IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
BECKLEY DIVISION

UNITED STATES OF AMERICA	)	
v.	)	**Criminal No. 5:14-cr-00244**
DONALD L. BLANKENSHIP	)	

MEMORANDUM IN SUPPORT OF DEFENSE MOTION NO. 4,
MOTION TO DISMISS INDICTMENT FOR
SELECTIVE AND VINDICTIVE PROSECUTION

Donald L. Blankenship seeks dismissal of the indictment on the ground that the government has charged him and singled him out for prosecution in retaliation for his release of a documentary film entitled "Upper Big Branch – Never Again." That documentary, an exercise of Mr. Blankenship's First Amendment rights, excoriated the federal government and accused the Mine Safety and Health Administration ("MSHA") of being negligent and wrong about the cause of the Upper Big Branch mine ("UBB") disaster and standing in the way of mine safety. This prosecution constitutes a vindictive and selective prosecution in violation of the First and Fifth Amendments to the United States Constitution.

The defense recognizes the burden on a defendant to demonstrate grounds for dismissal of an indictment for unconstitutional vindictiveness and selectiveness. *See, e.g.*, *United States v. Wilson*, 262 F.3d 305, 314 (4th Cir. 2001); *United States v. Hastings*, 126 F.3d 310, 313 (4th Cir. 1997). The facts and circumstances discussed below more than satisfy that burden. The indictment is so contrived that it, in and of itself, demonstrates improper animus. It accuses Don Blankenship of an agreement with others to commit safety violations at Upper Big Branch simply because of budgeting decisions he made as the Chief Executive Officer of Massey Energy

Company ("Massey"), without charging a single other person for this so-called conspiracy. And it accuses him of securities fraud charges based on nonactionable statements of the company's subjective intent, statements that in any event he did not author, revise, or make (and which are routinely made by other coal companies with more safety violations than are alleged in the indictment). It was procured in a rushed six-hour presentation to a grand jury asked to vote the day after the grand jury was empanelled. The prosecutors responsible for the case misrepresented key legal principles and critical facts. When grand jurors asked sensible questions, they were told that negligent conduct was criminal, all notice of the presence of inspectors at a mine was criminal, and that Mr. Blankenship approved a statement to Massey shareholders when he had only authorized it to be sent to lawyers. *See* Mem. in Supp. of Defense Mot. No. 5.

It is startling enough that experienced prosecutors made such a hasty and misleading presentation to the grand jury when the conduct had been under investigation and known to them for years. It is even more troubling that, in this most public of prosecutions, the prosecution rests on contrived theories of criminal liability.

The defense respectfully submits that the undisputed facts described below explain the misconduct in the grand jury and the defective charges that emerged. These facts constitute direct and conclusive evidence that the motivation for this indictment was not to enforce the law but to silence Don Blankenship.

FACT 1: The explosion at UBB occurred on April 5, 2010. Federal authorities began investigating the explosion soon thereafter.

FACT 2: The United States Attorney's Office repeatedly told Mr. Blankenship's counsel, William W. Taylor, III, that Mr. Blankenship was not a target. On three occasions, the last in April 2013, the Assistant United States Attorney told defense counsel that Mr.

Blankenship was not a target of the investigation and that he would inform counsel if Mr. Blankenship's status changed.

FACT 3: On March 31, 2014, Mr. Blankenship released a documentary critical of federal regulators in connection with the UBB disaster. The response of the Democratic Party establishment in West Virginia, led by Senator Joe Manchin (a political ally of the United States Attorney and his family), to this constitutionally protected speech was swift and harsh. Senator Manchin publicly stated that "Don [Blankenship] has blood on his hands. And I believe that justice will be done," and he wrote to Mr. Blankenship that he would be communicating with the United States Attorney's Office. United Mine Workers of America President Cecil Roberts released a statement saying, "This self-serving video is no more than a feeble effort by one millionaire to stay out of jail, and is an affront to the families of the victims. I again urge the U.S. Attorney's Office to expeditiously follow the trail of its investigation all the way up the corporate chain of command . . . ."

And the United States Attorney's Office itself found the documentary to be so offensive that it described it as an "extreme and unorthodox" attempt to "obtain influence" and argued that it showed that Mr. Blankenship posed a danger to the community warranting onerous conditions of release in this case.

FACT 4: After the documentary, without informing Mr. Blankenship's counsel as it promised it would, the government empanelled a grand jury in Charleston, West Virginia on November 12, 2014 and the next day obtained an indictment against Mr. Blankenship.

FACT 5: Although each count of the indictment alleges concerted action with many other individuals at Massey, the indictment charges only one alleged conspirator, Mr. Blankenship, and no one else – not any of the miners who allegedly committed the violations

that the indictment attempts to attribute to Mr. Blankenship, not the mine president who had far more day-to-day responsibility over the mine than Mr. Blankenship, not any of the other company executives who stood between Mr. Blankenship and the mine and who had greater involvement than him, and not any of the executives and lawyers who wrote, edited, and signed the statements that are the subject of Counts Three and Four. Notwithstanding its allegations of lengthy, wide-ranging conspiracies involving untold numbers of other individuals, the indictment charged one individual and one individual only – the individual who released the controversial documentary.

FACT 6: The indictment singles out Mr. Blankenship not only internally at Massey, but also in the industry. Each of Massey's primary competitors in the industry ran mines with violations comparable in number to and even greater than UBB. Yet none of the executives of these companies ever have been charged with conspiring to violate safety standards as Mr. Blankenship has been charged here. Likewise, each of the companies routinely made comparable public statements about its safety efforts, notwithstanding the number of violations for which each was cited. Yet again, none of the executives of any of these companies ever has been charged with securities fraud, as Mr. Blankenship has been charged here.

These facts – including the United States Attorney's Office's own statements about the documentary – are direct evidence that motivations other than law enforcement drove the decision to indict Mr. Blankenship. The motivations are easy to see, and they are constitutionally impermissible. It is a violation of constitutional proportions to single out an individual for prosecution because he exercised his free speech rights to criticize the government in a documentary film. Dismissal of the indictment is therefore required. At a minimum, the showing made here amply justifies an order from the Court compelling discovery.

I. Legal Standards

The United States Constitution – through the First Amendment and the Due Process Clause of the Fifth Amendment – plainly prohibit the government from indicting an individual in retaliation for the exercise of his First Amendment rights.

a. The First Amendment

"[S]peech on 'matters of public concern' . . . is 'at the heart of the First Amendment's protection,'" and "occupies the highest rung of the hierarchy of First Amendment values." *Snyder v. Phelps*, 562 U.S. 443, 131 S. Ct. 1207, 1211 (2011) (citations and internal quotation marks omitted). Even when the speech strikes a listener as deeply offensive, it "is entitled to special protection." *Id.* (citation omitted). No matter where one stands on the questions of responsibility for the UBB disaster and on how to make mines safer, those questions are a "matter of public concern," *id.* at 1216, and speech about them, including the documentary film Mr. Blankenship supported, is protected against retaliation by the government. *See, e.g.*, *Lane v. Franks*, 134 S. Ct. 2369 (2014) (First Amendment prohibits retaliation against government employee for protected speech); *Crawford-El v. Britton*, 523 U.S. 574 (1998) (First Amendment forbids punitive transfer of prisoner in retaliation for protected speech); *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668 (1996) (First Amendment prohibits retaliation against government contractors for protected speech). Mr. Blankenship's political activities in support of conservative candidates and causes are similarly protected activities.

