

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF KENTUCKY  
LOUISVILLE DIVISION

WERNER CO.,	)	
	)	
Plaintiff,	)	
	)	Case No. 3:18-cv-00794-DJH
v.	)	
	)	
LOUISVILLE LADDER, INC.,	)	<u>JURY TRIAL DEMANDED</u>
	)	
Defendant.	)	
	)	

**SECOND AMENDED COMPLAINT FOR DECLARATORY JUDGMENT**

Plaintiff Werner Co. (“Werner”) brings this action against Defendant Louisville Ladder, Inc. (“Louisville Ladder”) and pleads as follows:

**NATURE OF THE ACTION**

1. This is an action arising under the Declaratory Judgment Act, [28 U.S.C. § 2201](#) *et seq.* and the patent laws of the United States, [35 U.S.C. § 1](#) *et seq.* Werner requests a declaratory judgment of non-infringement, invalidity, and unenforceability of one or more claims of U.S. Patent No. 7,000,731 (the “’731 patent”), entitled “Multi-Material Cover for a Ladder Rail End.”

**PARTIES**

2. Plaintiff Werner Co. is a Delaware corporation with its principal place of business in Greenville, Pennsylvania.

3. Upon information and belief, Defendant Louisville Ladder, Inc. is a Delaware corporation with its principal place of business in Louisville, Kentucky.

## **JURISDICTION AND VENUE**

4. This is an action for patent infringement arising under the patent laws of the United States, Title 35 of the United States Code. This Court has jurisdiction over this action pursuant to [28 U.S.C. §§ 1331 and 1338\(a\)](#).

5. Louisville Ladder is subject to personal jurisdiction in Kentucky because it does business here and its headquarters are here.

6. Venue is proper in the Western District of Kentucky pursuant to [28 U.S.C. § 1391\(b\)\(1\)](#) because Louisville Ladder resides here.

## **GENERAL ALLEGATIONS**

7. Since 2017, Louisville Ladder has asserted that Werner infringes one or more claims of the '731 patent.

8. On September 28, 2018, Louisville Ladder sued Werner in the United States District Court for the Eastern District of Texas, Marshall Division, alleging infringement of one or more claims of the '731 patent.

9. Venue over Louisville Ladder's infringement claims is improper in the Eastern District of Texas pursuant to [28 U.S.C. § 1400\(b\)](#), because Louisville Ladder is not incorporated in Texas and has no regular and established place of business in the Eastern District of Texas. Accordingly, on December 3, 2018, Werner moved to dismiss that case for improper venue pursuant to [Federal Rule of Civil Procedure 12\(b\)\(3\)](#). On January 8, 2019, Louisville Ladder filed a notice of voluntary dismissal without prejudice, and on January 10, 2019, the Eastern District of Texas issued an order dismissing Louisville Ladder's infringement complaint.

10. Louisville Ladder asserts that it owns the '731 patent.

11. One or more claims of the '731 patent are not infringed by Werner, invalid, and/or unenforceable due to Louisville Ladder's inequitable conduct during prosecution before the U.S. Patent Office.

12. An actual, justiciable controversy exists between Werner and Louisville Ladder with respect to the infringement of claims of the '731 patent.

## **COUNT I**

### **NON-INFRINGEMENT OF THE '731 PATENT**

13. Werner incorporates the foregoing paragraphs as if separately set forth herein.

14. There is an actual controversy within the meaning of 28 U.S.C. §§ 2201 and 2202 between Werner and Louisville Ladder concerning the infringement, validity, and enforceability of claims of the '731 patent that requires a declaration of rights by this Court.

15. Werner has not infringed one or more claims of the '731 patent.

16. Werner is entitled to a declaration that it has not infringed one or more claims of the '731 patent.

## **COUNT II**

### **INVALIDITY OF THE '731 PATENT**

17. Werner incorporates the foregoing paragraphs as if separately set forth herein.

18. One or more claims of the '731 patent is invalid under the patent laws of the United States, 35 U.S.C. § 1 et seq., including but not limited to §§ 102, 103, and/or 112.

19. At least claims 8-16 and 19-20 of the '731 patent are invalid under 35 U.S.C. §§ 102 and/or 103 because the claimed subject matter was anticipated by and/or obvious in view of the prior art.

