

No. 07-117

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In The  
**SUPREME COURT OF THE UNITED STATES**

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October Term, 2007  
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**STUART SLOPE**, by and through his parents  
and legal guardians,  
**STACY and SERINA SLOPE**,

Petitioner,

- against -

**UNDER THE SEA TOYS, Inc.**,

Respondent.

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ON WRIT OF CERTIORARI TO THE  
COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT  
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**BRIEF FOR PETITIONER**  
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## **QUESTIONS PRESENTED**

- I. In a civil case, whether *Williamson v. United States*, 512 U.S. 594, interpreting Federal Rule of Evidence 804(b)(3), precludes admission of reliable collateral statements within a narrative containing a declarant's statements against pecuniary interest; and, whether under Rule 804(b)(3), otherwise admissible statements against penal interest are *per se* inadmissible because the declarant committed suicide.
  
- II. In a civil case, whether a declarant's hearsay statement of intent is admissible to infer third party conduct pursuant to Federal Rule of Evidence 803(3).
  
- III. Whether Federal Rule of Evidence 407 precludes admission of involuntary post-event reports containing remedial measures undertaken at the direction of a government agency; and whether Rule 407 precludes factual findings from post-event reports when remedial measures have been redacted.

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## **OPINIONS BELOW**

The opinion of the United State District Court for the Southern District of Boerum granting Defendant's Motion for Summary Judgment is located at pages 17-27 of the Record and, unpublished, at Boerum Civ. No. 06-090210. The opinion of the United States Court of Appeals for the Fourteenth Circuit affirming the District Court's grant of Defendant's Motion for Summary Judgment is located at pages 28-45 of the Record and, unpublished, at Boerum Civ. No. 07-02170.

## **STATUTORY PROVISIONS**

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

## **STANDARD OF REVIEW**

This Court reviews a district court's evidentiary rulings for abuse of discretion. *Old Chief v. United States*, 519 U.S. 172, 174 (1997); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). This Court reviews questions of law *de novo*. *Elder v. Holloway*, 510 U.S. 510, 516 (1994).

## **STATEMENT OF THE CASE**

### **Factual History**

The summer of 2005 saw the release of the hit, animated film "Shark Attack." (R. 2.) In connection with the release of the film, Under the Sea Toys, Inc. (hereinafter referred to as "Sea Toys"), in collaboration with BFP Tattle, Inc. (hereinafter referred to as "Tattel"), created the "Finn E. Shark" plush toy. (R. 1.) Beginning May 2005, Sea Toys distributed "Finn E. Shark" in the United States and Tattel distributed the toy in Legolia. *Id.* Shortly thereafter, Legolian

doctors diagnosed record numbers of children with brain damage caused by exposure to rH-12. (R. 3.) On September 30, 2005, the Legolian government launched an investigation into the rH-12 poisoning epidemic. *Id.* No later that September 30, 2005, Tattle's then CEO Mimi Jussel became aware that "Finn E. Shark" contained rH-12 and caused the poisoning outbreak. (R. 30.) On or around October 10, 2005, Sea Toys was informed that the adhesive used to attach "Finn E. Shark's" eyes contained rH-12 and that rH-12 caused brain damage in children. (R. 3.) Despite their knowledge of rH-12's toxicity and its use in producing "Finn E. Shark," Sea Toys neither warned of the dangers associated with "Finn E. Shark" nor issued a recall until April 1, 2006; nearly six months after receiving knowledge of the danger rH-12 poses to children. (R. 4.)

Plaintiff, Stuart Slope, a four year-old boy, loved "Shark Attack" and saw it numerous times during the summer of 2005. (R. 4.) In December 2005, Stuart's parents, the Slopes, purchased "Finn E. Shark" as a gift for Stuart. *Id.* Stuart cherished the toy, and frequently played with it and licked its eyes. *Id.* Within a matter of weeks, the Slopes noticed distressing changes in Stuart including: slurred speech, brief periods of unconsciousness, constant headaches, confusion, dizziness, sensory problems, mood changes, and memory and concentration problems. *Id.* On January 2, 2006, the Slopes, concerned by Stuart's ill health, sought medical aid. (R. 3.) Diagnostic tests revealed Stuart's symptoms were the product of irreversible brain damage caused by exposure to rH-12. *Id.*

### **Procedural History**

On April 14, 2006, upon learning of Sea Toys' exceedingly belated recall, the Slopes filed suit against Sea Toys in the Eastern District of Boerum under §204 of the Boerum Tort Reform Act. (R. 3.) The Slope's complaint alleged Sea Toys failed to warn or issue a timely recall upon its October 2005 discovery that "Finn E. Shark" contained the toxin rH-12. *Id.* The

complaint further alleged that, as a result of Sea Toys' failure to warn, Stuart suffered permanent and severe brain damage precluding him from ever leading a normal life and requiring continuous, life-long medical care. (R. 4.) Sea Toys subsequently filed a Motion for Summary Judgment claiming the Slopes lacked admissible evidence showing Sea Toys' knowledge—a requisite element in proving a manufacturer or distributor's failure to warn or recall under the Boerum Tort Reform Act (R. 7.)—of rH-12's toxicity and its incorporation into "Finn E. Shark." (R. 18.)

