

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

RAYMING CHANG, et al.,

Plaintiffs,

v.

Civil Action No. 02-2010 (EGS/JMF)

UNITED STATES, et al.,

Defendants.

MEMORANDUM OPINION

I have now finished resolving the District's claims of privilege as to the documents submitted for my in camera review. I note however that there is a distinct difference, depending upon the function I was performing, in how I resolved the issues before me. In my capacity as the magistrate judge presiding over discovery, I resolved claims of privilege that were asserted in response to discovery demands. In the most recent opinion of that type, dated January 24, 2011, although I overruled the District's claims of privilege, I stayed its obligation to produce the documents to permit review of my decision by the presiding judge.

Alternatively, during the course of the hearings I held in my capacity as special master, I would take a claim of privilege under advisement and resolve it after the hearing. In those instances, however, I permitted plaintiffs immediate access to the documents. The difference in my treatment of these privilege claims when presiding as special master flows from my perception that the Order appointing me as special master does not appear to contemplate interlocutory appeals from my rulings. I would no more expect such an interlocutory appeal had I been presiding over a trial in which I was functioning as trial judge and sustained or overruled

any objection, whether it was premised on a privilege or urged the irrelevancy of an exhibit or that certain testimony was hearsay. Additionally, the Supreme Court (overturning this Circuit's law to the contrary) has held that interlocutory appeals from rulings overturning privilege claims are prohibited. FTC v. Church & Dwight Co., Inc., No. 10-Misc.-149, 2010 WL 5209257, at *5 (D.D.C. Dec. 23, 2010) (citing Mohawk Indus. Inc. v. Carpenter, 130 S.Ct. 599 (2009)).

While I appreciate that the determination of whether to consider the District's interlocutory appeal from my ruling as special master is before Judge Sullivan, I wanted to provide the Judge and the parties an explanation of what would otherwise be an inexplicable inconsistency in my ruling on privilege claims.



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Date: 2011.02.01 09:01:30 -05'00'

JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE