

No. 07-117

**IN THE  
SUPREME COURT OF THE UNITED STATES**

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STUART SLOPE, by and through his parents  
and legal guardians,  
Stacey 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 THE PETITIONER

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## QUESTION PRESENTED

- I. Whether the interpretation of Federal Rule of Evidence 804(b)(3) in *Williamson v. United States*, 512 U.S. 594 (1994) permits the admission 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, and whether statements acknowledging criminal conduct in a personal letter are per se inadmissible in a civil case, when after sending it, the writer commits suicide?
- II. Whether under Federal Rule of Evidence 803(3), a declarant's hearsay statement that she intends to meet and discuss a matter with a business associate constitutes evidence in a civil case that the meeting took place and that the matter was discussed?
- III. Whether under Rule 407 of the Federal Rules of Evidence, there exists at least one exception where the post-incident reports can be admitted when they include factual information obtained through an involuntary investigation at the direction of a governmental agency?

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## **STANDARD OF REVIEW**

A District Court's granting of a Motion for Summary Judgment is reviewed de novo. *Sologub v. City of New York*, 202 F.3d 175 (2d Cir. 2000).

## **OPINIONS BELOW**

The United States District Court for the Southern District of Boerum and The United States Court of Appeals for the Fourteenth Circuit granted Sea Toys' Motion for Summary Judgment, holding that each of the items proffered on the element of knowledge was inadmissible as a matter of law. R. 31.

## **STATEMENT OF THE CASE**

Stuart Slope was four years old when he saw his first favorite movie, "Shark Attack". R. 2. He enjoyed the movie so much that he saw it three times. R. 2. Following the release of the movie, in December of 2005, Stuart's parents bought him the Finn E. Shark plush toy modeled after the main character in the movie. R. 2. Stuart loved the toy and never went anywhere without it. His parents noticed that he would often hold the shark close to his face and even lick the eye of the toy. R. 2.

The toy was manufactured by BFP Tattel, Inc. ("Tattel") and exclusively distributed in the United States by Under the Sea Toys, Inc. ("Sea Toys"). R. 2. Sea Toys is a California-based corporation that distributes and markets plush toys for

children. Tattel, a Legolian corporation, is now defunct and therefore not a party to this lawsuit. R. 6.

Within weeks of giving Stuart the toy, Stuart's parents, Stacy and Serina Slope, noticed that he was beginning to exhibit strange behavior. R. 2. His speech became slurred and he showed other unusual signs. They became very alarmed when Stuart began to frequently lose consciousness, suffer convulsions, headaches, confusion, and violent mood swings. They also noticed he was suffering with memory and concentration. R. 2. In early January 2006, just a couple weeks after buying Stuart the plush toy, his parents sought medical attention. R. 3. Following blood tests, brain scans, and other diagnostic procedures, his parents received the most terrible news of their lives; Stuart was determined to have suffered irreversible brain damage caused by exposure to the rare toxin rH-12. R. 3.

Unfortunately, this was not the first case of such brain damage in the area. As early as September of the previous year, Legolian doctors noticed a record trend of brain damage in young children caused by this exposure to rH-12. R. 3. In fact, in September of 2005, the Legolian Times reported that the Legolian government had launched a full investigation to determine the source of this outbreak. R. 3.

It was determined that rH-12 was present in the glue used to attach the eyes to the Finn E. Shark toy. R. 3. Evidence

plainly indicates that Defendant, Sea Toys, had learned that the Finn E. Shark toy that it had widely distributed contained the poisonous rH-12, and knew at this time that the substance caused brain damage. However, they did not recall the product after obtaining knowledge, but rather, continued selling the toy knowing young children would buy it. R. 3. In fact, it was not until 5 months later, on April 1, 2006, that Sea Toys finally issued a recall of all Finn E. Shark toys in the United States. R. 3. The evidence which suggests Defendant's knowledge is that in question.

One such piece of evidence is the October 10, 2005 professional business journal of Mimi Jussel, the late CEO of Tattel, in which she describes a meeting with a Legolia government official about the outbreak of rH-12 poisoning among young children in that country. R. 7. That journal entry includes Ms. Jussel stating that "Tattel and everyone in America" knew that there was rH-12, but they kept selling the product anyway out of a fear of losing a tremendous amount of business. R. 7. Another such piece of evidence includes a letter written by Ms. Jussel on October 11, 2005, which includes statements that implicate herself and Defendant in knowingly continuing to market and sell Finn E. Shark toys. R. 9. This letter's authenticity is not contested, and it clearly demonstrates the defendant's knowledge in October of 2005 that

the Finn E. Shark toy contained rH-12. Ms. Jussel states in the letter that she went California and told Sea Toys that rH-12 had dangerous effects on children as soon as she learned of such information. R. 9.

