

No. 07-117

In The
Supreme Court of the United States

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

v.

UNDER THE SEA TOYS, INC.,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fourteenth Circuit**

BRIEF FOR THE PETITIONER

Team
32-P
Counsel for Petitioner

QUESTIONS PRESENTED

- I. Under Federal Rule of Evidence 804(b)(3):
 - A) Does the interpretation of Federal Rule of Evidence 804(b)(3) in *Williamson v. United States*, 512 U.S. 594, 144 S. Ct. 2431 (1994), preclude the admissibility in a civil case of a reliable collateral statement contained in the same narrative as statements that satisfy that rule's hearsay exception for declarations against interest?
 - B) Are statements acknowledging criminal conduct contained in a personal letter *per se* inadmissible in a civil case if, after sending it, the writer commits suicide?

- II. Under Federal Rule of Evidence 803(3), does a declarant's hearsay statement that she intends to meet and discuss a matter with a business associate constitute evidence in a civil case that the meeting took place and that the matter was discussed?

- III. Does the Federal Rule of Evidence 407 exclusion of "subsequent remedial measures":
 - A) Apply to factual information in a post-injury report prepared by a distributor of a product, when the information supports a recommendation in that same report to recall the product?
 - B) Apply to measures undertaken at the direction of a government agency?

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BRIEF FOR THE PETITIONER
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STUART SLOPE, by and through his parents and legal guardians, Stacy and Serina Slope, respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Fourteenth Circuit with instructions to deny defendant’s motion for summary judgment and to permit admission of four pieces of evidence¹, any one of which could suffice to establish the element of knowledge.

¹ The four pieces of evidence at issue in this case include Plaintiff’s Exhibit A: Personal Business Journal, M. Jussel (R 22); Plaintiff’s Exhibit B: Letter of M. Jussel to Her Daughter (R 23); Plaintiff’s Exhibit C: Excerpt of Deposition of Jaffe Peetz, Secretary to Mimi Jussel, CEO of Tattel (R 24); and Plaintiff’s Exhibit D: Internal Memorandum – Under the Sea Toys (R 25-26).

OPINIONS BELOW

The Fourteenth Circuit's unpublished order, *Slope v. Under the Sea Toys, Inc.*, Civ. No. 07-02170, appears at Record on Appeal ("R") 28-45. The District Court's unpublished order, *Slope v. Under the Sea Toys, Inc.*, Civ. No. 06-090210, appears at R 17-21.



STATUTORY PROVISIONS AT ISSUE

The relevant portions of the Federal Rules of Evidence provide:

§ 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.

§ 803(3). 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.

§ 804(b)(3). Hearsay Exceptions; Declarant Unavailable.

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.



STATEMENT OF THE CASE

A. Factual History

In the summer of 2005, the movie “Shark Attack” was released in the United States. (R.2) Like many other children in the United States and Legolia, Stuart Slope (“Stuart”), then four years old, watched and loved the movie. (R 2) He loved it so much that his parents bought him a plush toy based on the movie’s main character, “Finn E. Shark,” as a holiday present in December 2005. (R 2) Stuart carried this toy with him constantly and was observed licking its eyes. (R 2) Approximately a week after Stuart received the toy, its eyes fell off. (R 3)

By late December of 2005 Stacy and Serina Slope began to notice some alarming changes in their five-year-old son Stuart. (R 2) He began to slur his speech, his mood changed and he suffered sensory, memory, and concentration problems. (R 2) More alarmingly, Stuart suffered headaches, dizziness, confusion, and brief periods of unconsciousness. (R 2) On January 2, 2006 Mr. and Mrs. Slope realized their son needed immediate medical attention. The doctors ran several tests including blood tests, brain scans, and other diagnostic procedures, all of which conclusively established that Stuart's symptoms were caused by exposure to a rare toxin known as rH-12 and that this exposure caused Stuart irreversible brain damage. (R 3)

During discovery, it was confirmed that the eyes of the Finn E. Shark toy were attached with glue that contained rH-12 and that Stuart had been exposed to rH-12 through his constant contact with the toy. (R 28) It was also discovered that numerous similar exposures occurred in Legolia, where Finn E. Shark was manufactured and that Finn E. Shark manufacturer, BFP Tattel, Inc. ("Tattel"), and its CEO, Mimi Jussel ("Jussel"), were aware of the presence of rH-12 in its Finn E. Shark toys no later than September 30, 2005. (R 28)

In or about March 2005, Under the Sea Toys, Inc. ("Sea Toys") collaborated with Tattel, located in the country of Legolia, to create the "Finn E. Shark" stuffed plush toy released in connection with the animated film "Shark Attack." (R 2) Tattel was the sole manufacturer of the Finn E. Shark toy. Tattel was also the distributor of Finn E. Shark in Legolia, while Sea Toys distributed the toy in the United States. (R 2) By May 2005, the toy was widely distributed in both Legolia and United States. (R 2)

On September 30, 2005 the *Legolian Times* reported that the Legolian government had launched an investigation to determine the source of an rH-12 outbreak. (R 3) Jussel's secretary, Jaffe Peetz ("Peetz") testified that that same day Jussel asked her to book a plane ticket to

California. (Pl. Exh. C, R. 24) She told Peetz that she intended to meet with Troy Ledbetter (“Ledbetter”), CEO of Under the Sea Toys, Inc., to tell him what was going on. (R 24) Peetz booked a flight for Jussel leaving October 2, 2005 and returning on October 3, 2005. (R 24) Jussel later submitted receipts for plane fare, taxi rides, and a hotel for her trip. (R 24)

On October 10, 2005, Jussel wrote an entry in her Personal Business Journal (“Plaintiff’s Exhibit A”). (Pl. Exh. A, R 22) In Plaintiff’s Exhibit A, Jussel describes a meeting with the Undersecretary of Commerce in Legolia. (Pl. Exh. A, R 22) She recalls that the Undersecretary asked whether she knew of the rH-12 in the Finn E. Shark toy. (Pl. Exh. A, 22) Jussel responded that she “knew – everybody here and in America knew – that there was rH-12 in that toy, but . . . kept selling it anyway.” (Pl. Exh. A, R 22) On October 11, 2005 Jussel wrote a letter to her daughter (“Plaintiff’s Exhibit B”). (Pl. Exh. B, R 23) In the letter Jussel tells her daughter that she knew the shark toys contained rH-12. (Pl. Exh. B, R 23) She further informs her daughter “I went to California and told Sea Toys that there was rH-12 in the shark toys and that rH-12 had dangerous effects on children.” (Pl. Exh. B, R 23) Shortly thereafter, Jussel was diagnosed with a life-threatening illness. (R 10) She subsequently committed suicide. (R 10) Approximately one week had lapsed between Jussel’s mailing of the letter and her death. (R 10)

