Redacted

THE STATE OF NEW HAMPSHIRE

MERRIMACK COUNTY

TRUST DOCKET
6th CIRCUIT COURT
PROBATE DIVISION

VALERIE C. SANTILLI, INDIVIDUALLY AND AS EXECUTRIX
OF THE ESTATE OF JOHN C. CHAKALOS,
ELAINE CHAKALOS,
AND
CHARLENE GALLAGHER

v.

NATHAN JAMES CARMAN
AND
VALERIE C. SANTILLI, LAWRENCE SANTILLI, AND PAUL STERCZALA,
EACH AS TRUSTEE OF THE TERMINATING TRUST UNDER ARTICLE III OF
THE JOHN C. CHAKALOS REVOCABLE TRUST; ELAINE CHAKALOS, AS
TRUSTEE OF THE RITA B. CHAKALOS NEW HAMPSHIRE PERSONAL
RESIDENCE TRUST; AND LAWRENCE SANTILLI, AND PAUL STERCZALA
EACH AS TRUSTEE OF THE CHAKALOS FAMILY DYNASTY TRUST

313-2017-EQ-00396

ORDERS

Presently before the Court are a series of motions, including: (1) a *Motion to Compel Respondent to Adequately Respond to their First Discovery Requests* ("First Motion to Compel"), see Index #35; (2) *a Motion to Compel Respondent to Adequately Respond to their Second Set of Requests for Production of Documents* ("Second Motion to Compel"),[1] see Index #43; (3) a *Motion to File Exhibit D of Motion to Compel Under Seal*, see Index #38; and (4) a *Motion to Compel Respondent to Adequately Respond to*

[1] The afternoon before the hearing on this *Motion*, the Petitioners also filed a *Supplement in Support of Their Second Motion to Compel*. See Index #46.

Their Second Set of Interrogatories ("*Third Motion to Compel*"), see Index #49, filed by Petitioners Valerie C. Santilli, individually and as Executrix of the Estate of John C. Chakalos (the "Estate"), Elaine Chakalos, and Charlene Gallagher. Respondent, Nathan Carman, pro se, did not file any written objection(s), although he did attend and participate in the hearing held on April 3, 2018. In addition, on March 30, 2018, the Union Leader Corporation (the "Union Leader"), publisher of a "statewide newspaper," filed a *Motion to Unseal All Petitions, Motions, Exhibits and Other Documents* ("First Motion to Unseal"), see Index #45, to which the Petitioners filed a *Limited Objection*. See Index #48. The Union Leader, along with the New England First Amendment Coalition ("NEFAC"), subsequently filed a *Motion to Intervene and to Unseal All Petitions, Motions, Exhibits, and Other Documents* ("Second Motion to Unseal"), seeking leave to intervene and an order making all court documents currently under seal, available in the public file. See Index ##50, 53.

The Court held a hearing on April 3, 2018, to consider then-outstanding *Motions to Compel*[2] and the Union Leader's *Motion to Unseal*. Attending the hearing were: Attorney Daniel I. Small, Attorney William C. Saturley and Attorney Rue Koester Toland on behalf of the Petitioners; Nathan Carman, pro se; and Attorney Alexandra Saanen Cote on behalf of Intervenor Glenn Terk, as Trustee of the Property of Linda Carman. In addition, Mark Hayward, a columnist and reporter for the *New Hampshire Union Leader* responded to a question by the Court concerning his filed, but not then ripe for

[2] On April 9th, the Petitioners filed the *Third Motion to Compel*. See Index #49. Since Mr. Carman did not respond to that motion within the ten days as provided by Circuit Court- Probate Division Rule 58, it will proceed to decide it. The issues raised are similar to those addressed at the hearing, as such, the Court will not schedule another hearing to address it.

consideration, *Motion to Unseal All Petitions, Motions, Exhibits and Other Documents*.[3] See Index #45.

After a review of the pleadings and discussion at the hearing, the Court ENTERS the following Orders:

- The *First Motion to Compel* is GRANTED IN PART AND DENIED IN PART;
- The *Second Motion to Compel* is GRANTED IN PART AND DENIED IN PART;
- The *Third Motion to Compel* is GRANTED IN PART AND DENIED IN PART;
- The *Motion to File Exhibit D Under Seal* is DENIED; and
- The Union Leader's *Motion to Unseal All Petitions, Motions, Exhibits and Other Documents*, see Index #45, is GRANTED and accordingly, the Court VACATES all prior orders sealing Exhibits B and C of the *Petition*, see Index #1 and Exhibits B-1 and C-1 of the *Amended Petition*, see Index #36;
- The Union Leader's and NEFAC's *Motion to Intervene and to Unseal All Petitions, Motions, Exhibits, and Other Documents*, see Index ##50, 53, is GRANTED with the exception of the "April 5th Letter," see infra, which shall provisionally remained sealed. The Court grants the requests of the Union Leader and NEFAC to intervene for the limited purpose of seeking to unseal court records. It is otherwise GRANTED to the extent it seeks similar relief as the *First Motion to Unseal*.

I. Brief Background

The Court sets forth the following undisputed facts for background purposes only. Additional facts will be set forth as needed.

This matter arises from a *Petition for Declaratory Judgment, Replevin, Restitution and Other Equitable Relief, and to Impose a Constructive Trust* (the "*Petition*"), see Index #1, filed by the Petitioners on July 17, 2017. It seeks various forms of relief against their nephew, Mr. Carman, pursuant to a common law "slayer action." See

[3] Specifically, the Court received that *Motion* with what appeared to be significant redactions. It confirmed with Mr. Hayward that he intentionally filed a redacted copy of the *Motion* with the Court.

generally, Hopwood v. Pickett, 145 N.H. 207 (2000); RESTATEMENT (THIRD) OF PROPERTY (Wills & Other Donative Transfers) § 8.4 (2003). They allege that Mr. Carman is responsible for murder of their father, John C. Chakalos, and stands to benefit from his estate and residuary distributions to various trusts from it, and proceeds from a bank account held by Nathan, John, and Linda Carmen[4] as joint tenants with rights of survivorship. See *Amended Petition* ¶¶21, 43, 45, 50-51. After transfer to the Trust Docket shortly thereafter, see Index #3, a hearing was held in December 2017 to address jurisdictional issues raised by the Respondent in his *Motion to Dismiss*, see Index #17, and the *Petitioners' Motion to Seal Exhibits B & C of the Petition*. See Index #4. The Court issued an Order following that hearing: (1) raising a series of concerns it had after review of the *Petition*; (2) deferring consideration of the *Motion to Dismiss* until May 2018 to allow for additional discovery by the parties; and (3) allowing for Exhibits B and C of the *Petition* to remain under seal.[5] See Order dated December 22, 2017 (Index #24). Shortly thereafter, attorneys for Mr. Carman withdrew, and he entered an appearance, pro se. See generally Order dated February 13, 2018 (Index #34).

