UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Tim Blixseth,	Civil Action No. 09-10219
Plaintiff,	)
vs.	) **EMERGENCY MOTION TO**
	) **OBTAIN PERSONALLY**
	) **IDENTIFIABLE INFORMATION**
Bresnan Communications, and Does 1 through 100	) **OF AN INTERNET SERVICE**
	) **PROVIDER'S SUBSCRIBER**
Defendants.	)

INTRODUCTION

Pursuant to Local Rule 40.4, Plaintiff Tim Blixseth files this Emergency Motion to obtain what is called "personally identifiable information" ("PII") from defendant Bresnan Communications, LLC. PII is information which identifies a subscriber or account holder of an internet service provider ("ISP"). Bresnan is an ISP in possession of the PII of an individual who approximately a week ago, posted a nationwide internet blog threatening to kill Plaintiff. Given the circumstances recited herein, the threat is ominous and Plaintiff's life is in imminent danger. Pursuant to 18 U.S.C. § 2702 (b)(8) a threat involving "danger of death or serious physical harm" is defined as an "emergency."

The threat was made on Monday, February 9, 2009 by an individual calling himself "Sharkbait" who posted the "Blog" on the nation-wide website, New West Network. The threat stated that Plaintiff's publicized plan to bid over $100 million dollars on the pending bankruptcy of a real estate development project will result in getting "lead between the eyes when you open

your door." Plaintiff's bid is in competition with a Boston based company.

The nationwide internet posting of the threat is in violation of 18 U.S.C. § 875 (b) (interstate communication of a threat to injure), and is currently under investigation by the FBI.

Sharkbait used an "IP address" of 69 144 25165 to post the threat. His identity is unknown, but there are specific suspects. Bresnan is the ISP for said IP address. Bresnan acknowledges that it is in possession of the PII for an individual subscriber whose IP address matches that used to post the threat. Bresnan asserts that it cannot voluntarily release the PII without a court order pursuant to 47 U.S.C. § 551 (c)(2)(B) (protection of subscriber privacy); and that it must notify the subscriber *in advance* pursuant to said statute.

Plaintiff asserts that the circumstances herein involving an explicit violation of 18 U.S.C. § 875 (b) constitute a serious and intended threat to kill, together with the authorization and requirements of 18 U.S.C. 2702 (b)(8) and § 2702 (c)(6) (voluntary disclosure of ISP subscriber records in an "emergency" involving "danger of death") compel immediate and voluntary disclosure with no court order; and, *most importantly without disclosure to the subscriber.*

Bresnan does not oppose a court order. It does require disclosure to its subscriber. Plaintiff asserts that such disclosure will jeopardize his life, allow Sharkbait to even formulate alternative plans, interfere with the pending government investigation, alert Sharkbait to destroy or conceal evidence, and give Sharkbait the opportunity to delay disclosure in direct contravention of the purposes of 18 U.S.C. 2702, (c)(6), a criminal statute designed to give the ISP authority under "emergency" life-threatening circumstances as exists here. The emergency provisions of 18 U.S.C. § 2702 (b)(8) *must* control in these circumstances. Plaintiff vigorously objects to notification before disclosure.

Sharkbait has a two year history of defaming Plaintiff on several websites, and has made implied threats in the past. The subject death threat was specific, explicit and intended to prevent Plaintiff from currently bidding on the real estate development project now in bankruptcy. Plaintiff believes that Sharkbait, *or his associates*, have a financial motive in excess of ten million dollars to kill him or prevent him from bidding in the pending bankruptcy.

The bankruptcy proceedings were filed after Plaintiff's contract for the sale of the project to Cross Harbor Capital ("CHC") of One Boston Place, Boston, MA was terminated by CHC. Plaintiff had worked with CHC for a year to consummate a sale. The sale may have collapsed as a result, in part, of the actions of an individual who may be Sharkbait. Plaintiff is now bidding against CHC.

