MEMORANDUM

DATE: October 25, 2008

TO: Judge Michael Baylson
Professor Edward Cooper
Judge Mark Kravitz
Judge Lee H. Rosenthal

FROM: Andrea Kuperman

SUBJECT: Admissibility Requirements for Summary Judgment Affidavits

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This memorandum addresses research regarding Federal Rule of Civil Procedure 56, and whether the requirement in the rule that affidavits "set out facts that would be admissible in evidence" has caused confusion about admissibility requirements for affidavits submitted in connection with summary judgment motions. Specifically, an issue arose during the June 2008 Standing Committee meeting as to whether that language in current Rule 56(e), which is carried forward in proposed Rule 56(c)(6), may cause confusion as to whether district courts are permitted to consider affidavits at the summary judgment stage that contain facts that would be admissible at trial but not through the affiant.

The following example has been used to illustrate the issue: In opposition to a motion for summary judgment, the plaintiff submits an affidavit stating: "I heard Jones say the light was red." Although Rule 56 clearly permits courts to determine whether summary judgment is appropriate on the basis of affidavits, despite the fact that affidavits are arguably hearsay,[1] the question at issue is

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[1] Some commentators take the view that an affidavit used in summary judgment is not hearsay. *See* James Joseph Duane, *The Four Greatest Myths About Summary Judgment*, 52 WASH. & LEE L. REV. 1523, 1545 (1995) ("[A] judge using an affidavit as a basis for granting or denying summary judgment is not using it in any way as proof of its contents; she is merely using it as evidence of what the affiant would be likely to say if called as a witness at trial (much as she might use it for the nonhearsay purpose of deciding whether the affiant can speak English or hold a pen)."); *see also* Adam N. Steinman, *The Irrepressible Myth of* Celotex*: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 130 (2006) ("Materials offered in opposition to summary judgment, however,

whether Rule 56 also permits consideration of Jones's statement contained within the affidavit. Although Rule 56(e) requires affidavits to set out facts that would be admissible in evidence, since Jones could theoretically testify at trial that the light was red, it might be argued that the facts in the affidavit are admissible even though neither the affidavit itself nor testimony from the affiant would be admissible at trial to prove those facts. However, it could also be argued that Rule 56(e) allows for consideration of evidence in the form of an affidavit even though the affidavit itself would be inadmissible at trial, but requires that the contents of the affidavit must be admissible at trial if testified to by the affiant.

The Civil Rules Committee requested that I research whether the cases have permitted consideration on summary judgment of affidavits containing facts that would be inadmissible if testified to by the affiant at trial but that might be admissible if submitted in another manner at trial. I have reviewed cases discussing the admissibility of affidavits containing hearsay and other evidence that would be inadmissible at trial.[2] The research revealed that most courts will not consider hearsay evidence contained within an affidavit on summary judgment, but that some courts have stated that they will consider summary judgment evidence if it is "reducible to admissible evidence at trial." There has been some variation in the cases as to what is meant by evidence that can be reduced to admissible evidence at trial. Most courts using this language appear to mean that an affidavit can be considered on summary judgment assuming that the affiant can testify live at trial to the same facts contained in the affidavit, even though the affidavit itself would not be admissible

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are not offered to establish the truth of the matter asserted. They are offered to establish a genuine issue of material fact for trial.") (citing Duane, *supra*, at 1532, 1535).

[2] Because a search for cases addressing the admissibility of hearsay within affidavits considered on summary judgment returned over a thousand results, I have focused my research on a sampling of appellate and district court cases from a range of circuits to survey how courts have considered this issue in a variety of contexts.

at trial. However, some courts appear to use language regarding the "reducibility" of evidence to admissible form to mean that an affidavit or other summary judgment evidence containing hearsay could be considered even if testimony from the affiant would not be admissible at trial, as long as there is some indication that the out-of-court declarant will be available and willing to testify in accordance with the hearsay statements in the summary judgment affidavit. A few courts have considered hearsay at the summary judgment stage as long as there is an absence of evidence showing that the out-of-court declarant would not testify in accordance with the hearsay statements at trial.

I. *Celotex Corp. v. Catrett*

The potential for confusion as to the admissibility of hearsay evidence in an affidavit on summary judgment may stem from one of the cases in the Supreme Court's 1986 summary-judgment trilogy, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In *Celotex*, the Court held that if a defendant makes a properly supported motion for summary judgment, "Rule 56(e) . . . requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324. The Court explained: "We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses." *Id.* The Court remanded, noting that the appellate court had "declined to address either the adequacy of the showing made by respondent in opposition to petitioner's motion for summary judgment, or the question whether such a showing, *if reduced to admissible evidence*, would be sufficient to carry respondent's burden of proof at trial." *Id.* at 327 (emphasis added).

Celotex's statements regarding admissibility of evidence have led some commentators to conclude that summary judgment evidence does not necessarily have to be admissible at trial. *See* Steinman, *supra*, at 130–31 (stating that "[t]he precise basis for importing trial evidentiary standards at the summary judgment phase is unclear," and that "the plaintiff's response [to a no-evidence motion for summary judgment] is sufficient only if her materials are 'reduc[ible] to admissible evidence.'") (quoting *Celotex*, 477 U.S. at 327). Other commentators have declined to find that *Celotex* imported a lower evidentiary standard into Rule 56. *See*, *e.g.*, Bradley Scott Shannon, Essay, *Responding to Summary Judgment*, 91 MARQ. L. REV. 815, 815, 830 (2008) (finding that "*Celotex* has nothing to say about an adverse party's burden in response to a motion for summary judgment," and concluding that "mere reducibility to admissible evidence is not the proper standard for assessing the adequacy of the materials presented by the adverse party at summary judgment. Rather, the adverse party must present materials that are themselves admissible."). A review of the cases shows that most courts will consider affidavits with testimony that is either admissible at trial or "reducible" to admissible form at trial, but courts generally will not consider evidence that is incapable of being reduced to admissible evidence. The cases generally fall into one of three categories: (1) cases finding that evidence within affidavits must be admissible to be considered on summary judgment; (2) cases finding that hearsay within an affidavit can be considered on summary judgment if the hearsay statement would be submitted in an admissible form at trial; and (3) cases finding that hearsay contained within an affidavit can be considered on summary judgment unless it is apparent that the hearsay could not be submitted in an admissible form at trial.

II. Cases Finding that Evidence Within Affidavits Must Be Admissible to Be Considered on Summary Judgment

Most of the cases I reviewed concluded that a court may not consider inadmissible evidence

contained within an affidavit on summary judgment. Some courts finding that it is not permissible to consider hearsay contained in an affidavit in ruling on a summary judgment motion hold that evidence must be capable of being reduced to admissible evidence at trial, but mean that a court can consider an affidavit on summary judgment even though an affidavit would not be admissible at trial, not that the affidavit may contain hearsay. The cases falling within this first category have held that it is inappropriate to consider hearsay contained within an affidavit on summary judgment unless the only defect in admissibility is the form, and not the content, of the evidence. *See*, *e.g.*, *Major League Baseball Props. v. Salvino, Inc.*, 542 F.3d 290, 310 (2d Cir. 2008) ("'[H]earsay testimony . . . that would not be admissible if testified to at the trial may not properly be set forth in [the Rule 56(e)] affidavit.'") (quoting *Beyah v. Coughlin*, 789 F.2d 986, 989 (2d Cir. 1986) (quoting 6 MOORE'S FED. PRACTICE ¶ 56.22[1], at 56-1312 to 56-1316 (2d ed. 1985))) (additional citations omitted); *Jenkins v. Winter*, 540 F.3d 742, 748 (8th Cir. 2008) ("'When an affidavit contains an out-of-court statement offered to prove the truth of the statement that is inadmissible hearsay, the statement may not be used to support or defeat a motion for summary judgment.'") (quoting *Brooks v. Tri-Sys., Inc.*, 425 F.3d 1109, 1111 (8th Cir. 2005)); *Woods v. Newburgh Enlarged City Sch. Dist.*, No. 07-0610-cv, 2008 WL 3841497, at *1 (2d Cir. Aug. 12, 2008) (unpublished) (holding that the plaintiff's allegations that relied on hearsay could not be considered on summary judgment) (citing FED. R. CIV. P. 56(e)(1); *Feingold v. N.Y.*, 366 F.3d 138, 155 n.17 (2d Cir. 2004); *Patterson v. County of Oneida*, 375 F.3d 206, 222 (2d Cir. 2004)); *United States v. $92,203.00 in U.S. Currency*, 537 F.3d 504, 508 (5th Cir. 2008) (finding that the district court erred by not striking the affidavit used to support summary judgment because "the affidavit clearly contained hearsay, was not based on personal knowledge, and, under normal summary judgment

