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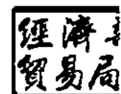
主旨：陳報美國國際貿易法院（CIT）頃判決，川普總統於2020年1月24日就「鋼鋁衍生品」課徵232國安關稅違反程序規定，應屬無效，命令返還對原告徵收之保證金，敬請查參。



說明：

一、背景說明：

(一)商務部前曾依據貿易擴張法第232條（簡稱232條款）就鋼、鋁進口進行調查，並於2018年1月11日向川普總統提出報告，認為鋼、鋁產品進口增加對美國家安全造成威脅，川普總統於同年3月8日發布第9704號及9705號命令（Proclamation 9704及9705）分別對鋼、鋁產品課徵25%、10%國安關稅。

(二)川普總統嗣於2020年1月24日發布第9980號命令（Proclamation 9980），將上述鋼、鋁232關稅擴大適用於鋼鋁衍生品（derivative aluminum and steel articles）。

(三)德州進口商PrimeSource Building Product, Inc. 公

國際貿易局　110/04/07

1107010619

司（簡稱PrimeSource）向美國國際貿易法院（U.S. Court of International Trade, CIT）提起訴訟，認為貿易擴張法232條款規定，當商務部向總統提出之報告認定進口產品對於國安造成威脅，總統須在105日內採取救濟措施。由於川普總統在商務部提出建議報告之後約兩年才發布命令將相關措施擴及鋼、鋁衍生品，違反232條款程序規定，爰主張該命令無效。

二、CIT之判決：

(一)CIT法院曾於2020年2月給予原告初步禁制令（preliminary injunction），要求行政機關暫免對原告PrimeSource進口之鋼鋁衍生品徵收國安關稅。

(二)CIT嗣於本（4）月5日公布其就本案之判決略以，川普政府2020年1月將鋼鋁232條款關稅擴至「鋼鋁衍生品」之9980號命令違反232條款法定期限，構成重大程序違法，爰屬無效，並命令行政機關退還對本案相關產品收取之押金（entries affected by this litigation be liquidated with refund of any deposits for such duty liability…）。

三、本案後續可能發展：據Husch Blackwell法律事務所分析指出，上述CIT判決並不影響原有對鋼、鋁產品（9704及9705號命令）之有效性。另，CIT判決行政部門依據9980號命令對原告PrimeSource徵收之保證金均須返還，爰預期未來很快會有其他廠商跟進，就行政部門依據9980號命令對「鋼鋁衍生品」課徵之國安關稅提出類似控訴。

四、檢送本案判決、法律事務所分析及相關報導如附件，併請卓參。

正本：經濟部國際貿易局

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騎縫章

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Slip Op. No. 21- 36

UNITED STATES COURT OF INTERNATIONAL TRADE

PRIMESOURCE BUILDING PRODUCTS, INC., Plaintiff, v. UNITED STATES, et al., Defendants.	Before: Timothy C. Stanceu, Chief Judge Jennifer Choe-Groves, Judge M. Miller Baker, Judge Court No. 20-00032

OPINION

[Granting summary judgment in favor of plaintiff. Judge Baker dissents.]

Dated: April 5, 2021

Jeffrey S. Grimson, Mowry & Grimson, PLLC, of Washington, D.C., for plaintiff. With him on the brief were *Kristin H. Mowry*, *Jill A. Cramer*, *Sarah M. Wyss*, *Bryan P. Cenko*, and *Wenhui Ji*.

Jeanne E. Davidson, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendants. With her on the brief were *Tara K. Hogan*, Assistant Director, and *Stephen C. Tosini*, Senior Trial Counsel.

Stanceu, Chief Judge: Plaintiff PrimeSource Building Products, Inc. ("PrimeSource"), a U.S. importer of steel nails, contested a proclamation issued by the President of the United States ("Proclamation 9980") in January 2020. *Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles Into the United States*, 85 Fed.

Reg. 5,281 (Exec. Office of the President Jan. 29, 2020) ("*Proclamation 9980*"). Before the court is a "Joint Status Report" the parties submitted in response to our order in *PrimeSource Bldg. Prods., Inc. v. United States*, 45 CIT __, Slip. Op. 21-8 (Jan. 27, 2021) ("*PrimeSource I*"). Joint Status Report (Mar. 5, 2021), ECF No. 108. In response to statements of the parties in the Joint Status Report, the court enters summary judgment in favor of plaintiff.[1]

I. BACKGROUND

The background of this action is set forth in our prior opinion and summarized briefly herein. *See PrimeSource Bldg. Prods., Inc. v. United States*, 45 CIT __, Slip. Op. 21-8 (Jan. 27, 2021) ("*PrimeSource I*").

