

No. 07-117

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2007

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

Petitioner,

v.

UNDER THE SEA TOYS, INC.,

Respondent.

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

BRIEF FOR PETITIONER

February 29, 2008

Team # 22P
Counsel for Petitioner

QUESTIONS PRESENTED

- I. A) Under Federal Rule of Evidence 804(b)(3), does the United States Supreme Court's holding in *Williamson v. United States* bar admission in a civil case of a reliable collateral statement which is against the declarant's pecuniary interest when the *Williamson* decision encompassed penal interests where the declarant was in custody and under arrest?

B) Under Federal Rule of Evidence 804(b)(3), does a personal letter which acknowledges criminal conduct constitute admissible evidence under the rule when the writer wrote the letter admitting guilt before she learned she had a terminal illness and when after learning of her terminal illness, the writer commits suicide?
- II. Under Federal Rule of Evidence 803(3), are declarant's hearsay statements admissible against third parties when the plain text of the rule does not explicitly forbid its admission against third parties, and when the legislative history indicates the rule drafters' intent that such statements be admissible against third parties?
- III. Under Federal Rule of Evidence 407, does a post-event investigative memorandum, which recommends subsequent remedial measures, fall under the exclusion of the rule when the recommendations are not followed and when the investigation was undertaken at the direction of a governmental agency?

PARTIES TO THE PROCEEDING

Petitioner: Stuart Slope is appealing the decision of the Fourteenth Circuit.
Respondent: Under the Sea Toys, Inc. is the Defendant in the underlying civil action.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The United States District Court for the Southern District of Boerum granted the Defendant's Motion for Summary Judgment. This unreported opinion can be found on page 17 of the Record. The Fourteenth Circuit upheld the district court's decision. This unreported opinion can be found on page 28 of the Record.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant Federal Rules of Evidence are set forth in Appendix A. The relevant statutory provisions are set forth in Appendix B.

STATEMENT OF THE CASE

Factual History

In the summer of 2005, Stuart Slope watched the hit movie, *Shark Attack*. (R. 2.) As a holiday present, Stuart's parents purchased a Finn E. Shark plush toy for him in December 2005 at a Boerum toy store. (R. 2.) BFP Tattel, a Legolian corporation, manufactured the plush toy; and Under the Sea Toys, Inc. ("the Corporation") distributed it in the United States. (R. 2.) Stuart played with the toy constantly and was even seen licking the toy's eyes. (R. 2.) Shortly thereafter, Stuart's parents noticed that he began having health problems. (R. 2.) These problems included dizziness, headaches, periods of unconsciousness, slurred speech, mood changes, convulsions, and seizures. (R. 1-2.) After brain scans, diagnostic procedures, and blood tests, doctors conclusively established that Stuart's symptoms were caused by exposure to the toxic substance—rH-12. (R. 3.) It was determined that rH-12 was found in the Finn E. Shark toy. (R. 3.) As a result of Stuart's exposure to the poisonous toy, on January 6, 2006—Stuart's fifth birthday—he was diagnosed with irreversible brain damage. (R. 1, 3.) Stuart will suffer from brain damage for the rest of his life. (R. 1, 3.)

Prior to this, in September 2005, Legolian doctors began diagnosing children with brain damage in record numbers. (R. 3.) The cause of the brain damage was identified as exposure to rH-12. (R. 3.) On September 30, 2005, the Legolian government began investigating the source of the rH-12 exposure in Legolia. (R. 3.) Aware of the devastation the rH-12 exposure caused in Legolia, Mimi Jussel, CEO of BFP Tattel, flew to the United States and advised the Corporation of the dangerous toy. (R. 24.) On October 10, 2005, the Legolian Undersecretary of Commerce met with Ms. Jussel. (R. 22.) After this meeting, Ms. Jussel met with her attorney and learned that she could go to prison for her role in the sale of the toxic toys. (R. 23.)

On October 11, 2005, the day after the government met with her, Ms. Jussel wrote a letter to her daughter. (R. 23.) Ms. Jussel had not spoken to her daughter in a while. (R. 23.) In the letter, Ms. Jussel acknowledged her role in the rH-12 exposure and stated that she had told the Corporation of the dangers. (R. 23.) Ms. Jussel wanted her daughter to hear about the toxic toy exposure from her rather than from a news outlet. (R. 23.) Later, Ms. Jussel was diagnosed with a life-threatening illness. (R. 10.) A week later, Ms. Jussel committed suicide. (R. 10.)

On October 20, 2005, the United States Consumer Product Safety Commission (CPSC) issued a directive to manufacturers and distributors of children's toys to conduct investigations and take remedial action. (R. 27.) In January 2006, the Corporation issued an internal memorandum which verified that the toy contained the poisonous substance and that the Corporation had known this information since October 2005. (R. 25.) In that same month, BFP Tattel was dissolved. (R. 3.) On April 1, 2006, almost six months after learning of the toxic toys, the Corporation issued a recall. (R. 3.) On April 14, 2006, Stuart Slope brought this action against the Corporation alleging failure to warn or recall in violation of § 204 of the Boerum Tort Reform Act. (R. 1, 3.)

Procedural History

On April 14, 2006, Stuart Slope brought this action against the Corporation for failure to warn or recall as required by § 204 of the Boerum Tort Reform Act. (R. 1, 3.) On June 29, 2006, upon motion by the Corporation, the United States District Court for the Southern District of Boerum held a pre-trial hearing to determine whether to grant summary judgment in favor of the Corporation. (R. 5-6.) The court allowed Stuart to present four pieces of evidence. (R. 7, 9, 12, 13.) Each of these items would prove that the Corporation knew of the toxic toys at least three months before Stuart was diagnosed with irreversible brain damage. (R. 1, 7.)

Stuart Slope introduced a personal business journal entry and a personal letter, both written by Mimi Jussel. (R. 7-12, 22, 23.) Stuart Slope also introduced a deposition of Jaffe Peetz which verified the Corporation's knowledge of the dangerous toys. (R. 12-13, 24.) The final piece of evidence proffered to show the Corporation's knowledge was an internal report prepared by the Corporation, itself. (R. 13-14, 25-26.) Although the Corporation did not contest the validity of any of the proffered items, the district court "regretfully" disallowed the evidence. (R. 7, 10, 19.)

On January 3, 2007, the United States Court of Appeals for the Fourteenth Circuit reviewed the lower court's decision *de novo*. (R. 28.) The Fourteenth Circuit evaluated each of the proffered items of evidence presented by Stuart Slope. (R. 30-31.) A divided panel then affirmed the district court's ruling. (R. 39.) Stuart Slope subsequently filed a petition for a writ of certiorari. (R. 46.) On October 1, 2006, this Court granted that petition. (R. 46.)

SUMMARY OF THE ARGUMENT

Federal Rule of Evidence 804(b)(3) permits the admission of statements which are against the declarant's pecuniary or penal interest. In *Williamson v. United States*, this Court held that collateral statements contained within a narrative that are against the declarant's penal interest and made while the declarant was in custody or under arrest are not admissible. However, because this case contains a statement against the declarant's pecuniary interest which was not made while the declarant was in custody, the personal business journal entry is admissible under Rule 804(b)(3). Additionally, Ms. Jussel's personal letter to her daughter is also admissible under Rule 804(b)(3). Rule 804(b)(3) admits a statement made by a declarant outside of court if that statement was sufficiently against the declarant's penal interest at the time

of making. Because Ms. Jussel was aware of her criminal responsibility and because she did not speak of death in her personal letter to her daughter, it is admissible under Rule 804(b)(3).