20. For example, the subject matter of at least claims 8-16 and 19-20 of the '731 patent was anticipated by and/or obvious to those of ordinary skill in the art before July 30, 2002, in view of at least the following prior art printed publications:

- a. 1999 Louisville Ladder Professional Products Catalog ("1999 Louisville Catalog"), including disclosure of the RHINO 375 stepladders with FULL METAL BOOT ladder boots;
- b. 2001 Louisville Full Line Catalog ("2001 Louisville Catalog"), including disclosure of the RHINO 375 stepladders with FULL METAL BOOT ladder boots;
- c. Louisville Ladder Website Product Catalog ("2001 Louisville Website Catalog"), available at least as early as August 1999, including disclosure of the RHINO 375 stepladders with FULL METAL BOOT ladder boots;
- d. U.S. Patent No. 5,636,706 to Plotner et al. ("the Plotner patent"), assigned to Werner;
- e. Harper, Charles A., *Modern Plastics Handbook*, McGraw-Hill, 1999;
- f. 2000 Werner T7200 Ladder Brochure ("2000 Werner Brochure");
- g. 1996 Werner Climbing Products Catalog ("1996 Werner Catalog"), including disclosure of the 360 Series Aluminum Stepladders with Structural Molded Copolymer Tool-Tra Top;
- h. Huntsman Corporation Website, available at least as early as July 10, 2001, including disclosure of Polypropylene Impact Polymers;

21. On March 22, 2019, Werner filed with the U.S. Patent Trial and Appeal Board a Petition for *Inter Partes* Review, No. IPR2019-00336, as to claims 8-16 and 19-20 of the '731 patent based on these prior art printed publications.

22. Separate from and independent of the printed publications, the subject matter of at least claims 8-16 and 19-20 was anticipated by and/or obvious to those of ordinary skill in the art in view of at least the following ladder products that were publicly used, offered for sale, and/or sold in the United States before July 30, 2002:

- a. Louisville Ladder Rhino 375 stepladders with the FULL METAL BOOT ladder boot;
- b. Werner FS200 Series stepladders with the EDGE brace;
- c. Werner 5900 Series stepladders with the EDGE brace;
- d. Werner 6206 Series stepladders with the EDGE brace;
- e. Werner 6300 Series stepladders with the EDGE brace;
- f. Werner T7200 Pro Series stepladders with the EDGE brace;

23. Werner is entitled to a declaration that one or more claims of the '731 patent is invalid.

### **COUNT III**

#### **UNENFORCEABILITY OF THE '731 PATENT DUE TO INEQUITABLE CONDUCT**

24. Werner incorporates the foregoing paragraphs as if separately set forth herein.

25. During prosecution of the '731 patent, Louisville Ladder withheld material information from the U.S. Patent Office, including material information related to Louisville Ladder's own prior art commercial products and material information related to Werner's prior art commercial products and patents.

**Louisville Ladder's Public Advertising and Sale of the  
RHINO 375 Ladders with the FULL METAL BOOT Ladder Boot**

26. On or around June 11, 1999, Louisville Ladder announced its RHINO 375 series of stepladders, including "Louisville Ladder's unique FULL METAL BOOT wrap-around rail support at the ladder base."

27. In or around 1999, Louisville Ladder began selling RHINO 375 stepladders with the FULL METAL BOOT ladder boot.

28. From 1999 until at least 2002, Louisville Ladder advertised the RHINO 375 stepladders and the FULL METAL BOOT ladder boot in various publicly-available marketing materials.

29. Marketing materials describing the RHINO 375 stepladders and the FULL METAL BOOT ladder boot included catalogs, such as the 1999 Professional Product Catalog and the 2001 New Full Line Catalog, that were distributed publicly to customers, distributors, and other interested members of the public.

30. The Louisville Ladder website also featured the RHINO 375 stepladders and the FULL METAL BOOT ladder boot as part of an online catalog beginning in or around 1999.

**Knowledge of the Louisville Ladder Prior Art**

31. On July 30, 2002, Louisville Ladder employees Paul R. Swiderski, Donald L. Gibson, Michael S. Gaynor, and Eric V. Chevalier filed Patent Application Serial Number 10/207,926, which the U.S. Patent Office would later issue as the '731 patent on February 21, 2006.

32. By the time Mr. Swiderski, Mr. Gibson, Mr. Gaynor, and Mr. Chevalier applied for the '731 patent, Louisville Ladder had been publicly using, advertising, offering to sell, and/or

selling the RHINO 375 stepladders and the FULL METAL BOOT ladder boot for approximately three years.

33. On information and belief, Mr. Swiderski, Mr. Gibson, Mr. Gaynor, and/or Mr. Chevalier were aware of Louisville Ladder's public use, advertising, offers to sell, and/or sale of the RHINO 375 stepladders and the FULL METAL BOOT ladder boot on or before July 30, 2002.

