STATE OF MAINE
KENNEBEC, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-09-190

STATE OF MAINE DHHS,
Plaintiff

v.

DOWN EAST COMMUNITY HOSPITAL et al.,
Defendants

ORDER ON RECEIVER EASTERN MAINE HEALTHCARE SYSTEMS'S PETITION FOR DECLARATION BARRING ACTION TO ENFORCE ARBITRATION AWARD AND JOINT MOTION TO TERMINATE RECEIVERSHIP

Currently before the court is a petition by the Eastern Maine Healthcare Systems ("EMHS"), the receiver for Down East Community Hospital ("DECH"), seeking an order precluding an action by the Maine State Nurses Association (the "Association") or Krista McCormick, one of the Association's members, to confirm an arbitration award in Ms. McCormick's favor against DECH or EMHS. The Association, on behalf of Ms. McCormick, objects and requests confirmation of the arbitration award. For the reasons that follow, the award is CONFIRMED.

Also before the court is a joint motion to terminate receivership signed by the Maine Department of Health and Human Services ("DHHS") and DECH on the grounds that the emergency receivership is no longer necessary. On or about August 8, 2011, counsel for DHHS, DECH, EMHS, and the Association submitted a proposed order to which all had consented, which provided for termination of the receivership except insofar as would be necessary to resolve and satisfy the arbitration issue. For the reasons that follow, more briefly discussed since all parties are in agreement as to this issue, the joint motion to terminate receivership is GRANTED.

Factual Background

On July 1, 2009, this court (Jabar, J.) appointed EMHS as the emergency receiver, pursuant to 22 M.R.S. §§7931-7938, to address critical problems of emergency care and hospital

governance at DECH. The court's order stated that EMHS "shall have all of the powers enumerated in 22 M.R.S.A. §7934." Expressly stating that it did not limit those enumerated powers, the order added, "The Emergency Receiver is authorized to hire, direct, manage and discharge any professional, administrative and/or management staff of DECH." The court's order went on to provide, "As of the date of this Order, the DECH Board of Directors is divested of governance responsibility and/or management authority over the affairs of DECH, and such authority shall instead be exercised by the Emergency Receiver and/ or the Emergency Receiver's designee(s)." Also on July 1, 2009, EMHS appointed Douglas Jones as Interim Chief Executive Officer of DECH. (Nov. 29, 2009 Joint Status Report Regarding Appointment of Emergency Receiver Pursuant to 22 M.R.S.A. §7931 et seq 1.)

On July 21, 2009, Ms. McCormick observed a Certified Registered Nurse Anesthetist ("CRNA") becoming somnolent while administering anesthesia during procedures upon which she was working in her nursing capacity. (Pet. ¶¶17, 23; Association Resp. to Pet. ¶¶17, 23.) She reported the CRNA's somnolence to the Director of Surgical Services that day, although the parties dispute the precise timing of Nurse McCormick's report. (Pet. ¶26; Association Resp. to Pet. ¶26.) Interim C.E.O. Jones interviewed Nurse McCormick as to what actions she had taken in connection with the somnolent CRNA prior to reporting the issue, and she explained that she had continued to assist in the surgery. (Pet. ¶¶29-31; Association Resp. to Pet. ¶¶29-31.) Interim C.E.O. Jones consulted with DECH C.E.O. Michelle Hood in determining that Nurse McCormick should be terminated for failing to promptly intervene in what she knew or should have known was an unsafe environment caused by the CRNA's somnolence. (Pet. ¶¶37, 38.) On September 11, 2009, Nurse McCormick's employment was terminated. (R. 107.) The termination letter was written on DECH letterhead, signed by "Douglas T. Jones, FACHE, Interim CEO," and provided in part, "This decision was regrettable but has been made on behalf of Down East Community Hospital and its patients as part of the Emergency Receivership." (R. 107.)

