

No. 07-117

IN THE
SUPREME COURT OF THE UNITED STATES

February Term, 2008

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

Petitioner,

- against -

UNDER THE SEA TOYS, Inc.,

Respondent.

On Writ of Certiorari from
The United States Court of Appeals for the Fourteenth Circuit

Brief for Respondent

QUESTIONS PRESENTED

- I. Whether, under Federal Rule of Evidence 804(b)(3), courts must automatically exclude collateral statements from admission in a civil case even though they are contained in the same narrative as self-inculpatory statements in light of the Supreme Court's decision in *Williamson v. United States*, and whether statements acknowledging one's own criminal conduct contained in a personal letter are *per se* inadmissible in a civil case if the writer subsequently commits suicide.
- II. Whether, under Federal Rule of Evidence 803(3), a declarant's hearsay statement expressing her intent to meet and discuss a matter with a business associate constitutes evidence in a civil case that the meeting took place and the matter was discussed where there is no independent, corroborating evidence to confirm either of those assertions.
- III. Whether Federal Rule of Evidence 407's evidentiary bar on subsequent remedial measures applies to i.) informational findings accompanying recommendations in a post-event internal report issued by a toy distributor after an investigation of a potential problem with its product, and ii.) measures undertaken at the direction of a government agency where the language of the government directive did not mandate or require specific remedial measures or name a particular entity to undertake such measures.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iv

OPINIONS BELOW.....vii

STATUTORY PROVISIONS.....viii

STATEMENT OF THE CASE.....ix

SUMMARY OF THE ARGUMENT.....xii

ARGUMENT

I. THE INTERPRETATION OF FEDERAL RULE OF EVIDENCE 804(B)(3) IN *WILLIAMSON V. U.S.* PRECLUDES THE ADMISSIBILITY IN A CIVIL CASE OF RELIABLE COLLATERAL STATEMENTS CONTAINED IN A BROADER, SELF-INCULPATORY NARRATIVE AND STATEMENTS ACKNOWLEDGING CRIMINAL CONDUCT IN A PERSONAL LETTER ARE *PER SE* INADMISSIBLE UNDER 804(B)(3) IN A CIVIL CASE WHERE THE WRITER COMMITS SUICIDE AFTER SENDING IT.....1

A. Both the Holding of *Williamson* and the Case Law Interpreting the Decision Find That the Supreme Court Explicitly Reads Rule 804(b)(3) to Deny Admission of Collateral Statements Even if Made Within a Broader, Self-Inculpatory Narrative.....3

B. Statements Made Prior to Suicide are *Per Se* Inadmissible Under Rule 804(b)(3) Because They are Inherently Unreliable.....8

II. UNDER FEDERAL RULE OF EVIDENCE 803(3), A DECLARANT’S HEARSAY STATEMENT OF INTENT TO MEET AND DISCUSS A MATTER WITH ANOTHER PERSON IS NOT EVIDENCE OF THE MEETING’S OCCURRENCE OR THE MATTER DISCUSSED.....11

A. For Statements of Intent to be Admissible, Additional Corroborating Evidence Connecting the Hearsay Statement of Intent to the Subsequent Conduct of the Non-Declarant is Required.....12

B.	<u>Even if Corroborating Evidence is Not Required, Hearsay Statements of Intent are Admitted Not as Evidence of Subsequent Conduct, But Merely as a Rebuttal Inference of the Subsequent Conduct.....</u>	13
III.	THE APPELLATE COURT CORRECTLY AFFIRMED THE DISTRICT COURT’S EVIDENTIARY FINDINGS REGARDING THE EXCLUSION OF RESPONDENT’S POST-EVENT REPORT BECAUSE THE ENTIRE REPORT CONSTITUTES A SUBSEQUENT REMEDIAL MEASURE.....	14
A.	<u>Federal Rule of Evidence 407 and Its Underlying Policy Require that the Informational Findings of Respondent’s Post-Event Internal Investigative Report be Excluded from Admissibility.....</u>	16
B.	<u>Federal Rule of Evidence 407 Requires the Exclusion of Respondent’s Post-Event Internal Investigative Report as a Subsequent Remedial Measure, Because the Superior Authority Exception Should Not be Recognized and is Otherwise Inapplicable to the Facts at Bar.....</u>	19
	CONCLUSION.....	23

TABLE OF AUTHORITIES

U.S. SUPREME COURT CASES

Lilly v. Virginia,
527 U.S. 116 (1999).....7

Mut. Life Ins. Co. v. Hillmon,
145 U.S. 285 (1892).....11, 12

Williamson v. U.S.,
512 U.S. 594 (1994).....*passim*

U.S. COURT OF APPEALS CASES

Brazos River Auth. v. GE Ionics, Inc.,
469 F.3d 428 (5th Cir. 2006).....18

Carson v. Peters,
42 F.3d 384 (7th Cir. 1994).....2, 7, 8

HDM Flugservice GmbH v. Parker Hannifin Corp.,
332 F.3d 1025 (6th Cir. 2003).....20, 21

Herndon v. Seven Bar Flying Serv., Inc.,
716 F.2d 1322 (10th Cir. 1983).....21

In re Aircrash in Bali, Indonesia,
871 F.2d 812 (9th Cir. 1989).....22

In re Airport Disaster at Metropolitan Airport, Detroit, Michigan,
782 F.2d 1041 (6th Cir. 1985).....20

O'Dell v. Hercules, Inc.,
904 F.2d 1194 (8th Cir. 1990).....21

Prentiss & Carlisle Co., Inc. v. Koehring-Waterous Div. of Timberjack, Inc.,
972 F.2d 6 (1st Cir. 1992).....17

Rocky Mountain Helicopters, Inc. v. Bell Helicopters Textron,
805 F.2d 907 (10th Cir. 1986).....17

Rozier v. Ford Motor Co.,
573 F.2d 1332 (5th Cir. 1978).....19, 21

<i>Silverstein v. Chase</i> , 260 F.3d 142 (2d Cir. 2001).....	2, 6
<i>Specht v. Jensen</i> , 863 F.2d 700 (10th Cir. 1988).....	16
<i>U.S. v. Badalamenti</i> , 794 F.2d 821 (2d Cir. 1986).....	13
<i>U.S. v. Best</i> , 219 F.3d 192 (2d Cir. 2000).....	12
<i>U.S. v. Delvecchio</i> , 616 F.2d 859 (2d Cir. 1987).....	13
<i>U.S. v. Jenkins</i> , 579 F.2d 840 (4th Cir. 1978).....	12
<i>U.S. v. Layton</i> , 720 F.2d 548 (9th Cir. 1983).....	10, 11
<i>U.S. v. Lemonakis</i> , 485 F.2d 941 (D.C. Cir. 1973).....	9
<i>U.S. v. Pheaster</i> , 544 F.2d 353 (9th Cir. 1976).....	11, 12, 13
<i>U.S. v. Sperling</i> , 726 F.2d 69 (2d Cir. 1984).....	13
<i>Werner v. Upjohn Co.</i> , 628 F.2d 848 (4th Cir. 1980).....	19, 20

