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14  
 15 **DISTRICT COURT**  
 16 **CLARK COUNTY, NEVADA**

17 AFFINITY GAMING,  
 18 a Nevada corporation,  
 19 Plaintiff,

20 v.

21 TRUSTWAVE HOLDINGS, INC.,  
 22 a Delaware corporation,  
 23 Defendant.  
 24

Case No. 2:15-cv-2464-GMN-(PAL)

Chief Judge Gloria M. Navarro

25 **MOTION TO DISMISS AND MEMORANDUM IN SUPPORT**

26 Pursuant to Rules 8, 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure, Defendant  
 27 Trustwave Holdings, Inc. ("Trustwave"), hereby moves the Court to dismiss Plaintiff Affinity  
 28

1 Gaming's ("Affinity") Complaint in its entirety.

2 **INTRODUCTION**

3 Affinity's eight-count complaint relates to Plaintiff's purchase of a limited set of services  
4 from Trustwave in the aftermath of a data breach Affinity experienced in October 2013.  
5 Following the breach, Affinity solicited Trustwave's services and Affinity and Trustwave, both  
6 sophisticated businesses, entered into a written contract in which Trustwave agreed to investigate  
7 certain specific cardholder data components of Affinity's network; not Affinity's entire network.  
8 Contrary to the allegations in the complaint, nothing in the parties' contract required Trustwave  
9 to remediate or secure Affinity's network. Second-guessing the terms of the contract that it  
10 entered into, and looking to shift the blame for its second data breach to Trustwave, Affinity now  
11 asserts a host of tort claims in an effort to avoid its contractual bargain. None of Affinity's  
12 efforts is availing.  
13

14 *First*, Affinity's breach of contract count must be dismissed because it fails to state a  
15 claim. The only specific provision of the contract that Affinity contends Trustwave breached  
16 was its warranty of services. However, even if Affinity were correct, the contract explicitly  
17 provides that the exclusive remedy for Trustwave's breach of warranty is that, upon notice from  
18 Affinity, Trustwave will re-perform the services. Affinity does not allege that it made any such  
19 request or notification to Trustwave, and therefore fails to state a claim.  
20

21 *Second*, Affinity's fraud-based claims must be dismissed for a variety of reasons. To  
22 begin, they fail to plead with particularity the "who, what, when, where, and how" of the  
23 supposed misrepresentations, and instead rely on general allegations of fraud. In addition, the  
24 general representations that Affinity does allege in its Complaint consist of opinions and  
25 statements of future intent—neither of which constitutes fraud. Finally, Affinity's fraud claims  
26 are nothing more than dressed-up breach of contract claims, all in an attempt to avoid the  
27 contractual limitations that otherwise bar or limit Affinity's recovery.  
28

1           *Third*, many of Affinity’s tort claims are barred by the economic loss doctrine. Because  
2 the tort claims arise exclusively out of the duties imposed by the contract between Affinity and  
3 Trustwave—and the damages sought are purely economic—those claims fall squarely within the  
4 prohibitions of the economic loss doctrine and must be dismissed.

5           *Fourth*, Affinity’s declaratory judgment action should be dismissed because it is wholly  
6 duplicative of Affinity’s other claims—all of which are based on Trustwave’s alleged prior  
7 actions.  
8

9           Accordingly, Trustwave respectfully requests that this Court dismiss each of the counts in  
10 the Complaint.

11                                 **RELEVANT BACKGROUND<sup>1</sup>**

12  
13           On or about October 24, 2013, Affinity learned that it had suffered a data breach when  
14 unknown hackers were able to compromise the security of the company’s network and data.  
15 (Compl. ¶¶ 13-14.) Upon learning of the breach, Affinity’s cyber insurance carrier  
16 recommended that Affinity retain the services of a professional forensic data security  
17 investigator. (*Id.* ¶¶ 16-17.) Consistent with that recommendation, Affinity contacted  
18 Trustwave. (*Id.* ¶¶ 17-18.) On October 31, 2013, Affinity retained Trustwave, and the parties  
19 entered into an Incident Response Agreement (the “Agreement”) which set forth the terms and  
20 scope of Trustwave’s engagement.<sup>2</sup> (*Id.* ¶¶ 24-25) The Agreement states that the scope of  
21

22 \_\_\_\_\_  
23 <sup>1</sup> For purposes of this motion to dismiss only, Trustwave accepts as true certain allegations  
in Affinity’s Complaint, as cited herein.