On October 20, 2005, the United States Consumer Products Safety Commission released a directive to Manufacturers, Distributors, and Sellers of Children’s Toys (“Plaintiff’s Exhibit E”). (Pl. Exh. E, R 27) Plaintiff’s Exhibit E directed Manufacturers and Distributors in the United States to “conduct appropriate investigations and take remedial action if there is any indication that their products pose serious health risks to consumers.” (Pl. Exh. E, R 27)

Legolian manufacturer Tattel was later dissolved in January 2006. (R 3) On January 16, 2006, Internal Design and Research for U.S. distributor Sea Toys submitted to Mr. Troy

Ledbetter an Internal Memorandum (“Plaintiff’s Exhibit D”) regarding its investigation of the Finn E. Shark plush toy. (Pl. Exh. D, R 25-26) This investigation indicated that the glue used as adhesive for the eyes on the Finn E. Shark toy contains rH-12. (Pl. Exh. D, R 25) It further confirmed that ingestion of rH-12 can cause permanent brain damage in humans and that continued exposure exacerbates initial brain damage. (Pl. Exh. D, R 25) Plaintiff’s exhibit D confirms that Sea Toys was provided with information concerning the etiology of brain damage in Legolian children as early as October 2005 and that the investigation substantiated that information. (Pl. Exh. D, R 25) Finally, Plaintiff’s Exhibit D recommends an immediate recall of the Finn E. Shark toy from all retailers and consumers. (Pl. Exh. D, R 25) On April 1, 2006 Sea Toys issued a recall of all Finn E. Shark toys in the United States, warning of the danger of rH-12 exposure. (R 3)

B. Procedural History

On April 14, 2006, Slope properly filed a complaint in the Southern District of Boerum under 28 U.S.C. § 1332. (R 1-4) Slope alleged that Defendant-respondent (“Sea Toys”) knowingly failed to warn of the dangers and risks associated with the Finn E. Shark toy or to issue a timely recall of the toy, thus violating section 204 of the Boerum Tort Reform Act. Boerum Tort Reform Act § 204 (2004). (R 3-4) Slope further alleged, and discovery confirmed, that Slope had been exposed to rH-12 due to his constant contact with the Finn E. Shark toy and that he was consequently severely injured. (R 30)

Defendant-Respondent moved for summary judgment seeking dismissal of Slope’s Boerum Tort Reform Act § 204 claim, arguing that “Plaintiff does not have sufficient admissible evidence to defeat summary judgment.” (R 6) On June 29, 2006, the United States District Court for the Southern District of Boerum heard evidence regarding Defendant-respondent’s motion.

(R 5-16) The only disputed issue was Defendant-respondent's knowledge of the dangerous condition of the toy. (R 7) Plaintiff offered four pieces of evidence, any of which would be independently sufficient to establish knowledge. (R. 7-15, 18) Defendant argued that each of the exhibits offered is inadmissible. (R 7-15) Plaintiff argued that each exhibit falls within an exception and is thus admissible under the Federal Rules of Evidence. (R 7-15)

On July 10, 2006, the United States District Court for the Southern District of Boerum (Doris Ritter, C.J.) denied admission of four exhibits proffered by Slope to prove the essential element of knowledge in his claim under section 204 of the Boerum Tort Reform Act. Boerum Tort Reform Act § 204. (17-20) The court consequently granted Defendant-respondent's motion for summary judgment and dismissed Slope's complaint pursuant to Rule 56(c) of the Federal Rules of Civil Procedure for lack of admissible evidence to prove an essential element of Petitioner's claim. FED. R. CIV. P. 56(c). (R 21)

Dismissal was affirmed on appeal in a 2-1 decision authored by Judge Louellen N. Perce. *Slope v. Under the Sea Toys, Inc.*, Civ. No. 07-02170. (R 28-45) The Honorable Marjorie K. Julio dissented. (R 39-45) Plaintiff petitioned for writ of certiorari. The Supreme Court granted certiorari on October 1, 2007, limiting their review to four questions.²

SUMMARY OF THE ARGUMENT

For the reasons that follow, Petitioner is requesting the Court reverse the decision of the lower court granting defendant's motion for summary judgment. Petitioner contends that the lower court erred by excluding four pieces of evidence. Each piece of evidence, examined independently, conclusively establishes that defendant had knowledge of the dangerous effect rH-12 has on children prior to December 2005.

² See **QUESTIONS PRESENTED**, *supra*, at i.

Petitioner contends that Jussel's statement "everyone here and in the U.S. knew" is admissible as a statement against Jussel's pecuniary interest under Federal Rule of Evidence 804(b)(3) because this Court's decision in *Williamson v. United States*, 512 U.S. 594, 114 S. Ct. 2431 (1994) only bans statements collateral to statements against penal interest. Even if this Court extends *Williamson* to cover collateral statements to those against pecuniary interest, Jussel's statement is still admissible because it is not collateral, but rather essential to her statement against her own pecuniary interest.

Additionally, Petitioner contends Jussel's letter stating "I went to California and told Sea Toys that there was rH-12 in the shark toys and that rH-12 had dangerous effects on children" is admissible under Rule 804(b)(3) because there is no *per se* rule against admission of a statement against penal interest when the declarant subsequently commits suicide. Rather, the Court must determine whether Jussel reasonably believed that she could be subjected to criminal liability at the time she wrote the letter. Petitioner further contends that Jussel's statement is admissible despite *Williamson*, because *Williamson* only applies to statements against penal interest made in a custodial setting.

Additionally, Petitioner contends that Jussel's statement to her secretary that she intended to go to California and meet with the CEO of Sea Toys to tell him about the dangerous effects of rH-12 on children is admissible under Rule 803(3) to establish that she did in fact go to California, that she did meet with the CEO, and that she did tell him about rH-12's dangerous effects.