### **Knowledge of the Werner Prior Art**

34. Prior to joining Louisville Ladder in or around June 1999, Mr. Gibson had been employed by Werner for approximately nine years.

35. In 1994, while Mr. Gibson was employed by Werner, Werner released the first of several series of stepladders including the innovative EDGE brace, which covered and protected the ends of the ladder rails and provided support for the bottom step of the ladder. By the time Mr. Gibson left Werner to join Louisville Ladder in 1999, Werner had been publicly using, advertising, offering to sell, and selling stepladders with the EDGE brace for approximately five years.

36. On July 8, 1994, the four Werner engineers who had invented the EDGE brace filed a patent application directed to certain of its features. On June 10, 1997, the Patent Office granted the Plotner patent from this application.

37. By July 30, 2002, Werner stepladders with the EDGE brace had become some of the most popular and successful stepladders sold in the United States.

38. Stepladder models including the EDGE brace that Werner publicly used, advertised, offered to sell, and sold prior to July 30, 2002, included at least the FS200 Series, the 5900 Series, the 6206 Series, the 6300 Series, and the 7200 Series.

39. On information and belief, Mr. Gibson was aware of Werner's public use, advertising, offers to sell, and/or sales of stepladders with the EDGE brace as a result of his work for Werner as an engineer from 1990 to 1999.

40. On information and believe, Mr. Gibson was also aware of the Plotner patent as a result of his work for Werner as an engineer from 1990 to 1999.

41. On information and belief, prior to July 30, 2002, Louisville Ladder and its employees, including Mr. Swiderski, Mr. Gibson, Mr. Gaynor, and/or Mr. Chevalier, regularly monitored the advertising and sales of competitor's products, including products advertised and sold by Werner.

42. On information and belief, prior to July 30, 2002, Louisville Ladder and its employees, including Mr. Swiderski, Mr. Gibson, Mr. Gaynor, and/or Mr. Chevalier, regularly monitored patents granted to competitors, including patents granted to Werner.

43. On information and belief, Mr. Swiderski, Mr. Gibson, Mr. Gaynor, and/or Mr. Chevalier were aware of Werner's public use, advertising, offers to sell, and/or sale of stepladders with the EDGE brace on or before July 30, 2002.

44. On information and belief, Mr. Swiderski, Mr. Gibson, Mr. Gaynor, and/or Mr. Chevalier were aware of the Plotner patent on or before July 30, 2002.

**Examination of the Application for the '731 Patent and  
Failure to Disclose Prior Art to the U.S. Patent Office**

45. Between January 27 and February 10, 2002, Mr. Swiderski, Mr. Gibson, Mr. Gaynor, and Mr. Chevalier signed a Declaration and Power of Attorney in connection with the application for the '731 patent, in which they declared they were the "original, first and joint inventor[s]" of the subject matter claimed in the patent application and "acknowledge[d] the duty



to disclose information which is material to patentability as defined in 37 CFR § 1.56” to the Patent Office during examination of the patent application.

46. Through the Power of Attorney, the four named inventors granted patent counsel authority to represent them in connection with the application for the ’731 patent. On information and belief, patent counsel was engaged by Louisville Ladder.

47. During examination of the application for the ’731 patent, none of the four named inventors disclosed to the Patent Office that Louisville Ladder had publicly used, advertised, offered to sell, and/or sold RHINO 375 stepladders with the FULL METAL BOOT ladder boot prior to July 30, 2002.

48. During examination of the application for the ’731 patent, none of the four named inventors disclosed to the Patent Office that Werner had publicly used, advertised, offered to sell, and/or sold stepladders with the EDGE brace prior to July 30, 2002.

49. During examination of the application for the ’731 patent, none of the four named inventors disclosed Werner’s Plotner patent to the Patent Office.

50. In the application for the ’731 patent, the named inventors referred to only one commercially available ladder, the “FS1500 Series Advent Fiberglass Stepladder that is shown in FIG. 1 and that is currently available from the Louisville Ladder® Group.” The FS1500 Series Advent Fiberglass Stepladder did not include the FULL METAL BOOT ladder boot.

51. In an Information Disclosure Statement filed with the application for the ’731 patent by patent counsel believed to have been engaged by Louisville Ladder, the named inventors did not disclose Louisville Ladder’s prior art RHINO 375 stepladders with the FULL METAL BOOT ladder boot, Werner’s prior art stepladders with the EDGE brace, or Werner’s prior art Plotner patent.