On June 29, 2006, the United States District Court for the Southern District of Boerum heard oral arguments on Sea Toys' Motion for Summary Judgment. (R.6.) The Slopes presented four pieces of evidence demonstrating Sea Toys' knowledge of rH-12: (1) then Tattle CEO, Mimi Jussel's personal business journal entry dated October 10, 2005 (R. 22, Pl.'s Ex. A.); (2) a letter from Mimi Jussel to her daughter dated October 11, 2005 (R. 23, Pl.'s Ex. 4.); (3) an excerpt of Mimi Jussel's former secretary Jaffe Peetz's deposition testimony (R. 24, Pl.'s Ex. C.); and (4) an internal memorandum to Sea Toys CEO Troy Ledbetter from Sea Toys' Internal Design and Research Department dated January 16, 2006, which included "informational findings" and "recommendations." (R. 25, Pl.'s Ex. D.) Sea Toys objected to the admission of this evidence on the following grounds:

1. Exhibit A: Mimi Jussel's Personal Business Journal

Sea Toys objected to the admission of Mimi Jussel's business journal dated October 10, 2005 (two months before the Slopes purchased "Finn E. Shark" for Stuart (R. 8:7-9.)), in which she describes a meeting with the Legolian Undersecretary of Commerce regarding the epidemic of rH-12 poisoning among Legolian children. (R. 7:13-16, 22, Pl.'s Ex. A.) In her journal, Jussel admitted both she and Sea Toys knew "Finn E. Shark" contained rH-12 and "kept selling it

anyway.” (R. 22, Pl.’s Ex. A.) Jussel declared “the company is going down the tubes,” her pension and stock options would be worthless as a result, and her savings would likely be taken to compensate the victims because she knew “Finn E. Shark” was poisoning children and “did nothing.” *Id.* The Slopes sought to admit Jussel’s letter under Federal Rule of Evidence 804(b)(3), the hearsay exception for statements against pecuniary interest. (R. 8-9.) Sea Toys conceded the evidence contained statements against Jussel’s pecuniary interest but argued the statements inculcating Sea Toys are inadmissible collateral statements prohibited under *Williamson v. United States*, 512 U.S. 594 (1994). (R. 9:7-15.)

## 2. Exhibit B: Mimi Jussel’s Letter to Her Daughter

Sea Toys objected to the admission of Mimi Jussel’s October 11, 2005 letter to her daughter. (R. 11, 23, Pl.’s Ex. B.) The letter recounts Jussel’s meeting with Ledbetter regarding “Finn E. Shark,” rH-12, and their responsibility for the poisoning epidemic in America and Legolia. *Id.* Jussel expressed guilt and remorse for the deaths of children stemming from her own inaction, as well as her pending fear of going to prison, which, based on a meeting with her lawyer she viewed as inevitable. (R. 23, Pl.’s Ex. B.) The Slopes sought to admit Jussel’s letter as statements against her penal interest under Federal Rule of Evidence 804(b)(3). (R. 10:2-4, 34.) After writing the letter, Jussel was diagnosed with a fatal disease. (R. 10.) She subsequently committed suicide. *Id.* Sea Toys argued the letter was inadmissible because Jussel committed suicide. (R. 11:13-14, 23, Pl.’s Ex. B.)

## 3. Exhibit C: Excerpt of Mimi Jussel’s Secretary, Jaffe Peetz’s Deposition

Sea Toys objected to the admission of Peetz’s deposition detailing the events of September 30, 2005, the date Jussel learned of the rH-12 poisonings. (R. 13:2-10, 24, Pl.’s Ex. C.) In his deposition, Peetz stated Jussel became distraught after reading the newspaper—which contained

an article about rH-12 poisonings—and that Jussel requested a plane ticket to California “to meet with Ledbetter to tell him what’s going on.” (R. 24.) As requested, Peetz booked Jussel’s plane ticket to California, which departed October 2, 2005. *Id.* On her return, on October 3, 2005, Jussel submitted receipts for plane fare, taxi rides, and her hotel stay. *Id.* The Slopes offered this evidence pursuant to Federal Rule of Evidence 803(3), the state of mind hearsay exception. (R. 12:14-18.) Ledbetter died prior to the filing of this suit. (R. 13.)

#### 4. Exhibit D: Sea Toys Internal Memorandum

Sea Toys objected to the admission of its Internal Memorandum, dated January 16, 2006. (R. 15.) The Internal Memorandum’s “Informational Findings” and “Recommendations” show Sea Toys’ knowledge of rH-12 in “Finn E. Shark” and the resulting harm. (R. 15:4-6.) Sea Toys claimed the Internal Memorandum was a subsequent remedial measure excluded under Federal Rule of Evidence 407. The Slopes argued this evidence is not precluded because the “Informational Findings” are not “measures” within the meaning of the rule. (R. 20:15-16.) Alternatively, the Slopes argued Rule 407 only pertains to voluntary remedial measures, and because Sea Toys’ investigation was mandated by the United States Consumer Product Safety Commission (“CPSC”) it was involuntarily. (R. 20:16-19.)

On July 10, 2006, after finding all four pieces of evidence inadmissible as a matter of law, the District Court summarily granted Sea Toys’ Motion for Summary Judgment. (R. 20.) The Slopes appealed the District Court’s decision in the United States Court of Appeals for the Fourteenth Circuit, which affirmed the District’s Court’s decision over an acuminous dissent. (R. 20, 26, 39-45.) This Court granted *certiorari* to determine whether the lower courts correctly applied Federal Rules of Evidence 804(b)(3), 803(3), and 407.

## SUMMARY OF THE ARGUMENT

Federal Rule of Evidence 804(b)(3) allows for admission of reliable collateral statements against interest, whether the statements are against pecuniary or penal interest, regardless of a declarant's suicide. In *Williamson*, 512 U.S. 595 (1994), this Court interpreted Federal Rule of Evidence 804(b)(3) in the context of statements against penal interests; never addressing the Rule's other exceptions—including statements against pecuniary interests. *Williamson* expressly limited its holding to statements against penal interest. Far from creating a *per se* rule against all collateral statements, *Williamson* recommended a totality of the circumstances test to ascertain the reliability of seemingly collateral statements. Moreover, both *Williamson*'s majority and Justice Scalia's concurrence explain statements inculcating another may be admissible. The totality of the circumstances test is also used to determine the reliability of a declarant's statements prior to suicide. Utilizing this test is in accord with Rule 804's underlying rationale, fulfilling the need for reliable evidence to ensure a fair trial where a key witness is absent. Thus, reliable collateral statements contained within an against interest narrative are admissible.