24 <sup>2</sup> Attached as Exhibit A hereto is a copy of the Agreement. In ruling on a motion to  
25 dismiss for failure to state a claim, “[a] court may consider evidence on which the complaint  
26 ‘necessarily relies’ if: (1) the complaint refers to the documents; (2) the document is central to  
27 the plaintiff’s claim; and (3) no party questions the authenticity of the copy attached to the  
28 12(b)(6) motion.” *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). HGI-Lakeside, LLC dba  
Lakeside Hotel & Casino, a wholly-owned subsidiary of Affinity, is the party that entered into  
the Agreement with Trustwave. The Agreement provides that either party may assign it to any  
parent without the prior written consent of the other party. (Ex. A at 14.) For purposes of this  
motion to dismiss, Trustwave presumes that HGI-Lakeside LLC assigned the Agreement to  
Affinity and that is why Affinity is the sole named plaintiff. Accordingly, Trustwave’s Motion  
3

1 Trustwave’s investigative obligations was to “establish an understanding of the extent of the  
2 potential compromise as required by Visa, MasterCard . . . .” (Ex. A at 7.) The Agreement also  
3 made clear that the scope of Trustwave’s work was based on the following information provided  
4 to Trustwave by Affinity: (a) Affinity had one location where the breach may have occurred; (b)  
5 Affinity is a brick and mortar merchant consisting of a restaurant and gift shop located inside of  
6 a hotel and casino; (c) the environment to be investigated included eight systems where the flow  
7 of cardholder data existed; and (d) while the environment had a connection to Affinity’s  
8 corporate systems, the corporate systems were “not under the scope of this contract.” (*Id.*)  
9

10 The Agreement also contained a number of terms and conditions governing Affinity and  
11 Trustwave’s contractual relationship and respective obligations and liabilities. In particular,  
12 Trustwave disclaimed all representations and warranties whatsoever<sup>3</sup>, save for the following,  
13 which is the only provision that Affinity now alleges was breached:  
14

15 • Warranties

- 16 ○ Trustwave Services. Trustwave warrants that the services provided under  
17 this Agreement shall be performed with that degree of skill and judgment  
18 normally exercised by recognized professional firms performing services of  
19 the same or substantially similar nature. The ***exclusive remedy for any***  
20 ***breach of the foregoing warranty*** shall be that Trustwave, at its own expense,  
and in response to written notice of a warranty claim by [Affinity] within 90  
days after performance of the Services at issue, re-perform the Services to  
conform to this standard.” (*Id.* at 13 (emphasis added).)

21 to Dismiss treats HGI-Lakeside LLC and Affinity as one and the same for purposes of this  
22 Motion and refers to them collectively herein as “Affinity.”

23 <sup>3</sup> “EXCEPT AS EXPRESSLY PROVIDED IN THIS AGREEMENT, TRUSTWAVE  
24 DISCLAIMS ALL REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED,  
25 INCLUDING, WITHOUT LIMITATION, ANY WARRANTIES REGARDING QUALITY,  
26 SUITABILITY, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE  
27 (IRRESPECTIVE OF ANY COURSE OF DEALING, CUSTOM OR USAGE OF TRADE) OF  
28 ANY SERVICES OR ANY GOODS OR SERVICES PROVIDED INCIDENTAL TO THE  
SERVICES PROVIDED UNDER THIS AGREEMENT. Trustwave does not warrant that the  
CPE or Services are offered without defect or error, or that the operation of the CPE or  
availability of the Services will be uninterrupted or error-free. . . . [Affinity] ***understands and***  
***agrees that receiving the Services does not guarantee that [Affinity’s] information systems will***  
***be secure.***” (*Id.* at 14 (emphasis added).)

