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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92061135
Party	Plaintiff Mattoon Rural King Supply, Inc.
Correspondence Address	FRANK B JANOSKI LEWIS RICE LLC BOX IP DEPARTMENT, 600 WASHINGTON AVE STE 2500 ST LOUIS, MO 63101 UNITED STATES ipdept@lewisrice.com
Submission	Opposition/Response to Motion
Filer's Name	Michael J. Hickey
Filer's e-mail	mhickey@lewisrice.com
Signature	/mjh/
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

MATTOON RURAL KING SUPPLY, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	Cancellation No. 92061135
	)	Registration No. 3,765,628
	)	
WEEMS INDUSTRIES, INC. d/b/a LEGACY	)	
MANUFACTURING COMPANY,	)	
	)	
Respondent.	)	

**PETITIONER’S MEMORANDUM IN OPPOSITION TO  
RESPONDENT’S MOTION TO SUSPEND PROCEEDINGS**

COMES NOW Petitioner Mattoon Rural King Supply, Inc. (“Rural King”) and, for its Memorandum in Opposition to Respondent Weems Industries, Inc. d/b/a Legacy Manufacturing Company’s (“Weems”) Motion to Suspend Proceedings, states as follows:

On March 22, 2015, Rural King filed a petition to cancel Weems’ registration on the Supplemental Register, U.S. Reg. No. 3,765,628, for the use of bright green on its air hoses (the “Furported Mark”). On May 1, 2015, Weems filed its Answer and a Motion to Suspend Proceedings based upon a Complaint that Weems had filed that same day in the United States District Court for the Northern District of Iowa, Case No. 1:15-cv-00036-LRR. Weems’ Motion to Suspend amounts to nothing more than an attempt to circumvent the Board’s authority and thwart Rural King’s choice of forum in its first-filed Petition for Cancellation.

On May 18, 2015, Rural King filed a Motion to Stay the district court action, and a Memorandum in Support thereof, pending disposition of the cancellation proceeding before the Board. The Motion and Memorandum in Support are attached hereto as Exhibit A and incorporated herein by reference. Rural King’s pending Motion in the District Court establishes

that this is a case in which the circumstances warrant a stay in the District Court pending a determination by the Board. *See, e.g., Microchip Tech., Inc. v. Motorola, Inc.*, No. CIV.A. 01-264-JJF, 2002 WL 32332753 (D. Del. May 28, 2002); *Citicasters Co. v. Country Club Commc'ns*, No. 97-0678 RJK, 1997 WL 715034 (C.D. Cal. July 21, 1997); *Kemin Indus., Inc. v. Watkins Products, Inc.*, No. 1-74 CIV. 129, 1974 WL 20194 (D. Minn. July 8, 1974); *Nat'l Mktg. Consultants, Inc. v. Blue Cross & Blue Shield Ass'n*, No. 87 C 7161, 1987 WL 20138 (N.D. Ill. Nov. 19, 1987); *Driving Force, Inc. v. Manpower, Inc.*, 498 F. Supp. 21 (E.D. Pa. 1980) *abrogated on other grounds by A & H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 237 F.3d 198 (3d Cir. 2000); *C-Cure Chem. Co. v. Secure Adhesives Corp.*, 571 F. Supp. 808 (W.D.N.Y. 1983). Accordingly, Rural King opposes Weems' Motion to Suspend because this is precisely the situation in which the Board should move forward with its proceedings while the District Court stays the proceedings before it.

First, the language in *Trademark Trial and Appeal Board Manual of Procedure* ("T.B.M.P.") § 510.02 regarding suspension is clearly permissive. *See* T.B.M.P. § 510.02(a) ("Whenever it comes to the attention of the Board that a party or parties to a case pending before it are involved in a civil action which may have a bearing on the Board case, proceedings before the Board **may** be suspended until final determination of the civil action.") (emphasis added). This permissive language "make[s] clear that suspension is not the necessary result in all cases." *Boyd's Collection Ltd v. Herrington & Company*, 2003 WL 152427, at \*2, 65 U.S.P.Q.2d 2017 (TTAB Jan. 16, 2003). In the instant case, allowing the Board to resolve the dispute "would probably be faster" and "be to the advantage of both sides [of the dispute]." *Kemin Indus., Inc.*, 1974 WL 20194, at \*2.