A. Proclamation 9980

On January 24, 2020, President Donald Trump issued Proclamation 9980, which imposed a 25% duty on certain imported articles made of steel, including steel nails, and a 10% duty on certain imported articles made of aluminum. As authority for its imposition of duties on the articles, identified as "derivative aluminum articles" and "derivative steel articles," Proclamation 9980 cited Section 232 of the Trade Expansion

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[1] Judge Baker dissents from the entry of summary judgment in favor of plaintiff for the reasons stated in his dissent from the court's prior opinion and order. *PrimeSource Bldg. Prods., Inc. v. United States*, 45 CIT __, Slip. Op. 21-8 (Jan. 27, 2021) (Baker, J., dissenting).

Act of 1962, 19 U.S.C. § 1862 ("Section 232").[2] Proclamation 9980 also cited previous Presidential proclamations that invoked Section 232, including Proclamation 9704, *Adjusting Imports of Aluminum Into the United States*, 83 Fed. Reg. 11,619 (Exec. Office of the President Mar. 15, 2018) ("*Proclamation 9704*"), and Proclamation 9705, *Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 11,625 (Exec. Office of the President Mar. 15, 2018) ("*Proclamation 9705*"). *Proclamation 9980* ¶¶ 9–10, 85 Fed. Reg. at 5,283.

B. Procedural History of this Litigation

On February 4, 2020, PrimeSource commenced this action, naming the United States, et al., as defendants and asserting five claims in contesting Proclamation 9980. Summons, ECF No. 1; Compl., ECF Nos. 8 (conf.), 9 (public). Defendants filed a Rule 12(b)(6) motion to dismiss an amended complaint on March 20, 2020 for failure to state a claim on which relief can be granted. Defs.' Mot. to Dismiss for Failure to State a Claim, ECF No. 60 ("Defs.' Mot."). Plaintiffs opposed defendants' motion to dismiss and moved for summary judgment on April 14, 2020. Rule 56 Mot. for Summ. J., Pl. PrimeSource Bldg. Prods. Inc.'s Mem. of Points and Authorities in Supp. of Mot. for Summ. J. and Resp. to Defs.' Mot. to Dismiss for Failure to State a Claim, ECF No. 73-1. Defendants responded to plaintiff's summary judgment motion on May 12, 2020. Defs.' Reply in Supp. of their Mot. to Dismiss and Resp. to Pl.'s Mot. for Summ. J., ECF No. 78.

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[2] All citations to the United States Code are to the 2012 edition.

On June 9, 2020, plaintiff replied in support of its summary judgment motion. Pl. PrimeSource Bldg. Prods. Inc.'s Reply Br. in Supp. of its Mot. for Summ. J., ECF No. 91.

C. Our Decision in *PrimeSource I*

In *PrimeSource I*, we granted defendants' motion to dismiss as to all of plaintiff's claims in the amended complaint except one, stated as "Count 2," in which plaintiff claimed that Proclamation 9980 was issued beyond the statutory time limits set forth in Section 232. *PrimeSource I*, 45 CIT at __, Slip Op. at 55. In Count 2, plaintiff argued that Proclamation 9980 was issued after the expiration of the 105-day time period set forth in Section 232(c)(1), which PrimeSource described as commencing upon the President's receipt, on January 11, 2018, of a report the Secretary of Commerce issued under Section 232(b)(3)(A) on the effect of certain steel articles on the national security of the United States (the "2018 Steel Report"). That report culminated in the President's issuance of Proclamation 9705 in March 2018, which imposed 25% duties on various steel articles, *see Proclamation 9705*, ¶¶ 1–2, 83 Fed. Reg. at 11,625, but not on the derivative steel articles affected by Proclamation 9980 in January 2020.

We stated in *PrimeSource I* that "[d]efendants do not dispute that the 2018 Steel Report is, for purposes of Section 232(c), 19 U.S.C. § 1862(c), the report issued according to Section 232(b)(3)(A), 19 U.S.C. § 1862(b)(3)(A), upon which the President based his adjustment to imports of steel derivatives, including steel nails." *PrimeSource I*, 45 CIT at __, Slip Op. at 20 (citing Defs.' Mot. 24–29). In denying defendants' motion to dismiss

Count 2, we concluded that Proclamation 9980 does not comply with the limitation on the President's authority imposed by the 105-day time limitation of Section 232(c)(1) if that time period is considered to have commenced upon the President's receipt of the 2018 Steel Report. *Id.* at __, Slip Op. at 44–45. We held that in this circumstance Count 2 stated a plausible claim for relief. *Id.* at __, Slip Op. at 50.

