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9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE DISTRICT OF ARIZONA

11 In re: Grand Jury Subpoena
12 Issued to Glassdoor, Inc.

GJ Subpoena No. 16-03-217
(Assigned to Honorable Diane J. Humetewa
United States District Judge)

13 **GOVERNMENT'S RESPONSE**
14 **IN OPPOSITION TO**
15 **MOVANT'S MOTION TO QUASH**

16 **(Filed Under Seal)**

17 The United States of America responds in opposition to Glassdoor's motion to
18 quash. The government has served a grand jury subpoena seeking information that would
19 enable it to identify and speak with eight anonymous individuals who posted adverse
20 information on an electronic bulletin board about business practices at issue in a criminal
21 fraud investigation. Glassdoor objects, and demands that this Court inquire deeply into the
22 nature of the investigation. Because the information contained within the four corners of
23 the subpoena and other averrals of counsel establish a connection between a pre-existing
24 investigation and the improprieties described by the anonymous reviewers, Glassdoor
25 cannot meet its heavy burden to justify an intrusion into the grand jury's investigative
26 authority. Consistent with *Branzburg v. Hayes*, 408 U.S. 665 (1972) and several
27 subsequent Ninth Circuit cases, this Court should deny the motion to quash and instead
28 order Glassdoor to comply.

1 **STATEMENT OF FACTS**

2 **A. Glassdoor Offers an Internet-Based Forum for Employees and**
3 **Employers**

4 Glassdoor.com provides an opportunity for current and former employees of
5 companies to post “reviews” including the “pros” and “cons” of employment. (*See*
6 *generally* Mot. at 3-5 and O’Brien Decl. (“Decl.”) at ¶¶ 2-4.) Glassdoor also provides
7 significant services to employers. “For employers, Glassdoor offers effective recruiting
8 and employer branding solutions via Glassdoor for Employers. We help thousands of
9 clients and partners promote their employer brand to candidates researching them and
10 advertise their jobs to ideal candidates who may not be aware of them.”¹

11 In its Terms of Use, Glassdoor purports to protect the anonymity of the reviewers
12 by reserving the right to take appropriate action “to the fullest extent permitted by
13 applicable law.” (Decl. at Ex. F, ¶ 6(D).) Glassdoor’s privacy policy is more circumspect
14 as to the sharing of information, and it implicitly recognizes the different types of
15 subpoenas. “Our general procedure with respect to *civil* subpoenas requesting user data is
16 to require a court order, binding on Glassdoor, before we release such information.”²
17 Glassdoor does not purport to offer anonymity protections with respect to grand jury
18 subpoenas.

19 **B. The Government Is Investigating Contracting Fraud**

20 On March 7, 2017, the government served a grand jury subpoena on Glassdoor
21 seeking information that could enable it to contact current and former employees who had
22 written reviews about [REDACTED] (Decl. at Ex. C.) The subpoena
23 included eight exemplar reviews posted in the fourteen-month span from November [REDACTED]
24 2015 through January [REDACTED] 2017, and the government has explicitly narrowed the scope of

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26 _____
27 ¹ See https://www.glassdoor.com/about/index_input.htm (retrieved April 7, 2017),
attached as Ex. I.

28 ² See <https://www.glassdoor.com/about/privacy-full.htm> (retrieved April 7, 2017)
(emphasis added), attached as Ex. J.

1 the subpoena to demand information as to only those eight reviews. From that subpoena,
2 Glassdoor and the Court may take notice of the nature of this investigation.

3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED] The
7 cover letter to the subpoena identifies the investigating agency as the Office of Inspector
8 General for the Department of [REDACTED] (Decl. at Ex. C.) The Inspector General
9 Act of 1978 establishes an Inspector General in each federal agency to “prevent and detect
10 fraud and abuse” in federal programs, 5 U.S.C. App. 3 § 2, and as part of that authority an
11 Inspector General may refer an investigation to the U.S. Attorney’s Office for a grand jury
12 investigation, as happened here.

