

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN  
GREEN BAY DIVISION**

UNITED STATES OF AMERICA,	X	
	:	CIVIL ACTION No. 07-C-316
	Plaintiff,:	
v.	:	
	:	<b>MENOMINEE TRIBAL ENTERPRISES'</b>
MENOMINEE TRIBAL ENTERPRISES,	:	<b>MEMORANDUM OF LAW IN</b>
the principal business arm	:	<b>SUPPORT OF ITS MOTION TO</b>
of the Menominee Indian Tribe of Wisconsin,	:	<b>STRIKE THE DECLARATION OF</b>
MARSHALL PECORE, and	:	<b>MICHAEL CHATMON AND EXHIBITS</b>
CONRAD WANIGER,	:	<b>THERETO</b>
	:	
	Defendants.:	
	X	

**INTRODUCTION**

The United States' ("Government") attempt to submit new evidence at this stage of the proceedings, namely, the Declaration of Michael Chatmon and Exhibits thereto, is improper, and these materials should be stricken from the record. These materials should be stricken for the additional reason that it is the province of the Court to determine what the law is, not an administrative employee's.

**ARGUMENT**

The Government's new "evidence" is the same type of evidence that the Seventh Circuit found improper in *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 252 (7th Cir. 1987) ("[m]ost of the 'newly discovery evidence' Rothwell submitted, along with its three briefs filed in support of the motion to reconsider, was either case law or commodity rules that were in existence before the motion for summary judgment was even filed.") As in *Rothwell*, the purported "legal and regulatory scheme" now proffered by the Government was in existence before the motion for summary judgment was filed, and there is no excuse for the Government's failure to file these materials before.

The Government's attempt to supplement the record for appeal through a motion for reconsideration is equally improper, and the Chatmon Declaration (and Exhibits thereto) should be stricken from the record. *Morgan v. Harris Trust and Sav. Bank of Chicago*, 867 F.2d 1023, 1028 (7th Cir. 1988); *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 474 (5th Cir. 1989) (party declining to offer evidence during summary judgment should not be allowed to "slip it into the record through a motion for reconsideration."); *Chirco v. Gateway Oaks, LLC*, No. 02-73188, 2006 WL 5056546, at \*2 (E.D. Mich. July 21, 2006).

The Chatmon Declaration must be stricken for the additional reason that it is the Court's province to determine what the law is, not an administrative employee's. *Steele v. Depuy Orthopaedics, Inc.*, 295 F. Supp. 2d 439, 445-46 (D.N.J. 2003) (striking affidavit of former FDA employee regarding the perfunctory nature of an agency "Real-Time review" as opposed to a "full PMA review" because "whether the FDA's approval of a PMA supplement imposes requirements on a particular device is a question of law to be determined by the Court, not a question of fact . . .").

### **CONCLUSION**

For the foregoing reasons, Menominee respectfully requests that the Court strike the Declaration of Michael Chatmon and Exhibits thereto from the record.

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