Moreover, given that the central issue of this dispute—namely, what rights, if any, does Weems have in its Purported Mark—is well within the Board's expertise and involves

complicated and technical issues of functionality, shade confusion, and acquired distinctiveness, the Board should deny Weems' Motion to Suspend and instead move forward with this proceeding. Indeed, denying the motion to suspend is further bolstered by the United States Supreme Court's recent decision in *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. ---, 135 S. Ct. 1293 (Mar. 24, 2015). In *B & B Hardware*, the Supreme Court clearly stated that final decisions by the Board can result in issue preclusion. *B & B Hardware, Inc.*, 135 S. Ct. at 1310. Thus, the expert Board can fully adjudicate the critical issue involved in this dispute—an issue which involves highly technical issues of trademark law—while at the same time essentially disposing of the dispute in its entirety in the most efficient and cost-effective manner possible. At worst, the Board's decision may allow the District Court to fully dispose of the case before it on summary judgment.

The reasoning of the court in *Kemin Industries, Inc.*, particularly in light of *B & B Hardware, Inc.*, further supports the Board's denial of Weems' Motion to Suspend. There, the court reasoned as follows:

While in this case there are issues that cannot be ruled upon by the [Board], the determination of the threshold question . . . lies particularly within their field of expertise. They would know best the criteria . . . that seems to be the key. If that question were resolved in favor of plaintiff and the trademark cancelled, the other issues would be disposed of in a very short time by this Court. If the [Board] rules in favor of defendant[,] then, on the facts as they now stand, all other questions would seem to be moot.

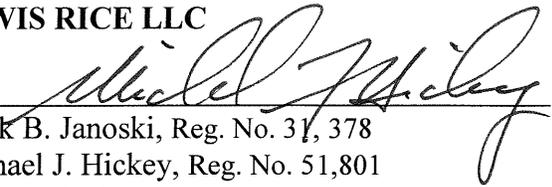
*Kemin Indus., Inc.*, 1974 WL 20194, at \*2. The Board's binding and issue preclusive decision as to Weems' rights, if any, in its Purported Mark will settle this case in short order.

For the foregoing reasons and those found in Exhibit A incorporated herein, Rural King respectfully requests that the Board deny Weems' Motion to Suspend and instead proceed with its disposition of this case.

Dated: May 18, 2015

Respectfully submitted,

**LEWIS RICE LLC**

By: 

Frank B. Janoski, Reg. No. 31,378

Michael J. Hickey, Reg. No. 51,801

Eric D. Block

600 Washington Avenue, Suite 2500

St. Louis, MO 63101-1311

Telephone: (314) 444-7600

Fax: (314) 241-6056

[fjanoski@lewisrice.com](mailto:fjanoski@lewisrice.com)

[mhickey@lewisrice.com](mailto:mhickey@lewisrice.com)

[eblock@lewisrice.com](mailto:eblock@lewisrice.com)

*Attorneys for Petitioner*

*Mattoon Rural King Supply, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that, on May 18, 2015, a copy of the above and foregoing was served upon Respondent's counsel, via electronic mail and First Class Mail, postage prepaid, as follows:

Brian J. Laurenzo

Steven P. Brick

Matt O'Hollearn

6701 Westown Parkway, Suite 100

West Des Moines, IA 50266

[brian.laurenzo@brickgentrylaw.com](mailto:brian.laurenzo@brickgentrylaw.com)

[steve.brick@brickgentrylaw.com](mailto:steve.brick@brickgentrylaw.com)

[matt.ohollearn@brickgentrylaw.com](mailto:matt.ohollearn@brickgentrylaw.com)



**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
CEDAR RAPIDS DIVISION**

WEEMS INDUSTRIES, INC. d/b/a LEGACY  
MANUFACTURING COMPANY,

Plaintiff,

v.

MATTOON RURAL KING SUPPLY, INC.,

Defendant.

Case No. 1:15-cv-00036-LRR

**DEFENDANT’S MOTION TO STAY CASE AND ALL DEADLINES**

COMES NOW Defendant Mattoon Rural King Supply, Inc. (“Rural King”), by and through its undersigned counsel, and hereby files its Motion to Stay Case and All Deadlines. In support thereof, Rural King states as follows:

**INTRODUCTION**

1. In this case, Plaintiff Weems Industries, Inc. d/b/a Legacy Manufacturing Company (“Weems”) generally alleges, in several causes of action, that Rural King has infringed upon Weems’ alleged trademark rights in the color of its Flexzilla compressed air hose as more fully detailed in Weems’ Complaint. (*See* Doc. No. 1 (Complaint).)