The parties, on January 29th submitted a *Joint Motion for Entry of a Protective Order*, see Index #26, and an agreed upon suggested protective order which the Court approved on January 30th. See Index #27. In that *Protective Order*, the parties agreed that during the discovery process, parties may designate certain documents and deposition transcripts as "CONFIDENTIAL – SUBJECT TO A PROTECTIVE ORDER," that are protected from disclosure "for any purpose other than to prepare for and to

[4] Linda Carmen is Mr. Carman's mother and John's daughter. The *Petition* and *Amended Petition* allege that she disappeared in September 2016 while on a fishing trip with Mr. Carman, and therefore, he stands to inherit her share of the Chakalos Family Dynasty Trust, along with other assets.
[5] These exhibits initially were placed under seal by Judge Moran in July 2017 pending proper notice and further hearing. See Index #4.

conduct discovery, hearings, and trial in this action . . . ." Id. ¶5. Documents may be so designated after review by them and "good faith determin[ation] that the documents contain information protected from disclosure by statute or that should be protected from disclosure as confidential personal information, trade secrets, personnel records, or other commercial information." Id. ¶3. If filing documents marked confidential, a party is required to move to seal, and file them "provisionally under seal." Id. ¶6. The *Protective Order* also appropriately recognizes that "[n]othing in this Order or any action or agreement of a party under this Order limits the court's power to make orders concerning the disclosure of documents produced in discovery, filed with the court, or used during any hearing or at trial." Id. ¶10.

On March 5, 2018, the Petitioners submitted a *Motion to (I) Amend Petition and (II) File Certain Exhibits Under Seal*, see Index #36, and *Amended Petition*, see Index #37, in which they sought to address the Court's previously expressed concerns through amendment/clarification of the allegations in the *Petition* and place under seal "Exhibits B-1 and C-1" of the *Amended Petition*. See Order dated March 23, 2018 (Index #44). The Court granted the motion to amend, Id., and granted the motion to seal the exhibits, "subject to revisiting its order should disclosure be sought by motion or petition filed with this Court." Id. at 2.

In addition, the Petitioners, in March 2018, filed the *First Motion to Compel*, see Index #35, and *Second Motion to Compel*, see Index #43, seeking orders directing Mr. Carman to submit additional answers to proffered interrogatories or produce certain documents. The Court observes that although the Petitioners included, as an exhibit to their *Second Motion*, Mr. Carman's responses to a second set of requests for

documents and a second set of interrogatories, they did not include in their *First Motion to Compel* a set of his answers, opting instead to attach letters between counsel for the Petitioners and Mr. Carman. See Cir. Ct. – Prob. Div. R. 36 ("Motions . . . to compel more specific answers [to interrogatories] . . . shall have annexed thereto the text of the questions and answers, if any, objected to"). At the hearing, the Court informed counsel for the Petitioners that it could not properly decide the *First Motion to Compel* without those responses. At the hearing, Counsel provided the Court with an incomplete set from his personal trial materials[6] which the Court placed under seal as an exhibit. Counsel for the Petitioners later submitted a letter and complete sets of responses with Exhibit A attached. However, in a letter to the Court, (the April 5th Letter"), counsel stated that the "Responses are not submitted for filing with the Court. Instead, we are providing them as a supplement to the annotated copy of the Responses that Attorney Small handed to the Court during the April 3 hearing." Given that the Court cannot decide the *First Motion to Compel* without Exhibit A[7] which was attached to the April 5th Letter, it sua sponte has determined that the letter and attachment are indeed a "filing" and will treat it as such. However, in an abundance of caution, and out of concern that the "Risk Warrant Affidavit" may be subject to other orders concerning public disclosure, it will place the letter and attachments, including the attached Risk Warrant Affidavit, provisionally under seal until the next hearing, at which time the Court will consider whether it is permissible to place it in the public file. To the extent the Court references

[6] The set provided to the Court did not include Exhibit A containing a "Risk Warrant" from Connecticut provided by Mr. Carman with his answers, which the Court needed to review to determine, as set forth infra, arguments concerning Request for Production ## 5-6.

[7] Indeed, the Court would most likely deny the *First Motion to Compel* without the proper supporting documentation needed to make a ruling as the Petitioners bear the burden of demonstrating that the interrogatory answers provided are incomplete.

potentially confidential information in this Order, it will redact that information in the copy of the Order placed in the public file, and place an original, unredacted copy, in the confidential file.

The Petitioners also filed a *Motion to File Exhibit D of [First] Motion to Compel Under Seal*, see Index #38, asking whether Exhibit D sealed at the filing of the *First Motion to Compel*, see Index #36, should be placed under seal. That *Motion* does not advocate sealing Exhibit D, which is Mr. Carman's letter to counsel for the Petitioners answering their alleged deficiencies in the responses to the first set of discovery requests. The Petitioners assert in this motion that although there is a *Protective Order*, the Respondent's letter is not subject to it. The Petitioners claim to have filed the *Motion*, however, "as an accommodation" to the Respondent, as his responsive letter was marked with a "Confidential – Subject to Protective Order" designation. The Petitioners indicate, however, that they will seek to unseal it.[8] The Court provisionally placed Exhibit D under seal, and deferred ruling until after the April 3rd hearing. See Order dated March 26, 2018.

Finally, following the April 3rd hearing, the Petitioners filed a *Third Motion to Compel*, see Index # 49, seeking an order directing Mr. Carman to supplement his mostly narrative answers to three interrogatories included in a second set of interrogatories propounded on him on January 25, 2018.

II. Applicable Law

The controversies currently before the Court require it to consider rules concerning proper discovery, Constitutional protections afforded by Part I, Article 15 of the New Hampshire Constitution and the Fifth Amendment to the United States

[8] The Court has not received a motion or other pleading seeking to unseal Exhibit D.

Constitution as they apply in the civil context, and the public's rights to court files under Part I, Article 8 of the New Hampshire Constitution.

Circuit Court – Probate Division Rule 35(b) governs the scope of permissible discovery. It provides in pertinent part:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the Party seeking discovery or to the claim or defense of any other Party . . . . It is not ground for objection that the information sought shall be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Cir. Ct. Prob. Div. R. 35(b)(1). This Court, however, is empowered to limit discovery or "make any order which justice requires to protect a Party or Person from annoyance, embarrassment, oppression, or undue burden or expense." Cir. Ct. Prob. Div. R. 35(c).

Under the common law, this Court has broad discretion to determine discovery matters. See generally, In re Juvenile 2002–209, 149 N.H. 559, 561 (2003). "The power of the judiciary to control its own proceedings, the conduct of participants, the actions of officers of the court and the environment of the court is absolutely necessary for a court to function effectively and do its job of administering justice." Sabinson v. Trustees of Dartmouth College, 160 N.H. 452, 461 (2010). "A decree granting specific relief is not a matter of right, but rests in the sound discretion of the trial court according to the circumstances of the case." RAI Automotive Group, Inc. v. Edwards, 151 N.H. 497, 499 (2004) (quotations omitted). Courts also have broad discretion to limit the scope of discovery so as to "keep discovery within reasonable limits and avoid open-ended fishing expeditions or harassment to ensure that discovery contributes to the

orderly dispatch of judicial business." N.H. Ball Bearings, Inc. v. Jackson, 158 N.H. 421, 429 (2009); see generally, Probate Div. R. 35.