procedures, is not admissible") (citing *Bolen v. Dengel*, 340 F.3d 300, 313 (5th Cir. 2003); FED. R. CIV. P. 56(e)(1)); *Ward v. Int'l Paper Co.*, 509 F.3d 457, 462 (8th Cir. 2007) (declining to consider affidavits containing inadmissible hearsay on summary judgment because "nothing in the affidavits indicates a hearsay exception applies"); *Alpert v. United States*, 481 F.3d 404, 409 (6th Cir. 2007) ("Martin Alpert's statement [in an affidavit used to oppose summary judgment] regarding the writing off of debts by Microsoft and CCA Advertising was apparently based solely upon information that he received from elsewhere and is thus inadmissible hearsay."); *Fisher v. Okla. Dep't of Corr. Unknown State Actor and/or Actors*, 213 F. App'x 704, 708 (10th Cir. 2007) (unpublished) ("We determine that the affidavits are insufficient to withstand summary judgment because they are based on either hearsay or speculation or both, and are therefore inadmissible.") (citing *Treff v. Galetka*, 74 F.3d 191, 195 (10th Cir. 1996)); *Trevizo v. Adams*, 455 F.3d 1155, 1160 (10th Cir. 2006) ("[P]arties may submit affidavits even though affidavits are often inadmissible hearsay at trial on the theory that the same facts may ultimately be presented at trial in an admissible form. However, '[t]o determine whether genuine issues of material fact make a jury trial necessary, a court may consider only the evidence that would be available to the jury' in some form.")[3] (internal citation omitted); *Argo v. Blue Cross & Blue Shield of Kan., Inc.*, 452 F.3d 1193, 1199 (10th Cir. 2006) ("The requirement that the substance of the evidence must be admissible is not only explicit in Rule 56, which provides that '[s]upporting and opposing affidavits shall . . . set forth such facts as would be admissible in evidence,' FED. R. CIV. P. 56(e), but also implicit in the court's role at the summary judgment stage. To determine whether genuine issues of material fact make a jury trial

[3] Although the court indicated that it was permissible to consider hearsay because the facts "may" ultimately be presented in admissible form, it is likely that the court was approving only of the use of affidavits at summary judgment and not of the use of hearsay statements within affidavits at summary judgment because the court found that it could only consider evidence that would be available to the jury in some form.

necessary, a court necessarily may consider only the evidence that would be available to the jury.")[4] (citing *Truck Ins. Exch. v. MagneTek, Inc.*, 360 F.3d 1206, 1216 (10th Cir. 2004)); *Smith v. Potter*, 445 F.3d 1000, 1009 (7th Cir. 2006) (affidavits executed by the plaintiff's coworkers, alleging that the plaintiff had told them about a phone call she made, were not sufficient to avoid summary judgment because the affidavits were "clearly offered to prove the truth of the matter asserted and thus constitute inadmissible hearsay") (citing FED. R. EVID. 801); *Noviello v. City of Boston*, 398 F.3d 76, 84 (1st Cir. 2005) ("Those facts [presented by a nonmovant to avoid summary judgment], typically set forth in affidavits, depositions, and the like, must have evidentiary value; as a rule, '[e]vidence that is inadmissible at trial, such as inadmissible hearsay, may not be considered on summary judgment.'")[5] (quoting *Vazquez v. Lopez-Rosario*, 134 F.3d 28, 33 (1st Cir. 1998)); *Patterson v. County of Oneida*, 375 F.3d 206, 219 (2d Cir. 2004) ("Rule 56(e)'s requirement that the affiant have personal knowledge and be competent to testify to the matters asserted in the affidavit also means that an affidavit's hearsay assertion that would not be admissible at trial if testified to by the affiant is insufficient to create a genuine issue for trial.") (citing *Sarno v. Douglas Elliman-Gibbons & Ives, Inc.*, 183 F.3d 155, 160 (2d Cir. 1999)); *Williams v. York Int'l Corp.*, 63 F. App'x 808, 814 (6th Cir. 2003) (unpublished) (refusing to consider a statement in the plaintiff's

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[4] The court noted that "[p]arties may . . . submit affidavits in support of summary judgment, despite the fact that affidavits are often inadmissible at trial as hearsay, on the theory that the evidence may ultimately be presented at trial in an admissible form." *Argo*, 452 F.3d at 1199 (citation omitted). The court explained: "Thus, for example, at summary judgment courts should disregard inadmissible hearsay statements *contained* in affidavits, as those statements could not be presented at trial in any form." *Id.* (citing *Hardy v. S.F. Phosphates Ltd. Co.*, 185 F.3d 1076, 1082 n.5 (10th Cir. 1999)).

[5] The court found two statements submitted by the plaintiff to be inadmissible. The plaintiff's allegation of a statement from an unnamed coworker that other employees told him to stay away from the plaintiff was hearsay if offered to show the other coworkers' harassing behavior. *Noviello*, 398 F.3d at 85 (citing FED. R. EVID. 801, 802; *Vazquez v. Lopez-Rosario*, 134 F.3d 28, 34 (1st Cir. 1998)). The court also found that the plaintiff's assertion that a tow truck driver had said that another person had been circulating a petition to have the plaintiff fired was hearsay. *See id.* (citing *LaRou v. Ridlon*, 98 F.3d 659, 663 (1st Cir. 1996)).

affidavit that described a doctor's diagnosis of the plaintiff's condition because "[h]earsay is inadmissible in affidavits submitted in conjunction with, or in opposition to, motions for summary judgment") (citing *Wiley v. United States*, 20 F.3d 222, 226 (6th Cir. 1994)); *Macuba v. DeBoer*, 193 F.3d 1316, 1323–24 (11th Cir. 1999) ("We believe that the courts have used the phrases 'reduced to admissible evidence at trial' and 'reduced to admissible form' to explain that the out-of-court statement made to the witness (the Rule 56(c) affiant or the deposition deponent) must be admissible at trial for some purpose. For example, the statement might be admissible because it falls within an exception to the hearsay rule, the statement does not constitute hearsay at all . . . , or the statement is used only for impeachment purposes . . . .") (footnotes omitted);[6] *Moore v. Gramley*, 151 F.3d 1033 (Table), 1998 WL 322663, at *3 (7th Cir. May 14, 1998) (unpublished) (an affidavit from an inmate in the plaintiff's prison stating that another inmate had said that others paid him to attack the plaintiff constituted inadmissible hearsay insufficient to oppose summary judgment

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[6] *Macuba* disapproved of a district court case within the Eleventh Circuit that had indicated that hearsay could be considered on summary judgment:

> We are, however, somewhat concerned about *Coker v. Tampa Port Authority*, 962 F. Supp. 1462 (M.D. Fla. 1997). In *Coker*, plaintiff had charged defendant, his former employer, with a violation of the Americans with Disabilities Act. One of the issues at the summary judgment stage was whether plaintiff was "disabled" for purposes of the Act. Plaintiff had submitted the testimony of his physician, but he also submitted a letter from defendant's insurance company, written to plaintiff, which stated that "[y]our doctor has reported that you have completed treatment and may return to work, but that you will have some permanent impairment from your on-the-job-accident." The court held that it could consider this hearsay because "there is no suggestion that the hearsay statement regarding plaintiff's permanent impairment cannot be reduced to admissible form at trial through the doctor's testimony." This is not a correct statement of the law. Plaintiff's doctor certainly could not testify at trial to what an insurance company said to plaintiff in a letter, because, aside from the letter, the doctor would have no personal knowledge of that. What the district court should have said was that plaintiff had demonstrated a genuine issue of material fact by submitting evidence (the testimony of the doctor) which could later be given in an admissible form (by the doctor testifying at trial).

