IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

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| JAMES J. MURTAGH, M.D<br><br>Plaintiff,<br><br>v.<br><br>FULTON-DEKALB HOSPITAL AUTHORITY, EMORY UNIVERSITY, EMORY HEALTHCARE, INC., GRADY HEALTH SERVICES COMPANY, INC., JOHN DOES 1-10,<br><br>Defendants. | ) | Civil Action<br>File No. 2004-CV-94259 |

**MOTION TO INTERVENE AND MOTION TO UNSEAL COURT RECORDS**

COME NOW SENATOR DAVID SHAFER, SENATOR DAN MOODY, SENATOR ERIC JOHNSON, SENATOR TOMMIE WILLIAMS, REPRESENTATIVE JOHN LUNSFORD and REPRESENTATIVE MELVIN EVERSON, Georgia citizens, and, pursuant to O.C.G.A. § 9-11-24(b) and Uniform Superior Court Rule 25.1, move the Court for an Order allowing them to intervene permissively in this case for the sole purpose of moving to have the record in this case unsealed and to allow public access to all pleadings and documents filed in the above-styled civil action.

In support of these motions, Movants show the Court that they have the requisite "good cause" to unseal these records. Movants rely on their Brief in Support of Motion to Intervene and Motion to Unseal Court Records.

WHEREFORE, MOVANTS respectfully request the Court enter an Order allowing them to intervene permissively and unsealing the pleadings and documents

previously filed in this matter and continuing to allow public access any pleadings or other documents filed in this case in the future.

This _____ day of _____, 2007.

Respectfully submitted,

_____
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| JAMES J. MURTAGH, M.D<br><br>Plaintiff,<br><br>v.<br><br>FULTON-DEKALB HOSPITAL AUTHORITY, EMORY UNIVERSITY, EMORY HEALTHCARE, INC., GRADY HEALTH SERVICES COMPANY, INC., JOHN DOES 1-10,<br><br>Defendants. | ) | Civil Action<br>File No. 2004-CV-94259 |

**BRIEF IN SUPPORT OF MOTION TO UNSEAL COURT RECORDS**

COME NOW SENATOR DAVID SHAFER, SENATOR DAN MOODY, SENATOR ERIC JOHNSON, SENATOR TOMMIE WILLIAMS, REPRESENTATIVE JOHN LUNSFORD and REPRESENTATIVE MELVIN EVERSON, MOVANTS, and support their Motion to Unseal Court Records as follows:

## I. STATEMENT OF FACTS

Movants are members of the Georgia General Assembly. Senator David Shafer is a Georgia State Senator who represents the 48th Senate District, which embraces a portion of Fulton County. Senator Shafer currently serves on the Senate Committee on Assignments and Senate Health and Human Services Committee, among other committee assignments. Senator Dan Moody is a Georgia State Senator representing the 56th Senate District, which embraces a portion of Fulton County. Senator Moody is also a resident of Fulton County. Senator Moody currently serves as Vice Chairman of the Fulton County

Senate Delegation and on the Senate Committee on Assignments, among other committee assignments. Senator Eric Johnson is a Georgia State Senator representing the 1st Senate District. Senator Johnson currently serves as President Pro Tempore of the State Senate and on the Senate Committee on Assignments, among other committee assignments. Senator Tommie Williams is a Georgia State Senator representing the 19th Senate District. Senator Williams currently serves as Senate Majority Leader and as Chairman of the Senate Committee on Assignments, among other committee assignments. Representative John Lunsford is a Georgia State Representative who represents the 110th House District. Representative Lunsford currently serves on the House Health and Human Services Committee and House Special Committee on Grady, among other committee assignments. Representative Melvin Everson is a Georgia State Representative who represents the 106th House District. Representative Everson currently serves on the House Special Committee on Grady, among other committee assignments.

The Georgia General Assembly is currently conducting investigations into the operations and viability of the Fulton-DeKalb Hospital Authority, which owns Grady Memorial Hospital and does business as the Grady Health System (hereinafter "Grady"). Grady cares for nearly one million Georgians annually and is the safety net hospital for Fulton and DeKalb Counties. It has been widely reported in the news media that Grady is insolvent, hemorrhaging cash and in jeopardy of closing. Grady has asked the State of Georgia for financial assistance to prevent its closure.