1 Moreover, contrary to the Complaint allegations, the Agreement expressly provided, and Affinity  
2 acknowledged and agreed, that Trustwave's services were *not* intended to remediate and/or  
3 secure Affinity's network from future intrusion:

4 • Terms Applicable to Certain Services

- 5 ○ *“Client acknowledges and agrees that [Affinity’s] use of Trustwave’s*  
6 *services does not guarantee PCI compliance or that its’ [sic] systems are*  
7 *secure from unauthorized access. Affinity is responsible for PCI compliance*  
8 *and notification of any suspected breach of its systems and any fines, penalties*  
9 *or registration fee imposed by any payment card association or its acquiring*  
10 *bank.” (Id. (emphasis added).)*

11 Some months after Trustwave completed its work, Affinity learned of an additional  
12 compromise of its networks. (Compl. ¶ 39.) Affinity now claims that Trustwave's alleged  
13 actions and inactions caused it to suffer monetary damages to remedy the additional data breach.  
14 (*Id.* ¶¶ 67-69.) Affinity's Complaint asserts eight counts against Trustwave: (1) fraudulent  
15 inducement; (2) fraud; (3) constructive/equitable fraud; (4) violation of NRS Chapter 598; fraud  
16 upon purchasers; misrepresentation; (5) gross negligence; (6) negligent misrepresentation; (7)  
17 breach of contract; and (8) declaratory judgment under 28 U.S.C. §§ 2201-2202. None of the  
18 counts states a viable claim against Trustwave.

19 **LEGAL STANDARD**

20 To support a claim for relief, a complaint's “[f]actual allegations must be enough to raise  
21 a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555  
22 (2007). Although a court must accept well-pleaded facts as true when ruling on a motion to  
23 dismiss, a “pleading that offers labels and conclusions or a formulaic recitation of the elements  
24 of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions  
25 devoid of further factual enhancement.” *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)  
26 (quoting *Twombly*, 550 U.S. at 555, 557). The court does “not necessarily assume the truth of  
27 legal conclusions merely because they are cast in the form of factual allegations.” *Coto*  
28

1 *Settlement v. Eisenberg*, 593 F.3d 1031, 1034 (9th Cir. 2010) (internal quotations and citation  
2 omitted); *Chapen v. Munoz*, No. 3:06-cv-00353-BES-VPC, 2009 WL 511114, at \*2 (D. Nev.  
3 Feb. 25, 2009) (a court “is not required to accept legal conclusions cast in the form of factual  
4 allegations if those conclusions cannot reasonably be drawn from the facts alleged.”) (internal  
5 quotations and citation omitted). As the Supreme Court has held, “where the well-pleaded facts  
6 do not permit the court to infer more than the mere possibility of misconduct, the complaint has  
7 alleged—but it has not shown—‘that the pleader is entitled to relief’” as required under Rule 8.  
8 *Iqbal*, 556 U.S. at 679 (quoting Fed. R. Civ. Proc. 8(a)(2)).

9  
10 Moreover, Affinity’s fraud-based claims must clear an even higher pleading hurdle.  
11 *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003). Rule 9(b) requires  
12 allegations of fraud to be pleaded with particularity. In other words, the allegations forming the  
13 basis for the alleged fraud must “be ‘specific enough to give defendants notice of the particular  
14 misconduct ... so that they can defend against the charge and not just deny that they have done  
15 anything wrong.’” *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001) (quoting  
16 *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993)). The factual support for each element of  
17 fraud must be stated with particularity, specifying “‘the who, what, when, where, and how’ of the  
18 misconduct charged.” *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (quoting  
19 *Vess*, 317 F.3d at 1106 (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)).

