IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, Pa.,	)	
Plaintiff,	)	C.A. No. 14C-10-160 MMJ CCLD
v.	)	
TRUSTWAVE LTD. and AMBIRON, TRSUTWAVE LTD.,	)	
Defendants.	)	

Submitted: November 16, 2017
Decided: December 21, 2017

OPINION

Robert J. Katzenstein, Esq., Smith, Katzenstein & Jenkins LLP, Scott L. Schmookler, Esq. (Argued), Christopher M. Kahler, Esq., Gordon & Rees LLP Attorney for Plaintiff National Union Fire Insurance Company of Pittsburgh, Pa.

John A. Elzufon, Esq., Peter C. McGivney, Esq., Elzufon Austin & Mondell, P.A., Brian P. Kavanaugh, Esq., William E. Arnault, Esq. (Argued), Kirkland & Ellis LLP Attorneys for Defendants Trustwave Ltd. and Ambiron Trustwave, Ltd.

JOHNSTON, J.

FACTUAL AND PROCEDURAL CONTEXT

Plaintiff National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union"), insures Euronet Worldwide ("Euronet"), a company that provides electronic payment services. Defendant Trustwave[1] provides data security services. Euronet and Trustwave entered into two sets of contracts in which Trustwave agreed to perform compliance assessments of Euronet's various data security measures. The first set of contracts, entered into in 2006, designated Delaware as the parties' mandatory forum. A 2011 agreement superseded all prior contracts and changed the mandatory forum to the Courts of England and Wales.

Euronet suffered a data breach during the contract period, costing it $6 million in damages. As Euronet's insurer, National Union covered those damages. National Union then brought this suit against Trustwave in 2014 and filed an amended complaint in 2015. In addition to breach of contract, National Union's amended 26-count complaint includes claims of breach of implied warranties, misrepresentation, indemnification, and gross negligence.

By Opinion dated May 3, 2016, this Court dismissed several counts for failing to state a claim upon which relief could be granted.[2] Most relevant to the present

[1] Ambiron Trustwave Ltd. now is Trustwave Ltd. For ease of reference, the Court will refer to Defendants as Trustwave.

[2] *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Trustwave Holdings, Inc.*, 2016 WL 2354621, at *5–6 (Del. Super.).

motion, the Court also considered a motion to dismiss for improper venue on the basis of the 2011 contract's forum selection clause. The Court held it was premature to rule on the motion, stating:

> Following discovery, if it appears that the alleged 2011 conduct was separate and distinct, and not in a continuous course from 2006 onward, the Court will consider whether to sever the 2011 claims to allow Trustwave to litigate in the Courts of England and Wales.[3]

Trustwave brings the present Motion to dismiss Counts 23–26. Trustwave argues that discovery has revealed that these counts constitute separate and distinct events from the conduct subject to the 2006 contracts, making the counts instead subject to the 2011 contract. The distinction matters, as the contracts contain conflicting forum selection clauses. The 2006 contracts provide:

> This Agreement shall be governed by and construed in accordance with the laws of the state of Delaware, without giving effect to conflict of law principles. Each party hereto hereby agrees that any proceeding relating to this Agreement and the transactions contemplated hereby shall be brought solely in the state or federal court located in Delaware.

The contract which became effective on February 2, 2011 states:

> This Agreement shall be governed by and construed in accordance with English law, without giving effect to conflict of law principles. Each party hereto hereby agrees that any proceeding relating to this Agreement and the transactions contemplated hereby shall be brought solely in the Court of England and Wales.

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[3] *Id.* at *5.

MOTION TO DISMISS STANDARD

Superior Court Civil Rule 12(b)(3) governs a motion to dismiss or stay on the basis of improper venue. The Court should enforce agreement terms to resolve disputes in a contractually-designated judicial forum.[4] The Court can grant dismissal prior to discovery, on the basis of affidavits and documentary evidence, if the plaintiff cannot make out a *prima facie* case in support of its position.[5] The Court generally will allow the plaintiff to take discovery when the plaintiff advances a non-frivolous legal argument that would defeat the motion if the facts turn out to be as alleged.[6]

ANALYSIS

Trustwave contends that Counts 23–26 all arise out of Trustwave's services by way of a 2011 Report on Compliance ("ROC"). Trustwave argues that the 2011 ROC is a "separate and distinct" source of alleged misrepresentations and therefore should be subject to the 2011 choice of forum clause. National Union counters that the 2011 ROC is simply another event in Trustwave's continuous course of conduct that occurred under both the 2006 and 2011 agreements.

