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Filing date: **01/13/2012**

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

Proceeding	92053426
Party	Plaintiff Bachmann Industries, Inc.
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Date	01/13/2012
Attachments	BLAINE SUPPLEMENTAL DECLARATION WITH EXHIBITS (M1007302).PDF ( 13 pages )(905101 bytes )

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

BACHMANN INDUSTRIES, INC

PETITIONER,

V.

SCIENTIFIC TOYS, LTD.

RESPONDENT.

CANCELLATION No. 92053426

**SUPPLEMENTAL DECLARATION OF DOUGLAS BLAINE**

Douglas Blaine declares:

1. I am a citizen of the United States, over 18 years of age, and a resident of the state of New Jersey.
2. I am the Vice President of Marketing of Bachmann Industries, Inc. ("Bachmann"), a model train company.
3. I previously submitted a declaration dated November 10, 2011, in support of Bachmann's motion for summary judgment.
4. I am submitting this supplemental declaration in support of Bachmann's combined reply in support of its motion for summary judgment and opposition to Scientific Toys, Ltd.'s cross-motion for summary judgment.
5. Within the toy train industry, certain manufacturers offer for sale toy trains that are remote-controlled or radio-controlled, and these are technological advances that are not present in non-electronic toy trains that are intended to be pushed by hand.

6. Bachmann's toy train products are not intended to be pushed by hand, and in fact, embody technological advances that have been found entitled to patent protection, as noted in Paragraph 13 of my declaration dated November 10, 2011.

7. I have reviewed the list of third party EZ/EASY registrations referenced by Scientific in its opposition to Bachmann's motion for summary judgment, and I do not consider any of these entities, or their products, to be in competition with Bachmann's E-Z TRACK toy train products. Bachmann's competitors are those companies that offer for sale and sell toy and model train products to the same categories of customers as Bachmann does.

8. Bachmann offers and has for many years offered for sale Christmas-themed toy train sets and displays, and its promotional materials encourage consumers to set these Christmas-themed toy train sets around Christmas trees, as shown in Exhibit 1 to this declaration.

9. Bachmann adopted and began using the E-Z mark for toy train products at least as early as 1994. Listed below are the SKU numbers for products bearing the E-Z mark, sold in 1994, 1995, and 1996:

- a. 1994: 44411, 44401, 44410, 44461, 44462, 44490, 00601, 00602, 00603, 00604, 00605, 00606, 00608;
- b. 1995: 44401, 44402, 44403, 44410, 44411, 44412, 44440, 44461, 44462, 44490, 44480, 44481, 00610, 00611, 00612, 00604, 00608, 00605, 00613, 00614, 99979; and
- c. 1996: 44401, 44402, 44403, 44410, 44411, 44412, 44440, 44461, 44462, 44490, 44480, 44481, 44501, 44502, 44503, 44510, 44511, 44512, 44540, 44561, 44562, 44590, 44580, 44581, 00625, 00610, 00611, 00612, 00604, 00608, 00605, 00613, 00614, 99979, 99978, 01101, 01102, 01103, 01104

10. On October 26, 2011, I was deposed by counsel for Scientific during the discovery phase of these proceedings. On reviewing the deposition transcript, I identified certain misstatements and took appropriate steps to correct the transcript so that it is accurate, as shown in Exhibit 2 to this declaration (copy of the Errata Sheet for Blaine Deposition).

I declare under penalty of perjury that the foregoing is true and correct.

Date: January 12, 2012

  
Douglas Blaine

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of Petitioner's the Supplemental Declaration of Douglas Blaine was served on the attorney of record in this matter via Federal Express Standard Next Day delivery on the date indicated below.

Chester Rothstein  
Amster Rothstein & Ebenstein Llp  
90 Park Avenue  
New York, NY 10016  
crothste@arelaw.com

