EXHIBIT 7

MCFADYEN et al v. DUKE UNIVERSITY et al
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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

RYAN MCFADYEN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:07–CV–00953
	)	
DUKE UNIVERSITY, et al.,	)	
	)	
Defendants.	)	

DUKE UNIVERSITY'S AMENDED RESPONSE TO PLAINTIFFS' FIRST INTERROGATORIES

Defendant Duke University ("Duke"), by and through counsel, hereby amends its response to Plaintiffs' First Interrogatories to Duke University (the "Interrogatories") as follows:

GENERAL OBJECTIONS AND LIMITATIONS

1. Pursuant to Rule 34(b)(2)(E)(i) of the Federal Rules of Civil Procedure, Duke will produce non-privileged responsive documents as such documents are kept in the usual course of business.

2. Pursuant to Rule 34(b)(2)(E)(ii) of the Federal Rules of Civil Procedure, which allows for the production of electronically stored information in a "reasonably usable form," Duke will produce emails in the near-native format of .htm.

3. Duke objects to the Interrogatories to the extent that they seek 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 these Interrogatories is inadvertent and shall not constitute a waiver of any claim, privilege, or other protection. Duke reserves the right to demand both that Plaintiffs return such inadvertently produced information and cease any use of that information in this litigation. These rights are and will be reserved through and including trial. Duke is maintaining a privilege log and will provide that privilege log to Plaintiffs.

4. Pursuant to Judge Beaty's Order on June 9, 2011 [DN 218] (the "June 9, 2011 Order"), discovery may proceed only as to Counts 21 and 24. Accordingly, Duke will respond to the Interrogatories only as they relate to these two claims, including: (i) information regarding the disciplinary proceedings relating to Plaintiff Breck Archer, the disciplinary proceedings relating to Plaintiff Matthew Wilson, and the interim suspension of Plaintiff Ryan McFadyen; and (ii) information regarding the disclosure of DukeCard Data to the Durham Police Department, the subsequent subpoena that was issued to Matthew Drummond on May 31, 2006, seeking production of DukeCard Data by Duke, and the responses to that subpoena.

5. Pursuant to Rule 26(b)(2)(B) of the Federal Rules of Civil Procedure, Duke objects to the Interrogatories to the extent that they request the discovery of electronically stored information from sources that Duke has identified as not reasonably accessible because of undue burden or cost. Accordingly, Duke has taken into consideration whether the "burden or expense of the proposed discovery outweighs its likely benefit, considering 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." Fed. R. Civ. P. 26(b)(2)(C)(iii). In order to reasonably mitigate costs while still complying with discovery mandates, Duke has limited its initial review of data to the email collections of 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, and Duke believes that these custodians will yield the most substantial and complete data, without being "unreasonably cumulative or duplicative."[1] Further, going

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[1] This approach, including the selection of the specific custodians whose data should be reviewed, is consistent with 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

beyond this list of seventeen 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

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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), vacated on other grounds, No. 5:07-CV-174-H(2), 2011 WL 4549101 (E.D.N.C. Sept. 29, 2011). Courts tend to limit the required custodians to those "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 "[e]ven 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).

reviewed for relevance and privilege as set forth below, and Duke will produce the data from these seventeen custodians that is responsive to the Interrogatories made by the Plaintiffs.

6. Similarly, Duke has 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 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, Duke will supplement this response with information held by those additional custodians at that time.

7. Duke objects to the Interrogatories to the extent that they seek 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

[3] Count 21 deals with claims that suspensions – all of which occurred during the summer of 2006 or before – were breaches of contract. 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. Accordingly, August 31, 2007 is a reasonable end-date for the review of data of any of the custodians identified by Duke.

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. Duke specifically objects to the production of any such information without the protection of a confidentiality order. Counsel for both parties have met and conferred several times since October 2011 regarding such a protective order. Although the parties agree that a blanket protective order is appropriate, they have not agreed on the contents of such an order. Therefore, Duke submitted a Motion for Entry of Protective Order on Confidentiality and Prospective Sealing Order on 26 March 2012 [DN 271]. Responsive documents that Duke intends to designate as confidential are being withheld pending a decision on this Motion.

8. No incidental or implied admissions are intended by the responses set forth below. The fact that Duke has responded to or objected to the Interrogatories shall not be deemed an admission that Duke accepts or admits the existence of any fact set forth or assumed by the Interrogatories, or that such response or objection constitutes admissible evidence. The fact that Duke has responded to the Interrogatories is not intended to be and shall not be construed as a waiver by Duke of any part of any objection to the Interrogatories.

9. Duke's investigation, discovery, and trial preparation is ongoing. Therefore, Duke reserves the right to amend, modify, or supplement these

responses and objections as additional facts are ascertained, as additional documents and information is obtained, and as additional analysis and contentions are formulated. Moreover, Duke reserves the right to assert additional objections should it discover additional grounds for objection.

This the 6th day of June, 2012.

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CERTIFICATE OF SERVICE

It is hereby certified that the foregoing **Duke University's Amended Response to Plaintiffs' First Interrogatories to Duke University** has been served this day by depositing copies thereof in a depository under the exclusive care and custody of the United States Postal Service in a postage prepaid envelope properly addressed as below, or by electronic transmission as provided in Rule 5(b)(2)(E) to those parties whose counsel agreed in writing to such electronic service in lieu of service by mail:

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This the 6th day of June, 2012.

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