52. In the original application for the '731 patent, the four named inventors presented 48 claims. Independent claim 1 read as follows:

1. A cover for an end of a ladder rail, the cover comprising:
  - a shell comprising at least one material, the shell being sized to engage the ladder rail; and
  - a tread comprising at least one other material, the tread being engaged with the shell at least partially by at least one bond, the at least one bond comprising at least a portion of the shell and at least a portion of the tread.

53. Other claims recited additional features, including:

- a. the “open face” feature (original dependent claims 9, 15, 17, and 22 and original independent claim 32);
- b. the “rail flange retainer” feature (original dependent claim 18);
- c. the “perimeter wall” feature (original dependent claim 21); and
- d. the “skirt” feature (original dependent claim 24).

54. On July 21, 2004, the Patent Office issued an Office Action rejecting all 41 claims presented in the application for the '731 patent based on the prior art. The Patent Office issued additional Office Actions rejecting the pending claims on October 7, 2004, and February 22, 2005.

55. On May 25, 2005, patent counsel acting on behalf of the four named inventors filed an Amendment canceling all claims pending at the time and presenting new claims 75-98.

56. In connection with the May 25, 2005 Amendment, patent counsel acting on behalf of the four named inventors argued that certain features purportedly distinguished the claims from the prior art upon which the Examiner had rejected previous claims. These features included:

- a. the “open face” feature (claim 82, later issued as claim 8 of the '731 patent);
- b. the “rail flange retainer” feature (claim 84, later issued as claim 10 of the '731 patent);

- c. the “perimeter wall” feature (claim 86, later issued as claim 12 of the ’731 patent); and
- d. the “skirt” feature (claim 88, later issued as claim 14 of the ’731 patent).

57. Accepting the arguments presented by patent counsel on behalf of the four named inventors, the Patent Office allowed all of the pending claims in a Notice of Allowance dated September 13, 2005.

58. On September 13, 2005, the Patent Office also issued a list of prior art references cited by the applicants and considered by the Examiner, which the Examiner had signed on June 30, 2005. The list confirmed that the applicants did not disclose Louisville Ladder’s prior art RHINO 375 stepladders with the FULL METAL BOOT ladder boot, Werner’s prior art stepladders with the EDGE brace, or Werner’s prior art Plotner patent during examination of the application for the ’731 patent.

59. The Patent Office file history for the ’731 patent indicates that the Patent Office Examiner was not aware of and did not consider Louisville Ladder’s prior art RHINO 375 stepladders with the FULL METAL BOOT ladder boot, Werner’s prior art stepladders with the EDGE brace, or Werner’s prior art Plotner patent during examination of the application for the ’731 patent.

**Materiality of the Undisclosed Prior Art  
and Intent to Deceive**

60. Louisville Ladder’s prior art RHINO 375 stepladders with the FULL METAL BOOT ladder boot, Werner’s prior art stepladders with the EDGE brace, and Werner’s prior art Plotner patent are all material prior art to the ’731 patent.

61. It would have been important for a reasonable examiner to be informed during examination of the application for the ’731 patent that Louisville Ladder had publicly used,

advertised, offered to sell, and/or sold RHINO 375 stepladders with the FULL METAL BOOT ladder boot prior to July 30, 2002.

62. The prior art RHINO 375 stepladder with the FULL METAL BOOT included most of the features recited in the claims of the '731 patent as issued, including features the named inventors identified as allegedly distinguishing their claims from the prior art. These features included at least the “open face” feature (claim 8 of the '731 patent) and the “rail flange retainer” feature (claim 10 of the '731 patent).

63. It would have been important for a reasonable examiner to be informed during examination of the application for the '731 patent that Werner had publicly used, advertised, offered to sell, and/or sold stepladders with the EDGE brace prior to July 30, 2002.

64. Prior art Werner stepladders with the EDGE brace included most of the features recited in the claims of the '731 patent as issued, including features the named inventors identified as allegedly distinguishing their claims from the prior art. These features included at least the “perimeter wall” feature (claim 12 of the '731 patent) and the “skirt” feature (claim 14 of the '731 patent).

65. It would have been important for a reasonable examiner to be aware of Werner's prior art Plotner patent during examination of the application for the '731 patent.

66. The prior art Plotner patent described most of the features recited in the claims of the '731 patent as issued, including features the named inventors identified as allegedly distinguishing their claims from the prior art. These features included at least the “open face” feature (claim 8 of the '731 patent), the “rail flange retainer” feature (claim 10 of the '731 patent), the “perimeter wall” feature (claim 12 of the '731 patent), and the “skirt” feature (claim 14 of the '731 patent).

67. Based on the foregoing, Mr. Swiderski, Mr. Gibson, Mr. Gaynor, and/or Mr. Chevalier breached their duty to disclose information which is material to patentability as defined in [37 CFR § 1.56](#).

