

THE HONORABLE ROBERT S. LASNIK

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

MARSHA LINEHAN, an individual,

Plaintiff,

v.

LANE PEDERSON, an individual;
COGNITIVE AND BEHAVIORAL
SPECIALTIES d/b/a DIALECTICAL
BEHAVIOR THERAPY NATIONAL
CERTIFICATION AND ACCREDITATION
ASSOCIATION, a Minnesota non-profit
corporation; LANE PEDERSON &
ASSOCIATES, LLC, a Minnesota limited
liability company; EVERGREEN
CERTIFICATIONS, LLC, d/b/a
EVERGREEN CERTIFICATIONS
INSTITUTE, a Wisconsin limited liability
company; and PESI, Inc., a Wisconsin non-
stock corporation,

Defendants.

Case No. 2:17-cv-01494-RSL

**AGREEMENT REGARDING
DISCOVERY OF
ELECTRONICALLY STORED
INFORMATION AND [PROPOSED]
ORDER**

A. General Principles

1. An attorney’s zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

2. The proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) must be applied in each case when formulating a discovery plan. To further the application of the

1 proportionality standard in discovery, requests for production of ESI and related responses
2 should be reasonably targeted, clear, and as specific as possible.

3 **B. ESI Disclosures**

4 Within 30 days after entry of the subpoenaed order, or at a later time if agreed to by the parties,
5 each party shall disclose:

6 1. Custodians. The five custodians most likely to have discoverable ESI in their
7 possession, custody or control. The custodians shall be identified by name, title, connection to
8 the instant litigation, and the type of the information under his/her control.

9 2. Non-custodial Data Sources. A list of non-custodial data sources (e.g. shared
10 drives, servers, etc.), if any, likely to contain discoverable ESI.

11 3. Third-Party Data Sources. A list of third-party data sources, if any, likely
12 to contain discoverable ESI (e.g. third-party email and/or mobile device providers, “cloud”
13 storage, etc.) and, for each such source, the extent to which a party is (or is not) able to
14 preserve information stored in the third-party data source.

15 4. Inaccessible Data. A list of data sources, if any, likely to contain
16 discoverable ESI (by type, date, custodian, electronic system or other criteria sufficient to
17 specifically identify the data source) that a party asserts is not reasonably accessible under
18 Fed. R. Civ. P. 26(b)(2)(B).

19 **C. Preservation of ESI**

20 The parties acknowledge that they have a common law obligation to take reasonable
21 and proportional steps to preserve discoverable information in the party’s possession, custody
22 or control. With respect to preservation of ESI, the parties agree as follows:

23 1. Absent a showing of good cause by the requesting party, the parties shall not
24 be required to modify the procedures used by them in the ordinary course of business to back-
25 up and archive data; provided, however, that the parties shall preserve all discoverable ESI in
26 their possession, custody or control.

1 2. All parties shall supplement their disclosures in accordance with Rule 26(e)
2 with discoverable ESI responsive to a particular discovery request or mandatory disclosure
3 where that data is created after a disclosure or response is made (unless excluded under (C)(3)
4 or (D)(1)-(2) below).

5 3. Absent a showing of good cause by the requesting party, the following
6 categories of ESI need not be preserved:

- 7 a. Deleted, slack, fragmented, or other data only accessible by forensics.
8 b. Random access memory (RAM), temporary files, or other ephemeral data
9 that are difficult to preserve without disabling the operating system.
10 c. On-line access data such as temporary internet files, history, cache,
11 cookies, and the like.
12 d. Data in metadata fields that are frequently updated automatically, such as
13 last-opened dates (see also Section (E)(5)).
14 e. Back-up data that are substantially duplicative of data that are more
15 accessible elsewhere.
16 f. Server, system or network logs.
17 g. Data remaining from systems no longer in use that is unintelligible on the
18 systems in use.
19 h. Electronic data (e.g. email, calendars, contact data, and notes) sent to or
20 from mobile devices (e.g., iPhone, iPad, Android, and Blackberry devices), provided that a copy
21 of all such electronic data is routinely saved elsewhere (such as on a server, laptop, desktop
22 computer, or “cloud” storage).
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25 **D. Privilege**

26 1. With respect to privileged or work-product information generated after the

1 filing of the related consolidated proceedings before the Trademark Trial and Appeal Board,
2 parties are not required to include any such information in privilege logs.

3 2. Activities undertaken in compliance with the duty to preserve information are
4 protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

5 3. Information produced in discovery that is protected as privileged or work
6 product shall be immediately returned to the producing party, and its production shall not
7 constitute a waiver of such protection, if: (i) such information appears on its face to have been
8 inadvertently produced or (ii) the producing party provides notice within 15 days of discovery
9 by the producing party of the inadvertent production.

10 **E. ESI Discovery Procedures**

11 1. On-site inspection of electronic media. Such an inspection shall not be permitted
12 absent a demonstration by the requesting party of specific need and good cause or by
13 agreement of the parties.

14 2. Search methodology. The parties shall timely attempt to reach agreement on
15 appropriate search terms, or an appropriate computer- or technology-aided methodology, before
16 any such effort is undertaken. The parties shall continue to cooperate in revising the
17 appropriateness of the search terms or computer- or technology-aided methodology.

18 In the absence of agreement on appropriate search terms, or an appropriate computer- or
19 technology-aided methodology, the following procedures shall apply:

20 a. A producing party shall disclose the search terms or queries, if any, and
21 methodology that it proposes to use to locate ESI likely to contain discoverable information. The
22 parties shall meet and confer to attempt to reach an agreement on the producing party's search
23 terms and/or other methodology.

24 b. If search terms or queries are used to locate ESI likely to contain
25 discoverable information, a requesting party is entitled to no more than 5 additional terms or
26 queries to be used in connection with further electronic searches absent a showing of good cause

1 or agreement of the parties.

2 c. Focused terms and queries should be employed; broad terms or queries,
3 such as product and company names, generally should be avoided.

4 d. The producing party shall search both non-custodial data sources and ESI
5 maintained by the custodians identified above.

6 3. Format. The parties agree that ESI will be produced to the requesting party with
7 searchable text, in single-page TIFFs (with Concordance load files that includes metadata fields
8 identifying natural document breaks and also includes companion OCR and/or extracted text
9 files). Unless otherwise agreed to by the parties, files that are not easily converted to image
10 format, such as spreadsheet, database and drawing files, should be produced in native format.

11 4. De-duplication. The parties may de-duplicate their ESI production across
12 custodial and non-custodial data sources after disclosure to the requesting party.

13 5. Metadata fields. If the requesting party seeks metadata, the parties agree that
14 only the following metadata fields need be produced: document type; custodian and duplicate
15 custodians; author/from; recipient/to, cc and bcc; title/subject; file name and size; original file
16 path; date and time created, sent, modified and/or received; and hash value.

1 Dated: September 4, 2018

2 CAIRNCROSS & HEMPELMANN, P.S.

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Certification and Accreditation Association; and
Lane Pederson & Associates, LLC

17 Attorneys for Plaintiff Marsha Linehan

18 **ORDER**

19 Based on the foregoing, IT IS SO ORDERED.

20 DATED: *September 6, 2018*

Robert S. Lasnik

24 The Honorable Robert S. Lasnik
25 UNITED STATES DISTRICT JUDGE