U.S. DISTRICT COURT CASES

<i>Alimenta v. Stauffer</i> , 598 F.Supp. 934 (N.D. Ga. 1984).....	17
<i>Ciccarelli v. Gichner</i> , 862 F. Supp. 1293 (M.D. Pa. 1994).....	7
<i>Coy v. Renico</i> , 414 F. Supp. 2d 744 (E.D. Mich. 2006).....	14

<i>Fasanaro v. Mooney Aircraft Corp.</i> , 687 F.Supp. 482 (N.D. Cal. 1988).....	18
<i>Schimpf v. Gerald</i> , 52 F. Supp. 2d 976 (E.D. Wis. 1999).....	6
<i>U.S. v. Angleton</i> , 269 F. Supp. 2d 878 (S.D. Tex. 2003).....	9, 10
<i>U.S. v. Crowder</i> , 848 F.Supp. 780 (M.D. Tenn. 1994).....	9, 10
<i>U.S. v. Houlihan</i> , 871 F.Supp. 1495 (D. Mass. 1994).....	12

STATE COURT CASES

<i>Atlas Metals Prod. Co. v. Lumberman’s Mut. Cas. Co.</i> , No. 001904B, 2003 WL 22699925 (Mass. Super. Ct. July 31, 2003).....	9, 11
<i>State v. Santangelo</i> , 534 A.2d 1175 (Conn. 1987).....	13

STATUTORY PROVISIONS

Fed. R. Evid. 407.....	<i>passim</i>
Fed. R. Evid. 803(3).....	11, 12
Fed. R. Evid. 804(b)(3).....	<i>passim</i>

OPINIONS BELOW

The U.S. District Court for the Southern District of Boerum granted Defendant's Motion for Summary Judgment. (R. at 21). The court rejected Plaintiff's claim that the Defendant had the requisite knowledge or awareness of the toy's danger to substantiate a failure to warn or recall cause of action as shown in four different pieces of evidence. (R. at 19). The court held that each of the four pieces of evidence was inadmissible under the Federal Rules of Evidence. (R. at 19-20).

The U.S. Court of Appeals for the Fourteenth Circuit affirmed the District Court's grant of summary judgment for Defendant. (R. at 39). The Court of Appeals similarly found all four pieces of evidence Plaintiff tried to admit into evidence inadmissible under the Federal Rules of Evidence. (R. at 31).

STATUTORY PROVISIONS

FEDERAL STATUTES

Fed. R. Evid. 407

“Subsequent Remedial Measures. When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product’s design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.”

Fed. R. Evid. 803

“Hearsay Exceptions; Availability of Declarant Immaterial.

(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 facts remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant’s will.”

Fed. R. Evid. 804(b)

“Hearsay Exceptions; Declarant Unavailable.

(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.”

STATEMENT OF THE CASE

This case presents the Supreme Court with an opportunity to reaffirm long-standing principles embodied in the Federal Rules of Evidence. The rules and their well-grounded policy justifications should be honored and complied with. Because evidence should not be unsound and prejudicial, the decisions of the lower courts should be affirmed.

This action began when a Complaint was filed on behalf of Stuart, by his parents, Stacy and Selina Slope (“Petitioner”), on April 14, 2006. (R. at 2). The complaint alleges that Under the Sea Toys, Inc. (“Sea Toys”) violated Section 204 of the Boerum Tort Reform Act by knowingly failing to warn Petitioner of the negative effects of its Finn E. Shark toy. (R. at 2-4, 18). The toy had been manufactured and distributed by a foreign manufacturer, Tattel, in Legolia, in early 2005. (R. at 2). The toy was then distributed in the U.S. by Sea Toys in conjunction with the animated film “Shark Attack” in the summer of 2005. (R. at 2, 28). After seeing the film, Stuart’s parents purchased the toy for him in December of 2005. (R. at 2). Unfortunately, on January 2nd, 2006, Stuart required medical attention as a result of exposure to a toxin known as rH-12. (R. at 3, 29).

On January 16th of 2006, Sea Toys’ internal investigative report (“Report”) was released which linked rH-12 to its Finn E. Shark toy. (R. at 25-26). The investigation preceding the Report had been commenced after Sea Toys received notice from the U.S. Consumer Product Safety Commission (“CPSC”). (R. at 27). The CPSC directive put “manufactures, distributors, and sellers of children’s toys on notice. . .” of potential issues toy manufacturers might have with toys produced abroad. (R. at 27). Finn E. Shark was

subsequently recalled on April 1, 2006. (R. at 3, 29).

Petitioner sought to establish its Failure to Warn claim through four pieces of evidence offered to try to establish that Sea Toys had knowledge of the health risks of its toy prior to its recall. (R. at 18). First, Petitioner sought admission of a journal entry of Tattel's late CEO, Mimi Jussel ("Jussel"), where she admitted to her knowledge of the rH-12 and implicated that Sea Toys, the company she had dealt with in America, knew of the existence of rH-12 in the Finn E. Shark toy. (R. at 22, 30-31). Second, Petitioner sought admission of Jussel's distressing letter written to her daughter on October 11, 2005, a week before Jussel's suicide, which contained another personal admission of knowledge about rH-12 in the toy and another implication that Sea Toys knew of the toxin as well. (R. at 23, 31). Third, Petitioner sought admission of the deposition of Jussel's former secretary, Jaffe Peetz, where he described Jussel's intention to meet with Sea Toys' CEO, Troy Ledbetter ("Ledbetter"), to discuss the toy's impact on Legolian children. (R. at 24, 31). Finally, Petitioner sought admission of the Report to Ledbetter that provided informational findings and recommendations regarding Sea Toys' internal product investigation. (R. at 25-26, 31). Sea Toys contested the admissibility of each of these four items. (R. at 18).

On July 10, 2006, Judge Ritter of the U.S. District Court for the Southern District of Boerum granted Sea Toys' motion for summary judgment and found that none of items proffered to establish Sea Toys' knowledge was admissible as a matter of law. (R. at 21). The Fourteenth Circuit subsequently affirmed the District Court's decision on January 3rd, 2007. (R. at 31). The Supreme Court granted a petition for a writ of certiorari to the Fourteenth Circuit to determine whether statements in the journal entry, letter, deposition

and Report were erroneously excluded. (R. at 46-47). Sea Toys, as Respondent in this matter, respectfully requests that the decision of the Fourteenth Circuit be affirmed.

SUMMARY OF THE ARGUMENT

This Court should affirm the judgment of the Court of Appeals for the Fourteenth Circuit because there is no admissible evidence to prove that Sea Toys had knowledge of the danger of the toy. As for the inadmissibility of Jussel's personal business journal, the interpretation of Rule 804(b)(3) in *Williamson v. U.S.*, 512 U.S. 594 (1994), precludes the admissibility of reliable collateral statements even when contained within a broader, self-inculpatory narrative. Rule 804(b)(3) permits an exception to the hearsay exclusion rule for statements against interest made by an unavailable witness. The rule defines an applicable statement against interest in relevant part as: "[a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest...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).

