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

Proceeding	92053426
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

BACHMANN INDUSTRIES, INC	:	
	:	
PETITIONER,	:	
	:	
V.	:	CANCELLATION NO. 92053426
	:	
SCIENTIFIC TOYS, LTD.	:	
	:	
	:	
RESPONDENT.	:	

PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM

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I. STATEMENT OF THE ISSUE

The issue is whether Petitioner, Bachmann Industries, Inc. (Bachmann) is entitled to summary judgment on the issue of likelihood of confusion between its E-Z TRACK mark, as shown in United States Trademark Registration Nos. 2,053,073 and 3,222,737, for toy trains and toy train sets, and the EZTEC mark of Scientific Toys, Ltd. (Scientific) for toy train sets, *inter alia*, given that there are no material issues of fact in dispute as to Bachmann's priority of use, the similarities between the marks, the identity of goods in Bachmann's registration and in the identification of goods in Scientific's Registration No. 3,567,168, which is the subject of this proceeding, and the overlap in the trade channels, in the types of customers, in the conditions of purchase, or any of the other factors on which the determination of likelihood of confusion is based.

II. STATEMENT OF MATERIAL FACTS NOT SUBJECT TO DISPUTE

Bachmann submits that no genuine dispute exists as to the following material facts:

A. BACHMANN

1. Bachmann's History and E-Z TRACK Mark

Bachmann is a well-known manufacturer of toy trains, train sets and accessories. Bachmann began manufacturing its first line of toy train products in 1947. (Blaine Dec ¶4, Exh. A). By 1969, Bachmann was producing N scale toy trains, scenery elements and track. Bachmann is the only model train company that makes all the most popular scale products: N, HO, O and G scale lines. (Blaine Dec. ¶5)

Bachmann adopted and has been using the E-Z TRACK mark in connection with toy train track, toy train sets and accessories since at least as early as January 1994. (Blaine Dec. ¶11, Exh. B). The E-Z TRACK mark consists of the primary E-Z designator, followed by the

generic term "TRACK," which has no trademark significance on its own when used in connection with track for toy trains and train sets. (Blaine Dec. ¶12).

The E-Z TRACK product lines started with an HO scale steel track/black roadbed line with approximately 12 SKUs and has expanded to include, *inter alia*, HO scale with nickel silver rails and grey road beds; track packs; an N scale system; HO scale, N scale and On30 train sets; DCC equipped turnouts for HO scale tracks; and consistent additions of track lengths, radii, turnouts and accessories in both HO and N scales. (Blaine Dec. ¶15). Currently, there are approximately 150 SKUs in the E-Z TRACK product lines (Blaine Dec. ¶16).

Bachmann is the owner of four valid, subsisting, U.S. trademark registrations comprising E-Z TRACK:

- *Incontestable* U.S. Registration No. 2,053,073 for E-Z TRACK for toy train sets, registered April 15, 1997 and subsequently renewed;
- *Incontestable* U.S. Registration No. 2,061,990 for BACHMANN E-Z TRACK SYSTEM and design for toy train sets, registered May 13, 1997 and subsequently renewed;
- U.S. Registration No. 3,301,198 for BACHMANN E-Z TRACK SYSTEM and design for toy model train sets; Toy trains and accessories therefore, namely, toy train tracks and toy train tracks with roadbeds registered October 2, 2007; and
- U.S. Registration No. 3,222,737 for E-Z TRACK for toy train sets; toy train track, and train track with roadbed registered March 27, 2007.

(Metzger Dec., Exh. E). Since its adoption in 1994, use of the E-Z TRACK mark has been continuous and substantial and substantially exclusive (Blaine Dec. ¶11, Exh. B). The E-Z TRACK mark is both molded into the tracks, as well as used as an umbrella mark on packaging and promotional materials for the varied products that are sold together, i.e. train sets, rolling stock, track and other toy train accessories. (Blaine Dec. ¶17).

