

to Def.'s Mot. for Summ. Jgmt., Depo. of John Barton at 159 ("Barton Depo."). More specifically, he worked for the Centers for Medicare and Medicaid Services ("CMS"), formerly the Health Care Financing Administration ("HCFA"). Pl.'s Mot. to Exclude Decs. of John Barton (Doc. 96), Tab A (declaration and supplemental decl. of John Barton) ("Barton Decl."). He was responsible for all Part A Agreements, Part B Contracts and DMERC Contracts during that time. Barton Depo. at 161. In his capacity as contracting officer, he entered into, interpreted, modified, administered and acted as a reference point for his contracts. Id. at 24.

He retired from his position with the United States government in November of 2001. Id. at 21. Upon his retirement, Barton sought and received a letter from a government ethics officer delineating certain restrictions on his post-employment activities. The restrictions were based in part on Section 207(a)(1) of Title 18 of the United States Code. Pl.'s Mot. to Exclude Decs. of John Barton, Tab C (Letter to John Barton from Michael Odachowski, Deputy Government Ethics Counselor). More specifically, the letter stated that Barton was prohibited "from representing anyone before any agency or court of the United States in connection with any particular matter involving specific parties in which [he] participated personally and substantially while [he was] a Government employee." Id.

Upon retiring, Barton decided to open an independent consulting agency. Barton Depo. at 107-108. In this role, in which he continues to work, he provides consulting services to health care insurance contractors. Id. at 107-108. In the hope of building his business, Barton sent an advertising and solicitation letter, in April of 2002, to many of his former government contractor contacts, including CGLIC. Id. at 108; see also Pl.'s Mot. to Exclude Decs. of John Barton, Tab D (sample solicitation letter).

Although it is unclear, it appears that defense counsel identified Barton as a potential witness in April/May 2002 after their client, CGLIC, received the solicitation letter from him. Regardless, it is undisputed that defense counsel contacted Barton in early May 2002 and asked him if he would be willing to answer certain questions regarding CGLIC's contract with the government. Barton Depo. at 12. Barton agreed. Id. Defense counsel spoke with Barton two to three more times by telephone. Id. at 24, 81. During those conversations, defense counsel asked Barton questions concerning factual issues about the contracting relationship between CGLIC and the government. Id. at 13. More specifically, they asked about “[m]atters concerning the way DMERC contractors [were] paid, matters concerning instructions the DMERC contractors gave to providers.” Id. at 14. Defense counsel then drafted the declaration, and subsequently the supplemental declaration, consistent with Barton's answers and provided drafts to Barton for review and correction. Id. at 97-98, 104. Once Barton reviewed the declarations and made minor changes, defense counsel submitted the declarations to the court in support of its motion for summary judgment. Id. at 28-29. Barton received no compensation from either CGLIC or defense counsel for the time he spent being interviewed or reviewing the declarations. Id. at 27, 105.

Plaintiff objected to those declarations in a motion filed on May 31, 2002. See Pl.'s Mot. to Strike the Decl. of John Barton and to Prohibit His Test. at Trial (Doc. 81). The court denied that motion, June 5, 2002 Order (Doc. 86), but after oral argument on other matters, issued an order allowing plaintiff to take the deposition of Barton. Sept. 20, 2002 Order (Doc. 93). Plaintiff did so on October 2, 2002. Barton Depo. at 1. In anticipation of that deposition, Barton, who was already in Washington D.C. on other business, spent two hours meeting with defense

counsel in their law offices on the day preceding the deposition. *Id.* at 7, 27.

After the deposition, plaintiff again filed a motion to exclude Barton's declarations. Pl.'s Mot. to Exclude Decls. of John Barton (Doc. 96). That motion was followed by additional briefs on both sides. Def.'s Oppos. (Doc. 98); Pl.'s Reply (Doc. 100); Def.'s Sur-Reply (Doc. 102). This is the motion, and the issue, currently pending before the court.