Nurse McCormick is a member of the Maine State Nurses Association, Local 124. (Pet. ¶41; Association Resp. to Pet. ¶41.) The Association grieved Nurse McCormick's termination on her behalf, asserting that it was inconsistent with Article 15, Section 1 of a Collective Bargaining Agreement ("CBA") between DECH and the Association, which provided that "the Hospital has the right to discipline or discharge for just cause." (Pet. ¶42; Association Resp. to

Pet. ¶42.) EMHS, as the Emergency Receiver, participated in the arbitration resulting from the Association's grievance, as provided by the CBA, on April 2 and May 10, 2010. (Pet. ¶¶43, 44; Association Resp. to Pet. ¶¶43, 44.) On October 11, 2010, the arbitrator issued his Decision and Award ("Award"), finding that Nurse McCormick's termination was without just cause and ordering DECH to reinstate Nurse McCormick and make her whole for all lost wages, seniority, retirement credit and other benefits. (Pet. ¶45; Association Resp. to Pet. ¶45.) The Emergency Receiver does not intend to reinstate Nurse McCormick, and asserts that it is entitled to judicial immunity from suit, including by way of the Association's attempt to legally enforce the Award and compel Nurse McCormick's reinstatement. (Pet. ¶¶46, 47, 53; Association Resp. to Pet. ¶¶46, 47[1], 53.)

On September 25, 2009, Interim C.E.O. Jones wrote to Barbara Lambarida, representative of the Association, in response to her inquiry about the applicability of the CBA's grievance procedures to Nurse McCormick's termination. Interim C.E.O. Jones's email stated in full:

> Dear Barbara, Of course the grievance procedure will be recognized by DECH and is an important part of our collective bargaining agreement for Down East Community Hospital and its workers. If the grievance is filed, however, it will be denied at least in part because DECH needs to preserve the argument that because this was an action of the emergency receiver, the grievance procedure does not apply in this particular case. Doug

(R. 111.) The CBA between the Association and DECH was intended to govern from November 1, 2007, through November 1, 2010. (*See* R. 30, 217.) Interim C.E.O. Jones authorized DECH employees and agents to negotiate with the Association for the purpose of reaching a new CBA, and ultimately approved the positions DECH representatives took in the negotiations, which successfully resulted in a new CBA ratified on December 22, 2010. (R. 218.) He apparently also approved the extension of the original CBA from November 7, 2010 "until December 9, 2010 or until the new contract is ratified, whichever comes first," although the document was signed by Allan Muir, Esq. for DECH and Barbara Lambarida, RN for the Association, and does not bear Interim C.E.O. Jones's signature. (R. 219.)

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[1] The Association responded "Denied" to EMHS's statement, "The Emergency Receiver continues to believe that its decision to terminate Ms. McCormick's employment was necessary to protect patient safety and does not intend to reinstate Ms. McCormick." The court construes the Association's response as a denial as to the necessity of Ms. McCormick's termination, rather than a denial as to EMHS's intent to reinstate her to her position. Given the parties' current legal posture, EMHS's intent not to reinstate Ms. McCormick is objectively clear.

On or about April 4, 2011, Mary E. Mayhew, Commissioner of the Department of Health and Human Services, and DECH filed a joint motion to terminate the emergency receivership, supported in part by an affidavit signed by Interim C.E.O. Jones. His affidavit stated in part that he had been serving as Interim C.E.O. since the inception of the emergency receivership on July 1, 2009, and that he had been named Chief Executive Officer of DECH, effective upon termination of the emergency receivership, backed by a "reconstituted DECH Board of Trustees." (Aff. Jones ¶¶4-5.) He also averred that "EMHS has involved the reconstituted DECH Board of Trustees in an advisory capacity with respect to DECH governance matters," and that it was the reconstituted DECH Board which had, on December 1, 2010, offered Interim C.E.O. Jones the position of DECH C.E.O.. (*Id.* at ¶5.) In accordance with 22 M.R.S. §7935, Interim C.E.O. Jones's affidavit also provided, "DECH agrees to assume all obligations incurred by EMHS in its capacity as Emergency Receiver to the extent provided by the receivership statute." (*Id.* at ¶6.)

During the emergency receivership, not only was a new Board of Trustees elected for DECH, but significant changes were made in the areas of hospital governance, recruitment, training and quality of care. (See Hood Aff., Cobb Aff.) The United States Department of Health and Human Services, Centers for Medicare and Medicaid Services ("CMS") has rescinded its planned termination of DECH from participation in Medicare, Medicaid, or MaineCare, which planned termination was the emergency which initially gave rise to the petition for an emergency receivership. (Cobb Aff. at ¶6; Hood Aff. at ¶33; Joint Mot. to Terminate at 1-2.) DHHS's Division of Licensing and Regulatory Services ("DLRS") had restored DECH to full licensure as a Critical Access Hospital; the court now finds itself past the date when the license was due to expire, but the parties represented at the hearing that the licensure status was not in jeopardy. (*See* Cobb Aff. at ¶8; Hood Aff. at ¶34.) DLRS will continue to conduct periodic licensing surveys at DECH as required by federal and state law. (Cobb Aff. at ¶9.) DHHS has concluded that DECH is presently in satisfactory compliance with state and federal licensing standards. (*Id.* at ¶7.)