The First Amendment, of course, prohibits criminal prosecution in retaliation for protected speech no less than other forms of retaliation. *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (discussing *Bivens* liability of arresting agents for inducing retaliatory prosecution). Apart from whether the prosecution is "vindictive" (because it involves charges brought to

retaliate for the exercise of a constitutional right) or "selective" (because it involves singling a person out for prosecution for an impermissible reason), an indictment must be dismissed if the motive behind it is to punish for protected speech. In the context of a civil action against a government official for damages for a retaliatory arrest, the Fourth Circuit has stated that, "[a] cognizable First Amendment retaliation claim requires a plaintiff to show: (1) 'that [plaintiff's] speech was protected'; (2) '[the government agent's] alleged retaliatory action adversely affected the plaintiff's constitutionally protected speech'; and (3) 'a causal relationship exists between [plaintiff's] speech and the defendant's retaliatory action.'" *Tobey v. Jones*, 706 F.3d 379, 387 (4th Cir. 2013) (citing *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 685–86 (4th Cir. 2000)).

b. Vindictive Prosecution

"It is now well established that a prosecutor violates the Due Process Clause of the Fifth Amendment by exacting a price for a defendant's exercise of a clearly established right or by punishing the defendant for doing what the law plainly entitles him to do." *United States v. Wilson*, 262 F.3d 305, 314 (4th Cir. 2001) (citations omitted); *see also Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort . . . and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is patently unconstitutional." (citations and internal quotation marks omitted)).

A prosecution brought to retaliate against the exercise of a constitutional right constitutes an impermissible "vindictive" prosecution. "To establish prosecutorial vindictiveness, a defendant must show, through objective evidence, that (1) the prosecutor acted with genuine animus toward the defendant and (2) the defendant would not have been prosecuted but for that animus." *Wilson*, 262 F.3d at 314 (citations omitted). "If the defendant is unable to prove an

improper motive with direct evidence, he may still present evidence of circumstances from which an improper vindictive motive may be presumed. To invoke such a presumption, a defendant must show that the circumstances 'pose a realistic likelihood of 'vindictiveness.'" *Id.* (quoting *Blackledge v. Perry*, 417 U.S. 21, 27 (1974)); *see also United States v. Goodwin*, 457 U.S. 368, 373 (1982) ("Motives are complex and difficult to prove. As a result, in certain cases in which action detrimental to the defendant has been taken after the exercise of a legal right, the Court has found it necessary to 'presume' an improper vindictive motive.").

c. Selective Prosecution

"Selective" prosecution, which involves singling a person out for prosecution for an impermissible reason, is similarly intolerable. To prove a selective prosecution, a defendant must demonstrate "(1) that similarly situated individuals . . . were not prosecuted, and (2) that the decision to prosecute was invidious or in bad faith." *United States v. Hastings*, 126 F.3d 310, 313 (4th Cir. 1997) (citation omitted) (examining a selective prosecution claim based on political affiliation). In other words, the defendant must show that the prosecution had "a discriminatory effect and that it was motivated by a discriminatory purpose." *Wayte v. United States*, 470 U.S. 598, 608 (1985). To obtain dismissal of an indictment on this basis, the defendant must produce "clear evidence" on these elements. *United States v. Venable*, 666 F.3d 893, 900 (4th Cir. 2012); *Hastings*, 126 F.3d at 313.

* * * *

The defense demonstrates below that each of these standards is more than satisfied in this case. Section II sets forth the events surrounding Mr. Blankenship's indictment, including the government's assurance that Mr. Blankenship was not a target of the investigation and its decision to reverse course and indict him months after the release of his documentary. Section

III shows how the indictment itself demonstrates the government's animus toward Mr. Blankenship in its singling out of Mr. Blankenship based on weak and indefensible legal theories. Section IV discusses the government's improper conduct before the grand jury, which renders unreliable the grand jury finding of probable cause here. Section V provides additional context, describing Mr. Blankenship's long history of antagonism with West Virginia Democrats and their long-standing animosity for Mr. Blankenship. Section VI applies legal precedent to the record facts to demonstrate that the prosecution of Mr. Blankenship is unconstitutional and his indictment must be dismissed. And Section VII sets forth, in the alternative to dismissal, discovery requests and the basis for them.

II. The Evidence Establishes that the Indictment of Mr. Blankenship Was Retaliation for the UBB Documentary.

The chronology of the United States Attorney's Office's decision to indict Mr. Blankenship establishes that the indictment was both vindictive and selective. The misconduct evident from the chronology is "sufficiently strong to overcome the presumption of prosecutorial regularity," *Wilson*, 262 F.3d at 315, and shows that the decision to indict was a "direct and unjustifiable penalty," *Goodwin*, 457 U.S. at 384 n.19, on Mr. Blankenship for exercising his First Amendment rights.

a. On April 22, 2013, the United States Attorney's Office Assures Mr. Blankenship's Counsel that Mr. Blankenship is not a Target of the Federal Investigation.

As of April 22, 2013, Mr. Blankenship was not a target of the United States Attorney's Office investigation into the UBB disaster. On that date, the Assistant United States Attorney, Steven R. Ruby, informed Mr. Blankenship's counsel that, while certain individuals had been identified as targets of the government's investigation, Mr. Blankenship was not a target. Ex. A ¶ 10 (Decl. of William W. Taylor, III). Mr. Ruby also told counsel that he would notify counsel

if Mr. Blankenship were to become a target. *Id.* Mr. Ruby had made those same assurances previously in 2011. *Id.* ¶¶ 5-6.

The April 22, 2013 call was the result of then-recent events. On February 28, 2013, David Hughart, the head of Massey subsidiary Green Valley Coal Co., had pleaded guilty to mine safety violations. In his plea hearing, he stated that Massey's "chief executive officer" had been involved in giving Massey miners advance warnings about inspections. Ex. B (John Raby, *Ex-CEO Implicated in Massey Coal Mine Case*, USA Today, Feb. 28, 2013). On April 15, 2013, the government moved for a stay in the shareholder class action against Massey due to the government's investigation, and the court scheduled an *ex parte* hearing with the government to discuss the basis of its request. Ex. A, ¶ 7. As a result of these developments, Mr. Blankenship's counsel decided to contact the United States Attorney's Office to ensure that Mr. Blankenship's status in the investigation had not changed. In the April 22, 2013 call, as noted above, the government informed counsel that his status had not changed and that he still was not a target. *Id.*

Something changed in the next 18 months, and it was not the facts of this case.

b. <u>On March 31, 2014, Mr. Blankenship Releases A Documentary Film Criticizing the Federal Government in Connection with the UBB Explosion.</u>

On March 31, 2014, in connection with the four-year anniversary of the explosion at UBB, Mr. Blankenship sponsored and released a documentary film entitled "Upper Big Branch – Never Again." Ex. C. The UBB explosion took the lives of 29 miners and was the worst coal mining accident in the United States in forty years. Mr. Blankenship's documentary explains what Mr. Blankenship believed and continues to believe, with good reason, was the cause of the UBB explosion – an unforeseen natural gas inundation. The documentary amassed data, science, and experts to demonstrate why that conclusion was correct. The purpose of Mr. Blankenship's

documentary was to contribute to an honest discussion about the cause of the tragic and unfathomable loss at UBB and what reforms might ensure that a tragedy of similar magnitude does not happen again.

