

Oct 1 1998

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

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In the Matter of )	
R.J. REYNOLDS TOBACCO COMPANY. )	DOCKET NO. 9285
a corporation. )	
_____ )	

ORDER DENYING CERTIFICATION TO COMMISSION  
OF RESPONDENT'S REQUEST FOR JUDICIAL ENFORCEMENT  
OF THIRD PARTY SUBPOENA ISSUED TO DR. JOHN P. PIERCE

On July 22, 1998 a subpoena ad testificandum was served on Dr. John P. Pierce. Dr. Pierce is one of complaint counsel's non-testifying experts in this case. He recently published the results of a longitudinal, peer-reviewed study, Tobacco Industry Promotion of Cigarettes and Adolescent Smoking, JAMA, February 18, 1998, at 511-15. The study found a correlation between having a favorite cigarette advertisement or owning or being willing to own a cigarette brand promotional item (such as those used in the Joe Camel campaign) and the uptake of smoking among children and adolescents. All three of complaint counsel's causation experts find that "Dr. Pierce's study has made an important contribution to the science and literature in this area."<sup>1</sup> and they each rely on the study as part of the basis of their opinions.

On August 26, 1998 pursuant to the subpoena, respondent R.J. Reynolds Tobacco Company ("Reynolds") served notice of the deposition of Dr. Pierce.<sup>2</sup> On September 17, 1998 Dr. Pierce appeared in response to Reynold's subpoena, but after three hours and 126 pages of testimony he and his attorney left the deposition prior to completion.

Reynolds wants to continue the deposition of Dr. Pierce because they argue that complaint counsel will rely on it as evidence, and that they should be allowed to show

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<sup>1</sup> Complaint counsel's motion filed September 30, 1998, at p. 2.

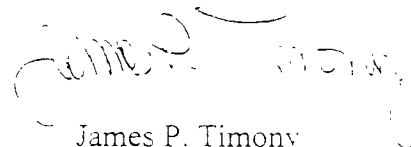
<sup>2</sup> Respondent previously had subpoenaed documents relating to the study from Dr. Pierce.

the alleged flaws<sup>3</sup> in the study. Complaint counsel argue that respondent cannot seek discovery of the study since Dr. Pierce's status as a non-testifying expert protects from discovery his expert opinions, in the absence of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

The arguments on this motion have centered on Dr. Pierce's status as a non-testifying expert. The underlying issue, however, is the evidentiary nature of Dr. Pierce's study as it will be introduced in this trial. Being hearsay, the study will be offered, if I understand the prospective proffer, as part of the basis for opinions by three of complaint counsel's expert witnesses. The study will apparently not be offered for the truth of the matters asserted therein, and will be offered for the limited purpose of providing support for the experts' opinions. McCormick on Evidence, p. 372 n.6 (4th ed. 1992).

Respondent has received a plethora of discovery on this study to prepare for cross examination of the three experts.

Having considered respondent Reynolds' motion for certification to the Commission for enforcement of the subpoena ad testificandum to Dr. John P. Pierce dated September 25, 1998, and complaint counsel's opposition thereto dated September 28, 1998, it is hereby ORDERED that respondent's motion for certification is DENIED.



James P. Timony  
Administrative Law Judge

Dated: October 1, 1998

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<sup>3</sup> Respondent argues that:

Important classifications and assumptions appear to have been changed from one study to the next. The questionnaires were altered in material respects. Protocols were modified during the studies. The data does not appear to support a number of Dr. Pierce's conclusions, and complaint counsel's witnesses have found significance in Dr. Pierce's conclusions beyond his actual findings.

Respondent's Request for certification, at p. 3.