Discussion

EMHS's central argument is that the arbitration award is unenforceable against either DECH or EMHS because DECH was not a party to the termination decision, and EMHS and its

agent, Mr. Jones, have judicially derived receiver immunity from suit and were not a party to the CBA under which the arbitration grievance was brought.

The Association counters that the CBA was in effect at all times relevant to Nurse McCormick's termination and that it was binding upon DECH, and that the receivership had no effect upon the validity of the CBA between the Association and DECH. It asserts that the federal Labor Relations Management Act ("LMRA") preempts any of EMHS's arguments regarding its judicially derived immunity, and asserts that such immunity governs tort cases and has little bearing on a contract case such as this. It further argues that the court has a limited role in reviewing the arbitrator's award, and seeks only that the court confirm it for enforcement against Nurse McCormick's once and future employer.

EMHS replies that the emergency receiver had the authority under the order appointing it and under statute to discharge Nurse McCormick, regardless of the terms of the CBA, as the receiver was not a signatory to the CBA, nor was it DECH's alter ego. At the hearing, counsel for EMHS asserted that EMHS, through Interim C.E.O. Jones, had attempted to follow as much of the CBA as possible, consistent with the duties of a receiver. Counsel asserted that to find that the receiver would need to either accept the CBA or destroy it entirely would curtail the receiver's authority too greatly. EMHS further contends that the LMRA does not apply to it because it is not an "employer," but rather a "state or political subdivision," and to find otherwise would run afoul of the constitutional grants of state sovereignty and judicial immunity contained in the Tenth and Eleventh Amendments to the United States Constitution. EMHS asserts that, to the extent "faithfully and carefully" is the standard for judicial immunity in Maine, it has met that standard, and that the Association did file "suit" against it sufficient to give rise to statutory and common law protections. It also argues that DECH cannot be liable for breach of the CBA, since it lacked authority over the termination decision.

The Association's response includes arguments that the common law does not permit a receiver to pick and choose which provisions of a CBA to apply; that EMHS did not have unqualified power, under the emergency receivership statute or the court's order, to terminate employees; that EMHS is not exempt from the LMRA and that its federalism and separation of powers arguments are unavailing; that the Association has not implicated the receivership statute because the present action is not a "suit"; that DECH remains primarily liable for breach of the CBA; and that the termination of Nurse McCormick was contrary to patient safety and the CBA.

The time pressure surrounding this disagreement, aside from Nurse McCormick's difficult employment situation, stems from the fact that the pending agreed-upon motion to terminate receivership, if granted, arguably would prevent any legal action against the receiver for actions taken during receivership. *See, e.g.*, 65 Am. Jur. 2d Receivers § 294 ("The effect of a discharge of a receiver is to relieve him or her from all his or her official liabilities as such. He or she is not thereafter a proper party to an action, and no judgment can be rendered against him or her thereon.") (footnotes omitted). For this reason, the court refrained from ruling on that motion separately from the arbitration question in order to avoiding prejudice to the rights of any party.

At this time, however, the issue is ripe for global resolution. EMHS, Interim C.E.O. Jones, and DECH have joined in a motion to terminate the receivership. 22 M.R.S. §7935 (2011) provides, "A receivership may not be terminated in favor of the former or the new licensee, unless that person assumes all obligations incurred by the receiver and provides collateral or other assurances of payment considered sufficient by the court." Because the parties seek to terminate the receivership in favor of both the former and the new licensee, that is, DECH with Interim C.E.O. Jones at the helm, EMHS and Interim C.E.O. Jones have agreed to be bound by any judgment of this court as to any obligations incurred by the receiver, including any obligations arising from the arbitration matter surrounding Nurse McCormick's termination. This resolution is actually tidier for all the parties, since the arbitrator's award is framed in such a way as to paint DECH as the petitioner's employer, although Interim C.E.O. Jones, acting for the receiver, was the individual who made the employment decision at issue. By granting the parties' wishes and restoring control over day-to-day operations to DECH, while retaining the ability to fulfill the obligations incurred during the receivership under the parties' express agreement, the court sees that all parties can be satisfied with the outcome. The motion to terminate receivership, subject to the satisfaction of any obligations incurred during the receivership, is GRANTED.