Federal Rule of Evidence 803(3) neither supersedes nor overrules the *Hillmon* Doctrine this Court established in *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285(1892). Rule 803(3) is devoid of language limiting the admissibility of a declarant's statements of intent to infer third-party conduct. Further, the canons of construction proscribe reviewing legislative history, where, as here, the rule's language is clear and unambiguous. Accordingly, Rule 803(3) permits admission of a declarant's statement of intent to prove both the declarant's conduct as well as that of a third party.

Rule 407 does not preclude admission of post-event reports containing factual findings where remedial action was undertaken at the directive of a government agency and therefore

involuntary. This is in line with the Rule’s policy objective, encouraging manufacturers to voluntarily take remedial steps to ensure public safety. Further, Rule 407 does not define “measures” as informational findings. Thus, to serve the Rule’s underlying policy, courts should admit findings of fact and, where necessary, redact unduly prejudicial remedial measures, regardless of the voluntariness of the measures undertaken.

Accordingly, this Court must reverse the United States Court of Appeals for the Fourteenth Circuit.

## **ARGUMENT**

### **I. JUSSEL’S STATEMENTS AGAINST HER PECUNIARY AND PENAL INTERESTS ARE ADMISSIBLE PURSUANT TO 804(b)(3).**

Federal Rule of Evidence 804 provides exceptions to the ban on hearsay where the declarant is unavailable. Fed. R. Evid. 804(a). Exceptions are enumerated in subsection (b) and include statements against the declarant’s interest. Fed. R. Evid. 804(b)(3). Rule 804(b)(3) admits a hearsay statement that, when made, was “so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability... that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true.” *Id.* The statement’s reliability is predicated on the assumption that reasonable people do not make self-inculpatory statements unless they believe the statements to be true. Fed. R. Evid. 804(b)(3) advisory committee’s note (citing *Hileman v. Nw. Eng’g Co.*, 346 F.2d 668 (6th Cir. 1965); *Williamson v. United States*, 512 U.S. 594, 599 (1994)). Thus, the essential determination under Rule 804(b)(3) is whether a reasonable person in the declarant’s position would perceive the statement as contrary to her interest at the time the statement was made.

*United States v. Hsia*, 87 F.Supp.2d 10, 15 (D.C. Cir. 2000). Courts may only answer this question “in light of all the surrounding circumstances.” *Williamson*, 512 U.S. at 595.

The need for admissible evidence impelled an expansion of the “against interest” exception. When the common law “against interest” exception was codified into Federal Rule of Evidence 804(b)(3), the rules drafters—in accordance with Justice Holmes’ dissent in *Donnelly v. United States*, 228 U.S. 243, 278 (1913) (Holmes, J., dissenting) (declaring the rationale for allowing admission of statements against interest is equally applicable where a declarant concedes criminal rather than civil liability) and several state courts’ decisions following Justice Holmes’ logic—including statements tending to expose the declarant to civil or criminal liability. Fed. R. Evid. 804(b)(3) advisory committee’s notes (discussing the history of the “against interest” exception and citing cases where state courts admitted statements against penal interest contrary to the majority’s holding in *Donnelly*, including *People v. Spriggs*, 389 P.2d 377 (Cal. 1964); and *Sutter v. Easterly*, 189 S.W.2d 284 (Mo. 1945)).

Congress’ rationale behind drafting Rule 804 was to provide an avenue for the admission of necessary, reliable hearsay evidence in cases where the declarant is unavailable. Rule 804(b)(3) attempts to strike a balance between “exclusion of trustworthy evidence [ ]and indiscriminate admission of less trustworthy evidence.” *United States v. Barrett*, 539 F.2d 244, 253 (1st Cir. 1976). In striking this balance courts have examined the factual circumstances surrounding a declarant’s statements to establish reliability; thereby fulfilling the need for admissible evidence while guaranteeing trustworthiness. *United States v. Jordan*, 509 F.3d 191, 203 (4th Cir. 2007).

Courts continue to demand a higher evidentiary standard for admission of statements against penal interest in criminal trials. The disparate treatment of statements against penal

interest in criminal trials is due to the special circumstances of criminal liability; specifically, that a declarant stands to gain from inculcating another. *Lee v. Illinois*, 476 U.S. 530, 541 (1986). This Court, recognizing the special circumstances of criminal liability, explicitly limited *Williamson* to statements against penal interest. *Williamson*, 512 U.S. at 596. Further, Rule 804(b)(3) contains no *per se* rules barring admission of statements against interest.

**A. In a Civil Case, Collateral Statements Contained within a Narrative Against a Declarant’s Pecuniary Interest are not Precluded from Admission under *Williamson v. United States*, 512 U.S. 594.**

In *Williamson*, this Court interpreted Federal Rule of Evidence 804(b)(3) to determine the admissibility of collateral statements contained within an against penal interest narrative. *Id.* *Williamson* never addressed the admissibility of collateral statements in the against pecuniary interest context. *Id.* at 596. This Court limited its holding to statements against penal interests. *Id.* This Court did not create a *per se* rule barring collateral statements; rather, it advocated the use of a totality of the circumstances test to determine the evidence’s admissibility. *United States v. Barone*, 114 F.3d 1284, 1295 (1st Cir. 1997) (citing *Williamson*, 512 U.S. at 603-06 (Scalia, J., concurring)). A broad reading of *Williamson* is contrary to this Court’s interpretation of Rule 804(b)(3) and would deprive the courts of otherwise admissible and reliable evidence.