2. Bachmann's E-Z TRACK Toy Train Sets Have Been Widely Promoted and Sold

Bachmann's E-Z TRACK products have been sold through approximately 2500 outlets and through all trade channels appropriate for toy trains and toy train sets, namely: direct

marketing catalog sales, online sales through Bachmann's and other retailers' websites, and brick and mortar retail sales. (Blaine Dec. ¶25; Metzger Dec. ¶5, Exh. A). The types of vendors selling Bachmann's E-Z TRACK products include mass merchandisers, such as Amazon.com and Target, as well as more specialized toy and hobby stores, such as Hobby Lobby, HobbyTown, USA, and Toys 'R Us. (Blaine Dec. ¶26).

The E-Z TRACK toy train products of Bachmann are promoted through all channels appropriate for such goods including: print advertising, radio and television advertising, trade shows and in-store promotions (Blaine Dec. ¶¶19-20). Bachmann has spent an average of $150,000 per year, since at least 1999, on the production of its annual catalog, in which the E-Z TRACK products are promoted to the public and the trade. (Blaine Dec. ¶21, Exh. E). Advertisements for E-Z TRACK toy train sets have appeared in USA Today, on cable television channels and in hobby publications, as well as, trade publications for the toy industry (Blaine Dec. ¶¶19-20). The E-Z TRACK products are displayed at multiple trade shows each year, including the New York Toy Fair, and iHobby Expo. (Blaine Dec. ¶7; Metzger Dec. ¶6, Exh. B).

3. Bachmann's E-Z TRACK Products Have Been Commercially Successful

Bachmann's E-Z TRACK track for toy train sets is an innovative product which is and has been the subject of numerous utility patents for both track and roadbed. (Blaine Dec. ¶13). Bachmann's innovation, advertising efforts and the quality of its E-Z TRACK toy train products have resulted in acceptance by the public and trade, as evidenced by its commercial success. Bachmann has enjoyed substantial sales for its E-Z TRACK toy train products, selling an average of over $12,000,000 worth of E-Z TRACK products annually since at least 2002. (Blaine Dec. ¶23, Exh. F). E-Z TRACK is the best-selling track and rail system in the United States (Blaine Dec. ¶22).

4. Toy Train Market

While there is a broad category of products identified as "toys", this designation encompasses a wide range of very different products from big foam blocks to hand-held electronic game devices. (Blaine Dec. ¶31).

Within the "toy" industry, there are recognized sub-categories of products. (Blaine Dec. ¶32; Metzger Dec. ¶12, Exh. H). Toy trains and toy train sets are a separate, specialized sub-category of toys. (Blaine Dec. ¶32; Metzger Dec. ¶12, Exh. H). Toy trains and toy train sets, particularly the more advanced and expensive set-ups, are also considered a "hobby" product and are the subject of specific trade publications, as well as retailers devoted to the train hobby. (Blaine Dec. ¶33).

The E-Z TRACK track is intended to be a stable, simple set up and the E-Z TRACK toy train sets are intended to be an easy introduction to model trains. (Blaine Dec. ¶27). Buyers of the E-Z TRACK products include purchasers for beginners to the toy train and train set market, and the actual users of the toy trains and toy train sets and accessories. (Blaine Dec. ¶28).

Toy train set-ups are not stagnant or permanent. Purchasers often assemble a toy train set in one configuration, then subsequently disassemble it to re-configure the set as a whole for a new look, or to replace individual track segments or cars as new pieces are purchased. (Blaine Dec. ¶29), Parts of a toy train set, couplers, for example, may need to be reconfigured for optimum performance or replaced over time. Part of the E-Z TRACK products' appeal for purchasers is that the E-Z TRACK parts are readily interchangeable and make adjustments simple. (Blaine Dec. ¶29).