As for the issues surrounding the obligations incurred during the receivership, the court begins its analysis by noting that the parties' arguments are grand in scope and, by and large, diametrically opposed, whereas the court's review of the governing law and the facts of this case was much less black-and-white. Many of the arguments, such as the alleged primacy of the LMRA over state judicial immunity and the constitutional arguments in response, suggest a

collision of authority that the court's review did not find pertinent to this case. Since "a receiver has only such powers as are conferred by statute and the court order appointing him," *Perry Ctr. v. Heitkamp*, 576 N.W.2d 505, 511 (N.D. 1998), the structure of Maine's receivership statute provides the introduction to the court's analysis of the receiver's powers.

Unlike in many of the other jurisdictions whose cases have been cited for the court, the statutory scheme governing EMHS's appointment as receiver, and Jones's as Interim C.E.O., does not provide absolute receiver immunity. Indeed, it specifically contemplates actions against the receiver. 22 M.R.S. §7936 (2010) provides, "No person may bring suit against a receiver appointed under section 7933 without first securing leave of the court. Except in cases of gross negligence or intentional wrongdoing, the receiver is liable in his official capacity only and any judgment rendered shall be satisfied out of receivership assets." In other words,

> [A] receiver authorized by the court to continue a business operation, or which is performing duties authorized by the court, is not personally liable for any losses incurred when it acts in good faith and its own misconduct or negligence did not cause the loss. Any judgments rendered in such cases are payable from funds in the receiver's hands (*i.e.*, stemming from the receivership estate) if the receiver was acting in its official capacity.

Anes v. Crown P'ship, Inc., 932 P.2d 1067, 1071 (Nev. 1997) (citation omitted). The Court concludes this is contrary to EMHS's argument—which finds support in some other jurisdictions, but not in Maine—that no action may be brought against a receiver because he or she is acting as an arm of the court and is therefore subject to absolute, judicial-level immunity.

Nor does 22 M.R.S. §7936 (2010) bar the present action. The court notes first that EMHS waived any argument under this provision at the July 7, 2011 hearing, noting that it did not want the issue to get bogged down in the procedural concerns surrounding "whether [the Association] said Simon Says," and jumped through the proper procedural hoops. EMHS's interpretation of this statute was that it represents the gravity of the receiver's immunity by installing the court as a gatekeeper, so that the court can determine whether or not a proposed suit falls within the sphere of the receiver's immunity. EMHS asserts that the action here, specifically, Nurse McCormick's termination, was so clearly within the receiver's purview that no gatekeeper was necessary to determine the applicability of receiver immunity. While this may be a reasonable interpretation of the purpose of the first sentence of Section 7936, requiring leave of the court before initiating suit, it fails to consider the second sentence, which provides for limited, personal—not absolute—receiver immunity: "the receiver is liable in his official

capacity only and any judgment rendered shall be satisfied out of receivership assets." Because the court "discern[s] legislative intent from the plain meaning of the statute and the context of the statutory scheme," and "[a]ll words in a statute are to be given meaning, and none are to be treated as surplusage if they can be reasonably construed," the court cannot agree with EMHS and find that Maine's statute provides absolute receiver immunity. *Allied Res., Inc. v. Dep't of Pub. Safety*, 2010 ME 64, ¶15, 999 A.2d 940, 944 (quotations and citation omitted).

The second reason that the present action does not run afoul of Section 7936's court approval requirement is that it provides, "No person may *bring suit* against a receiver . . . without first securing leave of the court" (emphasis added). The parties have focused on the word "suit"; the court would instead emphasize the word "bring." Here, the Association did not file an action against the receiver. The court's consideration of the arbitration award stems from a petition "in the nature of a request for a declaratory judgment," filed by EMHS rather than the Association, to prevent the Association from seeking to enforce the award. The Association's response to EMHS's petition cannot constitute "bring[ing] suit" for the purposes of the receivership statute.