In so doing, the documentary criticized MSHA and debunked the agency's investigative reports proclaiming that the cause of the explosion at UBB was Massey's tolerance of safety violations in the mine. It further attacked MSHA as impeding mine safety. It disparaged MSHA policies as "irrational" and "not based on science," *id.* at 28:21-28, 36:36-40, and said that MSHA regularly blocked safety innovations, acting "more like a police force trying to get someone for doing something wrong as opposed to . . . focus[ing] on true issues." *Id.* at 39:00-17. And it recounted that, in the months prior to the UBB explosion, MSHA inspectors "spent an average of seven hours, fifteen minutes per day in the mine. In spite of this, they never addressed their own responsibility for the safety of the mine, before or during the time of the accident." *Id.* at 43:29-43. The documentary also took direct aim at MSHA officials by name. It "question[ed]" the credentials of MSHA Administrator Joe Main. *Id.* at 18:56-19:02. The documentary also noted that J. Davitt McAteer, a former MSHA official who authored an investigative report to the Governor on the UBB disaster that blamed the culture at Massey for the blast, was arrested for drunk driving and was the subject of a fraud investigation. *Id.* at 3:45-50, 18:28-55.

In short, the documentary "absolv[ed] [Don Blankenship] of blame and spew[ed] venom toward regulators and political enemies." Ex. D (Paul M. Barrett & Justin Bachman, *Notorious Former Coal Chief Makes His Case for Vindication*, Bloomberg BusinessWeek, Apr. 2, 2014, at 2). The documentary incensed MSHA, the federal government, and the West Virginia Democratic political establishment.

c. The Documentary Inflamed the West Virginia Democratic Establishment.

The fury that was unleashed at Mr. Blankenship in the wake of his documentary was immediate and intense. United Mine Workers of America President Cecil Roberts released a statement saying "This self-serving video is no more than a feeble effort by one millionaire to stay out of jail, and is an affront to the families of the victims. I again urge the U.S. Attorney's Office to expeditiously follow the trail of its investigation all the way up the corporate chain of command . . . ." Ex. E (Press Release, *UMWA Slams Blankenship Video on Upper Big Branch Disaster* (Apr. 2, 2014)).[1]

United States Senator Manchin, who was featured in the documentary, claimed that he was duped into being interviewed for it. He reportedly was "livid" about the film and demanded that the film's producer "cease and desist the distribution of [the] documentary" and "remove the documentary from any websites where you posted it, and remove any and all references to my name, image, and likeness from the film." Ex. G (Press Release, *Manchin Demands Propaganda Film Be Taken Off the Internet and Cease to be Distributed* (Apr. 1, 2014)). At the same time that he was trying to suppress the film, Senator Manchin released a public statement stating that Mr. Blankenship "should be more concerned with his role in the deaths of 29 brave miners and the ongoing U.S. Department of Justice investigation rather than filming a propaganda documentary" and pledging to use "every legal recourse" against the film's producer. Ex. H (Press Release, *Manchin Outraged by Don Blankenship-Funded Propaganda Documentary* (Mar. 31, 2014)). The statement was, in part, as follows:

[1] Notably, Joe Main, the Assistant Secretary of Labor in charge of MSHA, spent approximately four decades working for the United Mine Workers of America ("UMWA") prior to being appointed to run MSHA, including union safety committeeman, Special Assistant to the International President of the UMWA, safety inspector, administrative assistant, and deputy director of the union's safety division. For twenty-two years, he served as administrator of UMWA's Health and Safety Department. Ex. F (Information About the Assistant Sec'y of Labor for Mine Safety & Health, MSHA).

> Had I known the film was in any way associated with Don Blankenship, I would have never agreed to the interview. . . . [Don Blankenship] should be more concerned with his role in the deaths of 29 brave miners and the ongoing U.S. Department of Justice investigation rather than filming a propaganda documentary. I am not only livid that I was lied to, but I am even more enraged that Don Blankenship would manipulate a tragedy to promote himself and his own agenda. I am going to pursue every legal recourse available against Adroit's despicable tactics. The most tragic part of all of this is that the families of these miners are forced to suffer yet again at the hands of Don Blankenship.

Id. He told ABC News that "I believe [responsibility for the explosion at UBB] permeated from the top down – from Don Blankenship down. I believe that Don has blood on his hands. And I believe that justice will be done." Ex. L (Brian Ross, et al., *US Senator: Coal Boss Has 'Blood On His Hands,'* ABC News, Apr. 2, 2014, at 2); *see also* Ex. I at 2:30-32. In the days after the release of the documentary, Senator Manchin did satellite interviews with local West Virginia television stations to excoriate the documentary and warn Mr. Blankenship that, rather than trying to vindicate himself, he should be concerned about being prosecuted. For example, Senator Manchin told WVAH-TV that "Don Blankenship should be worried and concerned about his own conscience and basically the ongoing investigation into the death of those 29 miners and the role that he played. That is what he should be worried about." Ex. J at 0:42-56.

Senator Manchin went so far as to state expressly that he would be in communication with the United States Attorney's Office. When Mr. Blankenship wrote to Senator Manchin to address his objections to the documentary, Senator Manchin responded in a May 13, 2014 letter on Senate stationary pronouncing himself "disgusted" by the documentary's attempt to place blame elsewhere given "[Mr. Blankenship's] company's culpability," and that he "support[ed]

efforts to prosecute anyone accountable for this tragedy to the fullest extent of the law. To that end, I have forwarded your correspondence to the U.S. Attorney's office." Ex. K.[2]

d. The United States Attorney's Office Indicts Mr. Blankenship**.**

In the days after the documentary, the pressure to prosecute Mr. Blankenship reached a fever pitch. The Democratically-appointed United States Attorney, Booth Goodwin, was forced to publicly respond, explaining that his prosecutions have been going "up the line" in prosecuting mine operators and that his office had seen a "very pervasive" "conspiracy to violate mine safety and health laws." Ex. L.

In the months immediately after the documentary, the government's investigation – which had gone nearly dormant – took on renewed vigor. As of April 2014, as best as the defense can tell from the discovery provided by the government, the government had interviewed only one individual (John Jones) in the preceding seven months. In the months following the documentary, however, the government undertook ten interviews in relatively quick succession, culminating in the empanelling of the grand jury on November 12, 2013. These interviews, however, did not uncover any new "smoking-gun" facts. Indeed, the purported facts set forth in the indictment had been known to the government for years.

