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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HILDA L. SOLIS, Secretary of Labor, United States Department of Labor Petitioner, vs. FOREVER 21, INC., Respondent.	CASE NO. CV 12-09188 MMM (MRWx) ORDER GRANTING PETITION TO COMPEL RESPONDENT TO COMPLY WITH ADMINISTRATIVE SUBPOENA

On October 25, 2012, Secretary of Labor Hilda L. Solis ("Secretary") filed a petition to compel respondent Forever 21 to comply with an administrative subpoena duces tecum issued by the United States Department of Labor.[1] On November 2, 2012, the court issued an order to show cause why the subpoena should not be enforced.[2] Forever 21 filed a response on December 31, 2012.[3] The Secretary filed a reply on January 9, 2013.[4]

[1]Petition to Enforce Administrative Subpoena ("Petition"), Docket No. 1 (Oct. 25, 2012).

[2]Order to Show Cause, Docket No. 4 (Nov. 2, 2012).

[3]Response to Petition ("Response"), Docket No. 11 (Dec. 31, 2012).

[4]Reply to Response ("Reply"), Docket No. 12 (Jan. 9, 2013).

I. BACKGROUND

The Los Angeles District Office of the Wage and Hour Division of the United States Department of Labor ("Wage and Hour Division") is charged with enforcing the provisions of the Fair Labor Standards Act ("FLSA").[5] The Secretary notes that the Los Angeles garment industry is a frequent target of Wage and Hour Division investigations, as workers in the industry have historically been subjected to exploitation and paid substandard wages.[6] On August 6, 2012, the Wage and Hour Division began an investigation of ten garment sewing factories located at 830 S. Hill Street, Los Angeles, California.[7] The investigation allegedly uncovered widespread violations of the FLSA.[8] On average, employees at these factories were working 47.45 hours per week, for which they were paid $302.85.[9] This amounts to an hourly wage of $6.38, below the federal minimum wage of $7.25.[10] The Secretary asserts that employees were also deprived of overtime wages, and that none of the ten employers involved maintained accurate time and payroll records as required by the FLSA.[11]

CUI Sewing, Inc. was one of the garment factories investigated. The investigation disclosed that the operator of the factory did not possess a valid garment registration authorizing him to operate the facility, and that employees of CUI Sewing were paid below minimum wage and received no overtime payments.[12] After making an inventory of the goods found at CUI Sewing, Wage and Hour Division investigators discovered that its employees were working on

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[5]Petition, Exh. 1("Bui Decl."), ¶ 2.

[6]*Id.*

[7]*Id.*, ¶ 4.

[8]*Id.*, ¶ 5.

[9]*Id.*

[10]*Id.*

[11]*Id.*

[12]*Id.*, ¶ 7.

goods for garment manufacturer CMR Clothing, Inc. The garments were allegedly destined for Forever 21 stores.[13] Investigators purportedly learned that CMR Clothing delivered more than 190,000 garments to Forever 21 between May 1 and August 8, 2012.[14] These findings were transmitted to Ruben Rosalez, the Regional Administrator for the Western Region of the Wage and Hour Division, who issued a subpoena to Forever 21 on August 16, 2012.[15] The subpoena sought to determine whether Forever 21 had violated or was violating the "hot goods" provision of the FLSA.[16] This provision makes it unlawful for any person to "transport, offer for transportation, ship, deliver, or sell in commerce, or . . . ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of [the FLSA minimum wage provisions]." 29 U.S.C. § 215(a)(1).

The subpoena directed Forever 21 to appear and produce certain requested records by September 5, 2012.[17] It specified eleven categories of documents sought, including documents related to Forever 21's business relationship with CMR, as well as documents regarding its business relationship with other garment manufacturers who supplied goods to Forever 21.[18] On September 5, 2012, Forever 21 sent documents to the Secretary in response to the subpoena.[19] The Secretary asserts that the documents provided responded only to the first five categories specified in the subpoena; she contends that Forever 21 did not provide documents responsive to

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[13] *Id.*, ¶ 8.