Upon information and belief, documents have been produced in this case under seal that bear directly on the current public policy debate and would be of enormous

value to the Georgia General Assembly in investigating the operations of Grady and determining and correcting the root causes of the current financial crisis. Movants serve on the various committees of the Georgia General Assembly currently investigating or having jurisdiction over Grady. In correspondence addressed to Senator Shafer and presented to the House Special Committee on Grady, a former trustee of Grady, William Loughrey, has stated that the case files of sealed whistleblower settlements contain information "bear(ing) directly on the current public policy debate concerning the future of Grady." Mr. Loughrey has urged the unsealing of whistleblower settlements, calling the decision to seal these settlements unjustified and "outrageous" given that they contain information concerning "the management of a public entity and the handling public funds." Movants show the Court that access to the records filed in this litigation is essential to the work of Georgia General Assembly, specifically its investigation of Grady.

Although Movants' knowledge of the pending litigation is necessarily limited because of the Court's previous Order requiring all documents and pleadings in this matter be filed under seal, Movants have determined some information about it from related court cases referenced by Mr. Loughrey, portions of which case files are not sealed. In Murtagh v Fulton-DeKalb Hospital Authority et al, 1:99-CV-03157-BBM (N.D. Ga. 2001), Dr. James J. Murtagh alleged extensive public corruption and whistleblower retaliation by Grady and its affiliated Emory University. Dr. Murtagh was an Emory University faculty member working at Grady. The Court unsealed the records of this underlying case in April 2001. Those records reveal extensive testimony and documents alleging financial wrongdoing, public corruption and whistleblower

retaliation, specifically including the alleged use of a bad faith peer review to silence Dr. Murtagh. In June 2001, the Court denied Defendants' Motion for Summary Judgment. Subsequently, in August 2001, the case was settled. Grady has refused a request by Senator Shafer under the Georgia Open Records Act for access to the settlement agreement, citing confidentiality provisions that Movants believe violate public policy.

Dr. Murtagh filed the pending action on November 30, 2004 in Fulton Superior Court. This file has been sealed, but the history suggests public corruption may be alleged in the sealed case, and that this case may be a continuation of the original case. If Grady used a bad faith peer review or engaged in other unlawful conduct to intimidate Dr. Murtagh or others from blowing the whistle on public corruption or improper patient care, extremely grave public interests are at stake.

The public has a right to know if Grady is following good faith processes, if patients are being protected, if the public purse is being used properly and if closed door sessions determining the fate of Grady are being properly conducted. The public has the right to know if whistleblower reports are being honestly and seriously investigated or if public corruption has been concealed by either retaliatory action against the whistleblowers or cash payments to silence whistleblowers.

Moreover, the Georgia General Assembly must have this information if it is to determine and correct the causes of the current financial crisis at Grady properly and respond to the requests for financial assistance by Grady.

## II. ARGUMENT AND CITATION OF AUTHORITY

In designing Uniform Superior Court Rule 21, the Georgia Supreme Court and the Council of Superior Court Judges, (1983 Ga. Const. Art. VI, Sec. IX, Para. I )

incorporated the presumption that the public will have access to all court records. USCR 21 states "All court records are public and are to be available for public inspection unless public access is limited by law or by the procedure set forth below." The aim of this presumption is to ensure that the public will continue to enjoy its traditional right of access to judicial records, except in cases of clear necessity. To this end, the presumptive right of access includes pre-judgment records in civil cases, and begins when a judicial document is filed. *See* Atlanta Journal v. Long, 258 Ga. 410, 413-414, 369 S.E.2d 755, 758 (1988). A party who moves to seal court records has the burden of overcoming this presumption, by demonstrating that "the harm otherwise resulting to [his privacy] clearly outweighs the public interest," USCR 21.2. The trial court has the corresponding duty to weigh the harm to the privacy interest of that party from not sealing the pre-judgment documents against the harm to the public interest from sealing the documents. Before sealing the documents, the court must conclude that the former clearly outweighs the latter. Id. at 759.

