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February 7, 2020

Peter R. Marksteiner
Clerk of the Court
United States Court of Appeals
for the Federal Circuit
717 Madison Place NW
Washington, DC 20439

RE: *Columbia Sportswear North America, Inc. v. Seirus Innovative Accessories, Inc.*
USCA Fed. Cir. Nos. 18-1329, -1331, -1728

Dear Mr. Marksteiner:

This letter responds to Columbia's letter regarding this Court's decision in *HVLPO2, LLC v. Oxygen Frog, LLC*, No. 19-1649 (Fed. Cir. Feb. 5, 2020). In *HVLPO2,* this Court reversed and remanded for a new trial because a fact witness had improperly given expert testimony at trial. *See id.* at 1. As this Court explained, the testimony at issue was improper because it was in "the clear purview of experts and lay witness testimony on such issues does not comply with the Federal Rules of Evidence or Civil Procedure." *Id.* at 7.

Contrary to Columbia's assertion, the *HVLPO2* decision has no bearing in this case. No lay witness testimony is challenged here. Indeed, the testimony Columbia complains of was expert testimony offered by an expert. Columbia does not assert otherwise. Instead, Columbia grasps onto one of the reasons this Court gave to support its determination that lay testimony on expert subjects was improper—that expert testimony must be disclosed prior to trial. *See id.* at 6. Columbia did not raise this challenge in its Petition, arguing only that the testimony was allegedly "false," and thus improperly admitted. *See* ECF 102 at 23-25. In any event, the *HVLPO2* decision is inapposite here, because this Court found Columbia failed to object to the testimony on any basis at trial and thus waived any such argument. *See* Oral Argument at 4:17-4:58 (Judge Moore: "You didn't subsequently object. You said nothing. . . . It's your obligation at that point to object and preserve it for appeal. You didn't.")

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Lastly, Seirus notes Columbia's continued mischaracterization of the record in this case. It is simply not true that "all parties and courts acknowledge the testimony to be incorrect and improper." At oral argument, the panel admonished Columbia's counsel for making a similar assertion. *See* Oral Argument at 22:40. As the panel properly found, the issue raised in Columbia's brief was one of expert credibility, and Columbia is not entitled to a new trial simply because the jury decided against it. *See* Panel Op. at 13.

Very truly yours,

/s/ Seth M. Sproul

Seth M. Sproul

cc: All Counsel of Record