20  
21 Affinity’s claims for fraudulent inducement, fraud, equitable fraud, deceptive trade  
22 practices, and negligent misrepresentation are all subject to this heightened standard, and in each  
23 case Affinity fails to meet its pleading burden. *See Davenport v. GMAC Mortg.*, No. 56697,  
24 2013 WL 5437119, at \*2-3 (Nev. Sept. 25, 2013) (dismissing a claim based on NRS 598.0915  
25 because the complaint failed the standards of NRCP 9(b)); *Montes v. Bank of Am. NA*, No. 2:13-  
26 CV-00660-RCJ, 2014 WL 1494234, at \*14, 8 (D. Nev. Apr. 15, 2014) (stating that a claim under  
27 NRS 598.0915 “will be dismissed absent adequate allegations of ‘the who, what, when, where,  
28

1 and how of the misconduct charged” and holding that negligent misrepresentation must be pled  
2 with particularity under 9(b)).

3  
4 **CHOICE OF LAW**

5 Affinity’s complaint asserts claims sounding in both contract and tort. Pursuant to the  
6 Agreement and well-established Nevada law, Delaware law applies to both types of claims.

7 **I. DELAWARE LAW GOVERNS THE AGREEMENT BETWEEN THE PARTIES**  
8 **AND APPLIES TO AFFINITY’S CONTRACT CLAIMS**

9 The Agreement provides that it “shall be governed and construed in accordance with the  
10 laws of the State of Delaware, without giving effect to conflict of law principles.” (Ex. A. at 14.)  
11 Under these circumstances, Nevada respects the freedom of parties to a contract to choose what  
12 law should govern their relationship, and will enforce that choice if (a) the parties acted in good  
13 faith; (b) they are not trying to evade the law of the real situs of the contract; (c) the choice of  
14 law has a substantial relationship to the transaction; and (d) the agreement is not contrary to the  
15 public policy of the forum. *DeLeon v. CIT Small Bus. Lending Corp.*, No. 2:11-CV-01028-PMP,  
16 2013 WL 1907786, at \*6 (D. Nev. May 7, 2013) (quoting *Ferdie Sievers & Lake Tahoe Land*  
17 *Co. v. Diversified Mortg. Investors*, 603 P.2d 270, 273 (Nev.1979)). Here, the Court should  
18 honor the parties’ Agreement.  
19

20 There are no allegations that the parties were not acting in good faith or attempting to  
21 avoid the real situs of the contract in choosing Delaware law to govern their relationship. Nor  
22 are there any allegations suggesting that the choice of law provision in the parties’ contract is  
23 contrary to the public policy of Nevada. Finally, Trustwave is incorporated in Delaware, which  
24 means that Delaware has a substantial relationship to the contract between Trustwave and  
25 Affinity. *Henderson v. Watson*, No. 64545, 2015 WL 2092073, at \*1 n. 1 (Nev. Apr. 29, 2015);  
26 Compl.¶ 11.  
27  
28

1           **II.       DELAWARE LAW APPLIES TO AFFINITY’S TORT CLAIMS**

2           Nevada courts have not squarely addressed the application of a contractual choice of law  
3 provision to tort claims relating to that contractual relationship. The Nevada Supreme Court,  
4 however, has cited with approval a California Supreme Court case that addressed this precise  
5 issue. See *Henderson*, No. 64545, 2015 WL 2092073, at \*1, n. 1 (citing *Nedlloyd Lines B.V. v.*  
6 *Superior Court of San Mateo Cnty.*, 3 Cal.4th 459, 11 Cal.Rptr.2d 330, 834 P.2d 1148, 1153  
7 (Cal. 1992)).

