

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN LIGHTING CONTROL
DEVICES INCLUDING DIMMER
SWITCHES AND PARTS THEROF (IV)**

Inv. No. 337-TA-776

**ORDER NO. 10: INITIAL DETERMINATION TERMINATING INVESTIGATION
AS TO RESPONDENT PASS & SEYMOUR, INC. BASED UPON
CONSENT ORDER**

(November 2, 2011)

On October 18, 2011, respondent Pass & Seymour, Inc. (“Pass & Seymour”) moved to terminate the investigation based on entry of a consent order. (Motion Docket No. 776-009.) On October 28, 2011, the Commission Investigative Staff (“Staff”) filed a response in support of the motion. On the same day, complainant Lutron Electronics Co., Inc. (“Lutron”) filed an opposition to the motion.

Pass & Seymour also seeks a brief extension of time to comply with certain procedural deadlines in light of this motion. Staff supports this aspect of the motion. No party opposes. Accordingly, Pass & Seymour is granted an extension of ten days after the Commission’s action on this motion to identify expert witnesses.

In accordance with Commission Rule 210.21(c), Pass & Seymour entered into a “Consent Order Stipulation” and a proposed “Consent Order,” both are attached hereto as Attachment A. Commission Rule 210.21(c)(3) sets forth certain requirements for the contents of a consent order stipulation. The Consent Order Stipulation submitted by Pass & Seymour complies with the requirements of Commission Rule 210.21(c)(3).

Specifically, Pass & Seymour agrees that upon entry of the consent order, Pass & Seymour “will not sell for importation, import into the United States, or sell in the United States

after importation, certain lighting control devices including dimmer switches and parts thereof that infringe any asserted claim of the '930 Patent until the expiration, invalidation, and/or a finding of unenforceability of the asserted claims of the '930 Patent or until Pass & Seymour's products are licensed." (See Consent Order Stipulation ¶ 4; Proposed Consent Order ¶ 1.) Pass & Seymour agrees, pursuant to Commission Rule 210.21(c)(3)(i)(A), to:

- (1) an admission of the Commission's *in rem* jurisdiction over "Pass & Seymour's certain lighting control devices including dimmer switches and parts thereof that are the basis of this Investigation" and personal jurisdiction over Pass & Seymour for purposes of the Consent Order (see Consent Order Stipulation ¶ 3);
- (2) an express waiver by Pass & Seymour of all rights to seek judicial review or otherwise challenge or contest the validity of the consent order (see Consent Order Stipulation ¶ 5; Proposed Consent Order ¶ 2);
- (3) Pass & Seymour's representation that they will cooperate with and will not seek to impede by litigation or other means the Commission's efforts to gather information under subpart I of part 210 of Title 19 of the Code of Federal Regulations (see Consent Order Stipulation ¶ 6; Proposed Consent Order ¶ 3), and
- (4) that the enforcement, modification, and revocation of the consent order will be carried out pursuant to subpart I of part 210 of Title 19 of the Code of Federal Regulations, incorporating by reference the Commission's Rules of Practice and Procedure (see Consent Order Stipulation ¶ 7; Proposed Consent Order ¶ 9).

Because this is an intellectual property-based investigation, the Consent Order Stipulation also contains a statement, pursuant to Commission Rule 210.21(c)(3)(i)(B), that:

- (1) the Consent Order shall not apply with respect to any claim of an intellectual property right that has expired or been found or adjudicated invalid or unenforceable by the Commission or a court or agency of competent jurisdiction, provided that such finding or judgment has become final and non-reviewable (see Consent Order Stipulation ¶ 8; Proposed Consent Order ¶ 5), and
- (2) a representation by Pass & Seymour that it will not seek to challenge the validity or enforceability of the U.S. Patent No. 5,637,930 in any administrative or judicial proceeding to enforce the Consent Order (see

Consent Order Stipulation ¶ 9; Proposed Consent Order ¶ 4).

In addition to the provisions required by Commission Rule 210.21(c)(3), the Consent Order Stipulation contains additional provisions, including a statement that the signing of the Consent Order Stipulation by Pass & Seymour does not constitute an admission by Pass & Seymour that an unfair act has been committed or that the U.S. Patent No. 5,637,930 is valid, enforceable, or infringed. (See Consent Order Stipulation ¶¶ 10, 11; Proposed Consent Order ¶¶ 7, 8.) Commission Rule 210.21(c)(3)(i)(C) specifically provides that a consent order stipulation may contain a statement that it is for settlement purposes and does not constitute an admission that an unfair act has been committed. Therefore, the additional terms in the Consent Order Stipulation are permissible. It should be noted that the additional statements regarding validity, infringement, and enforceability are allowed because they merely break out the elements of an unfair act.