On November 13, 2014, the government sought and obtained this indictment. Contrary to the policy of the United States Department of Justice, undersigned counsel was given no notice that the government had decided to change course and target Mr. Blankenship. This kind of secret pursuit of an individual is virtually without precedent in white collar prosecutions. The failure to provide such notice violated Section 9-11.153 of the United States Attorneys' Manual, which "encourage[s]" prosecutors to provide notice to investigative targets "a reasonable time

[2] Senator Manchin's rage is particularly notable given the apparent closeness of his relationship with the United States Attorney for West Virginia, R. Booth Goodwin II. *See infra* Section V.

before seeking an indictment." Such notice is customary and consistent with the Department of Justice's mission and practice, and gives defense counsel the opportunity to present argument and evidence to both the United States Attorney and the Department of Justice in Washington, D.C., as to why a potential defendant should not be indicted. It is not just uncommon, it is unheard of, that in a complex white collar case, a federal prosecutor does not follow the Department of Justice guidelines and send a target letter or simply make a phone call. Mr. Blankenship was denied the opportunity to seek pre-indictment review from the Department of Justice,[3] and, instead, was indicted on contrived theories of law that never should have been brought.

The indictment had its intended effect. Since the publication of his documentary, Mr. Blankenship had continued to disparage federal regulators related to the UBB disaster and to criticize MSHA and the federal government, including through the publication of a second documentary. *See REGCESSION: How the EPA Is Destroying America*, www.donblankenship.com/2014/10/07/regcession-how-the-epa-is-destroying-the-economy/. The threat of criminal conviction and imprisonment, combined with the gag order, has now successfully silenced him.

Even post-indictment, the government remains fixated on the documentary, viewing it as evidence of Mr. Blankenship's misconduct. It argued that this Court should impose onerous restrictions on his liberty precisely because he published the documentary. In its opposition to Mr. Blankenship's motion to modify the conditions of his release and lift the no-contact rule, the government pointed to the documentary as evidence of the "extreme" and "unorthodox" lengths that Mr. Blankenship will go to influence potential jurors or witnesses. ECF No. 40, at 5. (Of

[3] Upon information and belief, every other defendant who has been charged or pled guilty had a dialogue with the prosecutor before being charged.

course, Mr. Blankenship released the documentary after the government told his counsel that he was not a target, so the documentary clearly was not an attempt to influence potential jurors or witnesses.) The government's position that Mr. Blankenship should have his liberty restricted because he criticized the government may be unprecedented. It confirms the regrettable conclusion that the motivation for this indictment was to silence Mr. Blankenship and retaliate against him for exercising his First Amendment rights.

III. The Indictment Itself Provides Evidence of the Government's Animus toward Don Blankenship and the Selectivity of the Prosecution.

Additional evidence of the government's animus and the selective nature of the prosecution exists in the charges themselves.

a. Count One

In Count One, the government charges Mr. Blankenship alone with a conspiracy at UBB to willfully violate safety standards promulgated under the Mine Act. It does not indict a single other person for this alleged conspiracy. It does not indict any of the individuals who actually committed the alleged violations at UBB, nor does it indict the managers they reported to, nor does it indict the people those managers reported to. It charges only Mr. Blankenship, notwithstanding that he is not even alleged to have been in the mine during the indictment period.[4]

Moreover, the government selects Mr. Blankenship from the tens if not hundreds of corporate executives in the industry whose mines have similar safety record. Based on the

[4] Even Gary May escaped a charge for this conspiracy. The criminal information against Mr. May concerned only the provision of advance notice, not a conspiracy to violate safety standards as charged here in Count One. Ex. M (Information, *United States v. Gary May*, No. 5:12-cr-00050 (filed Feb. 22, 2012)). The defense recognizes that the information against David Hughart charged a comparable conspiracy. But that conspiracy was in an altogether different mine. And unlike Mr. Blankenship, Mr. Hughart was an executive of the mine itself (not the chief executive of the company that owned it and scores of other mines). Mr. Hughart's proximity to the alleged violations themselves puts him in a much different category than Mr. Blankenship.

defense's research, the prosecution of Mr. Blankenship stands alone in its attempt to hold a high-level corporate officer criminally responsible for an untold number of regulatory violations that he did not directly authorize, know the underlying facts of, or specifically intend.[5] This is particularly remarkable because many other coal companies run mines with as many – and in some cases more – safety violation citations than UBB. According to the indictment, UBB was cited approximately 835 times for safety violations during the twenty-seven month indictment period. Indictment ¶ 8. But in the period between January 1, 2008 and December 31, 2010, two mines run by Peabody Energy each received over 2,500 citations, including one that was issued more than 1,200 citations in a single year. Ex. N (MSHA Mine Overviews for Air Quality #1 Mine & Willow Lake Portal Mine). In the same time period, six mines run by Consolidation Coal Company each received over 1,600 citations, including three that each received more than 2,200 citations. Ex. O (MSHA Mine Overviews for McElroy Mine, Loveridge #22 Mine, Buchanan Mine #1, Robinson Run No. 95 Mine, Blacksville No. 2 Mine, & Shoemaker Mine). And, again in the same time period, one mine run by Arch Coal, Inc. received more than 1,300 citations. Ex. P (MSHA Mine Overview for Sentinel Mine). To the defense's knowledge, none

[5] In every 30 U.S.C. § 820 prosecution of a corporate CEO or director that the defense can find, including civil proceedings brought under the lower *mens rea* requirement of section 820(c), the defendant was personally and directly involved in a specific regulatory violation. *See United States v. Turner*, 102 F.3d 1350 (4th Cir. 1996); *MSHA v. Mize Granite Quarries, Inc.*, 33 FMSHRC 886 (2011); *MSHA v. Qmax Co.*, 2006 WL 2927266 (F.M.S.H.R.C. Sept. 29, 2006); *MSHA v. Weathers Crushing, Inc.*, 22 FMSHRC 1032 (2000); *MSHA v. Sunny Ridge Mining Co.*, 19 FMSHRC 254 (1997); *MSHA v. Kemp*, 16 FMSHRC 2139 (1994); *MSHA v. Warren Steen Constr., Inc.*, 14 FMSHRC 1125 (1992); *MSHA v. Teel*, 13 FMSHRC 1915 (1991); *MSHA v. Middleton*, 5 FMSHRC 692 (1983); *see also Sec'y of Labor, MSHA v. Fed.Mine Safety & Health Review Comm'n*, 81 F.3d 173 (10th Cir. 1996) (affirming dismissal of charges brought against mine operator's vice president and general manager); *MSHA v. Gopher Constr. Inc.*, 2013 WL 3865349 (F.M.S.H.R.C. June 14, 2013) (dismissing charge brought against mine owner); *MSHA v. REB Enters., Inc.*, 20 FMSHRC 203 (1998) (affirming dismissal of charges brought against mine company president); *MSHA v. Brunson*, 10 FMSHRC 594 (1988) (dismissing charge brought against quarry vice-president); *MSHA v. Quarries*, 4 FMSHRC 728 (1982) (affirming petitioner's motion to dismiss charges brought against quarry vice-president and general manager).