In *Williamson*, the Supreme Court held that Rule 804(b)(3) does not permit the admissibility of collateral statements even if made in a self-inculpatory narrative and even if neutral as to the declarant's interest. 512 U.S. at 600-01. In reaching this holding, the Supreme Court noted the basis for allowing the admission of self-inculpatory statements as having its roots in the inherent reliability of those statements and emphasized the lack of that same quality in collateral statements. *Id.* at 599-601. The case law interpreting the *Williamson* decision finds that the Supreme Court did not limit its holding in *Williamson* to the criminal context and holds that the rule of the case is equally applicable in civil cases. Therefore, under *Williamson* and the relevant case law, it is proper to admit the portions of Jussel's business journal inculpatory her personal

knowledge and to exclude the part of the statement indicating liability on the part of Sea Toys under Rule 804(b)(3).

Second, the letter written by Jussel to her daughter is inadmissible because statements made prior to suicide are *per se* inadmissible due to their unreliability. Statements made prior to suicide lack that inherent reliability attached to statements against interest since there is not the same exposure to criminal or civil liability that permits the reasonable assumption that the person is telling the truth that is attached to statements against interest generally. *U.S. v. Angleton*, 269 F. Supp. 2d 878 (S.D. Tex. 2003). Jussel wrote the letter one week prior to committing suicide and in it asked her daughter for forgiveness, spoke of her dreams for her daughter, and spoke of how defeated she felt. (R. at 23). The tone of Jussel's letter indicated that she was never going to see her daughter again and saw the letter as her last opportunity to tell her daughter her side of the story. *Id.* Due to Jussel's subsequent suicide and the opportunity this letter provided for her to rewrite history in the eyes of her daughter, the Fourteenth Circuit was correct in holding that these statements, as statements made prior to suicide, are *per se* inadmissible under Rule 804(b)(3).

Next, the hearsay statement of Jussel's intention to meet with Ledbetter and tell him about the rH-12 contamination in the toy is inadmissible because under Rule 803(3), a declarant's hearsay statement of intent is not admissible as evidence to prove another person's conduct. Rule 803 of the Federal Rules of Evidence provides that statements of a declarant's "then existing state of mind, emotion, sensation or physical condition" are not excluded by the hearsay rule. Although the Supreme Court held in *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285, 295-96 (1892), that it was permissible to infer a

declarant's actions from his expressions of intent and to infer another person's actions from the declarant's expressions of intent, there is evidence that Rule 803(3) does not fully adopt that doctrine. *U.S. v. Pheaster*, 544 F.2d 353, 379 (9th Cir. 1976). The Ninth Circuit pointed to the Notes of the House Committee on the Judiciary regarding Rule 803(3) by citing this excerpt: “[T]he Committee intends that the Rule be construed to limit the doctrine of *Mutual Life Insurance Co. v. Hillmon* (citation omitted) so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person.” *Id.* at 379 (citing House Report No. 93-650, Note to Paragraph (3), 28 U.S.C.A. at 579).

Lower courts that have considered the interpretation and application of Rule 803(3) are divided between those that follow the approach taken by the 9th Circuit adopting the *Hillmon* doctrine and those that follow the 2nd Circuit and 4th Circuit approach requiring corroborating evidence. *U.S. v. Houlihan*, 871 F.Supp. 1495, 1499 (D.Mass. 1994). However, those courts that do allow the admission of hearsay statements of intent, only allow their admission to serve as an inference of the subsequent conduct not as proof that the subsequent conduct necessarily occurred. *See, e.g., Pheaster*, 544 F.2d at 379. Here, there is no corroborating evidence of Jussel's meeting with Ledbetter. Therefore, under either approach, the statements contained in the deposition of Jussel's secretary are inadmissible to prove Ledbetter did in fact meet with Jussel and did in fact learn about the rH-12 contamination.

Lastly, Sea Toys' post-event report is inadmissible under Rule 407 because the entire report constitutes a subsequent remedial measure. Federal Rule of Evidence 407 (“Rule 407”) provides that, “[w]hen, 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.” Fed. R. Evid. 407. There is no doubt that the Report at issue occurred subsequent to the injury of which Petitioner complains. (R. at 14). Furthermore, Petitioner does not dispute that a portion of the Report, namely the section marked “Recommendations,” is wholly inadmissible. (R. at 13). However, Petitioner misguidedly requests that the Report be redacted, the Recommendations Section excised, and the “Informational Findings” admitted for the purposes of showing Sea Toys’ knowledge. (R. at 13). The relief Petitioner requests is in contradiction to the policy behind Rule 407. Redaction of the Report, which was the culmination of Sea Toys’ investigation of the Finn E. Shark product, should not be permitted.

Petitioner alternatively contends that if the Report in its entirety is a subsequent remedial measure it should still be admitted as an involuntary response to a governmental directive issued by the U.S. Consumer Product Safety Commission (“CPSC”). (R. at 38). In this argument, Petitioner erroneously seeks to invoke a judicially created exception to Rule 407 known as the “Superior Authority” exception. (R. at 38). This exception should not be recognized by the Supreme Court, and even if it were, it would not fit the facts of this case. The CPSC directive never required Sea Toys’ investigation and its subsequent Report. Thus, the Report cannot fairly be characterized as an involuntary response to a governmental directive that would trigger the exception’s application. For the foregoing reasons, the Supreme Court should affirm the Fourteenth Circuit Court of

Appeals' decision in favor of Sea Toys' on all evidentiary matters related to Rule 407, Rule 803(3), and Rule 804(b)(3).

ARGUMENT

I. THE INTERPRETATION OF FEDERAL RULE OF EVIDENCE 804(B)(3) IN *WILLIAMSON V. U.S.* PRECLUDES THE ADMISSIBILITY IN A CIVIL CASE OF RELIABLE COLLATERAL STATEMENTS CONTAINED IN A BROADER, SELF-INCULPATORY NARRATIVE AND STATEMENTS ACKNOWLEDGING CRIMINAL CONDUCT IN A PERSONAL LETTER ARE *PER SE* INADMISSIBLE UNDER 804(B)(3) IN A CIVIL CASE WHERE THE WRITER COMMITS SUICIDE AFTER SENDING IT.

The general hearsay rule of the Federal Rules of Evidence precludes the admissibility of hearsay statements. Fed. R. Evid. 802. Rule 804 allows for exceptions to the general rule of hearsay inadmissibility in certain cases where the declarant is unavailable as a witness for reasons such as death. Fed. R. Evid. 804(a). Rule 804(b)(3) permits the exception to the hearsay exclusion rule for statements against interest made by a now unavailable witness. The rule defines an applicable statement against interest in relevant part as: “[a] statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest...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). The Supreme Court in *Williamson v. U.S.*, 512 U.S. 594 (1994), interpreted and clarified the scope of the hearsay exception for statements against interest in Rule 804(b)(3).