Macuba, 193 F.3d at 1324 n.18 (internal citations omitted).

because "[t]he law is well established that 'a party may not rely upon inadmissible hearsay in an affidavit or deposition to oppose a motion for summary judgment'") (citing *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 562 (7th Cir. 1996)); *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 742 (7th Cir. 1997) ("And hearsay is inadmissible in summary judgment proceedings to the same extent that it is inadmissible in a trial, except that affidavits and depositions, which (especially affidavits) are not generally admissible at trial, are admissible in summary judgment proceedings to establish the truth of what is attested or deposed, provided, of course, that the affiant's or deponent's testimony would be admissible if he were testifying live.")[7] (internal citations omitted); *Kapetanovich v. Rockwell Int'l, Inc.*, No. 92-3018, 1994 WL 530912, at *3 n.4 (3d Cir. July 15, 1992) (unpublished) (approving of the magistrate judge's striking of an affidavit because it was

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[7] The court noted:

> Some courts have, it is true, allowed letters, articles, and other unattested hearsay documents to be used as evidence in opposition to summary judgment—provided some showing is made (or it is obvious) that they can be replaced by proper evidence at trial. An example would be a letter inadmissible only because the signature on it had not been verified and there was no doubt that it could and would be. Any broader dispensation to disregard the rules of evidence in summary judgment proceedings would make it impossible ever to grant summary judgment, and . . . is not supported by the Supreme Court's statement in [*Celotex*, 477 U.S. at 324,] that a party opposing summary judgment need not do so with evidence that is in a form that would make it admissible at trial. In context, the reference is to affidavits and depositions.

Eisenstadt, 113 F.3d at 742–43 (internal citations omitted). The court continued:

> There are many exceptions to the rule that makes hearsay evidence inadmissible at a trial; if none of them is applicable, the "evidence" submitted in opposition to summary judgment is likely to be pretty worthless. No doubt there should be an exception for the cases just mentioned in which it hasn't been feasible to obtain better evidence but it is reasonably clear that such evidence will be available at trial. That exception (possibly implicit in the Federal Rules of Evidence . . . as well as the case law) isn't applicable here.

Id. at 743. The court concluded that "[i]t would be an abuse of discretion to admit the [newspaper] article as evidence because of the doubt about what it means and about whether it is an accurate report of what Centel said and because the author was available to be deposed, or give an affidavit, and clear up these questions." *Id.* at 745.

based on inadmissible hearsay and could not be considered under Rule 56(e)); *Gell v. Town of Aulander*, 252 F.R.D. 297, 301 (E.D.N.C. 2008) (striking an unsigned draft affidavit attached to an investigator's notarized affidavit because even though "should [the proposed author of the unsigned affidavit] testify as forecast by plaintiff at trial, it is possible that, at that time, the unsigned affidavit might be admissible pursuant to Rule 613(b)," that was "not the situation before the court at this time" because "[c]urrently the court is confronted with [a] bona fide affidavit (Waller's) that seeks to enter into evidence the unsworn, unsigned affidavit of a third party which contains material that is offered in evidence to prove the truth of the matter asserted."); *Adams v. Gardner Constr. Group*, No. CIV-07-722-C, 2008 WL 2944932, at *1 (W.D. Okla. July 25, 2008) ("'[H]earsay testimony that would be inadmissible at trial may not be included in an affidavit to defeat summary judgment because '[a] third party's description of [a witness'[s]] supposed testimony is not suitable grist for the summary judgment mill.'") (quoting *Thomas v. Int'l Bus. Machs.*, 48 F.3d 478, 485 (10th Cir. 1995)); *Aludo v. Denver Area Council*, No. 06-cv02257-LTB-MJW, 2008 WL 2782734, at *1 (D. Colo. July 8, 2008) ("'Parties may, for example, submit affidavits in support of summary judgment, despite the fact that affidavits are often inadmissible at trial as hearsay, on the theory that the evidence may ultimately be presented at trial in an admissible form.'")[8] (quoting *Argo*, 452 F.3d at 1199); *cf. Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003) ("[W]e need not decide whether the diary [submitted to oppose summary judgment] itself is admissible. It would be sufficient if the contents of the diary are admissible at trial, even the diary itself may be inadmissible. At the

[8] The court explained that even though affidavits could be considered on summary judgment despite their inadmissibility at trial, "'the content or substance of the evidence must be admissible.'" *Aludo*, 2008 WL 2782734, at *1 (quoting *Thomas*, 48 F.3d at 485). The court concluded: "'Thus, for example, at summary judgment courts should disregard inadmissible hearsay statements *contained* in affidavits as those statements could not be presented at trial in any form.'" *Id.* (quoting *Argo*, 452 F.3d at 1199).

summary judgment stage, we do not focus on the admissibility of the evidence's form. We instead focus on the admissibility of its contents.")[9] (citing *Block v. City of Los Angeles*, 253 F.3d 410, 418–19 (9th Cir. 2001); *Fed. Deposit Ins. Corp. v. N.H. Ins. Co.*, 953 F.2d 478, 485 (9th Cir. 1991)); *Summers v. Winter*, No. 5:07cv28/RH/EMT, 2008 WL 576489, at *5 (N.D. Fla. Feb. 29, 2008) ("The general rule regarding the consideration of hearsay statements included in verified pleadings, affidavits, documents, and other materials submitted pursuant to Rule 56 is that inadmissible hearsay, meaning out-of-court statements presented for the purpose of establishing the truth of the content of the statement and that [do] not fall within an exception to the hearsay rule, may not be considered on a motion for summary judgment")[10] (citing *Macuba*, 193 F.3d at 1322), *report and recommendation adopted*, 2008 WL 783582 (N.D. Fla. Mar. 19, 2008); *Murphy v. County of Yavapai*, No. CV-04-1861-PCT-DGC, 2006 WL 2460916, at *5 (D. Ariz. Aug. 23, 2006) (noting that "[a]t the summary judgment stage, courts focus on the admissibility of the evidence's content rather than its form," and that "[c]ourts thus may consider hearsay evidence contained in an expert

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[9] The court further explained:

> The contents of the diary are mere recitations of events within Fraser's personal knowledge and, depending on the circumstances, could be admitted into evidence at trial in a variety of ways. Fraser could testify to all the relevant portions of the diary from her personal knowledge. FED. R. EVID. 602. If she forgets the exact dates or the details of the event, she may be able to use the diary to refresh her recollection. FED. R. EVID. 612. Indeed, even inadmissible evidence may be used to refresh a witness's recollection. *United States v. Frederick*, 78 F.3d 1370, 1376 (9th Cir. 1996); *United States v. Weller*, 238 F.3d 1215, 1221 (10th Cir. 2001); *United States v. Muhammad*, 120 F.3d 688, 699 (7th Cir. 1997). If the diary fails to refresh her recollection, she might still be able to read the diary into evidence as a recorded recollection under FED. R. EVID. 803(5).

Fraser, 342 F.3d at 1037.