13 An examination of possible fraud in the administration of [REDACTED]
14 is squarely within the scope of the Inspector General Act, and the statutes underlying the
15 investigation include but are not limited to wire fraud in violation of 18 U.S.C. § 1343 and
16 misuse of government funds, in violation of 18 U.S.C. § 641. The government avers that
17 the Glassdoor reviews played no role in the Inspector General’s decision to open an
18 investigation. The eight reviews at issue nonetheless offer common employee insights into
19 [REDACTED] and its administration of the federal contracts, and those reviewers are third party
20 witnesses to potential unlawful conduct within the scope of the Inspector General’s pre-
21 existing investigation. The government has no way to identify those reviewers outside of
22 subpoena compliance, and those reviewers would be expected to inform the existing
23 investigation specifically about [REDACTED]
24 [REDACTED] (post of [REDACTED] 2016) and more generally about the [REDACTED]
25 [REDACTED] practices that maximize profit numbers for [REDACTED] which are reflected in each
26 of the eight reviews. (Decl. at Ex. C, Annex.)

27 Beyond the four corners of the subpoena and the government’s averral that the
28 Inspector General opened its investigation prior to reading reviews through Glassdoor, the

1 government declines in this Response to identify any subjects of the grand jury
2 investigation, or to describe the predication that led it to open the investigation, or to opine
3 on the relative strength of its investigation. Disclosure of such information in this forum
4 would be inconsistent with the grand jury's role "to inquire into all information that might
5 possibly bear on its investigation until it has identified an offense or has satisfied itself that
6 none has occurred." *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297 (1991)
7 (reversing the quashal of a grand jury subpoena). To the extent this Court deems it
8 necessary to know more about the status of the underlying criminal investigation, the
9 Supreme Court in *R. Enterprises* suggested an *in camera* review procedure, 498 U.S. at
10 302, and the government will submit such information *in camera* upon request.

11 ARGUMENT

12 **I. The Court Should Follow the *Branzburg* Good Faith Test and Order** 13 **Glassdoor to Comply with the Subpoena**

14 Glassdoor argues that the government must show a compelling interest in and
15 substantial nexus to the reviewers' identities before Glassdoor is required to provide the
16 information. Glassdoor is wrong. The Supreme Court, in *Branzburg v. Hayes*, 408 U.S.
17 665, 680, 707 (1972), squarely rejected the compelling interest/nexus test urged by
18 Glassdoor, in favor of a bad faith test. The *Branzburg* test has since been followed
19 numerous times over the past decades by the Ninth Circuit.

20 **A. Grand Jury Subpoenas Are Presumed Legitimate**

21 Grand jury subpoenas maintain a presumption of legitimacy. "[T]he law presumes,
22 absent a strong showing to the contrary, that a grand jury acts within the legitimate scope
23 of its authority." *R. Enterprises, Inc.*, 498 U.S. at 300-01; *see also United States v.*
24 *Calandra*, 414 U.S. 338, 343 (1974 (the grand jury "deliberates in secret and may
25 determine alone the course of its inquiry.")). Although a trial subpoena requires that the
26 information sought be relevant to the offense charged, and admissible, *United States v.*
27 *Nixon*, 418 U.S. 683, 700 (1974), the nature of the grand jury militates against any inquiry
28 in subpoenas duces tecum issued by the grand jury. *R. Enterprises, Inc.*, 498 U.S. at 300.