68. On information and belief, Mr. Swiderski, Mr. Gibson, Mr. Gaynor, and/or Mr. Chevalier withheld material information including at least Louisville Ladder's prior art RHINO 375 stepladder with the FULL METAL BOOT ladder boot, Werner's prior art stepladders with the EDGE brace, and Werner's prior art Plotner patent with the intent of deceiving the Patent Office into granting patent claims to which neither the named inventors nor Louisville Ladder was entitled. The large volume of undisclosed prior art, its high degree of materiality, and the significant experience the named inventors had with the prior art are all indicative of an intent to deceive.

69. Based on the inequitable conduct of Louisville Ladder and the four named inventors during examination of the '731 patent, Werner is entitled to declaratory judgment that all claims of the '731 patent are unenforceable.

**Additional Allegations Regarding  
Materiality of the Undisclosed Prior Art and Intent to Deceive**

70. On August 30, 2019, the Patent Trial and Appeal Board ("Board") granted Werner's petition and instituted *Inter Partes* Review No. IPR2019-00336 (the "IPR Proceeding").

71. In the IPR Proceeding, Louisville Ladder effectively conceded that the prior art 2001 Louisville Catalog, the prior art Plotner patent, and the prior art 2000 Werner Brochure collectively taught most of the features recited in claims 8-16 of the '731 patent.

72. Louisville Ladder challenged the prior art disclosure as to only three specific claim features: the "entirely open face" of claim 8, the "rail flange retainer" of claim 10, and the "at least one bond of claims 8-16.

73. Louisville Ladder also argued that it would not have been obvious to combine the prior art teachings and arrive at the combination of features recited in the challenged claims.

74. On August 24, 2020, the Board issued a Final Written Decision and Judgment canceling claims 8-16 of the '731 patent based on the prior art 2001 Louisville Catalog, the prior art Plotner patent, and the prior art 2000 Werner Brochure. The Board also canceled claims 19-20 based on those same three prior art references in further combination with the *Modern Plastics Handbook* (Charles A. Harper, ed. 2000).

75. The Board rejected Louisville Ladder's arguments regarding the three disputed claim limitations.

76. In particular, the Board found that: both the 2001 Louisville Catalog and the Plotner patent taught the "entirely open face" feature of claim 8; the 2001 Louisville Catalog taught the "rail flange retainer" feature of claim 10; and Werner Brochure taught the "at least one bond" feature of claims 8-16 and 19-20.

77. The Board also rejected Louisville Ladder's argument of non-obviousness, finding that it would have been obvious to a person of ordinary skill in the art at the time of the alleged invention to combine the relevant prior art features as recited in each of claims 8-16 and 19-20.

78. Louisville appealed the Board's judgment to the Court of Appeals for the Federal Circuit. The Federal Circuit received heard oral argument on August 30, 2021. The next day, the Federal Circuit issued an order affirming the Board's decision.

79. The Board's decision and the Federal Circuit's affirmance establish that the undisclosed prior art 2001 Louisville Catalog, Plotner patent, and 2000 Werner Brochure are and were material to the patentability of '731 patent claims 8-16 and 19-20.

80. Beyond its specific non-disclosures relating to the '731 patent, Louisville Ladder has engaged in a larger pattern of non-disclosure designed to secure patents covering features Louisville Ladder did not invent. This pattern further evidences Louisville Ladder's deceptive intent.

81. For example, Louisville Ladder has alleged infringement in Mexico by Werner of two Mexican patents, both of which were allowed only because Louisville deceived the Mexican Patent Office by withholding critical information.

82. The first of these two asserted patents is Mexican Patent No. 248624 (the "Mexican Ladder Foot Patent"), which relates to and claims essentially the same subject matter as the '731 patent that Louisville asserted in the United States.

83. During examination of the Mexican Ladder Foot Patent, Louisville did not disclose to the Mexican Patent Office the prior art 2001 Louisville Catalog, the prior art Plotner patent, or the prior art Werner Brochure.

84. The second of these two asserted patents is Mexican Patent No. 290898 (the "Mexican Ladder Top Patent"), which relates to and claims features of a ladder top. Louisville Ladder also applied for nearly identical patent claims in the United States, but the U.S. Patent Office rejected those claims based on certain prior art.

85. During examination of the Mexican Ladder Top Patent, Louisville Ladder did not tell the Mexican Patent Office that the U.S. Patent Office had rejected nearly identical patent claims. Nor did Louisville Ladder disclose to the Mexican Patent Office the prior art used by the U.S. Patent Office in its rejection of those claims.