Additional evidence which demonstrates the Defendant's knowledge are statements made by Jaffe Peetz, Mimi Jussel's secretary, who stated at a deposition that on September 30, 2005, after reading an article about rH-12's devastating effects on children, that Jussel told Peetz to book a flight to California so she could meet with Sea Toys' CEO and "tell them what's going on." R. 12. Receipts from plane tickets, taxi cab fares, and hotel bills from Jussel's trip to California were given to Jaffe Peetz once Jussel returned from her trip. R. 12.

The final piece of evidence demonstrating knowledge comes in the form of a post-incident report created by Sea Toys. R. 13. Sea Toys created the report in response to a directive from the Consumer Products Safety Commission that required manufacturers to investigate any products that contain rH-12. R. 14. That report included an informational section illustrating the Defendant's knowledge of rH-12 and its effects as early as October 2005. R. 14.

Plaintiff brings this cause of action pursuant to § 204 of the Boerum Tort Reform Act. R. 6. Upon information and belief, Defendant learned in or around October 2005 that its Finn E.

Shark product contained the poisonous substance rH-12, which causes detrimental health effects in children, including brain damage. R. 7. A reasonable distributor with defendant's knowledge concerning the defect in Finn E. Shark should have issued a warning to owners of the toy and recalled the product from the market in October, 2005. R. 7. Upon information and belief, Defendant continued to market and sell the Finn E. Shark product from October 2005 until April 2006. R. 3-4.

## SUMMARY OF THE ARGUMENT

The United States District Court Southern District of Boreum incorrectly affirmed the District Court's decision granting Defendant's Motion for Summary judgment because it failed to properly allow relevant and admissible facts into evidence which would have been sufficient to establish the element of the Defendant's knowledge of the harmful effects of rh-12 prior to its recall from the consumer market.

The interpretation of Federal Rule of Evidence 804(b)(3) in *Williamson v. United States*, 512 U.S. 594 (1994) does not preclude the admissibility in a civil case of a reliable collateral statement contained in the same narrative as statements that satisfy the rule's hearsay exception for declaration's against interest because *Williamson* only applies to collateral custodial statements made in criminal cases and doesn't extend to statements against pecuniary interests in a civil case, which should always be admitted.

Additionally, statements made in a personal letter which acknowledge criminal conduct are not per se inadmissible just because the writer commits suicide after sending it. A reliability-focused approach to statements like this one is more appropriate, and since the letter was written to her daughter, a full week before Ms. Jussel's suicide, prior to her diagnosis

with a fatal illness, and because nothing in the letter indicates a suicidal disposition, such statements were reliable and should have been admitted into evidence. A per se bar to statements such as those made by Ms. Jussel excludes relevant and reliable evidence that would come in under a reliability-based standard.

Another piece of evidence which was improperly excluded was the statement of Ms. Jussel's intent to meet with Defendants to tell them about the harmful effects of their product. Hearsay statements of intent are admissible under Federal Rule of Evidence 803(3) and the long standing *Hillmon* doctrine not only as evidence of the conduct of the declarant, but also as an inference that a third party implicated in the declarant's statement also engaged in that conduct. Any corroborating evidence of the conduct, or lack thereof, goes only to the weight of the evidence, not its admissibility. Ms. Jussel's statement was admissible evidence and it was inappropriate to exclude it.

The final piece of evidence which was incorrectly excluded by the Court of Appeals was a post-injury internal memorandum issued by the Defendant. While a subsequent remedial measure made by a defendant after an alleged injury has occurred is not admissible under Federal Rule of Evidence 407, the post-injury report at issue here pertains to factual information regarding

the company's knowledge of defects and in no way makes the product any less harmful, and thus, is not a subsequent remedial measure. Furthermore, the findings in the report were compiled as a response to a directive by the United States Consumer Product Commission, and post-incident evidence of remedial measures is admissible when taken as a direct result of direction from any governmental agency.

Any piece of the aforementioned evidence establishes the Defendant's knowledge of its product's harmful effects, and since each individual piece of evidence is admissible under the Federal Rules, the affirmation of the District Court's grant of Defendant's Motion for Summary Judgment by the United States Court of Appeals was erroneous.

## Argument

I. The interpretation of Federal Rule of Evidence 804(b)(3) in *Williamson v. United States*, 512 U.S. 594 (1994) does not preclude the admission 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.