In addition, Ms. Jussel's statement to her secretary is admissible evidence under Federal Rule of Evidence 803(3). Under Rule 803(3), a declarant's hearsay statement may be admissible evidence against a third party. Although there is concern as to whether Rule 803(3) statements are admissible against third parties, the plain text of the rule as well as the legislative history indicates the drafters' intent to codify *Mutual Life Insurance v. Hillmon* when it enacted Rule 803(3) in 1975. Under *Hillmon*, such statements are admissible against third parties. Therefore, Ms. Jussel's statement is admissible evidence against the Corporation.

Finally, Federal Rule of Evidence 407 neither excludes the memorandum of a post-event internal investigative report, nor prohibits the admission of subsequent remedial action recommendations that are not implemented. Rule 407 is further inapplicable when the post-event investigative report is conducted in response to a governmental agency's mandate. Therefore, the Corporation's internal investigative report, which was completed at the direction of the United States Consumer Product Safety Commission, is admissible. The recommendations made as a result of the investigation were not followed and cannot be considered as subsequent remedial actions.

ARGUMENT

This argument addresses the following issues in turn: (1) whether Federal Rule of Evidence 804(b)(3) precludes admissibility of collateral statements contained within a narrative which is against the declarant's pecuniary interest and whether a letter acknowledging criminal conduct is *per se* inadmissible if the writer later commits suicide, (2) whether Federal Rule of Evidence 803(3) permits the admission of a declarant's statement of intent against a third party,

and (3) whether Federal Rule of Evidence 407 excludes an internal investigative memorandum when its recommendations were not implemented and when it was produced in response to a governmental directive. This Court is entitled to review a grant of summary judgment *de novo*. *E.g.*, *United States v. Winstar*, 518 U.S. 839, 860 (1996). However, there is also precedent which allows this Court to examine the exclusion of evidence using the abuse of discretion standard. *E.g.*, *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). The *de novo* standard is more appropriate in this case because the “genuine issue of material fact” issue is threshold compared to the mere evidentiary exclusion question.

I. The Fourteenth Circuit Should Be Overturned Because *Williamson v. United States* Does Not Apply to Collateral Statements Contained Within a Narrative That is Against the Declarant’s Pecuniary Interest and Because Personal Letters Written Before Contemplation of Suicide Are Not *Per Se* Inadmissible.

The Fourteenth Circuit should be overturned because it erroneously relied on *Williamson v. United States*. *Williamson* does not apply to collateral statements contained within a narrative that is against the declarant’s pecuniary interest. *See Williamson v. United States*, 512 U.S. 594, 596, 600 (1994). The Court in *Williamson* held that statements made by a declarant in custody, which are collateral to statements against that declarant’s penal interest, are inadmissible. *Id.* at 600. Because the statements in this case were not made while the declarant was in custody and because those statements were against the pecuniary interest of the declarant, they are wholly admissible.

Furthermore, letters written before contemplation of suicide are not *per se*, inadmissible. If such statements expose the writer to criminal liability, then those statements are admissible under Federal Rule of Evidence 804(b)(3). Because personal letters exposing the writer to potential criminal liability are admissible, the personal letter at issue in this case is admissible.

A. *The Fourteenth Circuit Should Be Overturned Because Williamson v. United States Does Not Preclude Admissibility in a Civil Case of Collateral Statements Within a Narrative That Contains Declarations Against Pecuniary Interest.*

The United States Supreme Court decision in *Williamson v. United States* does not preclude admission of collateral statements within a narrative which contained declarations against pecuniary interest. *Williamson*, 512 U.S. at 596, 600. Federal Rule of Evidence 804(b)(3) expressly allows statements made which are against pecuniary interest. Fed. R. Evid. 804(b)(3). In *Williamson*, the Supreme Court determined that collateral statements contained within a narrative against penal interest made while the declarant was in custody did not fall within the hearsay exception because of the inherent unreliability of statements by arrestees. *Williamson*, 512 U.S. at 600. Collateral statements are those statements which are in close proximity to statements that are against the declarant's interest. *Id.* *Williamson's* holding only reaches narratives against penal interest made by custodial declarants. *Id.* at 596, 600. Therefore, because statements collateral to adverse pecuniary interest statements do not carry the same level of unreliability as statements against penal interests made by arrestees, those statements are admissible pursuant to Federal Rule of Evidence 804(b)(3). Fed. R. Evid. 804(b)(3).

Although statements made out of court are generally inadmissible as hearsay, the Federal Rules of Evidence will allow those statements if they fit within an exception. *See* Fed. R. Evid. 801–807. Federal Rule of Evidence 804(b)(3) allows statements against interest made outside of court even though the declarant is unavailable. Fed. R. Evid. 804(b)(3). Statements against interest are considered reliable and admissible because declarants do not tend to make statements against their interest, unless they believe them to be true. *Williamson*, 512 U.S. at 599 (stating that reasonable people do not make “self-inculpatory statements unless they believe them to be

true”). Finally, the declarant must be fully aware that the statements are against her interest at the time she made the statements. *United States v. Andreas*, 216 F.3d 645, 662 (7th Cir. 2000).

In our case, Mimi Jussel, CEO of BFP Tattel, made an entry into her personal business journal acknowledging her role in the toxic toy exposure. (R. 22.) At the time of the entry, Ms. Jussel was aware that the statement was against her interest. Because the statements at issue here were against Ms. Jussel’s pecuniary interest, the entire narrative, including all collateral statements, should be allowed as an exception to the hearsay rule. Moreover, because *Williamson* confined its holding to statements against penal interest made by suspects in custody, Ms. Jussel’s entire statement, including any collateral statements, is admissible.

1. Because the Williamson decision focused exclusively on statements against penal interest made by declarants in custody, any collateral statements against pecuniary interest should be admitted.

The *Williamson* Court confined its holding to custodial statements that were against the declarant’s penal interest; therefore, *Williamson* should not be extended to statements collateral to those made against pecuniary interest. *Williamson*, 512 U.S. at 600, 603. In *Williamson*, a search of Reginald Harris’s car turned up nineteen kilograms of cocaine. *Id.* at 596. Mr. Harris was arrested and during his interrogation, he implicated both himself and Fredel Williamson. *Id.* at 596, 597. Because Harris would not testify at Williamson’s trial, the trial court determined that he was “unavailable” for purposes of Rule 804(b)(3) and admitted his statements under that rule’s hearsay exception. *Id.* at 597-98. The defendant appealed asserting that because the collateral statements were not against Harris’s interest, those statements should not be admitted under Rule 804(b)(3). *Id.* at 598. The United States Supreme Court granted certiorari to “clarify the scope of the hearsay exception for statements against *penal* interest.” *Id.* at 596 (emphasis added).

The Court’s opinion focused exclusively on the statement against penal interest made by Mr. Harris while he was in custody. *Id.* at 596. Although that opinion discussed “penal interest” multiple times, it explicitly excluded all references to “pecuniary interest.” *Id.* at 596-605. In Part II.A of the majority opinion, the Court set out Federal Rule of Evidence 804(b)(3). *Id.* at 599. However, the opinion inserted ellipses in the rule which deleted all references to “pecuniary” and “civil liability.” *Id.*¹ The remaining portion of the rule focused exclusively on statements against penal interest made by defendants facing criminal liability. *Id.* Further, the first concurring opinion analyzed the case to determine “whether evidence can be admitted under the statement-against-*penal*-interest exception.” *Williamson*, 512 U.S. at 606 (Scalia, J., concurring) (emphasis added). The second concurring opinion would also only apply the exception to statements “sufficiently against the declarant’s *penal* interest.” *Id.* at 607 (Ginsburg, J., concurring) (emphasis added).