2. On March 20, 2015, prior to Weems filing its Complaint, Rural King initiated cancellation proceedings in the Trademark Trial and Appeal Board (“TTAB”) by filing a Petition for Cancellation of Weems’ trademark registration (registered on the Supplemental Register) for the use of bright green on its air hoses (the “Purported Mark”). In its Petition for Cancellation pending in the TTAB, Rural King has asserted that Weems’ registration should be cancelled because, *inter alia*, the Purported Mark is highly functional and lacks acquired distinctiveness. A

copy of Rural King's Petition for Cancellation is attached hereto as Exhibit A, and incorporated herein by reference.

3. On May 1, 2015, Weems filed its Answer and a Motion to Suspend Proceedings in the TTAB. On that same day, Weems filed the instant action pending before this Court, in an obvious attempt to circumvent the TTAB proceeding and thwart Rural King's choice of forum.

4. The key preliminary issue in the trademark dispute between Rural King and Weems, including both the instant case and the TTAB proceedings, is what rights, if any, Weems has in its Purported Mark. This determination involves highly technical issues of trademark functionality and shade confusion, not to mention issues of the more familiar, yet sometimes complicated, doctrine of acquired distinctiveness.

5. The pending TTAB proceeding—which was filed first-in-time—puts the technical and complicated issues of functionality and shade confusion, as well as the issue of acquired distinctiveness, before a Board of trademark experts. Thus, staying this case and allowing the TTAB proceeding to proceed allows this critical issue to be determined by a Board whose sole focus is trademark law.

6. By staying the instant case pending the decision of the TTAB, this Court will also promote efficiency and lessen the financial burden on the parties because the TTAB will have before it a focused issue of trademark law allowing for focused discovery while also alleviating the financial burden of travel for both parties.

7. Moreover, the TTAB's decision should dispose of the most critical and complex issue of the instant case because, as the Supreme Court recently held, TTAB decisions can now have binding, issue-preclusive effects on federal trademark litigation. *See B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. ---, 135 S. Ct. 1293 (Mar. 24, 2015). The determination by the TTAB

thus will either potentially foster immediate settlement of the current dispute or simplify the issues before a Court through issue preclusion, thereby promoting the conservation of judicial resources.

8. The stay will promote efficiency, will facilitate conservation of judicial resources, will not prejudice Weems, and will utilize the expertise of the TTAB, as more fully set forth in the memorandum in support of this Motion filed contemporaneously herewith and incorporated herein by reference.

9. Pursuant to Local Rule 7(l), Counsel for Defendant conferred in good faith with counsel for Plaintiff regarding this Motion to Stay. Counsel for Plaintiff did not agree to the requested stay.

WHEREFORE, Rural King respectfully requests an order staying this action in its entirety until the TTAB reaches a final determination as to what trademark rights, if any, that Weems possesses in its choice of bright green for its compressed air hoses.

Dated: May 18, 2015

Respectfully submitted,

**SIMMONS PERRINE MOYER  
BERGMAN PLC**

By: /s/ Stephen J. Holtman

Stephen J. Holtman, No. AT0003594  
115 Third Street SE, Suite 1200  
Cedar Rapids, IA 52401-1266  
Telephone: (319) 896-4043  
Fax: (319) 366-1917  
[sholtman@simmonsperrine.com](mailto:sholtman@simmonsperrine.com)

**LEWIS RICE LLC**

Frank B. Janoski, No. 32402MO  
Michael J. Hickey, No. 47136MO  
Eric D. Block, No. 65789MO  
*(pro hac vice motions to be filed)*  
600 Washington Avenue, Suite 2500  
St. Louis, MO 63101-1311  
Telephone: (314) 444-7600  
Fax: (314) 241-6056  
[fjanoski@lewisrice.com](mailto:fjanoski@lewisrice.com)  
[mhickey@lewisrice.com](mailto:mhickey@lewisrice.com)  
[eblock@lewisrice.com](mailto:eblock@lewisrice.com)

*Attorneys for Defendant  
Mattoon Rural King Supply, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that, on May 18, 2015, a copy of the above and foregoing was served upon Plaintiffs' counsel, via the Court's ECF system, as follows:

Brian J. Laurenzo  
Steven P. Brick  
Matt O'Hollearn  
6701 Westown Parkway, Suite 100  
West Des Moines, IA 50266  
[brian.laurenzo@brickgentrylaw.com](mailto:brian.laurenzo@brickgentrylaw.com)  
[steve.brick@brickgentrylaw.com](mailto:steve.brick@brickgentrylaw.com)  
[matt.ohollearn@brickgentrylaw.com](mailto:matt.ohollearn@brickgentrylaw.com)

/s/ Stephen J. Holtman

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
CEDAR RAPIDS DIVISION**

WEEMS INDUSTRIES, INC. d/b/a LEGACY  
MANUFACTURING COMPANY,

Plaintiff,

v.