5. Bachmann Has Actively Policed Its E-Z TRACK Marks And There Are No Pertinent Third Party Marks or Registrations Which Diminish the Strength of the E-Z TRACK Mark for Toy Train Products

Bachmann has been diligent in policing its E-Z TRACK marks in the toy train and train set category. (Blaine Dec. ¶34, Exh. H).

Bachmann has licensed its E-Z TRACK mark to third parties, including Walthers, Athearn, Model Power and Hawthorne. (Blaine Dec. ¶24, Exh. G). Such uses of the E-Z TRACK mark inure to Bachmann's benefit.

B. SCIENTIFIC

Scientific is a toy company based in Hong Kong. Scientific owns U.S. Registration No. 3,567,168 (the "168 registration") for the mark EZTEC for toys, namely, remote controlled, radio controlled, and battery operated vehicles, trains, train sets, helicopters, submarines, boats, musical instruments, pinball machines, animals, and insects issued January 27, 2009.

Scientific claims that it has used the mark EZTEC in the United States on these goods as early as 1996, and specifically with toy trains since 1998.

The '168 Registration contains no limitation as to the channels of trade and Scientific claims that its toy trains and toy train sets are available to consumers through "toy stores, specialty stores, mass merchants, warehouse clubs and Internet marketers." (Metzger Dec. ¶10, Exh. F). Scientific claims that its EZTEC toy trains are promoted at trade shows and on the internet. (Metzger Dec. ¶10, Exh. F).

Scientific has provided little evidence of use of the EZTEC mark on toy trains and toy train sets. It has produced only one catalog in which two toy train sets are shown. The EZTEC mark is not visible on either set depicted. The toy train sets bear the marks "Silvernite Express" and "Black Canyon Express," respectively. (Metzger Dec. ¶8, Exh. D, SI0000134-135).

Scientific has produced no advertisements or point of sale displays, and has produced no evidence of any consumer recognition of its mark for toy trains and toy train sets, although such materials were requested. (Metzger Dec. ¶11, Exh. G).

Scientific had actual notice of Bachmann's federal trademark registrations for the E-Z TRACK mark for toy train sets prior to using the EZTEC mark on toy trains and train sets as well as prior to filing its application for registration of the EZTEC mark for toy trains and toy train sets, and still proceeded. On March 12, 1996, when Scientific conducted a search for the EZTEC mark, the E-Z TRACK mark for toy train sets was identified in the search report. (Metzger Dec. ¶8, Exh. D, SI0000159, SI0000172).

III. STATEMENT OF LAW AND ARGUMENT

A. The Standard for Grant of Summary Judgment is Well-Established

Grant of summary judgment is proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986); see also F.R.C.P. 56(c); *Hewlett Packard v. Vudu*, Opposition No. 91185393 (TTAB October 26, 2009) (precedential). Once the moving party provides evidence that there is no issue of material fact, the burden shifts to the nonmoving party "to proffer countering evidence sufficient to create a genuine factual dispute." *Sweats Fashions, Inc. v. Pannill Knitting Company, Inc.*, 833 F.2d 1560, 1562 (Fed. Cir. 1987).

To establish its right to summary judgment on a Section 2(d) claim, the movant must establish that "there is no genuine dispute that (1) it has standing to maintain this proceeding; (2) that it is the prior user of its pleaded mark; and (3) that contemporaneous use of the parties' respective marks on their respective goods would be likely to cause confusion, mistake or to deceive consumers." *Hornblower v. Weeks, Inc. v. Hornblower & Weeks, Inc.*, 60 USPQ.2d 1733, 1735 (TTAB 2001).

B. Based on Material Facts Not Subject to Dispute, Bachmann Is Entitled To Summary Judgment

1. Bachmann Has Standing to Bring This Proceeding

Bachmann owns several federal trademark registrations for its E-Z TRACK mark. Registration No. 2,053,073 is incontestable. Bachmann is the prior user of the E-Z TRACK mark of its registrations for toy trains and toy train sets and accessories. Bachmann alleges that the EZTEC mark, as registered and used by Scientific in connection with toy trains and toy train sets, is likely to cause confusion as to source or sponsorship or affiliation. These facts establish Bachmann's standing.