After denying defendants' motion to dismiss as to the claim in Count 2, we denied plaintiff's motion for summary judgment on that remaining claim upon determining that there existed one or more genuine issues of material fact. Although concluding that Proclamation 9980 was untimely under Section 232(c)(1) when viewed solely as an action taken in response to the Steel Report, we also concluded that there were genuine issues of material fact that bore on the extent to which the subsequent "assessment" or "assessments" of the Commerce Secretary, as identified in Proclamation 9980, validly could be held to have served a function analogous to that of a Section 232(b)(3)(A) report. *Id.* at __, Slip Op. at 54. We also noted that we did not know what form of inquiry or investigation the Commerce Secretary conducted prior to his submission of these communications to the President and whether, or to what extent, that inquiry or investigation satisfied the essential requirements of Section 232(b)(2)(A), 19 U.S.C. § 1862(b)(2)(A). *Id.*

In summary, we concluded in *PrimeSource I* that factual information pertaining to the Secretary's inquiry on, and his reporting to the President on, the derivative articles

would be required in order for us to examine whether and to what extent there was compliance by the President with the procedural requirements of Section 232 and whether any noncompliance that occurred was a "significant procedural violation." *Id.* at __, Slip Op. at 54–55 (quoting *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985) (requiring that a procedural violation be "significant" in order to serve as a ground for judicial invalidation of a Presidential action)). We added that "at this early stage of the litigation, we lack a basis to presume that these unresolved factual issues are unrelated to the issue of whether the President clearly misconstrued the statute or the issue of whether the President took action outside of his delegated authority." *Id.* at __, Slip Op. at 55. We noted that the "filing of a complete administrative record could be a means of resolving, or helping to resolve, these factual issues" and directed the parties to consult on this matter and file a scheduling order to govern the subsequent litigation. *Id.*

D. The Joint Status Report

On March 5, 2021, the parties submitted the Joint Status Report in lieu of a scheduling order. In it, defendants expressly waived "the opportunity to provide additional factual information that might show that the 'essential requirements of Section 232(b)(2)(A), 19 U.S.C. § 1862(B)(2)(A)' were met," adding that "[d]efendants do not intend to pursue that argument." Joint Status Report 2 (quoting *PrimeSource I*, 45 CIT at __, Slip Op. at 54). Defendants informed the court that their "position continues

to be that procedural preconditions for the issuance of Proclamation 9980 were met by the Secretary's 2018 Steel Report and the timely issuance of Proclamation 9705, a position that the majority has already rejected." *Id.* at __, Slip Op. at 2–3. The Joint Status Report concludes by stating that "the parties agree and respectfully submit that there is no reason for this Court to delay entry of final judgment. In so representing, the parties fully reserve all rights to appeal any adverse judgment." *Id.* at __, Slip Op. at 3.

II. DISCUSSION

A. *Sua Sponte* Entry of Summary Judgment according to USCIT Rule 56(f)

Because we denied plaintiffs' motion for summary judgment in *PrimeSource I*, no motion for summary judgment is now before us. Nevertheless, we may enter summary judgment for a party *sua sponte* under USCIT Rule 56(f), which provides that "[a]fter giving notice and a reasonable time to respond, the court may . . . consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute."

The United States Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) ("*Celotex*") opined that "district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*." In interpreting *Celotex*, the Court of Appeals for the Federal Circuit instructed that "[t]he *Celotex* Court also made clear that all that is required is notice [to the party with the burden of proof] that she had to come forward with all of her evidence." *Exigent Tech., Inc. v. Atrana Sols., Inc.*, 442 F.3d 1301,

1308 (Fed. Cir. 2006) (brackets in original). In determining whether to enter summary judgment *sua sponte*, a court must ensure that prejudice will not accrue to the would-be losing party stemming from that party's inability to present evidence of a genuine dispute of material fact. *See Celotex*, 477 U.S. at 326.

B. Defendants' Waiver of the Opportunity to Present Evidence and of Any Defense Related to Procedures Subsequent to the 2018 Steel Report

In this litigation, the parties, and defendants in particular, expressly have declined to pursue the opportunity to present additional evidence to demonstrate the existence of a genuine dispute of a material fact. Specifically, defendants waive any defense they might base on a showing that the "'essential requirements of Section 232(b)(2)(A), 19 U.S.C. § 1862(b)(2)(A)' were met." Joint Status Report 2 (quoting *PrimeSource I*, 45 CIT at __, Slip Op. at 54). Further, we note the significance of defendants' statement in the Joint Status Report that their "position continues to be that procedural preconditions for the issuance of Proclamation 9980 were met by the Secretary's 2018 Steel Report and the timely issuance of Proclamation 9705." *Id.* at 2–3. This statement constitutes a waiver of any defense that the assessments of the Commerce Secretary, as described in Proclamation 9980, were the functional equivalent of a Section 232(b)(3)(A) report.