In *Williamson*, the Supreme Court held that Rule 804(b)(3) does not permit the admissibility of collateral statements even if made in a self-inculpatory narrative and even if neutral as to the declarant’s interest. 512 U.S. at 600-01. In reaching this holding, the Supreme Court noted that the basis for allowing the admission of self-inculpatory statements has at its roots the inherent reliability of those statements and emphasized the lack of that same quality in collateral statements. *Id.* at 599-601. The

case law interpreting the *Williamson* decision finds that the Supreme Court did not limit its holding in *Williamson* to the criminal context and holds the rule of the case equally applicable in civil cases. *See, e.g., Silverstein v. Chase*, 260 F.2d 142, 147-48 (2d Cir. 2001) (holding that the rule of *Williamson* should apply in civil cases because the Court did not limit its holding to the criminal context and did not differentiate between statements against different types of interests). Case law also indicates that the proper interpretation of *Williamson* under Rule 804(b)(3) is that it allows for the dissection of statements in order to admit only those portions which are truly self-inculpatory. *See, e.g., Carson v. Peters*, 42 F.3d 384, 386 (7th Cir. 1994) (reading *Williamson* to require judges to separate self-inculpatory portions of statements from non-self-inculpatory portions to determine admissibility). For these reasons, the Fourteenth Circuit did not err in finding the *Williamson* decision to preclude the admission of all collateral statements as inadmissible hearsay.

The Fourteenth Circuit also correctly held that, under 804(b)(3), as a matter of law declarations against interest made prior to committing suicide are *per se* inadmissible. “The question under Rule 804(b)(3) is always whether the statement was sufficiently against the declarant’s penal interest that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true, and this question can only be answered in light of all the surrounding circumstances.” *Williamson*, 512 U.S. at 603-04. Statements made prior to suicide lack that inherent reliability attached to statements against interest because the writer is not facing liability as a result of his or her statements. Jussel’s letter to her daughter was written a week before her suicide where she had the opportunity to tell her daughter as much or as little

of the truth as she wanted. The letter was personal and did not in any way result in her facing criminal or civil liability for her statements contained therein. Therefore, the Fourteenth Circuit correctly held that Jussel's statements in the letter to her daughter are *per se* inadmissible under Rule 804(b)(3) as statements made prior to suicide.

A. Both the Holding of *Williamson* and the Case Law Interpreting the Decision Find That the Supreme Court Explicitly Reads Rule 804(b)(3) to Deny Admission of Collateral Statements Even if Made Within a Broader, Self-Inculpatory Narrative.

The holding of *Williamson v. U.S.*, 512 U.S. 594, reads Rule 804(b)(3) to preclude the admissibility of all collateral statements including those made in a narrative containing statements satisfying the hearsay exception for declarations against interest. In writing for the majority, Justice O'Connor wrote: "In our view, the most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory." *Williamson*, 512 U.S. at 600-01. The relevant facts in *Williamson* involved post-arrest statements made by a declarant found transporting cocaine during an interview with a government agent, some of which were self-inculpatory and others of which implicated the defendant as a participant in the drug scheme. 512 U.S. at 596-97. At trial, when the declarant refused to testify, the trial court allowed the admission of the declarant's statements implicating the defendant via testimony from the interviewing officer. *Id.* at 597-98. The defendant later appealed his conviction and claimed the admission of the declarant's statements violated Rule 804(b)(3). *Id.* at 598.

After the appellate court affirmed the defendant's conviction, the Supreme Court granted certiorari to clarify the interpretation of the Rule 804(b)(3) hearsay exception for statements against interest. *Id.* at 596. The Court began with a determination of the

proper definition of “statement” as used in the Rule by comparing the possible definition options: the narrow definition, “ ‘a single declaration or remark,’” and the broader definition, “ ‘a report or narrative.’” *Id.* at 599 (citing Webster’s Third New International Dictionary 2229, defn. 2(a)-(b) (1961)). In comparing the two possibilities, the Court noted that the broader definition would allow for the admission of entire confessions containing both self-inculpatory statements and collateral, non-inculpatory statements as long as the confession as a whole sufficiently inculpated the declarant. *Williamson*, 512 U.S. at 599. In comparison, the Court found that the narrow definition would allow admission under Rule 804(b)(3) only for those statements individually self-inculpatory within the confession. *Id.* at 599.

Finding no indication of the proper definition in the text of the Rule itself, the Court held that the principle behind the Rule undeniably supports the narrower reading. *Id.* The majority explained that the Rule is based “...on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true.” *Id.* The Court emphasized that the broader reading of the Rule is inconsistent with this principle because even though self-inculpatory statements have an inherent reliability, “...the fact that a statement is collateral to a self-inculpatory statement says nothing at all about the collateral statement’s reliability.” *Id.* at 600.

The Court noted that Rule 804(b)(3) is an exception to the general rule of hearsay inadmissibility and neither the mere proximity of non-inculpatory parts to inculpatory parts nor the broader context of a self-inculpatory confession make the confession’s non-inculpatory parts more reliable. *Id.* at 599-600. In fact, Justice O’Connor further

reasoned that “[o]ne of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.” *Id.* The Court rejected Justice Kennedy’s argument for excluding only self-serving collateral statements under the Rule and reiterated its belief that the correct interpretation of Rule 804(b)(3) excludes the admission of collateral statements, whether self-exculpatory or neutral to declarant’s interest, just like any other hearsay statement. *Id.* at 600-01.

In addressing the application of the holding of the case, the Supreme Court stated that “[t]he district court may not just assume for purposes of Rule 804(b)(3) that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else.” *Williamson*, 512 U.S. at 601. The Court held that only the self-inculpatory parts of statements are admissible and held that this is a determination to be made by looking at the circumstances of each case. *Id.* at 603. In *Williamson*, the Court found that not all of the declarant’s statements were properly admitted and found that only the part where he admitted to knowing that there was cocaine in the suitcases properly was admissible. *Id.* at 604. However, the Court held that the parts implicating the defendant in the case were inadmissible because they “did little to subject [the declarant] himself to criminal liability. A reasonable person in [the declarant’s] position might even think that implicating someone else would decrease his practical exposure to criminal liability...” *Id.*

Even if the holding of *Williamson* does not explicitly preclude the admission of collateral statements in civil cases, the case law interpreting the *Williamson* decision is consistent with this reading of the holding. Although *Williamson* involved a criminal

case with statements against penal interest, the holding and rationale of the case are applicable to the civil context with statements against pecuniary interest. Because the Supreme Court focused on the word “statement”, rather than the interest being affected, the rule of *Williamson* is equally applicable to civil cases involving statements against pecuniary interests. *Silverstein v. Chase*, 260 F.3d 142, 148 (2nd Cir. 2001). The Second Circuit found the *Williamson* rule applicable because the holding of the case addressed self-inculpatory statements in general and did not limit its holding to statements against penal interest only. *Id.* at 148.