MATTOON RURAL KING SUPPLY, INC.,

Defendant.

Case No. 1:15-cv-00036-LRR

**DEFENDANT'S MEMORANDUM IN SUPPORT OF  
MOTION TO STAY CASE AND ALL DEADLINES**

**BACKGROUND**

The instant case is part of a larger trademark dispute between Plaintiff Weems Industries, Inc. d/b/a Legacy Manufacturing Company ("Weems") and Defendant Mattoon Rural King Supply, Inc. ("Rural King"). This dispute includes a parallel cancellation proceeding filed prior to this action and currently pending in the Trademark Trial and Appeal Board ("TTAB"). In an effort to promote efficiency, conserve judicial resources, and utilize the expertise of the TTAB, Rural King now requests, as set forth below, that the Court stay the entire case until the TTAB proceedings are resolved and complete.

On March 20, 2015, after an exchange of letters in which Weems' asserted that it had trademark rights in the bright green color used in its compressed air hoses (the "Purported Mark"), Rural King filed a Petition for Cancellation with the TTAB to cancel Weems' registration on the Supplemental Register for its Purported Mark (the "TTAB Proceeding"). (*See* Rural King's Petition for Cancellation, attached hereto as Exhibit A.) As grounds for cancellation, Rural King

asserts that, *inter alia*, the Purported Mark is highly functional and lacks acquired distinctiveness—*i.e.*, Weems has no trademark rights in its Purported Mark, and therefore its registration must be cancelled.

On May 1, 2015, Weems filed its Answer to Rural King's Petition for Cancellation and also submitted a Motion to Suspend the TTAB Proceeding because, that same day, Weems filed its Complaint in this Court generally alleging that Rural King has infringed upon Weems' alleged rights in the Purported Mark. (*See* Doc. No. 1 (Complaint).) The filing of the instant action amounts to an obvious attempt to circumvent the TTAB Proceeding and thwart Rural King's choice of forum.

Rural King now seeks a stay in the instant action to allow the TTAB to utilize its expertise and make its determination as to the highly technical issues of trademark functionality and shade confusion, not to mention the more common, yet potentially complicated, issue of acquired distinctiveness. Given its sharp focus, the TTAB Proceeding will efficiently and cost-effectively dispose of these highly technical issues in the case before this Court while conserving judicial resources. Moreover, the TTAB's disposition of the most critical issues involved in the instant case will either potentially foster the immediate settlement of the current dispute or, at least, greatly simplify the issues before this Court, in view of the United States Supreme Court's recent decision on the potential issue preclusive effect of TTAB proceedings. *See B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. ---, 135 S. Ct. 1293 (Mar. 24, 2015). Rural King now respectfully seeks a stay of all deadlines and proceedings in the case, pending resolution of the TTAB Proceedings.

#### **DISCUSSION**

The power to stay proceedings rests in the Court's wide discretion and "is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy

of time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). “A district court has broad discretion to stay proceedings when appropriate to control its docket.”<sup>1</sup> *Sierra Club v. U.S. Army Corps of Eng’rs*, 446 F.3d 808, 816 (8th Cir. 2006). In deciding whether to grant a stay pending a decision by the TTAB, courts consider both judicial economy and fairness to the parties. *See Kemin Indus., Inc. v. Watkins Products, Inc.*, No. 1-74 CIV. 129, 1974 WL 20194, at \*1 (D. Minn. July 8, 1974) (“In exercising that discretion the Court must take into consideration not only the hardship that will be suffered by either side but also the most efficient utilization of its judicial resources.”). “Generally, courts consider the following factors in determining whether to grant a stay: ‘(1) whether a stay would unduly prejudice or present a clear tactical disadvantage to the non-moving party; (2) whether a stay will simplify the issues in question and trial of the case; and (3) whether discovery is complete and whether a trial date has been set.’” *Dordt Coll. v. Burwell*, No. C 13-4100-MWB, 2014 WL 5454649, at \*1 (N.D. Iowa Oct. 27, 2014) (citation omitted); *see also Pfizer Inc. v. Apotex Inc.*, 640 F. Supp. 2d 1006 (N.D. Ill. 2009) (“[C]ourts consider the following factors: (i) whether a stay will unduly prejudice or tactically disadvantage the non-moving party, (ii) whether a stay will simplify the issues in question and streamline the trial, and (iii) whether a stay will reduce the burden of litigation on the parties and on the court.”). These factors all support staying this action pending the outcome of the TTAB Proceeding.

