be permitted to draw any inference it wished from a hearsay statement so admitted. *Id.*

The Fourth Circuit may have stated that 803(3) does not embody the *Hillmon* doctrine, but the court’s holding effectively provides an avenue for the admission into evidence for the majority of *Hillmon*-type statements. In the present case, the statements contained in Exhibit C are admissible as proof that Jussel traveled to California to tell Respondent about the toxins contained in its Finn E. Shark toy. If for no other reason, the statements are admissible to show why Jussel acted as she did, namely flying to California, taking a cab from the airport to the hotel, and taking a cab back to the airport for the return flight, all to alert Respondent to the problems with the shark toy. (R. at 24). Once admitted for that purpose, the jury would be allowed to infer that Mr. Ledbetter met with Jussel. Therefore, even under the Fourth Circuit’s

restrictive rule, the *Hillmon*-type statements made by Jussel may be introduced as evidence from which jurors can infer Ledbetter's future conduct. Therefore, under any theory of the incorporation of *Hillmon* into 803(3), Exhibit C is admissible and it was reversible error for the District Court to have excluded it.

IV. Respondent's internal memorandum is admissible to prove the Respondent's knowledge of the neuro-toxin, because its admission is consistent with both the plain language of and the policies embodied in Rule 407.

Federal Rule of Evidence 407 does not operate to protect factual information contained in post-injury reports, even where the report recommends recalling the product. The plain language of Rule 407 excludes only evidence of subsequent remedial measures that, if taken previously, would have made the injury or harm less likely to occur. The Rule was framed in this manner in order to prohibit later voluntary corrective conduct from being treated as an admission of liability and to encourage businesses to be proactive regarding safety. Neither of these policy objectives is served by excluding factual information contained in a post-accident report recommending a remedial measure, since the report, if made prior to the injury, would not have made that injury less likely to occur. The Notes of the Advisory Committee and the bulk of Rule 407 jurisprudence conclude that post-accident analyses are not subsequent remedial measures under the Rule. Even if this Court were to set aside the plain language of Rule 407, Exhibit D falls squarely within an exception to the Rule, which makes such reports admissible when the resulting report was requested by a governmental authority, and thus involuntarily made. To hold otherwise would eviscerate the Rule by protecting the willful ignorance of businesses which mass produce products with deadly defects. Accordingly, the District Court should have admitted Exhibit D, because its admission is consistent with the text of, policies behind, and exception to the Rule.

A. Exhibit D was improperly excluded, because it is not a “remedial measure” within the meaning of that term in Rule 407.

The entire internal memorandum is not a remedial measure and is, thus, admissible as a matter of law. For Rule 407 purposes, “subsequent” means the period of time occurring directly after the injury for which the plaintiff sues. *Brazos River Auth. v. G.E. Ionics, Inc.*, 469 F.3d 416, 428 (5th Cir. 2006). In the instant case, Petitioner acknowledges that because his injuries occurred in December 2005 and the report was made in January 2006 that the report, concededly, was made subsequent to the injuring event. (R. at 2, 25). The second term “remedial” is defined as “[i]ntended to correct, remove, or lessen a . . . defect.” Black’s Law Dictionary 598 (2d Pocket ed. 2001). For present purposes, both Petitioner and Respondent agree that proper remedies encompass a timely warning of the dangers of rH-12, accompanied by an immediate suspension of all sales and distribution of the Finn E. Shark toy, as well as a recall of all toys containing the rH-12 compound. (R. at 3, 25). However, since subsequent remedial inaction is not protected, the language of the rule makes it clear that only “remedial *measures*” are protected.

The factual information in the report is not a measure as defined by Comment (2) of Federal Rule of Evidence 407, which states that “[a] remedial measure is one that would have reduced the likelihood that an injury or harm caused by an event would have occurred had the measure been made prior to the event that caused the injury or harm.” Fed. R. Evid. 407, cmt. (2). Along those lines, the courts have indicated that “remedial measures” are actions that, in themselves, result in added safety. *Fasanaro v. Mooney Aircraft Corp.*, 687 F. Supp. 482 (N.D. Cal. 1988). Because post-event analyses do not, in and of themselves, result in added safety, they are not and must not be considered “measures.” See *Brazos*, 469 F.3d at 428; *Prentiss & Carlisle Co., Inc. v. Koehring-Waterous Div. of Timberjack*, 972 F.2d 6, 10 (1st Cir. 1992) (discussing the

evidentiary fact that Rule 407 prohibits evidence of subsequent measures, not evidence of party's analysis of its product); *Rocky Mountain Helicopters v. Bell Helicopters Textron*, 805 F.2d 907, 918 (10th Cir. 1986) (stating post-accident tests are admissible, and should not be excluded, under 407). The factual information or knowledge in Respondent's memorandum is not a measure precisely because the information in the report did not, in and of itself, make young Mr. Slope's injuries less likely to occur. The report indicates that as early as October 2005, Respondent knew its Finn E. Shark toy contained the rH-12 toxin. (R. at 25). Furthermore, the Record presents the uncontroverted fact that by January 16, 2006, Respondent had full knowledge of the effects its Finn E. Shark toy was having on American children. (R. at 25). In absolute disregard of this knowledge, which was later set down as "factual information" in the report, respondent failed to recall its Finn E. Shark toy for five-plus months exemplifying Petitioner's contention that knowledge and factual information in no way made little Stuart Slope's injuries less likely to occur. (R. at 4, 25). That is exactly the reason Rule 407 only protects subsequent remedial measures. Stuart Slope was exposed to rH-12 and will remain, for the rest of his life, permanently brain damaged, because the factual information underlying the Respondent's report was not a measure.