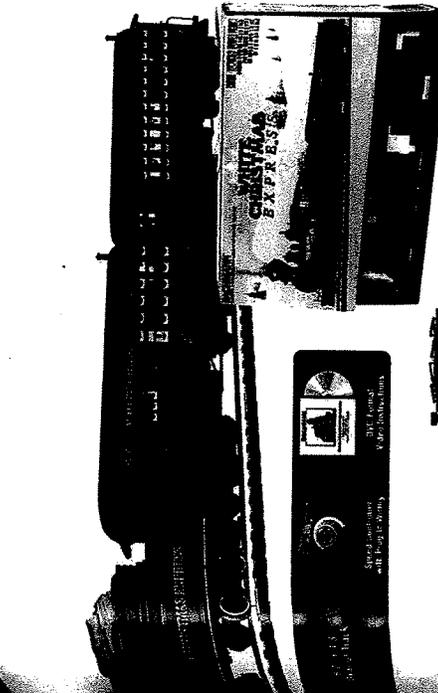
Date: Jan 13, 2012

By:   
John F. Metzger

# **EXHIBIT 1**

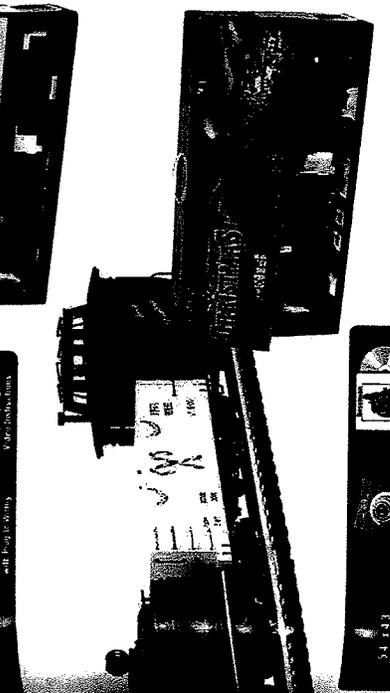
### White Christmas® Express

Item No. 90076 • Standard Pack: 1 • \$475.00  
 Create a festive scene under your tree with this colorful Yuletide. With a full load of passengers in the trailer, your passengers will be transported on a magical holiday adventure aboard the *White Christmas Express*. The *White Christmas Express* comes complete with a 4-6-0 steam locomotive (with operating headlight, smoke, and speed-synchronized sound), tender with 1000 lbs. of coal, and a 4' x 4' x 4" scale passenger car with lighted interior. 8" x 4" x 3" scale of track (20 pieces), power pack and speed controller, illustrated "The White Christmas" instruction manual, and DVD-format video instructions.



### Night Before Christmas™

Item No. 90037 • Standard Pack: 1 • \$425.00  
 Perhaps there is no other gift more fun to find under the Christmas tree than a brand new train. Delighting in the magic and delight is the *Night Before Christmas* train set. The *Night Before Christmas* comes complete with a 4-6-0 steam locomotive (with operating headlight, smoke, and speed-synchronized sound), tender with coal load, gondola, boiler, and 1000 lbs. of coal. Also included are a 5'4" x 4'3" scale passenger car, power pack, and speed controller. Illustrated "The Night Before Christmas" instruction manual, and DVD-format video instructions.



ALL SETS ARE READY TO RUN AND PROTECTED BY BACHMANN'S EXCLUSIVE LIFETIME LIMITED WARRANTY.  
 Note: Sound system and passenger car lights (if applicable) require one 9V battery (not included). Batteries are not included.

**Home for the Holidays** **NEW**

an *E-Z Train*® set with *E-Z Man*® couplers  
Item No. 25021 • Standard Pack: 3 • \$375.00

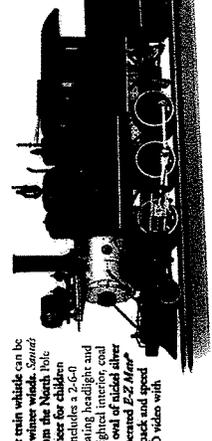
Welcoming family and friends to share the holidays is one of life's most cherished pleasures. This festively decorated ready-to-run train set carries passengers ever closer to home as it travels around your Christmas tree or holiday layout. *Home for the Holidays* comes complete with a 2-60 steam locomotive with operating headlights and coal hopper, 50' x 38" oval of aided silver *E-Z Train*® hopper gondola, 50' x 38" oval of aided silver *E-Z Man*® coupler on all cars, power pack and speed controller, and helpful DVD video with assembly instructions.



**Santa's Express**

an *E-Z Train*® set with *E-Z Man*® couplers  
Item No. 25019 • Standard Pack: 3 • \$365.00

The crisp sound of a distant train whistle can be heard drifting on the frosty winter winds. *Santa's Express* is making its trek from the North Pole with a delivery of holiday cheer for children everywhere! *Santa's Express* includes a headlight and coal tender combine with lighted interior, coal hopper, gondola, 50' x 38" oval of aided silver *E-Z Train*®, magnetically operated *E-Z Man*® couplers on all cars, power pack and speed controller, and helpful DVD video with assembly instructions.