2. Bachmann Has Priority

"To establish priority on a likelihood of confusion ground brought under Trademark Act Section 2(d), a party must prove that, vis-à-vis the other party, it owns 'a mark or trade name previously used in the United States...and not abandoned...'" *Fram Trak Industries, Inc. v. WireTracks, LLC*, Opposition No. 92043947 (TTAB 2004) at p. 12 (quoting 15 U.S.C. § 1052).

The E-Z TRACK mark has been in use by Bachmann in connection with toy train products since January 1994. (Blaine Dec. ¶11, Exh. A). This use has been continuous and extensive and substantially exclusive. (Blaine Dec. ¶11, Exh. A).

Scientific does not claim any use of the EZTEC mark of the registration which is the subject of this proceeding, before Bachmann's established first use date for the E-Z TRACK mark. (Metzger Dec. ¶10, Exh. F). Scientific admits that the first sale of toy trains bearing the EZTEC mark did not occur until 1998. (Metzger Dec. ¶10, Exh. F).

These facts not subject to dispute establish Bachmann's priority.

3. Scientific's EZTEC Mark For Toy Trains and Toy Train Sets is Confusingly Similar to Bachmann's E-Z TRACK Mark for Toy Trains and Toy Train Sets and Toy Train Track.

The test for likelihood of confusion under Section 2(d) of the Lanham Act was established in *In Re Application of E.I. DuPont DeNemours & Co.*

The *DuPont* factors include: 1) the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression; 2) the similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use; 3) The similarity or dissimilarity of established, likely-to-continue trade channels; 4) the conditions under which and buyers to whom sales are made; 5) the fame of the prior mark; 6) the number and nature of similar marks in use on similar goods; 7) the nature and extent of any actual confusion; 8) the length of time during and conditions under which there has been concurrent use without evidence of actual confusion; 9) the variety of goods on which a mark is or is not used; 10) the market interface between applicant and the owner of a prior mark; 11) the extent to which applicant has a right to exclude others from use of its mark on its goods; 12) the extent of potential confusion; 13) any other established fact probative of the effect of use. *See In Re Application of E.I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973).

The focus of the inquiry is "whether the purchasing public would mistakenly assume that the goods originate from the same source as, or are associated with, the goods in the cited registration." *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 1314 (Fed. Cir. 2003) (citing *Paula Payne Prods. Co. v. Johnson Publ'g Co.*, 473 F.2d 901, 902, 177 USPQ 76, 77 (CCPA 1973)).

"Not all of the *DuPont* factors may be relevant or of equal weight in a given case, and 'any one of the factors may control a particular case.'" *In re Majestic Distilling Co., Inc.*, 315 F.3d at 1315 (quoting *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1406-07, 41 USPQ.2d 1531, 1533 (Fed. Cir. 1997)). The *DuPont* analysis "may focus...on dispositive factors, such as similarity of the marks and relatedness of the goods." *Hewlett Packard v. Vudu*, Opposition No. 91185393 at

p. 4 (quoting *Han Beauty, Inc. v. Alberto-Culver Co.*, 235 F.3d 1333, 57 USPQ.2d 1557, 1559 (Fed. Cir. 2001)).

Here, the dispositive factors are the close similarity of the marks and the overlap in the identity of the goods. All the relevant factors for which there is evidence weigh in favor of finding confusion likely, or are neutral.

a. <u>The E-Z TRACK and EZTEC marks are similar</u>

"The first *DuPont* factor requires an examination of 'the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.'" *Palm Bay Imports v. Veuve Cliquot Ponsardin*, 396 F.3d 1369, 1371 (Fed. Cir. 2005) (quoting *In re Application of E.I. DuPont DeNemours & Co.*, 476 F.2d at 1361).