The ALJ concludes by addressing Lutron's opposition. Lutron raises four "objections." *First*, Lutron complains that "Pass & Seymour has failed specifically to admit both *in personam* and subject matter jurisdiction." (Opposition at 1.) This is incorrect. As discussed above, Pass & Seymour has admitted jurisdiction over the subject matter of the investigation – the accused products, and Pass & Seymour has admitted the Commission has personal jurisdiction over it for purposes of the Consent Order. A review of *Black's Law Dictionary* reveals that "personal jurisdiction" and "*in personam* jurisdiction" mean the exact same thing. BLACK'S LAW DICTIONARY 863 (9th ed. 2009). Thus, there can be no dispute that Pass & Seymour has submitted itself to the Commission's jurisdiction. *Second*, Lutron complains that the "Consent Order Stipulation does not contain an express waiver of all rights to seek judicial review or otherwise contest the validity of the consent order . . . to the extent that it is 'subject to Section

8.” (Opposition at 1-2.) It appears that Lutron’s complaint is that the express waiver was not in the “proper place” in a single paragraph, but instead is broken up over two paragraphs, with one paragraph referencing the other, *i.e.* “subject to Section 8.” The ALJ finds nothing improper about this approach since Pass & Seymour has expressly waived the right to seek judicial review. The qualification in Section 8 merely recognizes – as does Rule 210.21(c) – the order does not extend to enforce invalid, expired, or unenforceable intellectual property rights. *Third*, Lutron complains that “Paragraph 7 . . . does not incorporate by reference the entirety of the Commission’s Rules of Practice and Procedure....” Once again, this is incorrect. Pass & Seymour’s stipulation specifically states that “Enforcement, modification, or revocation of the Consent Order will be carried out pursuant to subpart I of the Commission’s Rules, 19 C.F.R. Part 210.” (Consent Order Stipulation ¶ 7.) If Lutron’s complaint is that the words “incorporates by reference” are not included, this is not necessary. *Cf. Northrup Grumman Corp. v. United States*, 535 F.3d 1339, 1346 (Fed. Cir. 2008) (noting in the contract context “[o]ur Circuit likewise does not require ‘magic words’ of reference or of incorporation.”). There can be no doubt that Pass & Seymour’s explicit and clear reference to Commission’s Rules was sufficient. *See Zenon Envtl., Inc. v. U.S. Filter Corp.*, 506 F.3d 1370, 1378 (Fed. Cir. 2007) (“Incorporation by reference provides a method for integrating material . . . by citing such material in a manner that makes clear that the material is effectively part of the host document as if it were explicitly contained therein.”) (quotation omitted). *Finally*, Lutron complains that Pass & Seymour separately provided in Paragraph 10 that “[t]he signing of the Consent Order Stipulation does not constitute an admission by Pass & Seymour that the ’930 Patent is valid, enforceable, or infringed by Pass & Seymour.” As the Staff correctly notes in their brief this is simply “a separate statement breaking out the separate components of a finding of violation.”

(Staff Brief at 3 n.2.) The ALJ agrees. Thus, the ALJ finds that Lutron's opposition fails to provide any valid basis to deny Pass & Seymour's motion.

Commission Rule 210.50(b)(2) provides that in the case of a proposed termination by settlement agreement or consent order, the parties may file statements regarding the impact of the proposed termination on the public interest, and the administrative law judge may hear argument, although no discovery may be compelled, with respect to issues relating solely to the public interest. In any initial determination terminating an investigation by settlement agreement or consent order, the administrative law judge is directed to consider and make appropriate findings regarding the effect of the proposed settlement on the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers. In its motion, Pass & Seymour asserts that termination of this investigation is in the public interest. (Motion at 3.) The Staff does not dispute this representation. (Staff Resp. at 4-5.)

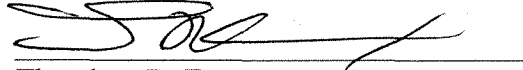
Based on the pleadings filed in connection with the motion to terminate the investigation, the ALJ finds that there is no indication that termination of this investigation based on the consent order stipulation would have an adverse impact on the public interest. In addition, the termination of an investigation as to a respondent, such as that proposed by the motion, is generally in the public interest.

Accordingly, it is the Initial Determination that Motion No. 776-009 be GRANTED. This initial determination, along with supporting documentation, is hereby certified to the Commission.

