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IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

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	:	
RAPHAEL J. OSHEROFF,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Law No. 66024
	:	
CHESTNUT LODGE, INC.,	:	
MANUEL ROSS, M.D.,	:	
C. WESLEY DINGMAN, M.D.,	:	
	:	
Defendants.	:	
	:	
-----	x	

MOTION RAISING PRELIMINARY OBJECTION

Rockville, Maryland 2019

May 2, 1984

ALL INQUIRIES

CONTACT  
TECHNICAL SERVICES  
TRANSCRIPT DESK

251-7507

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1 IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

2 ----- x  
 3 RAPHAEL J. OSHEROFF, :  
 4 Plaintiff, :  
 5 v. : Law No. 66024  
 6 CHESTNUT LODGE, INC., :  
 7 MANUEL ROSS, M.D., :  
 8 C. WESLEY DINGMAN, M.D., :  
 Defendants. :  
 ----- x

9 Rockville, Maryland

10 May 2, 1984

11 WHEREUPON, proceedings in the above-entitled  
12 matter commenced:

13 BEFORE: THE HONORABLE RICHARD B. LATHAM, Judge

14 APPEARANCES:

15 FOR THE PLAINTIFF:

16 PHILIP P. HIRSCHKOP, Esq.  
 17 JOHN D. GRAD, Esq.  
 18 DAVID J. FUDALA, Esq.  
 108 North Columbia Street  
 Post Office Box 1226  
 Alexandria, Virginia 22313

19 ROBERT SALZER, Esq.  
 1320 Fenwick Lane  
 Silver Spring, Maryland 20910

20 FOR THE DEFENDANTS:

21 WILLIAM A. EHRMANTRAUT, Esq.  
 51 Monroe Street, Suite 700  
 22 Rockville, Maryland 20850

23 JAMES F. ROSNER, Esq.  
 24 ALFRED L. SCANLAN, JR., Esq.  
 2000 First Maryland Building  
 25 25 South Charles Street  
 Baltimore, Maryland 21201

P R O C E E D I N G S

1  
2 THE CLERK: Law Number 66024, Osheroff v.  
3 Chestnut Lodge, et al.

4 THE COURT: You gentlemen want to identify  
5 yourself as to who you are and who you represent in this  
6 case.

7 MR. ROSNER: Your Honor, I am James Rosner, and  
8 I represent Chestnut Lodge.

9 THE COURT: How do -- R-O-S-N-E-R?

10 MR. ROSNER: Yes, sir.

11 THE COURT: Okay.

12 MR. EHRMANTRAUT: William Ehrmantraut, attorney  
13 for the Defendants, Dr. Ross and Dr. Dingman.

14 MR. SALZER: Your Honor, Robert Salzer for the  
15 Plaintiff. I have entered my appearance this morning for  
16 the sole purpose of being Maryland Counsel to Mr. Philip  
17 Hirschkop sitting on my right who is an out-of-state  
18 Counsel.

19 MR. HIRSCHKOP: Your Honor, Philip Hirschkop,  
20 and I represent the Plaintiff, Rapheal Osheroff.

21 MR. SALZER: Your Honor, I would move at this  
22 time to admit Mr. Hirschkop for purposes of trying this  
23 matter. Mr. Hirschkop is a member of the Bar of the State  
24 of Virginia. He is a member in good standing of that Bar.  
25 He has not tried a case in the State of Maryland in the

1 last 12 months. Now, a formal motion has not been submitted  
2 to the Court, and that is why I move him at this time. His  
3 Maryland Counsel did not appear today.

4 THE COURT: We better get this thing started off  
5 on the right foot. I do not know what Mr. Hirschkop is  
6 doing out here practicing law in our jurisdiction. As I  
7 understand, you have not been admitted in this case, is  
8 that right?

9 MR. HIRSCHKOP: No sir, I did argue the panel  
10 hearing, Your Honor. I was here for three weeks in the  
11 panel hearing. We do have Maryland Counsel on the papers  
12 that indicate --

13 THE COURT: Well, do not tell me about Maryland  
14 Counsel. We have rules over here how to do these things,  
15 and I do not understand lawyers filing pleadings in  
16 proceedings that they are not members of the Bar before  
17 they are properly before the Court.

18 MR. HIRSCHKOP: Your Honor, our advice was we were  
19 doing it properly. It was not until this morning Mr.  
20 Salzer informed me for the first time that it was not in  
21 conformity. That is why we brought it to your attention  
22 immediately, but we certainly will file whatever is  
23 necessary, Your Honor.

24 THE COURT: Well, there is not any motion here  
25 that has been filed in this Court, and you have been

1           apparently filing pleadings in here on a regular basis.