By joining in the statement that "the parties agree and respectfully submit that there is no reason for this Court to delay entry of final judgment," *id.* at 3, defendants have waived any claim of prejudice that could result from the entry of summary

judgment in favor of plaintiff, subject to their right to appeal. The parties have been given the full opportunity to "come forward" with any evidence of a dispute of material fact. A *sua sponte* order of summary judgment is, therefore, appropriate. *See Celotex*, 477 U.S. at 326.

The court further notes that defendants did not file an answer to plaintiff's complaint or amended complaint. The court's opinion in *PrimeSource I* directed the parties to file a joint scheduling order to govern the remainder of the litigation, which normally would have included a date for the government to answer the complaint with respect to the remaining claim. Here, defendants having waived any argument that Proclamation 9980 was issued within the 105-day time period beginning on the President's receipt of a report qualifying under Section 232(b)(3)(A), there are no contested issues of fact. Therefore, the absence of an answer to the amended complaint is not a procedural bar to the entry of summary judgment.

C. In the Absence of a Genuine Dispute as to any Material Fact, Plaintiff Is Entitled to Judgment as a Matter of Law

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a). As discussed above, there is no longer a genuine issue of material fact as a result of the representations of the parties in the Joint Status Report. In particular, defendants have waived any defense grounded in a factual circumstance other than one in which the 2018 Steel Report is the only submission made by the Commerce Secretary

that could satisfy the requirements of Section 232(b)(3)(A) and upon which Proclamation 9980 could have been based.

Plaintiff PrimeSource is now entitled to judgment as a matter of law. As we concluded in *PrimeSource I*, "the action taken by Proclamation 9980 to adjust imports of derivatives was not implemented during the 105-day time period set forth in § 1862(c)(1), if that time period is considered to have commenced upon the President's receipt of the Steel Report." 45 CIT at __, Slip Op. at 44. Because defendants no longer may raise as a defense that the procedural requirements of Section 232 were met based on any procedure other than one reliant upon the 2018 Steel Report, summary judgment in favor of plaintiff is warranted on the ground that Proclamation 9980 was issued after the President's delegated authority to impose duties on derivatives of steel products had expired. As we held in *PrimeSource I*, any determination the President could have made to adjust the duties on imports of derivatives of the articles named in Proclamation 9705 was required by the statute to have been made during the 90-day period commencing with the President's receipt of a report of the Commerce Secretary satisfying the requirements of Section 232(b)(3)(A), and any action to implement that determination was required to have been taken, if at all, during the 15-day period following that determination. *See* 45 CIT at __, Slip Op. at 32 (holding that "the 90- and 15-day time limitations in Section 232(c)(1) expressly confine the exercise of the President's discretion *regardless* of whether the President determines to adjust imports

only of the 'article' named in the Secretary's report or, instead, to adjust imports of the 'article and its derivatives.'") (emphasis in original).

To declare Proclamation 9980 invalid, we must find "a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority." *Maple Leaf Fish Co.*, 762 F.2d at 89. Because the President issued Proclamation 9980 after the congressionally-delegated authority to adjust imports of the products addressed in that proclamation had expired, Proclamation 9980 was action outside of delegated authority. For the reasons we stated in *PrimeSource I*, 45 CIT at __, Slip Op. at 45–49, we reject defendants' position that Congress intended for the time limitations in Section 232(c)(1) to be merely directory, and we find in the untimeliness of Proclamation 9980 a significant procedural violation. As a remedy, PrimeSource is entitled to a declaratory judgment that Proclamation 9980 is invalid as contrary to law and to certain other relief, as described below.

III. CONCLUSION

We award summary judgment to PrimeSource on the remaining claim in this litigation, which was stated in Count 2 of the amended complaint. As relief on this claim, we will declare Proclamation 9980 invalid as contrary to law and, on that basis, direct that the entries affected by this litigation be liquidated without the assessment of duties pursuant to Proclamation 9980, with refund of any deposits for such duty

liability that may have been collected pursuant to Proclamation 9980.[3] Also, should any entries of PrimeSource's merchandise at issue in this litigation have liquidated with the assessment of 25% duties pursuant to Proclamation 9980, PrimeSource is entitled to reliquidation of those entries and a refund of any duties deposited or paid, with interest as provided by law.

Judgment will enter accordingly.