Finally, Petitioner contends that the factual findings portion of Sea Toys' Internal Memorandum, including their admission of knowledge as early as October 2005 of rH-12's dangerous effects, is admissible. The plain language of Rule 407 excludes only evidence of the

actual subsequent remedial measures, and not the factual findings obtained when determining whether subsequent remedial measures should be implemented. Furthermore, the entire memorandum is admissible because Rule 407 does not prohibit evidence of subsequent remedial measures when such measures were taken as a result of a government mandate.

ARGUMENT

I. STANDARD OF REVIEW

The Court is to review a lower court's grant of summary judgment *de novo*. *Holloway v. Brush*, 220 F.3d 767, 772 (6th Cir. 2000). The Court will view the facts, and all inferences to be drawn from them, in the light most favorable to the nonmoving party. *Id.* Summary judgment is appropriate only when "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c).

II. THE COURT SHOULD REVERSE THE COURT OF APPEALS' GRANT OF SUMMARY JUDGMENT TO DEFENDANT ON THE ISSUE OF KNOWLEDGE BECAUSE PLAINTIFF'S EXHIBIT A IS ADMISSIBLE UNDER 804(b)(3)'S HEARSAY EXCEPTION FOR STATEMENTS AGAINST PECUNIARY INTEREST.

When the Federal Rules of Evidence became federal law in 1975, Congress established an exception to the general exclusion of hearsay evidence for statements against the pecuniary, proprietary, and penal interest of an unavailable witness. FED. R. EVID. 804(b)(3). This Court has described this exception as "founded on the commonsense notion that reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true." *Williamson*, 512 U.S. at 599, 114 S. Ct. at 2432. (R 32)

Three conditions must be satisfied for a statement to be admissible under 804(b)(3): (1) the declarant must be unavailable, (2) the statement must be based on her own first-hand knowledge, and (3) there must be an awareness on the part of the declarant that her statement

exposes her to possible civil or criminal liability. *Atlas Metals Product Co. v. Lubermans Mutual Casualty Co.*, 2003 WL 22699925, at *2 (Mass. Super., July 31, 2003). *See, e.g., United States v. Bumpass*, 60 F.3d 1099, 1102 (4th Cir. 1995) (citing *United States v. MacDonald*, 688 F.2d. 224, 233 (4th Cir. 1982), *cert. denied*, 459 U.S. 1103, 103 S. Ct. 726 (1983)). Here it is uncontested that all three requirements are met in reference to Jussel's statements evidencing her own knowledge that the Finn E. Shark toy contained rH-12, a rare toxin dangerous to children. It is further uncontested that the conditions are met in the portion of her statement explaining her subsequent actions, or lack thereof. What is contested, however, is whether her addition of "everyone here and in America knew" constitutes an inadmissible collateral statement as defined in *Williamson*. It does not.

A. The Court's decision in *Williamson* extended only so far as to exclude admission of custodial statements against penal interest, and thus statements collateral to those against pecuniary interest, follow the existing common law rule and should be admitted.

From the time the exception was established, "it has been held that a declaration against interest is admissible, not only to prove the disserving fact stated, but also to prove other facts contained in collateral statements connected with the disserving statement." *Williamson*, 512 U.S. at 615, 114 S. Ct. at 2442 (Kennedy, J., concurring in the judgment) (quoting Bernard S. Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 HARV. L. REV. 1, 57 (1944)). It is plain from the language of the Court's opinion in *Williamson* that the Court was concerned only with declarations against penal interest, not with any of the other interests covered by Rule 804(b)(3). *See id.* at 596, 114 S.Ct. at 2433. Furthermore, the focus of the Court in that case is far more specific yet, focusing on *custodial* declarations against penal interest. *See generally, id.*

Petitioner acknowledges that the concern with reliability of non-self-inculpatory

statements is inherent in the custodial context where an arrested co-defendant can hope to reduce the penal consequences against himself by making a deal and shifting the blame. This was the concern in *Williamson*, where a criminal defendant, caught red-handed, may have sought to reduce his punishment by implicating his co-defendants in his statements. *See generally, Williamson*. But no such concern is present in the case at bar.

Implicating others in a civil context does not ordinarily reduce the penalties that may be levied against the declarant, nor does it decrease the likelihood that suit will be filed. (R 40 (Julio, J. dissenting)) Here, it is not rational to believe that Jussel felt that by implicating “everyone here and in America” in her own personal business journal, she would somehow decrease her civil liability. Given this vast difference between declarations against penal interest made in a custodial setting, like those in *Williamson*, and declarations against pecuniary interest made in a private journal, such as the one in dispute in the case at bar, it is too great of a stretch to extend the holding of *Williamson* to exclude the latter. Thus, the common law rule – a declaration against pecuniary interest “is made under circumstances fairly indicating the declarant’s sincerity and accuracy,” and thus, the entire statement should be admitted – is not altered by the *Williamson* decision. *Williamson* 512 U.S. at 612, 114 S. Ct. at 2441 (citing 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1465, at 271 (3d ed. 1940)). And so, the so-called “collateral statement,” that everyone in America knew about the toxin, should be admitted. *See* WIGMORE § 1465, at 271.

B. Even if the Court holds that *Williamson* applies to statements against pecuniary interest, Plaintiff's Exhibit A is still admissible because it is not a separate statement within a broader self-inculpatory narrative, but rather an inseparable piece of the self-inculpatory statement itself.

Even if the Court decides that *Williamson* does extend to statements against pecuniary interest, Jussel's statement that everyone in America knew about the toxin is still admissible. As a decision, *Williamson* was anything but conclusive as to the method that should be used in determining whether a statement should be excluded as a collateral statement. While *Williamson* was a unanimous decision on the merits, there were four separate opinions filed, representing at least two unique approaches to addressing the issue at hand today. *Williamson*, 512 U.S. at 594, 605, 607, 611, 114 S. Ct. at 2434, 2438, 2438, 2440. Under either approach, Jussel's entire statement – "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. We are going to lose so much business" – is admissible under Rule 804(b)(3).

While the majority of the court in *Williamson* refuses to give weight to the Advisory Committee's notes to Rule 804(b)(3),³ the court does not explicitly reject statements against interest that implicate a co-defendant in the same sentence. *See generally, Williamson*. In fact, in further extrapolating on the majority's opinion, Justice Scalia stated that "a declarant's statement is not magically transformed from a statement against penal interest into one that is inadmissible

³ The Advisory Committee notes to Rule 804(b)(3) state in pertinent part that "[o]rdinarily the third-party confession is thought of in terms of exculpating the accused, but this is by no means always or necessarily the case: it may include statements implicating him, and under the general theory of declarations against interest they would be admissible as related statements Whether a statement is in fact against interest must be determined from the circumstances of each case. Thus a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest On the other hand, the same words spoken *under different circumstances*, e.g. to an acquaintance, would have no difficulty in qualifying." *Williamson*, 512 U.S. at 601-602, 114 S. Ct. at 2435-36 (emphasis added); FED. R. EVID. 804(b)(3) advisory committee's notes.

merely because the declarant names another person or implicates a possible codefendant.”

