# EXHIBIT 4

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

CIVIL ACTION NUMBER 1:07-CV-00953

RYAN McFADYEN, et al.,

Plaintiffs,

v.

DUKE UNIVERSITY, et al.,

Defendants.

**RESPONSE BY DUKE DEFENDANTS TO**
**PLAINTIFFS' FIRST REQUEST FOR PRODUCTION**

Defendants Duke University, Robert Dean, Matthew Drummond, Aaron Graves, and Gary N. Smith (herein "Duke Defendants"), by and through their undersigned counsel, hereby respond to Plaintiffs' Request for Production as follows:

**REQUEST FOR PRODUCTION**

1. Pursuant to Rule 34 of the Federal Rules of Civil Procedure, Plaintiff Breck Archer requests that Duke University, Robert Dean, Matthew Drummond, Aaron Graves, and Gary Smith produce all documents, electronically stored information, and tangible thing [sic] described in the Initial Disclosures made by Duke University, Robert Dean, Matthew Drummond, Aaron Graves and Gary Smith to the Plaintiffs in this action pursuant to Fed. R. Civ. P. Rule 26(a)(1)(A) (referred to herein as "Defendants' Initial Disclosures," incorporated herein by reference, and annexed to this Request as Exhibit A).

**RESPONSE:**

Pursuant to Rule 26(b)(2)(B), the Duke Defendants object to this Request for Production to the extent that it requests the discovery of electronically stored information

from sources that they have identified as not reasonably accessible because of undue burden and cost. Accordingly, the Duke Defendants have taken into consideration whether the "burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." Fed. R. Civ. P. 26(b)(2)(C)(3). In order to reasonably mitigate costs while still complying with discovery mandates, the Duke Defendants have limited their initial review of data to a specified group of seventeen custodians, whose names have previously been supplied to the Plaintiffs. These seventeen custodians are a significant number of custodians for the two narrow claims going forward as to the Duke Defendants, and the Duke Defendants believe that these custodians will yield the most substantial and complete data, without being "unreasonably cumulative or duplicative."[1] Further, going beyond this list of seventeen

[1] This approach, including the selection of the specific custodians whose data should be reviewed, is consistent with the approaches taken by other courts. When dealing with ESI, courts have generally deferred to the producing party to identify the custodians likely to possess responsive documents. See generally Garcia v. Tyson Foods, Inc., No. 06-2198-JWL-DJW, 2010 WL 5392660, at *2-4 (D. Kan. Dec. 21, 2010). Where such a determination is contested, however, it is quite common for courts to limit the number of custodians from which a party must produce documents. See, e.g., Martinez-Hernandez v. Butterball, LLC, No. 5:07-cv-174-H, 2010 WL 2089251, at *4-5 (E.D.N.C. May 21, 2010) (finding plaintiff's request that defendant "run sixty-one numbered queries, most of which include multiple search terms, for thirty-plus custodians, encompassing numerous servers . . . unreasonable and unduly burdensome" and specifically eliminating custodians due to their limited involvement and the unlikelihood that they would possess relevant documents); In re Fannie Mae Sec. Litig., 552 F.3d 814, 820 (D.D.C. 2009). Courts tend to limit the required custodians to those

custodians imposes both a "burden" and "expense" that "outweighs" the "likely benefit" to be gained from searching the electronic records of additional custodians.[2] The data of these seventeen custodians has been reviewed for relevance and privilege as set forth below, and the Duke Defendants will produce the data from these seventeen custodians that is responsive to the request made by the Plaintiffs.

Similarly, the Duke Defendants have used an end-date of August 31, 2007. The burden and expense of examining data created or received after August 31, 2007, in general, outweighs any benefit in that there is little likelihood that any relevant

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"likely to possess responsive documents." See, e.g., CDW LLC v. NETech Corp., No. 1:10–cv–00530–SEB–DML, 2011 WL 1743749, at *2 (S.D. Ind. May 5, 2011).

[2] Courts have been particularly likely to limit the number of custodians where a party can demonstrate that production of documents without such a restriction would be unjustifiably costly, as it would be in this case. See, e.g., Thermal Design, Inc. v. Guardian Bldg. Prods., Inc., No. 08–C–828, 2011 WL 1527025, at *1 (E.D. Wis. Apr. 20, 2011) (holding that a search of "all archived e-mail accounts and shared network drives, without any restriction as to custodian or individual" that would take "several months" and cost "an additional $1.9 million dollars" not including an additional thirteen weeks and $600,000 to review "is not reasonably accessible"). The court in Thermal Design explained that "even if the information sought is relevant or reasonably calculated to lead to the discovery of admissible evidence, [the requesting party] doesn't explain why the extensive amount of information it seeks is of such importance that it justifies imposing an extreme burden on the [defendants]. Fed. R. Civ. P. 26(b)(2)(C)(iii) (factors include 'the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues'). Courts should not countenance fishing expeditions simply because the party resisting discovery can afford to comply." Id.

The onus should be on the Plaintiffs to put forward evidence that additional custodians were involved in the relevant events and would likely possess responsive documents and that this benefit would outweigh the additional costs. See, e.g., Harris v. Koenig, 271 F.R.D. 356, 367 (D.D.C. 2010).

information regarding Counts 21 and 24 was created or received after August 31, 2007.[3] If, at a later time, either party shows that data from additional custodians should be produced in order to comply with discovery obligations or that data created or received after August 31, 2007, should be produced in order to comply with discovery obligations, the Duke Defendants will supplement this response with information held by those additional custodians at that time.