STANDARD OF REVIEW

It is a long standing rule that evidence in support of a motion for summary judgment will be subject to the federal rules of evidence. Sempier v. Johnson & Higgins, 45 F.3d 724, 727 (3d Cir. 1995) ("Summary judgment is appropriate only when the *admissible* evidence fails to demonstrate a dispute of material fact and the moving party is entitled to judgment as a matter of law.") (emphasis added) (citation omitted); Fed. R. Civ. Pro. 56(e) ("Supporting and opposing affidavits 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.") (emphasis added). Thus, I must determine whether consideration by the court of Barton's testimony, in resolving the parties' motions for summary judgment, would violate the federal rules of evidence.

DISCUSSION

Plaintiff urges this court to exclude Barton's testimony. His argument, while interrelated has two distinct prongs. First, plaintiff argues that any consideration, by the court, of Barton's declarations will violate 18 U.S.C. § 207, a criminal statute that restricts the post-employment activities of former government employees. Plaintiff's second argument is that Barton's

statements constitute impermissible¹ expert opinion testimony because they are based on his specialized knowledge of and expertise in the health care insurance industry. In response to both arguments, defendant asserts that Barton is a lay witness with factual information and permissible lay opinion testimony regarding the contract between the government and defendant. I will address each of plaintiff's arguments in turn.

I. Violation of Section 207

Plaintiff's first argument is based on Section 207 of the Ethics in Government Act. Section 207 is a criminal statute. Its express language prohibits former government employees from engaging in certain activities. Plaintiff argues that any consideration, by the court, of Barton's declarations will violate certain provisions of this section, and thus that such evidence should be ruled inadmissible.²

Plaintiff initially argues that Barton's declarations violate Section 207(a)(1). That provision, entitled "[p]ermanent restrictions on *representation* on particular matters" (emphasis added), states:

Any person who is an officer or employee (including any special Government employee) of the executive branch of the United States (including any

¹ Plaintiff claims that Barton would be unable to testify as an expert witness because defendant did not follow the procedures laid out in the Rules of Civil Procedure regarding the admission of expert testimony, *i.e.*, listing him as an expert witness and submitting an expert witness report during initial disclosures. Because I conclude that most of Barton's testimony is admissible as fact and lay opinion testimony, and I will not rely on other statements that may be construed as expert opinion, there is no need to address whether or not Barton could have been offered as an expert witness.

² In an evidentiary sense, plaintiff is arguing that Barton's declarations are not relevant because they were obtained in violation of the law. He relies, presumably, on the text of Rule 401 of the federal rules of evidence which states that evidence is relevant and admissible "except as otherwise provided . . . by Act of Congress." FED. R. EVID. 401.

independent agency of the United States), or of the District of Columbia, and who, after the termination of his or her service or employment with the United States or the District of Columbia, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, *on behalf of any other person* (except the United States or the District of Columbia) in connection with a particular matter . . . (A) in which the United States or the District of Columbia is a party or has a direct and substantial interest, (B) in which the person participated personally and substantially as such officer or employee, and (C) which involved a specific party or specific parties at the time of such participation . . . shall be punished as provided in section 216 of this title.

18 U.S.C.A. § 207(a)(1) (West 2000) (emphasis added).

Thus, the issue under this provision is whether Barton is representing CGLIC or appearing “on behalf of” CGLIC. The evidence shows he is not. There is no evidence that Barton was acting as a representative or consultant for CGLIC. Nor is there evidence that he was acting on behalf of CGLIC. See Barton Depo. at 25-26 (stating that he did not think he was acting in violation of the Ethics in Government Act “as long as [he] was not representing Connecticut General but was just answering questions as to [his] experience or knowledge at the time”). Barton received no compensation from either CGLIC or defense counsel. He performed no additional work for defendant. He did not conduct an independent evaluation of the documents in this matter. He did not review witness depositions. He did not formulate proposed testimony for the defendant. Defense counsel contacted Barton and asked him questions concerning factual issues raised by plaintiff. Defense counsel then drafted declarations consistent with Barton’s answers and provided drafts for correction to Barton prior to submitting them to the court. This seems very much like the procedure often used by attorneys in interviewing potential witnesses, the goal being to obtain a written statement from the witness on issues relevant to the case. Barton merely responded to questions based on his personal