The 14th Circuit Court of Appeals incorrectly held that *Williamson v. United States*, 512 U.S. 594 (1994) extends to statements against pecuniary interest as well as statements against penal interest. R. at 33. In *Williamson*, 512 U.S. 594 (1994), the United States Supreme Court addressed Federal Rule of Evidence 804(b)(3). This rule allows for the admission of a declaration against the interest of an unavailable declarant when it is 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 ... that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

*Williamson* held that statements collateral to an admissible custodial statement against penal interest under Federal Rule of Evidence 804(b)(3) were inadmissible. It noted that, "The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts." *Id.* at 600. In *Williamson*, Justice Ginsburg's concurrence notes that the Court based its exclusion of statements collateral to custodial

statements against penal interest on the lack of reliability, as well as the declarant's potential motivation to shift blame to others when making supposed statements against penal interest. *Id.* at 607-08. See *Bruton v. United States*, 391 U.S. 123 (1968) (dealing with similar Confrontation Clause concerns). However, in addressing these statements, the Court did not deal with statements against pecuniary interests. The Court also failed to address reliable collateral statements. Accordingly, the 14th Circuit erred in extending *Williamson* to deal with statements collateral to a statement against pecuniary interest. Because the decision in *Williamson* does not address reliable statements collateral to a statement against interest, this Court should look to the Advisory Committee Notes to the rule and the policy behind Rule 804(b)(3) and allow the admission of such statements.

**A. *Williamson v. United States*, 512 U.S. 594 (1994) is concerned only with custodial statements against penal interest in a criminal case. It should not be extended to deal with statements in a civil case.**

*Williamson* dealt with collateral statements against penal interest in a criminal case, not collateral statements in a civil case. The Supreme Court addressed the admission of statements at Williamson's trial made by his accomplice in a cocaine distribution scheme. Williamson's accomplice was unavailable due to his refusal to testify. The statements at

issue were made after the accomplice, Harris, was arrested and in custody. Harris' statements implicated Williamson as the mastermind of the cocaine distribution scheme and Harris refused to allow the recording of his statement or to sign a written statement. At trial, the court allowed the agent who spoke with Harris to relate his conversations with Harris to the jury.

The statements made by Harris implicated both himself and Williamson and the Court held that the statements implicating Williamson were collateral to the statements implicating Harris. Since these statements implicated Williamson, they did not subject Harris to criminal liability. Instead, they tended to mitigate his responsibility, and the court saw them as self-serving. In arriving at this decision, the Court looked only to the text of the rule and did not give the Advisory Committee Notes any weight. *Id.* In properly assessing the holding of *Williamson*, it is important to note that the Court only dealt with a statement against penal interests made while in police custody.

Other courts also note that *Williamson* dealt with statements in a criminal case. See *Silverstein v. Chase*, 260 F.3d 142 (2001); *United States v. Barone*, 114 F.3d 1284 (1997) (applying *Williamson* to non-custodial statements in a criminal case). While *Williamson* clearly settles the issue of custodial

collateral statements in a criminal case, it does not clearly address reliable collateral statements in a civil case.

**B. The Advisory Committee Notes to Rule 804(b)(3) allow for the admission of reliable collateral statements in a civil case.**

In his concurrence in *Williamson*, Justice Kennedy suggests that the purpose and policies behind Rule 804(b)(3) allow for the admission of some collateral statements. Justice Kennedy explicitly notes, "The text of the Rule does not tell us whether collateral statements are admissible." *Id.* at 612. After examining a variety of other sources, Justice Kennedy argues that some collateral statements should be admitted so long as they are not so self-serving as to be unreliable, or where circumstances show that the declarant had no motive to lie to gain favorable treatment.

Reliable collateral statements in a civil case are exactly the type of statements that Justice Kennedy saw as admissible in *Williamson*. In interpreting the text of a Federal Rule of Evidence, courts look to the Advisory Committee Notes when the language of the Rule is not clear. *Huddleston v. United States*, 485 U.S. 681 (1988); *United States v. Owens*, 484 U.S. 554 (1988). Since the text of the rule itself does not address collateral statements, this Court should look to the Advisory Committee Notes. Here, the Advisory Committee Notes state that, "The Committee intended to retain the traditional hearsay

exception to statements against pecuniary or proprietary interest." *Fed. R. Evid. 804(b)(3)*. The 1972 Notes also cite Dean McCormick in support of balancing the self-serving and dis-serving aspects of a statement. *Id.* Dean McCormick advocates admitting collateral statements in civil cases when the collateral statement is "closely connected to the statement against interest." *McCormick on Evidence* §319, at 324 (John W. Strong ed., 5th ed. 1999).

In addition to the Advisory Committee Notes, commentators who have examined this issue weigh in favor of admitting reliable collateral statements. The approach suggested by Dean Wigmore allows for the admission of the entire statement. 5 John H. Wigmore, *Evidence in Trials at Common Law* § 1465, at 271 (3d ed. 1940). Wigmore takes this position because the statement as a whole takes place while the person was making a statement against their interest. *Id.* This viewpoint would allow for the admission of an entire statement without the redaction advocated in the *Williamson* decision. Furthermore, Justice Kennedy notes that, "from the very beginning of this exception, it has been held that a declaration against interest is admissible, not only to prove the dis-serving fact stated, but also to prove other facts contained in collateral statements connected with the dis-serving statement." *Williamson*, 512 U.S. at 615 (quoting

Bernard S. Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 Harv. L. Rev. 1, 57 (1944)).

