

United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510-6250

CHRISTOPHER R. HIXON, STAFF DIRECTOR
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January 12, 2018

The Honorable Claire McCaskill
Ranking Member
Committee on Homeland Security and Governmental Affairs
442 Hart Senate Office Building
Washington, DC 20510

Dear Ranking Member McCaskill:

Thank you for your letter dated December 21, 2017, requesting that the Committee issue a subpoena to Teva Pharmaceutical Products Ltd. (Teva).¹ During my Chairmanship, the Committee has done extensive and collaborative work examining the opioid epidemic.² In March 2017, in furtherance of your oversight duties as Ranking Member, you initiated a significant inquiry into the opioid epidemic without seeking to work collaboratively with me.³ That is certainly your right and prerogative, and the severity and complexity of the issue lends itself to multiple lines of inquiry and oversight that the whole Committee will continue to explore. However, for the reasons that follow, I cannot agree to your request at this time

Since March 2017, you have expanded your inquiry to include several drug manufacturers, drug distributors, and over a dozen other organizations. In total, you have sought several categories of information from 27 separate entities, including Teva. As I understand your request to Teva, you are seeking to “understand[] the role of manufacturers and distributors in overseeing opioid shipments and preventing diversion.”⁴

¹ Letter from Claire McCaskill, S. Comm. on Homeland Security & Governmental Affairs, to Ron Johnson, S. Comm. on Homeland Security & Governmental Affairs (Dec. 21, 2017).

² See, e.g., *The Effects of Border Insecurity and Lax Immigration Enforcement on American Communities: Hearing before the S. Comm. on Homeland Security & Governmental Affairs*, 115th Cong. (2017); *Border Security and America's Heroin Epidemic: The Impact of the Trafficking and Abuse of Heroin and Prescription Opioids in Wisconsin: Field Hearing Before the S. Comm. on Homeland Sec. and Gov't Affairs*, 114th Cong. (2016); *Examining the Impact of the Opioid Epidemic in Ohio: Field Hearing Before the S. Comm. on Homeland Sec. and Gov't Affairs*, 114th Cong. (2016); *All Hands on Deck: Working Together to End the Trafficking and Abuse of Prescription Opioids, Heroin, and Fentanyl: Field Hearing Before the S. Comm. on Homeland Sec. and Gov't Affairs*, 114th Cong. (2015); S. Comm. on Homeland Sec. and Gov't Affairs, *America's Insatiable Demand for Drugs: The Public Health and Safety Implications for Our Unsecure Border* (Sept. 1, 2016).

³ On the afternoon of March 27, your staff transmitted drafts of letters to five pharmaceutical companies that requested several categories of documents related to opioid sales and marketing. Your staff noted that you planned to send the letters the following morning. My staff replied the same afternoon, requesting more time to review the draft letters to find areas in which we could collaborate. Your staff responded that you would welcome me joining the letters as drafted, but that you would not delay the letters. You transmitted the letters early on March 28.

⁴ Letter from Claire McCaskill, S. Comm. on Homeland Security & Governmental Affairs, to Yitzhak Peterburg, Teva Pharma. Products Ltd. (July 26, 2017) [hereinafter “McCaskill letter to Teva”].

From what I understand about your interaction with Teva, it appears that the company made a good-faith effort to provide you with information you seek. According to Teva, the company held “numerous conversations” with your staff in early 2017 about the company’s role in overseeing opioid shipments and preventing diversions, culminating in a 90-minute discussion on July 24.⁵ In a letter to you, Teva described how it sought to provide information to your staff consistent with what they understood your interests to be. Teva staff detailed the company’s systems for identifying and reporting potentially suspicious orders, explained Teva’s “state-of-the-art analytic database solutions” for tracking sales to its customers and its customers’ customers, and described how Teva assesses its affiliates’ relationships with opioid customers.⁶ Teva reported that your staff called this briefing “extremely helpful.”⁷ Teva later sent you a letter memorializing this information.⁸

In your letter dated December 21, you argue that the Committee must subpoena Teva due to “the continued lack of cooperation from Teva.”⁹ With the information before me, it is not readily apparent that Teva has declined to cooperate with your inquiry. Indeed, Teva appears to have spent significant time and resources seeking to address the issues you raised. Based on this record, I do not believe that compulsory process is warranted at this time for several reasons.

First, you have not articulated why the information that Teva has already provided in response to your requests is insufficient to satisfy your oversight interests. The information that Teva provided seems to address your goal of understanding “the role of manufacturers and distributors in overseeing opioid shipments and preventing diversion.”¹⁰ It is not clear what information you could gather from the documents that you do not possess already.

Second, it is not apparent whether you have sought to accommodate or mitigate Teva’s confidentiality concerns. In its letter to you, Teva articulated valid concerns that public disclosure of its sensitive proprietary information could chill the willingness of Teva’s customers to report suspicious orders, and that such information could be misused during private litigation.¹¹ I am not aware of any effort you have made to attempt to accommodate Teva’s articulated concerns, whether through *in camera* reviews, redactions, or other means.

Indeed, based upon your past practice, Teva’s concern may be well-founded. In September 2017, you released a staff report about Insys Therapeutics containing material that you had obtained from Insys during your oversight.¹² You enclosed with your report a document

⁵ Letter from James Matthews, Foley & Lardner LLP, to Claire McCaskill, S. Comm. on Homeland Security & Governmental Affairs (Oct. 5, 2017).

⁶ *Id.*

⁷ *Id.*

⁸ Letter from James Matthews, Foley & Lardner LLP, to Claire McCaskill, S. Comm. on Homeland Security & Governmental Affairs (Aug. 30, 2017).

⁹ Letter from Claire McCaskill, *supra* note 1, at 4.

¹⁰ McCaskill letter to Teva, *supra* note 4.

¹¹ Letter from James Matthews, *supra* note 5.

¹² S. Comm. on Homeland Security & Governmental Affairs Minority Staff Report, Insys Therapeutics and the Systemic Manipulation of Prior Authorization (2017).

obtained from Insys, which Insys had labeled as “Attorney Client Privileged & Confidential,” and for which Insys had requested confidential treatment.¹³ You also invited two parties in litigation against Insys to testify at a roundtable about the findings of your report.¹⁴

Third, it is not apparent how the material you seek to compel from Teva will explain Teva’s “role in the opioids marketplace.”¹⁵ Instead, you propose to compel Teva to produce material identifying its Missouri-based customers suspected of opioid abuse, and documents concerning Teva’s work with distributors on anti-diversion efforts. Neither of these categories directly explains Teva’s role in the opioids marketplace, and ignores the national scope of the crisis.

Finally, you justify your request for a subpoena to Teva by describing private litigation involving Teva related to the opioid crisis.¹⁶ Teva is a party to the national opioid litigation recently consolidated in the Northern District of Ohio, which will litigate issues similar to the questions you raise in your requests to Teva.¹⁷ The court recently approved Paul J. Hanly, a shareholder at Simmons Hanly Conroy, as co-lead counsel in the litigation.¹⁸ Mr. Hanly has bragged about using the Big Tobacco settlement as a template for the opioid litigation, seeking to file 1,000 lawsuits to force drug companies to negotiate for a settlement.¹⁹ With these cases pending, and in light of the fact that information you released about Insys has already been used in private litigation against Insys,²⁰ I believe the Committee must proceed carefully. The issuance of a subpoena to Teva that compels the production of documents at issue in private litigation could create the appearance that the Committee’s work is being conducted to advance the interests of private litigants, an appearance that you surely do not intend and would seek to avoid.

I appreciate your partnership on the Committee, as well as our frank and honest relationship. I support your right to request information relating to your oversight interests, which is why I agreed to invite Teva to an unrelated hearing of the Committee examining the perverse incentives created by Medicaid that contribute to the opioid epidemic.²¹ In this case, I am not convinced that a subpoena to Teva Pharmaceuticals is necessary at this time to advance your oversight or that the issuance of a subpoena would reflect well on the Committee.

¹³ *Id.* Ex. B; *see, e.g.*, Letter from Brian D. Smith, Covington & Burling LLP, to Brandon Reavis (Apr. 25, 2017).

¹⁴ S. Comm. on Homeland Security & Governmental Affairs Minority Roundtable, “Fueling an Epidemic: Insys Therapeutics and the Systemic Manipulation of Prior Authorization” (Sept. 12, 2017).

¹⁵ Letter from Claire McCaskill, *supra* note 1, at 4.

¹⁶ *Id.* at 2 (citing *County of Wayne & County of Oakland v. Purdue Pharma L.P., et al.*, No. 2:17-cv-13334 (Oct. 12, 2017), and *City of Chicago v. Purdue Pharma L.P. et al.*, No. 14-cv-04361 (Oct. 25, 2016)).

¹⁷ *See In re: National Prescription Opiate Litigation*, Transfer Order, MDL-2804 (U.S. Judicial Panel on Multidistrict Litigation, Dec. 5, 2017).

¹⁸ *See, e.g.*, Press Release, Simmons Hanly Conroy, “Paul Hanly of Simmons Hanly Conroy to Co-Lead Legal Team in Federal Opioid Litigation” (Jan. 4, 2018).

¹⁹ Steve LeVine, *Lawsuits may seek hundreds of billions from opioid makers*, Axios, Dec. 20, 2017.

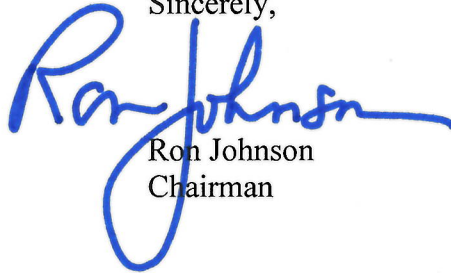
²⁰ *See* Plaintiff’s Brief in Support of Motion for Remand Returnable November 6, 2017, *Fuller & Fuller v. Matalon M.D., et al.*, 2:17-cv-07877 (D.N.J. Oct. 11, 2017).

²¹ *See “Unintended Consequences: Medicaid and the Opioid Epidemic”: Hearing before the S. Comm. on Homeland Security & Governmental Affairs*, 115th Cong. (2018).

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I look forward to continuing to work collaboratively with you on addressing the root causes of the opioid crisis and the other pressing issues facing our Committee.

Sincerely,

A handwritten signature in blue ink that reads "Ron Johnson". The signature is written in a cursive style with a large initial "R" and a long, sweeping underline.

Ron Johnson
Chairman