The Second Circuit further emphasized that the Court in *Williamson* supported its holding with the reasoning that the mere proximity of a collateral statement to a self-inculpatory statement says nothing about the collateral statement’s reliability and argued that this reasoning is “equally applicable to statements against pecuniary interest.” *Id.* at 148 (citing *Williamson*, 512 U.S. at 600). Additionally, the *Silverstein* opinion noted that the reasoning on which the hearsay rules in general are based, apply to statements against pecuniary interest as well when it wrote: “[a]s for motive, a declarant may well use a declaration against pecuniary interest as a method of lying about another’s actions just as in a declaration against penal interest.” *Id.*

Those courts that apply the *Williamson* rule in the civil context, read *Williamson* to require the dissecting of statements to separate the self-inculpatory parts from the non-inculpatory parts. *See, e.g., Schimpf v. Gerald*, 52 F. Supp. 2d 976, 986 (E.D.Wis. 1999) (holding that the *Williamson* analysis requires the dissection of statements in order to admit only the self-inculpatory portions under Rule 804(b)(3)). Similarly, the Middle District of Pennsylvania held that under *Williamson* a generally self-inculpatory sentence

may have collateral, inadmissible portions. *Ciccarelli v. Gichner*, 862 F. Supp. 1293, 1298 (M.D. Pa. 1994). The court in *Ciccarelli* gave the following example as the proper way to interpret the *Williamson* rule: “For example, in the following sentence, only the parts referring to culpable conduct by the declarant would be admissible: ‘Matthew, Derek, and I robbed Kenneth.’ The references to Matthew and Derek would have to be redacted.” *Id.*

The Seventh Circuit also read *Williamson* to hold that under Rule 804(b)(3), judges must separate self-inculpatory portions of statements from other portions to determine admissibility and noted that the basis for this interpretation lies in the reasoning that “[p]ortions of inculpatory statements that pose no risk to the declarants are not particularly reliable; they are just garden variety hearsay.” *Carson v. Peters*, 42 F.3d 384, 386 (7th Cir. 1994). Moreover, the Supreme Court itself has affirmed in other opinions that *Williamson* interprets Rule 804(b)(3) to allow admission of only those portions of statements which are truly self-inculpatory. In *Lilly v. Virginia*, the Supreme Court affirmed that *Williamson* adhered to this approach to admissibility of statements under the Federal Rule of Evidence and stated that *Williamson* recognized “the presumptive unreliability of the ‘non-self-inculpatory’ portions of the statement.” 527 U.S. 116, 133 (1999) (citing *Williamson*, 512 U.S. at 599-601).

Under the holding and rationale of *Williamson*, the Fourteenth Circuit correctly held that Jussel’s collateral statement, “everybody here and in America knew,” is inadmissible. (R. at 33) (quoting R. at 22). Like the example in *Ciccarelli*, Jussel’s statement refers to her knowledge of the danger as well as others’ knowledge: “I knew – everybody here and in America knew – that there was rH-12 in that toy but we kept

selling it anyway and we just sent a shipment to the U.S.” (R. at 22). It is clear that the portion of the entry implicating Jussel which reads, “I knew...that there was rH-12 in that toy,” is an admissible statement against interest since it subjects Jussel herself to liability. (R. at 22). However, the portion reading, “everybody here and in America knew” implicating Sea Toys by implying it had knowledge of the rH-12 presence in the toy as well, is inadmissible since it is neither against Jussel’s interest nor does it subject her to any liability; that statement is simply “garden variety hearsay” under *Carson*. (R. at 22). Therefore, under *Williamson*, it is proper under Rule 804(b)(3) to admit the portions of Jussel’s journal entry inculcating her personal knowledge and to exclude the portions indicating liability on the part of Sea Toys.

B. Statements Made Prior to Suicide are *Per Se* Inadmissible Under Rule 804(b)(3) Because They are Inherently Unreliable.

The Fourteenth Circuit was correct in holding that as a matter of law declarations against interest made prior to committing suicide are *per se* inadmissible under 804(b)(3). Rule 804(b)(3) allows an exception for hearsay statements against interest because self-inculpatory statements are inherently reliable. *Williamson*, 512 U.S. at 600. “The question under Rule 804(b)(3) is always whether the statement was sufficiently against the declarant’s penal interest that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true, and this question can only be answered in light of all the surrounding circumstances.” *Id.* at 603-04.

Statements made prior to suicide lack that inherent reliability attached to statements against interest because “[w]hen a declarant knows that he will not be present to respond to prosecution or civil suit, impending liability cannot be considered a motivating impetus ensuring trustworthiness.” *The Judicial Interpretation of Suicide*, 105

U. Pa. L. Rev. 391, 505 (1957). As the Chief Justice of the Supreme Court of Appeals of West Virginia once noted, “[a] suicide note is the perfect opportunity to rewrite one’s own history in a way calculated to impress one’s final audience.” *State v. Satterfield*, 457 A.2d 440, 456 (1995). The District of Columbia Circuit rejected the admissibility of a statement against interest contained in a suicide note because penal interest, the court reasoned, is “an interest of no moment to a dead man.” *U.S. v. Lemonakis*, 485 F.2d 941, 957 n. 24 (D.C. Cir. 1973).

Statements made prior to one’s suicide cannot be said to subject the declarant to liability as a practical matter. *U.S. v. Angleton*, 269 F. Supp. 2d 878, 898 (S.D. Tex. 2003). In *Angleton*, the defendant argued that notes written by a man almost a week before his suicide found in his jail cell were admissible as statements against the writer’s interest but the court rejected this argument because it found the notes were not sufficiently against the writer’s interest since they would not subject him to any liability due to his suicide. *Id.* at 898-890. Similarly, the Middle District of Tennessee found that statements made by a terminally ill man were not statements against interest because he knew it was unlikely he would live long enough to suffer the criminal or civil consequences resulting from his statements. *U.S. v. Crowder*, 848 F. Supp. 780, 781-82 (M.D. Tenn. 1994).

