

# In The United States Court of Federal Claims

No. 07-613C

(Filed: May 17, 2011)

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NORTHROP GRUMMAN COMPUTING  
SYSTEMS, INC.,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

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## ORDER

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On March 21, 2011, defendant filed a motion *in limine* for summary judgment, in part, concerning non-breach of the non-substitution clause and exclusion of evidence and testimony upon this issue. On the same day, defendant filed a motion *in limine* to exclude the report and testimony of plaintiff's expert Scott W. Woehr. The motions have been fully briefed. Based on its review of these briefs and accompanying materials, the court rules as follow:

1. Defendant's motion *in limine* for partial summary judgment on non-breach of the non-substitution clause is hereby **GRANTED**. In the court's view, the Federal Circuit's decision in *McHugh v. DLT Solutions, Inc.*, 618 F.3d 1375 (Fed. Cir. 2010), is controlling. The Federal Circuit, faced with a nearly identical non-substitution clause, interpreted "replace" to require the defendant to take some action beyond continuing to use the same, unmodified software it had previously used. *Id.* at 1380. Application of this ruling here leads to the conclusion that defendant's continued use of the ISP-based software did not constitute a replacement of the Oakley software. Accordingly, the court finds, as a matter of law, that defendant did not breach the non-substitution clause of the modified Delivery Order. The court reserves the right to issue a more extensive opinion on this issue as part of any ruling or opinion ultimately resolving this case; and

2. Defendant's motion *in limine* to exclude Scott W. Woehr is hereby **GRANTED**. Mr. Woehr, in his expert report and deposition testimony, opines on the interpretation and application of the clauses at issue to the facts in this case. In the court's view, his report and testimony involve issues that are within the unique purview of the court; the report and testimony would not assist the court as the trier of fact here. *See* Fed. R. Evid. 702. Accordingly, the court finds that his expert testimony is inadmissible. *See Stobie Creek Invs. LLC v. United States*, 608 F.3d 1366, 1383-84 (Fed. Cir. 2010), *aff'g*, 81 Fed. Cl. 358, 360-62 (2008) (citing cases excluding expert testimony on legal issues and analysis); *Mola Dev. Corp. v. United States*, 516 F.3d 1370, 1379 n.6 (Fed. Cir. 2008).

At the May 20, 2011, pre-trial conference, the parties shall be prepared to discuss how the foregoing rulings impact their witness lists.

**IT IS SO ORDERED.**

s/ Francis M. Allegra

Francis M. Allegra

Judge