1. This Court expressly limited *Williamson* to declarations against penal interest.

Reading *Williamson* expansively as encompassing pecuniary and proprietary interests is contrary to the language this Court used, the examples it provided, and its rationale. *Id.* This Court limited *Williamson*’s scope to declarations against penal interest. *Id.* at 595. The opinion begins, “[i]n this case we clarify the scope of the hearsay exception for statements against penal interest.” *Id.* at 596. Further, the language this Court used in *Williamson* solely describes criminal proceedings. *Id.* at 596-621. For example, this Court consistently used the word

“confession” when referring to the declarant’s statement; a word commonly used in reference to admission of a crime.<sup>1</sup> *See, e.g., id.* at 599-604. Moreover, the only examples of admissible statements this Court provided were those against penal interest. *Id.* at 603 (for example, “yes, I killed X;” “I was robbing the bank on Friday morning;” and “I hid the gun in Joe’s house”). If this Court meant its holding to be construed broadly to encompass all of Rule 804(b)(3)’s exceptions, it would not have begun its opinion with a statement explicitly narrowing its holding to penal interests, and it would have used more general language and examples applicable outside the criminal/penal context. *See id.* at 596.

This Court’s rationale for excluding certain collateral statements in a criminal proceeding cannot be applied to the admissibility of statements against pecuniary interest in a civil proceeding because the dangers inherent in a criminal proceeding are absent in the civil context. The major concern regarding the reliability of statements against penal interest is that defendants will make false confessions implicating others in an attempt to shift blame or curry favor. *Williamson*, 512 U.S. at 603; *Lee*, 476 U.S. at 545 (“Due to his strong motivation to implicate the defendant and exonerate himself, a codefendant’s statements about what the defendant said or did are less credible than ordinary hearsay evidence.”); *Bruton v. United States*, 391 U.S. 123, 141 (1968). Shifting blame and currying favor are peculiar to criminal cases where the government has the ability to decrease a declarant’s sentence in return for his testimony inculcating another. *Williamson*, 512 U.S. at 604 (“Small fish in a big conspiracy often get shorter sentences . . . especially if the small fish are willing to help the authorities catch the big ones”) (internal citations omitted). At common law courts admitted statements against pecuniary

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<sup>1</sup> Black’s Law dictionary defines “confession” as “a criminal suspect’s oral or written acknowledgment of guilt, often including details about the crime.” Black’s Law Dictionary 317 (8th ed. 2004). Similarly, The American Heritage Dictionary of the English Language 395, defn. 3 (3d ed. 1992) defines “confession” as “a written acknowledgement of guilt by a party accused of an offense.”

interest because the aforementioned dangers associated with statements against penal interest were absent. *Chambers v. Mississippi*, 410 U.S. 284, 299-300 (1973). Further, in a civil case, there is no one from whom the declarant may curry favor, and shifting blame is unlikely to decrease the declarant's own liability. Accordingly, this Court's rationale in *Williamson* is inapposite to statements against pecuniary interests.

2. Even if this Court extended *Williamson* to include statements against pecuniary interest, Jussel's statements implicating the defendant, Sea Toys, would still be admissible under *Williamson*'s totality of the circumstances test.

Collateral statements against interest are not unreliable and therefore inadmissible simply because they may inculcate another. *Id.* at 606; *United States v. Tocco*, 200 F.3d 401 (6th Cir. 2000) (comparing the case before it with Justice Scalia's example in his concurrence in *Williamson*, 512 U.S. at 606, and admitting statements inculcating the defendant as against penal interest statements); *Barone*, 114 F.3d at 1297; *United States v. Sasso*, 59 F.3d 341, 349-50 (2d Cir. 1995) (admitting statements that inculpated both the declarant and the defendant, finding the statements trustworthy because they inculpated both equally rather than shifting blame). Further, statements that appear to be collateral to statements against interest may be sufficiently inculpatory and therefore admissible when viewed in light of the surrounding circumstances. *Williamson*, 512 U.S. at 603-04; *see also United States v. Parguio*, 114 F.3d 928, 934 (9th Cir. 1997) (declaring *Williamson* did not require exclusion of non-inculpatory statements but rather that the statement be "examined in context"). Consequently, Jussel's collateral statement inculcating herself and Sea Toys is admissible under *Williamson*.

Statements are not *per se* inadmissible solely because they may inculcate another. *Barone*, 114 F.3d at 1297 (citing *Williamson*, 512 U.S. at 606-07 (Scalia, J., concurring)). *Williamson*'s majority advocated the application of a totality of circumstances test to ascertain

whether a seemingly collateral statement is admissible. 512 U.S. at 603; *Barone*, 114 F.3d at 1295; *see also United States v. Barrett*, 539 F.2d 244, 252 (1st Cir. 1976) (finding Congress never “intended to constrict the scope of a declaration against interest to the point of ‘collateral’ material [] that actually tended to fortify the statement’s disserving aspects”). *Williamson’s* majority provided an example illustrating where a collateral statement inculcating another would be admissible. 512 U.S. at 603 (“Sam and I went to Joe’s house, might be against the declarant’s interest if a reasonable person in the declarant’s shoes would realize being linked to Joe and Sam would implicate the declarant in Joe and Sam’s conspiracy.”); *see also Tocco*, 200 F.3d at 415 (citing *Williamson’s* “Sam and I went to Joe’s house” example); *Barone*, 114 F.3d at 1295 (same). Justice Scalia expanded on the majority’s example in his concurrence in *Williamson* explaining, “a declarant’s statement is not magically transformed from a statement against [] interest into one that is inadmissible merely because the declarant names another person.” 512 U.S. at 606 (Scalia, J., concurring). Justice Scalia used the example of a lieutenant in a criminal organization to illustrate a scenario in which the naming of names, while inculcating others, would inculcate the declarant. *Id.* at 606-07. Justice Scalia opined that while such statements may incriminate another, they are sufficiently reliable and thus admissible if they do not shift blame or minimize the declarant’s liability. *Williamson*, 512 U.S. at 607. Several circuits follow Justice Scalia’s logic, admitting statements that inculcate another where the statement is self-inculpatory and not blame-shifting. *See, e.g., United States v. Centracchio*, 265 F.3d 518, 526 (7th Cir. 2001) (admitting a declarant’s statement that inculpated himself as well as the defendant); *Sasso*, 59 F.3d at 349-50 (same); *Tocco*, 200 F.3d at 415 (same); *Barone*, 114 F.3d at 1297 (same). This is particularly true in cases where proving knowledge is at issue.<sup>2</sup>