In general, New Hampshire law favors liberal discovery because "in civil actions [it] has been regarded in this jurisdiction as a proper procedural aid for parties to prepare their case." McDuffey v. Boston & M.R.R., 102 N.H. 179, 181-82 (1959). It assists in the efficient and fair disposition of matters before the Court by avoiding surprise and "permitting both court and counsel to have an intelligent grasp of the issues to be litigated and knowledge of the facts underlying them." Id. Therefore, there is a long history of broad and liberal application of discovery rules. N.H. Ball Bearings, Inc., 158 N.H. at 429.

Discovery, while acting as "a tool to make the trial process more focused" is not, however, "a weapon to make it more expensive." In re Allstate County Mut. Ins. Co., 277 S.W.3d 667, 668 (Texas 2007). Therefore it is subject to limitation, and courts appropriately exercise their discretion to limit its scope. See N.H. Ball Bearings, Inc., 158 N.H. at 429 (quotations omitted). Determination of whether discovery constitutes a permissible search for information "reasonably calculated to lead to the discovery of admissible evidence," Cir. Ct. Prob. Div. R. 35(b)(1), or impermissible "fishing," N.H. Ball Bearings, Inc., 158 N.H. at 429, can sometimes be a difficult task. As one court observed, broad or liberal interpretation of discovery rules does "not mean oceanic fishing expeditions will be permitted. Much of discovery is a fishing expedition of sorts, but the [rules] allow the Courts to determine the pond, the type of lure, and how long the parties can leave their lines in the water." Myers v. Prudential Ins. Co. of Am., 581 F. Supp. 2d 904, 913 (E.D. Tenn. 2008). Courts must endeavor to avoid discovery orders

that allow litigants to "sail a trawler through the Atlantic Ocean" or alternatively limit parties "to a fishing hole for five minutes with a plastic worm." Eli Lilly & Co. v. InvaGen Pharm., Inc., No. 109CV87-DFH-TAB, 2009 WL 3018744, at *1 (S.D. Ind. Sept. 17, 2009).

The *Motion(s) to Compel* also implicate the Respondent's privilege against self-incrimination as guaranteed by the Fifth Amendment of the United States Constitution and Part I, Article 15 of the New Hampshire Constitution.[9] Part I, Article 15 of the New Hampshire Constitution provides that "[n]o subject shall ... be compelled to accuse or furnish evidence against himself." The Fifth Amendment to the United States Constitution similarly provides: "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." Generally, when invoking the privilege, "[a]n individual must show three things to fall within the ambit of the [privilege]: (1) compulsion, (2) a testimonial communication or act, and (3) incrimination." In re Grand Jury Subpoena Duces Tecum Dated Mar. 25, 2011, 670 F.3d 1335, 1341 (11th Cir. 2012).

Although invoked by Mr. Carman in the civil context, "[a] party in a civil proceeding may assert the privilege to particular questions if the answer to the question could result in criminal liability." DeMauro v. DeMauro, 142 N.H. 879, 883 (1998). The privilege against self-incrimination "extends not only to answers that in themselves would support a conviction, but also to any information sought which would furnish a link in the chain of evidence needed to prosecute." Key Bank of Maine v. Latshaw, 137 N.H. 665, 669-70 (1993)(quotations omitted)(Part I, Article 15); see generally Ohio v.

[9] For example, in his response to Request for Production #5, he "invokes his Fifth Amendment privilege against self-incrimination pursuant to the Fifth and Fourteenth Amendments of the United States Constitution, Part First, Article 15 of the New Hampshire Constitution, applicable New Hampshire common law and statutes, and applicable federal common law and statutes."

Reiner, 532 U.S. 17, (2001)(Fifth Amendment privilege extends "to witnesses who have reasonable cause apprehend danger from a direct answer" (quotations omitted)); United States v. Hubbell, 530 U.S. 27, 38 (2000)(Fifth Amendment). As such, "[f]or a witness to invoke this privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." DeMauro, 142 N.H. at 883. "A danger of imaginary and unsubstantial character will not suffice" to afford invocation of the privilege. Reiner, 532 U.S. at 21 (quotations omitted).

In the instant controversy, Mr. Carman invoked the privilege in response to a request that he produce certain documentation. It has been observed that production of documents can "be the legal equivalent of identifying and authenticating evidence of conduct which is evidence of delictual activity and would constitute an admission that certain records were possessed and received, admissions which could constitute an incriminatory testimonial act." Day v. Boston Edison Co., 150 F.R.D. 16, 21 (D. Mass. 1993)(quotations omitted); see, e.g., Hubbell, 530 U.S. at 36-37; 42 (the act of producing documents can be testimonial); Fisher v. United States, 425 U.S. 391, 410 (1976)(same). Essentially;

> the act of producing evidence . . . . may have communicative aspects that would render the Fifth Amendment applicable. Whether an act of production is testimonial depends on whether [it] compels the individual to disclose the contents of his own mind to explicitly or implicitly communicate some statement of fact. More particularly, the act of complying with the . . . demand could constitute a testimonial communication where it is considered to be a tacit admission to the existence of the evidence demanded, the possession

> or control of such evidence by the individual, and the authenticity of the evidence.

Com. v. Gelfgatt, 11 N.E.3d 605, 613 (Mass. 2014)(quotations and citations omitted); see e.g., In re Grand Jury Subpoena Duces Tecum Dated Mar. 25, 2011, 670 F.3d at 1345)("an act of production can be testimonial when that act conveys some explicit or implicit statement of fact that certain materials exist, are in the . . . individual's possession or control, or are authentic").

Relevant to the Court's inquiry today, however, is the "foregone conclusion" exception that there is no Fifth Amendment privilege if the fact of ownership and control conveyed by production of a document is already known to the authorities such that it "adds little or nothing to the sum total of the Government's information" and would thus not supply a link in the evidentiary chain that may imperil the respondent. Fisher, 425 U.S. at 411; see generally, Hubbell, 530 U.S. at 44-45; Gelfgatt, 11 N.E. 3d at 616. For the "foregone conclusion" exception to apply, it must be established that the government already knows "of (1) the existence of the evidence demanded; (2) the possession or control of that evidence by the defendant; and (3) the authenticity of the evidence," Gelfgatt, 11 N.E.3d at 614, so that production of it would not result in possible criminal liability.

An individual may also waive the privilege by disclosing certain facts about a subject but then invoking the privilege when further questioned about them. See, e.g., Mitchell v. United States, 526 U.S. 314, 321 (1999); see generally, 1 McCormick on Evidence §133 (4th ed.). Such waiver occurs when an individual, through selective response, has "created a significant likelihood that the finder of fact will be left with and

prone to rely on a distorted view of the truth, and . . . the witness had reason to know that his prior statements would be interpreted as a waiver of the Fifth Amendment's privilege against self-incrimination." Klein v. Harris, 667 F.2d 274, 287 (2d Cir. 1981); accord State v. Irvine, No. 2016-0415, 2017 WL 2797361 at *2 (N.H. May 26, 2017). Such waiver, however, "is not to be lightly inferred and the courts accordingly indulge every reasonable presumption against finding a testimonial waiver." Klein, 667 F.2d at 287 (citations omitted).