1 **B. Just Like a News Reporter Protecting a Source, Glassdoor Must**
2 **Demonstrate Bad Faith to Block Compliance with a Grand Jury**
3 **Subpoena**

4 *Branzburg* rebuffs Glassdoor’s argument that subpoenas for commercial records
5 involving anonymous, apolitical Internet posts are subject to a constitutional exception. In
6 *Branzburg*, the Supreme Court held that grand jury subpoenas involving First Amendment
7 rights did not require a judicial authorization before compliance, unless the party seeking
8 to quash the subpoena demonstrated bad faith by the government. That decision
9 consolidated the appeals of three reporters, *Branzburg*, Pappas and Caldwell, who were
10 each subpoenaed to testify before different grand juries regarding activities they observed
11 while reporting on drug dealers (*Branzburg*) and the Black Panthers (Pappas and Caldwell).
12 *Branzburg*, 408 U.S. at 667-79. Like Glassdoor, the reporters argued that they “should not
13 be forced either to appear or to testify before a grand jury . . . until and unless sufficient
14 grounds are shown for believing that the reporter possesses information relevant to a crime
15 the grand jury is investigating . . . and that the need for the information is sufficiently
16 compelling to override the claimed invasion of First Amendment interests occasioned by
17 the disclosure.” *Id.* at 680. The Supreme Court disagreed.

18 Notably, the Supreme Court explicitly considered and rejected some of the same
19 arguments advanced by Glassdoor. With respect to the specter of a “chilling effect” on
20 the anonymous exercise of First Amendment rights (*see* Mot. at 7-8), *Branzburg* trusts to
21 the secrecy of the grand jury and the experience of law enforcement officers to protect
22 those who provide information. *Branzburg*, 408 U.S. at 695 (“There is little before us
23 indicating that informants . . . would in fact be in a worse position . . . if they risked placing
24 their trust in public officials as well as reporters.”) “Estimates of the inhibiting effect of
25 such subpoenas on the willingness of informants to make disclosures to newsmen are
26 widely divergent and to a great extent speculative.” *Id.* at 693-94. Forty years later, with
27 social media use rampant, Glassdoor has offered nothing to suggest that its customer base

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1 would refrain from posting reviews if reviewing courts continue to treat grand jury
2 subpoenas different from civil subpoenas.³

3 Nor does *Branzburg* offer any support for Glassdoor's argument (*see* Mot. at 9-11)
4 that it and this Court must have the opportunity to inquire into the purpose of the
5 investigation or the compelling need to obtain the users' identities. The Supreme Court
6 squarely rejected such an inquiry in *Branzburg*, using the language of separation-of-
7 powers jurisprudence. "Thus, in the end, by considering whether enforcement of a
8 particular law served a 'compelling' governmental interest, the courts would be inextricably
9 involved in distinguishing between the value of enforcing different criminal laws. By
10 requiring testimony . . . in investigations involving some crimes but not in others, they
11 would be making a value judgment that a legislature had declined to make . . ." *Id.* at 705-
12 06. Glassdoor's normative view is simply not supported by the dispositive case law.

13 *Branzburg* thus decisively rejects a privilege in the same nature as Glassdoor claims
14 here. In reaching this conclusion, the Court emphasized the constitutionally-rooted
15 importance of affording grand juries wide latitude to conduct criminal investigations:

16 Grand jury proceedings are constitutionally mandated for the
17 institution of federal criminal prosecutions for capital or other
18 serious crimes, and its constitutional prerogatives are rooted in
19 long centuries of Anglo-American history. . . . Because its task
20 is to inquire into the Existence of possible criminal conduct and
21 to return only well-founded indictments, its investigative
22 powers are necessarily broad. It is a grand inquest, a body with
23 powers of investigation and inquisition, the scope of whose
24 inquiries is not to be limited narrowly by questions of propriety
25 or forecasts of the probable result of the investigation, or by
26 doubts whether any particular individual will be found properly
27 subject to an accusation of crime. Hence, the grand jury's
28 authority to subpoena witnesses is not only historic, but
essential to its task.