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<sup>2</sup> For examples see *Tocco*, 200 F.3d at 415 (a conspiracy case where statements against interest that inculpated the declarant and the defendant were held admissible to show knowledge); *United States v. Westmoreland*, 240 F.3d

Jussel's statements in her business journal coupled with her actions—flying to California to meet with Sea Toys' CEO—provide the context that *Williamson's* majority, would find admissible. (R. 22, 24, Pl.'s Ex. A, C); *See Williamson*, 512 U.S. at 603. Moreover, this case presents a situation directly analogous to that of Justice Scalia's hypothetical conspiracy case. (R. 7:6-7.); *Williamson*, 512 U.S. at 606-07 (Scalia, J., concurring). For instance, Justice Scalia's example of a lieutenant in a criminal enterprise naming names associated with the enterprise is like the instant case, where Jussel, a potential defendant facing civil liability named Sea Toys, a co-conspirator that shared knowledge of rH-12. *Williamson*, 512 U.S. at 606 (Scalia, J., concurring). As in conspiracy cases where proof of knowledge constitutes participation in the conspiracy, thereby exposing the declarant to criminal liability, here Jussel's admission of knowledge constitutes failure to warn, exposing her to civil liability. Jussel's statement also makes no attempt to shift blame to minimize her own liability; in fact, she begins the statement with an admission of her own knowledge and guilt. Thus, Jussel's statement that Sea Toys knew of the rH-12 is precisely the kind of reliable collateral statement admissible under *Williamson*.

**B. A Per Se Rule Barring Statements a Declarant Made Prior to Their Suicide Defies the Rationale Behind Hearsay Exceptions and Fails to Take into Account Additional Factors that Demonstrate Reliability.**

A *per se* rule barring admission of a declarant's statement prior to the declarant's suicide deprives courts of evidence and is incongruous with the rationale supporting exceptions to the hearsay rule. While not all pre-suicide statements are admissible; implying a *per se* bar on admission of pre-suicide statements without first examining case specific, external factors—which may provide the requisite indicia of reliability—is imprudent. Courts differ in their

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618, 626 (7th Cir. 2001) (same, and additionally noting demonstration of knowledge of conspiracy is sufficient to qualify as a statement against interest); *Barone*, 114 F.3d at 1297 (explaining a statement demonstrating "an insider's knowledge" of a criminal enterprise and its criminal activities was sufficiently against a declarant's penal interest); *United States v. Layton*, 720 F.2d 548, 560 (9th Cir. 1983) (same).

treatment of suicide notes. Some courts determine notes and statements followed by the declarant's suicide unreliable, and thus, inadmissible (*See United States v. Angleton*, 269 F. Supp. 2d 878, 883 (S. D. Tex. 2003)), while others find the statements reliable in view of the surrounding circumstances. *See, e.g. Jordan*, 509 F.3d at 203 (admitting a declarant's statements inculcating herself made prior to her suicide); *West Virginia v. Satterfield*, 457 S.E.2d 440, 448 (W. Va. 1995) (holding suicide notes admissible as a dying declaration). The better approach is viewing the statement's reliability within context rather than barring all statements regardless of their individual reliability. This approach embodies Congress' rationale behind the hearsay exceptions, admitting vital evidence necessary to ensure a fair hearing when a key witness is unavailable due to death. *Note*, Stephen F. Rose, *Can a Suicide Victim be Taken at their Word?: The Louisiana Supreme Court Declares a Suicide Note Inadmissible Hearsay in Garza v. Delta Tau Fraternity National*, 81 TUL. L. REV. 1715, 1724-1725; Fed R. Evid. 804(b)(3) advisory committee's notes (the common law exception originated from the need for evidence in homicide cases and applies with equal force in civil cases). Additionally, lack of knowledge concerning a declarant's motivation to commit suicide does not diminish the reliability of statements preceding the event. *Note*, M. E. Bitterman, *The Judicial Interpretation of Suicide*, 105 U. PA. L. REV. 391, 392-394 (1957).

A declarant's against interest statements made prior to suicide are admissible where the surrounding circumstances demonstrate reliability. For instance, in *Jordan*, the court admitted a declarant's confession to her friend, finding the statement was the declarant's effort to relieve herself of guilt, not an attempt to minimize culpability or criminal liability. 509 F.3d at 202. Acceptance of guilt has been recognized as epitomizing the reliability of a statement against penal interest. *See Donnelly*, 228 U.S. at 278 (Holmes, J., dissenting) (no statement is more

against the declarant's interest than one admitting criminal liability); *United States v. Layton*, 720 F.2d 548, 559 (9th Cir. 1983) (a statement against penal interest must subject the declarant to the possibility of criminal liability). Another external factor indicating reliability is the expanse of time between the declarant writing the note and her suicide. The greater the expanse of time the less likely the note is connected to the suicide. *United States v. Lemonakis*, 485 F.2d 941, 957 (D.C. Cir. 1973) (finding a note written a week before a prisoner's suicide neither demonstrates a belief of imminent death nor clues to suicide).