Generally, under the *McWane* doctrine, "litigation should be confined to the

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[4] *Loveman v. Nusmile, Inc.*, 2009 WL 847655, at *2 (Del. Super .).
[5] *Id.* (citing *Simon v. Navellier Series Fund*, 2000 WL 1597890, at *4 (Del. Ch.)).
[6] *Health Trio, Inc. v. Margules*, 2007 WL 544156, at *2 (Del. Super.) (citing *Simon*, 2000 WL 1597890, at *4).

forum in which it is first commenced," a concept impelled by "considerations of comity and the necessities of an orderly and efficient administration of justice."[7] The procedural posture of this case does not completely align with that in *McWane*. There, the court decided whether to grant a stay when there was a prior pending related action in a different forum. In this case, the Court must decide whether to partially dismiss a case so that the severed counts may be brought later in a different forum.[8]

Nonetheless, *McWane*'s observations regarding the "wasteful duplication of time, effort, and expense that occurs when judges, lawyers, parties, and witnesses are simultaneously engaged in the adjudication of the same cause of action in two courts"[9] are relevant considerations when analyzing competing forum selection clauses.[10] Federal courts considering competing clauses also have considered similar factors.[11] As the Court held in its previous ruling, the extent to which

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[7] *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co.*, 263 A.2d 281, 283 (Del. 1970).
[8] *Id.*
[9] *Id.*
[10] *See Ashall Homes Ltd. v. ROK Entertainment Group, Inc.*, 992 A.2d 1239, 1251–1252 (considering *McWane*'s efficiency factors, in place "to minimize claims splitting," when analyzing whether two forum selection clauses required dismissal based on venue).
[11] *See Mitek Systems, Inc. v. United Services Auto. Ass'n*, 2012 WL 3777423, at *2 (D. Del.) ("[E]nforcement of the Delaware forum selection clause would violate Delaware's public policies promoting judicial efficiency and comity.") (quoting *Freedom Mortgage Corp. v. Irwin Financial Corp.*, 2009 WL 763899, at *7 (D. Del.)); *Pressdough of Bismarck, LLC v. A&W Restaurants, Inc.*, 587 F. Supp. 2d 1079, 1087) (D. N.D. 2008) (adopting the reasoning that "[t]he facts surrounding both restaurants and the parties' agreements are so intertwined that dividing the case up among the different forums could lead to unjust and conflicting results, confusion, expense, and a waste of resources").

Delaware law's aversion to claim splitting, as expressed in *McWane*, is implicated in this case depends on how related the 2011 conduct is to the conduct that occurred under the 2006 agreement.[12]

A report relied on by both parties estimated the timeframes for the data breaches at the heart of this dispute as occurring between July 2010 and December 2011 and November 2010 and December 2011. The parties executed the second agreement in April of 2011. Therefore, the events the alleged misconduct arises out of existed before and after the 2011 agreement. Additionally, Trustwave's alleged actions after the execution of the 2011 agreement were not limited to a single, isolated ROC wholly unique from its actions under the prior agreement. Instead, National Union alleges that Trustwave performed dozens of vulnerability scans while under the 2006 agreement and continued to do so after the execution of the 2011 agreement. Nothing separates or distinguishes the 2011 ROC from the continuous stream of reports and audits Trustwave allegedly supplied from 2006 onward.

National Union has established a *prima facie* case that the alleged 2011 conduct is not a separate and distinct occurrence, and is instead part of a continuous course of conduct from 2006 onward, making it subject to the 2006 forum selection

[12] *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Trustwave Holdings, Inc.*, 2016 WL 2354621, at *5–6 (Del. Super.).

clause. Litigating such related conduct in two different forums would risk conflicting results, duplicative damage awards for a single loss, and undue expense, making the "efficient administration of justice" unlikely.[13] Therefore, Counts 23–26 will not be severed for purposes of litigation in England or Wales.

CONCLUSION

Trustwave's renewed Motion to Dismiss is hereby **DENIED**. The Court finds Counts 23–26 are sufficiently intertwined with National Union's other allegations that their dismissal would be contrary to the considerations of comity and the necessities of orderly and efficient administration of justice.

IT IS SO ORDERED.

The Honorable Mary M. Johnston

[13] *McWane*, 263 A.2d at 283.