Having found that the receiver is not absolutely immune from suit, and that the action is not barred by any failure of the Association to seek the court's permission before responding to EMHS's petition, the court must next determine to what extent the CBA applied to either DECH or EMHS during the emergency receivership. Maine's receivership statute does not specifically address the status of CBAs during periods of emergency receivership. However, it does appear to contemplate actions against the receiver under other executory contracts. *Cf. Nat'l Labor Relations Bd. v. Bildisco*, 465 U.S. 513 (U.S. 1984), *superseded by statute as stated in Mason v. Official Comm. of Unsecured Creditors (In re FBI Distrib. Corp.)*, 330 F.3d 36, 44 (1st Cir. 2003) (collective bargaining agreements are executory contracts). 22 M.R.S. §7934(3) (2010) provides an option whereby an uninterested receiver may escape an unreasonable executory contract, such as a mortgage or lease, and have the court determine an appropriate and reasonable amount for such a contract. Other than this provision, however, the statute is silent as to executory contracts, so the court will look to the common law for guidance on the extent to which a receiver is bound by an executory contract in place at the time of the receivership.

The Association's argument that the receiver is DECH's alter ego and therefore bound by the CBA deserves brief mention. "A finding that two employers are alter egos will bind the nonsignatory to a collective bargaining agreement between the union and the nonsignatory's alter

ego." *Mass. Carpenters' Central Collection Agency v. Belmont Concrete Corp.*, 139 F.3d 304, 307 (1st Cir. 1998) (citing *NLRB v. Hospital San Rafael, Inc.*, 42 F.3d 45, 52-53 (1st Cir. 1994); *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 24 (1st Cir. 1983)). "The alter ego doctrine is meant to prevent employers from evading their obligations under labor laws and collective bargaining agreements through the device of making 'a mere technical change in the structure or identity of the employing entity . . . without any substantial change in its ownership or management.'" *Id.* (quoting *Hospital San Rafael*, 42 F.3d at 51. "[T]he alter ego doctrine is primarily applied in situations involving successor companies, 'where the successor is merely a disguised continuance of the old employer.'" *Id.* (quoting *C.E.K. Indus. Mechanical Contractors, Inc. v. NLRB*, 921 F.2d 350, 354 (1st Cir. 1990)). "[T]his is not a case where the successor corporation is the 'alter ego' of the predecessor, where it is 'merely a disguised continuance of the old employer,'" because "[s]uch cases involve a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management." *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 259 n.5 (1974) (quoting *Southport Petroleum Co.* v. *NLRB*, 315 U.S. 100, 106 (1942)). Here, by contrast, the court's action in appointing EMHS as the emergency receiver resulted in an immediate and dramatic change of ownership and management, as the reins of DECH were handed to Interim C.E.O. Jones, who had not previously been involved in the governance of DECH, and the DECH Board was reconstituted under his supervision. DECH in receivership, under EMHS and Jones, is not the alter ego of DECH prior to the emergency receivership, and therefore is not bound by the CBA under this doctrine.

In general,

> A receiver is not bound by the executory contracts of the corporation over whose property he is appointed, and subject to the control of the Court he may abandon and repudiate them, if in his opinion it would not be profitable or desirable to adopt and perform them, and he is entitled to a reasonable time within which to make his election.

DuPont v. Standard Arms Co., 81 A. 1089, 1090 (Del. Ch. 1912).

> A receiver appointed to manage or operate a business frequently finds executory contracts still subsisting between the debtor and other parties. The receiver must determine whether or not she, with the approval of the court, will carry out these contracts on behalf of the debtor or let them go and subject the debtor and the receivership estate to the consequences of a breach of such contracts. The receiver

> is under no obligation to the other parties to the contract to perform such contract on behalf of the debtor.

Haw. Ventures, LLC v. Otaka, Inc., 164 P.3d 696, 759 (Haw. 2007) (quotations and brackets omitted); *see also Fauci v. Mulready*, 150 N.E.2d 286, 289 (Mass. 1958) ("An equity receiver upon appointment is not bound to perform or adopt executory contracts and leases, unless directed to do so by the court which appointed him."). "In other words, a receiver does indeed have the option of either accepting or rejecting executory contracts." *Real Estate Marketers, Inc. v. Wheeler*, 298 So. 2d 481, 483-84 (Fl. Dist. Ct. App. 1974).