24 ³ Glassdoor of course is not part of the news media. Similar to the news media,
25 however, it claims to speak on behalf of its sources/reviewers, and it claims standing to
26 assert its reviewers' own First Amendment interests in anonymous speech. *See generally*
27 Mot. at 9 n.1. Indeed, a California appellate court, in overturning a trial court's order
28 compelling compliance by Glassdoor with a civil subpoena, characterized Glassdoor in
precisely that manner. *Glassdoor, Inc. v. Superior Court*, 2017 WL 944227 (Cal. Ct. App.
March 10, 2017). "[I]ts interests resemble those of a news outlet resisting disclosure of the
identity of a confidential source." *Id.* at *4 n.3. The rationale and holding in *Branzburg* is
particularly apt with respect to Glassdoor.

1 *Id.* at 687-88 (citations and internal quotation marks omitted). Even without the
2 government's factual proffer in this Response, this presumption of regularity militates in
3 favor of subpoena enforcement.

4 **C. The Ninth Circuit Has Consistently Rejected the Broad Privilege That
5 Glassdoor Claims**

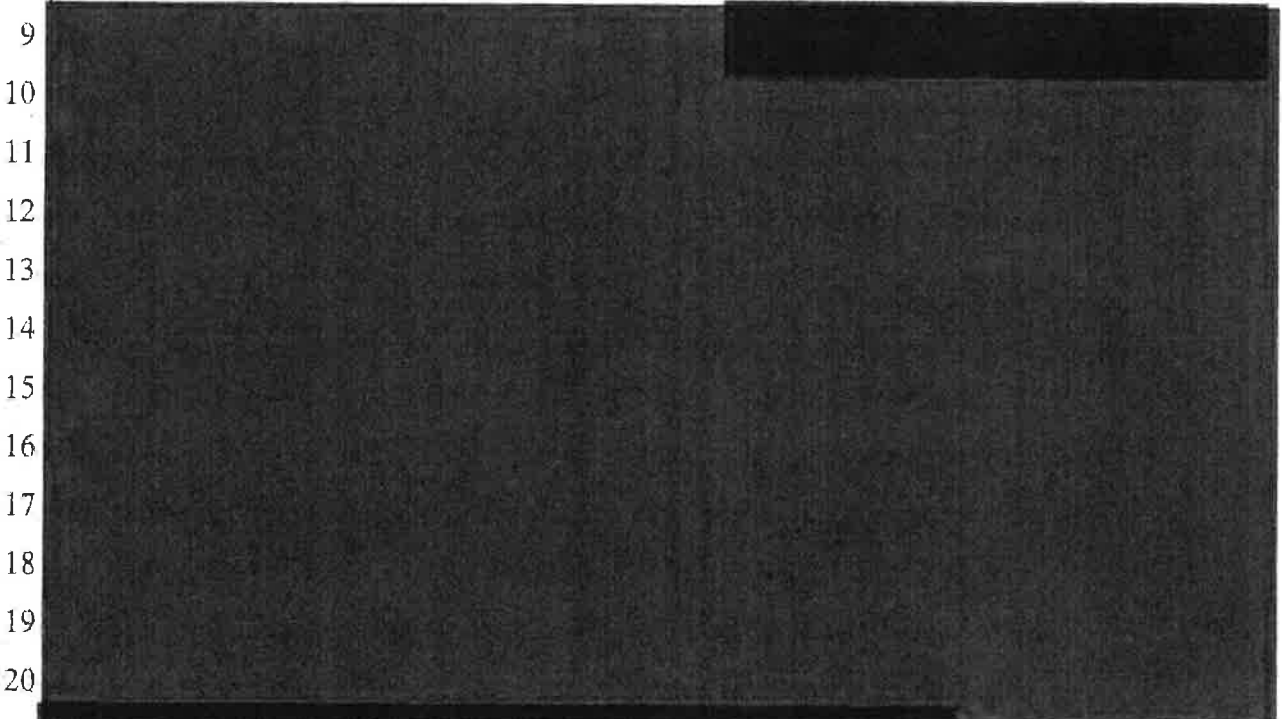
6 Two years after the Supreme Court's decision in *Branzburg*, in *Lewis v. United*
7 *States*, 501 F.2d 418 (9th Cir. 1974), the Ninth Circuit had an opportunity to consider a
8 First Amendment-based challenge to a grand jury subpoena seeking information a radio
9 station had received about a bombing. Citing *Branzburg*, the court held that a party may
10 resist a grand jury subpoena on First Amendment grounds only if (1) the grand jury
11 investigation was "instituted or conducted other than in good faith," (2) the information
12 was being sought only to harass the recipient, or (3) there was no legitimate need for the
13 requested material. *Id.* at 422-23. The following year, the Ninth Circuit reiterated these
14 standards when affirming the recipient's contempt conviction for refusing to comply with
15 the subpoena. *Lewis v. United States*, 517 F.2d 236, 238 (9th Cir. 1975).