Here, a factual examination reveals four factors pointing to the reliability of Jussel's statements. First, the letter makes no mention of suicide or her contemplation thereof, but rather addresses and accepts probable criminal liability. (R. 23, Pl.'s Ex. B.) Second, the letter addresses Jussel's fear of going to prison: "now that everyone knows, it is almost certain that I will go to prison." (*Id.*) Third, the expanse of time between Jussel sending the letter and her suicide suggests the letter was not a suicide note, but rather a confession to her daughter in an effort to prepare her daughter for what Jussel perceived was an inevitable criminal investigation. (R. 23, Pl.'s Ex. B.). Finally, Jussel's suicide is more likely attributable to her diagnosis with a life threatening disease rather than her involvement in the rH-12 poisonings. (R. 10:18.) Accordingly, when viewed in context, it is apparent Jussel's letter is reliable and therefore admissible under the against penal interest exception.

Jussel's business journal and letter to her daughter are admissible in their entirety under Rule 804(b)(3). First, *Williamson* explicitly limited its holding to statements against penal interests and never reached the question of whether collateral statements within an against pecuniary interest narrative were admissible in a civil trial. *See Williamson*, 512 U.S. at 596. However, even if this Court extended *Williamson* to encompass statements against pecuniary

interests, Jussel's collateral statements inculcating Sea Toys would still be admissible given the surrounding circumstances. *See id.* at 603. Second, a *per se* rule barring statements a declarant made prior to suicide ignores this Court's advocacy of a totality of the circumstances reliability test and is absent from the language of Rule 804(b)(3). Therefore, Rule 804(b)(3), when correctly applied, allows for the admission of the entire contents of both Jussel's business journal and her letter to her daughter.

## **II. IN A CIVIL CASE, FEDERAL RULE OF EVIDENCE 803(3) PERMITS THE INFERENCE OF THIRD PARTY CONDUCT FROM A DECLARANT'S STATEMENT OF INTENT.**

Federal Rule of Evidence 803(3) neither supersedes nor overrules the *Hillmon* Doctrine. Rule 803(3) states, in pertinent part, "a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)" is admissible as an exception to the ban on hearsay. Fed. R. Evid. 803(3). In a civil proceeding, the *Hillmon* Doctrine allows admission of statements indicating a declarant's state of mind and future intent to prove conduct in conformity with those statements as well as the conduct of third persons. *Mut. Life Ins. Co. v. Hillmon*, 145 U.S. 285, 295 (1892) (establishing the pre-Federal Rules of Evidence common law doctrine codified in 803(3)). Rule 803(3)'s plain language places no limits on the admissibility of inferences concerning third party conduct. Fed. R. Evid. 803(3). Given Rule 803(3)'s clarity, resorting to the legislative history is inappropriate. *See* Fed. R. Evid. 803(3) advisory committee's notes. Therefore, Jussel's statement of intent is admissible to show both her own knowledge and that of Ledbetter.

Federal Rule of Evidence 803(3) codified the common law rule *Hillmon* established. 145 U.S. at 285. In *Hillmon*, a civil case, this Court admitted a declarant's letters expressing his

intention to meet with a third party to show that both the declarant and the third party acted in accordance with the declarant's expressed intent. *Id.* at 295. This Court explained the declarant's statements "made it more probable both that he did go and that he went with Hillmon." *Id.* *Hillmon* allowed a declarant's statement of intent to meet with another person to prove that both the declarant and the third party subsequently acted in conformity with their respective intentions. *See, e.g., United States v. Calvert*, 523 F.2d 895, 910 (2d Cir. 1975); *Connecticut v. Santangelo*, 534 A.2d 1175, 1184 (Conn. 1987). Congress' adoption of Rule 803(3) "codifies *Hillmon* as written and does not disturb its conclusion or reasoning." *United States v. Houlihan*, 871 F. Supp. 1495, 1500 (Mass. Dis. Ct. 1994) (referring to *Hillmon*, 145 U.S. 285).

Rule 803(3) is straightforward and unambiguous; allowing for admission of statements of intent and requiring the trier of fact to infer "the probability of a particular act not only by the declarant but also by the other person." *United States v. Pheaster*, 544 F.2d 353, 376 (9th Cir. 1976). "The fact that the cooperation of another party is necessary . . . is a matter going to the weight of the evidence" and not grounds for excluding it. *Id.* at 376, n.14. Rule 803(3) contains no limitations; it plainly states all statements regarding a "then existing mental condition" are admissible. Fed. R. Evid. 803(3); *Pheaster*, 544 F.2d at 379 (the text of Rule 803(3) contains no limiting language indicating a proscription on the use of declarant's statements to prove third party conduct). If Congress meant to limit Rule 803(3), as it did with other rules of evidence<sup>3</sup>, it would have provided such language in the rule. *United States v. Houlihan*, 871 F. Supp. at 1501 ("Had Congress intended to limit the admissibility of such statements, it presumably would have done so").

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<sup>3</sup> For example, see Federal Rule of Evidence 804(b)(3) which requires corroborating evidence as a condition precedent to admit a declarant's statement against interest that exculpates a criminal defendant.

Additionally, resorting to the legislative history is inappropriate as the rule is clear and its history is ambiguous. A traditional canon of statutory construction dictates where a rule is unambiguous examination of the legislative history is improper. *See, Cabral v. INS*, 15 F.3d 193, 194 (1st Cir. 1994) (examination of legislative history only appropriate where a statute creates ambiguity or an unreasonable interpretation); *United States v. Charles George Trucking Co.*, 823 F.2d 685, 688 (1st Cir. 1987) (legislative history should not be examined if the language of the statute is definite and clear). Moreover, Rule 803(3)'s legislative history is contradictory. *Houlihan*, 871 F. Supp. at 1499. Although the House of Representatives sought to exclude the *Hillmon* Doctrine from Rule 803(3), the Senate and the Judicial Conference report were silent on the issue. *Id.* Such silence "is revealing as it indicates that only one chamber of Congress (indeed, only one committee of that chamber) approved the limitation of the *Hillmon* Doctrine." *Id.* at 1501. Further, Rule 803(3)'s Advisory Committee's Notes state the *Hillmon* Doctrine was to be left undisturbed. Fed. R. Evid. 803(3) advisory committee's notes ("The rule of *Mutual Life Insurance Co. v. Hillmon* allowing evidence of intention as tending to prove the doing of the act intended, is, of course, left undisturbed.").