Pursuant to Rule 34(b)(2)(D), the Duke Defendants further object to this Request for Production to the extent that the Definitions and Instructions call for production of responsive e-mails in .pst files, as such mode of production is unduly burdensome, costly, oppressive, and unnecessary for the discovery of relevant or admissible information. The Duke Defendants have advised Plaintiffs' counsel of the substantial disadvantages to a .pst production – including technical challenges, the likelihood of corruption, formatting limitations, and the substantial cost. (See August 10, 2011 letter to Robert C. Ekstrand from Richard W. Ellis, attached hereto as Exhibit A.) Further pursuant to Rule 34(b)(2)(D), the Duke Defendants object to this Request for Production to the extent that the Definitions and Instructions call for production of responsive emails by forwarding those responsive emails directly to counsel for Plaintiffs. This approach would be burdensome, inefficient, costly, and create unnecessary risks to the integrity of the data.

[3] Count 24 focuses on specific events, namely the writing of letters, that occurred in May of 2006 and what was known before those letters were written. Count 21 deals with claims that suspensions – all of which occurred during the summer of 2006 or before – were breaches of contract. Accordingly, August 31, 2007 is a reasonable end-date for the review of data for any of the custodians identified by the Duke Defendants.

As with the instruction regarding production of .pst files, there would be no way to identify unique emails for the purpose of managing documents. Further, this approach would materially alter the actual electronic file and there would be a risk of accidental distribution of the email to unintended parties. Finally, the process would take weeks of additional work. Pursuant to Rule 34(b)(2)(E)(ii), which allows for the production of electronically stored information in a "reasonably usable form," the Duke Defendants will produce emails in the near-native format of .htm. Other electronically stored information will be produced in its native format. Documents that existed in hard copy format at the time of collection will be produced as multi-page .pdf files. In addition, a load file will be produced that contains begdoc, enddoc, begattach, endattach, custodian, to, from, cc, bcc, subject and date.

The Duke Defendants further object to the Request for Production to the extent that it seeks information or the production of documents protected by the attorney-client privilege, the work-product doctrine, or any other applicable privilege, immunity, or exemption recognized by law. Furthermore, any production of privileged or otherwise protected information pursuant to this Request for Production is inadvertent and shall not constitute a waiver of any claim or privilege or other protection. The Duke Defendants reserve the right to demand both that Plaintiffs return such inadvertently produced documents and cease any use of the documents in this litigation. These rights are and will be reserved through and including trial. The Duke Defendants are maintaining a privilege log and will provide the privilege log to Plaintiffs.

The Duke Defendants object to the Request for Production insofar as the Definitions and Instructions reference "documents, electronically stored information, and tangible things" that "*should have been* described in Defendants' Initial Disclosures" (emphasis added). This instruction is vague, ambiguous, confusing, harassing, redundant and/or seeks to impose duties or responsibilities on the Duke Defendants beyond those imposed by the Federal Rules of Civil Procedure.

The Duke Defendants object to this Request for Production to the extent that it seeks information relating to the following: medical records; education records, including but not limited to disciplinary information; business, financial or economic data that would ordinarily be maintained in confidence; and other information the disclosure of which would subject a party or person to annoyance, embarrassment, or oppression, where the disclosing person has taken appropriate efforts to maintain the confidentiality of such information or the party is otherwise required to keep such information confidential by agreement or law. The Duke Defendants specifically object to the production of any such information without the protection of a confidentiality order. The Duke Defendants have made multiple attempts to confer with counsel for the Plaintiffs regarding such a Stipulated Protective Order. On October 7, 2011, counsel for the Duke Defendants emailed a proposed Stipulated Protective Order to counsel for the Plaintiffs that would cover the information described in this paragraph. Counsel for the Plaintiffs did not respond. Counsel for the Duke Defendants again emailed counsel for the Plaintiffs on October 21, 2011 regarding the proposed Stipulated Protective Order.

Counsel for the Plaintiffs still has not indicated whether he agrees with the proposed order, whether he would propose changes to that proposed order, or whether he disagrees with that proposed order. If the parties are not able to agree on the terms of such a proposed Stipulated Protective Order, then the Duke Defendants will seek such an order from the court. Accordingly, the information described in this paragraph is being withheld pending resolution of this issue.

The Duke Defendants' investigation, discovery and trial preparation is ongoing. Therefore, the Duke Defendants reserve the right to amend, modify or supplement these responses and objections as additional facts are ascertained, as additional documents are identified and/or obtained, and as additional analysis and contentions are formulated.

Subject to and without waiving these objections, the Duke Defendants will produce non-privileged, non-confidential information that they have identified by category in section II of their Initial Disclosures in the format described above and as such documents are kept in the usual course of business. Information relating to medical records; education records, including but not limited to disciplinary information; business, financial or economic data that would ordinarily be maintained in confidence; and other information the disclosure of which would subject a party or person to annoyance, embarrassment, or oppression, where the Duke Defendants have taken appropriate efforts to maintain the confidentiality of such information or is otherwise required to keep such information confidential by agreement or law is being withheld and will be produced after an appropriate Protective Order is entered by the Court in this case.

This the 9th day of November, 2011.

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*Counsel for Duke University, Robert Dean, Matthew Drummond, Aaron Graves, and Gary N. Smith*

## CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2011, I served the foregoing **Duke Defendants' Response to Plaintiffs' Request for Production** by electronic transmission as provided in Rule 5(b)(2)(E) and by depositing a copy thereof in a depository under the exclusive care and custody of the United States Postal Service in a postage prepaid envelope and properly addressed as follows:

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This the 9th day of November, 2011.

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