The visual and phonetic similarity between the E-Z TRACK and EZTEC marks is undeniable. Both marks are registered as plain word marks. No designs serve to differentiate the marks. Each word mark contains only three syllables, the first two of which are aurally identical and essentially identical visually. The last syllables are also visually and aurally similar in that each begins with "T" and has a short vowel sound and ends with the same hard "K," which sound punctuates the strong overall similarity. Such identity between the number of syllables and the phonetic flow of the marks decreases the likelihood of consumers distinguishing between the marks. *Autobytel, Inc. v. Auto By Rent, Inc.*, Opposition No. 91180067 (TTAB July 28, 2011) (Non-Precedential).

As the first component of a mark is generally dominant, confusion is likely where, as here, the first component of each mark is essentially the same and the remaining component is descriptive, or otherwise dilute. *See Century 21 Real Estate v. Century Life of America*, 970 F.2d 874, 876 (Fed. Cir. 1992); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943 (Fed. Cir. 2000);

In re Edwards Lifesciences Corp., 2009 TTAB LEXIS 180 (TTAB 2009) (Likelihood of confusion found between EZ GLIDE and E-Z GLIDER);

"E-Z" is the dominant portion of both the E-Z TRACK and EZTEC marks, not only because it is the first word of each mark, but also because both TEC and TRACK are highly suggestive, if not descriptive. TEC, and its phonetic equivalents, is shorthand for technology. TEC, and its phonetic equivalents, is commonly disclaimed in registrations. *See* Registration Nos. 3,017,168 (VP TECH), 3,442,752 (LAVA TECH), 3,961,064 (BLUE TECH) and 3,993,492 (BLUE TECH). "TRACK" identifies a component of the toy train sets and one of the toy train products sold under Bachmann's E-Z TRACK mark.

Granted the strong similarity between the marks, this *DuPont* factor weighs heavily in favor of Bachmann.

b. The goods as identified in the respective registrations are, in part, identical

"When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines." *Century 21 Real Estate,* 970 F.2d at 877.

There can be no dispute that the goods in Bachmann's and Scientific's registrations are, in part, identical. Bachmann's registration is directed to "toy train sets; toy train track, and train track with roadbed." (Registration No. 3,222,737). Scientific's registration is for, *inter alia*, "toys, namely...trains, train sets." (Registration No. 3,567,168).

A finding that confusion is likely based on identity or overlap in some of the goods is not defeated because the challenged registration includes other goods that are not the same as or so closely related to the goods of the complaining party. *Decho Corp. v. Brigitte Mueller*, Opposition No. 91183001 (TTAB August 12, 2011) (Non-Precedential). In fact, services are deemed related if at least some of the services are complementary to those of the opposer.

Specialty Brands v. Coffee Bean Distrib., 748 F.2d 669, 672, 223 USPQ 1281, 1282 (Fed. Cir. 1984).

Likelihood of confusion must be found if the public, being familiar with the Petitioner's use of its mark on its goods, on seeing the Respondent's mark on *any item* that comes within the description of goods set forth by the Petitioner in its registration, is likely to believe that Petitioner has expanded its use of the mark, directly or under a license, for such item. *See*, e.g. *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 1336 (CCPA 1981).

That the EZTEC registration is directed to the broader category of toys, in addition to toy trains and toy train sets, does not defeat a claim of likelihood of confusion. The EZTEC registration is in part directed at the identical goods as are covered by the registration for the E-Z TRACK mark. This identity of some of the goods of the EZTEC registration with the goods of the E-Z TRACK registrations weighs heavily in favor of Bachmann.

c. <u>The trade channels in which the E-Z TRACK and EZTEC goods travel are the same</u>

"As this court has previously stated, absent restrictions in the application and registration, goods and services are presumed to travel in the same channels of trade to the same class of purchasers." *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1268 (Fed. Cir. 2002). As neither Bachmann or Scientific restricted the channels of trade for their goods identified in their respective registrations, their trade channels are presumed to be the same for the same goods. The trade channels are in fact the same, as each party sells toy trains and toy train sets to the ultimate purchaser through toy stores, online retailers and mass marketers.