[14] *Id.*, ¶ 9.

[15] *Id.*, ¶ 10. See also Petition, Exh. 2 ("Rosalez Decl."), ¶¶ 1, 6

[16] Rosalez Decl., ¶ 5.

[17] Petition, Exh. 4 ("Subpoena") at 1.

[18] *Id.* at 3.

[19] Petition, Exh. 3 ("Seletsky Decl."), ¶ 2.

categories six through eleven.[20] On September 10, 2012, the Secretary sent a letter to Forever 21's corporate counsel, identifying the categories of documents for which responses were still outstanding.[21] Three days later, the Secretary sent a second letter to Forever 21, notifying it that the Department of Labor was lifting a previously-imposed moratorium on the shipment of goods produced by CMR Clothing, as CMR had provided back pay to its employees; the Secretary stated, however, that this did not relieve Forever 21 of its obligation to comply with the subpoena.[22] The Secretary extended the deadline to produce the outstanding documents to September 25. Forever 21, however, declined to produce additional documents.[23]

At issue here is Forever 21's alleged failure to comply with categories nine, ten, and eleven of the subpoena. These categories seek: (9) "Documents sufficient to identify all domestic garment manufacturers who supplied apparel to [Forever 21] since May 7, 2012"; (10) "Documents sufficient to identify all facilities in the United States . . . where apparel for Forever 21 was produced during the period of May 7, 2012 to the date of production"; and (11) "Documents sufficient to identify all measures in effect since May 7, 2012 to determine whether apparel supplied to [Forever 21] by domestic garment producers [is] produced in compliance with the FLSA."[24]

II. DISCUSSION

A. Jurisdiction to Hear the Secretary's Petition to Enforce the Subpoena

The Federal Trade Commission Act provides that "[a]ny of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or

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[20] *Id.*, ¶ 3; Bui Decl., ¶ 12; Petition, Exh. 7.

[21] *Id.*, ¶ 3; Petition, Exh. 7.

[22] *Id.*, Exh. 8.

[23] *Id*; Bui Decl., ¶ 13.

[24] Subpoena at 3.

refusal to obey a subpoena issued to any person, partnership, or corporation issue an order requiring such person, partnership, or corporation . . . to produce documentary evidence if so ordered, or to give evidence touching the matter in question." 15 U.S.C. § 49. This section was made applicable to Wage and Hour Division subpoenas in § 9 of the FLSA. 29 U.S.C. § 209. The court has jurisdiction to hear this action because the Wage and Hour Division's Los Angeles Office is conducting the investigation of the Los Angeles garment industry and Forever 21.

B. Enforceability of the Subpoena

A proceeding brought to enforce an administrative subpoena is summary in nature. See *E.E.O.C. v. Karuk Tribe Housing Authority*, 260 F.3d 1071, 1078 (9th Cir. 2001) (describing subpoena enforcement actions as "summary procedure[s]"). This is because "the very backbone of an administrative agency's effectiveness in carrying out the congressionally mandated duties of industry regulation is the *rapid exercise* of the power to investigate the activities of the entities over which it has jurisdiction." *Fed. Maritime Commission v. Port of Seattle*, 521 F.2d 431, 433 (9th Cir. 1975) (emphasis added). An administrative agency may secure judicial enforcement of a civil investigative subpoena if it demonstrates that (1) the investigation is conducted pursuant to a lawfully authorized legitimate purpose; (2) the subpoena seeks information reasonably relevant to the investigation; (3) the information sought is not already within the agency's possession; and (4) all administrative requirements are satisfied. *United States v. Powell*, 379 U.S. 48, 57-58 (1964); *United States v. Jose*, 131 F.3d 1325, 1327-28 (9th Cir. 1997).[25] "An affidavit from a government official is sufficient to establish a prima facie showing that these requirements have been met." *F.D.I.C. v. Garner*, 126 F.3d 1138, 1143 (9th Cir. 1997).