Additionally, the Court highlighted the unreliability of statements by criminal defendants made during interrogations while those defendants were in custody. *Id.* at 603. In Part II.B of the majority opinion, the Court focused on the admissibility of confessions of arrested accomplices. *Id.* For support, the majority cited *Lee v. Illinois* which centered on the “arrest statements of a co-defendant.” *Williamson*, 512 U.S. at 600 (quoting *Lee v. Illinois*, 476 U.S. 530, 541 (1986)). Because the majority opinion was only concerned with statements against penal interest made by arrestees, criminal defendants, and others in custody, the Court’s holding should be limited to statements against penal interest. Therefore, *Williamson* would not exclude

¹ The majority opinion redacted the rule to eliminate all evidence of pecuniary interest and civil liability stating “statements which . . . at the time of [their] making . . . so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant’s position would not have made the statements unless believing [them] to be true.” *Id.* at 599 (redacting Fed. R. Evid. 804(b)(3)).

collateral statements contained within an adverse pecuniary interest narrative made by a declarant not under arrest and not in custody.

Moreover, the *Williamson* Court framed the issue to determine the scope of Rule 804(b)(3)'s exception for statements against penal interest which were made by the declarant while in custody. *Williamson*, 512 U.S. at 596. The Supreme Court has held that when the Court grants certiorari, that review will be limited to the petition's question. *See, e.g., Miller v. Albright*, 523 U.S. 420, 451 (1998) (refusing to extend question beyond the issue as stated in the grant of certiorari). When the question presented is so limited, the holding should also be limited. Because the Court's question was limited to clarifying the scope of Rule 804(b)(3) as it related to penal interests, the holding was likewise limited. *See Williamson*, 512 U.S. at 596.

Furthermore, in the *Williamson* case, both the brief for the Petitioner and the Respondent limited their "Questions Presented" to determine whether a "statement against penal interest" made by a declarant "post-arrest" is admissible. Brief of United States, at *i, *Williamson v. United States*, 512 U.S. 594 (1994) (No. 93-5256); *see also* Brief for Petitioner, at *i, *Williamson v. United States*, 512 U.S. 594 (1994) (No. 93-5256) (asking whether "an admission against penal interest" is admissible). Because both parties contemplated limiting the question to statements against penal interest made by declarants while in custody, *Williamson's* holding should be limited to collateral statements related to penal interest made by custodial declarants.

Finally, the oral argument transcript of the *Williamson* case before the Supreme Court confined its inquiry to "postarrest" statements of accomplices made while the declarant was "in the throngs of custodial interrogation. Transcript of Oral Argument at 3, *Williamson v. United States*, 512 U.S. 594 (1994) (No. 93-5256). Counselor for Petitioner—Mr. Williamson—argued that statements "made in the coercive atmosphere of police interrogation" are uniquely

untrustworthy. *Id.* He argued that the crucial factor in the *Williamson* case was the fact that the statements were “made in the coercive atmosphere of custodial interrogation.” *Id.* at 22. In addition, during oral argument, one member of the Court stated that it would make a big difference whether a statement was made to police officers while in custody as opposed to statements made in other contexts. *Id.* at 39-40. As is clear from the oral transcript, the Court intended to hold and did hold that *Williamson* only applied to statements against penal interests made by declarants while “in the throngs of custodial interrogation.” *Id.* at 3.

Here, Ms. Jussel met with the Legolian government and learned that the government was aware that there were possible toxins in BFP’s toys. (R. 22.) After the meeting, Ms. Jussel made an entry into her personal business journal recounting the meeting. (R. 22.) Ms. Jussel’s journal entry admitted that her company would “lose so much business” as a result of the rH-12 exposure. (R. 22.) Although Ms. Jussel later met with her attorney and learned that her role in the toxic toy scandal could lead to prison time, at the time of the personal business journal entry, Ms. Jussel was only aware of the possible pecuniary liability. Because *Williamson*’s holding only applies to exclude statements which are against a declarant’s penal interest, Ms. Jussel’s entire journal entry should be admitted to prove that the Corporation had knowledge of the toxic toys as early as October 2005.

2. *Statements against penal interest were not allowed at common law while statements against pecuniary interest were allowed.*

At common law, statements that were against penal interest were not excepted, but were a violation of the hearsay rule if the declarant was unavailable. *Donnelly v. United States*, 228 U.S. 243, 273 (1913). Conversely, the common law universally accepted statements against pecuniary interest. *Id.* The early cases distrusted evidence offered by others to exculpate criminal defendants. Fed. R. Evid. 804(b)(3) advisory committee’s note 3. These cases doubted

the reliability and credibility of statements made which were against the declarant's penal interest. *See, e.g., New York v. Schooley*, 43 N.E. 536, 537 (N.Y. 1896) (refusing third party testimony offered to exonerate the defendant); *see also California v. Hall*, 30 P. 7, 8 (Cal. 1892) (holding that declarations by a third party against penal interest offered to exonerate the defendant are never admissible).

Moreover, at common law, not only were declarations against pecuniary interest admissible, but statements collateral to those declarations were also admissible. *Aetna Life Ins. Co. v. Strauch*, 67 P.2d 452, 455 (Okla. 1937); *Turner v. Turner*, 50 S.E. 969, 971 (Ga. 1905). These cases would allow all parts of a statement against interest so long as the statement was against pecuniary interest. *See* Bernard S. Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 Harv. L. Rev. 1, 57-58 (1944). Therefore, there is historical precedent for admitting collateral statements against pecuniary interest. *See generally Donnelly*, 228 U.S. at 273 (noting that it is almost universally held that only statements against pecuniary interest are admissible as exceptions to hearsay). Moreover, the *Williamson* case did not overturn that precedent as that case only dealt with statements against penal interest. *See* discussion *supra* Part I.A. Because prior case law allows collateral statements contained within a narrative which is against pecuniary interest and because *Williamson* did not circumscribe this precedent, Ms. Jussel's personal business journal entry is admissible to prove that the Corporation had knowledge of the poisonous toys as early as October 2005.

3. *Because Federal Rule of Evidence 804(b)(3) has a special corroboration requirement for penal interest declarations, Williamson's holding should not be extended to encompass pecuniary interest declarations.*

Federal Rule of Evidence 804(b)(3) adds an additional requirement for criminal declarations to ensure trustworthiness. Fed. R. Evid. 804(b)(3). This special requirement states

that statements by declarants facing criminal liability must have “additional corroborating circumstances [which] clearly indicate the trustworthiness of the statement.” Fed. R. Evid. 804(b)(3). This particular clause does not apply to statements made against pecuniary interest as those statements historically have been considered more reliable. *See* discussion *supra* Part I.A.2. This extra requirement is needed to eliminate the additional element of untrustworthiness found in criminal statements. Because this untrustworthiness is not as prevalent in civil cases, this additional requirement was not added by the Legislature. *See* Fed. R. Evid. 804(b)(3) advisory committee note exception 3.

Therefore, *Williamson* should not apply to civil cases where pecuniary interests are at stake because those statements do not carry any additional requirements of trustworthiness. Ms. Jussel’s personal business journal should be admitted to verify that the Corporation had knowledge of the toxins in October 2005.