Finally, although Mr. Carman may invoke his privilege against self-incrimination in this civil matter, New Hampshire Rule of Evidence 512(d) permits this Court, as the finder of fact, to draw a negative inference from that invocation. See generally, In re G.G., 166 N.H. 193, 199 n.1 (2014)(Rule 512(d) "permits the fact finder to draw an adverse inference against a litigant in a civil proceeding who chooses not to testify based on the exercise of the privilege against self-incrimination")(Lynn, J. concurring specially); see, e.g., Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp., 383 F.3d 1337, 1345 (Fed. Cir. 2004).

Finally, the Court has been asked to unseal records filed under seal by the parties. As discussed in previous order(s), see Index ##4, 24, it is a well-established principle of state constitutional law that "the public's right of access to governmental proceedings and records shall not be unreasonably restricted." N.H. CONST. Pt. I, art. 8; see, e.g., Petition of Union Leader Corp., 147 N.H. 603, 604 (2002). This constitutional directive applies to court records in order to ensure fair and impartial proceedings and an accountable judiciary. Id. The "right to open courtrooms and access to court records related to court proceedings is firmly supported by New

Hampshire practice and common law principles, . . .our State Constitution and the [Supreme Court's] guidelines for public access." Id. (citations omitted).

As such, court records, in the absence of an "overriding consideration or special circumstance" routinely are made available for public view. Petition of Keene Sentinel, 136 N.H. 121, 126 (1992)(quotations omitted). Courts place the burden of proof on the party "seeking closure or nondisclosure of court records to demonstrate with specificity that there is some overriding consideration or special circumstance, that is, a sufficiently compelling interest, which outweighs the public's right of access to those records." Douglas v. Douglas, 146 N.H. 205, 208 (2001) (quotations omitted). Courts place this burden on parties "because the presumption is strongly in favor of open judicial proceedings and unsealed records." Petition of Keene Sentinel, 136 N.H at 127 (quotations omitted). Consequently,

> whenever a member of the public . . . seeks access to a sealed court document, Part I, Articles 8 and 22 of the State Constitution require: (1) that the party opposing disclosure of the document demonstrate that there is a sufficiently compelling reason that would justify preventing public access to that document; and (2) that the court determine that no reasonable alternative to nondisclosure exists and use the least restrictive means available to accomplish the purposes sought to be achieved."

Associated Press v. State, 153 N.H. 120, 130 (2005).

In addition, as it pertains to Exhibits B-1 and C-1, the Petitioners contended, and continue to assert, that these documents should remained sealed so that the ongoing criminal investigation into John Chakalos's murder is not compromised. It is true that the presumption is not absolute, see Id. at 129, and certainly, in a criminal matter, the New Hampshire Supreme Court held that courts can limit public access to pre-

indictment court records, specifically search warrant applications and accompanying documents. In re State (Bowman Search Warrants), 146 N.H. 621, 629 (2001). Although it recognized that there is "a presumptive right of access to court records," Id. at 625, where the records at issue involve pre-indictment disclosure of "search warrants and accompanying documents," the "dangers of opening pre-indictment processes to the public", including the effect on potential witness testimony, threat of destruction of evidence, and potential harm to innocent individuals, "most often significantly outweighs any possible benefits from public disclosure." Id. at 627- 628. It further observed that:

> criminal cases present considerations not present in civil cases. In order to preserve the legitimate public interest in the integrity of on-going, pre-indictment criminal investigations and to protect the rights of the individuals involved, including the defendant's right to a fair trial should a defendant be identified, we prefer to recognize a qualified right of access to court records for a reasonable time in order not to jeopardize the State's ability to conduct a proper criminal investigation. Therefore, in applying the *Petition of Keene Sentinel* test to court records associated with an on-going criminal investigation, we hold that in most pre-indictment criminal investigations, the existence of an investigation itself will provide the overriding consideration or special circumstance, that is, a sufficiently compelling interest, that would justify preventing public access to the records.

Id. at 629 (quotations omitted). The New Hampshire Supreme Court declined, however, to adopt a *per se* rule. Id. at 626.

III. Analysis

Having outlined the applicable law, the Court now proceeds to resolve the matters before it.

A. First Motion to Compel

On March 5th, the Petitioners filed the *First Motion to Compel*, see Index #35, further answers to their "First Set of Interrogatories and First Set of Requests for Production" propounded on Mr. Carman. As previously noted, the Petitioners initially did not file the actual answers to the interrogatories, but instead submitted correspondence between counsel for the Petitioners and Mr. Carman discussing the Petitioners' objections and Mr. Carman's response. Mr. Carman, although responding to letters from counsel, has not filed any responsive pleading with this Court, but did address certain questions at the hearing. As such, the Court will consider his letter responses and oral arguments as representing his viewpoint when it considers each request in the *Motion to Compel*.

Turning to the issues at bar, the Petitioners sought to compel Mr. Carman to respond as follows:

1.) Interrogatory #8

The Petitioners seek to compel further answer to interrogatory number 8 asking "[w]hat financial benefits did you receive as a result of your grandfather's death? If your response includes access to bank or similar accounts of any kind" to list those accounts. Mr. Carman initially answered that he did not receive any financial benefits as after his death, because substantial financial support from his grandfather ended. He further stated that certain funds in a Fidelity account that he received after Mr. Chakalos's death and a qualified tuition plan account were was less valuable than the financial support he previously received.

The Petitioners now specifically assert that they want information regarding the "Nathan Carman Family Trust."[10] The interrogatory is phrased, however, as seeking "[w]hat financial benefits did you receive as a result of your grandfather's death," including the nature and access to bank accounts "or similar accounts of any kind", but does not specify a trust. In his letter response, Mr. Carman again states that he received no benefit because he lost significant financial support from his grandfather. Mr. Carman does list some financial accounts, but these appear to be the same ones as previously provided. He does not respond to a question concerning his knowledge of the existence of a "Nathan Carman Family Trust," nor, for that matter, a new question concerning purchase of, or support for, a horse.

The *First Motion to Compel* further answers to Interrogatory #8 is DENIED. The Court finds that Mr. Carman answered the question asked, namely, funds he gained access to as a result of his grandfather's death. The Petitioners have not demonstrated that a "Nathan Carman Family Trust" is reasonably subsumed in the question asked. Therefore he should not be further compelled to provide additional information as to this question. At the hearing, however, Mr. Carman stated that he knew he was a beneficiary of the Nathan Carman Family Trust.[11]

2.) Interrogatories 11 & 12

These interrogatories ask whether, from 2010 to present, Mr. Carman kept "a calendar or other document" indicating his activities at that time or if he kept a "diary,

[10] The Court is somewhat puzzled by this request. In the Petitioners' *Third Motion to Compel*, see Index #49, they represent that Ms. Santilli until recently was the "trustee of the Nathan Carman Family Trust." Id. at 6, n. 2. If true, then Ms. Santilli presumably would have better access to the information than Mr. Carman.