This court has jurisdiction and venue because of the interstate conveyance of the threat, the interstate application of 18 U.S.C. § 2702, § 875, and 47 U.S.C. § 551, the involvement of Massachusetts domiciliaries, including CHC and Plaintiff's lawyers (who have some concern for their safety), the location of facts, events and witnesses in Massachusetts, and the involvement of multiple jurisdictions including Massachusetts, Montana, Nevada, California, Washington, France and Mexico.

Pursuant to Local Rule 40.4, Plaintiff requests that this motion be filed under seal and heard on an emergency basis, if necessary by the "Miscellaneous Business Docket Judge," or by the Judge assigned to the case.

POINTS AND AUTHORITIES

I. Summary of Facts

1. Plaintiff is an American citizen, and an international businessman, and real estate

developer with multiple residences inside and outside the United States Plaintiff is now domiciled in Seattle Washington.

2. Plaintiff developed the world famous Yellowstone Club, (the "Club") in Montana, with satellite locations in California, Scotland, France, Mexico, Turks and Caicos and other locations. Plaintiff executed an asset sales contract on January 15, 2008 to sell the assets to CHC, a Boston based investment company, for $470 million dollars. The negotiations and sales contract had taken over a year to prepare beginning in early 2007, and millions of dollars in due diligence costs. Much of the work was done in Boston by a Boston law firm representing CHC.

3. On March 26, 2008, CHC terminated the sales contract after a Club member ("LeMond"), during the same year long period, had sued the Club and had generated extensive nation-wide publicity against Plaintiff. Plaintiff believes the LeMond suit was baseless, the media accusations were false, but they were designed to use the Club's sale to extract a settlement from Plaintiff knowing that he would not risk negative publicity regardless of the merits of the case.

4. During the same time period, January 2007 through March 26, 2008, CHC had informed Plaintiff that it was communicating with Plaintiff's then ex-wife who was then seeking control of the Club in a California divorce proceeding; and who was making negative statements about the Plaintiff to CHC and to LeMond. The California court had issued two orders prohibiting the ex-wife's interference with the sale, which she and her lawyers essentially ignored. During the same period, Plaintiff's ex-wife and her lawyers were also communicating with LeMond and made an agreement to settle with LeMond if she obtained control of the Club.

5. Throughout the same period, early January, 2007 through February 9, 2009,

Sharkbait and an associate blogger named "Blockhead" were posting false, defamatory and threatening blogs antagonistic to Plaintiff on nationwide websites, including but not limited to New West Network. The blogs were strongly supportive of LeMond, and later of CHC, and extremely damaging to Plaintiff. But none actually threatened his life until the February 9, 2009 death threat.

6. During the same period, LeMond and his associates made false accusations to several government agencies, which were subsequently shown to be false, baseless, and designed to pressure Plaintiff into settlement. The accusations to the government were part of the LeMond campaign to extract a settlement from Plaintiff. The government determined their accusations to be meritless, but they were widely publicized by Sharkbait and Blockhead, and some of them were published in the national media.

7. On or about March 24-27, 2008, CHC and the ex-wife informed Plaintiff that the Club could be put into a "pre-packaged bankruptcy" if she controlled it, and that CHC was terminating the sale. CHC then made a separate deal with the ex-wife, gave her $35 Million dollars to use some of the proceeds to buy out Plaintiff's share of the Club, and to put it in bankruptcy, and to settle with LeMond. The ex-wife then put the Club into bankruptcy.

8. On or about Friday February 6, 2009, Plaintiff publicly announced his intention to bid for the Club in the bankruptcy proceedings.

9. On Monday, February 9, 2009, Sharkbait posted the explicit death threat on the New West website using the IP address 69 144 25165. The death threat explicitly referenced Plaintiff's intention to make a public bid in the then pending bankruptcy proceedings. The IP address was then provided to Plaintiff's counsel by New West Network after the FBI was

notified.

10. On Friday, February 13, 2009, Defendant Bresnan Communications, LLC having its principal place of business at One Manhattanville Rd., Purchase, N.Y. 10577 - 2596, through its counsel, notified Plaintiff's counsel that it possessed a PII for the blog posted by "Sharkbait;" and that it would not oppose a court order disclosing the PII providing notice was given to its subscriber.