2           MR. HIRSCHKOP: Your Honor, I will attend to that  
3 as soon as I get back to the office. I did not realize it  
4 was a violation -- what was happening. I have not filed  
5 those pleadings, but I certainly take responsibility for my  
6 office.

7           THE COURT: What is your name?

8           MR. SALZER: Robert Salzer, Your Honor.

9           THE COURT: Who is John D. Grad, G-R-A-D?

10          MR. SALZER: John Grad, Your Honor, is a partner  
11 in form --

12          THE COURT: Is he a member of the Maryland Bar?

13          MR. SALZER: No, Your Honor, but Michael Abelson,  
14 Esquire, is who has joined as Counsel in the original  
15 pleadings. At least that is what I have been lead to  
16 understand this morning. Mr. Abelson could not appear this  
17 morning and apparently did not inform Mr. Hirschkop of  
18 the necessity to make a special motion to be admitted for  
19 purposes of a single case. His name is appearing on the  
20 pleadings, Your Honor, Michael Abelson, Esquire.

21          THE COURT: Well, are you prepared to argue this?

22          MR. SALZER: Mr. Hirschkop is prepared.

23          THE COURT: That question is directed to you.

24          MR. SALZER: No, Your Honor, I am not prepared to  
25 argue it. I have this morning taken the time to read the

1 motion.

2 THE COURT: Well, Mr. Hirschkop cannot argue it  
3 because he is not before the Court properly, and you are not  
4 prepared to argue I take it. Do you know Mr. Abelson, Mr.  
5 Hirschkop?

6 MR. HIRSCHKOP: I have never met him personally.  
7 I have spoken with him on the phone, Your Honor.

8 THE COURT: Did you people do anything about  
9 checking with the Maryland Rules for Practice and Procedure  
10 before you came over here and filed this lawsuit in our  
11 Court?

12 MR. HIRSCHKOP: We checked with Mr. Abelson, Your  
13 Honor, in light of his advice on it. We had brought it --

14 THE COURT: Are you telling me that he advised  
15 you to go ahead and file a lawsuit over here in which you  
16 sign your name as Counsel of record without even being  
17 admitted?

18 MR. HIRSCHKOP He was on the lawsuit also, Your  
19 Honor. Yes, we thought that was the proper form. If it  
20 was a mistake, we certainly will correct it, Your Honor.  
21 It was not an effort to defraud the Court in any way or to  
22 deceive the Court, and we do practice extensively in other  
23 states. The procedure, apparently, in Maryland is not the  
24 common procedure in other states. So it is purely --

25 THE COURT: When you go to other states, you

1 file -- a Maryland lawyer goes over to Virginia, a Maryland  
2 lawyer is expected by the Court over there to follow the  
3 rules or practices and procedure over there --

4 MR. HIRSCHKOP: Yes, sir.

5 THE COURT: Would you agree with that, sir?

6 MR. HIRSCHKOP: What happens over there, Your  
7 Honor, is they just admit on a motion pro hoc viche by  
8 resident Counsel. I would ask for leave of the Court and  
9 would just argue that these are very short motions pro hoc  
10 viche today, and we will file the appropriate pleading.

11 THE COURT: I take it you have not even met Mr.  
12 Abelson?

13 MR. HIRSCHKOP: He has met with the other lawyers  
14 in my firm. I have not personally met, no sir, Your Honor.  
15 At the arbitration, it was determined that Maryland Counsel  
16 did not have to be present. There were a lot of  
17 proceedings before that, and I think it was worked out with  
18 the Attorney General's Office actually as to whether or not  
19 Maryland Counsel was required. At the administrative end  
20 of a proceeding, it was determined they were not required.

21 I spoke to Mr. Abelson just last night, Your  
22 Honor.

23 THE COURT: Did anybody in your firm ever discuss  
24 with him about the procedures of having a Virginia lawyer  
25 come over here and practice law in the State of Maryland?

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1 MR. HIRSCHKOP: Yes sir, that was looked into  
2 extensively at the arbitration panels. There was a question  
3 whether we could be here without him or not, and as I say,  
4 there was carte blanche with the Attorney General's Office,  
5 and there may have been some pleadings filed along those  
6 lines. It was not something we just ignored, Your Honor.  
7 It was something we did look into --

8 THE COURT: You certainly do not relate what we  
9 are doing here in this Courthouse with an arbitration  
10 proceeding, do you, Mr. Hirschkop?

11 MR. HIRSCHKOP: No sir, I do not. I am not  
12 unmindful of rules, Your Honor. I am on the governing  
13 body of the Virginia State Bar, and when I saw what  
14 happened this morning, I immediately said we will get the  
15 proper pleadings filed and bring it to the Court's  
16 attention which is why Co-Counsel got up initially to  
17 make it known to Your Honor.