Pursuant to 19 C.F.R. § 210.42(h), this Initial Determination shall become the determination of the Commission unless a party files a petition for review of the Initial

Determination pursuant to 19 C.F.R. § 210.43(a), or the Commission, pursuant to 19 C.F.R. § 210.44, orders, on its own motion, a review of the Initial Determination or certain issues here.

SO ORDERED.

A handwritten signature in black ink, appearing to read 'T. Essex', is written over a horizontal line.

Theodore R. Essex
Administrative Law Judge

PUBLIC VERSION

Attachment A

(PUBLIC VERSION)

UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C. 20436

Before The Honorable Theodore R. Essex
Administrative Law Judge

In the Matter of

**CERTAIN LIGHTING CONTROL DEVICES
INCLUDING DIMMER SWITCHES AND
PARTS THEREOF (IV)**

Investigation No. 337-TA-776

CONSENT ORDER STIPULATION

WHEREAS, Complainant Lutron Electronics Co., Inc. filed a complaint ("Complaint") before the United States International Trade Commission ("Commission") on May 16, 2011, alleging unfair acts in the importation into the United States, sale for importation into the United States, and sale in the United States after importation of certain lighting control devices including dimmer switches and parts thereof by Respondent Pass & Seymour, Inc. ("Pass & Seymour") that are alleged to infringe one or more claims of U.S. Patent No. 5,637,930 ("the '930 Patent");

WHEREAS, the Commission instituted this Investigation under Section 337 of the Tariff Act of 1930, as amended, (19 U.S.C. § 1337), based upon the allegations contained within the Complaint;

WHEREAS, Pass & Seymour agrees to the entry of a Consent Order by the Commission, in the form attached hereto as Exhibit A;

NOW THEREFORE, pursuant to Commission Rule 210.21(c)(1)(ii) and (c)(3)(i), Pass & Seymour stipulates and agrees as follows in connection with its Motion for the

Termination of this Investigation as to Pass & Seymour, Inc. and for the Entry of the Proposed Consent Order:

- 1) Respondent Pass & Seymour is a company organized and existing under the laws of the state of New York, with its principal place of business at 50 Boyd Avenue, Syracuse, New York 13221.
- 2) Pass & Seymour stipulates to the entry of a Consent Order in the form attached hereto as Exhibit A (the "Consent Order").
- 3) The Commission has *in rem* jurisdiction over Pass & Seymour's certain lighting control devices including dimmer switches and parts thereof that are the basis of this Investigation and the Commission has personal jurisdiction over Pass & Seymour for purposes of the Consent Order.
- 4) Pass & Seymour agrees that, upon entry of the Consent Order, it will not sell for importation, import into the United States, or sell in the United States after importation, certain lighting control devices including dimmer switches and parts thereof that infringe any asserted claim of the '930 Patent until the expiration, invalidation, and/or a finding of unenforceability of the asserted claims of the '930 Patent or until Pass & Seymour's products are licensed.
- 5) Pass & Seymour expressly waives all rights to seek judicial review or otherwise challenge or contest the validity of the Consent Order, subject to Section 8, below.

- 6) Pass & Seymour will cooperate with and will not seek to impede by litigation or other means the Commission's efforts to gather information under subpart I of the Commission's Rules, 19 C.F.R. Part 210.
- 7) Enforcement, modification, or revocation of the Consent Order will be carried out pursuant to subpart I of the Commission's Rules, 19 C.F.R. Part 210.
- 8) The Consent Order shall not apply with respect to any claim of any intellectual property right that has expired or been found or adjudicated invalid or unenforceable by the Commission or a court or agency of competent jurisdiction, provided that such finding or judgment has become final and non-reviewable.
- 9) Pass & Seymour will not seek to challenge the validity or enforceability of the '930 Patent in any administrative or judicial proceeding to enforce the Consent Order.
- 10) The signing of the Consent Order Stipulation does not constitute an admission by Pass & Seymour that the '930 Patent is valid, enforceable, or infringed by Pass & Seymour.
- 11) The signing of the Consent Order Stipulation does not constitute an admission by Pass & Seymour that an unfair act has been committed.
- 12) There are no agreements, written or oral, express or implied, between the parties concerning the subject matter of this investigation.

Respectfully submitted,

FISH & RICHARDSON P.C.

Dated: October 18, 2011

By: /s/ Joseph V. Colaianni

Joseph V. Colaianni

Jeffrey R. Whieldon

Fish & Richardson P.C.