As respects the current subpoena, the Secretary has demonstrated that she has authority to investigate possible violations of the FLSA. Under the statute, the Secretary "may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any

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[25]Alternatively, the agency can satisfy its burden by demonstrating that (a) its investigation is for a proper purpose; (b) the information sought is relevant to that purpose; and (c) all administrative prerequisites have been met. See *United States v. Morton Salt Co.*, 338 U.S. 632, 652-53 (1950).

industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as [s]he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter." 29 U.S.C. § 211(a). The Secretary is authorized to issue a subpoena to gather such information. See 29 U.S.C. § 209;[26] *Donovan v. Mehlenbacher*, 652 F.2d 228, 230 (2d Cir. 1981) ("[T]he Department of Labor clearly has the power to issue subpoenas in the course of an investigation conducted under statutory authority, and to have those subpoenas enforced by federal courts"). As noted, the Secretary's subpoena was issued to investigate whether Forever 21 violated the "hot goods" provision of the FLSA, which prohibits selling or transporting in commerce any goods produced in violation of the FLSA's minimum wage and overtime provisions. This is a lawful investigation within the authority of the Secretary.[27]

The Secretary has also demonstrated that the information she seeks is relevant to the investigation. To determine relevance, " the appropriate inquiry is whether the information sought might assist in determining whether any person is violating or has violated any provision of [the FLSA]." *Donovan v. Nat'l Bank of Alaska*, 696 F.2d 678, 684 (9th Cir. 1983). "The test for relevance is broad, and the subpoena must be enforced unless the evidence sought is 'plainly incompetent or irrelevant to any lawful purpose.'" *Solis v. MZS Corp.*, No. MISC 10–80302 VRW, 2011 WL 337492, *2 (N.D. Cal. Jan. 31, 2011) (quoting *E.E.O.C. v. Children's Hosp. Medical Center of N. Cal.*, 719 F.2d 1426, 1429 (9th Cir. 1983), abrogated on other grounds by *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)).

The Secretary's subpoena seeks, *inter alia*, to identify Forever 21's domestic manufacturers and the domestic facilities where goods destined for Forever 21 are produced. Such information

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[26]This section of the FLSA makes the provisions of §§ 9 and 10 of the Federal Trade Commission Act applicable to the Secretary's conduct of investigations under the FLSA. See 15 U.S.C. § 49.

[27]Forever 21 does not dispute the Secretary's authority to issue a subpoena to investigate a possible violation of the "hot goods" provision.

would enable the Wage and Hour Division to determine whether Forever 21 has sold or transported "hot goods" in violation of the FLSA.[28] The Wage and Hour Division's investigation has already revealed one garment manufacturer, CMR, which provided goods to Forever 21 that were produced in violation of the FLSA's wage provisions. Although the moratium on shipping CMR's products has been lifted, the Secretary retains authority to request information concerning other garment manufacturers who supplied goods to Forever 21 so that she can determine whether additional violations have occurred. See *MZS Corp.*, 2011 WL 337492 at *2 (finding that a subpoena seeking "information regarding respondent's suppliers" was relevant to an investigation into possible violations by respondent of the FLSA).

Similarly, information regarding Forever 21's FLSA compliance procedures is not "plainly incompetent or irrelevant to any lawful purpose"; rather, the existence or non-existence of such compliance procedures speaks to whether or not Forever 21 has systems in place to prevent the sale of "hot goods" and whether it knows the status of its goods. See *Chao v. Fashion Etoile*, No. 99–08871–MMM(RNBx), 2002 WL 31947202, *10 (C.D. Cal. Aug. 19, 2002) ("[I]t is incumbent upon a person that intends to sell or ship goods in commerce . . . to implement a compliance program in order to guard against any violations of FLSA §§ 6 and/or 7 to ensure that it itself complies with the provisions of FLSA § 15(a)(1)"). The FLSA provides a good faith exception to the "hot goods" provision for a "purchaser who acquired [the merchandise] in good faith [and] in reliance on written assurances from the producer" that the goods do not violate § 15(a)(1). The Secretary is authorized to investigate whether an entity is entitled to invoke this exception. See *Wirtz v. Lone Star Steel Co.* 405 F.2d 668, 670 (5th Cir. 1968).