18 THE COURT: Mr. Rosner, you have some motions in  
19 here apparently. Do you want to go first?

20 MR. EHRMANTRAUT. Let me say this, Your Honor,  
21 on behalf of Mr. Rosner. His motion is the same as my  
22 motion, and he will argue on behalf of all the Defendants  
23 rather than have me repeat. I may briefly add something,  
24 but we are trying to keep the time --

25 THE COURT: As I understand it, there is a Motion



1 to Strike the Jury Demand, but that becomes moot if the  
2 preliminary objection is granted.

3 MR. EHRMANTRAUT: That is correct, Your Honor.

4 THE COURT: Okay.

5 MR. EHRMANTRAUT: I would request that Mr. Rosner  
6 speak on behalf of all Defendants.

7 THE COURT: All right. 15 minutes. That does not  
8 mean you have to take 15.

9 MR. ROSNER: May it please the Court, we have two  
10 motions. If Your Honor pleases, I will argue the Motion  
11 Raising Preliminary Objection first, and if necessary,  
12 address the Motion to Strike if that is suitable with you?

13 THE COURT: Go ahead.

14 MR. ROSNER: Okay. Basically we have raised  
15 three issues in our Motion Raising Preliminary Objection.  
16 The first issue, Your Honor, is that the Court does not have  
17 subject matter jurisdiction to hear this case because  
18 no declaration has ever been filed pursuant to the B-Y  
19 Rules of Maryland Procedure.

20 The second issue that we have addressed is that  
21 there insufficiency of service of process in this case. The  
22 third issue is that the arbitration determination that was  
23 made by the arbitration panel was improperly made and should  
24 be vacated.

25 Now addressing the subject matter of jurisdiction

1 argument. In this case on January 11th of 1984, the Health  
2 Claims arbitration panel served an amended arbitration  
3 determination. On January 17th of 1984, the Defendants  
4 filed a Notice of Rejection of that award, and they also  
5 filed an Action to Nullify.

6 The B-Y Rules have to be read in conjunction  
7 with the Maryland Arbitration Statute. The statute says  
8 that the Notice of Rejection has to be filed within 30 days  
9 of service of the award. The statute also says that an  
10 Action to Nullify must be filed in the Circuit Court within  
11 30 days of serving of the award. The B-Y Rules then say  
12 within days after the Action to Nullify is filed, the  
13 Plaintiffs are required to file a declaration in Court.

14 The Health Claims arbitration statute specifically  
15 provides that the filing of the declaration in the Circuit  
16 Court must be pursuant to the Maryland Rules of Procedure,  
17 and I would cite to the Court the statute is 3-2A-06(b).  
18 It specifically says that the Maryland Rules of Procedure  
19 shall be filed with the filing of the initial declaration.  
20 In this case, no declaration has ever been filed pursuant  
21 to the B-Y Rules.

22 An Action to Nullify was filed by the Defendants.  
23 An Action to Nullify was filed later by the Plaintiff. An  
24 Amended Action to Nullify was again later filed by the  
25 Plaintiff. No declaration was ever filed. It is our

1 position that the B-Y Rules are mandatory in requiring that  
 2 a declaration be filed within 30 days. Now, I am sure Your  
 3 Honor knows much better than I the Rules of Procedure  
 4 governing the filing of declarations in Maryland. Rule 301  
 5 provides a number of specifics about a declaration. One of  
 6 things it provides, and if necessary, I can cite the specific  
 7 sections, it specifically provides that it has to be a title  
 8 declaration. It specifically provides that it must contain  
 9 the names of the parties. It must contain the parties'  
 10 addresses. It provides here that if there is out-of-state  
 11 Counsel, it must be certified with his name, address and  
 12 a statement that he is a member in good standing of the  
 13 Maryland Bar. All of that is provided in 301-G.

14 The Action to Nullify has as an exhibit  
 15 attached to it a the Statement of Claim that was filed --  
 16 pardon me -- the Amended Statement of Claim that was filed  
 17 in the Health Claims Arbitration Office. You can see if  
 18 you take a look at it -- and it is attached to the  
 19 document -- it has a date of September 1983 written on the  
 20 bottom of it. It does not indicate that it is a declaration.  
 21 It does not meet any of the requirements whatsoever of a  
 22 declaration being filed pursuant to the sections that I have  
 23 just referred to in Rule 301.

24 It is clear that the Plaintiffs were not familiar  
 25 with the B-Y Rules. It is clear that they did not intend

1 to serve a declaration. The time period for serving the  
 2 declaration starts to run after the Action to Nullify has  
 3 been filed. What we have is an Action to Nullify by the  
 4 Plaintiffs in this case, but we never had a declaration  
 5 that is filed by them thereafter. So it is our position  
 6 that the Court does not have jurisdiction to hear the case  
 7 because the requirement of filing a declaration within 30  
 8 days after the Action to Nullify is a mandatory requirement.