16 The Ninth Circuit's next significant decision in this area came in 1993, when it
17 considered a researcher's attempt to invoke the First Amendment as the basis for refusing
18 to comply with a grand jury subpoena investigating the sabotage of an animal research
19 facility. *In re Grand Jury Proceedings (Scarce)*, 5 F.3d 397 (9th Cir. 1993). Citing *Lewis*
20 and *Branzburg*, the court held that a First Amendment-based challenge to a subpoena will
21 lie only "where a grand jury inquiry is not conducted in good faith, or where the inquiry
22 does not involve a legitimate need of law enforcement, or has only a remote and tenuous
23 relationship to the subject of the investigation." *Id.* at 400-01.

24 Finally, in 2006, the Ninth Circuit again reiterated (in an unpublished opinion) that
25 courts need not apply a balancing test whenever a subpoena recipient believes compliance
26 would burden its First Amendment rights. *In re Grand Jury Subpoena (Wolf)*, 2006 WL
27 2631398, *1 (9th Cir. 2006). *Wolf* involved a freelance videographer – apparently
28 unconnected to any news organization – who refused to turn over a video of a disruptive
protest to the grand jury investigating the crimes associated with the protest, and who was

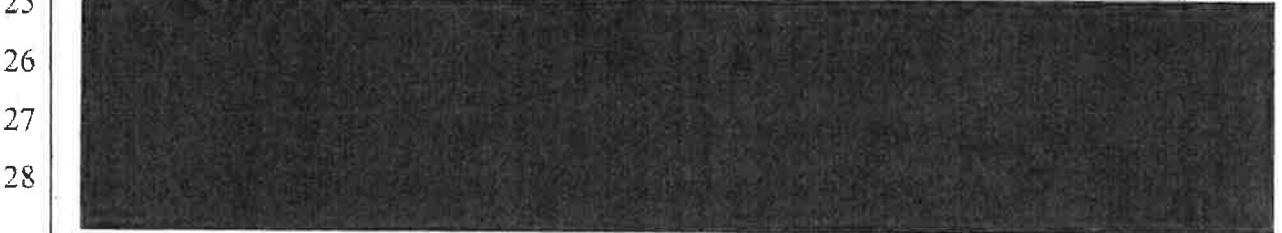
1 sanctioned for his refusal.⁴ *Id.* at *2 n.1. “[W]e have held that a limited balancing of First
2 Amendment interests may be conducted only ‘where a grand jury inquiry is not conducted
3 in good faith, or where the inquiry does not involve a legitimate need of law enforcement,
4 or has only a remote and tenuous relationship to the subject of the investigation’
5 [Nothing] requires the district court to conduct a balancing test where, as here, there is no
6 showing of bad faith and the journalist refuses to produce non-confidential material
7 depicting public events.” *Id.* at *1.