It is not necessary that the goods be offered side by side in particular retail outlets for the trade channels to overlap and for confusion to be likely. "This court does not limit channels of trade to identical stores or agents. Rather a channel of trade includes the same type of distribution channel. For example, this court has held channels of trade identical when products

were sold under opposing marks in supermarkets and grocery stores across the country." *Century 21 Real Estate*, 970 F.2d at 877 (quoting *Specialty Brands,* 748 F.2d at 672).

As Bachmann's and Scientific's goods are presumed to be, and are, sold through the same trade channels, this factor weighs in favor of finding a likelihood of confusion.

d. The conditions under which, and buyers to whom, sales are made

"'When the products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care.'" *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 1329, 54 USPQ.2d 1894, 1899 (Fed. Cir. 2000).

Toy trains and train sets are ordinary consumer products for which there is no special class of purchasers. (Blaine Dec. ¶28). Toy trains and toy train sets and accessories are not the subject of a complex purchase decision requiring considered contemplation, but instead are more likely to be purchased without study and without investigation when browsing through toy stores or online toy retailers. These goods are often bought as gifts by parents, grandparents or friends who may be less familiar with the products and marks than the actual user of the toy trains or toy train sets. (Blaine Dec. ¶28)

The E-Z TRACK products, in particular, are intended for beginners as an introduction to toy train sets and are priced at a relatively inexpensive price point. (Blaine Dec. ¶30).

Given the lack of sophistication of purchasers and users of toy trains and toy train sets and the relatively low price of the goods, this factor weighs in favor of Bachmann.

e. The E-Z TRACK mark is commercially strong

Commercial strength is demonstrated by strong sales, extensive advertising and recognition by the relevant purchasing public. *See Mansell Construction, Ltd. v. Lu*, Opposition No. 91184771 (TTAB August 24, 2011).

The E-Z TRACK mark merits protection strong enough to preclude others from use and registration of closely similar marks, such as EZTEC, on essentially identical goods, namely toy trains and toy train sets.

The E-Z TRACK mark has been in continuous use in connection with toy trains and train sets and track for over 16 years. (Blaine Dec. ¶11, Exh. A). Bachmann has expended significant time and resources on marketing its E-Z TRACK products through attendance at trade shows, catalogs, advertisements in print and its online presence. (Blaine Dec. ¶¶7, 19-21)

During that time, the E-Z TRACK products have enjoyed substantial sales, averaging over $12,000,000 per year since at least 2002. (Blaine Dec. ¶23, Exh. F). E-Z TRACK products have become the best-selling track and rail system in the United States, which evidences public acceptance of the mark. (Blaine Dec. ¶22).

The E-Z TRACK products and the E-Z TRACK mark have gained recognition with the relevant public and the toy train industry based on the innovative nature and quality of the products, which are the subject of four United States trademark registrations and seven utility patents. (Blaine Dec. ¶¶13-14; Metzger Dec. ¶9, Exh. E).

All this circumstantial evidence establishes the strength of the E-Z TRACK mark and supports a finding that Bachmann's mark is entitled to a level of protection sufficient to warrant cancellation of the registration for EZTEC as a mark for toy trains and toy train sets.

f. <u>There are no similar marks in use on similar goods such as would dilute the strength of the E-Z TRACK mark</u>

Whether a mark similar to the mark of a senior user is in use on other types of goods is not relevant to a determination of likelihood of confusion. "The relevant inquiry examines the

number and nature of similar marks used for [goods] *similar* to [those of Petitioner]." *Century 21 Real Estate*, 970 F.2d at 878 (emphasis added).