9 I have been able to obtain three decisions from  
 10 Circuit Courts in Maryland who considered issues similar to  
 11 this. I have a case from Howard County, Baltimore City and  
 12 Baltimore County, and those are available if Your Honor  
 13 would like to review them -- where very similar issues have  
 14 been before the Court, and all three of the Courts have  
 15 said that those rules are mandatory rules, and the time  
 16 periods are mandatory rules, and they are not discretionary.  
 17 They must be followed.

18 The second issue is the insufficiency of service  
 19 of process. Again, I would refer back to the Health Claims  
 20 Statute, Section 3-2A-06(b). That statute says that the  
 21 Maryland Rules of Procedure are applicable, and the filing  
 22 of declarations are governed by them. The Maryland Rules of  
 23 Procedure on service of process, Rule 103C, says that when  
 24 an action is commenced, process is to be issued by the  
 25 Clerk of the Court. A summons is to be issued, and it is

1 to be issued on each of the Defendants. In this case, no  
2 declaration was filed. The parties did not provide the  
3 Clerk of the Court with copies of declarations to be served  
4 with summons on the parties. They have never been served,  
5 and so we say that the Motion Raising Preliminary Objection  
6 on the ground of insufficiency of service of process is  
7 properly raised because there was no issuance of service.

8 The third issue that we have raised is that the  
9 arbitrators' award itself should be vacated because it is an  
10 improper award. Now, the arbitration panel met following a  
11 hearing in this case and came to a determination on  
12 December 23rd of 1983. That award was served on Walter  
13 Cabler at the Health Claims Arbitration Office.- He is the  
14 Director of the Health Claims Arbitration Office -- as is  
15 required by statute, and Walter Tabler then wrote back a  
16 letter dated January 5th of 1984 refusing to accept the  
17 arbitrator's award. All of that is attached -- all four  
18 of these letters and determinations are attached to our  
19 motion.

20 So the January 5th letter instructed the panel  
21 that the award was unacceptable -- that they were going to  
22 have to reach an agreement on the issue of liability and  
23 damages. What had happened in the case was none of the  
24 three arbitrators could agree on anything. No, that is not  
25 entirely accurate. The panel chairman found no liability

1 and consequently no damages. The doctor member of the  
2 panel found liability and damages in the sum of \$44,000 and  
3 some odd dollars. The lay panel member wanted to award  
4 \$400,000. So there was no agreement between the three of  
5 the, and that was the reason for Walter Tabler sending the  
6 award back to be reconsidered again.

7 The panel members submitted a second award. It  
8 was an amended award on January 10th, and it is following  
9 the submission of the second award that this appeal follows.  
10 Now, our position is that Mr. Tabler had absolutely no  
11 authority whatsoever to refuse to accept the initial  
12 arbitration award in this case. We refer the Court to  
13 Attorney General v. Johnson in our brief, and the Maryland  
14 Court of Appeals specifically states what the authority of  
15 Walter Tabler is in that opinion, and he says that the  
16 Director of the Health Claims Arbitration Office does  
17 essentially two things. Number one, he handles the  
18 servicing of claims -- the paperwork that needs to be done  
19 in that office, and the second thing is he submits lists of  
20 proposed panel members that the attorney can strike from.  
21 Those are the two things that he can do.

22 The Court specifically says that he has no  
23 judicial authority whatsoever. There is no requirement in  
24 the Health Claims Arbitration Statute that there must be  
25 an agreement among the arbitrators. There is no statement

1 in there that you cannot have a disagreement or a hung  
2 panel much the same as you could have a hung jury, and yet,  
3 Mr. Tabler exercised judicial authority and more authority  
4 than what a Judge could because he said, "We will not accept  
5 your award until you reach a majority decision".

6 The statute provides by reference to the  
7 Arbitration Statute a means of vacating an award, and I  
8 would refer Your Honor to the course of Judicial Proceedings  
9 Article, Section 3-224, and it says -- it gives four  
10 grounds for which an award can be vacated, and one of them  
11 includes undue means. The second one is misconduct  
12 prejudicing the rights of any party, and the third is that  
13 the arbitrators exceeded their power, and we are contending  
14 that all three of those are applicable because Mr. Tabler  
15 did not have authority to do what he did. He did not have  
16 authority to reject the award, to send it back. The  
17 arbitration panel members did not have authority to meet  
18 and reconsider their decision. The statute provides only  
19 for their reaching a decision, and if an attorney files for  
20 a modification of award, and there are specific grounds  
21 for that, they can reconsider and modify the award, but  
22 there is no authority for reconsidering the entire award  
23 such as was done in this case, and it falls within none of  
24 the specific exceptions within the statute.