Jussel's statement to her secretary, Jaffe Peetz, regarding her intent to travel to California, is precisely the kind of statement admissible under Rule 803(3). Jussel asked Peetz to book her a plane ticket immediately after reading the paper containing an article about rH-12 poisoning, explaining "something terrible has happened and I am going to meet with Ledbetter to tell him what's going on." (R. 24, Pl.'s Ex. C.) Her statement describes her present intentions to travel to Sea Toys' headquarters to explain the rH-12 problem associated with "Finn E. Shark". This statement is admissible under Rule 803(3); as, pursuant to the *Hillmon* Doctrine, a trier of fact

can not only infer that Jussel traveled to California, but that she met with Ledbetter and apprised him of the dangers of rH-12 and its use in “Finn E. Shark.” *Hillmon*, 145 U.S. at 295.

Rule 803(3) leaves this Court’s holding in *Hillmon* undisturbed. The Rule contains no language limiting the admissibility of a declarant’s statements of intent to infer third-party conduct. Given the Rule’s clarity resorting to a review of its ambiguous legislative history is erroneous. Accordingly, Jussel’s statements are admissible to infer Jussel went to California to meet with Ledbetter, and that Ledbetter attended the meeting where Jussel apprised him of the rH-12 poisoning epidemic and Sea Toys’ role in it.

### **III. FEDERAL RULE OF EVIDENCE 407 SHOULD NOT EXCLUDE RELEVANT EVIDENCE OF REMEDIAL ACTION WHERE THE RULE’S UNDERLYING POLICIES WOULD NOT BE SERVED.**

Federal Rule of Evidence 407 states “[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 products design, or a need for a warning instruction.” Fed. R. Evid. 407. One rationale behind excluding subsequent remedial measures rests on the social policy of encouraging individuals to remedy unsafe conditions within their control. *Herndon v. Seven Bar Flying Serv. Inc.*, 716 F.2d 1322, 1327 (10th Cir. 1983). For example, the rule assures companies that potential plaintiffs will not be able to use companies’ post-event remedial steps to demonstrate negligence. *Id.*

Courts have used Rule 407’s underlying social policies to exclude involuntary subsequent remedial measures. *O’Dell v. Hercules Incorp.*, 904 F.2d 1194, 1204 (8th Cir. 1990); *Aircrash in Bali v. Zinke*, 871 F.2d 812, 817 (9th Cir. 1989); *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1343

(5th Cir. 1978); *Millette v. Radosta*, 404 N.E.2d 823, 834 (Ill.App. 1 Dist. 1980). Further, reports including factual findings subsequent to the “accident” typically do not constitute “measures” as defined by Rule 407 and thus are admissible. *Brazos River Auth. v. GE Ionics*, 469 F.3d 416, 431 (5th Cir. 2006); *Allred v. Maersk Line Ltd.*, 35 F.3d 139, 142 (4th Cir. 1994); *Prentiss v. Koehring*, 972 F.2d 6, 10 (1st Cir. 1992); *Aircrash in Bali*, 871 F.2d at 816 (9th Cir. 1989); *Rocky Mountain Helicopters v. Bell Helicopters*, 805 F.2d 907, 918 (10th Cir. 1986).

**A. Federal Rule of Evidence 407’s Exclusion of “Subsequent Remedial Measures” Does Not Apply to Measures Undertaken at the Directive of a Government Agency.**

Rule 407’s policy objective—to encourage manufacturers to make necessary changes in the interest of safety without the fear of plaintiffs using those changes against them in a subsequent lawsuit—is inapplicable to situations where the actions of the manufacturers were involuntary. *O’Dell*, 904 F.2d at 1204 (policy goal of encouraging remediation is not furthered by excluding government mandated remedial measures); *Farnar v. Paccar, Inc.*, 562 F.2d 518, 528 (8th Cir. 1990) (same); *Air Crash in Bali*, 871 F.2d at 817 (where remediation is involuntary, admission of the evidence does not punish the defendant); *Rozier*, 573 F.2d at 1343 (report made in anticipation of a remedial measure to be required by government authority is considered involuntary and thus admissible).

Rule 407 permits admission of involuntary remediation because, unlike voluntary remediation, it does not further the goal of social responsibility. In *HDM Flugservice GmbH v. Parker Hannifin Corp.*, Parker, the defendant/manufacture, requested the Federal Aviation Association (“FAA”) approve its service bulletin that stated “. . . in the *interest of safety to all Owner/Operators* of the Wheeled Landing Gear Kit, we have generated a Service Bulletin. . . .” 332 F.3d 1025, 1034 (6th Cir. 2003) (emphasis added). Finding Parker was motivated by

protecting consumer's safety, the court held its letter to the FAA indicated a voluntary action and deemed the service bulletin inadmissible. *Id.* Contrarily, in *Rozier*, Ford Motor Company prepared a cost/benefit report comparing the costs of two proposed fuel tank designs in anticipation of the National Highway Traffic Safety Administration's revised safety standard. 573 F.2d at 1340. The court held Rule 407's invocation to justify exclusion was "particularly inappropriate since the estimate was prepared not out of a sense of social responsibility, but because the remedial measure was to be required in any event by a superior authority." *Id.* at 1343.