of the executives of these companies have been charged for these safety violations. Mr. Blankenship stands alone among the chief executives in the industry in being prosecuted.[6]

b. Count Two

In Count Two, the government charges Mr. Blankenship with another conspiracy at UBB – a conspiracy to impede MSHA inspections by providing advance warning to miners of the presence of MSHA inspectors at the mine. Notwithstanding that Mr. Blankenship is not alleged to have provided advance notice on a single occasion and that the entirety of the scheme is alleged to have occurred at the mine outside of his presence, no one else is charged in the indictment. And, in this regard, the only evidence linking him to this supposed conspiracy is a single conversation in which he simply asked a question. Before the grand jury, Mr. Blanchard testified that he phoned Mr. Blankenship to tell him that he needed to cancel a meeting because inspectors had arrived at UBB and he wanted to accompany them as they traveled through the mine. According to Mr. Blanchard's grand jury testimony, Mr. Blankenship responded simply by asking "if the crews knew they were coming." Ex. T at 63:4-11 (Blanchard Grand Jury Tr., Nov. 12, 2014). The government then asked Mr. Blanchard to explain why Mr. Blankenship might have wanted the miners to know that the inspectors were on site. Mr. Blanchard

[6] The indictment alleges that, in January 2008, Mr. Blankenship "learned that federal mine safety regulators had designated UBB as a mine with a *potential* pattern of violations, a status that applied only to the worst mines in the country as measured by serious safety-law violations and other indicators of safety." Indictment ¶ 40 (emphasis added). Prior to his indictment, however, other mines in West Virginia were determined *actually* to have engaged in a pattern of violations. For example, on November 26, 2013, MSHA notified Coal River Mining, LLC that the agency had determined that a pattern of violations of mandatory federal and health and safety standards existed at the company's Fork Creek No. 1 mine, located in Lincoln County, West Virginia. Ex. Q. According to MSHA, during a preceding 12-month period, the mine had been cited by MSHA 158 times for violations of mandatory standards that could "significant[ly] and substantial[ly]" contribute to the cause and effect of a safety or health hazard, including "21 for ventilation hazards and 21 for explosion hazards." Ex. R. MSHA also reported that an audit revealed that the mine operator had "failed to report miner injuries equivalent to 239 days of lost time during the period of review." *Id.* During the same period, a miner at another Coal River Mining operation was crushed to death by a continuous mining machine operating without a proximity detection device. Ex. S. No charges have resulted.

speculated: "I mean, there are many different reasons, but generally, so that everybody could check their work area and make sure there weren't any, I guess, easily correctible violations of the mine laws." *Id.* at 63:18-21. This evidence – a witness's testimony that in connection with a single inspection, Mr. Blankenship asked a mere question and the witness's follow-on speculation that Mr. Blankenship may have done so "so that everyone could check their work area" to make sure that were not any "easily correctible violations" – hardly establishes probable cause that Mr. Blankenship joined a conspiring to defraud the United States. Thus, without probable cause, the government seeks to prosecute Mr. Blankenship for a conspiracy to which he is connected by a single question – and does not seek to prosecute *anyone else* in the same alleged conspiracy.[7]

c. Counts Three and Four

Even more egregiously, in Counts Three and Four, the government seeks to prosecute Mr. Blankenship for securities law violations (which together expose him to up to 25 years' imprisonment) based on unattributed statements made by Massey that addressed whether "we," a term undefined in the statements, "condone" mine health and safety violations and "strive" to be in compliance with mine health and safety regulations. Courts uniformly hold that statements of this nature and character are not actionable as a matter of law. *See* Mem. in Supp. of Defense Mot. No. 14, at 6-23. Moreover, Mr. Blankenship did not author, revise, make, or file the statements at issue. Others did. Indeed, the statements were reviewed by multiple in-house and outside disclosure counsel as well as other high-ranking officials within Massey. Yet the government seeks to prosecute only Mr. Blankenship for these statements – and not anyone who

[7] The defense notes that Gary May voluntarily pled guilty to a similar conspiracy. But unlike Mr. Blankenship, Mr. May was the UBB Mine Foreman in charge of at least three room-and-pillar mining sections and a longwall mining section. And the criminal information filed against him identifies specific underground acts by him. Ex. M ¶¶ 13(e) & (f); *see also id.* ¶ 13(d).

actually authored, revised, made, or filed them. The government has not even sought to charge the company. And, of course, the Securities and Exchange Commission has expressed no interest in the matter.

Singling Mr. Blankenship out for prosecution in this fashion is more egregious given the fact that coal companies across the country – including, for example, CONSOL Energy, Inc., Alpha Natural Resources, Inc., Arch Coal, Inc., and Peabody Energy Corp. – *routinely* issue similar assessments of their commitments to safety and compliance with mine health and safety regulations. *See* Mem. in Supp. of Defense Mot. No. 14, at 23-26 (quoting public filings that contain statements nearly identical to the statements for which Mr. Blankenship has been criminally charged). These companies run mines that have been issued as many *or more* citations by MSHA for violations of health and safety standards as those that were issued at UBB. And yet *no one* – no executive and no corporate entity – has ever been charged for securities fraud based on such statements. *Id.*

By way of example, during the 24-month period between January 1, 2011, and December 31, 2012, CONSOL Energy was issued 2,985 citations by MSHA for violations of mandatory health and safety standards that could "significantly and substantially" contribute to the cause and effect of a safety or health hazard (so-called "S&S" violations). *See* Ex. U (Exs. 95 to CONSOL's 2011 & 2012 Form 10-K). During the same period, *five* CONSOL mines in West Virginia were issued more than 1,100 MSHA citations each, including over 330 S&S citations each (one with more than 1,450 total citations and over 600 S&S citations). *See id.*; *see also* Exs. N-P (MSHA Mine Overviews). Despite these citations, in its annual report for the fiscal year ended December 31, 2012, CONSOL made the following statements: "*We* believe that CONSOL Energy is one of the safest mining companies in the world. . . . The objectives of our

health and safety programs are *to eliminate workplace incidents*, *comply with all mining-related regulations* and provide support for both regulators and the industry to improve mine safety." Ex. U (CONSOL Form 10-K, Feb. 7, 2013, at Ex. 95) (emphasis added). No executive at CONSOL has ever been charged with securities fraud for such statements. Additional examples are contained the Memorandum in Support of Defense Motion No. 14, at 23-26.

In short, the charges in the indictment demonstrate that the government has stretched the law to beyond its breaking point in its sudden zeal to prosecute Mr. Blankenship and punish him for his outspokenness. In so doing, the government singled out Mr. Blankenship from all of the alleged co-conspirators who are not charged and from all of the executives at the nation's other major coal companies.

IV. The Government's Conduct before the Grand Jury to Procure the Indictment Further Reinforces the Vindictive Nature of the Prosecution.

In the day and a half between the time when this grand jury was empanelled and when it "returned" this indictment, the government caused the grand jury to misunderstand the law and the facts. As set forth in the Memorandum in Support of Defense Motion No. 5, the government gave improper and misleading legal instructions to the grand jury and otherwise misled the grand jury by misrepresenting the evidence. As described in that Memorandum, the government's conduct not only reached all four counts of the indictment, but also went to the heart of each.