25 So the arbitrators exceeded their power. Mr.

1 Tabler exercised undue influence on the arbitrators when  
2 he required them to reconsider the award in this case, and  
3 we ask that the Court vacate the arbitration award.

4 Now, the other motion that we filed is the  
5 Motion to Strike. I will address that if Your Honor pleases;  
6 otherwise, I will reserve if you would like me --

7 THE COURT: Let me hear from Mr. Hirschkop.

8 MR. HIRSCHKOP: If it pleases Your Honor, in  
9 regard to the first point on the petition. There is a  
10 problem in Maryland law in that there is a conflict between  
11 the law and the rules. The law has been modified since  
12 the rules were first passed. The law which is Section  
13 3-2A-06 in the Maryland Course of Judicial Procedure says  
14 that a Notice of Rejection must be filed within a 30 day  
15 period from the time award is made from the panel.

16 Now within that same time, Section B of that, you  
17 must file an Action to Nullify the Award within the Court.  
18 The rules B-Y-2 and B-Y-4 have you file within 90 days a  
19 notice to the arbitration award and then a petition. We  
20 did not file a petition. What we did is with the conflict  
21 in rules we took the earlier time period, and we took the  
22 law -- the statute -- over the rules. We felt compelled to  
23 do that, and it was not something we did arbitrarily. We  
24 did, in fact, consult several Maryland Counsel who are  
25 experienced in this area.



1           The only infirmity they seem to point out is we  
2 did not call some things a petition. In fact, what we  
3 filed -- if you are looking in the records, Your Honor, the  
4 Action to Nullify the Award -- it has everything you would  
5 have in a petition. It has the complete substance  
6 statement. It is the statement Counsel referred to as  
7 handwritten in September -- notice of -- because that is  
8 our amended notice in the arbitration panel. We used that  
9 to then start the Court proceeding. Everything is in there  
10 though. Same Defendants and the same proceedings.

11           Now, I'm sorry. I called it a petition. It is a  
12 declaration. It is a question then of form over substance,  
13 Your Honor. I point out that regard to a declaration, there  
14 is nothing in there that -- other than the address of the  
15 Defendants I think they pointed out in their pleadings --  
16 that would be lacking. These are Defendants we have been  
17 litigating with for over a year. Certainly that would be  
18 pure form.

19           Maryland Rule 3-01C says "Any pleading which  
20 contains a clear statement of the facts necessary to  
21 constitute a course of action or ground of defense shall be  
22 sufficient without reference to mere form". So whether we  
23 call --

24           THE COURT: Let me interrupt, Mr. Hirschkop. I  
25 am looking at what is filed up here, an Action to Nullify

1 HCA Award, which was filed on January 31, 1984.

2 MR. HIRSCHKOP: Yes, sir.

3 THE COURT: Apparently it has attached to it an  
4 amended statement of claim which is followed up HCA Number  
5 82-262.

6 MR. HIRSCHKOP: Yes, sir.

7 THE COURT: Is that what you claim is your  
8 declaration?

9 MR. HIRSCHKOP: That is our initial pleading to  
10 the Court which would meet the needs of the declaration,  
11 yes sir. You see all the statute calls for, Your Honor, is  
12 the Action to Nullify the Award, and the statute, with the  
13 much shorter time frame, nullified the rules. Had you  
14 tried to follow the rules, we had been out of Court for not  
15 filing the action -- for not following that statute. The  
16 statute is the 30 day limitation, and the Court, of course,  
17 has a much longer limitation.

18 We had to follow one or the other. We followed  
19 the statute, but everything we followed in the statute, the  
20 Action to Nullify has all the substance you would require  
21 of a declaration.

22 THE COURT: I do not agree with that. This  
23 Action to Nullify does not include anything that we would  
24 require here in our pleadings as to a declaration, but go  
25 ahead.

1 MR. HIRSCHKOP: Well, all the substantive claims  
2 are there, Your Honor, is what I am trying to say. When  
3 you look at the tendered portion, that has all our  
4 substantive claims. Now, with regard to form, Your Honor,  
5 they have also complained we do not have a statement of our  
6 amount of damages, for instance, as why it was in the  
7 declaration. I note Maryland Code Section 3-2A-02 prohibits  
8 us from setting forth the exact amount in the claim.

9 "Initial pleadings filed in any subsequent  
10 action may not contain a statement to the amount of  
11 damages sought." In regard to that, Your Honor, all that  
12 is allowed we did under the statute. What their complaint  
13 is we did not do it under the rules. The rules put us in a  
14 different time frame. That would have put us beyond the  
15 statute. We had to follow one or the other.