4. *Because the motivation to shift blame is not prevalent in statements against pecuniary interest, Williamson does not apply to those statements.*

In *Williamson*, the Court stressed the unreliability of statements made in the criminal context because of the dangers of blame-shifting. *Williamson*, 512 U.S. at 603 (noting that confessions of arrestees may be admissible only if the arrestee is not attempting to shift blame or curry favor). The Court reemphasized this point later in *Lilly v. Virginia* by showing that statements made by a person in custody may be made to inure to the arrestee’s advantage. *Lilly v. Virginia*, 527 U.S. 116, 138-39 (1999). Because the motivation to shift blame is not prevalent in statements against pecuniary interest, *Williamson* should not be applied to bar admission of statements collateral to narratives which are against pecuniary interest.

Here, the potential to gain advantage by shifting blame is not present. Ms. Jussel was not facing criminal liability and was not in custody at the time of the statement. (R. 22.) Moreover,

the Corporation is a United States corporation and not likely to be subject to the legal reach of the Legolian government. *See, e.g., Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 116 (1987) (refusing to extend legal reach of state of California to Japanese corporation).

Therefore, Ms. Jussel had no incentive to shift blame to the Corporation, as she would still suffer any sanctions imposed by the Legolian government without the opportunity to shift blame to the other company located out of the country. Furthermore, Ms. Jussel was not attempting to curry favor by admitting to the Legolian government her involvement in a major tort. Thus, adding a United States company to that confession would not improve her situation. Because shifting blame would not improve the standing of any party facing pecuniary liability, *Williamson* does not apply. Therefore, Ms. Jussel's statement should be admitted in its entirety to prove that the Corporation knew about the poisonous toys in October 2005.

B. The Fourteenth Circuit Should Be Overturned Because Statements in a Personal Letter Acknowledging Criminal Conduct Are Admissible in a Civil Case Even if the Writer Later Commits Suicide.

Ms. Jussel's personal letter to her daughter acknowledging criminal conduct may be admissible in this case even though Ms. Jussel later committed suicide. Statements made by a declarant outside of court are not admissible as hearsay. Fed. R. Evid. 801(b); Fed. R. Evid. 802. However, statements against interest are admissible as an exception to the hearsay rule. Fed. R. 804(b)(3). Federal Rule of Evidence 804(b)(3) allows admission of a statement by an unavailable witness where that statement subjects the declarant to criminal liability such that a reasonable person would not have made the statements unless they believed them to be true. Fed. R. Evid. 804(b)(3). Because Ms. Jussel's personal letter acknowledged criminal conduct and exposed her to criminal liability, it is admissible and offers further proof that the Corporation knew of the toxic toy well before Stuart's parents purchased it.

The mere fact of a suicide occurring more than a week after the statements and after Ms. Jussel discovered that she had a terminal illness does not make the statements *per se* inadmissible. In *United States v. Angleton*, Roger Angleton wrote five notes before committing suicide. 269 F. Supp. 2d 878, 881-82 (S.D. Tex. 2003). At least four of those notes could be construed as suicide notes because they spoke of Roger's impending death. *Id.* at 881-82. In each of those notes Roger spoke of ending his life and no longer wanting to live with the pain he had caused. *Id.* In his fourth suicide note, Roger attempted to exculpate his brother for the murder of his brother's wife. *Id.* at 882. In *Angleton*, Robert Angleton attempted to introduce the suicide notes as evidence of his innocence. *Id.* The district court noted that the admissibility of the suicide notes turned on "whether the statement was sufficiently against the declarant's penal interest." *Id.* at 890. Because Roger Angleton wrote the notes in contemplation of suicide, the Court held that the statements were not sufficiently against his penal interest to be admissible. *Id.* at 889. Because at the time he wrote the suicide note Roger knew he was going to kill himself, he did not legitimately believe he would face criminal liability. *Id.* Therefore, that court would not admit the letters to exculpate the defendant. *Id.*

In *United States v. Crowder*, Jerry Bell wrote a signed statement implicating himself and the defendant. 848 F. Supp. 780, 781-82 (M.D. Tenn. 1994). However, at the time Mr. Bell made the statements he was aware that he was "terminally ill with cancer." *Id.* at 781. Federal Rule of Evidence 804(b)(3) requires exposure to criminal liability to establish that the statement was truly against interest. *Id.* at 781-82. That court held that because Mr. Bell made the statements at a time when he knew he was not likely to live long, the statements were not sufficiently against his interest. *Id.* at 782. That court held that knowledge of the fact of imminent death undermines the against-interest requirement. *Id.*

Here, Ms. Jussel's personal letter to her daughter is admissible because at the time she wrote the letter, she was completely unaware of her impending death. Unlike *Angleton*, Ms. Jussel's letter was not written as a suicide note because it was not written in contemplation of death. Ms. Jussel spoke in the letter of one day becoming a grandmother. (R. 23). Ms. Jussel also stated that she would certainly go to prison. (R. 23.) Because Ms. Jussel did not mention suicide and because she feared prison and spoke of the future, the letter is admissible.

Moreover, unlike Jerry Bell in *United States v. Crowder*, Ms. Jussel was not aware that she had a terminal illness at the time she wrote the letter implicating the defendant. (R. 10.) She did not learn of her illness until after she wrote the personal letter to her daughter. (R. 10.) Because she was not aware of her imminent death and was not contemplating suicide at the time she wrote the letter, Ms. Jussel did believe that she was facing criminal liability. Therefore, Ms. Jussel's letter was sufficiently against her interest and should be admitted as a statement against her penal interest. Although the personal letter was against her penal interest, *Williamson* still would not apply to exclude the collateral statements because Ms. Jussel was not in custody or under arrest when she wrote the personal letter. *See* discussion *supra* Part I. Admitting the personal letter provides evidence that the Corporation had knowledge of the toxic toys a full two months before Stuart's parents purchased the toy that caused Stuart irreversible brain damage.

II. The Fourteenth Circuit Should Be Overturned Because Ms. Jussel's Statement To Her Secretary, "I am going to meet with Troy Ledbetter to tell him what's going on," Is Admissible Evidence Under Federal Rule of Evidence 803(3).

Ms. Jussel's statement to her secretary is admissible evidence under Federal Rule of Evidence 803(3) to prove that Ms. Jussel intended to meet with Troy Ledbetter and for the further inference that she met with him and told him as early as October 2005 about the toxic toys. Rule 803(3) is a hearsay exception that deems statements of a declarant's "then existing

state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health),” as admissible evidence. Fed. R. Evid. 803(3). Rule 803(3) applies irrespective of the declarant’s availability as a witness, and it is the legislative codification of this Court’s holding in *Mutual Life Insurance v. Hillmon*, 145 U.S. 285 (1892).

A. *The Common Law Prior to the Adoption of Federal Rule of Evidence 803(3).*

This Court first announced the “then existing state of mind” hearsay exception in *Mutual Life Insurance v. Hillmon*. *Id.* at 294-96. *Hillmon* was a civil case brought by a widow (Mrs. Hillmon) against three insurance companies to recover the proceeds from three life insurance policies on her husband. *Id.* at 285. The insurance companies all refused to pay, alleging they were being defrauded because the body was not that of Mr. Hillmon, but rather, Mr. Walters. *Id.* To prove this, the insurance companies sought to introduce into evidence letters written by Mr. Walters to his fiancé and sister. *Id.* at 287-88. The letters indicated Mr. Walters’s intent to travel with Mr. Hillmon. *Id.* at 288. Mrs. Hillmon objected to the admission of this evidence. *Id.* at 287.