The great weight of authority favors the admission of reports such as Respondent's internal memorandum. Indeed, the First, Fifth, Eighth, and Tenth Circuits state that it is error to exclude post-injury reports like the one in the present case, because such reports do not, by themselves, make an incident less likely to occur and are thereby not "subsequent remedial measures." *See e.g., Brazos*, 469 F.3d 416 (controlling Fifth Circuit case); *Prentiss & Carlisle v. Koehring-Waterous*, 972 F.2d 6 (controlling First Circuit case followed by the Fifth Circuit in *Brazos* and District Court in Massachusetts); *O'Dell v. Hercules Inc.*, 904 F.2d 1194 (8th Cir. 1990); *Dow*

Chem. Corp. v. Weevil-Cide Co., 897 F.2d 481 (10th Cir. 1990) ("Remedial measures are those actions taken to remedy any flaws or failures.").

The most recent of these cases is *Brazos* which came out of the Fifth Circuit in 2006. In that case, the court held that it was reversible error to exclude investigatory documents which documented the respondent, Ionics', recognition of component problems. That court explained that, by definition, Rule 407 only applies to measures "actually taken" after an injury for which plaintiff sues and "that post-accident plans, investigations, and testing do not constitute subsequent remedial measures." *Brazos*, 469 F.3d at 428. The court's explanation noted that the primary rationale underlying Rule 407 does not apply to post-injury reports since "by themselves, post-accident investigations would not make the event 'less-likely to occur'" and that "only the actual implemented changes make it so." *Id.* at 430.

The *Brazos* court indicated that it was well aware of the split among the circuits, and accordingly, it decided that the most persuasive argument was the one that remained true to the text, the spirit, and the overwhelming majority of the circuits which favored admission of post-accident reports. *Id.* In similar fashion, it is important to be forthright with this Court by bringing to this Court's attention older cases which allowed the exclusion of voluntarily created post-event memoranda. Those cases come from state authorities, scattered District Courts, and the Third and Ninth Circuits and for all intents they are not binding on this Court nor are they applicable due to changes within the circuits. *Complaint of Consolidation Coal Co.*, 123 F.3d 126 (3d Cir. 1997); *In re Aircrash in Bali, Indonesia*, 871 F.2d 812 (9th Cir. 1989); *Martel v. Mass. Bay Transp. Auth.*, 403 Mass. 1, 525 N.E.2d 662, 664 (1988); *Alimenta v. Stauffer*, 598 F. Supp. 934, 940 (N.D. Ga. 1984) (distinguished by *Brazos*). None of this contradictory jurisprudence is binding upon this court. Furthermore, none of these authorities have gained

momentum or garnered a strong rapport in other circuits. Accordingly, this Court should follow the greater weight of authority represented by the First, Fifth, Eighth, Ninth, and Tenth circuits and admit the post-injury report on the grounds that it is not excluded by Rule 407.

B. The informational findings in Exhibit D were impermissibly excluded, because neither those findings nor the recommendations that followed were offered for purposes prohibited by Rule 407.

Even if this Court assumes that the memorandum qualifies as evidence of a subsequent remedial measure, Rule 407 explicitly provides that subsequent remedial measure evidence is admissible when offered for some purpose other than to prove culpable conduct or a need for a warning. The Rule then provides a non-exclusive list of alternative uses for subsequent remedial measure evidence. Proof of subsidiary issues such as knowledge is one alternative use allowed by Rule 407. *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1343 (5th Cir. 1978). In the present case, Respondent's knowledge of the presence of the dangerous toxin in its toys should be admissible according to the language and jurisprudence surrounding the Rule.

The informational findings in Respondent's internal memorandum should have been admitted, because they were offered for the permissible purpose of showing Respondent's knowledge. By its plain language, Rule 407 excludes only evidence of post-incident remedial measures offered for the purpose of proving "negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction." Fed. R. Evid. 407. On the other hand, the text of this Rule allows the admission of evidence of subsequent measures when offered for another purpose, *see id.*, such as knowledge of the dangerous condition or feasibility of precautionary measures. *Rozier*, 573 F.2d at 1343. In that case, Mrs. Rozier had brought a products liability claim against Ford, claiming negligent design of her husband's car which led to his death in 1973 from a rear-end collision. *Id.* at 1337. The Fifth Circuit gained jurisdiction