16 Now, we could have done both, I guess, by saying  
17 it is a declaration and an action. Once we say that, I  
18 think we have met their objections unless it is just  
19 the fact that we did not include the addresses of the  
20 Defendants or the amount of damages sought.

21 I point also to Maryland Rule 3-20-A4, Your Honor.  
22 "The Court, in every stage of the proceeding, shall  
23 disregard any error or defect in process, pleadings or  
24 records which does not effect the substantial rights of the  
25 parties." I point to Your Honor that had we come in and

1 filed 30 days out of time or 100 days out of time or  
2 something, even then we might have said unless it is a  
3 jurisdictional question that would divest you of  
4 jurisdiction, we might seek to amend. They themselves, in  
5 fact, when they wanted to file a response, came into the  
6 Court and got a 30 day extension to file a response, and  
7 on the same day they applied were granted the 30 days.

8 So the Court can, under Rule 320, allow for  
9 correction of any defects -- do not, however, allow for  
10 substance. Now on the substance, they are not prejudiced  
11 in any way by anything we have done. We, in fact, filed  
12 very promptly. The award came out, I think, on January  
13 11th, and we filed on January 30th. We filed an amended  
14 thing on February 7th because of the jury trial demand, but  
15 we moved very promptly. It was not that we sat back on our  
16 hands and did not do anything.

17 The statute says you should file an Action to  
18 Nullify. We filed an Action to Nullify. What they are  
19 complaining we are lacking is the word declaration, and the  
20 exact form of the declaration, but the substance, we submit,  
21 is here, Your Honor. It would be a severe injustice  
22 because it does not have that exact form to say now that  
23 if you require it be in that form, that we cannot amend  
24 put it in that form.

25 Secondly, on the service of process, Your Honor,

1 Rule B-Y-2B, the very rules they are seizing upon, say  
2 "A copy of the notice shall be served on all of the parties  
3 to the arbitration proceeding. Service and proof of service  
4 of the notice and all subsequent papers in the action shall  
5 be in the manner prescribed by Rule 306."

6 Rule 306B of the Maryland Rules indicates that  
7 where there is a Counsel, the service shall be made upon  
8 the attorney. We, indeed, made the service upon the  
9 attorney, and this is a subsequent paper under the very  
10 statute in which we are proceeding. I point also to Rule --  
11 the very statute -- and I have quoted them in the  
12 Plaintiff's reply, Your Honor, the statute is set out in  
13 complete text, but in the statute it says that you may  
14 serve on the parties or their Counsel. "A Notice of  
15 Rejection must be filed directly to the arbitration panel  
16 and served on the other parties or their Counsel."

17 So again, we followed exactly what was set forth  
18 there. We did not follow the rules as if it was just a  
19 totally initial action, nothing had happened. B-Y-2 and  
20 B-Y-4 set forth at that point what we should do on just  
21 that procedure. B-Y-2 says you follow Rule 306. Even if  
22 there was no B-Y-2, 306 says that where there is a Counsel  
23 in an action, you shall serve the Counsel in the action,  
24 and in fact, the rule I just read a moment ago, the original  
25 statute says you serve either party or the Counsel on the

1 notice. So I think we did all we could on that.

2 Now with regard to the arbitration panel  
3 determination, it is our view, Your Honor, that the first  
4 thing sent in by the panel was not award. The law in  
5 Maryland, as we understand it, at Section 3-2A-050D which  
6 is quoted in our brief says, "The arbitration panel shall  
7 first determine the issue of liability," and then farther on  
8 it says it shall then consider and assess and apportion  
9 appropriate damages.

10 Now before they do that, the law is in Maryland,  
11 "An arbitration panel shall exercise its authority by a  
12 majority". The problem with the initial so-called award  
13 is it was not a majority decision. What they did is "Here  
14 is what one person said, here is what the other person  
15 says, and here is what the third person says". You can --

16 THE COURT: This is an arbitration panel  
17 determination that is dated December 23, 1983, I take it,  
18 is that right?

19 MR. HIRSCHKOP: Yes, Your Honor. That does not  
20 meet the law in the State of Maryland that it must be a  
21 majority decision, and they shall make those findings. What  
22 happened apparently is Cabler went back and said, "You  
23 have not given me an award in conformance with the law,"  
24 and they said okay, they re-met, and then they issued an  
25 award which then conformed to the law. It was the only

1 legal award, and in that award they apparently came up with  
2 a unitary award.

3 Now, the first award does find liability if you  
4 just count up the votes, but the second part of the statute,  
5 3-2A-05D, which says "It shall then consider and assess  
6 and apportion appropriate damages" was not met. So there  
7 was no award within the statute as is set forth in Maryland  
8 rules, and under that basis, we think it is a proper award  
9 and should stand.