Under the Notes to Rule 804(b)(3) or the approach advocated by Wigmore or McCormick, collateral statements in a civil case would be admissible. The central concerns of the *Williamson* court are not present when dealing with a civil case. As the dissent in the lower court noted, there are great differences between statements against penal interest and statements against pecuniary interest. R. at 40. The issue presented here differs greatly from the issue in *Williamson*. When the declarant in *Williamson* made statements, he spoke to DEA agents while under arrest and in custody. Certainly, the collateral statements that he made were exactly the type of statements that McCormick counseled against admitting.

Here, the offered statement suffers from none of the problems inherent in the statement from *Williamson*. First, unlike Harris' statement, Ms. Jussel's statement was non-custodial. In addition, the statement when made was only against Ms. Jussel's pecuniary interest and not her penal interest. The statement does not attempt to shift the blame to other parties and make them more culpable; instead, it shares the blame equally. Finally, this statement does not reduce Ms. Jussel's civil liabilities at all. She would still be liable for damages even if other companies knew what was happening.

Because of the large difference between the custodial statements considered in *Williamson* and a reliable collateral statement in a civil case, the lower court erred in extending *Williamson* to exclude such statements.

**II. Statements acknowledging criminal conduct contained in a personal letter are not per se inadmissible in a civil case if the writer commits suicide after sending it because a reliability-focused approach to these statements is much more appropriate, while still fulfilling the goals of Rule 804(b)(3).**

The 14th Circuit Court of Appeals incorrectly held that Ms. Jussel's statements in a personal letter to her daughter were inadmissible under Fed. R. Evid. 804(b)(3). The statements in the letter are statements against her penal interest under Rule 804(b)(3), and her statement that Sea Toys knew about the rH-12 is collateral to her statement against penal interest. The majority in the lower court adopted a per se ban on the admission of statements made prior to the suicide of the declarant. R. at 34. As the facts of this case clearly demonstrate, a per se ban on these types of statements is fundamentally flawed. Therefore, this Court should reject a per se ban and adopt a reliability-focused approach for evaluating statements made prior to a suicide.

The reliability based approach is consistent with Rule 804(b)(3) because the Rule allows the admission of statements when a, "reasonable person in the declarant's position would not

have made the statement unless believing it to be true." Courts have previously admitted statements against penal interest made prior to suicide. See *Atlas Metals Product Co. v. Lumbermans Mut. Casualty Co.*, 2003 WL 22699925 (Mass. Super., July 31, 2003)(admitting a custodial statement made to police shortly before the declarant's suicide); *United States v. Layton*, 720 F.2d 548 (9th Cir. 1983)(admitting statement to a lawyer made prior to the declarant's suicide in the Jonestown massacre); *United States v. Jordan*, 509 F.3d 191 (4th Cir. 2007)(admitting statements made to a friend concerning the declarant's involvement in a drug conspiracy prior to the declarant's suicide). Evaluating the reliability of the hearsay statements allows for the exclusion of statements that are untrustworthy, while still admitting those statements that a court finds trustworthy after evaluating the circumstances surrounding the statement. See *United States v. Dike*, 166 F.3d 335 (4th Cir. 1998)(denying the admission of a letter in which the defendant threatened to commit suicide because the contents of the letter lacked trustworthiness); *United States v. Lemonakis*, 485 F.2d 941 (D.C. Cir. 1973) (not admitting a suicide note under Rule 804(b)(3)). Compare *Jordan*, *supra*.

The facts of this case demonstrate the proper role of a reliability-based standard. Here, Ms. Jussel wrote the letter one-week before her suicide. During that one-week period, a

doctor diagnosed Ms. Jussel with a potentially fatal illness. Ms. Jussel knew about her potential criminal liability when she wrote the letter, but did not know of her illness. The length of time between the writing of the letter and the time of the suicide demonstrates that Ms. Jussel did not contemplate suicide when she wrote the letter. Furthermore, the letter does not act as a suicide note as in *Lemonakis*, but instead is similar to the statement made in *Jordan*. Here, as in *Jordan*, Ms. Jussel's made her statements to a friend, her daughter, and nothing in the letter indicates that Ms. Jussel was depressed or contemplating suicide. Finally, the statements by Ms. Jussel were not made while in custody and therefore the collateral statements are admissible as well. See, §I supra. A per se bar to statements such as those made by Ms. Jussel excludes relevant and reliable evidence that would come in under a reliability-based standard.