knowledge of certain contracts while employed by the government. There is nothing consulting-like about this arrangement.³ As such, I find that none of Barton's actions indicate that he was acting as a representative of, a consultant to, or on behalf of CGLIC, and thus, I conclude that Section 207(a)(1) is inapplicable to this case.

Plaintiff also argues that Barton's declarations run afoul of Section 207(j)(6)(A) which prohibits certain former government employees from serving as expert witnesses in certain cases. More specifically, that provision states:

A former officer or employee of the executive branch of the United States (including any independent agency) who is subject to the restrictions contained in subsection (a)(1) with respect to a particular matter may not, except pursuant to court order, serve as an expert witness for any other person (except the United States) in that matter . . .

18 U.S.C.A. § 207(j)(6)(A) (West 2000).

The issue under this provision is whether Barton was acting as an expert witness for defendant. The evidence shows he was not. He was not retained by defendant as an expert witness. He was not paid. He was testifying about matters of which he had personal knowledge while working for the government. Again, based on the above facts, there is nothing to indicate that Barton was hired or acted as an expert witness for defendant. Thus, Section 207(j)(6)(A) is

³ Plaintiff specifically points to two instances of conduct as showing that Barton was acting as a consultant or representative of defendant. First, plaintiff argues that Barton was soliciting business from defendant. While Barton did send a letter advising defendant and many others of the availability of his services as an independent consultant, there is no evidence in the record that defendant ever retained him as such in this case. Second, plaintiff argues that Barton was acting on behalf of defendant because he spent a whole day with defense counsel in Washington D.C. preparing for his deposition. The facts, however, show that Barton was in D.C. on other business and that he met with defense counsel for only two hours. Further, the deposition preparation was necessary because plaintiff requested the deposition. Such facts do not make Barton a consultant.

also inapplicable.

Finally, there is a dispute between the parties as to whether the exception listed in Section 207(j)(6), which states that “nothing in [Section 207] shall prevent an individual from giving testimony under oath, or from making statements required to be made under penalty of perjury,” includes declarations like Barton’s. 18 U.S.C.A. § 207(j)(6) (West 2000 and Supp. 2002).⁴ Plaintiff relies on a regulation in support of its argument that the exception does not cover such declarations. That regulation, 5 C.F.R. § 2637.208, describes the precursor⁵ to Section 207(j)(6):

A former Government employee may make any statement required to be made under penalty of perjury, such as those required in registration statements for securities, tax returns, or security clearances. The exception does not, however, permit a former employee to submit pleadings, applications, or other documents *in a representational capacity on behalf of another* merely because the attorney or other representative must sign the documents under oath or penalty of perjury.

5 C.F.R. § 2637.208 (emphasis added).

While arguably on point, the regulation’s plain text does not prohibit Barton’s declarations. It does not prohibit any involvement with court proceedings by former government employees but merely prevents such employees from filing documents *in a representational capacity on behalf of another*. For example, the regulation seems aimed at closing any loopholes that may exist by which an attorney, who was a former government employee, could escape the

⁴ There are two sub-exceptions to the testimony exception but neither is relevant here. The first exception maintains the rule that former government employees cannot serve as expert witnesses except by court order. 18 U.S.C.A. § 207(j)(6)(A) (West 2000 and Supp. 2002). I find this exception inapplicable here as shown above. The second exception pertains to former employees of the District of Columbia, 18 U.S.C.A. § 207(j)(6)(B) (West 2000 and Supp. 2002), and has no bearing on this case.