The Secretary has also adduced sufficient evidence to demonstrate that she has satisfied the formal administrative prerequisites. The subpoena was issued by Ruben Rosalez, Regional Administrator of the Wage and Hour Division.[29] As regional administrator, Rosalez is authorized to issue administrative subpoenas under the FLSA due to a delegation of authority by the

[28]Petition at 15.

[29]Rosalez Decl., ¶¶ 1, 2.

Secretary. See Secretary's Order 5-96, § 3(c).[30] The Secretary proffers evidence that the subpoena was properly served on Forever 21's agent for service of process.[31] Forever 21, moerover, does not contend that administrative prerequisites were not satisfied.

The Secretary has thus made a prima facie showing that she is entitled to judicial enforcement of the subpoena. See *United States v. Kis*, 658 F.2d 526, 537 (7th Cir. 1981) (the government's burden is "slight," and consists only of a showing that the *Powell* factors have been met; presentation of evidence by affidavit of the officers involved in the investigation is all that is necessary to make the prima facie case). The burden therefore shifts to Forever 21 to establish that the subpoena constitutes an abuse of process or is otherwise improper. This burden is a "heavy" one, which can be met only by affidavits setting forth specific facts that demonstrate the subpoena should not be enforced. Mere memoranda of law or allegations of bad faith are insufficient. See *United States v. LaSalle National Bank*, 437 U.S. 298, 316 (1978); *Jose*, 131 F.3d at 1328; *Kis*, 658 F.2d at 540 (the subpoena recipient "bears an extraordinarily heavy burden" in challenging the propriety of the issuance of the subpoena, and "can succeed only by proving by a preponderance of the evidence some improper use of the summons by the [administrative agency]"); *United States v. Garden National Bank*, 607 F.2d 61, 71 (3d Cir. 1979).

In its response to the order to show cause, Forever 21 contends that the Secretary is conducting an improper, overly broad "fishing expedition."[32] It also asserts that it was not the specific target of the investigation and has not been accused of wrongdoing. Consequently, Forever 21 contends, it is inappropriate to force it to provide sensitive business information to the government.[33] "Of course a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the

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[30]Rosalez Decl., ¶ 1.

[31]Petition, Exh 5.

[32]Response at 7.

[33]*Id.* at 9.

investigatory power." *Morton Salt*, 338 U.S. at 652 (citing *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298 (1924)). The requests need only be "reasonably relevant to the purpose" of the investigation, however. See *id.* at 652; *Powell*, 379 U.S. at 57-58. See also *Securities and Exchange Commission v. Kanter*, No. 98 C 2101, 1998 WL 397835, * 3 (N.D. Ill. July 10, 1998); *Securities and Exchange Commission v. Cahan & Co.*, No. MISC. 95-0210, 1995 WL 472350, * 2 (E.D. Pa. Aug. 10, 1995) (finding that the court's inquiry regarding relevance was limited to determining whether the subpoena requested information that was "not plainly incompetent or irrelevant to any lawful purpose"). The Secretary's requests are plainly relevant to investigating possible FLSA violations by Forever 21. The Secretary has shown that Forever 21 was implicated in CUI's wage violations, as CUI sewed garments for CMR, which in turn manufactured apparel for Forever 21. Thus, the relationship between Forever 21 and its suppliers is relevant to the Wage and Hour Division's investigation of the Los Angeles garment industry.[34]

Forever 21 asserts that the Secretary is improperly demanding an array of records merely "in the hope that something will turn up."[35] *Am. Tobacco Co.*, 264 U.S. at 305-06. In *Am.*