[11] The Court notes, however, that should a more targeted one be propounded in the future, concerning the "Nathan Carman Family Trust," he should answer that question. If it then appears that the terms of that trust are such that it should have been reasonably included in the answer to Interrogatory #8, that further question should not be included in the limits set forth by Circuit Court – Probate Division Rule 36.

journal, or other document reflecting [his] thoughts or experiences." In his initial responses, Mr. Carman objected as to the length of time and the scope, however, he further answered each interrogatory in the negative.[12] In a follow-up letter, counsel for the Petitioners sought confirmation that he did not possess an "electronic device incorporating any type of software for calendar or diary purposes." Mr. Carman responded that his initial response was complete based upon the definition of "document" set forth in the preamble of the interrogatories.

The *First Motion to Compel* as to Interrogatories 11 and 12, to the extent it seeks confirmation that he did not have an "electronic device incorporating any type of software for calendar or diary purposes," is DENIED. The definition of "document," even construed "in the broadest sense" may have included an electronically kept diary, journal or calendar or other "stored compilation". However, any calendar/diary "software" that may support such compilations in an electronic device is not reasonably subsumed in the question asked, and thus, in follow-up discussions cannot be expanded without submission of a separate interrogatory.

3.) Interrogatories 15 & 16

These interrogatories seek information on the alterations made to the "Chicken Pox" in the two weeks prior to September 16, 2016, and whether there was specific safety/communications equipment on it on September 16, 2016 when Mr. Carman and Linda Carman left for their fishing excursion. Mr. Carman responded that the request was unduly burdensome and reasonably would not lead to discoverable evidence.[13]

[12] Mr. Carman did not invoke his privilege against self-incrimination to this question.
[13] Again, he apparently, from the documents before the Court, has not invoked his Fifth Amendment Privilege to this question.

The Petitioners dispute that answer, claiming the questions are relevant to the question of whether Nathan "took steps to accelerate the inheritance . . . by killing two people." Nathan stands on his initial response. The Petitioners argue the information is relevant and not unduly burdensome. The Court agrees and the *First Motion to Compel* is GRANTED as to Interrogatories 15 and 16. Although not specifically alleged by the Petitioners in their *Petition* or *Amended Petition*, it is clear from proceedings before this Court that whether Mr. Carman purposefully caused the death of his mother in order to receive the benefits of his mother's inheritance from her father may become an integral part of their proof at trial. Thus, the questions raised in Interrogatories 15 and 16 are "relevant and reasonably calculated to lead to the discovery of admissible evidence." Cir. Ct. Prob. Div. R. 35(b)(1). The Court concludes that the scope of the inquiry is not unduly burdensome as Interrogatory 16 seeks information on just five types of devices. Interrogatory 15 is limited to a specific time. Mr. Carman would know of any alterations he made to the Chicken Pox and should have an understanding of whether it had the safety equipment listed by the Petitioners on-board.

4.) Requests for Production ##1, 4, 7, 9, 10

The Petitioners complain that Mr. Carman has not properly responded to Requests for Production seeking: (a) tax returns for the years 2012-2016 (Request #1); (b) cell phone records for December 2013 (Request #4); (c) "notes or other documents written or prepared by you regarding the murder of your grandfather or disappearance of your mother" (Request #7); (d) credit card records from January 2011-December 2013 (Request #9); and (e) bank statements between January 2011-December 2013

(Request #10).[14] To each of these requests, Mr. Carman answered that there were "[n]one in the Respondent's possession, custody, or control."

First, in reference to Request #1, the Petitioners assert that Mr. Carman should release his tax returns for the years 2012-2016 and/or confirm whether any person assisted him in preparing those returns. Mr. Carman stated at the hearing that he did not file any tax returns at the time as he had no reportable taxable income. The Court observes that with respect to the returns, he cannot produce that which does not exist, and therefore if he did not file returns it cannot compel him to produce them. Certainly, if he filed tax returns, he must make them available, but on the state of this record it does not appear that they exist. The Court also notes that the initial request did not seek the identity of tax preparers, therefore it will not compel him to produce that information even if any tax returns exist. As such, the *First Motion to Compel* with respect to Request #1 is GRANTED as to any tax returns to the extent they exist, but otherwise is DENIED.

The Petitioners also sought Mr. Carman's "telephone (including cellular) records for December 2013" and "credit card records for the time period January 1, 2011 through and including December 23, 2013." See Request for Production ##4, 9. He responded that since his grandfather provided him with the cell phone and credit card, he does not have access to those account records. Again, he cannot provide records he does not have. Indeed, if the cell phone and credit card were in his grandfather's name, those are records that Ms. Santilli, as administratrix, has the authority to obtain.

[14] The Court observes that although the Petitioners request compelled production of documents in Requests "9-21", there were only twelve questions. Further, the Petitioners only specifically develop arguments concerning questions 1,4-7, 9 and 10, and as such, it will only address those requests at this time.

In addition, the Petitioners request that the Court compel him to produce related information they did not initially seek in Requests #4 and #9, and therefore, if they seek to supplement their document requests they must do so by separate, and new, requests. As such, the *First Motion to Compel* with respect to Requests #4 and #9 is GRANTED as to any cell phones or credit cards in Mr. Carman's name, but is otherwise DENIED.

Similarly, Request for Production #10 seeks Mr. Carman's "bank statements for the time period January 1, 2011 through December 23, 2013." The Petitioners presently insist that Mr. Carman's answer is inadequate as he "has not identified the financial institutions at which accounts were maintained for his benefit or to which he had access," and seek account number, addresses, and the identity of the holder. First, the propounded request only asked for bank statements, not additional information sought in the *First Motion to Compel* and therefore, the Court will not compel him to answer questions not reasonably subsumed in the request made. In addition, to the extent such accounts were held by his grandfather for his benefit, Petitioner Santilli already has access to such information. Consequently, the *First Motion to Compel* is GRANTED as to bank accounts in Mr. Carman's name, but otherwise DENIED with respect to Request #10.

The *First Motion to Compel* seeks an order compelling an answer to Request #7 seeking "any documents written or prepared by him regarding the murder of his grandfather or the disappearance of his mother," claiming that his answer that: (1) this request is overbroad, burdensome and not calculated to lead to discoverable evidence; and (2) and that there are none in his control, is insufficient. The Court disagrees with

Mr. Carman that the information requested is not relevant as it goes to the heart of the *Petition and Amended Petition*. To the extent any documents exist in his control, however, it is overbroad in that it may encompass documents that are subject to privileges such as the attorney-client privilege or the privilege against self-incrimination. Accordingly the *First Motion to Compel* is GRANTED with respect to Request #7 to the extent such documents are not privileged and in his control, otherwise Mr. Carman must state affirmatively that they do not exist.

5.) Requests for Production #5 & #6

In response to Request #5 (seeking receipts or documents relating to purchase and ownership of any firearm or weapon between January 2011and December 2013) and Request #6 (seeking receipts or documents relating to use of or involvement with a firing range between January 2011and December 2013), Mr. Carman not only asserts these requests are unduly broad and burdensome, but he invokes his privilege against self-incrimination under both the State and Federal Constitutions.

In the *First Motion to Compel*, the Petitioners argue that production of receipts for the gun purchase or gun range is not testimonial and it is inappropriate to invoke the privilege because although the police have a receipt from a gun store, the Petitioners, without production of the receipts would have to do a substantial search of New Hampshire gun shops.