Georgia public policy clearly favors wide open access and dissemination of court documents. "Public access protects litigants both present and future, because justice faces its gravest threat when courts dispense it secretly. Our system abhors star chamber proceedings with good reason. Like a candle, court records hidden under a bushel make scant contribution to their purpose." Atlanta Journal v. Long, 258 Ga. 410, 411, 369 S.E.2d 755, 757 (1988).

The Supreme Court of Georgia has held the standard for amending an Order sealing court records is simply "good cause." "Upon notice to all parties of record and after hearing, an order limiting access may be reviewed and amended by the court

entering such order or by the Supreme Court at any time on its own motion or upon the motion of any person for good cause." Long, supra, at 413. The Eleventh Circuit has held likewise: "where a third party seeks access to material disclosed during discovery and covered by a protective order, the constitutional right of access, like Rule 26, requires a showing of good cause by the party seeking protection." Chicago Tribune Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1310 (11th Cir. 2001). Likewise, that Court has disfavored the sealing of court documents in a civil case and has held: "where, as in the present case, the [court] attempts to deny [ ...] access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is *necessitated by a compelling governmental interest, and is narrowly tailored to [...] that interest.*" '*Wilson v. American Motors Corp.,* 759 F.2d 1568, 1571 (11th Cir.1985) (quoting *Newman v. Graddick,* 696 F.2d 796, 802 (11th Cir.1983) (quoting *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 606-07, 102 S.Ct. 2613, 2619-20, 73 L.Ed.2d 248 (1982))) (emphasis added); *see also* Brown v. Advantage Engineering, Inc., 960 F.2d 1013, 1015 -1016 (11th Cir. (Ga.)1992).

Movants, as members of the Georgia General Assembly and of committees currently investigating and having jurisdiction over Grady, have standing to intervene in this matter on behalf of their constituencies and all Georgia citizens. "[B]ecause it is the rights of the public, an absent third party, that are at stake, any member of the public has standing to view documents in the court file that have not been sealed in strict accordance with *Wilson,* and to move the court to unseal the court file in the event the record has been improperly sealed." Brown v. Advantage Engineering, Inc., 960 F.2d 1013, 1016 (C.A.11 (Ga.)1992). Under Brown and O.C.G.A. § 9-11-24(b), Movants have

proven they have standing to intervene and the Court should allow them to intervene permissively to move the Court to unseal the record of this case.

Secondly, Movants have shown this Court "good cause" to unseal the record in this case. Dr. Murtagh, in prior litigation and, perhaps in this case, has alleged, among other things, Grady has engaged in bad faith peer review of physicians' work to intimidate them from blowing the whistle on wrongdoing. If Grady did, in fact, hold bad faith peer reviews to silence whistleblowers on matters of public interest, the public has a right to know any and all details, and legislators need to take remedial steps to protect the public. Further, if Grady made cash payments to any such whistleblowers, in the guise of court settlements or otherwise for the purpose of purchasing their silence, the public has the right to know any and all such details as well.

There have also been widespread allegations that Grady may have mismanaged public funds which resulted in the financial crisis it faces today. The silencing of whistleblowers through cash payments and confidential settlements and the conduct of whistleblower litigation under seal undermines public confidence in Grady, interferes with the ability of the Georgia General Assembly to properly investigate the crisis involving Grady, deters the State of Georgia from financially assisting Grady, and potentially jeopardizes the survival of Grady.

Upon information and belief, the records filed under seal in this case would assist the Georgia General Assembly in its investigation of Grady, its efforts to determine and correct the root causes of the financial crisis at Grady, its response to requests by Grady

for financial assistance and its consideration of measures to save and reform Grady. This meets the standard of "good cause" to unseal the record in this case.

For these reasons, Movants respectfully pray that the Court grant them permission to intervene in this matter and grant their motion to unseal the record in this case, as it is in the best interests of the citizens of Georgia.

This _____ day of _____, 2007.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this _____ day of _____, 2007 served a true and correct copy of the forgoing *Motion to Intervene and to Unseal Court Records* and *Brief in Support of Motion* via electronic mail and U.S. Mail, postage pre-paid, as addressed as follows:

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