[10] The court was not considering the admissibility of hearsay within an affidavit, but granted a motion to strike a paper and an article submitted by the plaintiff in opposition to summary judgment, finding that they "do not constitute materials which may be considered on a motion for summary judgment because they contain hearsay for which no exception exists." *Summers*, 2008 WL 576489, at *5.

report or affidavit where the expert 'could later present that evidence through direct testimony, i.e., 'in a form that would be admissible at trial.'"').[11]

In *Macuba v. DeBoer*, 193 F.3d 1316 (11th Cir. 1999), the Eleventh Circuit attempted to clarify the standard for evidence considered on summary judgment. The court noted that the district court did not deal with the problem of hearsay contained within an affidavit, possibly "because of apparent confusion in the federal courts on the extent to which hearsay may be considered in ruling on a motion for summary judgment." *Id.* at 1322. The *Macuba* court explained that "[t]he general rule is that inadmissible hearsay 'cannot be considered on a motion for summary judgment.'" *Id.* (footnote omitted) (quoting *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 50 (1st Cir. 1990)). The court noted that "[s]ome courts, including our own, appear to have restated the general rule to hold that a district court may consider a hearsay statement in passing on a motion for summary judgment if the statement could be 'reduced to admissible evidence at trial' or 'reduced to admissible form.'" *Id.* at 1323 (citing *Wright v. Southland Corp.*, 187 F.3d 1287 (11th Cir. 1999); *Pritchard v. S. Co. Servs.*, 92 F.3d 1130, 1135 (11th Cir. 1996); *McMillian v. Johnson*, 88 F.3d 1573, 1584–85 (11th Cir. 1996); *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc.*, 998 F.2d 1224, 1246 (3d Cir. 1993); *Raby v. Baptist Med. Ctr.*, 21 F. Supp. 2d 1341, 1353–54 n.9 (M.D. Ala. 1998); *Coker v. Tampa Port Auth.*, 962 F. Supp. 1462, 1466–67 (M.D. Fla. 1997)). The court explained the confusion:

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[11] In *Murphy*, it was undisputed that the expert whose testimony was at issue would not be available to testify at trial because of a confidentiality agreement. 2006 WL 2460916, at *5. The court found that "[b]ecause Plaintiff has made no argument or showing that the evidence contained in Mr. Sullivan's reports and affidavit can be presented in admissible form at trial . . . , the Court may not consider the evidence for summary judgment purposes." *Id.* (citing *Bortell v. Eli Lilly & Co.*, 406 F. Supp. 2d 1, 8–9 (D.D.C. 2005); *Metro. Enter. Corp. v. United Techs. Int'l Corp.*, No. Civ. 303CV1685JBA, 2005 WL 2300382, at *7 (D. Conn. Sept. 21, 2005); *Santos v. Murdock*, 243 F.3d 681, 682 (2d Cir. 2001)). The court considered whether the affidavit could be considered on summary judgment despite the fact that the affiant would be unavailable at trial, and was not faced with the issue of whether it could consider a hearsay statement within an affidavit.

> We believe that the courts have used the phrases "reduced to admissible evidence at trial" and "reduced to admissible form" to explain that the out-of-court statement made to the witness (the Rule 56(c) affiant or the deposition deponent) must be admissible at trial for some purpose. For example, the statement might be admissible because it falls within an exception to the hearsay rule, or does not constitute hearsay at all (because it is not offered to prove the truth of the matter asserted), or is used solely for impeachment purposes (and not as substantive evidence).[12]

Id. at 1323–24 (footnotes omitted). The *Macuba* court concluded that the affidavit containing hearsay could not be considered on summary judgment because the hearsay statements were being offered for their truth, none of the statements would be admissible at trial under an exception to the hearsay rule, and even though some of the statements allegedly made to the affiant might be admissible for impeachment purposes, they would not be admissible as substantive evidence. *Id.* at 1325.

The view that hearsay within affidavits cannot be considered on summary judgment has been endorsed by many commentators. One article argues that "Federal Rule of Civil Procedure 56 . . . is best interpreted as imposing a strict standard with respect to the admissibility of materials presented by parties at summary judgment, a standard that approximates a party's evidentiary burden at trial." Shannon, *supra,* at 815–16. Professor Shannon takes the position that "*Celotex* really has nothing definitive to say about an adverse party's response to a motion for summary judgment," *id.* at 826, arguing that "there is no doubt that anything the Court might have said with respect to the

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[12] One commentator has noted that "[u]nder the majority's holding, the testimony contained in such documents [affidavits, deposition transcripts, or similar written forms of testimony] must itself be admissible. In other words, the question is whether the hearsay statement in an affidavit would be admissible if the affiant were testifying 'live' in court rather than by affidavit." Marc T. Treadwell, *Evidence*, 51 MERCER L. REV. 1165, 1186 (2000). Mr. Treadwell argues that "[i]f this is the majority's holding, it arguably does not address squarely the issue before the court. It would appear that the phrases 'reduced to admissible evidence at trial' and 'reduced to admissible form,' if they mean anything, must stand for something more than the simple proposition that affidavits can be considered even though affidavits would be inadmissible at trial." *Id.* at 1186–87.

adverse party's burden was dicta," *id.* at 825. Professor Shannon contends that "mere reducibility to admissible evidence is not the proper standard for assessing the adequacy of the materials presented by the adverse party at summary judgment. Rather, the adverse party must present materials that are themselves admissible."[13] *Id.* at 830. Professor Shannon explains his theory as follows:

> Admittedly, Rule 56(e) permits a party to present affidavits in connection with a motion for summary judgment, and as Steinman observes, affidavits themselves generally are not admissible at trial. But Rule 56(e) does require that the contents of the affidavits consist of admissible evidence, and it makes little sense to impose this requirement on affidavits and not on anything else that might be presented in response. It also makes little sense to permit a party to avoid summary judgment—the purpose of which is to avoid a needless trial—with materials that would not be admissible at trial. How may one determine whether there is a genuine issue for trial other than by the consideration of that evidence that would be admissible at trial? An exception (as to form) has been created for affidavits so as to permit a party to present non-deposition testimony on paper. There are no other exceptions.

Id. at 830–32 (footnotes omitted).

Similarly, in William W. Schwarzer, Alan Hirsch & David J. Barrans, *The Analysis & Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure*, 139 F.R.D. 441, 481 (1992), the authors argue that "[w]hile one court relied on this language [in *Celotex* regarding the form of summary judgment evidence] to hold that inadmissible evidence may be considered on a motion for summary judgment, apparently without regard to whether the facts can be proved at trial, the better view is that *Celotex* merely clarifies the nonmovant's right to oppose a summary judgment motion with any of the materials listed in Rule

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[13] Professor Shannon's essay is a rebuttal to the arguments made in Adam N. Steinman, *The Irrepressible Myth of* Celotex*: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81 (2006).

56(c), including affidavits of its own witnesses that may contain testimony in a form not admissible at trial." (footnotes omitted). The authors explain that "[t]he fact that a witness affidavit is hearsay does not make the testimony it contains inadmissible when offered at trial by that witness. That such affidavits are permitted, therefore, does not justify considering evidence that would be inadmissible at trial." *Id.* at 481–82. This article distinguishes between affidavits of a party's own witness and a statement of the proposed testimony of an independent or adverse witness:

> To permit an opposition [to a summary judgment motion] to be based on evidence that would not be admissible at trial would undermine the goal of the summary judgment procedure to prevent unnecessary trials, since inadmissible evidence could not support a jury verdict. A distinction must be drawn, therefore, between the affidavit of [a] party's own witness—which can be converted into admissible testimony at trial—or an opponent's admission, and a statement reciting the testimony of an independent or adverse witness that would be barred as hearsay. (The testimony of such a witness would normally have to be submitted in the form of a deposition.)

Id. at 482. The article argues that there must be some showing that summary judgment evidence would be admissible at trial, stating: "Of course, a nonmovant's mere promise to produce admissible evidence will not suffice to defeat summary judgment. And unauthenticated documents or hearsay evidence should not be considered without adequate assurance that their contents can be proved by admissible evidence at trial." *Id.* (footnotes omitted) (citing *Garside*, 895 F.2d at 49, 50;[14] *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1990)). Although this article could be interpreted to support the position that a court may consider a hearsay statement within an

[14] In *Garside*, the court found that an interrogatory answer stating what the plaintiff's expert would testify to at trial was insufficient to avoid summary judgment. *Garside*, 895 F.2d at 50 ("A third-party's description of an expert's supposed testimony is not suitable grist for the summary judgment mill."). The court noted that interrogatory answers, like affidavits, must set forth facts that would be admissible in evidence. *Id.* at 49–50. The court found that "expert opinion is admissible and may defeat summary judgment only where it appears that the *affiant* is competent to give an expert opinion." *Id.* at 50 (citation omitted). The court held that "[i]n short, what we have here—the Garsides' account of what they think (or hope) that Dr. Theodarides' testimony might be—amounts to inadmissible hearsay. . . . Hearsay evidence, inadmissible at trial, cannot be considered on a motion for summary judgment." *Id.* (citations omitted).

affidavit if there is sufficient assurance that the declarant will testify in accordance with the affidavit at trial, it seems more likely that the authors are arguing that an affidavit may be considered on summary judgment despite the fact that the affidavit itself might not be admissible at trial, but that an affidavit containing another person's out-of-court statement could not be considered on summary judgment because there would be no guarantee that the declarant would testify the same way at trial.