1425 K Street NW, Suite 1100

Washington, D.C. 20005

Telephone: (202) 783-5070

Facsimile: (202) 783-2331

Counsel for Pass & Seymour, Inc.

EXHIBIT A

UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C. 20436

Before The Honorable Theodore R. Essex
Administrative Law Judge

In the Matter of

**CERTAIN LIGHTING CONTROL DEVICES
INCLUDING DIMMER SWITCHES AND
PARTS THEREOF (IV)**

Investigation No. 337-TA-776

[PROPOSED] CONSENT ORDER

The United States International Trade Commission (hereinafter the "Commission") has instituted this Investigation under Section 337 of the Tariff Act of 1930 as amended (19 U.S.C. §1337), based upon the allegations contained in the Complaint filed by Complainant Lutron Electronics Co., Inc. ("Complainant") that alleges unfair acts in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain lighting control devices including dimmer switches and parts thereof by Respondent Pass & Seymour, Inc. ("Pass & Seymour").

Pass & Seymour has executed a Consent Order Stipulation to this Proposed Consent Order in which Pass & Seymour agrees to the entry of this Consent Order and to all waivers and other provisions as required by the Commission's Rules of Practice and Procedure and has filed a Motion for Termination of this Investigation based upon the Proposed Consent Order. In particular, Pass & Seymour has stipulated as follows:

- 1) Respondent Pass & Seymour is a company organized and existing under the laws of the state of New York, with its principal place of business at 50 Boyd Avenue, Syracuse, New York 13221.
- 2) Pass & Seymour stipulates to the entry of this Consent Order (the "Consent Order").
- 3) The Commission has *in rem* jurisdiction over Pass & Seymour's certain lighting control devices including dimmer switches and parts thereof that are the basis of this Investigation and the Commission has personal jurisdiction over Pass & Seymour for purposes of the Consent Order.
- 4) Pass & Seymour agrees that, upon entry of the Consent Order, it will not sell for importation, import into the United States, or sell in the United States after importation, certain lighting control devices including dimmer switches and parts thereof that infringe any asserted claim of the '930 Patent until the expiration, invalidation, and/or a finding of unenforceability of the asserted claims of the '930 Patent or until Pass & Seymour's products are licensed.
- 5) Pass & Seymour expressly waives all rights to seek judicial review or otherwise challenge or contest the validity of the Consent Order, subject to Section 8, below.
- 6) Pass & Seymour will cooperate with and will not seek to impede by litigation or other means the Commission's efforts to gather information under subpart I of the Commission's Rules, 19 C.F.R. Part 210.
- 7) Enforcement, modification, or revocation of the Consent Order will be carried out pursuant to subpart I of the Commission's Rules, 19 C.F.R. Part 210.
- 8) The Consent Order shall not apply with respect to any claim of any intellectual property right that has expired or been found or adjudicated invalid or unenforceable by the Commission or a court or agency of competent jurisdiction, provided that such finding or judgment has become final and non-

reviewable.

- 9) Pass & Seymour will not seek to challenge the validity or enforceability of the '930 Patent in any administrative or judicial proceeding to enforce the Consent Order.
- 10) The signing of the Consent Order Stipulation does not constitute an admission by Pass & Seymour that the '930 Patent is valid, enforceable, or infringed by Pass & Seymour.
- 11) The signing of the Consent Order Stipulation does not constitute an admission by Pass & Seymour that an unfair act has been committed.
- 12) There are no agreements, written or oral, express or implied, between the parties concerning the subject matter of this investigation.

NOW, THEREFORE, the Commission issues the following Consent Order:

- 1) Upon entry of this Consent Order, Pass & Seymour shall not sell for importation, import into the United States, or sell in the United States after importation, certain lighting control devices including dimmer switches and parts thereof that infringe any asserted claim of the '930 Patent until the expiration, invalidation, and/or a finding of unenforceability of the asserted claims of the '930 Patent or until Pass & Seymour's products are licensed.
- 2) Pass & Seymour shall be precluded from seeking judicial review or otherwise challenging or contesting the validity of the Consent Order, subject to Sections 4 and 5, below.
- 3) Pass & Seymour shall cooperate with and will not seek to impede by litigation or other means the Commission's efforts to gather information under subpart I of the Commission's Rules, 19 C.F.R. Part 210.
- 4) Pass & Seymour shall not seek to challenge the validity or enforceability of the '930

Patent in any administrative or judicial proceeding to enforce the Consent Order.