/s/ Timothy C. Stanceu
Timothy C. Stanceu, Chief Judge
/s/ Jennifer Choe-Groves
Jennifer Choe-Groves, Judge

Dated: April 5, 2021
New York, New York

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[3] Earlier in this litigation, upon the consent of both parties, this Court entered a preliminary injunction against the collection of 25% cash deposits on PrimeSource's entries of merchandise within the scope of Proclamation 9980 and against the liquidation of the affected entries. *Order* (Feb. 13, 2020), ECF Nos. 39 (Conf.), 40 (Public). This preliminary injunction will dissolve upon the entry of judgment. *Id.* If, despite the preliminary injunction, any cash deposits were made or collected, PrimeSource is entitled to a refund of these cash deposits, with interest as provided by law.

April 6, 2021

CIT Declares Section 232 Steel Tariffs On "Derivatives" Under Proclamation 9980 Invalid And Contrary To Law

Nithya Nagarajan, Jeffrey Neeley

Husch Blackwell LLP

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The U.S. Court of International Trade ("CIT" or "the Court") ruled in an opinion issued on April 5, 2021, that Proclamation 9980 subjecting steel and aluminum "derivatives" to 25 percent tariffs under Section 232 of the Trade Expansion Act of 1962 (19 U.S.C. § 1862) is invalid because of a failure to comply with statutory time limits.

The Court concluded that Proclamation 9980, which was issued by President Trump and based on the theory that the President had the power to issue the Proclamation based on earlier findings on different products, was void from the outset because it came too late and had no independent basis. As the CIT states in its opinion regarding the inability to rely on an earlier finding regarding different products: "Because the President issued Proclamation 9980 after the congressionally-delegated authority to adjust imports of the products addressed in that proclamation had expired, Proclamation 9980 was action outside of delegated authority."

The Court's order stated that, as a result, Plaintiff PrimeSource Building Products, Inc. is to have all its entries that were affected by Proclamation 9980 refunded, whether they were liquidated or unliquidated. This was a result of the derivatives duties being invalid from the outset. The CIT is now likely to act on the parallel challenges to the Section 232 derivative tariffs and issue similar findings. We expect consultations among the parties and with the Court to proceed soon.

This decision does not affect the original Section 232 tariffs placed on aluminum and steel pursuant to Proclamations 9704 and 9705 effective March 23, 2018. Those Proclamations were upheld by both the CIT and the U.S. Court of Appeals for the Federal Circuit and were issued in a timely manner.

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The U.S. Court of International Trade on Monday declared that by expanding Section 232 tariffs to steel and aluminum derivates last January, the Trump administration exceeded its authority under the law, according to a court filing.

The court issued a summary judgment in a case brought by Texas-based importer PrimeSource after the Biden administration waived its opportunity to present information intended to prove the administration met all the necessary requirements of Section 232 of the Trade Expansion Act of 1962.

At issue is a 105-day deadline the president has to impose remedies following the Commerce Department's submission of a report finding that imports pose a threat to national security. Commerce submitted report to then-President Trump in January 2018 finding that steel and aluminum imports posed threats to national security. Trump imposed 25 percent tariffs on steel and 10 percent tariffs on aluminum two months later.

But in a January 2020 order, Trump announced those tariffs would be expanded to include steel and aluminum derivatives. PrimeSource promptly challenged the expanded scope of the tariffs.

CIT last February granted PrimeSource a preliminary injunction preventing the administration from collecting duties from the company on imported steel and aluminum derivatives. PrimeSource alleged the administration violated several U.S. laws, but the court threw out all but one of the company's claims -- that the administration could not act after the 105-day deadline.

In a March joint status report, the Biden administration said it maintained the Trump administration's claim that the January 2020 proclamation met all of the requirements under Section 232. "Further, we note the significance of defendants' statement in the Joint Status Report that their "position continues to be that procedural preconditions for the issuance of Proclamation 9980 were met by the Secretary's 2018 Steel Report and the timely issuance of Proclamation 9705," the court said in its ruling, referring to Trump's order expanding the scope of the tariffs to cover derivatives and the initial order of the steel and aluminum tariffs, respectively. "This statement constitutes a waiver of any defense that the assessments of the Commerce Secretary, as described in Proclamation 9980, were the functional equivalent of a Section 232(b)(3)(A) report."

With the court declaring that the order expanding the Section 232 to steel and aluminum derivatives is "contrary to law," the administration was directed to refund any deposits collected under the invalid order.

The Biden administration to date opted to leave the controversial tariffs on steel and aluminum in place, with Commerce Secretary Gina Raimondo last week saying they help level the playing field for U.S. producers. -- *Brett Fortnam* (bfortnam@iwpnews.com)

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