Due to Bachmann's diligent efforts in policing its E-Z TRACK marks, there are no significant, relevant, third party uses of any mark which includes E-Z for toy trains and there is no third party use of any mark for toy train products which is as similar to E-Z TRACK as EZTEC is. (Blaine Dec. ¶34, Exh. H).

There are licensed uses of the E-Z TRACK mark which inure to Bachmann's benefit and demonstrate the strength of the E-Z TRACK mark. (Blaine Dec. ¶24).

It is immaterial that the term "E-Z" and its phonetic equivalents may be used by third-parties on products other than toy trains and toy train sets and accessories. For instance, Easy Bake Oven is a mark used to sell toy ovens, but those goods are completely unrelated to the toy train products sold under Bachmann's E-Z TRACK mark. Such goods are not generally sold to the same end user and are not promoted through the same trade publications and are not part of the sub-category of toys, namely toy train products. (Blaine Dec. ¶32; Metzger Dec. ¶12, Exh. H).

In these circumstances, use of EZTEC by Scientific in connection with toy trains and toy train sets is likely to cause a purchaser to believe, in error, that the goods are those of Bachmann or are sold under a license from or are sponsored by Bachmann or are otherwise part of the line of products or an extension of the line of products sold by or in affiliation with Bachmann under Bachmann's E-Z TRACK mark.

g. <u>The nature and extent of any actual confusion is a neutral factor here</u>

There are at this time no known instances of actual confusion as to source based on the use of the EZTEC mark, but the applicable test is whether there is a likelihood of confusion. *See In re Application of E.I. DuPont DeNemours & Co.*, 476 F.2d at 1360.

The lack of evidence of actual confusion is a neutral factor in this proceeding because the use of EZTEC by Scientific has been so downplayed and secondary that it is likely to go unnoticed by purchasers. By way of example, on the pages of its catalog that show the toy train sets, the dominant mark is that of the particular train model, and EZTEC is not visible on the toy train or anywhere on those pages. (Metzger Dec. ¶8, Exh. D, SI0000134-135). Even where the EZTEC does appear on the packaging, the mark is inconspicuous. (Metzger Dec. ¶8, Exh. D, SI0000438-442). Scientific does no advertising of the EZTEC mark to purchasers of toy train sets. There simply has not been such use of the mark by Scientific which would create an environment in which actual confusion would be expected to have manifest itself. Accordingly, "lack of evidence of actual confusion carries little weight." *In re Majestic Distilling Co., Inc.*, 315 F.3d at 1317.

h. <u>The extent of potential confusion is substantial</u>

When the marks are closely similar as here and the goods are essentially identical at least in part and travel in the same channels, the extent of potential confusion is substantial. *Cunningham v. Laser Golf Corp.*, 222 F.3d at 943.

No marked distinctions exist between either the toy train sets or trade channels for the toy train sets to diminish the likelihood of confusion when the marks are as similar as E-Z TRACK and EZTEC.

IV. CONCLUSION

Based on the striking visual and phonetic similarities between Bachmann's E-Z TRACK mark and Scientific's EZTEC mark alone, when the marks are each used in connection with toy train sets, purchaser confusion can only be deemed likely. When the factor of the similarity of the marks and overlap of goods is combined with the remaining relevant factors, which either

favor Bachmann or are neutral, the balance weighs heavily in favor of Bachmann in finding likelihood of confusion.

Scientific can proffer no evidence to create a valid dispute that contemporaneous use of the E-Z TRACK and EZTEC marks on toy trains, toy train sets and accessories would likely cause confusion of the relevant purchasers. Bachmann therefore respectfully submits that it is entitled to grant of its motion for summary judgment.

Date: 11/11/2011

Respectfully submitted,

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By: _____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the attached Motion and Memorandum in Support of Petitioner's Motion for Summary Judgment was served on counsel for Scientific Toys, Ltd. on the date listed below via Fed Ex standard next day delivery:

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