Williamson, 512 U.S. at 606, 114 S. Ct. at 2438 (Scalia, J., concurring).

The majority makes clear that “whether a statement is self-inculpatory or not can only be determined by viewing it *in context* . . . [and that] [e]ven statements that are on their face neutral may actually be against the declarant’s interest.” *Williamson*, 415 U.S. at 603, 114 S. Ct. at 2436-37 (emphasis added); *see also*, *Silverstein v. Chase*, 260 F.3d 142, 148 (2d Cir. 2001).

Here, Tattel CEO Jussel stated “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. We are going to lose so much business.” (R 22) As the court below recognized, “[t]he declaration against [Jussel’s] pecuniary interest is shown both by her admission, ‘I knew,’ as well as her comments on the continued sale and predicated loss of business and personal assets.” (R 33).

The implication of co-defendants in America is necessarily intertwined in the portions of the statement the court recognizes to be against Jussel’s pecuniary interest as each of her statements reference “we,” rather than “I.”⁴ The initial “everybody here and in America” is necessary to the reader’s understanding of the subsequent language. Without this explanatory clause, the reader and the jury would be left wondering “who is we?”. Thus, this clause is clearly not one that the Court in *Williamson* intended to exclude, but rather one of those statements that may appear on its face neutral, but actually is against the declarant’s pecuniary interest.

Justice Kennedy, joined by Chief Justice Rehnquist and Justice Thomas, adopted the common-law’s more expansive approach in his concurring opinion, even with regard to statements against penal interests. *Williamson*, 512 U.S. at 611-21, 114 S. Ct. at 2440-45.

Whereas the majority rejected the Advisory Committee’s Notes, Justice Kennedy adopted them,

⁴ Recall the statement at issue: “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. *We* are going to lose so much business.” PLAINTIFF’S EXHIBIT A (emphasis added). (R 22)

reasoning that “[w]hen . . . the text of a Rule of Evidence does not answer a question that must be answered in order to apply the Rule, and when the Advisory Committee’s Note does answer the question, our practice indicates that we should pay attention to the Advisory Committee’s Notes.” *Williamson*, 512 U.S. at 614, 114 S. Ct. at 2442. In fact, there is a long-standing history of referencing the notes in interpreting the Rules of Evidence. *See Huddleston v. United States*, 485 U.S. 681, 688, S. Ct. 1496, 1500-01 (1988); *United States v. Owens*, 484 U.S. 554, 562, 108 S. Ct. 838, 844 (1988); *Bourjaily v. United States*, 483 U.S. 171, 179 n.2, 107 S. Ct. 2775, 2780 n.2 (1987); *United States v. Abel*, 469 U.S. 45, 51, 105 S. Ct. 465, 468-69 (1984).

The Advisory Committee notes to Rule 804(b)(3) make clear that “whether a statement is in fact against interest must be determined from the circumstances of each case.” FED. R. EVID. 804(b)(3) advisory committee notes. The Advisory Committee notes further guide that while “a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest[,] . . . the *same* words spoken under *different circumstances*, e.g. to an acquaintance, would have no difficulty in qualifying.” *Id.* (emphasis added). In other words, the Advisory Committee’s notes would have the Rule admit collateral neutral statements, such as the one at issue in the case at bar, and exclude collateral self-serving statements, such as those made in *Williamson*. *Id.* This is the crux of the distinction between *Williamson* and the case at bar.

In *Williamson*, the statement the Prosecution sought to admit was made in a custodial setting to the police. *Williamson*, 512 U.S. at 596-97, 114 S. Ct. at 2433. The declarant in that case had incentive to color facts so as to shift the blame from himself to another. Thus, the statement was properly excluded. Here, Jussel’s statement was not elicited as part of an interrogation, but rather is contained within her own private business journal. Private journals

tend to contain the most intimate thoughts of the author and as such, the author usually does not intend the contents to be read by others. A statement of this type is inherently more reliable because there is no incentive whatsoever for Jussel to lie. If she did not intend anyone else to read the journal's contents, she could not have anticipated being subject to less liability by implicating a possible co-defendant, Sea Toys. Excluding this statement would undermine the very rationale under which the Rule has been applied since its inception at common law. Furthermore, exclusion would undermine the meaning of the codified rule as further extrapolated by the Advisory Committee's notes. Under the clear meaning of Rule 804(b)(3), Jussel's entire statement must be admitted.

III. THE COURT SHOULD REVERSE THE COURT OF APPEALS' GRANT OF SUMMARY JUDGMENT TO THE DEFENDANT ON THE ISSUE OF KNOWLEDGE BECAUSE PLAINTIFF'S EXHIBIT B IS ADMISSIBLE UNDER FEDERAL RULE OF EVIDENCE 804(b)(3) AS AN ADMISSION AGAINST INTEREST DESPITE THE FACT THAT THE DECLARANT LATER COMMITTED SUICIDE.

For a statement to be admissible under 804(b)(3), the proponent of admission must establish that (1) the declarant is unavailable as defined under Rule 804(a), (2) the statement was based on the declarant's own first-hand knowledge, and (3) the declarant was aware that her statement exposes her to possible criminal action. *Atlas*, 2003 WL 22699925 at *2. *See, e.g., Bumpass*, 60 F.3d at 1102 (citing *MacDonald*, 688 F.2d. at 233). Here all three requirements are met. Both parties concede authenticity of the letter, which relates only those things that Jussel knows to be true through her own actions and observations. As Jussel is deceased, she qualifies as unavailable under Federal Rule of Evidence 804(a)(4). FED. R. EVID. 804(a)(4). Jussel's statement that "it is almost certain I will go to prison" evidences her awareness that her statement exposes her to possible criminal action. In fact, the Defendant concedes the letter contains declarations against Jussel's penal interest. (R 34)

Defendant argues, however, that the letter is *per se* inadmissible because Jussel committed suicide a week after writing and sending the letter. (R 34) This is not an accurate interpretation of Rule 804(b)(3), nor is it an accurate interpretation of the case law surrounding this area of the law. *See generally, Atlas*, 2003 WL 22699925 at *2 (holding admissible a voluntary confession made shortly before the declarant committed suicide).