The cases involving suicide where statements against interest were admitted into evidence involve spoken statements where the decisions emphasize the voluntary and spontaneous nature of the statements. In finding that a declarant’s statement made to police shortly before she committed suicide was admissible under the hearsay exception for declarations against interest, the Superior Court of Massachusetts held that “[t]o be

admissible, the declarant must be unavailable, the statement must be based on her own first-hand knowledge, and there must be an awareness on the part of the declarant that her statement exposes her to possible criminal action.” *Atlas Metals Prod. Co. v. Lumberman's Mut. Cas. Co.*, No. 001904B, 2003 WL 22699925, at *2 (Mass. Super. Ct. July 31, 2003). The court noted that the declarant’s statements in that case met all the requirements to constitute a statement against interest despite the declarant’s subsequent suicide because the statement was made voluntarily to police and with full awareness that making the inculpatory statement could result in criminal liability. *Id.* In another case, the Ninth Circuit held inculpatory statements made by a religious leader just before a mass suicide at the religious organization’s camp were admissible despite the leader’s subsequent suicide. *U.S. v. Layton*, 720 F.2d 548, 560 (9th Cir. 1983). The court found that statements he made implicating himself and others in a conspiracy to commit mass suicide were statements against his interest because they were made spontaneously to a trusted advisor just as the events of the suicide were about to unravel. *Id.* at 560. Additionally, the statements made by the declarant in *Layton* were subsequently corroborated. *Id.* The court found these factors together were sufficient to ensure reliability. *Id.*

Here, the Fourteenth Circuit correctly held that Jussel’s statements in the letter to her daughter are *per se* inadmissible under Rule 804(b)(3) as statements made prior to suicide. In this letter, Jussel had the opportunity to rewrite history in the eyes of her daughter who had no prior knowledge of the rH-12 contamination in the toys. (R. at 23). Like *Angleton* and *Crowder*, Jussel wrote her letter as though she was never going to see or talk to her daughter again, as though death were imminent. Although Jussel mentioned

facing criminal liability, she also asked her daughter for forgiveness, told her to be careful in her travels, spoke of her dreams for her daughter, and spoke of how defeated she felt. (R. at 23). Jussel's letter is distinguishable from the spontaneous statements made to a trusted associate that were later corroborated in *Layton*. Similarly, Jussel's statements are distinguishable from those in *Atlas Metals* where the declarant voluntarily made a statement to police while aware of possible resulting criminal liability. For these reasons, the Fourteenth Circuit was correct in holding that statements made prior to suicide are *per se* inadmissible.

II. UNDER FEDERAL RULE OF EVIDENCE 803(3), A DECLARANT'S HEARSAY STATEMENT OF INTENT TO MEET AND DISCUSS A MATTER WITH ANOTHER PERSON IS NOT EVIDENCE OF THE MEETING'S OCCURRENCE OR THE MATTER DISCUSSED.

The Fourteenth Circuit did not err in finding Jussel's statement inadmissible to prove that Ledbetter did meet with Jussel in October 2005 and did learn of the toy's rH-12 contamination. Rule 803 of the Federal Rules of Evidence provides that statements of a declarant's "then existing state of mind, emotion, sensation or physical condition" are not excluded by the hearsay rule. Although the Supreme Court held in *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285, 295-96 (1892), that it was permissible to infer a declarant's actions from his expressions of intent and to infer another person's actions from the declarant's expressions of intent, there is evidence that Rule 803(3) does not fully adopt that doctrine. *U.S. v. Pheaster*, 544 F.2d 353, 379 (9th Cir. 1976). The Ninth Circuit pointed to the Notes of the House Committee on the Judiciary regarding Rule 803(3) by citing this excerpt: "[T]he Committee intends that the Rule be construed to limit the doctrine of *Mutual Life Insurance Co. v. Hillmon* (citation omitted) so as to render statements of intent by a declarant admissible only to prove his future conduct, not

the future conduct of another person.” *Id.* at 379 (citing House Report No. 93-650, Note to Paragraph (3), 28 U.S.C.A. at 579).

The courts that have considered the interpretation and application of Rule 803(3) are divided between those that follow the approach taken by the 9th Circuit adopting the *Hillmon* doctrine and those that follow the 2nd Circuit and 4th Circuit approach requiring corroborating evidence. *Unites States v. Houlihan*, 871 F.Supp. 1495, 1499 (D.Mass. 1994). However, those courts that do allow the admission of hearsay statements of intent, only allow their admission to serve as an inference of the subsequent conduct not as proof that the subsequent conduct necessarily occurred. *See, e.g., Pheaster*, 544 F.2d at 379. Other courts require independent corroborating evidence as a prerequisite to the admission of the statements of intent. *See, e.g., U.S. v. Jenkins*, 579 F.2d 840, 842-43 (4th Cir. 1978). Here, there is no corroborating evidence of Jussel’s meeting with Ledbetter. Therefore, under either approach, the statements contained in the deposition of Jussel’s secretary are inadmissible to prove Ledbetter did in fact meet with Jussel and did in fact learn of the rH-12 contamination.

A. For Statements of Intent to be Admissible, Additional Corroborating Evidence Connecting the Hearsay Statement of Intent to the Subsequent Conduct of the Non-Declarant is Required.

The Second and Fourth Circuits require corroborating evidence in order for statements of intent to be admissible as evidence of subsequent actions. *Jenkins*, 579 F.2d at 843; *See also U.S. v. Best*, 219 F.3d 192, 199 (2d Cir. 2000). The Second Circuit similarly held that a declarant’s hearsay statement of intent to meet with an associate was not admissible to prove that associate’s actual attendance at the meeting because there was no corroborating evidence offered to prove the presence of the associate at the

meeting. *U.S. v. Delvecchio*, 616 F.2d 859, 863 (2d Cir. 1987); *See also U.S. v. Badalamenti*, 794 F.2d 821, 826 (2d Cir. 1986) (hearsay statement of intent to meet with defendant admissible if corroborating evidence offered as to the meeting's actual occurrence). In *U.S. v. Sperling*, 726 F.2d 69, 73-74 (2d Cir. 1984), the Second Circuit held that a declarant's statement of intent to meet with her drug dealer later that day was admissible to prove the dealer's participation in the drug conspiracy. The court allowed the statement of intent to be admitted because law enforcement agents later observed the dealer meeting with the declarant at the specified time to corroborate the declarant's statement of intent. *Id.*

Here, there is no corroborating evidence of the meeting between Jussel and Ledbetter. Therefore, under this approach, the statements of Jussel's intent to have this meeting are inadmissible to prove the meeting occurred. Like *Delvecchio*, the statement's expression of intent to have a meeting is not sufficient evidence that the meeting took place without corroborating evidence of that meeting. Unlike *Sperling*, there are no witnesses who subsequently saw Jussel meet with Ledbetter. Therefore, the statements of intent are inadmissible to prove Ledbetter's subsequent conduct.

B. Even if Corroborating Evidence is Not Required, Hearsay Statements of Intent are Admitted Not as Evidence of Subsequent Conduct, But Merely as a Rebuttal Inference of the Subsequent Conduct.

The courts following the competing approach allowing the admission of hearsay statements of intent do not allow them as evidence of actions, but allow them as inferences that the actions may have taken place. *See, e.g., State v. Santangelo*, 534 A.2d 1175, 1184 (Conn. 1987). In *Pheaster*, the Ninth Circuit held that statements of intent were admissible as evidence of actions of third parties, but it emphasized that this should

be allowed in as an inference and nothing more, recognizing the strong possibility of its unreliability. 544 F.2d at 379-80. In *Coy v. Renico*, 414 F. Supp. 2d 744, 772 (E.D. Mich. 2006), the court allowed the admission of hearsay statements of intent but likewise cautioned against their reliability: “Admittedly, the probative force of statements offered to show subsequent conduct is weakened by acknowledging that interceding events may diminish the possibility of subsequent conduct.”