The misconduct in the grand jury is highly unusual. In a normal prosecution, the government does not subject the grand jury to misrepresentation and obfuscation. It does not cause agents to misquote witnesses. Indeed, in long complex investigations, it rarely rests so much of its evidence on the testimony of a case agent who has no first-hand knowledge. Here, however, the bulk of the evidence came from the government case agent who himself had no

first-hand information. He willingly accepted each leading question the Assistant United States Attorney put to him, including those that flatly misstated critical legal principles and facts.

This abusive conduct was pervasive, and it corrupted the integrity of the grand jury – the very body whose purpose it was to protect Mr. Blankenship from unfounded prosecutions – thereby rendering illegitimate its determination of probable cause.

V. The Deep-Seated Political Animus toward Don Blankenship in West Virginia.

The federal government's reaction to Mr. Blankenship's documentary, "Never Again," was fueled by the West Virginia Democratic establishment's long-standing hatred for Mr. Blankenship. As this Court well knows, Mr. Blankenship is an outspoken and notorious Republican who has funded political campaigns for conservative politicians and issues, written and campaigned extensively on political issues,[8] and achieved major victories in contested elections. His unapologetic expenditures on behalf of right-wing political causes and candidates have earned him the enmity of the state's Democratic Party leaders and supporters, including the labor unions. This deep-seated resentment of Mr. Blankenship has been years in the making. The documentary pushed the Democratic establishment over the edge.

A brief history of Mr. Blankenship's political activities is instructive in understanding how and why he became the nemesis of the West Virginia Democratic establishment:

[8] Much of Mr. Blankenship's writing, particularly in the past two years, was published on his website, www.donblankenship.com.

- In 2004, Mr. Blankenship spent approximately $3.5 million to back Republican lawyer Brent Benjamin in the state's Supreme Court election, successfully unseating long-time incumbent Democratic state Supreme Court Justice Warren McGraw who Mr. Blankenship believed was bad for business in West Virginia. Ex. V (Tobey Coleman, *Benjamin May Face Bias Questions Court Winner Says He Is 'Not Bought By Anybody,'* Charleston Gazette (W. Va.), Nov. 4, 2004).
- In 2005, Mr. Blankenship spent approximately $500,000 in a campaign to repeal the food tax. Although the campaign was unsuccessful at the time, the campaign started the now politically popular opposition to that tax, which was ultimately repealed many years later, saving West Virginians hundreds of millions of dollars in taxes. Ex. W (Kris Wise, *Massey CEO Won't Back Off Blankenship Says He Will Keep Up the Pressure For Repeal of Food Tax*, Charleston Daily Mail (W. Va.), Sept. 15, 2005).
- In 2006, Mr. Blankenship poured $6 million into state legislative races in an attempt to turn the West Virginia state legislature from Democrat to Republican, deeply angering the Democratic Party in West Virginia, which responded with anti-Don Blankenship ads and bumper stickers saying "Don, WV is not for sale." Ex. X (Ian Urbina, *Wealthy Coal Executive Hopes to Turn Democratic West Virginia Republican*, NY Times, Oct. 22, 2006, at 3).
- Mr. Blankenship has long fought unionization and unions, making himself an enemy of the state's powerful and well-connected unions, particularly the United Mine Workers of America. He famously beat back a major union strike in 1984 and fiercely fought unionization at Massey for the next three decades. As a result of his

policies, he "largely succeeded in purging union members from [Massey's] ranks." Ex. Y (Pat Garofalo, *Blankenship's Union-Busting Goal: 'Sell Coal Cheaper and Drive Union Coal Operations Out of Business,'* ThinkProgess.org, Apr. 9, 2010, at 2). By 2010, only 1.8 percent of Massey's workforce was unionized, *id*, whereas before Mr. Blankenship took over, between 30 and 40 percent of Massey's miners were unionized. Ex. Z (Rawan Jabaji, *Massey CEO Don Blankenship*, PBS, May 20, 2010, at 1).

- Mr. Blankenship is responsible for defeat of then-Governor Joe Manchin III's signature issue during his early days as governor. In February 2005, the West Virginia legislature passed a bond amendment to the state constitution. If approved by the state's voters, the amendment would have permitted the sale of state bonds to fund pension and disability plans for state workers. As Governor, Manchin ardently campaigned in support of the bond issue. Mr. Blankenship poured approximately $650,000 into a campaign against the bond issue. As a result of Mr. Blankenship's efforts, the voters voted against the bond amendment, dealing then-Governor Manchin a public and painful defeat. Ex. X.

Mr. Blankenship pursued these issues not to be combative, but because he believed passionately that they were right for West Virginia and its citizens. While people of course can disagree on the merits with his positions, he took them for the right reasons – whether it be securing pension plans or improving family budgets. His positions, however, caused the West Virginia Democratic establishment to despise him. Among that establishment, Senator Manchin, the State's ranking Democrat, has a particularly intense loathing for Mr. Blankenship. Senator Manchin also has a history of retaliating against Mr. Blankenship for exercising his First

Amendment rights. In the midst of the bond campaign mentioned above, in June 2005, then-Governor Manchin threatened Mr. Blankenship by warning that the government would scrutinize his affairs and Massey more closely because of Mr. Blankenship's campaign against the bond amendment. The press reported that Governor Manchin said, "I think that [additional scrutiny] is justified now, since Don [Blankenship] has jumped in [the bond debate] with his personal wealth trying to direct public policy." Ex. AA (Ken Ward Jr., *Manchin Still Sparring Over Pension Bond Bid*, Charleston Gazette (W. Va.), June 18, 2005). Shortly after those remarks, the West Virginia Department of Environmental Protection ("DEP") approved a Massey permit application to build a coal silo in Raleigh County, West Virginia. Despite the approval, Governor Manchin ordered members of his staff to meet with DEP and other regulatory officials to investigate possible safety concerns with regard to the silo site. This investigation had nothing to do with safety and everything to do with Mr. Blankenship's campaign against the bond amendment.

One month later, Mr. Blankenship sued Governor Manchin under 42 U.S.C. § 1983 on the grounds that the Governor had directed the state's regulatory machinery to carry out his threat against Mr. Blankenship and subjected Massey to unfair and unwarranted scrutiny. Mr. Blankenship alleged that the Governor had violated his First Amendment rights by retaliating against Mr. Blankenship for his opposition to the bond amendment. Governor Manchin moved to dismiss the complaint on the ground that qualified immunity attached to his actions. The district court denied his motion. *Blankenship v. Manchin*, 410 F. Supp. 2d 483 (S.D. W. Va. 2006). On appeal, the Fourth Circuit also sided with Mr. Blankenship. *Blankenship v. Manchin*, 471 F.3d 523 (4th Cir. 2006). The court held that Mr. Blankenship had alleged that Governor Manchin threatened imminent adverse regulatory scrutiny and the actual scrutiny that Massey

experienced shortly thereafter "strongly supports interpreting Manchin's remarks as a threat of increased regulatory scrutiny." *Id.* at 529. Thus, the court concluded that Mr. Blankenship had successfully alleged a First Amendment retaliation claim, and qualified immunity did not attach to Governor Manchin's actions. *Id.* at 533. Mr. Blankenship ultimately decided to drop the lawsuit after Governor Manchin made a public statement expressing regret for his remarks.