Petitioner does not dispute that declarations against interest made *in anticipation of* a declarant's suicide may not carry the same reliability as a normal declaration against penal interest. Nor does Petitioner disagree that contemplation of suicide may permit one "to rewrite one's own history." *United States v. Angleton*, 269 F. Supp. 2d 878, 890 (S.D. Tex. 2003). In fact, it has long been established that

assertions in suicide notes may not offer the same safeguards of the writer's sincerity as are normally assumed to exist in declarations against penal . . . interests. When the declarant *knows* that he will not be present for prosecution or civil suit, impending liability cannot be considered a motivating impetus ensuring trustworthiness.

Note, *The Judicial Interpretation of Suicide*, 105 U. PA. L. REV. 391, 404-05 (1957) (emphasis added). But none of these principles in any way suggests the *per se* rule Defendant advocates excluding statements that would otherwise be admissible under Rule 804(b)(3) but for the declarant's subsequent suicide. What these authorities do suggest is that when a declarant has subsequently committed suicide, the Court must examine the facts of the case closely to determine that the third requirement for admissibility – declarant's awareness that her statement may subject her to criminal action – is met. (R 41 (Julio, J. dissenting))

As Judge Julio pointed out in her dissent below, "[t]he plain language of 804(b)(3) does not contain any exceptions or require any additional guarantees of trustworthiness or reliability for a declaration against penal interest not offered to exculpate." (R 41 (Julio, J., dissenting)) For

this reason, each time a confession has been excluded because of a subsequent suicide, the court acknowledges the failure of the statement to meet one of the three necessary criteria outlined above, namely the third – a genuine awareness on the part of the declarant that her statement exposes her to possible criminal action. *See, e.g., Angleton*, 269 F. Supp. 2d at 889; *United States v. Lemonakis*, 485 F.2d 941, 957 (refusing to admit a note clearly indicating that the declarant intended to commit suicide because penal interest is “of no moment to a dead man”).

Adopting a *per se* rule and removing the Court’s discretion would not only be inconsistent with the case law, but would also undermine the very rationale upon which this rule was founded. The courts have recognized that some statements exist that “so far tend to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant’s position would not [make] the statement unless believing it to be true” long before the inception of Rule 804(b)(3). *Williamson*, 512 U.S. at 611, 114 S. Ct. at 2440. And for this reason, courts have admitted such statements over hearsay objections. The courts should retain the discretion to determine which statements meet this criteria, and those statements which do should be admitted.

A. Because Jussel was not contemplating suicide at the time she wrote the letter, the letter is admissible.

The inquiry then is whether Jussel genuinely believed at the time she wrote the letter to her daughter that her statements could subject her to criminal liability. All of the evidence before the Court suggests that she did. In fact, her letter itself indicates that she believed it “almost certain [that she would] go to prison.” (Pl. Exh. B, R 23) Furthermore, there is not even a hint in the letter that Jussel was at the time contemplating suicide. If anything, the letter indicates a desire to live to “one day hopefully . . . be a grandmother.” (Pl. Exh. B, R 23)

Defendant would have the Court believe that because Jussel did later commit suicide, this is enough to establish that she was contemplating doing so at the time she wrote the letter. This

assertion is not supported by the facts in this case. Jussel did not immediately commit suicide after sending the letter. (R 10) In fact, a full week went by in which Jussel did not commit suicide. (R 10) During that week it is uncontested that Jussel was diagnosed with a life-threatening illness. (R 10) Her diagnosis being closer in time to her suicide, it is more reasonable to believe that she was motivated by the diagnosis, and not her involvement with the Finn E. Shark toy, to commit suicide. Furthermore, during the one week time period, Jussel was certainly subject to criminal repercussions and therefore during this time period the statements were certainly against her interest, and should thus be admitted.

B. The collateral statements in the letter are admissible despite *Williamson*, because they were not made in a custodial setting.

Because Jussel's statement was made to her daughter, presumably a confidant, and not to the police in a custodial setting, Plaintiff's Exhibit B falls outside the purview of *Williamson*. *See generally, Williamson*. The Court should apply the common law rule that "a declaration against interest is admissible, not only to prove the disserving fact stated, but also to prove other facts contained in collateral statements connected with the disserving statement." *Id.* at 615 (Kennedy, J., concurring in the judgment) (quoting Bernard S. Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 HARV. L. REV. 1, 57 (1944)).

Because Jussel's statement was "made under circumstances fairly indicating [her] sincerity and accuracy," the entire letter should be admitted. WIGMORE § 1465, at 271; *see also Williamson*, 512 U.S. at 612, 114 S. Ct. at 2441 (Kennedy, J., dissenting). Here, Jussel's statement that "I went to California and told Sea Toys that there was rH-12 in the shark toys and that rH-12 had dangerous effects on children" (Pl. Exh. B, R 23) was made not "to curry favor with the authorities," but rather to explain the full extent of her responsibility for the actions. Statements of this nature have traditionally been admitted at common law. *Williamson*, 512 U.S.

at 612, 615, 114 S. Ct. at 2441, 2442 (Kennedy, J., concurring in the judgment). And as this Court has not yet heard a case analogous to one such as this, the Court should adopt the analysis put forward by the Advisory Committee's notes, Justice Kennedy in his *Williamson* dissent, and legal theorists dating back to the early 1900s. *See supra* pp. 10-11. Under any of these approaches to the statement against interest exception, Jussel's statements in her letter to her daughter, including those that indicate Sea Toys' knowledge, are admissible.

IV. THE LOWER COURT'S GRANT OF SUMMARY JUDGEMENT TO DEFENDANT SHOULD BE REVERSED BECAUSE, UNDER FEDERAL RULE OF EVIDENCE 803(3), A DECLARANT'S OUT-OF-COURT STATEMENT THAT SHE INTENDS TO MEET AND DISCUSS A MATTER WITH A BUSINESS ASSOCIATE IS ADMISSIBLE TO PROVE IN A CIVIL CASE THAT THE MEETING TOOK PLACE AND THAT THE MATTER WAS DISCUSSED.

