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**UNITED STATES COURT OF INTERNATIONAL TRADE
BEFORE THE HONORABLE TIMOTHY C. STANCEU, CHIEF JUDGE**

PRIMESOURCE BUILDING PRODUCTS, INC.,)
)
)
 Plaintiff,)
)
 v.)
)
 THE UNITED STATES, DONALD J. TRUMP, IN HIS)
 OFFICIAL CAPACITY AS PRESIDENT OF THE)
 UNITED STATES; WILBUR L. ROSS, JR., IN HIS)
 OFFICIAL CAPACITY AS UNITED STATES)
 SECRETARY OF COMMERCE; UNITED STATES)
 DEPARTMENT OF COMMERCE; MARK A.)
 MORGAN, IN HIS OFFICIAL CAPACITY AS ACTING)
 COMMISSIONER, UNITED STATES CUSTOMS AND)
 BORDER PROTECTION; UNITED STATES)
 CUSTOMS AND BORDER PROTECTION,)
)
 Defendants.)

Ct. No. 20-00032
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**MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY
INJUNCTION**

Pursuant to Rules 7 and 65 of the Rules of the U.S. Court of International Trade, Plaintiff, PrimeSource Building Products, Inc. (“PrimeSource”) hereby moves for a temporary restraining order and preliminary injunction enjoining the collection of cash deposits from PrimeSource pursuant to Presidential Proclamation 9980, published in the Federal Register on January 29, 2020. Proclamation No. 9980, Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles into the United States, 85 Fed. Reg. 5,281 (Jan. 29, 2020) (“Proclamation No. 9980”). Specifically, this motion enjoins Defendants from taking any action against PrimeSource to implement the expansion of the steel tariffs currently imposed under Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862 (2018) (“Section 232”) to “derivative steel products”

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identified in Proclamation No. 9980. This injunctive relief is sought during the pendency of this litigation including all appeals.

Specifically, PrimeSource requests that this Court enter an order:

1. granting this Motion;
2. enjoining Defendants from collecting duty deposits pursuant to Proclamation 9980 of January 24, 2020: Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles Into the United States, 85 Fed. Reg. 5281 (January 29, 2020), on entries by PrimeSource Building Products Inc. filed on or after 12:01 am February 8, 2020;
3. ordering that Defendants, within 10 business days, return to PrimeSource Building Products, Inc., any duties deposited pursuant to Proclamation 9980 prior to implementation of this Order, without otherwise affecting the liquidation of the entries upon which the duties were deposited;
4. ordering Defendants to suspend liquidation of all entries filed by PrimeSource Building Products, Inc. of articles subject to Proclamation 9980. Such suspension shall continue through the pendency of this litigation, including any appeals;
5. ordering Defendants and PrimeSource Building Products, Inc. to ensure that, within 15 days of this Order, the continuous importation bond of PrimeSource Building Products, Inc. is increased to reflect one half of the amount of Section 232 duties to otherwise have been due upon PrimeSource's imports over a prospective six month period, based on the estimate provided in Confidential Ex. 2 to PrimeSource's Complaint;

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6. Ordering that the United States and PrimeSource Building Products, Inc., shall confer prior to the expiry of the prospective six month period to review the actual Section 232 duty deposits foregone, PrimeSource's estimated imports over the next six month period, and to ensure that PrimeSource's continuous bond is further adjusted to secure one half of the uncollected Section 232 duties for each subsequent six-month period while this Order is in effect.

We provide two proposed Orders with our motion. One grants the motion, in part, and imposes a temporary restraining order pending further consideration of a preliminary injunction. The other grants injunctive relief in the form of a temporary restraining order and preliminary injunction, in the event that further proceedings regarding the preliminary injunction are not necessary.

In this action, PrimeSource challenges the expansion of the duties currently imposed pursuant to Section 232 on the "derivative steel products" identified in Proclamation No. 9980 without providing any sort of reasoned explanation or proper notice and comment period, issuing the proclamation outside of the statutory window for actions based on the Department of Commerce's ("Commerce") 2018 report on the Effects of Imports of Steel on the National Security and the broader lawfulness of the authority granted to the President by Section 232.