Another commentator has taken the view that it is never permissible to consider hearsay on summary judgment, but that this problem does not usually arise because affidavits offered on summary judgment are not offered to prove the truth of the statements in the affidavits. *See* Duane, *supra*, at 1532. Professor Duane disapproves of what he deems an inconsistency in the traditional view that permits consideration of affidavits on summary judgment, despite the fact that they are out-of-court statements, while prohibiting consideration of statements that are hearsay within affidavits:

> [T]he standard "explanation" for this apparent inconsistency is that an affidavit considered on a summary judgment motion may be hearsay but may not include hearsay. To put the matter in slightly more technical terminology, the almost universally received view is that Rule 56 allows a judge to consider hearsay (in the form of an affidavit), but not "multiple hearsay." The hearsay words of the affidavit, we often are told, may be accepted in lieu of oral testimony from the affiant himself as long as they describe a matter within his personal knowledge, but his words about what another has told him may not be accepted in lieu of a statement from that other person.

Id. at 1529 (footnotes omitted). Professor Duane argues:

> Why would the framers of the federal rules trust a judge on a summary judgment motion to use and consider all hearsay evidence in the form of an affidavit—no matter what the source—but never multiple hearsay? At best, the two differ only in degree of reliability, not in kind, and everyone knows that some forms of multiple hearsay are infinitely more reliable than some simple hearsay.

Id. at 1530. Professor Duane contends that "the truth of the matter is that judges ruling upon

summary judgment motions are not authorized to consider hearsay in the form of affidavits, they do not do so, and Rule 56 is not an exception to the hearsay rules at all." *Id.* at 1530–31. Professor Duane explains his theory as follows:

> (1) An assertion made out of court—including an affidavit—is not hearsay at all and, therefore, not even subject to exclusion under Rule 802 unless it is "offered in evidence to prove the truth of the matter asserted." (2) When does that description apply to affidavits submitted in a summary judgment motion? Never. In the landmark case of *Anderson v. Liberty Lobby, Inc.*, the Supreme Court stated that a judge ruling upon a summary judgment motion "is not himself to weigh the evidence and determine the truth of the matter" involved in the litigation which, of course, includes the matter asserted in the parties' pleadings, depositions, and affidavits. So, those affidavits are not hearsay, they are not excluded under Rule 802, and they would be admissible under the Federal Rules of Evidence even if Rule 56 said nothing about them.

Id. at 1532–33 (footnotes omitted). Professor Duane argues that "the fact is that a judge ruling on such a motion is neither permitted nor required to draw any conclusions about what happened in the past—that is, the truth of the matter asserted in the parties' pleadings and affidavits—but what will happen at a future trial if there is one." *Id.* at 1535. He further explains that a summary judgment motion "merely requires the judge to assume that the parties and their witnesses would testify at a hearing just as they have in their affidavits and then to decide whether such testimony would entail a conflict that might be decided more accurately after observing the witnesses' demeanor at a live hearing. . . . [W]hen an affidavit is used solely to predict what witnesses are likely to say, its significance lies solely in the fact that it was made, and it is therefore not hearsay." Duane, *supra*, at 1544. Professor Duane concludes that "Rule 56 does not authorize a judge to consider hearsay in any form, not even in part; it allows consideration of affidavits (and other statements, such as deposition transcripts) solely for predicting what those witnesses are likely to say at trial and not for

resolving the truth of the matter asserted in those statements."[15] *Id.* at 1547. He notes that the statement from *Celotex* indicating that "a nonmovant is not required to 'produce evidence in a form that would be admissible at trial in order to avoid summary judgment,'" *id.* at 1548, "has unleashed a torrent of academic and judicial debate and commentary, most of it devoted to whether the Court thereby overrode the apparent requirement in Rule 56(e) that all supporting and opposing affidavits set forth facts that would be admissible in evidence," *id.* at 1549. Professor Duane states:

> I respectfully submit that Justice Rehnquist's statement can be understood far better by reading it with the emphasis supplied elsewhere, to say that the nonmoving party is not required to "produce evidence in a form that would be admissible at trial in order to avoid summary judgment"—but without altering in any way Rule 56(e)'s requirement that the affidavit be admissible, both in content and form, at the summary judgment stage, where the court is deciding an altogether different question. As we have seen, where an affidavit is being considered on a summary judgment motion and is based on the personal knowledge of the affiant, it is not hearsay at all, either in content or form, even though the same affidavit will be hearsay if it is later offered at trial to prove the truth of the events described in the affidavit.[16]

Id. at 1550–51.

III. Cases Finding that Hearsay Within an Affidavit Can Be Considered on Summary Judgment if the Hearsay Statement Would Be Submitted in Admissible Form at Trial

Some courts will consider a hearsay statement contained within an affidavit on summary

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[15] Professor Duane recommends that the Advisory Committee Notes to Evidence Rules 802 and 104(a) be amended "to delete any reference to summary judgment affidavits as an example of 'hearsay made admissible by other rules' or 'an important judicial determination' made on the basis of otherwise inadmissible hearsay." Duane, *supra*, at 1546.

[16] It is not entirely clear whether Professor Duane's theory would allow consideration of the statement of a third party contained in an affidavit on summary judgment. His theory permits consideration of an affidavit as nonhearsay because it is not considered for the truth of the matter asserted, and his theory might arguably extend to statements made by third parties contained within an affidavit because, under his theory those statements may not be offered for their truth, but merely as a prediction of what that third party would say if testifying at trial. However, it could be argued that an affiant's recitation of a third party's statement is not a reliable method of predicting what that third party would say if testifying at trial, particularly if it is not clear that the third party is available and willing to testify.

judgment if there is a showing, or at least a possibility, that the statement would be submitted in admissible form at trial. *See, e.g.*, *Cutrona v. Sun Health Corp.*, No. CV 06-2184-PHX-MHM, 2008 WL 4446710, at *5 (D. Ariz. Sept. 30, 2008) ("'[H]earsay evidence produced in an affidavit . . . may be considered if the out-of-court declarant could later present that evidence through direct testimony, i.e. in a form that would be admissible at trial.'")[17] (citing *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1542 (3d Cir. 1990); *Williams v. Borough of W. Chester*, 891 F.2d 458, 465 n.12 (3d Cir. 1989)); *DeBiasi v. Charter County of Wayne*, 537 F. Supp. 2d 903, 911 (E.D. Mich. 2008) ("[T]he majority of circuits interpret *Celotex* to permit consideration of evidence submitted at summary judgment in non-admissible form when the evidence 'will be reduced to admissible form at trial.'") (citing *McMillian v. Johnson*, 88 F.3d 1573, 1584 (11th Cir. 1996); *Gleklen v. Democratic Cong. Campaign Comm., Inc.*, 199 F.3d 1365, 1369 (D.C. Cir. 2000); *J.F. Feeser*, 909 F.2d at 1542; *Garside*, 895 F.2d at 50); *cf. McCann v. Astrue*, No. 07-3804, 2008 WL 4298835, at *2 (3d Cir. Sept. 16, 2008) (unpublished) (considering testimony by a third-party, including testimony as to what that third-party was told by others and what another third-party was told, and noting that "'hearsay evidence produced in an affidavit opposing summary judgment may be considered if the out-of-court declarant could later present that evidence through direct testimony, i.e., 'in a form that would be admissible at trial.'") (quoting *Williams*, 891 F.2d at 466 n.12).