**III. The United States Court of Appeals incorrectly affirmed the District Court's decision granting Defendant's Motion for Summary judgment because the interpretation of Federal Rule of Evidence 803(3) allows hearsay statements of a declarant's future intent to be admitted into evidence as proof of the future conduct of the declarant, as well as for the inference that a third party implicated in the declarant's future plans also engaged in the conduct with the declarant, and the lack of any corroborating circumstances goes to the weight of the evidence, not its admissibility.**

The United States Court of Appeals in the Fourteenth District improperly affirmed the District Court of the Southern District of Boerum's grant of Defendant's Motion for Summary

Judgment, declaring inadmissible the "*Hillmon*" Statement under The Federal Rule of Evidence 803(3) because the rule has been interpreted to allow for the inference by the trier of fact of the intent of a party other than the declarant, even without corroborating circumstances. The court in *Hillmon* states, and does so without ambiguity, that statements of a declarant's future intent are admissible to prove not only the future conduct of the declarant, but also for the inference that the third party implicated in the declarant's future plans, did, in fact, also engage in that conduct. *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 296 (1892). Corroborating evidence, or the lack thereof, goes to the weight of the evidence, not its admissibility. *United States v. Pheaster*, 544 F.2d 353, 376 (9<sup>th</sup> Cir. 1976). Further, it has been established that other circumstances surrounding the statement can create a stronger argument for admissibility, even without corroborating evidence of the third party's actions. *State v. Santangelo*, 534 A.2d 1175, 1184 (Conn.1987). In the case at hand, the statement made by Ms. Jussel is a clear showing of her intent to go to California and meet with Troy Ledbetter. The unavailability of the declarant, the context in which the declarant made the statement, and the additional circumstantial evidence that the future behavior occurred create an inference that both parties did meet and that the matter of the poisonous effects of rH-12

was discussed. Because the meaning behind Rule 803(3) has been interpreted to allow the admission of evidence of one person's intent to create an inference of a third party's actions, Ms. Jussel's statement should have been admitted as an inference that Troy Ledbetter and Under the Sea Toys had knowledge of its product's dangerous effects, and it was error on the part of the United States Court of Appeals of the Fourteenth District to exclude it.

**A. The interpretation of Federal Rule of Evidence 803(3) specifically permits the admission of statements of future intent as proof of future conduct of both the declarant and a third party implicated in the proclamation.**

The Federal Rule of Evidence 803(3) allows the admission of hearsay statements of a declarant's then existing state of mind or intent, and when such a declaration necessarily implicates another person, it can be used to prove the conduct of both parties. *Fed.R.Evid. 803(3); Hillmon*, 415 U.S. at 299. Ms. Jussel's statement that she was going to California to meet with Troy Ledbetter to "tell him what's going on" is a clear expression of her then existing intent, and it is relevant to make such behavior more probable to have occurred. The common law rule can be shown by the court in *Hunter v. State*, 40 N.J. Law, 495 which admitted a similar hearsay statement after the following discussion, which was cited by *Hillmon* as support for its ruling: "If it is legitimate to show by a man's own

declarations that he left his home to be gone a week . . . which seems incontestable, why may it not be proved in the same way that a designated person was to bear him company?" *Id.* Chief Justice Beasley then continued without pause or constraint, in a statement which can be summarized as this: if it was ordinary for the declarant to say where he was going, then it was equally ordinary for him to say with whom he was going, and the declaration can be used to prove both. *Id.*

Additionally, the Ninth Circuit cited the *Hillmon* doctrine in its admission of a declarant's statement of his intent to meet with a third party to prove that such a meeting took place. *Pheaster*, 544 F.2d at 376. In its discussion of arguments against admitting such a statement, particularly the notion that a statement of third party's intent lacks the reliability on which Rule 803(3) is based, the court firmly stated "The unreliability of the inference to be drawn from the present intention is a matter going to the **weight** of the evidence which might be argued to the trier of fact, but it **should not be a ground for completely excluding** the admittedly relevant evidence." [emphasis added] *Id.* at 377. See also *Coy v. Renico*, 414 F.Supp.2d 744, 769-779 (E.D. Mich. 2006) (statements of the victim's intent to meet with the defendant fell within the plain meaning of Rule 803(3) and were admitted as substantive evidence

that both parties acted in conformity with the stated intent and the meeting took place).

In its opinion affirming the lower court's exclusion of Ms. Jussel's statement, the Fourteenth Circuit Court of Appeals cited Judge Traynor's dissenting opinion in *People v. Alcade*, 24 Cal.2d 177, 148 P.2d 627 (Cal. 1944) without any reference to the majority opinion, which firmly admitted hearsay evidence which mirrors the evidence which this court so decisively found inadmissible. "From the declared intent to do a particular thing an inference that the thing was done may fairly be drawn." *Id.* at 185. Also arising from that court opinion was the notion that where the statement possesses a high degree of trustworthiness, is relevant to an issue in the case, and where the declarant is unavailable, the admission of such statements is necessary. *Id.* at 186.

In the case at hand, Ms. Jussel had nothing to gain from declaring her intent to perform an act she had no intention of performing. That fact, along with the submitted receipts for plane fare, taxi rides, and a hotel for her trip to California all insulate her statement with a high degree of trustworthiness. Additionally, Ms. Jussel has since committed suicide, and her statement, as described by the District Court, "could suffice to satisfy the element of knowledge,"

establishing both her unavailability and the relevance of the evidence. R. 17.

