IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

DANIELLE SEAMAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:15-CV-462
	)	
DUKE UNIVERSITY, et al.,	)	
	)	
Defendants.	)	

ORDER

This matter is before the Court on motions to dismiss filed by the defendants. (Docs. 28, 30). The motions will be denied, without prejudice to renewal of state action immunity questions at summary judgment after development of a factual record. One issue raised by the motions is appropriate to certify for immediate appeal pursuant to 28 U.S.C. § 1292(b).

The Court concludes that the University's status as a constitutionally-established entity is not enough to entitle it and its employees to *ipso facto* state action immunity from antitrust liability under *Parker v. Brown*, 317 U.S. 341 (1943), and its progeny, and that the question of *ipso facto* immunity is better dealt with after development of a factual record. The Court finds that this is a controlling question of law, as this lawsuit would be over as to the UNC defendants, and possibly over as to all defendants, if those defendants are entitled to *ipso facto* immunity as a matter of law. The Court further finds that there is substantial ground for difference of opinion on this controlling question.

The plaintiff observes that the Supreme Court has never extended *ipso facto* immunity beyond legislatures, *see Parker*, 317 U.S. 341, and state supreme courts acting in their legislative capacity, *see Hoover v. Ronwin*, 466 U.S. 558 (1984), and that the Fourth Circuit has suggested in dicta that executive branch officers may not be entitled to *ipso facto* immunity. *S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436, 442 n.6 (4th Cir. 2006). The plaintiff points to the holding in *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1111 (2015), that "[s]tate agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity," and other language suggesting that such state actors must satisfy some or all of the test set forth in *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), to benefit from *Parker* immunity, especially as the University is a non-accountable market participant accused of horizontal collusion. The plaintiff notes that the cases cited by the defendants all involve facts beyond state agency status and also predate *Dental Examiners*, 135 S. Ct. 1101, *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003 (2013), *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992), and other cases favorable to her position.

The defendants contend that the constitutionally-established university system and its employees always act as the sovereign for antitrust liability purposes. They cite several cases holding that a state university system is entitled to *ipso facto* immunity, including one in this district holding that the very entity involved in this case, the University of North Carolina system, is entitled to immunity because it acted in that case as the sovereign. *See Bd. of Governors of Univ. of N.C. v. Helpingstine*, 714 F. Supp. 167 (M.D.N.C. 1989); *see also Saenz v. Univ. Interscholastic League*, 487 F.2d 1026 (5th Cir.

1973); *Pharm. & Diagnostic Servs., Inc. v. Univ. of Utah*, 801 F. Supp. 508 (D. Utah 1990); *Cowboy Book, Ltd. v. Bd. of Regents*, 728 F. Supp. 1518 (W.D. Okla. 1989). The defendants rely further on other cases indicating that a state agency is usually entitled to *ipso facto* immunity. *E.g.*, *Neo Gen Screening, Inc. v. New England Newborn Screening Program*, 187 F.3d 24 (1st Cir. 1999); *Charley's Taxi Radio Dispatch Corp. v. SIDA of Haw., Inc.*, 810 F.2d 869 (9th Cir. 1987). The defendants further contend that state agencies generally are entitled to *ipso facto* immunity absent some showing that the state has delegated its regulatory responsibilities to market participants, as in *Dental Examiners*, 135 S. Ct. 1101, which has not been alleged here.

Finally, the Court finds that an immediate appeal from the order may materially advance the ultimate termination of the litigation.[1] The litigation has significant potential to be protracted and complex. If the UNC defendants are entitled to *ipso facto* immunity as a matter of law, the lawsuit will be over as to them and possibly as to all defendants,[2] and both sides will avoid significant unnecessary expense. If *ipso facto* immunity is not available to the defendants as a matter of law, then discovery will be simplified and summary judgment can focus on other issues. If the question of *ipso facto* immunity depends on the facts and is more appropriate for resolution at summary judgment, then

[1] It is possible, but not likely, that *S.C. State Bd. of Dentistry* is limited to state action immunity issues involving municipalities and private parties and that this Order would be appealable as of right. *S.C. State Bd. of Dentistry*, 455 F.3d at 442-443. None of the parties assert this is the case.

[2] The plaintiff contends that dismissal of the University and Dr. Roper based on *ipso facto* immunity does not require dismissal of Duke. The Court's resolution of the motion to dismiss did not require it to resolve that question specifically.

clarification of the applicable legal test will allow the parties to focus on discovery, reduce costs, and facilitate earlier resolution of the case.

The motions to dismiss raise other issues. As to those issues, the Court makes no findings related to the need for an immediate appeal.

It is **ORDERED** that:

1. The motions to dismiss, (Docs 28 and 30), are **DENIED** for the reasons stated in open court on January 28, 2016.
2. To the extent the motions to dismiss were based on *ipso facto* immunity under *Parker v. Brown*, the Court's decision to deny the motion involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal from the order may materially advance the ultimate termination of the litigation.
3. Pursuant to § 1292(b), the defendants shall have ten days from the date of this order to apply to the Fourth Circuit for permission to appeal. Except as stated in Paragraph 4 *infra*, all proceedings are hereby **STAYED** for fourteen days pending the defendants' application.
4. The parties shall immediately meet and confer about evidence preservation and about selection of a mediator. An initial mediated settlement conference shall take place within thirty days.

This the 12th day of February, 2016.

UNITED STATES DISTRICT JUDGE