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[34]In support of its response, Forever 21 proffers the declaration of Leslie Abbott, its outside counsel. Abbott avers that she spoke with an agent of the Secretary on September 12, 2012, who informed her that Forever 21 was "not a target of any pending investigation by the Department." (Declaration of Leslie L. Abbott ("Abbott Decl."), Docket No. 11 (Dec. 31, 2012)). Even if this statement was made, it does not mean that the Secretary lacks authority to subpoena documents from Forever 21. Forever 21 cites no authority for the proposition that a subpoena can be directed only to the specific target of a pending, formal investigation; rather, the case law is clear that a court must enforce an administrative subpoena unless "the evidence sought by the subpoena [is] 'plainly incompetent or irrelevant' to '*any lawful purpose*' of the agency." *Karuk*, 260 F.3d at 1076 (emphasis added). The Wage and Hour Division is conducting a broad investigation of the Los Angeles garment industry, which includes suppliers used by Forever 21. It is undisputed that in investigating violations of § 15(a) of the FLSA, the Wage and Hour Division is engaged in a lawful purpose. Moreover, information regarding Forever 21's supply chain and compliance procedures is relevant to that investigation, whether or not the investigation is narrowly focused on Forever 21 or broadly focused on multiple entities in the garment industry. See *Children's Hosp.*, 719 F.2d at 1428 (""[T]he evidence [must be] relevant and material *to the investigation*" (emphasis added)).

[35]Response at 9.

Tobacco, the Court refused to compel a company suspected of unfair competition and price-fixing in interstate commerce to comply with a subpoena requesting "accounts, books, records, documents, memoranda, contractors, papers and correspondence." The Court concluded that Congress did not intend to authorize "fishing expeditions into private papers on the possibility that they may disclose evidence of crime," and that the agency did not have a right to "all documents, but to such documents as are *evidence*." *Id.* at 306 (emphasis added). The Court determined that many of the requested documents did not pertain to interstate commerce and were thus wholly irrelevant to the agency's investigation. *Id.* at 307.

Here, unlike in *Am. Tobacco*, the documents sought by the Secretary are narrowly defined and directly relevant to the Wage and Hour Division's investigation of Forever 21's compliance with the FLSA. The Secretary seeks documents "sufficient" to identify garment manufacturers and facilities that supply Forever 21 with goods, as well as documents "sufficient" to identify Forever 21's compliance measures.[36] She does not request a broad swathe of documents unrelated to the Department's current investigation. Nor does she request "all" documents pertaining to Forever 21's supply chain. She seeks only such documents as are necessary to determine what entities supply goods to Forever 21 so that she can determine whether Forever 21 has violated or is violating § 15(a)(1). Contrary to Forever 21's assertions, the Secretary is not conducting a fishing expedition to "investigate other wrongdoing, as yet unknown," *In re Sealed Case*, 42 F.3d 1412 (D.C. Cir. 1994); rather, she seeks additional information regarding Forever 21's compliance with the FLSA, as facts discovered earlier in the investigation suggest that it is appropriate to investigate the company's compliance with the "hot goods" provision of the FLSA.

Forever 21's discussion of *United States v. Humble Oil & Refining Co.*, 518 F.2d 747, 748 (5th Cir. 1975), is similarly unavailing. There, the court concluded that a subpoena issued by the Internal Revenue Service seeking to "discover the identities of all lessors of mineral leases surrendered by Humble Oil in the calendar year 1970" so as to examine compliance with lease restoration requirements should not be enforced, as there were not "any factually demonstrable

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[36]Subpoena at 3.

grounds to suggest the likelihood of unpaid taxes," and "[t]he summons was not issued to facilitate any ongoing investigation." *Id.* Rather, "the primary purpose of the project was research," and the relevant statute did not "authorize the IRS to force private citizens to do its research." *Id.* at 748-49. Here, the Secretary is not simply researching a general problem; rather, she is investigating a specific industry that is allegedly notorious for its violations of the FLSA. The Secretary has demonstrated that there is a factual link between Forever 21 and at least one entity that failed to pay adequate wages. She thus has sufficient grounds to demand more information regarding Forever 21's suppliers and compliance procedures.