> Adoption may be signified either by express agreement or by implication (*Crawford* v. *Gordon,* 88 Wash. 553, 557 [L.R.A. N.S. 1916C 516, 153 P. 363]), and if, without declaring himself, he undertakes performance, he assumes the obligations of the contract and adopts it subject to its burdens and to any right of offset. (*Odell* v. *Bedford Co.,* 224 F. 996, 997; *In re Farmers' & Merchants' Bank,* [194 Mich. 200, 207 [160 N.W. 601]].)

H. D. Roosen Co. v. Pacific Radio Pub. Co., 11 P.2d 873, 876 (Cal. Ct. App. 1932). *See also Anes*, 932 P.2d at 1069 ("[A]doption of existing executory contracts may be inferred by the actions of the receiver or acceptance of the benefits of the contract. . . . [A] receiver, stepping into the shoes of a lessor, which fails to use its court-authorized powers to cancel or modify an existing executory lease within a reasonable time, and accepts performance from the lessee, impliedly adopts that lease.")

"[O]nce having elected to accept a contract, [the receiver] is bound thereby. While he may pick which contracts he will honor, he may not pick which *parts* of a contract he will honor." *Real Estate Marketers, Inc.,* 298 So. 2d at 484; *see also Haw. Ventures*, 164 P.3d at 759.

Here, the receiver, through Interim C.E.O. Jones, appears to have accepted the benefits of the CBA. He accepted, for example, that the nurses were not going to strike. Apparently, the benefits of the CBA were sufficiently valuable during the receivership that Interim C.E.O. Jones authorized DECH representatives to extend the CBA when it was at risk of expiring. (*See* R. 217-220.) Interim C.E.O. Jones appears to have recognized the value of the CBA in his email to Association representative Lambarida, wherein he stated that the CBA's grievance procedure "is an important part of our collective bargaining agreement for Down East Community Hospital and its workers." (R. 111.) While these actions are not an explicit acceptance or adoption of the CBA, the receiver's adoption of the executory agreement "may be signified either by express agreement or by implication."

In *Hawaii Ventures*, the receiver engaged in many similar actions—including complying with a union dues deduction procedure based upon the collective bargaining agreement, arbitrating some grievances without raising the defense that there was no valid agreement between the parties that would compel her to arbitrate, and authorizing the entity in receivership to extend its collective bargaining agreement with its employees' union—but the Hawaii Supreme Court found that the receiver had not "'assumed' the obligations of the collective bargaining agreement by her conduct in managing the Hotel during the receivership." *Hawaii Ventures*, 164 P.3d at 759-61. The court also found that she was not an "employer" under the NLRA. *Id.* at 760.

The court is thus faced with the question of whether the receiver, through Interim C.E.O. Jones, can be considered Nurse McCormick's employer through Interim C.E.O. Jones's implicit adoption of the CBA. Maine does not offer much common law as to the boundaries of receiver liability in this area. However, authority from both the federal courts and our sister states suggests the factors that courts examine in determining whether a receiver is an "employer," which are similar to those which demarcate the boundaries of a receiver's derived judicial immunity. The similarity of these factors is no coincidence; the term "employer" under the NLRA explicitly excludes "any State or political subdivision thereof." 29 U.S.C. § 152(2) (2011).

> This exception includes entities "that are either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." *NLRB v. Natural Gas Utilities of Hawkins County, Tenn., 402 U.S. 600, 604-605, 29 L. Ed. 2d 206, 91 S. Ct. 1746 (1971)* ("*Hawkins County* test").

Peters v. Nat'l Labor Relations Bd., 153 F.3d 289, 294 (6th Cir. 1998). As the Sixth Circuit explained, "As we understand it, the rationale for the 'political subdivision' exemption has its ultimate basis in the *Tenth Amendment* considerations of state sovereignty and the *Eleventh Amendment* grant of judicial immunity to the states."[2] *Crestline Memorial Hosp. v. Nat'l Labor Relations Bd.*, 668 F.2d 243, 245 n.1 (6th Cir. 1982). Likewise, the rationale underlying judicially derived receiver immunity is based upon the premise that the receiver is carrying out the judge's explicit orders.

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2 The court followed this explanation by stating, "These concerns simply do not extend to cases involving private nonprofit corporations such as the hospital involved here." *See id.*

> [W]e held in *T & W Inv. Co., Inc. v. Kurtz*, 588 F.2d 801, 802-03 (10th Cir. 1978), that a receiver named as a defendant in a corporation's civil rights action was a court officer who shared the judge's immunity *to the extent he carried out the orders of his appointing judge*. . . . To force officials performing ministerial acts intimately related to the judicial process to answer in court every time a litigant believes the *judge* acted improperly is unacceptable. Officials must not be called upon to answer for the legality of decisions which they are powerless to control.