86. Louisville Ladder's pattern of deceptive non-disclosure has also resulted in the issuance of at least four other U.S. patents: U.S. Patent No. 11,187,039 (the "'039 patent"); U.S. Patent No. 10,767,418 (the "'418 patent"); U.S. Patent No. 10,550,638 (the "'638 patent"); and U.S. Patent No. 10,550,639 (the "'639 patent").

87. The '039 patent is directed to a "configurable ladder system and method." Louisville Ladder first applied for the '039 patent on August 9, 2018. The '039 patent describes and claims a ladder with a "platform" for standing.

88. Louisville Ladder failed to tell the Patent Office that it had been selling prior art ladders with such platforms since at least 2015.

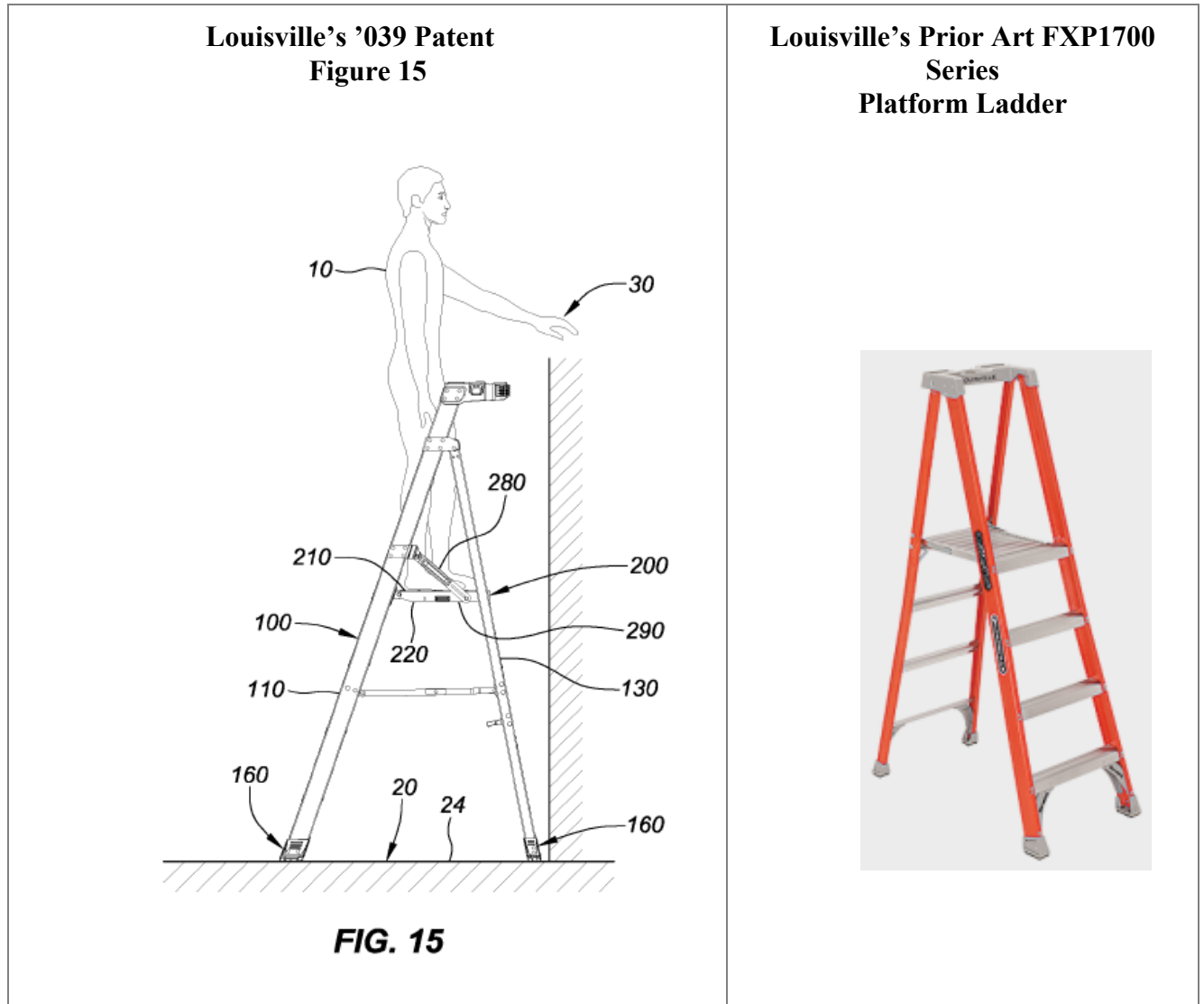
89. At least as early as March 17, 2015, Louisville Ladder advertised the FXP1700 Series Platform Ladder on its website.

