

EXHIBIT 9

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 RESPONSES AND OBJECTIONS
TO PLAINTIFFS’ FOURTH REQUEST FOR PRODUCTION
OF DOCUMENTS AND THINGS**

Defendant Duke University (“Duke”), by and through counsel, hereby responds to Plaintiffs’ Fourth Request for Production to Duke (the “Requests”) 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 non-confidential, non-redacted emails in both .pdf form and the near-native format of .htm. Confidential and redacted documents will be

produced as .pdfs, but not as .htm files, because of the necessity of branding the images. For every document it produces, Duke is producing extracted text files.

3. Duke objects to the Requests 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. Any production of privileged or otherwise protected information pursuant to these Requests is inadvertent and shall not constitute a waiver of any claim, privilege, or other protection. Duke reserves the right to demand 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 supplemental privilege log and will provide that supplemental privilege log to Plaintiffs.

4. Pursuant to Judge Beaty's Order on June 9, 2011 [DE 218] (the "June 9, 2011 Order") and Judge Peake's Order on July 24, 2012 [DE 282] (the "July 24, 2012 Order"), discovery may proceed only as to Counts 21 and 24. Accordingly, Duke will respond to the Requests 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 Requests 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 and 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 proposed 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.¹ 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,

¹ These seventeen custodians are: (1) Zoila Airall; (2) Richard Brodhead; (3) Stephen Bryan; (4) Robert Dean; (5) Matthew Drummond; (6) Roland Gettliffe; (7) Aaron Graves; (8) Kate Hendricks; (9) Larry Moneta; (10) Sara-Jane Raines; (11) Michele Rasmussen; (12) Judith Ruderman; (13) Gary Smith; (14) Bob Steel; (15) Greg Stotsenberg; (16) Sue Wasiolek; and (17) Gerald Wilson.

without being “unreasonably cumulative or duplicative.”² Further, going 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.³ Further, Duke is limiting its review in response to these

² This approach, including the selection of the specific custodians whose email ESI 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 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).

³ 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 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.

Requests for Production by a key-word-based electronic search of the seventeen custodians' email ESI.⁴ This key-word list was developed to be specifically tailored to Plaintiffs' discovery (requests for production, interrogatories, and requests for admission) issued August 22, 2012. Duke's keyword lists are available upon request.

6. As described herein, the email ESI data of these seventeen custodians has been reviewed for relevance and privilege. Duke has been producing and will produce the email ESI data from these seventeen custodians in accordance with the above criteria that is responsive to the Requests made by the Plaintiffs.

7. Duke also produced to Plaintiffs on September 17, 2012, thousands of emails, sourced from hundreds of ESI custodians which were To, From, Copying, or Blind-Carbon-Copying any Plaintiff as the term is defined at Plaintiffs' Definition Number 10.

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

⁴ Courts approve the use of key-word-based searching where, as here, production requires review of a large volume of data and the key-word search process is reasonable and adequate. See, e.g., Wood v. Town of Warsaw, No. 7:10-cv-219, 2011 WL 6748797, at *2 (E.D.N.C. Dec. 22, 2011) (approving of use of "limited search and production" using "appropriately tailored" key words); Romero v. Allstate Ins. Co., 271 F.R.D. 96, 109-10 (E.D. Pa. 2010) ("[T]he use of key words has been endorsed as a search method for reducing the need for human review of large volumes of ESI . . .") (internal quotations and citations omitted).

8. Duke objects to the Requests for Production to the extent they purport to require Duke to review non-email ESI data for any custodian due to the undue burden and expense entailed in the processing and reviewing of such data.

9. In responding to these Requests, 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, 2007.⁵

10. Duke objects to the Requests 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 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.

⁵ 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.

11. Duke objects that documents responsive to these Document Requests may be subject to protections afforded by the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99), a federal law that safeguards the privacy of student education records. A litigation exception exists under the federal regulations, “[i]f a parent or eligible student initiates legal action against an educational agency or institution, the educational agency or institution may disclose to the court, without a court order or subpoena, the student’s education records that are relevant for the educational agency or institution to defend itself.” *See* 34 CFR 99.31(a)(9)(iii)(B). Any production of FERPA-protected information pursuant to these Document Requests (other than that of Plaintiffs in this specific case) is inadvertent. Duke reserves the right to demand both that Plaintiffs return such inadvertently produced documents for redaction and cease any use of the un-redacted documents in this litigation. These rights are and will be reserved through and including trial.

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

13. Duke's investigation 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 are 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.

14. Duke objects to these Document Requests to the extent any request is wholly duplicative of the Initial Disclosures required by Rule 26(a)(1), any another request in these Document Requests, and/or any request within the First, Second, and Third Sets of Document Requests propounded by Plaintiffs. A single copy of non-privileged, responsive documents will be produced in response to the complete set of Document Requests.

15. "Confidential" documents will be so designated and are being produced subject to your agreement to treat such documents as "Confidential" under the Protective Order on Confidentiality and Prospective Sealing Order entered by the Court [DE 284].

REQUEST 38: Please produce all electronic correspondence between Peter Wilson and Stephen Bryan from March 2006 to September 2006.