8           According to the *Nedlloyd* court, “[w]hen two sophisticated, commercial entities agree to  
9 a choice-of-law clause” like the one in the Agreement, “the most reasonable interpretation of  
10 their actions is that they intended for the clause to apply to all causes of action arising from or  
11 related to their contract.” *Id.* at 1153. This is true of all related claims “*regardless of how they*  
12 *are characterized*, including tortious breaches of duties emanating from the agreement or the  
13 legal relationships it creates.” *Id.* at 1155 (emphasis added). The California Supreme Court  
14 reasoned that:  
15

16           Applying choice-of-law provisions to all related causes of action comports with common  
17 sense and commercial reality. When a rational businessperson enters into an agreement  
18 establishing a transaction or relationship and provides that disputes arising from the  
19 agreement shall be governed by the law of an identified jurisdiction, the logical  
20 conclusion is that he or she intended that law to apply to all disputes arising out of the  
21 transaction or relationship. We seriously doubt that any rational businessperson,  
22 attempting to provide by contract for an efficient and businesslike resolution of possible  
23 future disputes, would intend that the laws of multiple jurisdictions would apply to a  
24 single controversy having its origin in a single, contract-based relationship. Nor do we  
25 believe such a person would reasonably desire a protracted litigation battle concerning  
26 only the threshold question of what law was to be applied to which asserted claims or  
27 issues. Indeed, the manifest purpose of a choice-of-law clause is precisely to avoid such a  
28 battle.

29           *Id.* at 1154.



1 Here, all of Affinity's tort claims are based on allegations regarding Trustwave's  
2 performance under or negotiation of the Agreement. (See Compl. ¶¶ 77-128.) As a result,  
3 Delaware law should govern those claims.

4  
5 **ARGUMENT**

6 **I. AFFINITY FAILS TO STATE A CLAIM FOR BREACH OF CONTRACT**

7 To state a claim for breach of contract, Affinity must adequately allege that "a contract  
8 existed, that [Trustwave] breached an obligation imposed by the contract, and that the breach  
9 resulted in damage to [Affinity]." *Chase Manhattan Mortg. Corp. v. Advanta Corp.*, No.  
10 CIV.A.01-507 KAJ, 2005 WL 2234608, at \*13 (D. Del. Sept. 8, 2005) (citation omitted).

11 **A. Affinity Does Not Allege A Breach of Any Specific Contract Provision**

12 In its breach of contract count, Affinity incorporates all of the averments of the  
13 Complaint but fails to identify any specific provision which it contends Trustwave breached.  
14 (See Compl. ¶¶ 129-34.) To be sure, Affinity's Complaint is filled with criticisms of Trustwave,  
15 but Affinity fails to tether its complaints to specific obligations Trustwave had under the  
16 Agreement.

17  
18 In the Factual Background section of the Complaint, Affinity makes passing reference to  
19 one specific provision of the Agreement, Trustwave's warranty of services. (*Id.* ¶ 29). To the  
20 extent that Affinity's breach of contract count is supposed to be based on an alleged violation of  
21 that provision, paragraph 8a of the Agreement, Affinity fails to state a claim. Specifically,  
22 Trustwave warranted under section 8a that its services would be:

23  
24 performed with that degree of skill and judgment normally exercised by recognized  
25 professional firms performing services of the same or substantially similar nature. The  
26 **exclusive remedy for any breach of the foregoing warranty** shall be that Trustwave, at  
27 its own expense, and in response to written notice of a warranty claim by [Affinity]  
28 within 90 days after performance of the Services at issue, re-perform the Services to  
conform to this standard.

1 (Ex. A. at 13) (emphasis added) Critically, Trustwave’s warranty is accompanied by an  
2 exclusive remedy—one which requires notice of a warranty claim. Affinity has not alleged that  
3 it gave written notice of a warranty claim to Trustwave; nor has it alleged that Trustwave refused  
4 to honor its warranty obligations following such a request. As a result, the Complaint fails to  
5 plead an actionable breach of paragraph 8a of the Agreement.