over that case on the consolidated appeal of both the original verdict against Rozier and the appeal of her denied Rule 60(b) motion for a new trial. *Id.* Ford resisted Rozier’s claim that she had been prejudiced by its failure to turn over a 1971 document called a “Trend Cost Estimate,” which tended to show that it had knowledge of the defect, basing its resistance on Rule 407. *Id.* at 1343. The Fifth Circuit rejected Ford’s evidentiary contention, saying that not only did the 1971 document not qualify as “subsequent” to the event in 1973, but it also was, in and of itself, not a “remedial measure.” *Id.* The court went on to say: “Finally, even if we assume that the Trend Cost Estimate qualifies as [a] remedial measure, it would be admissible as proof of subsidiary issues in the case, such as knowledge of the dangerous condition Our acceptance of Ford’s 407 argument would effectively ‘turn the blade inward.’” *Id.* In the instant case, the internal memorandum was not a measure that was taken, nor would it have made the injury less likely had it been written prior to Petitioner’s devastating injuries. Therefore, the factual information in the memorandum is admissible since the protective mantle of Rule 407, by definition, excludes only “subsequent remedial measures.” Fed. R. Evid. 407.

C. Admission of Exhibit D is completely consistent with the policy objectives underlying the adoption and operation of Rule 407.

The two policy rationales underlying the rule are not served by the exclusion of factual information in a post-injury report, even when a recall is recommended by the same. There are two prominent policies served by Rule 407. The first rightfully protects defendants by making clear that “conduct is not in fact an admission.” Fed. R. Evid. 407 advisory committee’s note; *Alimenta*, 598 F. Supp. at 940. Rule 407 is a rejection of the notion that “‘because the world gets wiser as it gets older, therefore it was foolish before.’” *Id.* (quoting *Hart v. Lancashire & Yorkshire Ry. Co.*, 21 L.T.R.N.S. 261, 263 (1869)). In the instant case, the report is not being offered to prove that the recall is a reliable indicia of guilt, but rather, to prove that Respondent

had knowledge in October 2005 that its Finn E. Shark toy contained rH-12—a toxin that was unquestionably causing brain damage in every single child exposed to a Finn E. Shark toy missing its eyes. (R. at 3, 7, 25). Therefore, admission of Exhibit D would be completely consistent with this policy aspect of Rule 407.

Rule 407 also operates to “encourage[e] people to take, or at least not [to] discourag[e] them from taking, steps in furtherance of added safety.” *Rozier*, 573 F.2d at 1343; Fed. R. Evid. 407 advisory committee’s note. The Rule in no way protects knowledge of a deadly defect because it was scribbled on scraps of paper, or buried within a file drawer, or purposefully noted in post-injury report. The existence of the knowledge that this toxin was present in every single Finn E. Shark toy did not change the behavior of Respondent from October 2005 until April 2006. The report created in the interim is not protected by the second policy rationale backing Rule 407, whether it recommended a recall or not. The simple fact remains that a report is neither a recall nor a measure that in any way furthers the policies underlying Rule 407. The Rule was created to protect the public, not to shield willfully ignorant businesses from liability. Since Exhibit D does not offend any of the policies underlying Rule 407, it should have been admitted.

D. Exhibit D, at the very least, is admissible, because it was generated pursuant to a governmental directive, which deprives Exhibit D of its voluntary appearance and, thus, protection by Rule 407.

In the alternative, if this Court finds that the report is a measure, then it should recognize and apply Rule 407’s longstanding compelled remedial measure exception. One recognized exception to Rule 407 applies to evidence of remedial action mandated by superior governmental authority, because the policy goal of encouraging remediation is not necessarily furthered by the exclusion of this type of evidence. *See O’Dell*, 904 F.2d at 1204 (citing *Farner v. Paccar, Inc.*, 562 F.2d 518 (8th Cir. 1977)). The exception elucidates that it is particularly inappropriate to

invoke the protection of Rule 407, which would justify exclusion of the evidence, when an investigatory report is prepared not out of a sense of social responsibility but because the remedial measure is required by a superior authority. *See generally In re Aircrash in Bali, Indonesia*, 871 F.2d at 817; *Chase v. General Motors Corp.*, 856 F.2d 17, 20-21 (4th Cir. 1988) (recall letter). A subsequent remedial measure should be admissible if a previously unwilling party is compelled by the government to take a precautionary act. Fed. R. Evid. 407 advisory committee's note. The driving policy behind 407 is to encourage, or to at least to not discourage, parties to take precautionary measures; the purpose of Rule 407 is not implicated in cases involving subsequent measures in which defendant did not voluntarily participate. Where the defendant is forced to participate in the efforts to remedy its safety problem, the admission of such evidence does not operate to "punish" the defendant.

In this case, the United States Consumer Product Safety Commission stepped in on October 20, 2005, and directed Respondent to (1) conduct appropriate investigations and (2) to take remedial action if there was any indicium that Respondent's products contained toxic substances. (R. at 27). The January 2006 report was a direct and proximate result of this governmental directive, and accordingly, even if Exhibit D was deemed to be a "remedial measure," the District Court should still have admitted it as evidence of a subsequent remedial measure under the compulsory governmental directive exception to Rule 407.

CONCLUSION

For the foregoing reasons, this Court should reverse the rulings of the United States District Court for the Southern District of Boerum and the United States Court of Appeals for the Fourteenth Circuit and remand for further proceedings.