- 5) When the '930 patent has expired or been found or adjudicated invalid or unenforceable by the Commission or a court or agency of competent jurisdiction, provided that such finding or judgment has become final and non-reviewable, this Order shall become null and void.
- 6) There are no agreements, written or oral, express or implied, between Pass & Seymour and Complainant concerning the subject matter of this investigation.
- 7) The entry of this Consent Order does not constitute an admission by Pass & Seymour that the '930 Patent is valid, enforceable, or infringed by Pass & Seymour.
- 8) The entry of this Consent Order does not constitute an admission by Pass & Seymour that an unfair act has been committed.
- 9) This Investigation is hereby terminated as to Pass & Seymour and Pass & Seymour is hereby dismissed as a named respondent in this Investigation; provided, however, that enforcement, modification, or revocation of the Consent Order shall be carried out pursuant to Subpart I of the Commission's Rules, 19 C.F.R. Part 210.

BY ORDER OF THE COMMISSION:

Date:

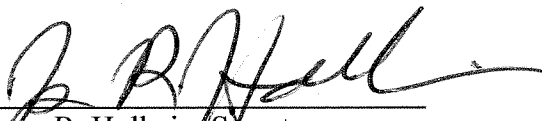
James, R. Holbein, Secretary

**CERTAIN LIGHTING CONTROL DEVICES
INCLUDING DIMMER SWITCHES AND
PARTS THEREOF (IV)**

Inv. No. 337-TA-776

PUBLIC CERTIFICATE OF SERVICE

I, James R. Holbein, hereby certify that the attached **ORDER 10** has been served by hand upon the Commission Investigative Attorney, **Lisa M. Kattan, Esq.**, and the following parties as indicated on **November 2, 2011**.


James R. Holbein, Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112
Washington, D.C. 20436

On Behalf of Complainant LUTRON ELECTONICS CO., INC.:

V. James Adduci II, Esq.
ADDUCI MASTRIANI & SCHAUMBERG LLP
1200 17th Street, NW, 5th Floor
Washington, DC 20036

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() Via First Class Mail
() Other: _____

On Behalf of Respondents PASS & SEYMOUR:

Joseph V. Colaianni, Jr., Esq.
FISH & RICHARDSON, PC
1425 K Street, NW, 11th Floor
Washington, DC 20005

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() Via Overnight Mail
() Via First Class Mail
() Other: _____

On Behalf of Respondents ELEMENTAL LED, LLC d/b/a DIODE LED:

Michael A. Berta, Esq.
ARNOLD & PORTER, LLP
One Embarcadero Center, 22nd Floor
San Francisco, CA 94111

() Via Hand Delivery
() Via Overnight Mail
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() Other: _____

On Behalf of Respondents AH LIGHTING:

Ken Ralidis, Esq.
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() Other: _____

**CERTAIN LIGHTING CONTROL DEVICES
INCLUDING DIMMER SWITCHES AND
PARTS THEREOF (IV)**

Inv. No. 337-TA-776

PUBLIC CERTIFICATE OF SERVICE – PAGE TWO

Respondents:

American Top Electric Corp.
1202 E. Walnut Avenue, Suite H
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() Other: _____

Big Deal Electric Corp.
1202 E. Walnut Avenue, Suite H
Santa Ana, California 92701

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() Via First Class Mail
() Other: _____

Wenzhou Huir Electric Science &
Technology Col, Ltd.
Bridge East Wan-AO
Qiaton Village
Yueqing, Zhejiang 325600

() Via Hand Delivery
() Via Overnight Mail
() Via First Class Mail
() Other: _____

Westgate Mfg., Inc.
4500 S. Boyle Ave.
Vernon, California 90058

() Via Hand Delivery
() Via Overnight Mail
() Via First Class Mail
() Other: _____

Zhejiang Lux Electronic Co., LTD
Weigi Rd. #222 (Building #4, 2nd Floor,
Tongling Tech. Group Ltd. Company)
Yueqing Economic Development Zone
Yueqing, Zhejiang 325600

() Via Hand Delivery
() Via Overnight Mail
() Via First Class Mail
() Other: _____

Zhejiang Yuelong Mechanical &
Electrical Co., LTD.
Yao Rd. & Nanxi Rd.
Jiazing, Zhejiang 31400

() Via Hand Delivery
() Via Overnight Mail
() Via First Class Mail
() Other: _____

**CERTAIN LIGHTING CONTROL DEVICES
INCLUDING DIMMER SWITCHES AND
PARTS THEREOF (IV)**

Inv. No. 337-TA-776

PUBLIC CERTIFICATE OF SERVICE – PAGE THREE

PUBLIC MAILING LIST:

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Kenneth Clair
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