The Court held that the letters were admissible based on Mr. Walter’s then existing state of mind. *Id.* at 295-96. Based on Mr. Walters’s intent (which he manifested in the letters), the letters were admissible “evidence that, shortly before the time when other evidence tended to show that he went away, he had the intention of going, *and of going with Hillmon.*” *Id.* at 296 (emphasis added).

The *Hillmon* Court properly constrained its role to determining the admissibility of the statements and did not assume the role of fact-finder to determine the veracity of the statements in the letter. *Id.* The *Hillmon* Court stated, “[t]heir truth or falsity is an inquiry for the jury.” *Id.* (quoting *Ins. Co. v. Mosley*, 75 U.S. (8 Wall.) 397, 405 (1869) (internal quotations omitted)).

Thus, the *Hillmon* Court did not assume the task of determining whether the letters actually proved that Mr. Walters accompanied Mr. Hillmon to Crooked Creek. *Id.* at 296-98. Rather, the Court admitted the letters as evidence for the jury to use in determining whether Mr. Walters accompanied Mr. Hillmon to Crooked Creek. *Id.* See also *United States v. Astorga-Torres*, 682 F.2d 1331, 1335-36 (9th Cir. 1982) (stating, “a statement of the declarant’s intent to do something is competent not as a narrative of facts communicated to the declarant by others, nor yet as proof that he actually did as he intended, but as *evidence* that he had the intention of so doing”) (emphasis added) (internal quotations omitted); *United States v. Pheaster*, 544 F.2d 353, 377 n.14 (9th Cir. 1976) (stating, “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”).

Further, the plain language of *Hillmon* supports the inference that one party’s intent can be used as proof of a third party’s conduct. *Hillmon*, 145 U.S. at 296. See also *Brown v. Tard*, 552 F. Supp. 1341, 1352 (D.N.J. 1982) (stating, “Under the *Hillmon* doctrine, statements are admissible not only to prove the future conduct of the declarant but also the future conduct of other persons when the declarant’s intention requires the action of these other persons if it is to be fulfilled”). This Court stated in *Hillmon* that Mr. Walters’s letters were evidence that he intended to go and that “*he went with Hillmon.*” *Hillmon*, 145 U.S. at 296 (emphasis added). The latter statement—that he went with Hillmon—imputes conduct upon a third party (Mr. Hillmon) based on the declarant’s (Mr. Walters’s) intent. *Id.*

Here, Ms. Jussel’s statement to her secretary is admissible evidence under the *Hillmon* doctrine. Ms. Jussel made the statement, “I am going to meet with Troy Ledbetter to tell him

what's going on," contemporaneously with learning that Legolian children were being poisoned by a toxic substance. (R. 24.) The statement is relevant because whether or not the Corporation had such knowledge is a material fact in this case. According to *Hillmon*, Ms. Jussel's statement (which admittedly imputes the requisite knowledge on the Corporation) may be used as proof of her intent to meet with Mr. Ledbetter and as evidence for the jury to use in determining whether she met with Mr. Ledbetter and told him what was going on. See *Hillmon*, 145 U.S. at 296.

Hillmon further teaches that judges should constrain themselves to the role of determining the admissibility of the evidence and not the additional role of weighing the evidence. Here, the district court judge improperly stepped into the jury's role as fact-finder. The judge did not determine whether the statement fell within the mandates this Court outlined in *Hillmon* or whether the statement accorded with Federal Rule of Evidence 803(3). Instead, the judge improperly assumed the role of fact-finder and made a determination as to whether it was believable that Ms. Jussel's intent to meet with Mr. Ledbetter actually resulted in a subsequent meeting with Mr. Ledbetter where Ms. Jussel apprised Mr. Ledbetter of the situation in Legolia. This was a job for the jury to perform, and not the district court judge. Accordingly, under this Court's ruling in *Hillmon*, Ms. Jussel's statement to her secretary was admissible evidence.

B. The Hillmon Doctrine Remains Intact After the Codification of Federal Rule of Evidence 803(3).

Ms. Jussel's statement is admissible evidence under Federal Rule of Evidence 803(3). Rule 803(3) was codified by Congress in 1975. *Coy v. Renico*, 414 F. Supp. 2d 744, 768 (E.D. Mich. 2006). Although some commentators and courts have questioned whether the *Hillmon* doctrine survived the codification of the Federal Rules of Evidence; the plain text of Rule 803(3), the legislative history of Rule 803(3), and the rules regarding statutory interpretation collectively

demonstrate that Rule 803(3) extends to the subsequent conduct of third persons. Because Congress enacted the Federal Rules of Evidence, they must be interpreted according to the rules of statutory interpretation. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 587 (1993) (stating, “We interpret the legislatively enacted Federal Rules of Evidence as we would any statute”). According to the rules of statutory interpretation, this Court should first look at the plain text of Rule 803(3) for purposes of interpretation. Next, this Court should look to the legislative history of Rule 803(3) only if it determines the text of Rule 803(3) is ambiguous.

1. *The plain text of Federal Rule of Evidence 803(3) supports the position that Hillmon statements are admissible against third parties.*

Federal Rule of Evidence 803(3) permits admission of a declarant’s out of court statements of intent. Fed. R. Evid. 803(3). However, the text of the rule is silent regarding whether such statements can be used against third parties. *Id.* Nevertheless, this silence is both revealing and important because it means that Congress did not explicitly limit Rule 803(3) to apply to declarants only. *See id.*

Congress explicitly limited the applicability of several rules within the Federal Rules of Evidence. *See United States v. Houlihan*, 871 F. Supp. 1495 (D. Mass. 1994). For example, Rules 404(a), 404(b), 407, 408, and 411 all contain limiting language within the text of those rules regarding the purposes and circumstances under which those rules would apply. *See id.* However, Rule 803(3) does not contain any limiting language. Thus by analogy, it is clear that Congress knew how to use specific language to limit the applicability of the rules; however, Congress chose not to do this when drafting Rule 803(3). Therefore, arguments seeking to limit the applicability of Rule 803(3) to declarants only must fail under the plain text of Rule 803(3).

2. *The legislative history and the rules regarding statutory interpretation both reveal Congress's intent to codify Hillmon within Federal Rule of Evidence 803(3).*

Assuming, *arguendo*, that this Court determines the text of Rule 803(3) to be ambiguous, Stuart Slope argues that the legislative history coupled with the rules regarding statutory interpretation urge this Court to hold that Rule 803(3) statements may be used against third parties. While the text of Rule 803(3) is silent regarding its applicability to third parties, the Advisory Committee notes following the rule are more revealing. According to the Advisory Committee notes, “[t]he rule of *Mutual Life Ins. Co. v. Hillmon*, allowing evidence of intention as tending to prove the doing of the act intended is, of course, left undisturbed.” Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Rules of Evidence with Advisory Committee Notes and Legislative History* 203 (Aspen Publishers 2006) (internal citation omitted). Thus, “[r]ule 803(3) appears on its face to codify the *Hillmon* doctrine in its entirety, and the note of the Advisory Committee to Federal Rule 803(3) confirms this interpretation of the text.” *Coy*, 414 F. Supp. 2d at 770. Although the House Judiciary Report following Rule 803(3) favors an opposing view, “[e]ven as a matter of statutory interpretation, the plain language of Rule 803(3) would not be trumped by this single committee report ‘which, as far as we know, not even the full committee, much less the full [House], much less the full [Senate], and much much much less the President who signed the bill, agreed with.’” *Id.* at 771 n.13 (quoting *Intel Corp. v. Advanced Micro Devices Inc.*, 542 U.S. 241, 267 (2004) (Scalia, J., concurring)).