The intense antagonism between now-Senator Manchin and Mr. Blankenship continued in the wake of the documentary, *see, e.g.*, Ex. H, and Senator Manchin made clear to the world that he was forwarding Mr. Blankenship's correspondence about the documentary to the United States Attorney's office. Ex. K.

Senator Manchin's "disgust" for Mr. Blankenship is particularly relevant because of the Senator's apparent communication about this case with United States Attorney Goodwin, with whom he has close political ties. For example, the Goodwin & Goodwin law firm – where many of United States Attorney Goodwin's relatives work – was one of the top ten employers of contributors to Senator Manchin's campaigns between 2000 and 2008. Ex. CC (*Names in the News: Gov. Joe Manchin*, Follow the Money, at Table 3). Since then, United States Attorney Goodwin's family, including at least his mother, uncle, aunt, and cousin, have continued to make significant contributions to Senator Manchin's election campaigns. Ex. DD (FEC Schedule A, Itemized Receipts). Additionally, United States Attorney Goodwin's cousin, Carte Goodwin, served as chief counsel to Senator Manchin during his term as governor. Ex. EE (Bernie Becker, *West Virginia Governor Picks Ex-General Counsel to Succeed Byrd*, NY Times, July 16, 2010). As governor, Manchin appointed Carte Goodwin to temporarily fill Senator Byrd's Senate seat when Senator Byrd passed away in 2010. *Id.*

The defense does not know of course exactly what United States Attorney Goodwin and Senator Manchin said to each other, or to colleagues, regarding Mr. Blankenship and his documentary. We do know, however, that the intervention of a sitting United States Senator in a criminal investigation, as Senator Manchin promised in his letter to Mr. Blankenship, is highly irregular. It is indisputable that the Democratic establishment in West Virginia long wanted to rid itself of Mr. Blankenship. The documentary was the final straw.

VI. The Facts Compel the Conclusion that Mr. Blankenship's Indictment Violates the First and Fifth Amendments to the United States Constitution.

The inescapable conclusion from this record is that Mr. Blankenship was not indicted because of his involvement in criminal conduct, but rather because of the political establishment and the prosecutor's desire to punish him for exercising his rights to criticize the government. Accordingly, the prosecution violates the First and Fifth Amendments of the United States Constitution.

a. First Amendment

The First Amendment does not allow for criminal prosecutions initiated to punish individuals for the exercise of First Amendment rights. In *Tobey v. Jones*, the Fourth Circuit articulated a three-part test for cognizable First Amendment retaliation claims: (1) plaintiff's speech was protected; (2) [the government agent's] alleged retaliatory action adversely affected the plaintiff's constitutionally protected speech; and (3) a causal relationship exists between plaintiff's speech and the defendant's retaliatory action. 706 F.3d at 387. The first element is clearly satisfied: Mr. Blankenship sponsored a documentary addressing the UBB disaster, a matter of public concern. So is the second element: this prosecution was intended to discredit as well as suppress Mr. Blankenship's speech. The third element is satisfied as well. As in *Tobey*, it was not until Mr. Blankenship exercised his First Amendment rights that he became a target of

criminal investigation. *Id.* at 387 (holding that "temporal proximity" between the exercise of First Amendment rights and arrest is sufficient to sustain a claim); *accord id.* at 391.

b. Vindictive Prosecution

The United States Attorney's Office's indictment of Mr. Blankenship constitutes a vindictive prosecution. As a preliminary matter, the circumstances of Mr. Blankenship's indictment give rise to a presumption of vindictiveness. *Wilson*, 262 F.3d at 314 (holding that a presumption is proper where "the circumstances 'pose a realistic likelihood of vindictiveness'" (quoting *Blackledge*, 417 U.S. at 27)). Such a presumption shifts the burden to the government "to present objective evidence justifying its conduct." *Id.* at 315 (citation omitted).

A presumption of prosecutorial vindictiveness is warranted where, as here, the government states that a person is not a target, and then that person is indicted (without warning to counsel) based on evidence that long pre-dated the declaration that he was not a target shortly after exercising his First Amendment rights to criticize the government. Those circumstances, combined with the baseless charges that were brought against Mr. Blankenship and no one else, "pose a realistic likelihood" of an improper vindictive motive, requiring that this Court apply a presumption of vindictiveness. *Blackledge*, 417 U.S. at 27.

In *United States v. Goodwin*, the Supreme Court warned that "[t]here is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting" because the prosecutor needs flexibility to "discover[] and assess[] all of the information against [the] accused." 457 U.S. at 381. Here, however, such caution is neither merited nor necessary. Here, there was years of investigation, during which the prosecutor told Mr. Blankenship's counsel on three occasions that he was not a target and, if that changed, the prosecutor would notify counsel. Had the prosecutor changed his view of Mr. Blankenship

based on new facts or evidence (and so communicated that change to counsel), this Court could properly be wary of a pretrial presumption of vindictiveness. No such facts or evidence were uncovered, however.

Even if such a presumption is not applied, the undisputed facts detailed here demonstrate that the prosecutors acted with actual animus and indicted Mr. Blankenship because of that animus.

In *United States v. Wilson*, 262 F.3d 305 (4th Cir. 2001), the district court dismissed an indictment in the Eastern District of North Carolina for prison escape because it found that the indictment was motivated by the defendant's successful appeal of his underlying conviction in another district. The Fourth Circuit reversed, but its reasoning in that case mandates dismissal of the indictment here. The court ruled the evidence insufficient to overcome the "presumption of regularity" that normally attaches to a prosecutor's decision to bring charges because (1) the escape facts supported a straightforward theory of prosecution, (2) the escape facts were distinct from the underlying offense and "therefore merited at least one initial review for prosecution," (3) a different prosecutor's office was involved in bringing the charges for prison escape as from the underlying conviction, (4) "efforts to initiate the escape prosecution began immediately after the escape and long before the firearm-possession conviction was vacated, and no decision was ever made not to prosecute the escape charge," and (5) the United States Attorney "had a policy of prosecuting all escapes." 262 F.3d at 316; *accord id.* at 317.

Against that background, an email from the United States Attorney's office that brought the initial prosecution requesting that another United States Attorney's office initiate an escape prosecution was not sufficient to show that the second United States Attorney's office had a retaliatory motive in bringing the escape charges. The evidence produced showed that the delay

in prosecuting was not a result of a retaliatory change of heart (as in this case) but "confusion" over which district was the proper venue. *Id.* at 317. Moreover, "the person who persisted in returning the prosecution to North Carolina" was a deputy marshal acting independently of the South Carolina United States Attorney's office and who began his efforts before the reversal. The fact that the reversal "accelerated" the escape prosecution to prevent the defendant's release did not suggest that retaliation for the defendant's exercise of his right to appeal was the motive for the escape prosecution.