Valdez v. Denver, 878 F.2d 1285, 1288-89 (10th Cir. 1989) (emphasis added, footnote omitted). "Allowing suits against trustees for executing explicit court orders would run an unacceptably high risk of turning trustees into lightning rods for harassing litigation aimed at judicial orders and would create counterproductive tension between bankruptcy judges and trustees." *Leblanc v. Salem (In Re: Mailman Steam Carpet Cleaning Corp.*, 196 F.3d 1, 8 (quotation omitted); *see also Kermit Constr. Corp. v. Banco Credito y Ahorro Ponceno*, 547 F.2d 1, 3 (1st Cir. 1976) ("[A] receiver who faithfully and carefully *carries out the orders of his appointing judge* must share the judge's absolute immunity. To deny him this immunity . . . would make the receiver a lightning rod for harassing litigation *aimed at judicial orders*. In addition to the unfairness of sparing *the judge who gives an order* while punishing *the receiver who obeys it*, a fear of bringing down litigation on the receiver might color a court's judgment in some cases; and if the court ignores the danger of harassing suits, tensions between receiver and judge seem inevitable.") (emphasis added); *Perry Ctr. v. Heitkamp*, 576 N.W.2d at 511 ("as long as a court-appointed receiver is acting under and in accordance with the court's directions, the receiver is immune from suit").

Because it is the impression that the orders governing the entity in receivership are judicially granted that leads to a finding that the receiver is not an "employer" because it is a "state or political subdivision," and also that such actions are immune from attack, courts have been called upon to parse to what extent the receiver's actions were in fact judicially ordered in order to determine the applicability of employer status or judicially derived immunity. Texas is explicit in its "functional approach" to derived judicial immunity, which "'looks to whether the person seeking immunity is intimately associated with the judicial process' and whether 'that person exercises discretionary judgment comparable to that of the judge.'" *Conner v. Guemez*, 2010 Tex. App. LEXIS 9383 at *7 (quoting *Dallas County v. Halsey,* 87 S.W.3d 552, 554 (Tex. 2002). "The functional approach looks to the nature of the function performed, not the identity of the actor, and considers whether the [receiver's] conduct is like that of the delegating or

appointing judge." *Id. But cf. Peters*, 153 F.3d at 294 ("federal, rather than state, law governs the determination, under § 2(2), whether an entity created under state law is a 'political subdivision' of the State.") (quoting *Hawkins County*, 402 U.S. at 602-03)..

In analyzing the issue of "whether a state court-appointed receiver falls within the ambit of the 'political subdivision exemption,'" *East Bay Automotive Council v. Salisbury-Kilmer Corp.*, 1992 U.S. Dist. LEXIS 8600 at *5 (N.D. Cal. 1992), the court noted three factors which had swayed previous courts' consideration of the same question:

> (1) Whether the receiver was a temporary appointment or whether he ultimately intended to become the true and permanent owner of the business in receivership;
> (2) The identity of the person or entity designating the receiver for appointment as the receiver; and
> (3) The amount of direction or control exercised by the state court over the receiver.

Id. at *10-*11. The ultimate matter to be determined by the consideration of these factors "is the amount of control exercised by the state court over the receiver." *Id.* at *10.

Here, while EMHS was intended to be a temporary appointment, Interim C.E.O. Jones, the person exercising actual day-to-day authority over the Hospital's workings and its staff, intended to take on that leadership role in a "true and permanent" fashion, as evidenced by his nomination for and acceptance of the position as C.E.O. of DECH upon termination of the receivership. That factor weighs against a finding of state court control over the receivership.

The entity designating the receiver for appointment appears to be a combination of the Superior Court and DHHS, the entity which brought the petition for emergency receivership. This factor suggests state involvement. However, the choice of a private receiver, rather than DHHS's acting as the receiver itself (compare Greenblatt v. Ottley, 430 N.Y.S.2d 958, 960-62 (1980) (finding State Commissioner of Health, acting as hospital's receiver, was not an "employer"), runs counter to a finding of state control. This factor is therefore neutral in an analysis of state control over the receivership.