In *DeBiasi*, the plaintiff opposed summary judgment on his discrimination claim by relying on his personal log notes, which mentioned a phone conversation the plaintiff had with one of his superiors in which that superior recounted a statement by one of the defendants. The court noted

[17] The court denied a request to strike certain declarations supporting summary judgment that discussed the declarant's receipt of complaints against the plaintiff by other employees, indicating that they may not be offered for their truth, and that "to the extent that matters in the subject paragraphs may constitute hearsay, the Court is satisfied that Defendant could later present the evidence contained therein through direct testimony, i.e. in a form that would be admissible at trial . . . ." *Cutrona*, 2008 WL 4446710, at *6.

that "[e]vidence containing multiple levels of hearsay is inadmissible for its truth unless each layer, analyzed independently falls within an established hearsay exception or is treated as nonhearsay." *DeBiasi*, 537 F. Supp. 2d at 911 (citations omitted). The court found that "inadmissible hearsay evidence cannot be considered on summary judgment," but that "at the summary judgment stage, the focus is not on the admissibility of the evidence's form." *Id.* (citing *Celotex*, 477 U.S. at 324). The court explained that "[t]he majority of circuits interpret *Celotex* to permit consideration of evidence submitted at summary judgment in non-admissible form when the evidence 'will be reduced to admissible form at trial.'" *Id.* (citations omitted). As a result, the court concluded that it did not need to decide whether the plaintiff's log itself is admissible, but only whether the contents of the log were admissible and stated that "[i]f the contents of DeBiasi's log could be presented in an admissible form at trial, the Court may consider the log's contents in deciding Defendants' summary judgment motion." *Id.* at 911–12 (citing *Fraser v. Goodale*, 342 F.3d 1032, 1037 (9th Cir. 2003)). The court also relied on *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524 (3d Cir. 1990), which had held that "'hearsay evidence produced in an affidavit opposing summary judgment may be considered if the out-of-court declarant could later present the evidence through direct testimony, i.e., in a form that 'would be admissible at trial.'" *DeBiasi*, 537 F. Supp. 2d at 912 (quoting *J.F. Feeser*, 909 F.2d at 1542). The *J.F. Feeser* court held that "'*there is no indication that Spagnola's salesforce would be unavailable to testify at trial. The averments of Spagnola's affidavit are capable of proof through admissible evidence* and we will consider them now on de novo review.'"[18] *Id.* (quoting *J.F. Feeser*, 909 F.2d at 1542 (emphasis added by *DeBiasi* court)). The

[18] In *J.F. Feeser*, the Third Circuit held that the district court had erred by refusing to consider testimony from Spagnola that he had received complaints from his salespeople that they were losing sales. 909 F.2d at 1542. The court noted that it had previously concluded that "hearsay evidence produced in an affidavit opposing summary judgment may be considered if the out-of-court declarant could later present the evidence through direct testimony, i.e., in a form that 'would be admissible at trial.'" *Id.* (quoting *Williams*, 891 F.2d at 465–66 n.12). The *J.F. Feeser* court appeared to take

DeBiasi court concluded that the statements within the plaintiff's log were not capable of proof through admissible evidence at trial because the superior denied having had the conversation with the defendant mentioned in the plaintiff's log and denied telling the plaintiff about that conversation. *Id.* at 912–13. The court held that "since [the superior] has denied making the statements attributed to him by Plaintiff, the statements are not capable of proof at trial through his first-hand testimony. They are inadmissible hearsay statements that may not be considered by the Court in deciding Defendants' motion for summary judgment." *Id.* at 913. The court refused to consider the hearsay statements within the log on summary judgment because there was evidence that those statements could not be admitted through direct testimony at trial. However, the court did not decide whether the statements would have been admissible on summary judgment if it had been less clear whether the superior would testify in accordance with the plaintiff's log at trial. The court's discussion of the statements made by the superior that showed that he would not testify in accordance with the log and the court's discussion of the *J.F. Feeser* opinion indicate that the court might have been willing to consider the hearsay statements on summary judgment if there had been some indication that the superior would testify in accordance with the plaintiff's log, or possibly even if there had been no indication that he would testify contrary to the statements in the log.

In *Lorenzo v. Seeley*, No. 06-cv-1682(PGS), 2008 WL 939623 (D.N.J. Apr. 7, 2008), the court confronted the issue of how likely it would have to be that hearsay could be converted to admissible evidence at trial in order for the court to consider it on summary judgment. On summary judgment, the court refused to consider one of the plaintiff's contentions because in depositions, the

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the position that a hearsay statement in an affidavit made by someone other than the affiant could be considered on summary judgment unless the declarant of the hearsay statement would be unavailable at trial to provide direct testimony. The *DeBiasi* court's reliance on *J.F. Feeser* may endorse this view.

plaintiff had conceded that the allegation was based on a statement from a third party and that he did not have paperwork to support the statement. *Lorenzo*, 2008 WL 939623, at *5. The court pointed out that the plaintiff had not argued that the statement fell within an exception to the hearsay rule and that the plaintiff did not conduct discovery to determine whether there was any support for the allegation. *Id.* The court relied on *Arce v. U-Pull-It Auto Parts, Inc.*, No. 06-5593, 2008 WL 375159, at *14 n.11 (E.D. Pa. Feb. 11, 2008), for the proposition that "'[w]hile, '[h]earsay evidence produced in an affidavit opposing summary judgment may be considered if the out-of-court declarant could later present that evidence through direct testimony, . . . the mere possibility that [a] hearsay statement will be presented in [the] form of admissible evidence at trial does not warrant consideration of hearsay evidence at [the] summary judgment stage.'" *Lorenzo*, 2008 WL 939623, at *5 (quoting *Arce*, 2008 WL 375159, at *14 n.11).[19] The court declined to consider the allegation at issue because its only support came from a hearsay statement from an unidentified third party.

Similarly, in *Santos v. Murdock*, 243 F.3d 681, 682 (2d Cir. 2001) (per curiam), the court required the party offering hearsay at the summary judgment stage to show that the witness would testify in that party's favor at trial. In *Santos*, the plaintiff, Angel Santos, had been a suspect in the murder of a seven-year-old girl. *Id.* On the day of the murder, the police had questioned Santos and performed physical tests on him, but did not arrest him. *Id.* The police later arrested Santos's step-uncle, Ernesto Diaz Gonzalez, on an outstanding, unrelated warrant. *Id.* While in custody, Gonzalez executed a sworn statement that Santos had admitted to Gonzalez that he had killed the girl. *Id.* Based on Gonzalez's sworn statement, Santos was arrested and jailed during the criminal

[19] The *Arce* court noted that "'[a] party must respond to a hearsay objection by demonstrating that the material would be admissible at trial under an exception the hearsay rule, or that the material is not hearsay.'" 2008 WL 375159, at *14 n.11 (quoting *Bouriez v. Carnegie Mellon Univ.*, No. 02-CV-2104, 2005 WL 2106582, at *9 (W.D. Pa. Aug. 26, 2005)).

proceedings. *Id.* Although Gonzalez repeated his implication of Santos at the probable cause hearing, Gonzalez later recanted his earlier statements implicating Santos and executed an affidavit prepared by Santos's lawyer stating that the police had coerced him into implicating Santos by threatening him with a nine-year prison sentence. *Santos*, 243 F.3d at 682–83. Santos was released based on this affidavit and brought suit alleging violation of his constitutional rights in connection with his arrest. *Id.* at 683. Gonzalez was deposed twice during discovery about his statement incriminating Santos. *Id.* During one deposition, Gonzalez invoked his Fifth Amendment privilege and refused to testify, but during the next deposition, Gonzalez testified that he had not been coerced by the officers and had falsely implicated Santos in order to obtain favorable police treatment. *Id.* The police officers moved for summary judgment and Santos responded by submitting the Gonzalez affidavit in which Gonzalez stated that he had been coerced into implicating Santos. *Id.* The district court rejected the theory that this affidavit showed that Gonzalez might testify consistently with that affidavit at trial. *See id.* The Second Circuit affirmed, finding that the defendants had shown, through the deposition testimony of Gonzalez, that Gonzalez would testify that he was not coerced. *Santos*, 243 F.3d at 684. Notably, the court pointed out that "Santos, on the other hand, provides nothing that would *affirmatively indicate that Gonzalez is prepared to testify in a manner consistent with the affidavit*. Absent such a showing, a nonmoving party's claim cannot survive a motion for summary judgment." *Id.* (emphasis added) (citing *McMillian*, 88 F.3d at1584). The court explained: "[A]s Rule 56 and our cases suggest, an implicit or explicit showing that the affiant is prepared to testify in a manner consistent with an affidavit is required to oppose summary judgment."[20] *Id.* (citations omitted).