The United State Supreme Court held over a century ago in *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 12 S. Ct 909 (1892), that a declarant's out-of-court statement regarding his intent to act with a nondeclarant is admissible to show the future conduct of the nondeclarant. *Id.* at 299-300, 12 S. Ct. at 914. Since that decision, no Supreme Court case has ever called into question the validity of this doctrine. *Coy v. Renico*, 414 F. Supp. 2d 744, 771 (E.D. Mich. 2006). Following this deeply rooted hearsay exception, a declarant's out-of-court statement that she intends to meet and discuss a matter with a business associate is admissible to show that the business associate attended the meeting and that the matter was discussed. *See Hillmon*, 145 U.S. at 299-300, 12 S. Ct. at 914.

When the Federal Rules of Evidence were enacted in 1975, Congress codified in Rule 803(3) a hearsay exception for a declarant's statement of her "then existing state of mind." FED.R.EVID. 803(3). The declarant's intent to act falls within this hearsay exception and is thus admissible as substantive evidence. FED. R. EVID. 801, 803(3); *Fireman's Fund Ins. Co. v. Thien*, 8 F.3d 1307, 1311 n.10 (8th Cir. 1993). The rule does not expressly address the *Hillmon*

doctrine, but the Advisory Committee's notes state that "[t]he rule of . . . *Hillmon* . . . , allowing evidence of intention as tending to prove the doing of the act intended, is, of course, left undisturbed." FED. R. EVID. 803(3) advisory committee's note. Contrary to the Rule's Advisory Committee's notes, the report of the House Judiciary Committee states that it intended the Rule to "limit the [*Hillmon*] doctrine . . . so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person." H.R. REP. NO. 93-650, at 13-14 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7075, 7087. The House Judiciary Committee report is insufficient to question the validity of the long-standing *Hillmon* doctrine. *Coy*, 414 F. Supp. 2d at 771 n.13. As a matter of statutory interpretation, the "plain language of Rule 803(3) would not be trumped by this single committee report 'which, as far as we know, not even the full committee, much less the full [House], much much less the full [Senate], and much much much less the President who signed the bill, agreed with.'" *Id.* (citing *Intel Corp. v Advanced Micro Devices, Inc.*, 542 U.S. 241, 267, 124 S. Ct. 2466, 2484 (2004) (Scalia, J., concurring in judgment)). Given the continued, extensive application of the *Hillmon* doctrine following the codification of Rule 803(3), this single report provides little support for uprooting such a deeply rooted hearsay exception.

Since 1975, three federal courts of appeals have considered whether Rule 803(3) incorporates the *Hillmon* doctrine, and all three have determined that, in some way or another, it does. *United States v. Astorga-Torres*, 682 F.2d 1331 (9th Cir. 1982); *United States v. Jenkins*, 579 F.2d 840 (4th Cir. 1978); *United States v. Best*, 219 F.3d 192 (2d Cir. 2000). The Ninth Circuit has correctly adopted *Hillmon*, holding that a declarant's statement of intent to act in the future is admissible under Rule 803(3), and that the jury may make any inferences that may properly be drawn from such evidence. *Astorga-Torres*, 682 F.2d at 1335-36. In doing so, the

jury may properly infer a nondeclarant's action from the intent of the declarant. *Id.* Jussel's statement, "Book me a plane ticket to California right away. Something terrible has happened and I am going to meet with Troy Ledbetter to tell him what's going on[,]" is a statement of her intent to go to California, meet with Ledbetter, and tell him about the dangerous effects of rH-12. This statement is admissible under both *Hillmon* and the Ninth Circuit's approach, and the jury may make the reasonable inference that Ledbetter met with and listened to Jussel. Therefore, under this approach, the factfinder could properly infer that the Sea Toys had knowledge of the dangerous effects of rH-12 before December of 2005.

The Second Circuit admits *Hillmon* statements as evidence, from which the jury may properly infer a nondeclarant's future conduct, as long as there is independent evidence, circumstantial or direct, connecting the declarant's statement of intent with the nondeclarant's future conduct. *Best*, 219 F.3d at 198-99. The court requires corroborating evidence that the declarant met with the nondeclarant and that the declarant talked to the nondeclarant, but emphasizes that such evidence may be circumstantial. *Id.* at 199.

In the case at bar, there is enough circumstantial evidence to corroborate both requirements. There is independent evidence that Jussel flew to California as shown by the receipts for her plane ticket, hotel room, and taxi rides. Additionally, Plaintiff's Exhibit B helps to corroborate that she met with Ledbetter, as it says that she "went to California and told Sea Toys⁵ that there was rH-12 in the shark toys and that rH-12 had dangerous effects on children." (Pl. Exh. B, R 23) Petitioner stands by his previous argument that the entire suicide note is admissible pursuant to Rule 804(b)(3). *See supra* pp. 15-19. But even in the event the Court

⁵ Troy Ledbetter, as CEO of Under the Sea Toys, Inc., is the company's agent. RESTATEMENT (SECOND) OF AGENCY § 1 (1958). Under the corporation law, he has the authority and the duty to act on behalf of the company. MODEL BUS. CORP. ACT § 8.42 (1984). Therefore, if Ledbetter has knowledge of the dangerous effects of rH-12, Sea Toys has the same knowledge. *See* RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

disagrees with Petitioner on that issue, the letter should still be admitted with the portions attributing liability to Defendant redacted. Therefore, any inadmissible or prejudicial portion of the letter would be kept away from the jury, while admitting the permissible portions, *i.e.*, “I went to California and told Sea Toys [remainder redacted].” The letter would not be offered for the truth that she actually did what the letter said she did, but as circumstantial, corroborating evidence showing she told her daughter that she performed the aforementioned actions.

Finally, the fact that Sea Toys investigated the dangerous effects of rH-12 and issued an internal memorandum indicating the results of the investigation is independent evidence that Jussel told Ledbetter of the dangerous situation. The contents of the memorandum are irrelevant to this determination. It is the existence of the memorandum, not its substance, that independently establishes that the meeting took place. Petitioner, in this instance, is not concerned with the results of the investigation because it is sufficient corroborating evidence that an investigation was instigated after the Defendant obtained knowledge that the shark toys contained rH-12. After passing the Second Circuit’s threshold determination of admissibility, Jussel’s entire statement is admissible, and the jury may properly infer Ledbetter’s future conduct from her statement.