Factor three is the ultimate question, "the amount of direction or control exercised by the state court over the receiver." *East Bay*, 1992 U.S. Dist. LEXIS 8600 at *11. As in *Rudes v. Bevona*, 1996 U.S. Dist. LEXIS 4566 at * 4-*5 (S.D.N.Y. 1996), the receiver argues that because he is responsible to the judge who appointed him, and that judge is a public official, "the political subdivision exception to the definition of employer is met, and the LMRA does not apply." *Rudes*, 1996 U.S. Dist. LEXIS 4566 at * 4. Despite this argument's "surface appeal," id., a

reviewing court must take "[a] closer look at the Order . . . establishing the receivership, which details its actual operations and characteristics," in order to determine whether the receivership falls within the "political subdivision" exception. *Id.* at *4-*5. The *Rudes* court noted that the order governing the receivership did "not require that the receiver seek court approval for decisions regarding employees of the premises," and concluded "that the receiver had the authority to handle these issues as part of its day to day management of the premises." Id. at 5; *see also Stanley E. Stein, Receiver for Holiday Inn Coliseum*, 300 N.L.R.B. 631, 631-32 (N.L.R.B. 1990) (finding receiver's control of manager who had authority to oversee labor relations at hotel in receivership relevant to determination that receiver is employer for LMRA purposes). In this case, the evidence of the receiver's independence from the court is even stronger, since the order explicitly grants the receiver authority "to hire, direct, manage and discharge any professional, administrative and/or management staff of DECH," without requiring the receiver to seek or receive court approval for such personnel actions.

Therefore, the court finds that the receiver enjoyed substantial autonomy from the court in which to make decisions for the good of DECH. Because the court did not control the receiver's functioning, the receiver is not a "political subdivision" under either prong of the *Hawkins County* test. Accordingly, the receiver is an "employer" for LMRA purposes. The court notes that under the state analysis, which looks less at "employer" status than at judicially-derived immunity, the court's finding that the receiver here was not under the court's control is supported by Maine's statutory scheme, which grants an emergency receiver extensive authority over day-to-day operations, *see* 22 M.R.S.A. §7934, but insulates the receiver from personal liability only, rather than providing absolute liability, *see* 22 M.R.S. §7936.

This case is thus distinguishable from those in which the receiver was found not to be an employer, which, not subject to the LMRA, were not governed by federal law and could be subject to various state interventions in the arbitration process. *See, e.g., East Bay*, 1992 U.S. Dist. LEXIS 8600 at *6 (citing *Greenblatt v. Ottley*, 430 N.Y.S.2d 958, 961-62 (1980)). It is also distinguishable from *Hawaii Ventures*, where the court found that the receiver was not an employer—but also, the receiver overtly informed counsel for the parties to the CBA that she would not be a successor employer, but an officer of the court, and thus explicitly did not assume the executory collective bargaining agreement. *Haw. Ventures*, 164 P.3d at 759-61.

Because the court finds that the receiver was not professionally immune from proceedings under the CBA, and did in fact adopt the CBA, the court finds that the receiver would be bound by the result of the arbitration, and now that the termination is granted, DECH is so bound. Pursuant to the arbitrator's award, Nurse McCormick shall be reinstated and made whole. Because the posture of this case, where the parties agreed to assume the obligations and therefore Nurse McCormick can resume her position at DECH without regard to the fact that the employment decision was technically made by EMHS, the court need not address the alternative ground supporting affirming the award against EMHS. *But cf. Cape Elizabeth Sch. Bd. v. Cape Elizabeth Teachers Ass'n*, 435 A.2d 1381 (Me. 1981) (dismissing declaratory judgment action in the context of a grievance arbitration and holding that the proper method of contesting arbitrability would be "a motion to compel or stay arbitration under 14 M.R.S.A. § 5928(1), (2), or on a motion to vacate the arbitrator's award under § 5938(1)(E)"); 14 M.R.S. § 5938 (2011) (providing grounds for the vacating of an arbitrator's award, and stating, "If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award").

The entry shall be:

The motion to terminate receivership in favor of DECH, subject to DECH and C.E.O. Jones's meeting all obligations incurred during the receivership, is GRANTED.

The petition for a declaration barring the Association from seeking to enforce the arbitration award is DENIED. The arbitration award is CONFIRMED.

This order is incorporated in the docket by reference. M.R. Civ. P. 79(a).

DATED: 8/29/11

Robert E. Murray
Justice, Superior Court