8 The Ninth Circuit has not yet had occasion to directly apply *Branzburg* to the newer



21 [Redacted] Simply put, Glassdoor

22
23 ⁴ *Wolf* was decided in September 2006, four months before the Rules of Appellate
24 Procedure and the local Circuit Rules made unreported decisions presumptively citable.
25 See FRAP 32.1 and Circuit Rule 36-3. The government cites to *Wolf* here based on the
26 “notice” exception to pre-2007 cases, to wit: to provide notice that the Ninth Circuit’s post-
27 *Branzburg* jurisprudence has remained consistent over time. See Circuit Rule 36-3(c)(ii).



1 can only justify quashal if Glassdoor meets its burden to show that “the information is
2 being sought in bad faith, has a tenuous relationship to the subject of the investigation, that
3 law enforcement does not have a legitimate need for the information, or that it is being
4 sought as a means of harassment.” (Order at 5:24-28.)

5
6 **D. The Subpoena to Glassdoor Was Issued in Good Faith and the
Government Has a Legitimate Need for the Information**

7 125 employees or former employees of [REDACTED] chose to publicly post comments
8 about [REDACTED] on Glassdoor. (Decl. at 2 ¶ 6.) In its subpoena, the government highlighted
9 eight reviews probative of the alleged fraud that it is investigating (Decl. Ex. C, Annex)
10 and subsequently agreed to limit the subpoena to encompass only those eight reviews.
11 (Decl. Ex. E). The reviews are recent and specific, and the information sought would
12 enable the government to speak with employees it could not otherwise identify who by
13 their own publicly-posted words have information about the business practices at issue,
14 such as a 2016 posting by an employee [REDACTED]
15 [REDACTED] (Decl. Ex. C, Annex).

16 Glassdoor cannot meet its burden to show that the government has acted in bad faith or is
17 engaged in a fishing expedition with a tenuous connection to its investigation, and in fact
18 the record establishes its good faith and the legitimate law enforcement need for the
19 evidence.

20 **II. Glassdoor’s Proposed Compelling Interest/Nexus Test Relies on Out-of-Circuit
Cases with Distinguishable Facts**

21 **A. Most of the Cases Cited by Glassdoor Are Inapposite to a Grand Jury
Subpoena Dispute**

22
23 In its heavily-cited brief, Glassdoor provides substantial support for the
24 unremarkable proposition that the First Amendment is important. But almost none of the
25 cases are relevant here. To be sure, companies in Glassdoor’s position have had success
26 challenging trial subpoenas, particularly in the civil realm (Mot. at 8-9), but the Supreme
27 Court has already counseled against reliance on trial subpoena cases when analyzing the
28 subpoenas issued under the grand jury’s authority. *R. Enterprises, Inc.*, 498 U.S. at 298.

1 “The multifactor test announced in *Nixon* would invite procedural delays and detours while
2 courts evaluate the relevancy and admissibility of documents sought by a particular
3 subpoena. We have expressly stated that grand jury proceedings should be free of such
4 delays.” *Id.* Nor are the cases alleging retaliation after engaging in protected conduct
5 (Mot. at 7-8) relevant here. The government accordingly focuses the remainder of its
6 argument on the three out-of-circuit cases in which reviewing courts balanced the grand
7 jury’s needs with First Amendment rights.

8
9 **B. Glassdoor’s Cited Cases Are Not the Law in this Circuit and Are
Factually Distinguishable**

10 Glassdoor relies on a small series of out-of-district cases for the incorrect
11 proposition that the government must demonstrate a compelling interest in and a sufficient
12 nexus between the information sought and the subject matter of the investigation. Mot. at
13 7 (citing *In re Grand Jury Subpoena Duces Tecum*, 78 F.3d 1307 (8th Cir. 1996); *In re*
14 *Grand Jury Investigation of Possible Violation of 18 U.S.C. § 1461*, 706 F. Supp. 2d 11
15 (D.D.C. 2009); *In re Grand Jury Subpoena to Amazon.com dated August 7, 2006*, 246
16 F.R.D. 570 (W.D. Wis. 2007)). These cases are inapposite.