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<sup>1</sup> In addition to the Court’s inherent power, the doctrine of primary jurisdiction further supports granting a stay in the current case. Primary jurisdiction “comes into play whenever enforcement of the claim requires the resolution of issues which under a regulatory scheme, have been placed within the special competence of an administrative body[.]” *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63-64 (1956); *see also National Marketing Consultants, Inc. v. Blue Cross & Blue Shield Association*, No. 87 C 7161, 1987 WL 20138 (N.D. Ill. Nov. 19, 1987) (granting defendant’s motion to stay pending the TTAB’s determination of the issue of likelihood of confusion between the parties’ respective marks).

**I. A STAY WILL NOT UNDULY PREJUDICE OR TACTICALLY DISADVANTAGE WEEMS.**

Weems will neither be unduly prejudiced nor tactically disadvantaged as a result of the stay. Indeed, “[b]ecause of the lack of demonstrable harm” and in light of “the efficiencies generated by the TTAB first addressing the issues involved in this matter[,]” this Court should stay the current proceeding. *See Citicasters Co. v. Country Club Commc'ns*, No. 97-0678 RJK, 1997 WL 715034, at \*2 (C.D. Cal. July 21, 1997). In fact, if this case were allowed to proceed, Rural King would be greatly prejudiced and tactically disadvantaged. Rural King maintains no stores within the State of Iowa, much less within this District, and it took no actions whatsoever directed at this District. If the stay is denied, Rural King would likely file a motion to dismiss for lack of jurisdiction, conduct jurisdictional discovery, and expend significant time and money before the parties even reach the merits of this action, disadvantaging Rural King. On the other hand, if the stay is granted, the parties can focus on discovery in the TTAB Proceeding and can move forward toward resolving the dispute’s critical threshold issues.

Moreover, the stay will not in any way prejudice or disadvantage Weems. The central issue of the instant case is what trademark rights, if any, Weems possesses in its Purported Mark. Granting a stay of this case allows the TTAB—experts in the fields of trademark functionality, shade confusion, and acquired distinctiveness—to decide this critical threshold question. The TTAB Proceeding can resolve this threshold issue quickly and efficiently, putting a Court in a position to summarily decide the remaining issues upon completion of the TTAB Proceeding.

**II. A STAY WILL SIMPLIFY THE ISSUES IN QUESTION AND TRIAL OF THE CASE.**

The substantive issues before the TTAB are identical to those that Weems asks this Court to resolve. The TTAB is an administrative body that specializes in adjudicating trademark registration disputes. It is equipped with specialized experience and expertise in such matters. *See*

*Microchip Tech., Inc. v. Motorola, Inc.*, No. CIV.A. 01-264-JJF, 2002 WL 32332753, at \*3 (D. Del. May 28, 2002) (“the issue of genericism is within the special expertise of the TTAB”).

A ruling from the TTAB on the issues of functionality, shade confusion,<sup>2</sup> and acquired distinctiveness will simplify the issues before the District Court and streamline the trial. *See Nat'l Mktg. Consultants v. Blue Cross & Blue Shield Ass'n*, No. 87 C 7161, 1987 WL 20138 (N.D. Ill. Nov. 19, 1987) (deference to the TTAB will promote a speedier disposition of the entire action because the TTAB will decide the core issue of both parties' claims). Furthermore, the TTAB's determination may result in issue preclusion, thus streamlining the issues before a Court. *See B & B Hardware, Inc.*, 135 S. Ct. at 1306.