10 MR. ROSNER: Your Honor, may I respond with  
11 one and a half minutes?

12 THE COURT: Okay.

13 MR. ROSNER: I would point out that the  
14 so-called Action to Nullify in no way was intended to be a  
15 declaration filed in this Court. If one will read page  
16 12, the last paragraph, it states "Upon the completion of  
17 discovery, Dr. Osheroff will provide the panel with  
18 appropriate records and other significant documents".

19 What would that have to do with a declaration  
20 filed in this Court? All they did was copy the same  
21 petition that had been filed in the Health Claims  
22 Arbitration Act. Now as to the right of Mr. Cabler to  
23 intervene with the arbitration panel, the Attorney General  
24 v. Johnson very clearly says that the arbitrators are  
25 obviously not a part of the executive unit created by the

1 Act and becomes plain that the unit so created, the Health  
2 Claims Arbitration Office, exercised no judicial function  
3 whatever, and in order to uphold the constitutionality of  
4 the statute, the Court of Appeals found that Mr. Tabler and  
5 his office had no right to exercise any judicial function,  
6 and what he did here, because he did not like the looks of  
7 this award by the arbitration panel, which this decision  
8 further says is completely separate and has no  
9 relationship with Mr. Tabler's office whatsoever, but is  
10 only -- they only handle the setting up of the panel period,  
11 and then they are on their own because they have been  
12 selected by the parties, and he has no right to control  
13 their actions, and that is what this decision says by the  
14 Court of Appeals.

15 Now, he had no right to intervene in this  
16 decision. He acted improperly. He was exercising judicial  
17 functions like Your Honor would if a jury was hung as far  
18 as its decision is concerned, and you may grant a new trial.  
19 He has no right to do that. Now, Your Honor, I think it is  
20 clear that they have --

21 THE COURT: Let me ask anybody who knows the  
22 answer to this -- what would happen if we did not have this  
23 amended thing in here? Do they start the process all over  
24 again? Suppose these people on December 23, 1983 filed  
25 this arbitration panel determination. Suppose Tabler had



1 not done what he did do, forgetting for the moment whether  
2 he has a right to do that, what would have the status of  
3 the matter been then?

4 MR. EHRMANTRAUT: Well, it would have been up to  
5 the parties to accept or reject the panel's decision  
6 as it stood on December 23.

7 MR. HIRSCHKOP: May I also give my input on that,  
8 Your Honor? I believe it was not an award until it was a  
9 majority in accordance with law. If it was brought to a  
10 Court, I think the Court would direct the panel to render  
11 an award according to law or else come back and say they  
12 are just unable to in which case is then tantamount to a  
13 mistrial.

14 THE COURT: That is what my problem is as to if  
15 you have in effect a hung jury before an arbitration panel,  
16 what happens?

17 MR. ROSNER: Your Honor, I do not believe there  
18 has been a case on that, but the statute itself  
19 specifically provides that the Court, if it is raised by  
20 way of preliminary objection -- preliminary motion -- can  
21 vacate an award, and what happens under those circumstances  
22 is that the case proceeds through a jury trial or Court  
23 trial the same as any other case filed in the Court.

24 The only distinction is that the presumption that  
25 is granted by the statute and that is given to the jury as

1 an instruction is not given in that case. It is just tried  
2 as any other case.

3 MR. EHRMANTRAUT: Mr. Rosner is correct, and that  
4 has been upheld. The only difference -- it is a trial de novo  
5 under either circumstances. The only difference if the  
6 arbitration panel decision becomes part of the record or  
7 the evidence, then the presumption applied. We tried one  
8 last year I guess it was in front of Judge Raker at which  
9 time we were confused by this ourselves, and Counsel and  
10 the Court agreed that we would act as if there had not  
11 been arbitration panel decision and just went on a de novo  
12 hearing throughout.

13 I would like before I forget, Your Honor, if you  
14 would like to have these decisions from the Circuit Court  
15 entertaining similar issues --

16 THE COURT: I do not need that.

17 MR. HIRSCHKOP: Your Honor, if I may just put  
18 my -- it is a different analogy I would draw on that, and  
19 I have this happen in a jury setting. The jury came back  
20 with a seven to five vote in a Court, and the Judge wrote  
21 back, "You have got to either reach a unanimous vote or  
22 tell me you are not able to reach a conclusion". They came  
23 back then with a unanimous vote.

24 They thought they knew a majority, took a vote  
25 and came out. They ignored the instruction that it had to

1 be either by a unanimous vote or they could not agree, and  
2 this is a case where they apparently did not follow that the  
3 law required a majority vote, sent it up, and he sent it  
4 back saying, "You have to find a majority vote". Now, they  
5 had the choice of saying this is all we can do, in which  
6 case I think you would vacate it, but that is not what  
7 happened.