Section 232 authorizes the President "to take action to adjust imports of an article and its derivatives" only if certain procedural requirements are met. See 19 U.S.C. § 1862. Specifically, Section 232 establishes "clear and unambiguous steps—of investigation, consultation, report, consideration, and action." Transpacific Steel LLC v. United States, No. 19-00009, 2019 Ct. Intl. Trade LEXIS 142, at *9 (Ct. Int'l Trade Nov. 15, 2019). On January 24, 2020, the President issued Proclamation No. 9980, imposing additional tariffs of 25 and 10 percent, respectively, on certain

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steel- and aluminum-derivative products. See Proclamation No. 9980 at 5,283-84. The procedural basis for the President’s action was an “assessment” made by the Secretary of Commerce and Commerce’s 2018 report considering the impact of “steel mill products { } on the national security of the United States. See id. at 5,282-83; U.S. DEP’T OF COMMERCE, BUREAU OF INDUS. & SEC. OFFICE OF TECH. EVALUATION, The Effect of Imports of Steel on the National Security at 1, (Jan. 11, 2018), *available at* https://www.commerce.gov/sites/default/files/the_effect_of_imports_of_steel_on_the_national_security_-_with_redactions_-_20180111.pdf.

On January 29, 2020, the Executive Office of the President published Annexes in the Federal Register listing the “derivative” products covered by Proclamation No. 9980. See Proclamation No. 9980, 85 Fed. Reg. at 5,286, 5,290. The covered products included steel nails, tacks (other than thumb tacks), drawing pins, corrugated nails, staples (other than those of heading 8305) and similar derivative steel articles as well as aluminum stranded wire, cables, plaited bands and vehicular bumper and body stampings.

As explained in detail in the accompanying Memorandum in Support of the Motion for a Temporary Restraining Order and Preliminary Injunction, the implementation of Proclamation No. 9980 should be limited in the ways described above and in the draft orders attached to this motion.

I. PRIMESOURCE MEETS THE LEGAL STANDARD FOR A PRELIMINARY INJUNCTION

To prevail on a motion for a preliminary injunction, the movant must show that the following four factors weigh in favor of granting the injunction: (1) the likelihood that the plaintiff will succeed on the merits of its claim; (2) the plaintiff will suffer or be threatened with irreparable harm without the requested injunctive relief; (3) the balance of equities and hardships weigh in plaintiff’s favor and (4) granting such relief would be in the public interest. See Winter v. NRDC,

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Inc., 555 U.S. 7, 20 (2008); Am. Signature, Inc. v. United States, 598 F.3d 816, 823 (Fed. Cir. 2010); Zenith Radio Corp. v. United States, 710 F.2d 806, 808–09 (Fed. Cir. 1983). PrimeSource meets this legal standard.

A. PrimeSource Has a High Likelihood of Success on the Merits

PrimeSource contends that the actions ordered in Proclamation No. 9980 are unconstitutional or otherwise contrary to law for four reasons: First, the legal basis for the expansion of the current 232 tariffs to cover “derivative steel products” violates the procedural and substantive protections in the Administrative Protective Act (“APA”). See 5 U.S.C. §§ 553(b), (c), 706(2)(A) (2018). Specifically, the Secretary of Commerce’s recommendation to expand the duties constitutes rulemaking without a concomitant notice and comment period, violating the procedural protections of APA. Id. at § 553(b), (c). In addition, the Secretary of Commerce’s undisclosed “assessments” of the alleged national security threat from derivative steel and aluminum articles are arbitrary and capricious and violate the substantive protections of the APA because the Secretary failed to provide any sort of reasoned explanation for these determinations. Id. at § 706(2)(A). For these reasons, PrimeSource has a high likelihood of succeeding on the merits of its procedural challenge under the APA to the tariff expansion in Proclamation No. 9980.

Second, the President lacks the authority to take the action announced in Proclamation No. 9980. Section 232 includes a strict timeline for actions taken pursuant to its delegation of authority. See 19 U.S.C. § 1862(c). Specifically, the President must act within 90 days of receiving a report “in which the Secretary finds that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.” Id. at § 1862(c)(1)(A). Within 15 days thereafter, “the President shall implement” any action the President determines to take under subsection (A). Id. at § 1862(c)(1)(B). The actions ordered in

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Proclamation No. 9980 do not comply with this statutory framework and, therefore, “lacked the power to new action.” TransPacific, No. 19-00009, 2019 Ct. Intl. Trade LEXIS 142, at *14 (finding that a proclamation adjusting the duty rate of subject products outside of the prescribed time period lacked effect). Additionally, the same statutory constraints on the President apply to the Secretary of Commerce. By making “assessments”, “determinations” and providing “information” to the President, the Secretary of Commerce violated the statute. For these reasons, PrimeSource has a high likelihood of succeeding on the merits of its statutory challenge to the tariff expansion in Proclamation No. 9980.