6 **B. The Implied Covenant Is Inapplicable to Affinity’s Claim**

7 Affinity also references the “implied covenant of good faith and fair dealing” in its  
8 breach of contract claim. (Compl. ¶¶ 131-32.) To the extent that Affinity is attempting to assert  
9 a claim for breach of the implied covenant of good faith and fair dealing, the Complaint contains  
10 no specific factual allegations that would support such a cause of action. Rather, Affinity merely  
11 concludes that “Trustwave failed to perform those services properly, and failed to fulfill its duty  
12 of good faith and fair dealing, as described herein . . .” (*Id.* ¶ 132.) Such “labels and  
13 conclusions” are insufficient to state a claim and warrant dismissal of the cause of action. *See*  
14 *Iqbal*, 556 U.S. at 678.  
15

16 Moreover, Affinity confounds a breach of contract cause of action with a breach of an  
17 implied covenant action by alleging that Trustwave breached a duty to perform its express  
18 contractual obligations “reasonably, prudently, fairly and in good faith.” (Compl. ¶ 131.)  
19 Affinity misunderstands how the implied covenant works under Delaware law. It is a gap-filling  
20 provision; it does not, as Affinity contends, add a “good faith” element to existing contractual  
21 obligations. The implied covenant involves a “cautious enterprise,” designed to fill contractual  
22 gaps in line with “the parties’ reasonable expectations at the time of contracting”—it is *not* a tool  
23 used to “rewrite the contract to appease a party who later wishes to rewrite a contract he now  
24 believes to have been a bad deal.” *Nemec v. Shrader*, 991 A.2d 1120, 1125-26 (Del. 2010) (*en*  
25 *banc*) (citation omitted). Delaware does not impose additional obligations on parties to a  
26 contract beyond those they bargained for, except to fill a gap in the contract regarding a situation  
27  
28

1 that “*could not be anticipated*” when the parties agreed to the contract. *Id.* at 1126. Here, there  
2 is no gap to fill. The parties bargained for the standard to which Trustwave’s services would be  
3 held and allocated the risk of substandard performance, or non-performance, through the remedy  
4 outlined therein and as otherwise provided in the remedies provisions of the Agreement. (Ex. A)

5 For the foregoing reasons, Affinity’s Seventh Claim for Relief should be dismissed.

6  
7 **II. EACH OF AFFINITY’S FRAUD-BASED CLAIMS IS FUNDAMENTALLY**  
8 **FLAWED**

9 Affinity’s fraud-based causes of action all challenge the same two categories of alleged  
10 statements: (1) statements allegedly made prior to formation of the contract (Compl. ¶¶ 78(a)-(b),  
11 87(a), 98(a), 110(a), 119, 122(a)) and (2) statements made concerning, and in the course of,  
12 Trustwave’s performance of the contract. (Compl. ¶¶ 87(b)-(d), 98(b)-(d), 110(b)-(d), 119,  
13 122(b)-(d).)

14 With regard to the first category, pre-contractual representations, Affinity’s Complaint  
15 alleges vaguely that in late October 2013 “Trustwave personnel represented that the company  
16 had the capabilities to, and would, identify and help remedy the causes of the data breach, as well  
17 as facilitate Affinity Gaming’s implementation of measures to help prevent further such  
18 breaches.” (Compl. ¶ 20; *see also* ¶¶ 78(a), (b), 87(a), 98(a), 110(a), 122(a).) With regard to the  
19 second category of alleged representations, each of Affinity’s fraud-based claims attacks the  
20 same three supposed statements—all allegedly taken from Trustwave’s final report delivered at  
21 the conclusion of its contract services:  
22

- 23 (i) “Trustwave misrepresented that it had undertaken a proper investigation to  
24 determine the cause of Affinity Gaming’s data breach, and to contain and help  
25 remedy such breach; “  
26 (ii) “Trustwave misrepresented at the conclusion of its so-called investigation that the  
27 data breach was ‘contained’ and the suspected backdoor was ‘inert’”; and  
28

1 (iii) “Trustwave misrepresented that its recommendations on improving Affinity  
2 Gaming’s data security would help to prevent this and further data breaches from  
occurring.”

3 (*See, e.g.*, Compl. ¶ 110(b)-(d).)