RESPONSE:

Duke objects to this Request to the extent that Plaintiffs are better-positioned to obtain the electronic correspondence of Plaintiff's father Peter Wilson. Duke further objects to this Request as over broad, oppressive, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence in that it seeks "all electronic correspondence" without subject matter limitation. Subject to and notwithstanding its general and specific objections, including the conditions and restrictions outlined above with respect to email custodians, Duke is producing non-privileged documents responsive to this Request that are (i) relevant to any party's claim or defense to Counts 21 or 24, and (ii) have not yet been produced. "Confidential" documents will be so marked.

REQUEST 39: Every Document relating or referring to the interim suspension of Ryan McFadyen.

RESPONSE:

Duke objects to this Request as unreasonably cumulative, duplicative and co-extensive with previous and contemporaneous Requests, including but not limited to Request Nos. 21, 22, 43, 45, 47, 50, 52, 54, 55, 56, 58, and 59. Duke further objects to this Request for Production to the extent the Request calls for the production of documents relating to communications between Duke and its attorneys and/or work product generated by or under the direction of those attorneys. Duke also objects that the lack of a time period for this Request is arbitrary, unreasonable, over broad, and unduly burdensome. Duke limits its response to events on or before August 31, 2007. Duke

further objects that this Request is facially over broad to the extent it uses the term “relating to” because it renders the Request limitless. Subject to and notwithstanding its general and specific objections, including the conditions and restrictions outlined above with respect to email custodians, Duke is producing non-privileged documents responsive to this Request that are (i) relevant to any party’s claim or defense to Counts 21 or 24, and (ii) have not yet been produced. “Confidential” documents will be so marked.

REQUEST 40: Every Document relating or referring to the suspension of Breck Archer.

RESPONSE:

Duke objects to this Request as unreasonably cumulative, duplicative and co-extensive with previous and contemporaneous Requests, including but not limited to Request No. 48. Duke further objects to this Request for Production to the extent the Request calls for the production of documents relating to communications between Duke and its attorneys and/or work product generated by or under the direction of those attorneys. Duke also objects that the lack of a time period for this Request is arbitrary, unreasonable, over broad, and unduly burdensome. Duke limits its response to events on or before August 31, 2007. Duke further objects that this Request is facially over broad to the extent it uses the term “relating to” because it renders the Request limitless. Subject to and notwithstanding its general and specific objections, including the conditions and restrictions outlined above with respect to email custodians, Duke is producing non-privileged documents responsive to this Request that are (i) relevant to

any party's claim or defense to Counts 21 or 24, and (ii) have not yet been produced.

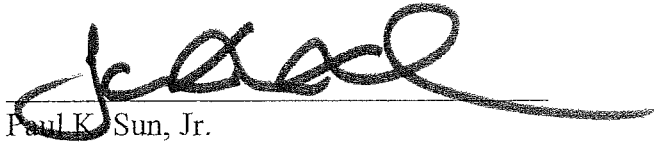
"Confidential" documents will be so marked.

REQUEST 41: Every Document relating or referring to the suspension of Matthew Wilson.

RESPONSE:

Duke objects to this Request as unreasonably cumulative, duplicative and co-extensive with previous and contemporaneous Requests, including but not limited to Request No. 44, 46, 49, 51, 53, and 57. Duke further objects to this Request for Production to the extent the Request calls for the production of documents relating to communications between Duke and its attorneys and/or work product generated by or under the direction of those attorneys. Duke also objects that the lack of a time period for this Request is arbitrary, unreasonable, over broad, and unduly burdensome. Duke limits its response to events on or before August 31, 2007. Duke further objects that this Request is facially over broad to the extent it uses the term "relating to" because it renders the Request limitless. Subject to and notwithstanding its general and specific objections, including the conditions and restrictions outlined above with respect to email custodians, Duke is producing non-privileged documents responsive to this Request that are (i) relevant to any party's claim or defense to Counts 21 or 24, and (ii) have not yet been produced. "Confidential" documents will be so marked.

This the 21st day of September, 2012.



Paul K. Sun, Jr.
N.C. State Bar No. 16847
Email: paul.sun@elliswinters.com
James M. Weiss
N.C. State Bar No. 42386
Email: jamie.weiss@elliswinters.com
Ellis & Winters LLP
1100 Crescent Green, Suite 200
Cary, North Carolina 27518
Telephone: (919) 865-7000
Facsimile: (919) 865-7010

Dixie T. Wells
N.C. State Bar No. 26816
Email: dixie.wells@elliswinters.com
Ellis & Winters LLP
333 N. Greene St., Suite 200
Greensboro, NC 27401
Telephone: (336) 217-4197
Facsimile: (336) 217-4198

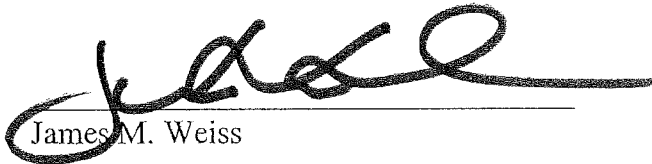
Counsel for Duke University

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing **Duke University's Response to Plaintiffs' Fourth Request for Production 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:

BY E-MAIL:
Robert C. Ekstrand
Stefanie A. Smith
EKSTRAND & EKSTRAND LLP
811 Ninth Street, Suite 260
Durham, NC 27705
Counsel for Plaintiffs

This the 21st day of September, 2012.



James M. Weiss