Third, the absence of a notice and comment period in conjunction with the expansion of the initial Section 232 action and the “assessments” proffered by the Secretary of Commerce, and upon which Proclamation No. 9980 is predicated, violated PrimeSource’s Fifth Amendment due process rights. PrimeSource has a cognizable property interest over its imports that fall into the definition of “derivative steel products” and therefore has a right to the opportunity to be heard at “a meaningful time and in a meaningful manner.” Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (internal quotation and citation omitted). The Court of Appeals for the Federal has recognized that importers facing a deprivation of their property have a property interest that is protected by the Fifth Amendment. See NEC Corp. v. United States, 151 F.3d 1361, 1370-71 (Fed. Cir. 1998) (explaining in the context of a deprivation of an importer’s property that “there inheres in a statutory scheme such as this an expectation that those charged with its administration will act fairly and honestly”). For these reasons, PrimeSource has a high likelihood of succeeding on the merits of its due process challenge to the tariff expansion in Proclamation No. 9980.

Fourth, the actions ordered in Proclamation No. 9980 demonstrate that Section 232 is an unconstitutional over-delegation of the authority “to lay and collect {t}axes, {d}uties, {i}mposts

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and “to regulate Commerce with foreign nations” vested in the Congress. U.S. Const. art. 1 § 8, cls. 1, 3. For this reason, PrimeSource has high likelihood of succeeding on the merits of its constitutional claim.¹

The facts underlying PrimeSource’s claims and the relevant legal authority demonstrate that PrimeSource has a high likelihood of success on the merits of the instance case. PrimeSource’s claims, therefore, warrant the protection afforded by injunctive relief so that it may defend its legal rights without any interstitial deprivation of property that this Court cannot remedy.

B. PrimeSource Has Suffered Irreparable Harm as a Result of the Procedural and Substantive Defects Associated With the Issuance of Proclamation No. 9980 and Will Suffer Additional Irreparable Harm if Cash Deposits are Collected

PrimeSource contends that it has already suffered irreparable harm as a result of the procedural and substantive defects inherent in the actions ordered by Proclamation No. 9980 discussed more fully above. PrimeSource had been deprived of the protections of the APA, been threatened with the unlawful imposition of duties outside of the prescribed statutory process and had its Fifth Amendment rights impinged. Each claim contains procedural injuries which the Court has recently found can, alone, “constitute irreparable injury.” Invenenergy Renewables LLC v. United States, No. 19-00192, 2019 Ct. Intl. Trade LEXIS 154, at *72 (Ct. Intl Trade Dec. 5, 2019). Further, this procedural injury cannot be remedied after the fact. Id. Ct. Intl. Trade LEXIS 154 at 72-73 (citing Am. Fed’n of Gov’t Emp v. Block, 655 F.2d 1153, 1158 (D.C. Cir. 1981) (“the submission of views after the effective date of a regulation is no substitute for the right of interested persons to make their views known to the agency in time to influence the rule making process in

¹ PrimeSource acknowledges that the Court of International Trade has previously found that it is bound by the holding in Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548 (1976). See Am. Inst. for Int’l Steel, Inc. v. United States, __ CIT __, __, 376 F. Supp. 3d 1335, 1345 (2019). This issue is, however, under appeal before the Federal Circuit. See Am. Inst. for Int’l Steel v. United States, Ct. No. 19-1727.

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a meaningful way.”); N. Mariana Islands v. United States, 686 F. Supp. 2d 7, 18 (D.D.C. 2009) (“the damage done by {the Agency’s} violation of the APA cannot be fully cured by later remedial action.”). This lost chance at having its voice heard is not merely a hypothetical opportunity denied to PrimeSource. PrimeSource actively monitors federal government activities that may affect its business and has a track record of filing public comment on matters important to its business. See, Affidavit of PrimeSource Official, ¶ 5, PrimeSource Am. Compl. at Ex. 11, Feb. 11, 2020, ECF No. 22. See also, id. at Exs 12-21 (providing examples of PrimeSource’s past public comments, including instances where PrimeSource successfully advocated for specific products to be removed from lists of products proposed for increased duties).

In addition, should cash deposits be required, PrimeSource will suffer irreparable harm in the form of an additional cash deposit burden in 2020 of [REDACTED] million. See Affidavit of PrimeSource Official, ¶ 8, PrimeSource Am. Compl. at Ex. 2, Feb. 11, 2020, ECF No. 21. PrimeSource has already experienced a competitive disadvantage as a result of the spectre of this additional tariff burden in the form of [REDACTED] and the costs associated with altering its sourcing methods and business model. See id. These are the very types of harm that the Court has previously found cannot be remedied by mere damages. Nat’l Fisheries Inst. Inv. v. U.S. Bureau of Customs and Border Protection, 30 CIT 1838, 1857, 465 F. Supp. 2d 1300, 1314 (2006) (finding that “harm that will occur absent a status quo preliminary injunction includes severe disruption of the plaintiffs’ business activities, damage to the plaintiffs’ long-standing relationships with their customers and suppliers, lost sales, diminished profits, and foregoing of business opportunities”).