[20] The Second Circuit required an affirmative showing that the affiant would testify in accordance with the affidavit, but did not specifically address the fact that the Gonzalez affidavit appeared to contain hearsay regarding what the

Some commentators have argued that if a party presents evidence that is "reducible" to admissible evidence at trial, the party can survive summary judgment. For example, one commentator argues that the statement in *Celotex* that the plaintiff does not have to use materials "in a form that would be admissible at trial" has been misunderstood. *See* Steinman, *supra*, at 112. Professor Steinman disagrees with the argument that the next sentence in *Celotex* stating that "Rule 56 does not require the nonmoving party to depose her own witnesses," means that "Rule 56 *does* require the nonmoving party to obtain affidavits of her witnesses." *Id.* (footnotes omitted). He argues that "[t]he term 'depose,' . . . frequently refers not only to the taking of a deposition as provided for in the federal rules, but also to the swearing of an affidavit." *Id.* (citing Duane, *supra*, at 1551 n.93). Professor Steinman concludes that "the majority's statement that 'Rule 56 does not require the nonmoving party to depose her own witnesses' may plausibly be read as rejecting the notion that a plaintiff must obtain affidavits of her witnesses in order to avoid summary judgment." *Id.* at 112–13 (footnote omitted). Professor Steinman notes that most courts seem to follow what he refers to as the "paper trial myth," requiring the plaintiff to satisfy its burden in response to a summary judgment motion by producing trial-quality evidence, *id.* at 121, but notes that some courts "have read *Celotex* as allowing a plaintiff to demonstrate a genuine issue of fact using materials that fall short of the admissibility standards that would govern at trial," *id.* Professor Steinman takes the

officers told Gonzalez in order to coerce him to implicate Santos. The court may not have needed to address that issue because it had already determined that the affidavit was inadmissible based on the facts that it would only be admissible at trial for impeachment purposes and that it did not show that Gonzalez would testify in support of Santos at trial. However, the court's statement that Santos "provides nothing that would affirmatively indicate that Gonzalez is prepared to testify in a manner consistent with the affidavit," *Gonzalez*, 243 F.3d at 684, could be interpreted to indicate that the court would have considered the Gonzalez affidavit had there not been conflicting deposition testimony and had it been apparent that Gonzalez would testify in a manner consistent with his affidavit, despite the existence of hearsay within the affidavit. Because the court did not need to reach the issue of the hearsay within the affidavit, the case may be better taken for the proposition that an affidavit may be considered on summary judgment if it appears likely that the affiant will testify in accordance with the affidavit at trial, and not for the proposition that an affidavit containing hearsay may be considered on summary judgment.

position that while "Rule 56 imposes no general standard of admissibility, . . . [w]ith respect to affidavits, . . . Rule 56(e) requires that they 'shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.'" Steinman, *supra*, at 128 (citation omitted). Professor Steinman's analysis seems to draw a distinction between affidavits and other forms of evidence submitted on summary judgment, pointing out that "Rule 56 does not impose any admissibility requirement, except for affidavits." *Id.* at 129. Professor Steinman argues that "[t]he precise basis for importing trial evidentiary standards at the summary judgment phase is unclear," and agrees with Professor Duane that "[m]aterials offered in opposition to summary judgment . . . are not offered to establish the truth of the matter asserted," but "are offered to establish a genuine issue of material fact for trial." *Id.* at 130 (citing Duane, *supra*, at 1532). Professor Steinman summarizes his theory as follows:

> [W]hen a defendant seeks summary judgment on the basis that there is an absence of evidence, the plaintiff does not have to produce trial-quality evidence such as an affidavit from a witness who would be competent to testify at trial or deposition testimony that itself would be admissible at trial. She does, however, need to provide material sufficient to refute the absence of evidence indicated by the defendant's showing. If, for example, the defendant had asked her to identify supporting witnesses and she failed to do so, then her responsive material must identify such witnesses.[21]

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[21] It is unclear if Professor Steinman's theory permits consideration of hearsay within an affidavit on summary judgment. Professor Steinman argues that Rule 56 imposes an admissibility requirement on affidavits, but not on other summary judgment evidence, *see* Steinman, *supra*, at 129, but he also argues that a responding party does not have to produce an affidavit from a witness who would be competent to testify at trial, *id.* at 133, and that a responding party's materials "must be sufficient to carry her burden of proof at trial 'if reduced to admissible evidence,'" *id.*, implying that an affidavit may be considered on summary judgment if it contains hearsay statements that the declarant is likely to directly testify to at trial. However, Professor Steinman also argues that

> [t]he drafters knew what language to use when they wanted to require trial-quality evidence. For affidavits, the drafters imposed explicit requirements of personal knowledge, competence, and the *ability to be admitted at trial if that testimony were provided live*. But when describing the general burden to be imposed on

Id. at 133.

Similarly, another commentator has argued that *Celotex* created a new summary judgment standard that allows consideration of evidence on summary judgment if it could be reduced to admissible evidence at trial. *See* Melissa L. Nelken, *One Step Forward, Two Steps Back: Summary Judgment After* Celotex, 40 HASTINGS L.J. 53, 60 (1988) ("[T]he majority in the Supreme Court [in *Celotex*] lent support, without elaboration, to the idea that inadmissible evidence could be considered in opposition to a summary judgment motion, creating yet another obscurity in the law of summary judgment."). According to Professor Nelken, the statement in *Celotex* that its holding "'does not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment,'" *id.* at 71, "opened the door to evidence that was not already reduced to admissible form, but merely was reducible to such form before the time of trial," *id.* Evaluating the results shortly after *Celotex*, Professor Nelken states that "the new-found license to consider procedurally inadmissible evidence on summary judgment seems to have largely escaped notice, even though the result in *Celotex III* depended on it. Among the courts that have discussed the subject, responses have ranged from incredulity that such a major change could have been intended to docile acceptance of a new standard." *Id.* at 77. Professor Nelken differentiates between the evidence that a moving party can use and the evidence that a nonmoving party can use, where the moving party will have the burden of proof at trial:

> There is no indication that *Celotex III* authorizes the use of

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> nonmovants, the drafters required only "specific facts." Juxtaposed against the language used to define the admissibility of affidavits, the "specific facts" requirement can hardly be read to require trial-quality evidence in all circumstances.

Id. at 137 (emphasis added). Although Professor Steinman believes that summary judgment evidence may be considered if it can be reduced to admissible evidence at trial, he appears to believe that Rule 56 makes an exception for the content of affidavits, which must be admissible.

> inadmissible evidence by a *moving* party in support of its motion; the *Celotex III* majority discussed only what evidence will be accepted from a *nonmoving* party. It would be difficult to justify allowing the party that will have the burden of proof at trial to avoid trial and to win summary judgment with anything but admissible evidence, since the results at trial might well turn on whether certain proffered evidence was admissible. Thus, *Celotex III* should not affect the moving party's initial burden or its obligation to use only admissible evidence in this situation. The nonmoving party on such a motion, however, apparently would be able to defeat the motion by producing *inadmissible* evidence, 'reducible' to admissible form at trial, if a genuine issue of material fact is raised.