The courts which have rejected the notion that the *Hillmon* doctrine may create an inference of a third party's conduct have done so while strongly relying on the House Judiciary Committee Reports on Rule 803(3), noting the intent of the Committee to limit the *Hillmon* doctrine so as to render statements of intent admissible only to prove the declarant's own future conduct and not the conduct of another. But reliance on these reports is unwarranted. When investigating Rule 803(3) as a statute, a court must begin by looking at its text, not its legislative history, which should be consulted only when the text of the rule is ambiguous. *United States v. Houlihan*, 871 F.Supp. 1495, 1500 (D.Mass.1994). As written, the rule clearly allows statements of intent, and because it does not by its terms limit the class of persons against whom such statements of intent may be admitted, it can be assumed that the Rule merely codifies the *Hillmon* doctrine without any amendments. *Id.* Had Congress wanted to place limits on the admissibility of statements of intent, the wide range of other codified limitations within the Federal Rules indicates that it would have done so. See *Fed.R.Evid. 404(a)* (limiting circumstances in which character evidence may be admitted); *Fed.R.Evid. 404(b)* (limiting purposes for which evidence of other crimes, wrongs, or acts may be

admitted); *Fed.R.Evid.* 407 (limiting purposes for which subsequent remedial measures may be admitted); *Fed.R.Evid.* 408 (limiting purposes for which compromises and offers to compromise may be admitted); and *Fed.R.Evid.* 411 (limiting purposes for which evidence of liability insurance may be admitted). Because Rule 803(3) is unambiguous, this court should not be persuaded by appeals to legislative history. See *United States v. Charles George Trucking Co.*, 823 F.2d 685, 688 (1st Cir.1987) (if the language of the statute is reasonably definite, it must be regarded as conclusive, and legislative history should not be consulted).

Additionally, even if the rule is found by this court to be ambiguous, the legislative history can provide no valuable solution. The House Reports may provide guidance as to that particular Committee's position, but they contradict the report of the Supreme Court Advisory Committee (the Rule's drafters), which states broadly that "the rule of [*Hillmon*] allowing evidence of intention as tending to prove the doing of the act intended, is, of course, left undisturbed." Note to Paragraph (3), 28 U.S.C.A. at 585 (quoted in *Pheaster* at 379). Further, the Senate Report and the Conference Report are silent on this point, which is important, as it indicates that only one chamber of Congress, and only one committee of that one chamber,

supported the limitation of the *Hillmon* doctrine which is argued here by the Defendant. *Houlihan*, 871 F.Supp at 1499.

**B. There is no requirement of corroborating evidence in order to admit a statement of intent as proof of an implicated third party's conduct.**

As a last attempt to support its decision to exclude Ms. Jussel's statement as proof of Defendant's relevant knowledge, the 14<sup>th</sup> Circuit referenced a corroboration requirement of Rule 803(3). See, e.g., *United States v. Best*, 219 F.3d 192, 198-99 (2d Cir. 2000) and *United States v. Delvecchio*, 816 F.2d 859, 863 (2d Cir. 1987). Unfortunately, there is no such written requirement and the lower court has further weakened its argument of legislative intent by relying on it. Neither the text of Rule 803(3) nor the legislative history provide any foundation for adopting a requirement for independent evidence and the courts which have admitted statements of intent only subject to corroborating evidence have done so independently of any stated legislative intent. ". . . While the approach adopted by the Second and Fourth Circuits may seem practical and fair, it is really little more than judicial policymaking." *Houlihan*, 871 F. Supp. at 1501. The Ninth Circuit, among others, has rejected the necessity of independent evidence, stressing that the lack of corroboration goes only to the weight of the evidence, not its admissibility. *Id.* at 1500, citing *United States v. Pheaster*, at 377 and Thomas A. Wiseman, III,

Note, *Federal Rule 803(3) and the Criminal Defendant: The Limits of the Hillmon Doctrine*, 35 VAND.L.REV. 659, 687, 690 (1982).

Because of the unambiguous text of Rule 803(3) and its lack of any stated limitation, the 14<sup>th</sup> Circuit erred in affirming the District Court's grant of Defendant's motion for summary judgment. By excluding Ms. Jussel's statement of her intent to meet with Troy Ledbetter as an inference that such a meeting did in fact take place, the Court of Appeals has followed the minority position, which is primarily stated in dicta and dissent. Additionally, its ruling requiring corroborating evidence in order to admit a statement of intent is unsupported by the Rule or the legislative history and is a product of judicial law making in the Second Circuit. The only independent evidence which is helpful in admitting statements of intent is that of the trustworthiness of the declarant, and had it been looking, the 14<sup>th</sup> Circuit would have found abundance of this evidence, in the receipts for plane tickets, cab fares, and hotel bills submitted by Ms. Jussel following her trip. Statements of a declarant's future intent are admissible to prove not only the future conduct of the declarant, but also for the inference that the third party implicated in the declarant's future plans, did, in fact, also engage in that conduct, and for these reasons, Ms. Jussel's statement should have been admitted

to prove the Defendant's knowledge of the harmful effects of rH-12, a relevant and essential element of the case against it.