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SCALE

ELECTRIC TRAIN SETS



### McKinley Explorer

an E-Z Track® set

Item No. 24010 • Standard Pack 6 • \$160.00

Treat passengers to breathtaking views of the Alaskan wilderness in special view-dome cars in the McKinley Explorer. Opening today from Anchorage to Fairbanks, and running through Denali National Park, this car set is sure to bring you right to the sight of bears, moose, sheep, and bald eagles. Out in the McKinley Explorer set comes complete with:

- powered EMD P9 diesel locomotive with operating headlight
- three full dome passenger cars (the Kenai, Kirk and Doyon, all named after Alaskan rivers)
- 39' x 25' oval of nickel silver E-Z Track® including 11 pieces straight track, 4 pieces curved track, and 1 curved plug-in terminal resistor
- power pack and speed controller
- illustrated instruction manual



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SCALE

ELECTRIC TRAIN SETS

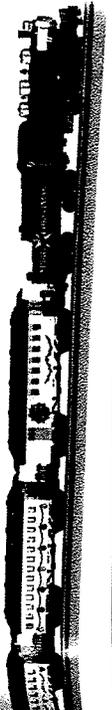
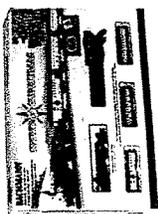
### Spirit of Christmas

an E-Z Track® set

Item No. 24017 • Standard Pack 6 • \$175.00

Good things come in small packages. This is certainly true when it comes to the Spirit of Christmas N scale set. Perfect for your Christmas, this ready-to-run set features:

- 1-60 steam locomotive and tender
- alkaline controller
- two all-time coaches
- 14' x 24' oval of nickel silver E-Z Track® including 11 pieces curved track, 4 pieces straight track, and 1 curved plug-in terminal resistor
- power pack and speed controller
- illustrated instruction manual



### Highballer

an E-Z Track® set

Item No. 24002 • Standard Pack 6 • \$115.00

The term "highball" originally referred to a railroad track signal indicating it was safe to proceed (literally, a ball hung over the track). In time, the expression "highballer" evolved to describe a train engineer who ran his locomotives at reckless speeds. We urge you to go easy on the throttle when you operate this Highballer train set! The Highballer comes complete with locomotive's exclusive E-Z Track® snap-fit track and roadbed system, plus:

- smooth-running EMD P9 diesel locomotive with 100-watt five and operating headlight
- tax car
- tank car
- off-center, above
- 24' circle of nickel silver E-Z Track® including 11 pieces curved track and 1 curved plug-in terminal resistor
- power pack and speed controller
- illustrated instruction manual



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# BACHMANN

July / August  
1994

News  
Newsletter for Hobby & Toy Retailers

## Putting Your New Customer Sales on Track: *Do it the "E-Z" Way*

When we talk about putting your new customer sales on track, we're talking about **E-Z Track™**. *E-Z Track™ is our revolutionary new track support and roadbed system that gets HO scale trains up and running in just minutes.*

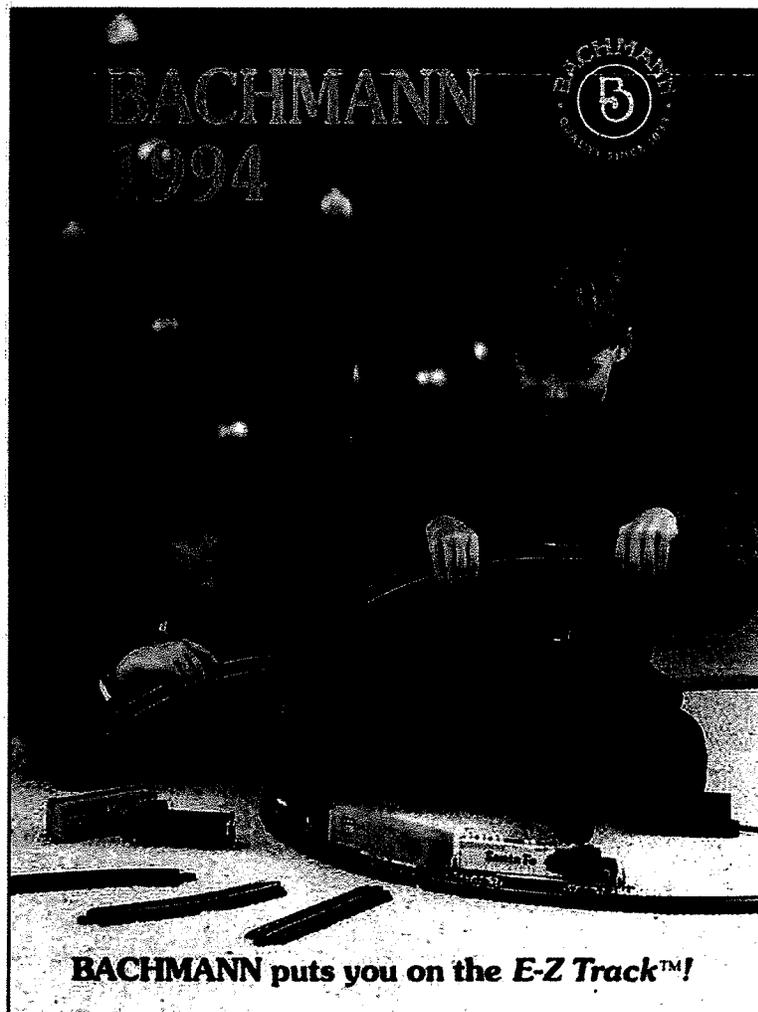
With the **E-Z Track™** system, boards, nails, screws and tools are no longer needed for track layout: trains can go directly on the floor, carpet, or tabletop for fast and easy railroading enjoyment!