Finally, Forever 21 asserts that even if the subpoena is not an overly broad fishing expedition, it should not be enforced because it lacks a "legitimate purpose."[37] To obtain judicial enforcement of a subpoena, an agency must show "that the investigation will be conducted pursuant to a legitimate purpose." *Powell*, 379 U.S. at 57. Forever 21 contends that the Secretary's true purpose in issuing the subpoena and investigating Forever 21 is to "pressure [Forever 21] to act as an FLSA compliance program pioneer given the Department's own limited resources."[38] As evidence that this is the Secretary's "true" purpose, Forever 21 cites her unwillingness to discuss Forever 21's trade secret concerns, her issuance of a "misleading" press release stating that Forever 21 condoned "sweatshop-like conditions" at garment manufacturers, and her unwillingness to enter into a stipulated protective order.[39] The argument is unavailing.

As noted, a subpoena recipient "bears an extraordinarily heavy burden" in challenging the propriety of an administrative subpoena, and "can succeed only by proving by a preponderance of the evidence some improper use of the summons by the [administrative agency]." *Kis*, 658 F.2d at 540. Forever 21's bare assertion that it believes the Secretary is using her subpoena power to coerce it to act as a compliance monitor is insufficient to meet this burden. Forever 21 adduces no evidence that the Secretary's unwillingness to have an in-person discussion regarding

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[37]Response at 10.

[38]*Id.*

[39]*Id.*

Forever 21's trade secret concerns prior to issuing the press release demonstrates such an intent; rather, Forever 21 offers only its subjective views. Additionally, the evidence reveals that although Department of Labor representatives may not have met personally with Forever 21 prior to issuance of the press release, the parties did meet shortly thereafter so that Forever could air its concerns.[40]

While the Secretary ultimately declined to enter into a stipulated protective order to maintain the confidentiality of Forever 21's records, the company offers nothing more than speculation that the Secretary's motive in doing so was to put public pressure on Forever 21 to become a "compliance program pioneer." There is no authority suggesting that the Secretary was required to agree to such a stipulation; indeed, courts tend to encourage public disclosure of FLSA violations to encourage compliance with the statute and help both employees and consumers make informed decisions. See *Wolinksy v. Scholastic Inc.*, __ F.Supp.2d __, 2012 WL 2700381, *5 (S.D.N.Y. July 5, 2012) (declining to file an FLSA settlement agreement under seal because failing to disclose the information would "thwart[ ] Congress's intent both to advance employees' awareness of their FLSA rights and to ensure pervasive implementation of the FLSA in the workplace"); *Chao v. SOS Sec. Service, Inc.*, 526 F.Supp.2d 196, 200, 204 n. 4 (D. P.R. Nov. 21, 2007) (noting that the Department of Labor permissibly issued "a press release regarding SOS's failure to comply with the FLSA").

Finally, Forever 21 does not explain how complying with the Secretary's subpoena request will force it to change its compliance procedures. The Secretary is simply investigating Forever 21's compliance with the FLSA; if she uncovers evidence of wrongdoing and Forever 21 changes its compliance procedures as a result, this is not an improper use of the subpoena power. Rather, it would be a desired result. Accordingly, the court concludes that Forever 21 has not demonstrated that the Secretary had an illegitimate purpose in issuing the subpoena.

In short, the evidence shows that there is a relationship between the investigation and the

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[40]Abbott Decl., ¶ 8. The press release was issued on October 25, 2012, and the meeting between Forever 21 and a Department of Labor representative occurred on November 9, 2012. (*Id.*, ¶¶ 5, 8).

records subpoenaed from Forever 21, and is sufficient tto satisfy the *Powell* reasonable relevance criterion. Because Forever 21's objections are not well taken, the court enforces the subpoena as written.