4 **A. Affinity’s Fraud Claims Based on Pre-Contractual Representations Fail**

5 **1. The Circumstances of the Alleged Pre-Contractual**  
6 **Misrepresentations Are Not Pleaded with Particularity**

7 The Complaint does not specify “the who, what, when, where, and how” regarding the  
8 alleged pre-contractual misrepresentations. *See Kearns*, 567 F.3d at 1124. Instead, the  
9 Complaint alleges only that “[f]rom October 28-31, 2013, Trustwave personnel, including Chris  
10 Hague, Grayson Lenik and Matthew Aronson, had *multiple direct and indirect conversations*  
11 with Affinity Gaming personnel (including its Vice President of Insurance and Benefits and Vice  
12 President of Information Technology).” (Compl. ¶ 19.)

13 Absent from the complaint are any specific allegations regarding the purported  
14 misrepresentations that could satisfy Rule 9(b). For example, Affinity does not allege who made  
15 the misrepresentations, to whom they were made, the specific statements allegedly made, or  
16 when and where these “direct and indirect” conversations took place. The only allegation  
17 regarding the supposed statements is far too generic to support any fraud-based claims. (Compl.  
18 ¶ 20) (“Trustwave personnel represented that the company had the capabilities to, and would,  
19 identify and help remedy the causes of the data breach, as well as facilitate Affinity Gaming’s  
20 implementation of measures to help prevent further such breaches.”) Without these basic details,  
21 Affinity cannot state a claim for fraudulent inducement, fraud, equitable fraud, deceptive trade  
22 practices, or negligent misrepresentation and each should be dismissed.  
23  
24

25 **2. The Complaint Fails to Allege That Trustwave Knew That its Pre-**  
26 **Contractual Representations Were False When Made**

27 To state a claim for fraudulent inducement, fraud, equitable fraud, or deceptive trade  
28 practice, a plaintiff must allege facts that could allow a court “to reasonably infer that the

1 [defendant was] in fact aware that the statements they were making to [the plaintiff] were false,  
2 or that they were recklessly indifferent as to their falsity.”<sup>4</sup> *Mkt. Am., Inc. v. Google, Inc.*, No.  
3 C.A. 09-494-GMS, 2010 WL 3156044, at \*6 (D. Del. Aug. 9, 2010) (discussing fraud and  
4 fraudulent inducement); *Kolber v. Body Cent. Corp.*, 967 F. Supp. 2d 1061, 1068 (D. Del. 2013)  
5 (citing *Narrowstep, Inc. v. Onstream Media Corp.*, 2010 WL 5422405, at \*13 (Del.Ch. Dec. 22,  
6 2010)) (the elements for equitable fraud are the same as those for common law fraud); NRS  
7 598.0915, 598.0923 (actionable misrepresentations or omissions must be made “knowingly”). In  
8 support of this element, Affinity offers only the bare assertion that Trustwave made  
9 “misrepresentations and omissions with knowledge of, or at least in reckless disregard of, their  
10 falsity.” (Comp. ¶¶ 80, 89.) But Affinity fails to provide any facts that would support this  
11 unadorned allegation and, as such, it is conclusory and insufficient to meet the federal pleading  
12 standard. See *Mkt. Am., Inc.*, 2010 WL 3156044, at \*6 (bare allegation that defendant “knew  
13 these representations to be false when they were made or the representations were made with a  
14 reckless indifference to their truth or falsity” was a “blanket assertion” that did “not support  
15 [plaintiff’s] fraud and fraudulent inducement counts.”).

16  
17  
18 Nor is it enough to allege that a statement must have been false because a service-  
19 provider’s “representations prior to execution of the agreement[ ] were ultimately incorrect with  
20 respect to the [provider’s] capacity” to perform a service. *Id.* (dismissing fraud and fraudulent  
21 inducement claims where defendants allegedly failed to perform the services outlined in their  
22 Statement of Work). Therefore, Affinity’s claims for fraudulent inducement, fraud, equitable  
23 fraud, and deceptive trade practices based on statements purportedly made prior to execution of  
24 the contract must be dismissed.