Finally, the Fourth Circuit relied on the House Judiciary Committee notes and held that only the future acts of declarant can be proven by the declarant’s intent. *Jenkins*, 579 F.2d at 842-43. Additionally, a *Hillmon* statement could be “admissible for some other valid reason- *e.g.*, to show why the declarant acted as she did[and]the jury would be permitted to draw any inference it wished from the hearsay statement.” *Coy*, 414 F. Supp. 2d at 769 (construing *Jenkins*, 579 F.2d at 844). Even under this restrictive view, Jussel’s statement is admissible. Her statement expresses her intention to do a future act, *i.e.*, fly to California and meet with

Ledbetter. Petitioner only offers the statement to prove that *she* did the act *she* intended to do. This is a valid reason to admit such statement under any approach discussed above, including that of the House Judiciary Committee. After Jussel’s statement is admitted, the jury is “permitted to draw any inference it wished from the hearsay statement.” *Id.*

In addition to the federal courts that have ruled on the issue, “the overwhelming majority of [state courts allow the] introduction of *Hillmon* statements to establish the future conduct of a nondeclarant under the state of mind exception.” *Id.* (citations omitted). Most notably, the California Supreme Court held that a murder victim’s statement to her friend that she intended to go out with the defendant the night of her murder was admissible to prove that she in fact did go out with the defendant that night, which allows for the reasonable inference that the defendant accompanied her. *People v. Alcalde*, 148 P.2d 627, 632 (Cal. 1944). *Alcalde* set forth three essential elements that a *Hillmon* statement must possess to be admissible: (1) the declaration must tend to prove the declarant’s intention at the time it was made; (2) it must have been made under circumstances which naturally give verity to the utterance; and (3) it must be relevant to an issue in the case. *Id.* at 187. It is obvious that the statement at issue possesses all of these essential elements. Jussel’s statement, “Book me a plane ticket to California right away. Something terrible has happened and I am going to meet with Troy Ledbetter to tell him what’s going on[,]” clearly proves her intention to meet with Ledbetter and to tell him about the effect of their poisonous product. The fact that the statement was made directly after Ms. Jussel read an article in the *Legolian Times* that children in Legolia were being poisoned by a rare substance naturally gives verity to the utterance. Finally, this statement is undoubtedly relevant to the issue of liability. Since all the elements of *Alcalde* are established, it allows for the reasonable inference that Jussel went to California, met with Ledbetter, and told him “that there was rH-12

in the shark toys and that rH-12 had dangerous effects on the children.” (Pl. Exh. B, R 23) If admitted, it will establish the defendant’s knowledge of the toxins in the toys.

Any criticism of the *Hillmon* doctrine has come from academia, judicial dicta, or dissent. In *Shepard v. United States*, 290 U.S. 96, 54 S. Ct. 22 (1933), the Court highlighted the criticisms of *Hillmon* in dicta. *Id.* at 105, 54 S. Ct. at 26. But that case dealt with a declarant’s statement regarding a nondeclarant’s past action and not with inferring the nondeclarant’s future conduct from the declarant’s intent. *Id.* at 106, 54 S. Ct. at 26. Thus, this Court should give the *Shepard* opinion no weight in evaluating this issue. The dissent in *Alcalde* relied on *Shepard*’s dicta, but this position was rejected by the majority of the California Supreme Court, and thus, it too has no persuasive effect. *Alcalde*, 148 P.2d at 633 (Traynor, J., dissenting). Finally, a Harvard Law Review article written thirty-three years after *Hillmon* was decided criticizes the decision. John M. Maguire, *The Hillmon Case – Thirty-Three Years After*, 38 HARV. L. REV. 709, 717 (1925). But since no decision in history has used this secondary source to support a position that the *Hillmon* doctrine should be overturned, this article is merely an academic opinion, and as such, holds no weight.

Despite any of these criticisms, the Court has never questioned the validity of the *Hillmon* doctrine. *Coy*, 414 F. Supp. 2d at 768 n.8. This hearsay exception is “firmly rooted even as to statements tending to show the future conduct of a nondeclarant.” *Id.* at 770 (citing *White v. Illinois*, 502 U.S. 346, 355 n.8, 112 S. Ct. 736, 743 n.8 (1992)). Furthermore, as mentioned above, the exception “has lasted for over a century, and in some form or another is applied in nearly all of the jurisdictions that have considered the issue.” *Id.* Therefore, the Court should leave undisturbed the one-hundred and sixteen year tradition and admit Jussel’s statement

that she intended to go to California and meet with Ledbetter to prove that Sea Toys had knowledge of the dangerous toxins before Stuart's parents bought the "Finn E. Shark" toy.

V. THE LOWER COURT'S GRANT OF SUMMARY JUDGEMENT TO DEFENDANT SHOULD BE REVERSED BECAUSE FEDERAL RULE OF EVIDENCE 407 EXCLUSION OF SUBSEQUENT REMEDIAL MEASURES DOES NOT PRECLUDE ADMISSIBILITY OF DEFENDANT'S POST-INJURY REPORT.

A. The plain language of Rule 407 only prohibits evidence of subsequent remedial measures, not facts uncovered by an internal investigation.

Federal Rule of Evidence 407 does not prohibit the introduction of the factual findings of a post-injury internal investigation. *Brazos River Authority v. GE Ionics, Inc.*, 469 F.3d 416, 430-31 (5th Cir. 2006); FED. R. EVID. 407. The plain language of the rule only "prohibits 'evidence of... subsequent measures,' not evidence of a party's analysis of its product." *Prentiss & Carlisle Co. v. Koehring-Waterous Div. of Timberjack, Inc.*, 972 F.2d 6, 10 (1st Cir. 1992). Additionally, just because "the analysis may often result in remedial measures being taken (as occurred here) does not mean that evidence of the analysis may not be admitted." *Id.* (citing *Benitez-Allende v. Alcan Alumino Do Brasil, S.A.*, 857 F.2d 26, 33 (1st Cir. 1988) (upholding admission of test of allegedly defective product even though test was used to plan voluntary recall of product following accident), *cert. denied*, 489 U.S. 1018, 109 S. Ct. 1135 (1989)). Clearly, the actual words Congress used to write Rule 407 indicates that the Rule "includes only the actual remedial measures themselves and not the initial steps toward ascertaining whether any remedial measures are called for." *Fasanaro v. Mooney Aircraft Corp.*, 687 F. Supp. 482, 487 (N.D. Cal. 1988).