The Court observes that after the Petitioners provided the complete answer to the First Set of Requests for Production, it was able to review the "Risk Warrant Affidavit" submitted by Connecticut authorities seeking court authorization to seize Mr. Carman's firearms at his Connecticut apartment that forms the basis of some of the

Petitioners' argument that Mr. Carman cannot assert his privilege against self-incrimination. It notes that it is not clear, despite the Petitioners' representation otherwise to this Court, that the Connecticut authorities in fact have the sought-after receipts. [redacted] [15] Similarly, the Risk Warrant does not indicate that Mr. Carman ever frequented a gun range between January 2011 and December 2013 [redacted]

The Petitioners, in their *First Motion to* Compel, contend that production of gun store/gun range receipts is not testimonial because it does not require him to reveal the contents of his mind and any receipt or credit card statement is a third-party document over which he has no Fifth Amendment privilege. The Court disagrees, as production of such receipts, if they exist, would show he has control over the receipt, which would by implication, indicate an that he bought the gun of similar caliber to the murder weapon[16] or in fact had visited a gun range in close temporal proximity to the murder, demonstrating ability to handle a firearm. See generally, U.S. v. Hubbell, 530 U.S. at 35-37. Production of the receipt(s) seems to fall squarely into the category of testimony

[redacted]

[16] This would provide a link in the chain of criminal liability as the Risk Warrant Affidavit stated [redacted]

that could be a link in the chain of evidence needed to prosecute and thus is protected from disclosure. See DeMauro, 142 N.H. at 883; Key Bank of Maine, 137 N.H. at 670-71. [17]

For similar reasons, the Court does not agree with the Petitioners, to the extent they raise the issue, that production of the receipts falls under the "foregone conclusion" exception to the privilege from self-incrimination if the fact of ownership and control of the receipts is conveyed by production of a document is already known to the government. See Commonwealth v. Gelfgatt, 11 N.E. 3d at 616. In the *First Motion to Compel*, the Petitioners assert, see id. ¶29, they contend that the police know he owned a similar caliber gun and was familiar with firearms. As set forth supra, the Risk Warrant attached to Mr. Carman's responses does not clearly support either premise.[18] Consequently, the *First Motion to Compel* is DENIED with respect to Request ##5-6.

Finally, Petitioners' counsel suggested to Mr. Carman in his letter that by responding to some of the requests, he has entirely "waived [the] privilege . . . ." Such a

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[17] The Court finds instructive the 11th Circuit's comparison of two Supreme Court "foregone conclusion" cases. See In re Grand Jury Subpoena Duces Tecum Dated Mar. 25, 2011, 670 F.3d at 1345. As stated supra, it is not clear that the authorities possess the receipts sought by the Petitioners, but rather have reason to believe they exist. The 11th Circuit observed that in the Fisher case, see Fisher v. United States, 425 U.S. 391, "the act of production was not testimonial because the Government had knowledge of each fact that had the potential of being testimonial. In contrast, the Court in Hubbell [530 U.S. 27], found there was testimony in the production of the documents since the Government had no knowledge of the existence of documents, other than a suspicion that documents likely existed and, if they did exist, that they would fall within the broad categories requested." [redacted]

[18] The Petitioners also assert that Mr. Carman failed to articulate "a credible reason" why he is asserting the Fifth Amendment privilege against self-incrimination, citing Bear Sterns v. Wyler, 182 F. Supp. 2d 679, 684 (N.D. Ill. 2002). This case, however, is substantially different than Wyler, where the Court stated that the invoking witness needed to "tender a credible reason" for invoking the privilege." Unlike the instant case, in Wyler, the reason the witness was invoking his privilege was not readily apparent – here, however, it is overwhelmingly apparent why Mr. Carman would invoke the privilege, namely that by responding he could subject himself to serious criminal liability.

broad interpretation of waiver is not supported by authority, see Klein, 667 F.2d at 287, nor has counsel offered any legal basis for this statement to Mr. Carman.

B. Second Motion to Compel

On March 26th, the Petitioners filed a *Motion to Compel Respondent to Adequately Respond to Their Second Set of Requests for Production of Documents.* See Index #43. They seek an order compelling production of the following:

1.) Requests for Production ##1, 2, and 4

The Petitioners first seek an order compelling Mr. Carman to further respond to Requests for Production ##1, 2, and 4. These requests concern background information concerning Mr. Carman. Specifically, Request #1 seeks "[a]ny application for and copy of any New Hampshire drivers', hunting, fishing, or other license." Request #2 seeks "[a]ny vehicle or other registration made by you with the State of New Hampshire." Request #4 seeks "[a]ny written communications from your grandfather to you, or from you to your grandfather, during the period January 1, 2011 through December 2013."

As to requests #1 and #2, Mr. Carman responded that it was overbroad, burdensome, and not calculated to lead to discoverable evidence and not in his possession, custody or control. The Petitioners assert that certain information provided as answers to a Second Set of Interrogatories indicate that Mr. Carman twice applied for a driver's license and registered his vehicle in New Hampshire. Accordingly, they contend that he can access *all* the information requested and provide it to them. The Court DENIES the *Second Motion to Compel* as it applies to Requests #1 and #2. While not a burdensome request, the Petitioners have not demonstrated how these

requests "appear[] reasonably calculated to lead to the discovery of admissible evidence," Cir. Ct.-Prob. Div. R. 35(b)(1), and the Court concludes that it resembles an impermissible fishing expedition that Mr. Carman justifiably objected to as overbroad.

As to Request #4, Mr. Carman responded simply that it is not in his possession, custody or control. In their *Second Motion to Compel*, the Petitioners state that Mr. Carman failed to confirm whether he possessed emails or texts. Although at the hearing Mr. Carman appeared to indicate that the does not have any emails or texts, the Court GRANTS the *Second Motion to Compel* as it pertains to Request #4 to the extent it remains unanswered. This request is valid in terms of scope and substance, as the definition of "communication" includes emails and texts, and as such, communication between Mr. Chakalos and Mr. Carman is a valid inquiry given that Mr. Carman is accused of causing his grandfather's death, and the time period covered by the request is not unduly long. As such, Mr. Carman shall either produce any such documents/communications or affirmatively state that none exist.

2.) Requests for Production ##3, 5, 6

The Petitioners claim that Mr. Carman improperly refused to produce certain documents pertaining to time he spent in New Hampshire, documents produced or received in other litigation, and records concerning the Chicken Pox. As to each request, Mr. Carman responded that each request was overbroad, unduly burdensome, and not reasonably calculated to lead to discoverable evidence.

In Request #3, the Petitioners seek "[a]ny receipts or records relating to your activities and time spent within the geographical limits of the State of New Hampshire." The Petitioners assert that this request is appropriate because Mr. Carman, by

challenging the Court's jurisdiction over Mr. Chakalos's estate in his *Motion to Dismiss*, see Index #17, "has raised the question of the nature and extent of his own activities in this State," and therefore must respond to Request #3. The Court finds no such allegation in Mr. Carman's *Motion to Dismiss*, and DENIES the *Second Motion to Compel* as it pertains to Request #4. The Court concludes that this request is unreasonable and overbroad in that there are no limits on time or activity and, importantly, the Petitioners have not demonstrated how Mr. Carman's activities, at any time or place, relate to the question whether this Court has jurisdiction over Mr. Chakalos's estate.