C. Forever 21's Request for a Protective Order

In the event the court determines to enforce the subpoena, Forever 21 requests that it issue a protective order to limit disclosure of Forever 21's confidential trade secrets.[41] A party seeking a protective order generally bears the burden of showing good cause for issuance of the order. See, e.g., *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir. 2004) ("The burden is upon the party seeking [a protective] order to 'show good cause' by demonstrating harm or prejudice that will result from the discovery," citing *Phillips ex rel. Estates of Byrd v. General Motors Corp.*, 307 F.3d 1206, 1210-11 (9th Cir. 2002)); *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995); *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 778 (1st Cir.1988); *Jones v. Hirschfeld*, 219 F.R.D. 71, 74 -75 (S.D.N.Y. 2003) ("The burden of persuasion in a motion to quash a subpoena and for a protective order is borne by the movant"); *Damiano v. Sony Music Entertainment, Inc.*, 168 F.R.D. 485, 490 (D.N.J. 1996).

Forever 21 has not met its burden in this regard. Aside from blanket assertions that the Secretary intends to disclose its trade secrets, Forever 21 provides no specific details regarding which subpoenaed items constitute trade secrets or why there is a risk the Secretary will publicly disclose them. See *Vallejo v. Allen Vester Auto Group, Inc.*, No. 5:07–CV–343–BO, 2008 WL 4610233, *2 (E.D.N.C. Oct.16, 2008) ("The request for a protective order must be based on a specific demonstration of facts rather than speculative statements about the need for a protective order and generalized claims of harm"); see also *Securities and Exchange Commission v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1056 (2d Cir. 1973) ("[T]he mere suggestion by appellants of possible damage to their business activities is not sufficient to block an authorized inquiry into relevant matters"). Forever 21 has not identified the particular trade secrets at risk of exposure, nor proffered sufficient evidence or explanation of the harm that would result from

[41]Response at 11.

disclosure.

Furthermore, Forever 21 can rely on the protections provided by Department of Labor regulations promulgated under Freedom of Information Act ("FOIA") to avoid public disclosure of confidential information. FOIA contains nine exemptions to its general policy mandating disclosure of government documents. 5 U.S.C. § 552. Exemption 4 "is available to prevent disclosure of (1) commercial and financial information, (2) obtained from a person or by the government, (3) that is privileged or confidential." *GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1112 (9th Cir. 1994); see 5 U.S.C. § 552(b)(4). Pursuant to this provision, the Department of Labor promulgated regulation 29 C.F.R. § 70.26, which states that "confidential business information will be disclosed under the FOIA" only when certain conditions are satisfied. Section 70.26 permits the submitter of business information to use "good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portions of its submission that it considers to be protected from disclosure under Exemption 4." 29 C.F.R. § 70.26(b). Prior to disclosing information designated as protected, the Department must provide notice to the submitter and give it an opportunity to object. 29 C.F.R. §§ 70.26(c)-(e). Accordingly, even if the Secretary's subpoena seeks confidential trade secret information, Forever 21 will have an opportunity to challenge public disclosure of this information under FOIA prior to the information being released. Forever 21 has not demonstrated that FOIA's protective mechanisms are insufficient to maintain the confidentiality of its trade secrets.[42] As a result, the court concludes that Forever 21 has failed to satisfy its burden of demonstrating good cause for the issuance of a protective order.

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[42]Forever 21 cites *McDonnell Douglas Corp. v. E.E.O.C.*, 922 F.Supp. 235 (E.D. Miss. 1996), for the proposition that FOIA does not provide adequate protection against public disclosure of trade secrets. The *McDonnell Douglas* court concluded that the E.E.O.C. had failed properly to consider whether confidential information was exempt from public disclosure under Exemption 4. *Id.* at 241-42. The court did not conclude that FOIA fails to provide adequate protections; rather, it concluded only that the E.E.O.C. did not properly implement FOIA's protections. Forever 21 has adduced no evidence that the Department of Labor will similarly fail correctly to implement FOIA. As a consequence, *McDonnell Douglas* does not support granting Forever 21's request for a protective order.

III. CONCLUSION

For the reasons stated, the court finds that the subpoena at issue is enforceable. The Secretary's petition to enforce the subpoenas is therefore granted. Forever 21 shall produce the requested documents no later than ten days from the date this order is filed. The action is dismissed.

DATED: March 7, 2013

MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE