KIRKLAND & ELLIS LLP
AND AFFILIATED PARTNERSHIPS

Diana M. Watral
To Call Writer Directly:
+1 312 862 2772
diana.watral@kirkland.com

300 North LaSalle Street
Chicago, IL 60654
United States

+1 312 862 2000

www.kirkland.com

Facsimile:
+1 312 862 2200

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Via ECF

The Hon. Manish S. Shah
United States District Judge
Northern District of Illinois
219 South Dearborn Street
Chicago, IL 60604

Re: *In re Humira (Adalimumab) Antitrust Litig.*, 1:19-cv-1873

Dear Judge Shah:

I write on behalf of the AbbVie defendants in the above-referenced matter in response to Plaintiffs' Notice of Supplemental Authority (Dkt.167)—filed without seeking leave of Court[1]—concerning *Nuance Communications, Inc. v. Omilia Natural Language Solutions, Ltd.*, 2020 WL 2198362 (D. Mass. May 6, 2020). Contrary to Plaintiffs' assertion, *Nuance* has no "particular relevance," Dkt.167 at 1—or any relevance whatsoever—to this case, given how far afield the allegations in *Nuance* are from the allegations in Plaintiffs' Consolidated Complaint (Dkt.109).

In *Nuance*, the patent defendant/antitrust plaintiff (Omilia) brought a counterclaim under Section 2 of the Sherman Act based on the patent holder (Nuance) "acquir[ing] at least 16 additional companies" and "over 5,000 [relevant] patents during the 2005-2018 timeframe." 2020 WL 2198362, at *1. According to Omilia, Nuance would "threaten[ ] to assert and/or actually assert[ ] baseless patent infringement litigation using its massive portfolio of acquired patents to drive its competitors out of the market and/or coerce them into being acquired by Nuance." *Id.* at *4. This conduct formed the basis of the court's decision to deny Nuance's motion to dismiss. *See id.* at *4 ("Omilia has plausibly alleged that Nuance violated Section 2 of the Sherman Act by wielding its pool of patents against competitors to threaten costly, baseless litigation unless the competitors agree to a buy out or merger, and by notifying the competitors' potential customers of

[1] *Williams v. City of Chi.*, 315 F. Supp. 3d 1060, 1069 n.3 (N.D. Ill. 2018) ("For clarity, the correct procedure [for introducing supplemental authority] is for [a party] to file a motion for leave to file supplemental authority and to notice that motion for a particular date where the parties can appear and be heard.").

the possibility of litigation, all with an anti-competitive motive."). AbbVie's alleged conduct, however, is nothing of the sort.

First, as AbbVie explained in Defendants' reply brief in support of dismissal, courts readily distinguish between "strategic *ex post* patent aggregation" by acquisition—the conduct in *Nuance*—and "internal patent development"—the alleged conduct by AbbVie. Reply Br. (Dkt.150) 3-4. Indeed, that Omilia also asserted a claim pursuant to Section 7 of the Clayton Act (which Plaintiffs here did not do), which "prohibits ***asset acquisitions*** whose effect 'may be substantially to lessen competition, or to tend to create a monopoly,'" *Nuance*, 2020 WL 2198362, at *6 (emphasis added) (quoting 15 U.S.C. §18), shows how Nuance and AbbVie acquired their patent portfolios in "opposite" ways, *see* Reply Br. 3. AbbVie ***innovated*** its "more than 100" U.S. patents through research and development, Compl. ¶4; *see* Opening Br. (Dkt.126) 4-5, whereas Nuance ***purchased*** its "over 5,000" patents through "acquir[ing] actual and potential competitors," 2020 WL 2198362, at *1. Only the latter conduct is subject to antitrust scrutiny. *See* Reply Br. 3-4 (citing Areeda & Hovenkamp, *Antitrust Law*, ¶704c).

Second, Omilia alleged that Nuance acted with the intent "to drive its competitors out of the market and/or coerce them into being acquired by Nuance." *Id.* at *4. Plaintiffs make no similar allegation here. Nor could they. AbbVie entered into agreements with biosimilars that provide dates certain on which those biosimilars may begin selling their products in the U.S. and European markets, respectively, ***before*** AbbVie's patents expired. *See* Opening Br. 9-11; Compl. ¶211. Licensing competitors to ***enter*** the market to sell an allegedly competing product (prior to patent expiration) is worlds apart from seeking to ***eradicate*** competitors from the market or acquire them.

Third, contrary to Plaintiffs' suggestion, *Nuance* does not stand for the proposition that courts should not decide at dismissal whether *Noerr–Pennington* immunity applies. *See* Dkt.167 at 2. Unlike in *Nuance*—where Omilia clearly invoked *Noerr–Pennington*'s sham petitioning exception in its counterclaim complaint, *see* 2020 WL 2198362, at *5; Dkt.44 ¶¶91, 130, 133, 134, 147, 148, 162 in 1:19-cv-11438 (D. Mass.)—Plaintiffs' Complaint fails to invoke that exception, never once alleging that AbbVie's lawsuits were "objectively baseless." *See* Opening Br. 17. That fact alone draws a bright line between the complaint in *Nuance* and the allegations here. *See also* Opening Br. 16-17 & n.7 (citing cases in which courts decide *Noerr–Pennington* immunity at the dismissal stage).

In *Nuance*, moreover, it arguably made sense to pass on the *Noerr–Pennington* question because the court believed that it "ha[d] no basis to assess the merits of the underlying patent suit." 2020 WL 2198362, at *5. But here, numerous of AbbVie's asserted patents have survived *inter partes* review, *see* Opening Br. 6-7, 19, and each biosimilar company that AbbVie sued identified at least one AbbVie patent that they—as infringement ***defendants***—believed "could reasonably be

asserted" against them, *see* 42 U.S.C. §262(*l*)(3)(B)(i); Compl. ¶¶148, 165, 181, even though they could have identified no such patent(s), *see* 42 U.S.C. §262(*l*)(5)(B)(ii)(II).

Additionally, AbbVie instituted only three lawsuits against biosimilar companies, whereas Nuance initiated "at least seventeen patent lawsuits against its competitors," including some reflexively because competitors "refused a buy-out offer by Nuance." 2020 WL 2198362, at *1. The *Nuance* court also noted with respect to *Noerr–Pennington* immunity that, "even if [Nuance's] litigation is not baseless, Omilia has also alleged non-litigation conduct by Nuance, such as threats to litigate if a competitor does not agree to a buy-out, threats to competitors' customers, and statements to the market via the press regarding Nuance's buy-out strategy." *Id.* at *5. Plaintiffs make no similar allegations here regarding buy-outs or threats to customers.

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At bottom, *Nuance* is inapposite in light of its obviously distinguishable facts from the allegations here. If anything *Nuance* underscores just how untethered from the antitrust laws Plaintiffs' liability theories are.

Sincerely,

/s/ *Diana M. Watral*

Diana M. Watral

cc: Counsel of Record