Further, this Court has noted the dangers in relying on legislative materials such as committee reports. This Court stated as follows:

As we have *repeatedly* held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material [J]udicial reliance on legislative materials *like committee reports*, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worst yet, unelected staffers and lobbyists—both the

power and incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.

Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005) (emphasis added).

Therefore, this Court should not be persuaded by the single House Judiciary Report which this Court has previously acknowledged can be trumped by the plain language of the statute. Here, the plain language of Rule 803(3) does not contain an explicit limitation forbidding the use of Rule 803(3) statements against third parties. Because such a limitation is not required by the text of Rule 803(3), this Court should overturn the Fourteenth Circuit's decision to exclude Ms. Jussel's statement from evidence.

C. The Circuits That Have Developed Tests Requiring Corroborating Evidence Have Ignored Both Congress's Intent and This Court's Prior Jurisprudence.

The Second and Fourth Circuits have strayed from Congress's direction and articulated rules requiring corroborating evidence before Rule 803(3) statements may be used against third parties. The Second Circuit has required independent evidence connecting the declarant's statement to the third party's conduct before the statement could be admissible against the third party under Rule 803(3). *United States v. Best*, 219 F.3d 192, 198 (2d Cir. 2000). Likewise, the Fourth Circuit has held that Rule 803(3) statements may be introduced against a third party for reasons other than to prove the third party's subsequent conduct. *United States v. Jenkins*, 579 F.2d 840, 843 (4th Cir. 1978). However, the additional requirement of providing corroborative evidence is not within the text of Rule 803(3), nor is it even mentioned in the Advisory Committee Notes or the House Judiciary Report following the rule. Therefore, both of these circuits have strayed from Congress's intent by adding an additional component to Rule 803(3).

The Ninth Circuit, however, has correctly adhered to Congress's intent and has recognized that under Rule 803(3), a declarant's statement of intent can be used against third

parties. *Astorga-Torres*, 682 F.2d at 1336. Moreover, an “overwhelming majority” of state jurisdictions have also recognized that the *Hillmon* doctrine was codified with Federal Rule of Evidence 803(3). *Id.* at 769 (listing twenty-eight jurisdictions that “have allowed introduction of *Hillmon* statements to establish the future conduct of a nondeclarant under the state of mind exception”).

There appears to be a national consensus favoring the notion that Rule 803(3) statements may be used against third parties. Even the critics recognize the continued importance of the *Hillmon* doctrine. See John MacArthur Maguire, *The Hillmon Case—Thirty-Three Years After*, 38 Harv. L. Rev. 709, 731 (1925) (stating, “in its ordinary, workaday application the principle leads to more good than evil”). Therefore, this Court should overturn the Fourteenth Circuit and hold that *Hillmon* statements are admissible against third parties under Rule 803(3).

III. The Fourteenth Circuit Should Be Overturned Because the Corporation’s Internal Investigative Memorandum Should Not Have Been Excluded Under Federal Rule of Evidence 407.

The decision of the United States Court of Appeals for the Fourteenth Circuit should be overturned because the investigative memorandum was incorrectly barred from admission. Federal Rule of Evidence 407 permits the exclusion of evidence which reflects subsequent measures taken that, had they been taken previously, would have made the injury or harm less likely to occur. Fed. R. Evid. 407. That evidence is then excluded only when introduced 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. *Id.* This rule does not require the exclusion of evidence when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment. *Id.*

Two rationales form the basis of Rule 407. First, subsequent remedial measures are not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. Second, there is an important social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety. *Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1211 (10th Cir. 2006). While Rule 407 recognizes the importance of encouraging safety improvements, it also recognizes that social policy must be balanced against competing interests. Chief among these interests is the admission of relevant, probative evidence. *Williams v. Sec. Nat'l Bank*, 358 F. Supp. 2d 782, 794 (N.D. Iowa 2005). Rule 407 strikes a balance by excluding subsequent remedial measures only when used as evidence of the defendant's negligence or culpable conduct. It permits introduction of such measures to prove other controverted issues. *Id.* at 793.

The Fourteenth Circuit incorrectly held that that an internal investigative memorandum compiled by the Corporation constituted a subsequent remedial measure and was therefore excludable under Rule 407. The circuit court also erred by holding that the investigation conducted by the Corporation was not a response to the mandatory governmental directive issued by the United States Consumer Product Safety Commission (CPSC).

A. *The Corporation's Post-event Investigative Memorandum Should Not Have Been Excluded Under Federal Rule of Evidence 407.*

Federal Rule of Evidence 407 does not preclude admission of post-event investigations. Rule 407 applies only to measures which would have made an injury or harm less likely to occur. *Ensign v. Marion County*, 914 P.2d 5, 7 (Or. 1996).² An investigation and report of the cause of an accident cannot be a measure that is excluded from evidence under the rule. *Id.* Because a report of the cause of an accident cannot be the basis for excluding evidence, the Corporation's

² Oregon Rule 407 is identical to Federal Rule 407. Or. Rev. Stat. § 40.185 (West 2007).

post-event investigative memorandum should not have been excluded under Federal Rule of Evidence 407.

1. An investigative memorandum or product analysis, even if it is conducted post-event, is not a subsequent measure.

Subsequent measures include only the actual measures themselves and not the initial steps taken toward ascertaining whether any measures are necessary. *Fasanaro v. Mooney Aircraft Corp.*, 687 F. Supp. 482, 487 (N.D. Cal. 1988). Numerous courts have held that Rule 407 does not prohibit evidence of a party's analysis of its product. *Prentiss & Carlisle v. Koehring-Waterous*, 972 F.2d 6, 9-10 (1st Cir. 1992); *see Rocky Mountain Helicopters v. Bell Helicopters*, 805 F.2d 907, 918 (10th Cir. 1986) (upholding admission of post-accident tests of allegedly defective product because “[i]t would strain the spirit of the remedial measure prohibition in Rule 407 to extend its shield to evidence contained in post-event tests or reports”).

The fact that the analysis may often result in remedial measures being taken does not mean that evidence of the analysis may not be admitted. *Fox v. Kramer*, 994 P.2d 343, 351 (Cal. 2000) (holding that Rule 407 only applies to actions taken to correct or repair a problem after the accident, not to actions taken to determine whether or not corrective action was needed); *Hochen v. Bobst Group, Inc.*, 193 F.R.D. 22, 25 (D. Mass. 2000) (does not apply to investigation into or analysis of the cause of the accident); *see Robinson v. Diamond Offshore Mgmt. Co.*, No. 04-1899, 2006 WL 197010, at *2-3 (E.D. La. Jan. 26, 2006) (holding investigative reports recommending measures are not themselves remedial measures).

In addition, even should the results of an investigative report lead to subsequent remedial measures being taken, it is only those changes actually implemented which make events less likely to occur. *Benitez-Allende v. Alcan Alumino Do Brasil, S.A.*, 857 F.2d 26, 33 (1st Cir. 1988) (upholding admission of test of defective product even though test was used to plan

voluntary recall of product following accident). The court stated clearly in *Prentiss* that investigations and tests are analysis and are not remedial measures themselves even though they may eventually result in remedial measures. *Prentiss*, 972 F.2d at 6. Rule 407 prohibits evidence of “measures” that have been “taken.” The Supreme Court of Alaska held that “measures” are concrete actions. *City of Bethel v. Peters*, 97 P.3d 822, 827 (Alaska 2004).³ However, even if post-accident investigations and reports could somehow be considered “measures,” the rule would still not apply as the rule excludes “subsequent measures” that would have reduced the likelihood of the accident if they had been “taken previously,” meaning before the accident. *Id.* Because no accident can be investigated before it occurs, an investigation and report cannot be a measure that is excluded. *Ensign*, 914 P.2d at 7.