On October 20, 2005, the United States Consumer Product and Safety Commission (hereinafter "CPSC") issued a directive warning manufacturers, distributors and sellers of children's toys warning of the possible contamination of toys manufactured abroad and directing investigations and appropriate remedial action. (R. 27.) Subsequent to CPSC's directive, Sea Toys conducted an internal investigation to determine whether toys it manufactured contained toxic chemicals, as evidenced in its internal memo. (R. 25, Pl.'s Ex. D.) Based on the findings of its investigation, Sea Toys recalled "Finn E. Shark" on April 1, 2006. (R. 3.) Sea Toys' Internal Design and Research Department ("IDR") stated its findings corroborated the information given it in October 2005; therefore, presumably the investigation commenced sometime after October. (R. 25, Pl.'s Ex. D.) Accordingly, Sea Toys' investigation and recall were involuntary actions undertaken at the directive of CPSC.

Further, Sea Toys' report was prepared three months after the CPSC issued its directive to conduct investigations into possible toxic contamination of toys. (R. 25-27.) Unlike *HDM*, there is no evidence Sea Toys was acting out of a sense of social responsibility and not merely following a government directive. Sea Toys' lack of social responsibility is evidenced by its

knowledge in October 2005, that “Finn E. Shark” contained rH-12 and its failure to provide a warning or recall until almost 6 months later, in April 2006. (R. 3.) Thus, Rule 407’s policy objective—protecting manufacturers by excluding changes made out of a sense of social responsibility—is inapplicable here.

**B. Even if Rule 407’s Exclusion of Subsequent Remedial Measures Applies to the Memorandum’s Recommendations, it is Inapplicable to its Factual Findings.**

Rule 407 only applies to “measures” that further its purpose, rendering the accident less likely to occur. Fed. R. Evid. 407. To admit post-event reports, courts may redact portions of the report referring to measures, so long as doing so does not confuse the jury. *Allred*, 35 F.3d at 142.

Factual findings differ from measures in that the former are merely determinations of fact ascertained from the investigation, while the latter are those steps actually taken to resolve the problem. Courts agree this distinction is significant enough to result in the admission of factual findings within post-event reports. *Brazos River Auth.*, 469 F.3d at 431 (same); *Aircrash in Bali*, 871 F.2d at 816 (remedial measures do not include initial steps toward ascertaining the necessity of remedial measures); *Allred*, 35 F.3d at 142 (post-accident report not a remedial measure); *Prentiss*, 972 F.2d at 10 (admitting an interoffice memo analyzing a defective product because an analysis is not a measure); *Rocky Mountain Helicopters*, 805 F.2d at 918 (Rule 407 is not so broad as to exclude post-accident reports). Moreover, the fact that a post-accident report may lead to remedial measures is irrelevant to the report’s admissibility. *Prentiss*, 972 F.2d at 10; *Benitez-Allende v. Alcan*, 857 F.2d 26, 33 (1st Cir. 1988).

Similarly, investigative reports do not serve the purpose of making the accident less likely to occur. *Brazos River Auth.*, 469 F.3d at 431; *Rocky Mountain Helicopters*, 805 F.2d at

918. In *Benitez*, a case where plaintiffs were injured by defective pressure cookers, (857 F.2d at 28), the court admitted a report discussing the results of a diagnostic test; holding the report, by itself, would not have made the event less likely to occur. *Id.* at 33. Likewise, *Fasarno v. Mooney Aircraft Corp.* involved a products liability action against an aircraft manufacturer where the court admitted post-event tests stating “post-event tests will not, in themselves, result in added safety. 687 F.Supp. 482, 483 (N.D. Cal. 1988). The court explained that the goal of added safety will only be furthered when the defects revealed in those tests are remedied and changes implemented. *Id.* at 487.

Many courts resolve admissibility issues surrounding post-event reports by simply redacting those portions of the report which Rule 407 would exclude. *Prentiss*, 972 F.2d at 10 (district court correct in admitting post-accident report after evidence of remedial measures redacted); *Allred*, 35 F.3d at 142 (same); *Brazos*, 469 F.3d at 431 (evidence from post-accident investigation admissible if reference to remedial measures redacted); *O’Dell*, 904 F.2d at 1205 (same). Courts do so in an effort to allow for admission of what is often the best evidence to determine the cause of the event. *Rocky Mountain Helicopters*, 805 F.2d at 918-19. In *Westmoreland v. CBS Inc.*, the court admitted a redacted post-event report, stating that defendant’s argument to exclude the report “fails to credit the social value of making available for trial what is often the best source of information.” 601 F.Supp. 66, 67 (S.D.N.Y. 1984).

Here, the internal report Sea Toys’ IDR prepared provided factual findings that “Finn E. Shark” contained rH-12 and caused brain damage in Legolian children. (R. 25.) The report additionally stated IDR’s findings substantiated information provided it in October 2005, concerning the “etiology of brain damage.” *Id.* These factual findings alone did not make the accident less likely to occur and, without Sea Toys’ remedial action, would not have resulted in

added safety. Further, the Slopes are reliant on Sea Toys' informational findings to link the chain of events leading from the October 2005 rH-12 poisoning epidemic to their son's brain damage. (R. 25.) The recommendations contained in Sea Toys' Internal Memo are consolidated into a single section which the court could easily redact without confusing the jury. Doing so would serve the policy behind rule 407, allowing for the admission of valuable evidence while not unduly prejudicing Sea Toys.

This Court should determine informational findings within a post-event report are admissible. Informational findings are not "measures" as defined by Rule 407. Further, redacting a report's remedial measures balances the need for admissible evidence with Rule 407's underlying policy of encouraging social responsibility. Thus, even where a company has acted voluntarily, informational findings that are easily severable from remedial measures should be admitted as a matter of policy.

### **CONCLUSION**

For the aforementioned reasons, Petitioner respectfully requests this Court REVERSE the Fourteenth Circuit's decision affirming the Boerum District Court's grant of Defendant's Motion for Summary Judgment, and hold the district court improperly excluded all independent evidence of Sea Toys' October 2005 knowledge of rH-12's toxicity and its presence in "Finn E. Shark."

## APPENDIX A

### **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 or precautionary measures, if controverted, or impeachment.

### **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.