90. Below is a comparison between the '039 patent and Louisville Ladder's prior art FXP1700 Series platform ladder that illustrates the significance of Louisville's non-disclosure.

91. Figure 15 of the '039 patent shows a person standing on "support platform 290." Louisville Ladder recited this "support platform" in all 15 claims of the '039 patent.

92. The photo of Louisville Ladder's prior art FXP1700 Series Platform Ladder shows a nearly identical support platform, as displayed on Louisville Ladder's website on March 17, 2015.





93. The FXP1700 Series Platform Ladder is prior art to the '039 patent. Yet Louisville Ladder did not disclose the FXP1700 Series Platform Ladder or its related advertisements to the U.S. Patent Office during examination of the '039 patent.

94. The '418 patent is directed to a "tripod stepladder." Louisville Ladder first applied for the '418 patent on September 27, 2018. The '418 patent describes and claims a ladder with three legs in the form of a tripod.

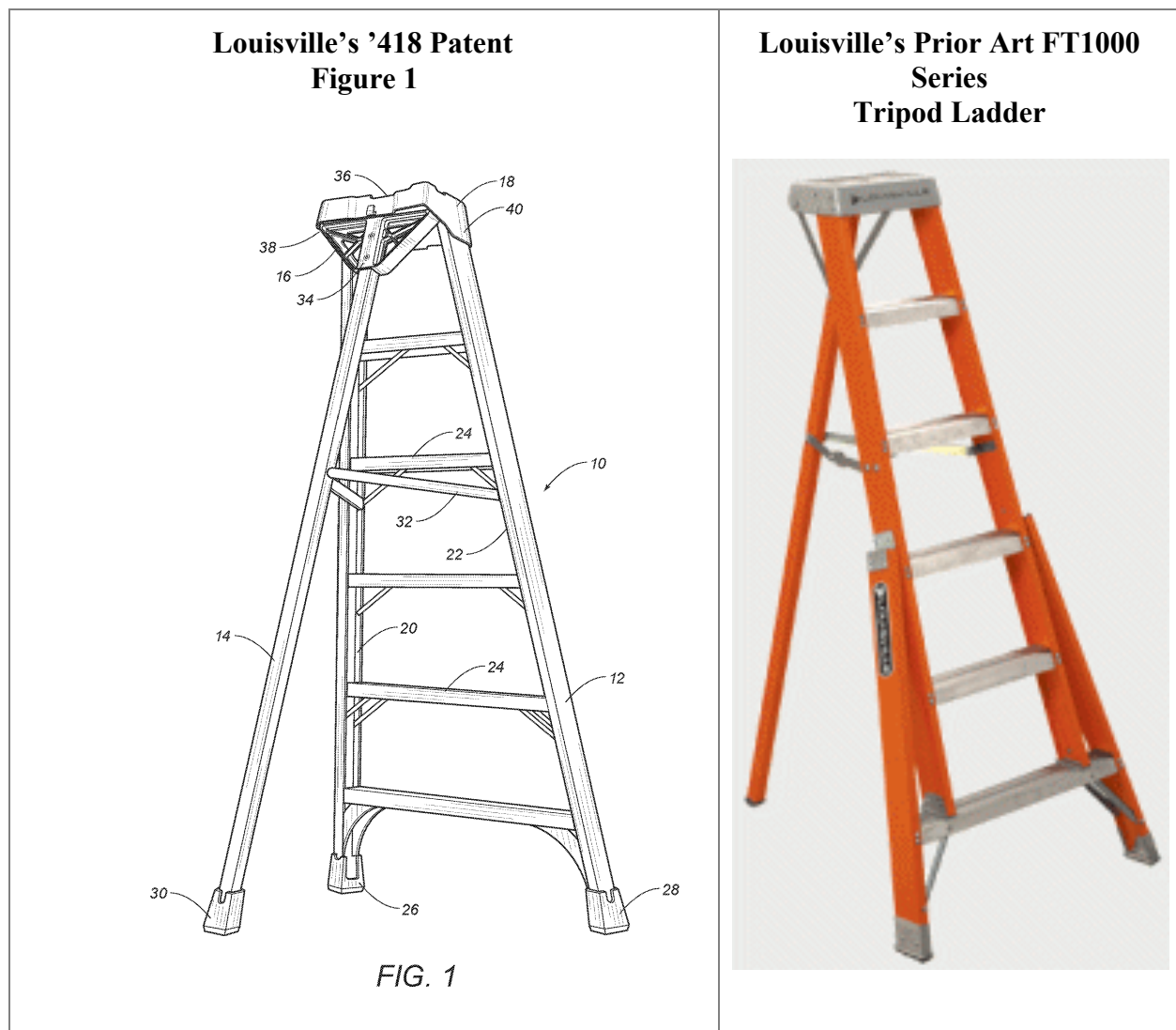
95. Louisville failed to tell the Patent Office that it had been selling such tripod ladders since at least 2015.