8 They were able to reach a decision same as the  
9 jury when the Judge sends back in and says, "No, this is not  
10 what the law allows".

11 THE COURT: No, it would be a little different  
12 with a jury, Mr. Hirschkop. You take a jury verdict and  
13 if their verdict is that we cannot agree, that is the  
14 verdict, and then you start all over from scratch. What  
15 Tabler apparently did here, in effect, whether he had the  
16 authority to do it or not was if they say, "Our final  
17 determination really is that we cannot agree in this," and  
18 he, in effect, sends it back to them and says, "Well, you  
19 have to agree".

20 MR. HIRSCHKOP: I do not know that is in fact  
21 what happened, Your Honor. They sent and said. "This is  
22 our position". They did not say, "We cannot agree. Each  
23 of us has taken a separate position at this point". He  
24 said, "Well, you ought to try and reach a position". They  
25 could have come back and said, "This is where we are, and

1 we just cannot reach a position," but the same as you have  
2 when Judges repeatedly tell juries, "Well, you should try  
3 and reach a position" or "You are supposed to bring a  
4 unanimous verdict. You did not bring any verdict". That  
5 happens all the time, and I think we have to apply some  
6 common sense unless it is jurisdictional, and it is not  
7 within your power to do that, but this is not a  
8 jurisdictional question.

9 This is a proceeding that went on for three  
10 weeks after a year of preliminary proceedings give or take  
11 some months, and I think it has to be looked at with some  
12 sense of reality, Your Honor. I apologize for cutting in.  
13 I think Mr. Ehrmantraut may have had something else to  
14 present.

15 MR. EHRMANTRAUT: The only other thing I would  
16 say is that the Chairman in this case was George Shaffer,  
17 who I and myself had participated in other panels before  
18 this particular panel, and he knew what he was doing, and  
19 this was the decision of the panel as he reported it to  
20 Mr. Tabler, the initial one on December 23.

21 I also would call the Court's attention, in  
22 contrast to Mr. Hirschkop, that the statute specifically  
23 states, assuming the pre-trial preliminary motions have  
24 been resolved or unresolved, "If the rejecting party still  
25 desires to proceed with judicial review, the modified or

1 corrected award shall be substituted for the original  
2 award. If the Court finds that a condition stated in  
3 Section 3224B-1, 2, 3 or 4 exists, it shall vacate the  
4 award and trial of the case shall proceed as if there has  
5 been no award".

6 THE COURT: Well, I guess we will find out about  
7 this, gentlemen. By the way, Docket Tab Number 7, as  
8 Defendant, Manuel Ross, M.D., C. Wesely Dingman and  
9 Elizabeth S. --

10 MR. EHRMANTRAUT: I think it is Palacio.

11 THE COURT: -- Palacio's Motion Raising  
12 Preliminary Objection -- that will be granted. Number 8  
13 is the Defendant, Manuel Ross, Motion to Strike, except for  
14 that is moot. Number 9 is the Defendant, Chestnut Lodge,  
15 makes Motion Raising Preliminary Objection. That will be  
16 granted.

17 Number 10 is Defendant's Motion to Stike. That  
18 is moot. The granting of Number 7 and Number 9, Motion  
19 Raising Preliminary Objection, means that this case will  
20 stand as dismissed. The Court is satisfied that the  
21 Claimants in this matter did not properly adhere to the  
22 Maryland Rules of Practice and Procedure, and for that  
23 reason, this claim is not properly aboard, and secondly,  
24 the Court is also satisfied that under the Health Claim  
25 Arbitration Rules and Regulation, that the action by Mr.

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Tabler in refusing to accept the initial award in this matter was beyond his power and it would have to be dismissed and vacated for that reason also.

That is it, Your Honor. Have a nice day.

MR. HIRSCHKOP: Pardon me, Your Honor. Would you allow us to move to amend to file the declaration? You have that power under Maryland law.

THE COURT: That is the end of the case as far as I am concerned, Mr. Hirschkop. Have a good day.

MR. HIRSCHKOP: Thank you, Your Honor.

(Whereupon, the hearing was concluded.)

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C E R T I F I C A T E

DEPOSITION SERVICES, INC. hereby certifies that the attached pages represent an accurate transcript of the electronic sound recording of the proceedings in the Circuit Court for Montgomery County in the matter of:

LAW NO. 66024

RAPHAEL J. OSHEROFF

v.

CHESTNUT LODGE, INC.,  
MANUEL ROSS, M.D.,  
C. WESLEY DINGMAN, M.D.

BY:

E. Aleva Schneider  
E. Aleva Schneider  
Transcriber