⁵ The language of the section remained the same; it was merely re-designated under a different letter.

dictates of the statute. The regulation also may prohibit the filing of amicus curiae briefs by former government employees. It does not, however, prevent the submission of relevant factual information in the form of declarations by former government employees. Thus, because there is no evidence that Barton ever acted in a representational capacity or on behalf of CGLIC,⁶ I conclude that Barton's two declarations, both signed under penalty of perjury, are admissible pursuant to this exception.

For the reasons outlined above and because every party to a lawsuit is entitled to every man's testimony as to the factual matters within the personal knowledge of that witness,⁷ I will deny plaintiff's motion to exclude Barton's testimony based on Section 207.

II. Rule 701

Plaintiff's second argument is that defendant is trying to have Barton's statements considered under the guise of lay opinion without meeting the strict discovery and foundation requirements imposed on the admission of expert testimony. Rule 701, which establishes the line between lay and expert opinion testimony, provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

FED. R. EVID. 701. Thus, the offer of lay opinion testimony must meet three criteria; it must be: (1) rationally based on the perception of the witness; (2) helpful to a clear understanding of the

⁶ See supra pages 6, 7.

⁷ It is a "longstanding principle that the public has a right to every man's evidence." United States v. Dionisio, 410 U.S. 1, 9-10 (1973) (citations and quotations omitted).

witness' testimony or the determination of a fact in issue; and (3) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

After reviewing Barton's declaration and his supplemental declaration, I must reject plaintiff's contention. I find that most of Barton's declarations contain factual statements based on his personal knowledge and perception. To the extent that any of the statements by Barton are opinions, they are based on knowledge he has by virtue of his position as the former contracting officer for defendant's contract during the years at issue. FED. R. EVID. 701 (advisory committee notes to the 2000 amends.) ("Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of *the particularized knowledge that the witness has by virtue of his or her position in the business.*") (emphasis added). The statements are thus derived from his particularized business knowledge and rationally based on his perceptions as the contracting officer. *Id.* Knowledge and perceptions of this kind are precisely what the committee to the Rules of Evidence, and the judges who have determined such issues,⁸ would classify as lay opinion testimony.

There are, however, several statements that may go beyond Barton's personal knowledge and experience and that may offer expert opinion testimony (*see, e.g.*, ¶¶ 14 and 16 in Barton's

⁸ Courts interpreting the amended rule have found that lay opinion testimony may include the following: (1) permitting a witness to testify as to the meaning of a term as used in certain copyright registrations, Medforms, Inc. v. Healthcare Management Solutions, Inc., 290 F.3d 98, 111 (2d Cir. 2002); (2) permitting the owner of a business to testify to the value or projected profits of the business, Lighting Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1175 (3d Cir. 1993) (cited with approval in the advisory committee notes to the 2000 amendments to Rule 701); (3) permitting an employee to testify to the conclusions he formed while investigating his company's purchasing department files, United States v. Leo, 941 F.2d 181, 193 (3d Cir. 1991); and (4) permitting a company's financial advisor to testify to the effect of certain credit and loan agreements on another company's operations, King v. Hartford Packing Co., Inc., 189 F. Supp. 2d 917, 925 (N.D. Ind. 2002).

initial declaration). To the extent that any of the statements do so, I will not rely on them in deciding the pending motions for summary judgment.

Furthermore, to the extent that any of Barton's statements conflict with the declaration of Rodney Benson submitted by the United States in an amicus curiae brief on November 1, 2002, I will not consider them because for purposes of a summary judgment motion I must consider the facts in a light most favorable to the non-moving party.⁹

CONCLUSION

For the reasons set forth above, plaintiff's motion to exclude Barton's declarations will be denied. An appropriate order follows.

⁹ It is noteworthy that the government did not raise the preclusion issue under Section 207 in its amicus curiae brief.