Id. at 81–82. Where the nonmoving party will have the burden of proof at trial, Professor Nelken asserts that the nonmoving party may respond to a motion with evidence that is "'reducible' to admissible form at trial and . . . sufficient to withstand a directed verdict motion at trial on that issue." *Id.* at 83. Professor Nelken concludes that the suggestion in *Celotex* that "evidence in opposition to summary judgment will be acceptable even if it is merely '[reducible]' to admissible evidence at trial . . . has no support in Rule 56," Nelken, *supra*, at 84, and urges "[t]he Court . . . [to] forsake the misguided position that evidence merely reducible to admissible form is also adequate to oppose a summary judgment motion once the moving party has met its initial burden," *id.* at 85. She proposes that once the moving party has met its initial burden, "only evidence already reduced to admissible form, or otherwise provided for by Rule 56, should be considered so that the trial judge can make a reliable decision about the nonmoving party's ability to get to the jury at trial."[22] *Id.*

Another article examines the Texas counterpart to Rule 56—Rule 166a(i)—and notes that

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[22] While Professor Nelken's interpretation of *Celotex* approves of the consideration of inadmissible evidence at summary judgment if it would be "reducible" to admissible evidence at trial, it is not clear whether this interpretation would permit consideration of hearsay within an affidavit. Professor Nelken recognizes that consideration of inadmissible evidence is not supported by the text of Rule 56 and, given her disapproval of statements in *Celotex* that she contends opened the door to consideration of inadmissible evidence, would likely argue that *Celotex* did not open the door to considering inadmissible hearsay within an affidavit even if the declarant could testify at trial because the *Celotex* court was not confronted with such an affidavit and only considered the admissibility of hearsay in other forms, including letters and a deposition from another case.

some federal courts have considered the contents of affidavits if they are reducible to admissible evidence. *See* Sarah B. Duncan, *No-Evidence Motions for Summary Judgment: Harmonizing Rule 166a(i) and its Comment*, 41 S. TEX. L. REV. 873, 899–900 (2000). Judge Duncan argues "[s]ummary judgment evidence is . . . usually contained within a writing that is, in the strictest sense of the word, hearsay—an out-of-court-declarant's statement that is offered to prove the truth of the matters asserted therein," and that "[i]t is thus demonstrably untrue—and extremely confusing—to state that summary judgment evidence is evidence that would be admissible at trial." *Id.* at 895. Judge Duncan's article provides an analogy for distinguishing between evidence that may be considered on summary judgment and evidence that may not:

> (1) A document in which evidence is contained is a "box." A box is either "procedurally admissible" or "procedurally inadmissible," depending upon whether it is among the forms of "summary judgment evidence" listed in the applicable rule. If a box is defective, but not so defective that it has lost its identity as one of the types of boxes listed in the applicable rule, it is "a functional equivalent of a procedurally inadmissible box."
>
> (2) The evidence contained in the box makes up the "contents of a box." The contents of a box are either "admissible" or "inadmissible," depending upon whether the contents, in whole or in part, would be admissible at trial.
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> (3) If a box is not procedurally admissible but could theoretically be made so, or if the contents of a box are not in a form that would be admissible at trial but could be made so, the box or contents are "reducible" to a procedurally admissible or admissible form.

Id. at 896 (footnotes omitted). Judge Duncan argues that "[b]efore *Celotex*, the federal courts interpreted Rule 56 in much the same way as the Texas courts interpret Rule 166a—'summary judgment evidence' consisted of the admissible contents of procedurally admissible boxes or their functional equivalents." *Id.* at 898. Judge Duncan argues that "courts have developed at least three interpretations of *Celotex*, depending upon whether one is discussing the procedural admissibility

of boxes or the admissibility of the boxes' contents." *Id.* at 899. Judge Duncan argues that "[d]espite the growing acceptance of procedurally inadmissible boxes, a majority of the federal courts of appeals appear to require that, whatever the box, its contents must be in a form that would be admissible at trial or at least reducible to an admissible form." *Id.* at 899–900. Judge Duncan contends that "fully one-third of the circuits have considered inadmissible contents that are 'reducible' to a form that would be admissible at trial." Duncan, *supra*, at 900. Judge Duncan differentiates the federal practice from Texas practice, stating: "[W]hile the Texas courts almost always require that boxes be procedurally admissible and their contents be in a form that would be admissible at trial, a majority of the federal courts of appeals will consider boxes that are procedurally inadmissible, and fully one-third will consider contents that are 'reducible' to a form that would be admissible at trial." *Id.*

IV. Cases Finding that Hearsay Contained Within an Affidavit Can Be Considered on Summary Judgment Unless it Is Apparent that the Hearsay Could Not Be Submitted in an Admissible Form at Trial

I came across a few cases that have gone even further than the cases allowing consideration of hearsay evidence if it would likely be reduced to admissible evidence at trial and that have found that hearsay evidence could be considered on summary judgment unless it clearly would not be admissible at trial. *See, e.g.*, *MDL Capital Mgmt., Inc. v. Fed. Ins. Co.*, Nos. 05cv1396, 06cv0389, 2008 WL 2944890, at *2 n.2 (W.D. Pa. July 25, 2008) ("Hearsay evidence contained in affidavits and deposition testimony may be sufficient to survive a summary judgment motion unless such evidence clearly would not be admissible at trial.") (citing *Clark v. Commonwealth of Pa.*, 885 F. Supp. 694, 709 n.3 (E.D. Pa. 1995)); *Kenawell v. DuBois Bus. College, Inc.*, No. 3:2005-429, 2008 WL 768139, at *6 (W.D. Pa. March 20, 2008) (same); *cf. Davis v. City of E. Orange*, No. 05-3720

(JLL), 2008 WL 4328218, at *9 n.19 (D.N.J. Sept. 17, 2008) (agreeing that "Plaintiff's brief and statement of facts are replete with hearsay statements and that a certification or declaration from the declarant of such statements would have been preferable," but finding that "since there is no indication that the declarants of the hearsay statements Plaintiff proffers will be unavailable to testify at trial, the Court will consider such statements in adjudicating this motion") (citing FED. R. CIV. P. 56(e); *Williams*, 891 F.2d at 466 n. 12; *King v. City of Philadelphia*, No. 02-2845, 2003 WL 1705967, at *3 (3d Cir. Apr. 1, 2003)).

In *Kenawell*, the defendant moved for summary judgment on the plaintiff's discrimination claim by submitting several documents, including, among others, an affidavit of the defendant's president attesting to the circumstances surrounding the plaintiff's termination, an incident report recording the plaintiff's misconduct, a statement of a subordinate who claimed to have been harassed by the plaintiff, and email correspondence between the plaintiff and the subordinate. *Kenawell*, 2008 WL 768139, at *5. The court denied a request to strike the incident report, finding that it fell within the business records exception to the hearsay rule. *Id.* at *7. The court also declined to strike the subordinate's statement and the email correspondence, finding that "this lack of authentication and presence of hearsay can be cured at the time of trial should [the subordinate] testify as to her personal knowledge of the documents." *Id.* at *8 (citing *Lexington Ins. Co. v. W. Pa. Hosp.*, 423 F.3d 318, 329 n.6 (3d Cir. 2005)). The court concluded: "despite an absence of authentication and the presence of hearsay, these matters may be a part of the summary judgment record before the Court. Therefore, these documents are admissible evidence." *Id.*

V. Conclusion

Most courts appear to be unwilling to consider hearsay within an affidavit on summary

judgment. However, some courts have found that inadmissible evidence may be considered on summary judgment if the evidence can be reduced to admissible evidence at trial, and there appears to be some variation in the cases as to what it means to be capable of being reduced to admissible evidence. Most courts interpret this requirement to mean that an affidavit can be considered on summary judgment even though the affidavit itself may not be admissible at trial, but that the statements within the affidavit must be admissible if the affiant were to testify to them at trial. Other courts have indicated that it might be appropriate to consider statements within an affidavit that would be inadmissible if the affiant were to testify to them at trial as long as there is sufficient assurance that the hearsay declarant would testify in accordance with the affidavit at trial. A few courts have implied that it would be permissible to consider statements that would be inadmissible if testified to by the affiant as long as there is no showing that the out-of-court declarant would testify contrary to the affidavit at trial.