The facts here are different. *First*, unlike the situation in *Wilson*, the prosecutors after three years of investigation had never classified Mr. Blankenship as a target, and told his lawyers that. They gave no indication that anything had changed until after the documentary was released. *Second*, the charges in the indictment in this case are anything but a straightforward application of the law to the facts. *Third*, the intervention of a sitting United States Senator in a criminal prosecution is itself a refutation of any "presumption of regularity." Unlike a request from a coordinate prosecutor's office (as in *Wilson*), Senator Manchin's promised communication to the United States Attorney's Office and public remark that Mr. Blankenship has "blood on his hands" was a form of political pressure that a United States Attorney cannot readily ignore. *Fourth*, the circumstances of this case tie the decision to prosecute to Mr. Blankenship's protected speech on a matter of intense public concern that evoked an extraordinary response, not the routine appeal of a criminal conviction. *Fifth*, unlike the marshal investigating the escape charge in *Wilson*, who had no retaliatory motive, in this case, the documentary criticized, indeed insulted, the very federal investigators assisting the United States Attorney's Office in the investigation. They too had a motive to punish Mr. Blankenship for his speech. Thus, distinct from the case in *Wilson*, here, the direct evidence establishes that this

prosecution rests on an improper retaliatory motive and is thus an impermissible vindictive prosecution.

c. Selective Prosecution

The case law similarly demonstrates that Mr. Blankenship's prosecution constitutes a constitutionally intolerable selective prosecution. A prosecution "cannot be motivated by a suspect's exercise of constitutional rights through participation in political activity." *United States v. Hastings*, 126 F.3d 310, 313 (4th Cir. 1997) (citations omitted). Indeed, if a prosecution is so motivated, the defendant's indictment must be dismissed. In *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972), the Court of Appeals for the Ninth Circuit reversed the conviction of a defendant for his refusal to answer census questions because the evidence demonstrated that only those who participated in a census resistance movement were prosecuted even though others had also refused to answer the questions. *Id.* at 1152. *See also United States v. Crowthers*, 456 F.2d 1074, 1080-81 (4th Cir. 1972) (reversing convictions for making a disturbance on government property where others made similar disturbances; prosecution was motivated by disagreement with the ideas that defendants expressed on its property). The same kind of impermissible selectivity has occurred in this prosecution.

Because of his documentary, Mr. Blankenship was singled out for indictment among persons at Massey as well as among executives at other major coal companies across the country. In Count One, Mr. Blankenship is charged with participating in a conspiracy at UBB – and yet he is the *only one* ever charged for the concerted conduct (despite his incredibly remote connection to the purported conspiracy). The government did not charge any of the miners who allegedly committed the willful regulatory violations at issue in UBB, or the mine president who had more day-to-day responsibility over the mine than Mr. Blankenship, or any of the other

company executives who stood between Mr. Blankenship and UBB and who had greater involvement than him. His indictment is also selective as compared to other executives at other mining companies who have mines with comparable violation numbers. Never before has a chief executive been charged with Mine Act safety violations in this fashion.

The selective nature of Mr. Blankenship's prosecution is particularly evident in Counts Three and Four of the indictment. In Counts Three and Four, Mr. Blankenship is charged with securities fraud based on two public statements discussing Massey's commitment to safety compliance. Mr. Blankenship did not draft, edit, sign, or file those statements, and yet none of the executives who did draft, edit, sign, or file have been charged. Moreover, no other CEO – or any other executive – has ever been charged for making similar statements even though such statements are made by other major coal companies with similar or greater numbers of violations. Indeed, coal producing companies routinely make similar statements and yet no one – no company and no executive – has ever been charged for securities fraud based on those statements.

So Mr. Blankenship stands alone in this prosecution while untold numbers of his co-conspirators go uncharged and while all executives outside of Massey go uncharged. He stands alone because of the documentary. Accordingly, Mr. Blankenship's indictment constitutes a selective prosecution in violation of the Due Process Clause and must be dismissed.

VII. In the Alternative, Mr. Blankenship Requests Discovery into the Decision to Indict Him.

In the event that the Court bears any doubt that Mr. Blankenship has shown evidence of vindictive and selective prosecution sufficient to dismiss the indictment, it should at a minimum authorize discovery into the facts and circumstances regarding the documentary and the decision to indict. To obtain discovery on a selective or vindictive prosecution claim, the defendant must

offer "some evidence" making a "credible" showing on the elements of such a claim. *Hastings*, 126 F.3d at 313; *Venable*, 666 F.3d at 900; *United States v. Sanders*, 211 F.3d 711, 717 (2d Cir. 2000) (holding that the standard for discovery is the same for selective prosecution as for vindictive prosecution).

The facts here make out far more than "some evidence" that Mr. Blankenship was singled out for indictment as a result of exercising his First Amendment rights in releasing the documentary. And they more than satisfy the "credible" showing needed to obtain discovery. Accordingly, if the Court is not now prepared to dismiss the indictment for vindictiveness and selectivity based on the facts set forth above, at the very least, it is necessary to obtain production of the prosecutorial documents bearing on Mr. Blankenship's documentary and the decision to indict him and of the communications had by the United States Attorney's Office with Senator Manchin and others regarding these issues. Specifically, the defense seeks:

(1) all prosecutor notes and/or prosecutorial memoranda from on or after the March 31, 2014 release of the documentary "Never Again" through November 13, 2014 relating to or regarding (a) the documentary; (b) the selection of who to charge and who not to charge; and/or (c) the decision to charge Mr. Blankenship; and

(2) any communications between any member of the United States Attorney's Office, including but not limited to the United States Attorney himself, and any member of the Office of United States Senator Joseph Manchin, including but not limited to Senator Manchin himself, on or after March 31, 2014 relating to or regarding (a) the documentary; (b) the investigation; and/or (c) Don Blankenship; and

(3) any communications on or after March 31, 2014 between any member of the United States Attorney's Office, including but not limited to the United States Attorney himself, and any

member of MSHA, including but not limited to Joe Main, relating to or regarding (a) the documentary; (b) the investigation; and/or (c) Don Blankenship; and

(4) any communications between any member of United States Attorney's Office, including but not limited to the United States Attorney himself, and any other member of the United States Attorney's Office between March 31, 2014 and November 13, 2014 relating to or regarding the documentary and/or the selection of who to charge and who not to charge; and

(5) any communications between any member of the United States Attorney's Office, including but limited to the United States Attorney himself, and any third party on or after March 31, 2014 relating to or regarding the documentary and/or any targeting of Don Blankenship; and

(7) the transcripts of the *ex parte* hearings held on July 17, 2013 and on April 25, 2013 between the United States Attorney's Office and this Court in *In re Massey Energy Co. Securities Litigation*, Civ. No. 5:10-cv-00689 (S.D. W. Va. 2010).

Each request seeking communications seeks not only written correspondence, but also emails and other electronic correspondence, as well as any notes, memoranda, summaries, or other records of oral conversations. If oral conversations or meetings took place, but there is no record of their substance, this request seeks a detailed description of the meetings, including its date, who participated, whether it was in person or over the telephone, and what was said about the topics above.

CONCLUSION

For the foregoing reasons, Mr. Blankenship respectfully requests the dismissal of the indictment or, in the alternative, discovery into the decision to prosecute him.

Dated: February 6, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been electronically filed and service has been made by virtue of such electronic filing this 6th day of February 2015 on:

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