The rationale behind these decisions is that post-accident investigations would not make the event “less likely to occur.” Only the actual implemented changes would have the effect of diminishing the possibility of occurrence. Under this logic, even investigative reports that lead a company to voluntarily recall a product may be admissible.

The underlying social policy doctrine of Rule 407 is to encourage investigations by shielding their fruits from use by adverse claimants. However, there is no such doctrine either as to the internal investigative report or as to facts revealed by it. *Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 429 (5th Cir. 2006).

Here, the Corporation’s internal post-event investigation memorandum clearly falls into the category of product analysis and investigation and testing. Moreover, the sole purpose of the memorandum was to determine whether any corrective action was required. The mere fact that the memorandum recommended measures does not make the memorandum itself a measure. Also, the fact that the memorandum recommended subsequent action is immaterial as none of

³ Alaska Rule 407 is substantially the same as Federal Rule 407. Alaska R. Evid. 407 (2007).

the recommendations were implemented. The recommendations were to: 1) immediately recall the suspect toy from all retailers and consumers; 2) suspend all sales and distribution of the suspect toy immediately; 3) issue a warning concerning the possible exposure to rH-12 from the suspect toy; and 4) where feasible, secure names and addresses of purchasers of the suspect toy and issue individual warning letters. (R. 25-26.)

Recommendations 1 and 2 required immediate action. “Immediate” is defined as “[o]ccurring without delay; instant.” *Black’s Law Dictionary* 338 (7th ed. 1999). The Corporation delayed recall of the toxic toys for three months. (R. 3, 25-26.) This time lag cannot be considered to have been “immediately” under any definition. There was also no evidence introduced by the Corporation that recommendations 3 and 4 were ever implemented at any time. Therefore, neither the investigative portion nor the recommendation portion of the Corporation’s internal memorandum fit the definition of a subsequent measure and was admissible.

2. *In the alternative, even if the entire memorandum is considered to be a subsequent remedial measure, it can be admitted under the exceptions.*

The exceptions to Rule 407 are when evidence is offered “for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.” *Reddin v. Robinson Prop. Group Ltd. P’ship*, 239 F.3d 756, 759 (5th Cir. 2001). The exceptions listed in Rule 407 are illustrative. They do not preclude admission for other purposes not stated in the Rule. *Albrecht v. Balt. & Ohio R.R.*, 808 F.2d 329, 332 (4th Cir. 1987).

a. The Impeachment Exception

Rule 407 does not preclude evidence of subsequent measures offered for purposes of impeachment, and impeachment based on later acts may be permitted. *Dollar v. Lang Mfg.*,

N.C., Inc., 561 F.2d 613, 618 (5th Cir. 1977). Impeachment in this sense may include proving defendant's knowledge of the dangerous condition at the time of the accident. *Kirkland v. Mariott Int'l Inc.*, 416 F. Supp. 2d 480, 489 (E.D. La. 2006); *see* 23 Fed. Prac. & Proc. Evid. § 5283, 5290 (2007) (evidence of repair would be admissible for showing the defendant's knowledge of the danger). Finally, courts have held that the impeachment exception to Rule 407 has also been used to prevent the jury from being misled. *Minter*, 451 F.3d at 1213; *Wood v. Morbark Indus., Inc.*, 70 F.3d 1201, 1208 (11th Cir. 1995).

Here, Stuart Slope does not advocate the admission of the memorandum to prove negligence or culpable conduct, but rather to prove knowledge. The Corporation has implicitly denied knowledge of the toxic nature of the suspect toy prior to its investigation of January 16, 2006. However, the investigative memorandum refers to the scientific test substantiating “information provided in October, 2005.” (R. 25.) This is a genuine issue of material fact which should preclude the granting of summary judgment. Erroneous exclusion of this evidence deprived Stuart Slope from having a fact-finder decide the merits of the Corporation’s testimony. The memorandum pervasively indicated knowledge by the Corporation of the danger at a much earlier time than admitted.

b. The “Other Purposes” Exception

The last exception expressly listed in the second sentence of Rule 407 permits the admission of evidence of subsequent remedial measures for “another purpose.” Fed. R. Evid. 407. The issue is whether a court can be certain that the exclusion of evidence had no (or only a slight) effect on the jury. *United States v. Underwood*, 588 F.2d 1073, 1076 (5th Cir. 1979). If there is a reasonable likelihood that a determination may have been different had the evidence

not been erroneously excluded, a party's substantial right has been impaired under Federal Rule of Evidence 103. Fed. R. Evid. 103; *Johnson v. William C. Ellis & Sons Iron Works, Inc.*, 609 F.2d 820, 823 (5th Cir. 1980).

Courts have also recognized the causation exception to Rule 407. *Bailey v. Kawasaki-Kisen, K.K.*, 455 F.2d 392, 395 (5th Cir. 1972). The court remarked that the policy favoring repair must be subordinated to the necessity for getting at the truth. *Id.* at 396. Furthermore, many courts fail to credit the social value of making available for trial what is often the best source of information. *Westmoreland v. CBS, Inc.*, 601 F. Supp. 66, 67 (S.D.N.Y. 1984).

An Illinois district court also held that subsequent measures were admissible to prove proximate causation. *Wetherill v. Univ. of Chi.*, 565 F. Supp. 1553, 1557 (N.D. Ill. 1983). The court reasoned that causation is distinct from fault and was "another purpose" for which evidence of subsequent remedial measures can be offered under Rule 407. *Id.*

Here, the Corporation had knowledge of the danger of the poisonous toys as early as October 2005. (R. 25.) The Corporation not only chose to wait six months to act upon this knowledge, but further denied possessing the knowledge altogether. (R. 3.) The Corporation was able to prevent a jury from hearing and seeing relevant and probative evidence. If summary judgment had not been erroneously granted, a jury would have been able to hear all the evidence and quite possibly find in Stuart's favor. This is the standard for finding impairment of Stuart's substantial rights under Federal Rule of Evidence 103. Allowing this case to go to a jury would allow the fact-finder to "get at the truth" in this matter, thus serving the interest of justice and social policy underlying Rule 407.

B. *The Corporation’s Post-event Memorandum Should Not Have Been Excluded Under Federal Rule of Evidence 407 Because It Was Conducted in Response to the Mandatory Government Directive Issued by the Consumer Product Safety Commission.*

Rule 407 applies to voluntary subsequent remedial measures, not to corrective actions that are required by law. *S.E.C. v. Uzzi*, No. 01-8437-CIV, 2003 WL 1342962, at *1 (S.D. Fla. Jan. 21, 2003). Rule 407 does not require exclusion of policy changes made in response to the dictates of a higher authority, as opposed to those made in response to a sense of social responsibility or a desire to remedy an injury. *Gilanian v. City of Boston*, 431 F. Supp. 2d 172, 177 (D. Mass. 2006); see *Aircrash in Bali, Indonesia v. Zinke*, 871 F.2d 812, 817 (9th Cir. 1989); *Raymond v. Raymond Corp.*, 938 F.2d 1518, 1524 (1st Cir. 1991) (commenting, “Rule 407 applies only to subsequent remedial measures taken voluntarily by the defendant”).