In this special issue of *Bachmann News*, we'll show

you all the benefits of the **E-Z Track™** system, and why it means good business for you. We have also enclosed two sections of **E-Z**

**Track™** so you can see for yourself how easily your customers can get started as railroad hobbyists. Go ahead.

Snap them together! See why we're so excited about **E-Z Track™**. Then read on to learn more about our plans for **E-Z Track™**, and how your hobby shop can be listed in our full, double page ad in a November issue of *USA Today*.



# **EXHIBIT 2**

ERRATA SHEET

Attach to Deposition of:            Douglas C. Blaine  
 Taken on:    October 26, 2011  
 In the matter of Bachmann vs. Scientific Toys

PAGE	LINE NO.	CHANGE	REASON
20	22	“Correct” to “The first time it was used was in the 1995 catalog”	To correct accuracy of response
21	3-5	Add “in 1996” to the end of the response	To correct accuracy of response
21	13-15	Add “in 1996” to the end of the response	To correct accuracy of response
21	22	Change “I believe so” to “I believe it was in 1996”	To correct accuracy of response
27	23	Change “I believe so” to “I believe it was in the 1995 catalog”	To correct accuracy of response
28	10	Add “the first use was on couplers in 1996 and on trains during 1997” to the end of the response	To correct accuracy of response
30	9	Change “I don’t know” to “I believe it was in the 1995 catalog”	To correct accuracy of response
30	25	Change “believe” to “believed”	To correct tense
33	3	After the sentence “I don’t know exactly” add “It was in the 1995 catalog”	To correct accuracy of response
34	4	Change “1997” to “February 1995”	To correct accuracy of response
34	11	Change “Correct” to “No, it was in the 1995 catalog.”	To correct accuracy of response
34	25	Change “I believe so” to “I believe it was in 1996.”	To correct accuracy of response
37	25	Change “1997” to “1994 or 1995”	To correct accuracy of response
42	7	Change “Yes” to “During or after 1997”	To correct accuracy of response
67	9	Change “No” to “Not on the packaging; it was on the couplers.”	To correct accuracy of response
67	12	Change “No” to “Not on the packaging; it was on the couplers.”	To correct accuracy of response
71	18	Change “I don’t know” to “Not on the packaging; it was on the couplers.”	To correct accuracy of response
71	22	Change “To my knowledge, that’s correct” to “To my knowledge, it was not on the packaging; it was on the couplers.”	To correct accuracy of response

Attach to Deposition of: Douglas C. Blaine  
 Taken on: October 26, 2011  
 In the matter of Bachmann vs. Scientific Toys

77	7	Change "That is correct" to Not on the packaging; it was on the couplers."	To correct accuracy of response
103	18	Change "1997" to "In or before 1995."	To correct accuracy of response
103	23	Change "That is correct" to "It was in 1997."	To correct accuracy of response
104	12	Change "Yes" to No, in the February 1995 catalog."	To correct accuracy of response
104	15-16	Change "I don't believe so" to "In the 1997 catalog"	To correct accuracy of response
104	20	Change "Correct" to "In the February 1995 catalog."	To correct accuracy of response
114	9	Add "I am aware that they sell tracks as part of train sets."	To correct accuracy of response
114	13	Add "I am aware that they sell tracks and train cars as parts of train sets. I am not aware that they sell them separately."	To correct accuracy of response
128	14	Change "I don't recall" to "It was in 1996."	To correct accuracy of response