11. Plaintiff opposes the pre-disclosure notification to Sharkbait.

II Applicable Legal Standards.

1. This motion qualifies as an "emergency." Pursuant to LR 40.4 this motion qualifies as an "Emergency" as defined in 18 U.S.C. § 2702 (b)(8). Plaintiff, therefore, requests that said motion be heard as soon as possible by the "Miscellaneous Business Docket Judge" or by the judge assigned to the case. The complaint was filed on Friday, February 13, 2009; and Plaintiff's counsel has conferred with defendant Bresnan's counsel and served him with a copy of the complaint and a copy of this motion.

2. The Electronic Communications Privacy Act compels disclosure. Pursuant to 18 U.S.C. § 2702 (c)(6), (the "Electronic Communications Privacy Act" - "ECPA"), an ISP, such as Brennan, may make voluntary disclosure of its subscriber's identity without any statutory limitation "to any person other than a governmental entity." Under 18 U.S.C. § 2702 (b)(8), it may *also* make disclosure to a governmental entity "*if the provider , in good faith, believes that* an *emergency involving danger of death or serious physical injury to any person requires disclosure without delay of communications relating to the emergency*." (Italics supplied..)

Thus, the ECPA imposes no restriction or limitation on the ISP to make voluntary

disclosure to Plaintiff; and the "danger of death"provision gives it permission to provide the PII to the government on an emergency basis without fourth amendment restrictions, and "without delay of communications relating to the emergency." Here, we plainly have an "emergency" statutorily defined as "the danger of death" involving a death threat which would even entitle the government to obtain the identity without notification to the subscriber for 90 days plus extensions under the statute.

It follows, therefore, that the EPCA should be construed to mean that the "danger of death" emergency involving a homicide threat compels disclosure without notification to the subscriber where a private individual, such as Plaintiff, has been targeted by the threat. Congressional intent to avoid delay under these exigent circumstances must be broadly construed to protect the life of the intended victim - the present death threat is integral to the statutory emergency. They go hand in glove. Notification to Sharkbait would not only give him a license to conceal and destroy evidence, it would help him and his associates to make alternative plans! Under this statute, Bresnan should disclose the identity of Sharkbait without notification.

But it will not. It asserts that 47 U.S.C. § 551 (c)(2)(B) (the "Communications Act") prohibits disclosure of "personally identifiable information" unless it is made "pursuant to a court order authorizing such disclosure if the subscriber is notified of such order by the person to whom the order is directed." Bresnan asserts that it is caught between a "rock and a hard place" between the two statutes.

3. <u>The Communications Act conflicts with the ECPA</u>. The two statutes appear to be in conflict; and this court previously refused to reconcile them when the *government* sought records with the ISP's apparently *complete* cooperation. *In re Application of U.S.,* 36 F. Supp.

2d 430, 433 (D. Mass. 1999) (Young J.). The *complete* cooperation of the ISP in that case caused Judge Young to rule that the "rock and a hard place" conflict between the statutes was not "ripe" for resolution under the facts of that particular case. No such problem exists here. Plaintiff does not want Sharkbait to be notified because he will obviously destroy or conceal evidence of his criminal conduct - most likely his computer, or make alternative plans. For his own security, Plaintiff must conduct his own investigation without risking destruction or concealment of evidence, or delay which might jeopardize his life.

Bresnan seeks to make disclosure under the Communications act, not under the ECPA. The Communications Act requires a court order and, according to Bresnan, requires prior notification. Plaintiff contends the ECPA controls. The cases decided after Judge Young's ruling favor Plaintiff' s position that the ECPA controls and does not require notification; and those cases do NOT appear to involve death threats, the presence of which invokes congressional intent to avoid *any* delay.

The "danger of death" provision in the ECPA virtually compels disclosure in these circumstances without notification based on the well reasoned case law. The matter is ripe for resolution in this court on a statutorily defined "emergency" basis; and Bresnan is understandably reluctant to make its own statutory interpretation in a matter potentially involving life or death.