96. At least as early as March 18, 2015, Louisville Ladder advertised the FT1000 Series Tripod Ladder on its website.

97. Below is a comparison between the '418 patent and Louisville's prior art FT1000 Series Platform Ladder that reveals the significance of Louisville's non-disclosure.

98. Figure 1 of the '418 patent illustrates the three-rail "tripod" ladder configuration, which Louisville recited as part of the invention in all 15 claims of the '418 patent.

99. The photo of Louisville's prior art FT1000 Series Tripod Ladder shows a nearly identical three-rail configuration, as displayed on Louisville's website on March 18, 2015.



100. The FT1000 Series Platform Ladder is prior art to the '418 patent. Yet Louisville Ladder did not disclose the FT1000 Series Platform Ladder or its related advertisements to the U.S. Patent Office during examination of the '418 patent.

101. The '638 and '639 patents are both directed to a “stepladder for use as a single ladder or an extension ladder.” In other words, the '638 and '639 patents are directed to multipurpose ladders. Louisville first applied for the '638 and '639 patents on November 9, 2015.

102. Louisville failed to tell the Patent Office that it had been selling multipurpose ladders with some of the claimed features since at least 2013.

103. At least as early as August 18, 2013, Louisville Ladder advertised on its website the “Multipurpose Ladder” shown in this photo.

104. Both the '638 and '639 patents claim ladders having “a first ladder section” and “a second ladder section.” As shown in this photo, the prior art Louisville Multipurpose Ladder also has first and second sections.

105. Further, claim 4 in both the '638 and '639 patents recite “said first ladder section having a greater length than a length of said second ladder section.” The prior art Louisville Multipurpose Ladder also could be configured to include a first ladder section that was longer than the second ladder section.



106. Even further, claim 8 of the '638 patent and claim 7 of the '639 patent both recite “said first ladder section being an extension ladder.” Likewise, the first section (and the second section) of the prior art Louisville Multipurpose Ladder was an extension ladder. As shown in this photo, the first section is extended, whereas the second section is not extended.

107. The Multipurpose Ladder is prior art to the '638 and '639 patents. Yet Louisville Ladder did not disclose the Multipurpose Ladder or its related advertisements to the U.S. Patent Office during examination of either the '638 or '639 patents.

108. Werner is still investigating Louisville Ladder's patents and may discover other examples of Louisville Ladder's deceptive pattern of non-disclosure. But even without any further examples, Louisville Ladder's serial non-disclosure of the commercial prior art ladders described above evidences an intent to hide the most relevant prior art and thereby deceive the U.S. Patent Office into granting at least five patents claiming subject matter that Louisville Ladder did not invent, including the '731 patent.

### **DEMAND FOR JURY TRIAL**

Werner demands a jury trial on all issues so triable.

### **REQUESTED RELIEF**

Werner respectfully requests that this Court:

- a. Issue a declaratory judgment of non-infringement as to one or more claims of the '731 patent.
- b. Issue a declaratory judgment of invalidity as to one or more claims of the '731 patent.
- c. Issue a declaratory judgment of unenforceability as to the '731 patent.

- d. Find this case exceptional under 35 U.S.C. § 285 and award Werner its attorneys' fees and costs.
- e. Award Werner its costs pursuant to 28 U.S.C. § 1920; and
- f. Grant Werner other such relief as the Court deems just and proper.

Respectfully submitted,

/s/ Charles M. McMahon

Charles M. McMahon  
Thomas DaMario  
MCDERMOTT WILL & EMERY LLP  
444 West Lake Street  
Chicago, Illinois 60606  
(312) 372-2000

Michael S. Nadel  
MCDERMOTT WILL & EMERY LLP  
500 North Capitol Street, N.W.  
Washington, D.C. 20001  
(202) 756-8000

John G. McNeill  
Elizabeth A. Deener  
LANDRUM & SHOUSE LLP  
106 West Vine Street, Suite 800  
Lexington, Kentucky 40507  
(859) 554-4038

*Counsel for Plaintiff  
Werner Co.*