17 The Eighth Circuit case involved a claim that a grand jury subpoena duces tecum,
18 issued by the Office of Independent Counsel (“OIC”) in its wide-ranging Whitewater
19 investigation against President Clinton and his associates, intruded on the First Amendment
20 right of freedom of association of persons (in that particular case, campaign contributors)
21 identified in documents sought by the subpoena. 78 F.3d at 1309. The Eighth Circuit
22 rejected this argument and found the government had demonstrated a compelling interest
23 in and a sufficient nexus between the information sought and the subject of its
24 investigation. But the fact that the Eighth Circuit employed a balancing test in a campaign
25 finance investigation does not mean it would employ the same balancing test on the facts
26 present here. The claims of the subpoena recipients in the Whitewater investigation
27 involved their right to freedom of association in the political sphere, and political speech
28 has a higher level of protection than the apolitical speech at issue in the instant case. *E.g.*,

1 *In re Anonymous Online Speakers*, 661 F.3d 1168, 1177 (9th Cir. 2011) (opining, in the
2 context of a civil discovery dispute, that “the notion that commercial speech should be
3 afforded less protection than political, religious or literary speech is hardly a novel
4 principle.”).

5 The other cases cited by Glassdoor involve subpoenas investigating distribution of
6 movies or books that would have resulted in disclosure of information regarding customers
7 and their purchases of expressive materials. See *In re Grand Jury Investigation of Possible*
8 *Violation of 18 U.S.C. § 1461*, 706 F. Supp. 2d at 16-17 (seeking copies of records that
9 show the identity of all movies sold or distributed); *In re Grand Jury Subpoena to*
10 *Amazon.com dated August 7, 2006*, 246 F.R.D. at 571 (seeking virtually all of Amazon’s
11 records with respect to the sale of 24,000 used books, including identities of the
12 purchasers). Here, the purchase of expressive materials is not at issue. The *Amazon* court
13 was specifically worried about the government receiving “Amazon’s list of customers *and*
14 *their personal purchases*” and the chilling effect it would have on “expressive e-
15 commerce.” 246 F.R.D. at 573 (emphasis added). In contrast, the government here is not
16 asking Glassdoor to provide *any information* other than the [REDACTED] reviewers’ identities
17 and whatever limited contact information Glassdoor collects and retains. The same
18 concerns expressed in the three out-of-district cases cited by Glassdoor are not present here.

19 **C. In Any Event, the Government Can Meet the Higher Standard Here**

20 The facts of this case establish the government’s compelling need to identify
21 anonymous reviewers who have voluntarily posted reviews critical of business practices
22 and ethics at issue in a government investigation of possible contracting fraud. Glassdoor
23 appears to contest most directly the nexus between the reviews and the pre-existing
24 investigation (Mot. at 9-10), but even Glassdoor’s out-of-circuit test only requires a
25 “sufficient” nexus rather than a direct or complete one. Here, Glassdoor’s reviewers have
26 considerable information about important facts in a [REDACTED] fraud
27 investigation, including the accuracy of information conveyed by the contractor to the
28

1 government agency responsible for it,⁶ the manner in which the system is manipulated to
2 [REDACTED]⁷ and the quality of the work performed under the contract.⁸
3 Under any test or standard, the grand jury is entitled to the subpoenaed information.

4 **CONCLUSION**

5 For the foregoing reasons, this Court should deny the request for relief and instead
6 order Glassdoor to comply with subpoena number 16-03-217.

7 Respectfully submitted this 14th day of April, 2017.

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15 **CERTIFICATE OF SERVICE**

16 I hereby certify that on April 14, 2017, I hand-delivered this document for filing under
17 seal by the Clerk's Office, and I arranged for a copy to be sent to movant's counsel.
18
19
20
21

22 6 [REDACTED]

23 7 [REDACTED]

24 8 [REDACTED]