Plaintiff's Exhibit D, Internal Memorandum - Under the Sea Toys, includes both a factual section and a recommendation section. (Pl. Exh. D, R 25) It was written two and a half months prior to Sea Toys recalling the toy. (R 3) Rule 407 does not preclude admissibility of "the initial

steps toward ascertaining whether any remedial measures are called for.” *Id.* Furthermore, it is easy to determine the factual findings as opposed to the subsequent remedial measures because the memorandum itself distinguishes between the two different sections.

Rule 407 was enacted with the purpose 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 notes. But “it would strain the spirit of the remedial measure prohibition... to extend its shield to evidence contained in post-event tests or reports.” *Rocky Mountain Helicopters, Inc. v. Bell Helicopters*, 805 F.2d 907, 918 (10th Cir. 1986). And although “the policy considerations underlying Rule 407 are to some extent implicated in the context of post-event [reports], . . . it would extend the Rule beyond its intended boundaries to include such [reports] within its ambit.” *Fasanaro*, 687 F. Supp. at 487, *cited with approval in Brazos*, 469 F.3d at 430 n.9.

Finally, if evidence of post-injury reports were excluded under Rule 407, it would discredit “the social value of what is often the best source of information.” *Westmoreland v. CBS, Inc.*, 601 F. Supp. 66, 67 (S.D.N.Y. 1984), *cited with approval in Brazos*, 469 F.3d at 430. The social policy defendant furthers – that in order to encourage internal investigations of injury causing events, the factual findings of such reports should be shielded from use by the opposing party – was considered and rejected by the United States District Court for the Southern District of New York. *Westmoreland*, 601 F. Supp. at 67-68, *cited with approval in Rocky Mountain Helicopters*, 805 F.2d at 918-19. In that case, the court recognized that there is “no such doctrine either as to the internal investigative report or as to the facts revealed by it.” *Westmoreland*, 601 F. Supp. at 67. It further recognized that “[i]n industrial and railroad accident litigation, . . . it is commonplace that such reports, or at least the facts revealed by them, are used by the injured to

establish the liability of the company that conducted the investigation.” *Id.* Rule 407 was enacted to encourage companies to add safety to their product after an injurious event without fear of occurring liability for doing so. But this policy consideration is “not as vigorously implicated where investigative . . . reports are concerned.” *Rocky Mountain Helicopters*, 805 F.2d at 918. Any effect of admitting a post-injury report on Rule 407’s policy considerations is outweighed by the “danger of depriving ‘injured claimants of one of the best and most accurate sources of evidence and information.’” *Id.* at 918-19 (citing *Westmoreland*, 601 F. Supp. at 68). It is not until the company actually performs the remedial measures that Rule 407’s policy is furthered, and “it is only evidence of those changes that is precluded by the rule.” 2 JACK B. WEINSTEIN ET AL., WEINSTEIN’S FEDERAL EVIDENCE § 407.06(1) (2d ed. 1997). For all these reasons, the factual findings of Defendant’s Internal Memorandum should be admitted to prove Defendant had knowledge of the dangerous effects of rH-12 since October 2005.

B. The entire post-injury report is admissible because Rule 407 does not prohibit evidence of subsequent remedial measures if such measures were mandated by a superior authority.

Although the plain language of Rule 407 does not directly express that evidence of subsequent remedial measures is admissible if mandated by a superior authority, at least three federal courts of appeal have held that such exception exists. *Raymond v. Raymond*, 938 F.2d 1518, 1524 (1st Cir. 1991); *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1343 (5th Cir. 1978); *O’Dell v. Hercules, Inc.*, 904 F.2d 1194, 1204 (8th Cir. 1990). Additionally, six other federal circuits have held that Rule 407 is not applicable if the subsequent measure was taken without the voluntary participation of the defendant. *Millennium Partners, L.P. v. Colmar Storage, L.L.C.*, 494 F.3d 1293, 1302-03 (11th Cir. 2007); *In re Aircrash in Bali, Indonesia*, 871 F.2d 812, 816-17 (9th Cir. 1989) (per curiam); *Mehojah v. Drummond*, 56 F.3d 1213, 1215 (10th Cir.

1995); *TLT-Babcock, Inc. v. Emerson Elec. Co.*, 33 F.3d 397, 400 (4th Cir. 1994); *Lolie v. Ohio Brass Co.*, 502 F.2d 741, 744 (7th Cir. 1974); *Steele v. Wiedemann Mach. Co.*, 280 F.2d 380, 382 (3d Cir. 1960). There is ample support for reading an exception into Rule 407 if the policy behind doing so is justified, and “[a]n exception to Rule 407 . . . for evidence of remedial action mandated by superior governmental authority [is justified] . . . because the policy goal of encouraging remediation would not necessarily be furthered by exclusion of such evidence.” *O’Dell*, 904 F.2d at 1204.

Contrary to the lower court’s finding, defendant’s post-injury report falls within the government mandate exception. The lower court relies on *HDM Flugservice GMBH v. Parker Hannifin Corp.*, 332 F.3d 1025 (6th Cir. 2003), for its holding that defendant’s post-injury report was a voluntary response to a government directive, not an involuntary action to a government mandate. (R 38-39) But the facts of *HDM* are vastly different than those facing the Court today. *See HDM*, 332 F.3d at 1034. The defendant in *HDM* generated a service bulletin after an accident on its own initiative and it merely asked the Federal Aviation Administration (FAA) to approve its bulletin. *Id.* The FAA never issued a request for an investigation. *Id.* In the case at bar, the Consumer Product Safety Committee (CPSC) issued a directive to all manufactures, distributors and sellers of children’s toys stating all manufactures and distributors “should conduct appropriate investigations and take remedial action if there is any indication that their products pose serious health risks to consumers.” (Pl. Exh. E, R 27) This directive is a government mandate. If defendant did not respond to this directive, it is clear by the language of the directive that the CPSC would have required them to perform an investigation. The post-injury report 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.” *Rozier*, 573 F.2d at 1343.

Therefore, the entire post-injury report is admissible. *Id.*

CONCLUSION

For the reasons stated above, this Court should reverse the decision of the Fourteenth Circuit granting summary judgment to Defendant and should remand the case to the lower court with instructions to admit any or all of the four exhibits proffered by Plaintiff to prove the element of knowledge.

Dated: Park Slope, Boerum
February 29, 2008

Respectfully submitted,

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