The rationale behind this exception is that in order to be shielded by the protection of Rule 407, defendants must be compelled to voluntarily recall their defective products under a sense of civil obligation—as opposed to being forced to do so by a superior authority or government agency. *Koonce v. Quaker Safety Prods. & Mfg. Co.*, 798 F.2d 700, 719 (5th Cir. 1986). Only a “voluntary” recall falls within Rule 407. *State v. Elementis Chem. Inc.*, 887 A.2d 1133, 1139 (N.H. 2005) (Rule 407 excludes this evidence because admitting it into evidence would be unfair to the person who voluntarily remedies a hazardous condition).⁴ “Voluntary” is defined as “not impelled by outside influence.” *Black’s Law Dictionary* 764 (7th ed. 1999).

Some courts have found that Rule 407 does not bar evidence of subsequent remedial measures when those measures were involuntarily compelled by a superior authority. Generally, these courts have held that Rule 407 does not apply to evidence of mandatory remedial measures, including recall campaigns that are compelled by government agencies. *O’Dell v. Hercules, Inc.*,

904 F.2d 1194, 1203 (8th Cir. 1990); *see Rozier v. Ford Motor Co.*, 573 F.2d 1132, 1343 (5th Cir. 1978) (remedial measure did not fall within Rule 407 as the action taken was not out of a sense of social responsibility, but rather, the action was required by the National Highway Safety Administration).

Additionally, to help foster public safety, Congress established the right of the Consumer Product Safety Commission (CPSC) to create a product safety surveillance system. 15 U.S.C. § 2066(h)(1) (2008). Congress also required importers, manufacturers, and distributors to make a report to the CPSC of dangerous products. 15 U.S.C. § 2064(b) (2008).

By issuing a directive to manufacturers, distributors, and sellers of children's toys, the CPSC put the Corporation on official notice in October of 2005 that some of their products may contain toxic substances. The word "directive" means "to cause something or someone to move on a particular course; to guide something or someone; to govern; to instruct something or someone with authority." *Webster's Ninth New Collegiate Dictionary* 358 (9th ed. 1984).

The Corporation was therefore directed to conduct investigations in October of 2005, yet took no action until January of 2006. (R. 25, 27.) Further, the Corporation failed to initiate product recall until April of 2006. (R. 3.) Finally, there is no evidence that the Corporation complied with 15 U.S.C. § 2064(b) by notifying the CPSC that its product contained a defect in October of 2005 or again in January of 2006. 15 U.S.C. § 2064(b) (2008). Therefore, both the investigation and product recall were mandatory. The Corporation violated both the letter and the spirit of the law by failing to notify the CPSC of the danger to American children by this product. The Corporation should not be able to reap the fruits of this behavior by denying

⁴ New Hampshire Rule 407 is substantially the same as Federal Rule 407. N.H. R. Evid. 407 (2007).

knowledge of the danger and then avoiding the introduction of evidence which impeaches that testimony.

However, a voluntary subsequent product recall is not considered a remedial measure and is not encompassed by Rule 407. *Benitez-Allende*, 857 F.2d at 33 (upholding admission of test of defective product even though test was used to plan voluntary recall of product following accident). Thus, even if the subsequent remedial measure itself is not admissible, evidence mounted against a defendant which leads to it implementing a remedial measure may be admissible. *See Prentiss*, 972 F.2d at 10. Under this logic, investigative reports that lead a company to voluntarily recall a product may be admissible. *Id.* Rule 407 does not bar evidence of a recall letter offered to show the presence of defect in the vehicle. *Manieri v. Volkswagenwerk A.G.*, 376 A.2d 1317, 1322 (N.J. Super. Ct. App. Div. 1977) (evidence of recall campaign admissible).⁵

The Corporation argues that their product recall was not in response to the CPSC directive and thus voluntary. Even if this Court should find that the product recall was voluntary, Rule 407 protections should not be extended to the memorandum.

C. The Probative Value of the Corporation's Post-event Investigation Is Not Substantially Outweighed By Any Unfair Prejudicial Effect and Therefore Should Not Be Excluded Under Federal Rule of Evidence 403.

Rule 407 operates on the presumption that undue prejudice is likely and questions a jury's ability to draw the proper inferences from the evidence. *Kelly v. Crown Equip. Co.*, 970 F.2d 1273, 1277 (3d Cir. 1992). Remedial measures not banned by Rule 407 are subject to exclusion under Federal Rule of Evidence 403. Fed. R. Evid. 403. The Advisory Committee's Note to 1997 amendment states that “[e]vidence of subsequent measures that is not barred by Rule 407

⁵ New Jersey Rule 407 is substantially the same as Federal Rule 407. N.J. R. Evid. 407 (2007).

may still be subject to exclusion on Rule 403 grounds when the dangers of substantial prejudice or confusion substantially outweigh the probative value of the evidence.” Christopher B. Mueller & Laird Kirkpatrick, *Federal Rules of Evidence with Advisory Committee Notes and Legislative History* 63 (Aspen Publishers 2006). Rule 403 then requires the judge to ensure that the evidence sought to be admitted will not confuse the issues and mislead the jury, unduly prolong the trial or unfairly prejudice the defendant with inflammatory and cumulative evidence. *C.A. Assoc. v. Dow Chem. Co.*, 918 F.2d 1485, 1489 (10th Cir. 1990).

The primary material issue is the truthfulness of the Corporation. Allowing a jury to consider all the evidence and testimony of witnesses would permit it to render a fair verdict. Granted, by its very nature all adverse evidence is prejudicial—but here the admission of the memorandum will enlighten a jury as to the truth of the matter in question. Stuart’s substantial rights were affected by the granting of summary judgment, and the probative value of this evidence substantially outweighs any possible prejudice or confusion. Therefore, the Fourteenth Circuit’s decision granting summary judgment to the Corporation should be overturned.

CONCLUSION

For the foregoing reasons, Stuart Slope respectfully requests that this Court reverse the Fourteenth Circuit’s decision, and hold that Ms. Jussel’s personal business journal entry; her letter to her daughter; her statement to her secretary; and the Corporation’s internal investigative memorandum are admissible evidence.

Respectfully Submitted,

Team 22P

Counsel for Petitioner

Dated: February 29, 2008

APPENDIX A

Federal Rule of Evidence Rule 103. Rulings on Evidence

(a) Effect of Erroneous Ruling.--Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection.--In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of Proof.--In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(b) Record of Offer and Ruling.--The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of Jury.--In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain Error.--Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

Federal Rule of Evidence 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Federal Rule of Evidence 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.

Federal Rule of Evidence 801. Definitions

(b) Declarant. A “declarant” is a person who makes a statement.

(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.

Federal Rule of Evidence 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.

Federal Rule of Evidence 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.

Federal Rule of Evidence 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.

APPENDIX B

15 U.S.C. § 2064(b) (2008). Substantial Product Hazards

(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.

15 U.S.C. § 2066(h)(1). Imported Products

(h) Product surveillance program

(1) The Commission shall establish and maintain a permanent product surveillance program, in cooperation with other appropriate Federal agencies, for the purpose of carrying out the Commission's responsibilities under this chapter and the other Acts administered by the Commission and preventing the entry of unsafe consumer products into the commerce of the United States.

(2) The Commission may provide to the agencies with which it is cooperating under paragraph (1) such information, data, violator lists, test results, and other support, guidance, and documents as may be necessary or helpful for such agencies to cooperate with the Commission to carry out the product surveillance program under paragraph (1).