4. <u>The subject threat is a murder threat and an emergency intended to prevent Plaintiff from bidding in the bankruptcy proceeding.</u> The death threat posted by Sharkbait is on its face an "emergency involving danger of death or serious physical injury." Under any reasonable analysis, a threat that Plaintiff will get "lead between the eyes when you open your

door" is a "danger of death" emergency. Placed in the context of the bankruptcy bidding it is a threat encompassed within the stated motive to murder Plaintiff if he makes a bid. The facts recited above plainly dictate that both pragmatic and statutory considerations such as delay and destruction of evidence, coupled with the criminal nature of the threat and requested disclosure, coupled with the purposes of the ECPA and congressional intent, should apply.

The threat is a violation of 18 U.S.C. § 875 (b) making it a felony to use the internet to communicate threats of serious physical harm. *United States v Sutcliffe,* 505 F. 3d 944, 961(9th Cir. 2007). ["conditional" threat to kill a process server posted on website is a "true threat" regardless of "contingency involved" and not protected by First Amendment or that it involved a labor conflict.]

5. <u>Current case law resolves the statutory conflict in favor of disclosure without notification.</u> The conflict between the statutes has since been construed in several cases. *In re Application of the U.S.,* 158 F. Supp 2d 644, (D. Maryland, 2001) involved a motion to quash by a cable company (also a "provider" under the two Acts - like the ISP here) in which the government sought PII.. The court reasoned that the ECPA "implicitly repealed" the notice requirements of the Communications Act, section 551. The court cited the usual rules governing statutory conflicts, found the two statutes to be in "facially and starkly conflict" and held that no notice to the subscriber was required. The court relied upon the intent of congress to permit disclosures as part of a criminal investigation. The case did not recite whether death or serious physical injury threats were involved or analyze the "delay" provision in 18 U.S.C. § 2702 (B)(8). *Id* at 648-49. The same reasoning applies here with more persuasive force because the government is not a party, no fourth amendment issues are implicated, and a murder threat and

"delay" are intrinsically involved.

In re Application of the U.S., 157 F. Supp. 2d 286, (D.N.Y., 2001) reached the same result holding that notice is not required under the ECPA but on different grounds. There, the court held that section 551 of the Communications Act "must be read to apply only to a narrow definition of cable service that would exclude the provision of internet access.... and because the ECPA requires no notice to the subscriber." *Id* at 292.

More recently, this court broadly construed the ECPA enabling the government to access historical cell information. *In re Application of U.S.* 509 F. Supp. 2d 76 (D. Mass. 2007). The Court, Stearns, J. held that "content information" archived by the provider could be disclosed to the government based on "specific and articulable facts."

At this point, Plaintiff is only seeking "content information," of the blog sent on February 9, 2008 with the subject IP address and the PII and related records. After ascertaining the PII and the "screen-shot" of the blog containing the death threat and connecting it to the IP address , Plaintiff may seek further "stored" records from Bresnan, which should be made accessible under the forgoing case precedent decided by Judge Stearns. At that time, Plaintiff will seek additional relief from the court, if necessary.

Plaintiff's disclosure request is NOT subject to the notification requirements of section 551 of the Communications Act. In the recent case of *Fitch v Doe,* 869 A. 2d 722, 728-29, Me. 2005, the Maine Supreme Court held that the section 551 disclosure and notification requirements do *not* apply to a non-governmental entity.

III. **Prayer for Relief**.

Plaintiff respectfully requests that this court enter an order that permits Bresnan

Communications to provide Plaintiff the PII for the subject IP address of 69 144 25165 without disclosure to the subscriber/account holder; and that Bresnan provide the blog or "screen-shot" containing the death threat sent on said IP address on February 9, 2009, and/or related information or records. Plaintiff further requests that this court enter an order to permit Plaintiff to conduct discovery and to subpoena from the subscriber and from third parties, relevant information, documents or electronic media relating to the subject death threats without requiring repeated interpretations of the EPCA and the Communications Act in connection with each subpoena or each request for discovery sought.

Plaintiff has attached herewith a form of Order.

Dated this 16th day of February, 2009 /S/_____

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