**IV. The United States Court of Appeals incorrectly affirmed the District Court's holding granting Defendant's motion for summary judgment because Rule 407 of the Federal Rules of Evidence allows for exceptions where evidence includes post-incident tests and evaluations where the report does not make the injury less likely to occur, and where involuntary post-incident reports are produced due to a formal directive made by a government agency.**

The Court of Appeals for the Fourteenth Circuit erred in ruling that the factual information included in Sea Toys, Inc. internal memorandum should be excluded because such information is not considered a measure, and therefore not excludable under Rule 407 of the Federal Rules of Evidence. *Brazos River Authority v. GE Ionics, Inc.*, 469 F.3d 416, 431 (5<sup>th</sup> Cir. 2006). Additionally, since Sea Toys created this report in response to a government agency directive mandating such investigation, the report was involuntary and is admissible. *See, e.g., Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1343 (5<sup>th</sup> Cir. 1978).

The relevant portion of Federal Rule of Evidence 407 provides:

When, after 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 measure is not admissible to prove negligence, culpable conduct, a defect in product, a defect in product's design, or a need for a warning or instruction . . . .

While the exact language of the rule appears to bar any such evidence pertaining to efforts made post-incident, policy

considerations have lead courts to carve out several judicial exceptions. Evidence associated with post-incident investigations; including tests, studies and reports are not deemed "measures", and should be admissible. Additionally, post-incident evidence of remedial measures is admissible when taken as a direct result of direction from a governmental agency.

**A. The "Informational Findings" section of the Sea Toys memorandum is a report which does not make the injury or harm less likely to occur, and thus, is not a "subsequent remedial measures".**

The section of the Sea Toys, Inc. memorandum entitled "Informational Findings" pertains to factual information regarding the company's knowledge of defects and in no way makes the product any less harmful. A majority of courts have concluded that this type of report is prepared only for investigative purposes and does not fall under the "measures" precluded by Rule 407. See *Prentiss & Carlisle Co., Inc. v. Koehring-Waterous*, 972 F.2d 6, 10(5th Cir. 1992); *Brazos River Authority v. GE Ionics, Inc.*, 469 F.3d 416, 431 (5<sup>th</sup> Cir. 2006); *Fasanaro v. Mooney Aircraft Corp.*, 687 F. Supp. 482 (D. Cal. 1988). Rule 407 is only intended to exclude evidence of the actual subsequent measures themselves, and not evidence of a manufacturer's analysis of the product. See *Rocky Mountain*

*Helicopters v. Bell Helicopters*, 805 F.2d 907, 918(10th Cir. 1986).

Similarly to the *Prentiss* case, where internal investigatory memoranda regarding a product were deemed admissible, so too should the "Factual Findings" included in the Sea Toys' memo be deemed admissible. *Prentiss*, 972 F. 2d at 10. The court in *Prentiss* found these memoranda to be admissible because Rule 407 prohibits evidence of subsequent remedial measures, not evidence of a party's analysis of its product. *Id.* The Sea Toys "Factual Findings" section of the memorandum is merely a report analyzing the Finn E. Shark toy.

Additionally, as these informational findings do not make the injury or harm any less likely to occur if taken previously, they are not to be considered "measures" under Rule 407. *Brazos River Authority*, 469 F.3d at 431; *Benitez-Allende v. Alcan Aluminio do Brasil, S.A.*, 857 F.2d 26, 33(1st Cir. 1988).

The "factual Information" section only includes past information known by Sea Toys regarding the product. This section and these facts fail to make the injury of pediatric brain damage any less likely to occur. Therefore, these findings are not "measures" as protected by the Rule, but rather they are evidence leading up to a product recall.

Such evidence of analysis which leads to a product recall is not precluded by Rule 407. *Prentiss*, 972 F.2d at 9; *Brazos*

*River*, 469 F.3d at 430 (stating that evidence leading up to a product recall is admissible). Rule 407 includes only the actual remedial measures themselves and not the initial steps towards reaching those measures. *Fasanaro*, 687 F.Supp. at 487. The court in *Fasanaro* elaborated, stating that the exclusion of such post-incident analysis would extend the Rule beyond its boundaries, as such analysis in no way results in added safety. *Id.* It is only when changes are implemented as a result of the tests that the added goal of safety is furthered, and even in these situations, it is only the evidence of the changes that are considered "measures", and thus, precluded by the rule. *Id.* Therefore, even though the informational findings present in the Sea Toys memo lead to a product recall, these "measures" should be redacted, and the informational findings should still be admissible. See also, *O'Dell v. Hercules, Inc.*, 904 F.2d 1194, 1207 (8<sup>th</sup> Cir. 1990).