Both types of harm can be avoided by the issuance of a preliminary injunction allowing PrimeSource to pursue the merits of its case and ensuring that any duties it does pay are the result

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of a lawful process in which the relevant organs of the United States Government comply with the relevant constitutional and statutory constraints.

C. The Balance of Hardships Favors Granting a Preliminary Injunction

PrimeSource will be irreparably harmed if the Government is not enjoined from proceeding with the actions ordered in Proclamation No. 9980. That harm, both legal and economic, will be without remedy if deposit of estimated duties and ultimately duties are collected unlawfully. The proposed orders attached to this motion includes provisions, such as an increased continuous bond and freezing the liquidation of PrimeSource's entries, ensuring that the Government's interests in preserving the ability to collect duties, should Proclamation No. 9980 be found lawful, are maintained. As a result, the balance of the hardships weighs in favor of granting a preliminary injunction so that PrimeSource can fully pursue the merits of its claims and get any remedy that it is due. Sunpreme Inc. v. United States, 145 F. Supp. 3d 1271, 1297 (Ct. Int'l Trade 2016) (concluding that the "the balance of equities favors Plaintiff because any possible harm to the Government and the domestic industry can be mitigated through requiring Plaintiff to post a bond as security").

D. Granting the Proffered Preliminary Injunction is in the Public Interest

The public interest favors that "governmental bodies comply with the law and interpret and apply trade statutes uniformly and fairly." Am. Signature, Inc. v. United States, 598 F.3d 816, 830 (Fed. Cir. 2010). In addition, the President is under a general obligation to ensure "that the laws be faithfully executed." U.S. Const. art. 2 § 3, cl. 4. Here, the President's action is procedurally defective, inconsistent with the cited statutory authority and contrary to a previous ruling by a three-judge panel of this Court. The public interest is, therefore, served by judicial review to

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determine the actual ambit of the President's authority under Section 232. Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the duty of the Judicial Department to say what the law is."). Granting this preliminary injunction will preserve the status quo ante, while ensuring that either party can be made whole, pending an adjudication of this case on the merits.

E. The Increased Continuous Bond Satisfies the Security Requirement of Rule 65

Rule 65(c) of the Court of International Trade requires that the movant "gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." By the terms of the proposed injunctive relief, PrimeSource will increase its continuous bond to provide significant additional security to protect Defendant's interests in the event that PrimeSource does not prevail in its lawsuit. In addition, PrimeSource notes that it is an established company with a track record of timely payment of all obligations to U.S. Customs and Border Protection. Considering all of the circumstances present, PrimeSource respectfully submits that the significant increase to its continuous bond satisfies the security requirement of Rule 65(c) and that PrimeSource therefore is eligible for injunctive relief.

II. Notice to the Government and U.S. Court of International Trade

Pursuant to Rule 7 and the practice notes of Rule 7 of the Court of International Trade, on February 3, 2020, counsel for PrimeSource, Mr. Jeffrey Grimson, personally spoke with Mr. Justin Miller, counsel for the United States at the U.S. Department of Justice at 3:45 p.m. via telephone. Mr. Grimson informed Mr. Miller of PrimeSource's intent to file a TRO in the present action the following day and detailed that it would be challenging Proclamation 9980. Mr. Grimson followed

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this phone call with an email to Mr. Miller and his colleague, Tara Hogan, at 4:03 p.m. reiterating the information shared on the call, requesting that the Government inform Plaintiff whether it would consent to such injunctive relief and sharing with the Government a proposed Joint Motion for Protective Order (“JPO”). At 8:07 p.m. Ms. Hogan responded that the Government had received the JPO and would endeavor to respond quickly the next day. Plaintiff and the United States filed a Joint Motion for Protective Order on February 4, 2020, which was promptly granted by the Court.

Further, on February 3, 2020, Mr. Grimson contacted the Court at 3:20 p.m. in order to discuss the matter and to inform the Court’s Case Management personnel that PrimeSource intended to file a TRO the next day challenging Proclamation 9980. Mr. Grimson spoke with Mr. Goell at the Court, who confirmed the necessary documents required to file a TRO.

From Friday, February 7, 2020 up until the filing of this motion, Mr. Grimson and Ms. Hogan have been in consultation regarding provisions in PrimeSource’s proposed injunction. Counsel have participated in three conference calls with the Court. Counsel have endeavored to seek solutions that meet their clients’ needs.

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The full basis and support for this Motion is set forth in detail in PrimeSource's Memorandum in Support of Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction. Two proposed orders for the relief requested are attached hereto, one imposing a Temporary Restraining Order only, and the other imposing injunctive relief in the form of a Temporary Restraining Order and Preliminary Injunction. For the reasons set forth above and in the attached Memorandum, the Court should grant PrimeSource's motion for injunctive relief.

Respectfully Submitted,

Dated: February 12, 2020

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