The Appellate Court did not err in holding that Jussel’s statement was inadmissible to provide that Ledbetter did in fact meet with her and learn of the rH-12 presence in the toys. The only evidence of the meeting is Jussel’s statement of intent to have the meeting in her secretary’s deposition and the receipts indicating that Jussel made the trip to California. (R. at 24). There is no actual evidence of the meeting itself, nor any evidence of what was discussed at this meeting if it did take place. (R. at 24). At most, the hearsay statements of Jussel’s intent to meet with Ledbetter may be admissible for the trier of fact to infer the meeting took place, but most courts would require independent corroborating evidence as well. Without corroborating evidence of the meeting, no matter what approach is followed, the hearsay statements of Jussel are inadmissible as evidence of the actions taken by Ledbetter.

III. THE APPELLATE COURT CORRECTLY AFFIRMED THE DISTRICT COURT’S EVIDENTIARY FINDINGS REGARDING THE EXCLUSION OF RESPONDENT’S POST-EVENT REPORT BECAUSE THE ENTIRE REPORT CONSTITUTES A SUBSEQUENT REMEDIAL MEASURE.

Sea Toys’ Report is inadmissible under Rule 407 because the entire report constitutes a subsequent remedial measure. Rule 407 provides that, “[w]hen, 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.” Fed. R. Evid. 407. Petitioner erroneously seeks to admit, in part or in whole, Sea Toys’ subsequent remedial measure which reaches the Court in the form of the Report drafted on January 16, 2006. (R. at 25).

There is no doubt that the Report at issue occurred subsequent to Petitioner’s injury. (R. at 14). Furthermore, Petitioner does not dispute that a portion of the Report, namely the section marked “Recommendations,” is wholly inadmissible. (R. at 13). However, Petitioner misguidedly requests that the Report be redacted, the Recommendations Section excised, and the “Informational Findings” admitted for the purposes of showing Sea Toys’ knowledge. (R. at 13). As will be shown below, this is in contradiction to Rule 407’s policy. Redaction of the Report, which was the culmination of Sea Toys’ investigation of its Finn E. Shark product, should not be permitted.

Petitioner alternatively contends that if the Report in its entirety is a subsequent remedial measure, it should still be admitted as an involuntary response to a governmental directive issued by CPSC. (R. at 38). In this argument, Petitioner erroneously seeks to invoke a judicially created exception to Rule 407 known as the “Superior Authority” exception. (R. at 38). This exception should not be recognized by the Supreme Court, and even if it were, it nonetheless is inapplicable to the facts of this case. The CPSC directive never required Sea Toys’ investigation and its subsequent Report. Thus, the Report cannot be characterized fairly as an involuntary response to a governmental directive that would trigger the exception’s application. For the foregoing

reasons, the Supreme Court should affirm the Fourteenth Circuit's decision in favor of Sea Toys on all evidentiary matters related to Rule 407.

A. Federal Rule of Evidence 407 and Its Underlying Policy Require that the Informational Findings of Respondent's Post-Event Internal Investigative Report be Excluded from Admissibility.

The Fourteenth Circuit was correct when it held that admitting any part of a post-injury report, including informational findings, would contravene the policies embodied in Rule 407. (R. at 37). Rule 407 does not provide any guidance as to whether informational findings can be distinguished from recommendations. Fed. R. Evid. 407. However, admitting such findings is antithetical to the Advisory Committee's suggestion that the Rule's "[m]ore impressive ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety." Fed. R. Evid. 407 advisory committee's note. The long-standing policy underlying Rule 407 would be chipped away if the informational findings of the Report could be extracted. Therefore, the Supreme Court has a compelling rationale to affirm the Fourteenth Circuit in favor of Sea Toys in this matter.

Furthermore, the informational findings in the Report should be precluded from admission as part of a subsequent remedial measure, because they are the result of investigative efforts to remedy a serious problem with Sea Toys' toy product. As the Third Circuit has pointed out, investigative reports, or portions of reports that are investigative, should not automatically be admitted. *See, e.g., Complaint of Consolidation Coal Co.*, 123 F.3d 126, 136 (3rd Cir. 1997) (finding an investigative portion of a safety memo inadmissible); *See also Specht v. Jensen*, 863 F.2d 700, 701-02 (10th Cir.1988) (upholding exclusion of press release detailing city investigation of

incident and response to problem discovered); *See also Alimenta v. Stauffer*, 598 F.Supp. 934, 940 (N.D. Ga. 1984) (excluding post-incident report and recommendations for improvement). Exclusion depends on whether the investigative report is designed to prevent future accidents rather than being commissioned “for the purpose of discovering what might have gone wrong or right.” 123 F.3d at 136 (distinguishing *Rocky Mountain Helicopters, Inc. v. Bell Helicopters Textron*, 805 F.2d 907, 918 (10th Cir. 1986)). An investigative report encompassing the former is best characterized as a subsequent remedial measure subject to exclusion, whereas the latter would equate to mere analysis. *See, e.g., Prentiss & Carlisle Co., Inc. v. Koehring-Waterous Div. of Timberjack, Inc.*, 972 F.2d 6 (1st Cir. 1992) (finding portions of documents drafted in the course of a fire investigation were not required to be excluded because they discussed only defendant’s analysis of the problem).

Here, the entire Report was the culmination of an investigation that was voluntarily formulated by Sea Toys as a reaction to the CPSC directive. (R. at 27). This directive clearly alerted Sea Toys to a potential and later-manifested problem with its toy. (R. at 27). The Report did not merely seek to explain what had gone wrong or right or provide a form of detached analysis of the Shark E. Finn toy. Instead, it was drafted for the overarching purpose of preventing possible ongoing and future issues with its toys. Therefore, the informational findings cannot be extracted and admitted from the rest of the Report.

The Fourteenth Circuit dissenter, Justice Julio, and Petitioner, accord greater respect to the case, *Fasanaro v. Mooney Aircraft Corp.* than is warranted. (R. at 44). First, in that case, the court was referring to post-event tests rather than post-event

investigations. *Fasanaro v. Mooney Aircraft Corp.*, 687 F.Supp. 482, 487 (N.D. Cal. 1988). Secondly, the court did not necessarily foreclose the applicability of Rule 407 to investigations and their reports. *Id.* at 487. The court merely stated that, “Rule 407 includes only the actual remedial measures themselves and not the initial steps toward ascertaining whether any remedial measures are called for.” *Id.* at 487; *See also Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 428, 430 (5th Cir. 2006) (adopting a similar definition of what constitutes subsequent remedial measures, but “declining to decide whether evidence of post-accident investigations is admissible”).