Request #5 seeks "[a]ll documents and materials, including transcripts, that you produced or received in other litigation relating to the vessel Chicken Pox or the death of John Chakalos." In his response, Nathan asserts the question is overbroad, burdensome, and not calculated to lead to discoverable evidence. In their *Motion*, the Petitioners assert that they understand there is a protective order in certain litigation concerning the Chicken Pox, but then assert that such a protective order would not bar production if the defendant agrees to give them the information subject to a protective order in this case. The Court concludes that this request is overbroad and DENIES the *Second Motion to Compel* as it pertains to Request #5. Some materials may be subject to the attorney-client privilege, may be subject to a protective order issued in another jurisdiction or not necessarily appropriate discovery in this case. The Court cannot make such a determination given the breadth of the request and will not compel production. In addition, it will not blithely compel production of documents subject to a protective order it has not seen and that is issued by another court in another

jurisdiction, solely on the basis that it would be appropriate because there is a protective order in this case.

Finally, Request #6 seeks "[a]ny and all records reflecting the make, model, serial number, and/or place or date of purchase [of] the EPIRB and all other navigation, communication, and emergency equipment that was on [the] Chicken Pox in September 2016." Mr. Carman answers that the question is overbroad, burdensome, and not calculated to lead to discoverable evidence. The Court disagrees with Mr. Carman, and GRANTS the *Second Motion to Compel* as it pertains to Request #6. Although broadly seeking documents concerning navigation equipment, this request is limited to equipment on the Chicken Pox in September 2016, which, as discussed supra may be relevant to the Petitioners' theory at trial. Mr. Carman is DIRECTED, to the extent he possesses such documentation, to produce it.

C. *Third Motion to Compel*

1.) Interrogatory #1

This interrogatory asked Mr. Carman to "identify all of your activities within the geographical limits of the State of New Hampshire," including multi-part specific questions seeking information on: (1) any time spent visiting the state since he was eighteen years old; (2) any applications for driver's, hunting, or fishing licenses; (3) any vehicle registrations; (4) the addresses and names of roommates, rent paid, and the source of funds for that rent; and (5) "any business dealings in the State of New Hampshire, including any business dealings on your own, or with or on behalf of John Chakalos." Mr. Carman responded that the interrogatory was overbroad, burdensome, and not calculated to lead to discoverable evidence, however, without waiving this

objection, he also provided a lengthy three-an-a-half page narrative at least partially responding. The Petitioners assert that by responding he "partially concedes the relevance of the request," and that a "partial answer" is not sufficient.

The Court DENIES IN PART the *Third Motion to Compel* as it applies to Interrogatory #1. As the Court noted in its discussion of a similarly overly broad request for production, Mr. Carman's activities in the state are not relevant to the jurisdictional issue raised concerning the propriety of this Court's jurisdiction over Mr. Chakalos's estate. In addition, the scope of the question(s) constitutes an impermissible fishing expedition that is not valid discovery. For example, Mr. Carman answered that he lives eight miles from the New Hampshire border. Compelling a description of every foray into the State is both unreasonable and burdensome and the Court is not convinced would lead to the discovery of relevant or admissible evidence.

The only exception would be a partial question concerning Mr. Carman's business dealings "with or on behalf of John Chakalos," as responses to that inquiry may shed light on Mr. Chakalos's presence in New Hampshire and thus whether this Court has jurisdiction over the Estate. As such, Mr. Carman is DIRECTED to respond, to the extent he has not already, to this limited inquiry.

2.) Interrogatory #2

This interrogatory requests that Mr. Carman "identify and describe any financial support [he] received, directly or indirectly, from John Chakalos including, without limitation, in the form of gifts, joint accounts, bills he paid you, or otherwise." Mr. Carman objected on the basis that it was "redundant and duplicative to the extent that financial support received from my grandfather is the same as promises of financial

support which were fulfilled" that was the subject of another interrogatory, "First Interrogatory 7," previously asked and answered. The Petitioners respond that this question is different in that it seeks information on support given by John Chakalos, whether promised or not. They further assert that in a prior response, "First Interrogatory #8," Mr. Carman claimed to have received support exceeding $100,000 per-year, however, the support noted in the response to First Interrogatory #7 falls far short of that number.

The Court DENIES the *Third Motion to Compel* as it pertains to Interrogatory #2 as it concludes that the question asked is overbroad as it seeks information concerning support in an unlimited timeframe, and, could cover support provided since birth. Should, however, the Petitioners narrow the scope of the question to a more relevant timeframe, it may be appropriate for Mr. Carman to fully respond.

3.) Interrogatory #5

The Petitioners requested that Mr. Carman "describe by make, model, serial number, and/or place and date of purchase the EPIRB and all other navigation, communication, and emergency equipment that was on the Chicken Pox in September 2016." Mr. Carman objected on the basis that this "request is unduly burdensome and is not reasonably calculated to lead to the discovery of admissible evidence." Similar to Request for Production #6 discussed supra, the Court concludes that this inquiry is proper as it pertains to the safety equipment on board the Chicken Pox prior to its final voyage and the theory that Mr. Carman is responsible for his mother's death. As such, the Court GRANTS the *Third Motion to Compel* as it pertains to Interrogatory #5.

D. Motion(s) to Unseal All Petitions, Motions, Exhibits and Other Documents

The Court now turns to issues pertaining to court records in the *Motion(s) to Unseal All Petitions, Motions, Exhibits and Other Documents*. See Index ##45, 48, 50, 52. As noted supra, the Court earlier provisionally granted motion(s) to seal Exhibits B and C of the *Petition* and Exhibits B-1 and C-1 of the *Amended Petition*[19] in large part due to the absence of objections to placing those exhibits under seal and subject to reconsideration. See Index ##24; 44. The Union Leader and NEFAC have since filed multiple motions asserting that no substantial reason has been offered to justify placing the exhibits under seal. See Index ##45, 50, 52. The Petitioners filed a *Limited Objection*, see Index #48, referencing their prior arguments supporting sealing Exhibits B, C, B-1 and C-1 and further arguing that their description of those documents in the pleadings "should be sufficient for the Union Leader and any other member of the press or public interested in the inner workings of Mr. Chakios's estate plan." See id. They further request that should the Court grant the Union Leader and NEFAC's motions, that it mark the exhibits as confidential and subject to the protective order, see Index #26, and therefore, declare them shielded from public view.

The Court notes that it previously allowed "Exhibits B and C" of the *Petition*, and their nearly identical counterparts, "Exhibits B-1 and C-1" of the *Amended Petition* to remain under seal. The Court did so, recognizing that although the argument to seal was "somewhat thin," there was no objection to sealing them. Following submission of the *Amended Petition* and the request to seal Exhibits B-1 and C-1, see Index #36, the Court again recognized that the argument for keeping them sealed lacked substance,

[19] These exhibits are comprised of Mr. Chakalos's trust documents.

but given no objection, it "provisionally" placed them under seal "subject to revisiting its order should disclosure be sought by motion or petition filed with this Court." See Order dated March 26, 2018 (Index #44).