Moreover, if the TTAB cancels Weems' Purported Mark, the remaining issues in this case can be summarily resolved. *See Microchip Technology, Inc.*, 2002 WL 32332753, at 3 (“In this case, a determination that [the mark] is generic, if adopted by the Court, would be dispositive of all of [plaintiffs] claims, as each depends on [plaintiff] owning a valid trademark.”). In staying the case before its pending disposition by the Patent and Trademark Office, the Court in *Kemin Industries*, reasoned as follows:

While in this case there are issues that cannot be ruled upon by the Patent Office, the determination of the threshold question . . . lies particularly within their field of expertise. They would know best the criteria . . . that seems to be the key. If that question were resolved in favor of plaintiff and the trademark cancelled, the other issues would be disposed of in a very short time by this Court. If the Patent Office rules in favor of defendant then, on the facts as they now stand, all other questions would seem to be moot.

1974 WL 20194, at \*2. If nothing else, the TTAB's determination will be a significant aid to a Court's determination. *See Citicasters Co.*, 1997 WL 715034, at \*2 (“the court is confident that

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<sup>2</sup> The preeminent treatise on trademark law has characterized shade confusion as “some of the most unpredictable and troublesome issues of infringement in trademark law.” 1 McCarthy on Trademarks and Unfair Competition § 7:45.70.

the TTAB will exercise its specialized knowledge in effecting a determination that will prove valuable to this court.”). Aside from the TTAB’s expertise in the matters before this Court, the TTAB is also particularly suited to efficiently and cost-effectively resolve this dispute without the jurisdictional issues present in the instant case. *See Microchip Tech., Inc.*, 2002 WL 32332753, at \*4 (“[T]he Court concludes that staying this action to await a decision from the TTAB would promote judicial efficiency by either narrowing the issues for trial or making this case ripe for summary judgment.”); *Kemin Indus., Inc.*, 1974 WL 20194, at \*2 (noting that the cancellation proceeding would dispose of the critical issues more quickly and efficiently than District Court litigation).

### **III. A STAY IS APPROPRIATE BECAUSE THIS CASE IS IN ITS INFANCY.**

This action is still in its infancy, and Rural King has not yet responded to the Petition. Moreover, the stay is temporary and should a party become dissatisfied with the pace at which the TTAB Proceeding progresses (which Rural King estimates will conclude within approximately six to nine months), the stay could be lifted. Additionally, deferring to the TTAB at this early juncture will encourage judicial efficiency and economy because the maintenance of two actions proceedings side-by-side would certainly be wasteful. *See Kemin Indus.*, No. 1-74 CIV. 129, 1974 WL 20194, at \*2 (“There can be no doubt that two judicial forums considering the same problem is wasteful.”).

### **CONCLUSION**

For the foregoing reasons, Rural King respectfully requests an order staying this action in its entirety until the TTAB reaches a final determination as to what trademark rights, if any, that Weems possesses in its choice of bright green for its compressed air hoses.

Dated: May 18, 2015

Respectfully submitted,

**SIMMONS PERRINE MOYER  
BERGMAN PLC**

By: /s/ Stephen J. Holtman

Stephen J. Holtman, No. AT0003594  
115 Third Street SE, Suite 1200  
Cedar Rapids, IA 52401-1266  
Telephone: (319) 896-4043  
Fax: (319) 366-1917  
[sholtman@simmonsperrine.com](mailto:sholtman@simmonsperrine.com)

**LEWIS RICE LLC**

Frank B. Janoski, No. 32402MO  
Michael J. Hickey, No. 47136MO  
Eric D. Block, No. 65789MO  
*(pro hac vice motions to be filed)*  
600 Washington Avenue, Suite 2500  
St. Louis, MO 63101-1311  
Telephone: (314) 444-7600  
Fax: (314) 241-6056  
[fjanoski@lewisrice.com](mailto:fjanoski@lewisrice.com)  
[mhickey@lewisrice.com](mailto:mhickey@lewisrice.com)  
[eblock@lewisrice.com](mailto:eblock@lewisrice.com)

*Attorneys for Defendant  
Mattoon Rural King Supply, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that, on May 18, 2015, a copy of the above and foregoing was served upon Plaintiffs' counsel, via the Court's ECF system, as follows:

Brian J. Laurenzo  
Steven P. Brick  
Matt O'Hollearn  
6701 Westown Parkway, Suite 100  
West Des Moines, IA 50266  
[brian.laurenzo@brickgentrylaw.com](mailto:brian.laurenzo@brickgentrylaw.com)  
[steve.brick@brickgentrylaw.com](mailto:steve.brick@brickgentrylaw.com)  
[matt.ohollearn@brickgentrylaw.com](mailto:matt.ohollearn@brickgentrylaw.com)

/s/ Stephen J. Holtman