In the case at bar, the Report’s informational findings can hardly be construed as initial steps toward ascertaining whether any remedial measures are necessary. It was developed as part of an investigatory response to receiving government notice of a potential issue with one of its products. (R. at 25-27). The government’s notice did not single out Sea Toys’ Finn E. Shark product; the toy was manufactured abroad in Legolia, where toxins had been linked. (R. at 2). Upon receiving the notice, Sea Toys had reason to voluntarily investigate whether its toys contained a toxic substance that made children sick. (R. at 27). The informational findings are therefore a part of this investigation, which was a subsequent remedial response by itself under the aforementioned precedent. These findings must be excluded from admission in accordance with Rule 407’s purpose and policy of encouraging such measures.

B. Federal Rule of Evidence 407 Requires the Exclusion of Respondent's Post-Event Internal Investigative Report as a Subsequent Remedial Measure, Because the 'Superior Authority' Exception Should Not be Recognized and is Otherwise Inapplicable to the Facts at Bar.

Alternatively, and with equal error, Petitioner seeks admission of Sea Toys' Report through the Court's application of a governmental "Superior Authority" exception to Rule 407. (R. at 20). This exception renders Rule 407 inapplicable whenever an otherwise excludable subsequent remedial measure was involuntarily undertaken at the request or insistence of the government. *Rozier v. Ford Motor Co.*, 573 F.2d 1332 (5th Cir. 1978). Applying the exception to the facts at bar grossly misstates Sea Toys' objectives in formulating its Report and the CPSC's intentions in formulating its directive. The Superior Authority exception to Rule 407, if it is even recognized as valid, does not apply here.

Sea Toys' Report should not be admitted under this exception, because Rule 407's language plainly does not provide for it. Fed. R. Evid. 407. As the Fourth Circuit has observed, "[w]e should not be too quick to read new exceptions into the rule because by doing so there is a danger of subverting the policy underlying the rule." *Werner v. Upjohn Co.*, 628 F.2d 848, 856 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981). Indeed, the Fourth Circuit's wisdom is applicable to the facts at bar and supports the conclusion of the Fourteenth Circuit; the drafters and enactors of Rule 407 would have created a Superior Authority exception if they had wanted one. (R. at 38). Therefore, the Supreme Court should strictly interpret Rule 407, which simply does not provide for the exception.

Moreover, a judicially created Superior Authority exception to Rule 407 has not been universally recognized by the circuit courts. In *Werner v. Upjohn Co.*, the Fourth

Circuit rejected the exception when it excluded admission of the defendant's subsequent institution of a warning label after an incident involving its drug product. *Id.* at 856. The court recognized that, "[i]f subsequent warnings are admitted to prove antecedent negligence simply because FDA required or might have required the change, then drug companies may be discouraged from taking early action on their own and from participating fully in voluntary compliance procedures." *Id.* at 859. A similar result was reached in *In re: Airport Disaster at Metro. Airport, Detroit, Mich.*, 782 F.2d 1041 (6th Cir. 1985), where the Sixth Circuit, applying the policy rationale of *Werner*, rejected the Superior Authority exception when it excluded an airworthiness directive that the Federal Aviation Administration had issued after an airplane accident. *See also HDM Flugservice GmbH v. Parker Hannifin Corp.*, 332 F.3d 1025, 1034 (6th Cir. 2003).

Here, if the Supreme Court were to recognize the Superior Authority exception, it would, as the Fourth and Sixth Circuits instruct, discourage manufacturers, distributors, and sellers from immediately and voluntarily addressing such measures. Admitting Sea Toys' Report simply because the CPSC suggested undertaking remedial action would fully conflict with Rule 407's aforementioned policy. It would punish Sea Toys for its early, socially responsible action in undertaking its investigation and eventually recalling its regrettably harmful toy. Therefore, the Supreme Court should firmly side with the reasoning of the Fourth and Sixth Circuits and outright reject the Superior Authority exception.

Furthermore, even if the Court were to recognize the Superior Authority exception, it has been tempered with the constraint that the government-induced measures be mandated or required to a degree not applicable in the case at bar. For

example, in *Rozier v. Ford Motor Co.*, 573 F.2d 1332 (5th Cir. 1978), the Fifth Circuit applied a Superior Authority exception to Rule 407 when it admitted the defendant's Trend Cost Estimate Report, prepared in anticipation of a revised National Highway Traffic Safety Administration ("NHTSA") safety standard. The court found that the Rule's policy could not be invoked because the remedial measure was later *required* by a superior authority, the NHTSA. *Id.* at 1343 (emphasis added); *See also O'Dell v. Hercules, Inc.*, 904 F.2d 1194, 1205 (8th Cir. 1990) (recognizing governmental Superior Authority exception if appellant had been able to show that its listing by the Environmental Protection Agency mandated that the defendant remedy its site); *See also Herndon v. Seven Bar Flying Serv., Inc.*, 716 F.2d 1322, 1331 (10th Cir. 1983) ("A tortfeasor cannot be discouraged from voluntarily making repairs if he must make repairs in any case.").

Contrasting the governmental actions in *Rozier* and *O'Dell*, the CPSC's directive at issue here never required Sea Toys to do anything. The Report was not formulated as a response to a "mandatory request" by the government. *See HDM Flugservice GmbH v. Parker Hannifin Corp.*, 332 F.3d 1025, 1034 (6th Cir. 2003) (rejecting application of the Superior Authority exception where defendant's service bulletin was not at the request of the Federal Aviation Administration ("FAA") and was instead voluntarily undertaken). The directive was suggestive in nature and only intended to put "manufactures, distributors, and sellers of children's toys on notice..." (R. at 27). If the government had intended for Sea Toys to undertake actual remedial measures, it would have instructed manufactures, distributors, and sellers that they must conduct appropriate investigations and take remedial action rather than stating that they simply should consider doing so.

(R. at 27). Moreover, the directive did not single out Sea Toys' company from any other. (R. at 27). The precise language used by the government is dispositive of its intention.

Even if Sea Toys' behavior is characterized by this Court as cooperative with the directive rather than independently socially conscious, the Report must still be excluded from admission. The case at bar is fully distinguishable from *In re Aircrash in Bali, Indonesia*, 871 F.2d 812, 817 (9th Cir. 1989), where the Ninth Circuit noted that cooperation from an airline, while valiant, was still mandated by the FAA, which triggered the Superior Authority exception. Here, despite Sea Toys' perceived cooperation, it was still under no lawful obligation to the CPSC to conduct its investigation, in contrast with the airline's duties to the FAA in *Bali*. Government involvement with respect to forcing cooperation by Sea Toys and mandating its Report is simply far too tenuous and peripheral to subvert the longstanding policy underlying Rule 407. (R. at 39). Therefore, the Fourteenth Circuit was correct in rejecting Petitioner's arguments and excluding the Report from admission.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that the Supreme Court affirm the judgment of the Fourteenth Circuit Court of Appeals.

Respectfully Submitted,

Team 26 R