Objections have since been filed and the Court proceeds to reconsider its prior decision to seal the documents. As discussed in its Order dated December 22, 2017, see Index #24, the Petitioners state that the death of John Chakalos has been investigated by both federal and state authorities. They have asserted, and continue to assert, that the exhibits should be under seal as "[m]aking the details of the estate plan public would likely feed the media frenzy surrounding the case and could chill both of those investigations, making potential witnesses less likely to talk, and impeding the parties from finding justice." *Limited Objection* ¶2 (Index #48). They contend that the Court should place the estate plan exhibits under seal pursuant to an exception to the general presumption favoring open court files, see, e.g. Petition of Keene Sentinel, 136 N.H. at 126, for keeping search warrants sought in an active criminal investigation, along with supporting affidavits and other documents filed with the District Division, under seal. See Bowman, 146 N.H. at 629.

As a preliminary matter, the Court points out that it was the Petitioners who brought this action and controlled both the timing and content of the pleadings. As a matter of strategy, they elected to include certain estate planning documents of John Chakalos which do not include information that might ordinarily be redacted by the court – for example, social security numbers and bank account numbers. This action was brought solely to prevent Mr. Carman from inheriting money with full knowledge that there was, or is, an ongoing criminal investigation. The Petitioners no doubt weighed

the risks and benefits of bringing a civil suit. To the extent that there are serial references to a "media frenzy," it appears that much of this, if not brought about by Petitioners' counsel, has certainly been fueled by them.

As previously discussed by this Court, see Order dated December 22, 2017 (Index #24), the considerations present in the Bowman matter – where an ongoing criminal investigation justified sealing court documents, were of a different degree than the instant case. See In re State (Bowman Search Warrants), 146 N.H. at 622-23. In Bowman, the media outlet sought to unseal search warrants, affidavits and accompanying documents from a district court file within weeks of their filing and mere months after the suspicious disappearance of a woman and her daughter. Id. at 622-23. The State was concerned that public disclosure may alert potential suspects to the "scope of the investigation" and increase the danger that suspects would destroy evidence and "coordinat[e] stories." Id. at 623. The Supreme Court observed that "[t]his case is precisely the type of case which should be afforded" protection from disclosure, Id. at 629, as the investigation was in its early stages and "[t]he cooperation of witnesses and the existence of evidence, especially evidence that may yet be discovered, is crucial to the investigation. *The secrecy of the nature and scope of the investigation is critical to ensure that potential suspects* are not able to avoid detection." Id. (emphasis added).

Here, the facts alleged to justify non-disclosure are not as compelling as the Bowman case. First, the need for discretion is not as critical as it was in Bowman. The Petitioners seek to seal trust documents executed in 2010 by John Chakalos, well before his death in December 2013. In the *Amended Petition*, they also allege that

multiple law enforcement agencies, including the Connecticut State Police Major Crimes Unit and FBI have actively investigated the murder and that Nathan Carman "is widely considered to be the prime suspect." *Amended Petition* ¶¶ 11, 13.

The Petitioners have argued that the previously sealed exhibits should remain under seal to protect individuals named in them from the "media frenzy." They contend that should the trust instruments become public, the media will seek out persons named in the trusts, and that this could be "uncomfortable" for them. This discomfort, in turn, may impact their potential testimony or their cooperation as potential witnesses.

The Court has carefully reviewed the documents under seal, and observes that it is not readily apparent, nor have the Petitioners made clear, how those identified in the trust documents are connected to any investigation of the unsolved murder of John Chakalos, and how this discomfort would affect a four-year-old criminal investigation. As such, in prior orders and again today, it concludes that the rationale for placing the exhibits under seal is far less substantial than that present in the Bowman matter. The Union Leader and NEFAC essentially request that this Court reconsider its prior orders contending that assert that there is no "overriding consideration or special circumstance" Thompson v. Cash, 117 N.H. 653, 654 (1977), justifying continued closure. See *Memorandum in Support of Union Leader Corporation's Motion to Intervene and Unseal All Petitions, Motions, Exhibits, and Other Documents* at 2 (Index #52.

Upon reflection, and in deference to this jurisdiction's strongly-held principles favoring open court files, the Court GRANTS the Union Leader's *Motion to Unseal All*

Petitions, Motions, Exhibits and Other Documents. See Index #45.[20] It VACATES all prior orders sealing Exhibits B and C of the *Petition*, see Index #1, and Exhibits B-1 and C-1 of the *Amended Petition*. See Index #36. Although the investigation into Mr. Chakalos' death remains open, it has been ongoing for over four years. Unlike the pre-indictment warrants in Bowman, Mr. Carman is well aware of his potential liability. Moreover, it is quite speculative that release of the estate documents would negatively impact the authorities' investigation. Consequently, the Court concludes that the public's right to access to court records would be unreasonably restricted if those documents remain under seal.[21]

In addition, as to any other documents filed provisionally or otherwise under seal, neither party has demonstrated or requested that they be placed/remain under seal and accordingly the Court directs the Clerk to ensure that all documents and pleadings filed to date are available for public review with the exception of the April 5th Letter and attachment which the Court will place provisionally under seal and address at the next hearing.

E. Motion to File Exhibit D Under Seal

The Petitioners also filed a *Motion to File Exhibit D of Motion to Compel Under Seal*, see Index #38, asking whether Exhibit D to the *First Motion to Compel* should be sealed upon filing of that pleading. See Index #36. That *Motion* does not advocate

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[20] The Union Leader's and NEFAC's *Motion to Intervene and to Unseal All Petitions, Motions, Exhibits, and Other Documents*, see Index ##50, 53, is GRANTED. The Court grants the requests of the Union Leader and NEFAC to intervene for the limited purpose of seeking to unseal court records. It is otherwise GRANTED to the extent it seeks similar relief as the *First Motion to Unseal*.

[21] The Court observes that the Petitioners, in their *Limited Objection*, request that should the Court grant the Union Leader's and NEFAC's motion(s), that it mark Exhibits B and C of the *Petition*, see Index #1 and Exhibits B-1 and C-1 of the *Amended Petition*, see Index #36, as "Confidential – Subject to Protective Order." The Court declines their invitation as the terms of the Confidentiality Agreement expressly, and appropriately, state that this Court is not bound by that agreement. See Index ## 26-27.

sealing Exhibit D, which is Mr. Carman's response to Attorney Saturley's letter alleging deficiencies in the responses to the first set of discovery requests. Id. The Petitioners assert that they believe that Mr. Carman's letter is not subject to the Protective Order. The Petitioners state that they filed the *Motion*, however, "as an accommodation" to Mr. Carman, who sent the responsive letter with a "Confidential – Subject to Protective Order" designation.[22]

The ***Motion to File Exhibit D of Motion to Compel Under Seal***, see Index #38, is DENIED in light of this Court's ruling on the motions to unseal and because Mr. Carman has not endeavored to demonstrate why the pleading should be placed under seal.

SO ORDERED.

Dated: 5/1/2018

David D. King, Judge

[22] Notably, the Petitioners indicate that they will seek to unseal it, however, no such pleading has been filed to date.