While the court in *Alimenta v. Stauffer* found such investigative measures to be inadmissible based on the plain language of the rule, that case involved one party trying to admit a document specifically for the subsequent remedial measures it suggested. *Alimenta, Inc. v. Stauffer*, 598 F. Supp. 934 at 940 (D. Ga. 1984). Here, the Appellant offers the Sea Toys report in order to demonstrate that Sea Toys had knowledge of the defect months before they issued the recall, not to

demonstrate that they issued a product recall. Furthermore, in *Rocky Mountain Helicopters*, the Tenth Circuit challenged *Alimenta* by stating that not allowing such post-event tests would "strain the spirit" of the remedial measure prohibition in Rule 407. *Rocky Mountain Helicopters*, 805 F.2d at 918.

The court in *Rocky Mountain Helicopters* went on to say that the policy considerations underlying Rule 407 "are not as vigorously implicated where investigative tests ... are concerned." *Rocky Mountain*, 805 F.2d at 918-19. The court stated that these considerations are outweighed by the probative value of such evidence. *Id.* As the Sea Toys report in no way makes the product safer, the policy of protecting manufacturers from being able to take such action and not admit guilt is far outweighed by the fact that Sea Toys was knowingly distributing toys which they knew to have very devastating health effects on children.

In conclusion, while it is not disputed that Rule 407 provides important prohibitions on certain forms of evidence, where petitioner is only seeking to admit factual portions of an investigation which in no way make the defect less likely to harm, the evidence shall be admissible. Furthermore, while the report contains a "recommendations" section, which may very well be inadmissible under this exception, the "informational"

section is admissible as it is not a "measure" and in no way makes the product any less harmful.

**B. The Sea Toys post-incident report was an involuntary subsequent remedial measure undertaken as a result of a request by a government agency, the Consumer Products Safety Commission.**

The United States Court of Appeals in the Fourteenth District erred in excluding the Sea Toys, inc. memorandum under Rule 407 because the memorandum was an involuntary investigative report created in response to a directive from the Consumer Product Safety Commission (the "Commission"). An exception to Rule 407 exists where the subsequent remedial measure was mandated by a superior or governmental authority. See, e.g., *O'Dell v. Hercules, Inc.*, 904 F.2d 1194, 1207 (8<sup>th</sup> Cir. 1990). Such involuntary reports are admissible as they fail to further the policy behind Rule 407. See *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1343 (5th Cir. 1978)

The plain language of the Commission's directive states, "Manufacturers and distributors of children's toys **should conduct** appropriate investigations **and take remedial action** if there is any indication that their products pose serious risks to consumers." This was more than a mere set of guidelines that Sea Toys, Inc. had the option to follow or not to follow. The lower court stated that the directive merely tells manufacturers to be aware of possible defects. However, the directive

actually states that manufacturers are to conduct investigations and take action if necessary.

Furthermore, involuntary subsequent remedial measures similar to Sea Toys' report are admissible due to their lack of furthering the policy driving Rule 407. See *Rozier*, 573 F.2d at 1343 (5th Cir. 1978) (finding a remedial measure taken because it was required by the National Highway Safety Administration, and not out of a sense of social responsibility, fell within the Rule 407 exception and was admissible); *In re Aircrash in Bali, Indon.*, 871 F.2d 812, 816-17 (9th Cir. 1989) (the purpose of Rule 407 is not furthered in cases where subsequent measures are involuntarily taken and not done out of a sense of social responsibility). See also *O'Dell*, at 1204.

The reasoning for such an exception lies in the policy behind Rule 407. The purpose of Rule 407 is to encourage defendants to take remedial action and not fear culpability based on these actions. Similar to *Aircrash and Rozier*, the Sea Toys memorandum was created in response to a directive from a superior authority, and not voluntarily or out of any sense of social responsibility. See *In re Aircrash*, 871 F.2d at 816-17; *Rozier*, 573 F.2d at 1343.

Additionally, the Respondent fails to present any evidence to show that Sea Toys acted out of social responsibility when they enacted such measures. In fact, the factual information

section suggests the alternative; that Sea Toys was avoiding social responsibility considering they knew of the harm the product caused for months prior to issuing any recall. The time lapse between Sea Toys' knowledge and the recall further demonstrates that this report came in response to the Commission's directive and was not a voluntary act done out of social responsibility.

### **Conclusion**

The United States District Court Southern District of Boreum incorrectly affirmed the District Court's decision granting Defendant's Motion for Summary judgment because it failed to properly allow relevant and admissible facts into evidence which would have been sufficient to establish the element of the Defendant's knowledge of the harmful effects of rh-12.

Respectfully Submitted

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Attorney for the Petitioner

**Certificate of Service**

This document certifies hand delivery of one copy of the foregoing brief to my opponent's mailbox this twenty-ninth day of February, 2008.

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Attorney for the Petitioner