25  
26  
27  
28 <sup>4</sup> While negligent misrepresentation carries a “reduced state of mind requirement,” a plaintiff must still allege the “failure to exercise reasonable care in obtaining or communicating information.” *Snowstorm Acquisition Corp. v. Tecumseh Products Co.*, 739 F. Supp. 2d 686, 709 (D. Del. 2010).

1                                   **3. Affinity Fails to Allege Justifiable Reliance on Trustwave's Pre-**  
2                                   **Contractual Statements**

3                                   Under Delaware law, a plaintiff must allege that it justifiably relied on a  
4                                   misrepresentation in order to state a claim for fraudulent inducement, fraud, equitable fraud, or  
5                                   negligent misrepresentation. *Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 472 (Del. 1992) (fraud and  
6                                   fraudulent inducement); *Kolber*, 967 F. Supp. 2d at 1068 (equitable fraud); *Snowstorm*  
7                                   *Acquisition Corp.*, 739 F. Supp. 2d at 709 (D. Del. 2010) (negligent misrepresentation).  
8                                   However, Affinity expressly disclaimed any such reliance in the Agreement, agreeing that pre-  
9                                   contractual representations were all “superseded by and merged into [the] agreement.” (Ex. A at  
10                                   p. 15.) It is well established that “sophisticated parties may not reasonably rely on  
11                                   representations that are inconsistent with a negotiated contract, when that contract contains a  
12                                   provision explicitly disclaiming reliance upon such outside representations.” *J.C. Trading Ltd. v.*  
13                                   *Wal-Mart Stores, Inc.*, 947 F. Supp. 2d 449, 458 (D. Del. 2013) (internal quotations and citation  
14                                   omitted). Whatever the nature of the parties’ pre-contract discussions regarding the various  
15                                   services Trustwave offers—we don’t know because the Complaint provides no details—the  
16                                   contract alone sets forth the services Affinity purchased and the scope of Trustwave’s  
17                                   engagement. Given the express language of the Agreement that Affinity negotiated and agreed  
18                                   to, it cannot justifiably have relied on any of Trustwave’s alleged representations that pre-dated  
19                                   the Agreement. *See id.* Therefore, Affinity has failed to state a claim for fraudulent inducement,  
20                                   fraud, equitable fraud, or negligent misrepresentation based on statements made outside the  
21                                   contract concerning the work to be performed by Trustwave pursuant to the contract.  
22                                     
23                                   

24                                   **4. Pre-Contractual Statements Are Not Actionable Fraud Where The**  
25                                   **Only Evidence of Falsity Is the Allegation of Substandard**  
26                                   **Performance**

27                                   Affinity “cannot ‘bootstrap’ a claim of breach of contract into a claim of fraud merely by  
28                                   alleging that a contracting party never intended to perform its obligations.” *Iotex Commc'ns, Inc.*

1 v. *Defries*, C.A. No. 15817, 1998 WL 914265, at \*4 (Del Ch. Dec. 21, 1998). Affinity alleges no  
2 facts to suggest that Trustwave’s representations regarding its ability and intentions to perform  
3 whatever services Affinity ultimately contracted with Trustwave to perform were false. All  
4 Affinity offers in this regard is an after-the-fact assessment that Trustwave’s performance was  
5 allegedly substandard. (*See* Compl. ¶ 4.) Under Delaware law, mere evidence of “a party’s  
6 failure to keep a promise does not prove the promise was false when made,” and allegations of  
7 such failure are insufficient to support a claim for fraud-based claims. *AJZN, Inc. v. Yu*, No. CV  
8 13-149 GMS, 2015 WL 331937, at \*9 (D. Del. Jan. 26, 2015) (quoting *Berdel, Inc. v. Berman*  
9 *Real Estate Mgmt., Inc.*, 1997 WL 793088, at \*8 (Del. Ch. Dec. 15, 1997)) (dismissing  
10 fraudulent inducement and fraud claims where plaintiff merely alleged that defendant did not  
11 perform and never intended to perform under the contract). Affinity’s allegations regarding  
12 Trustwave’s ability to perform the contracted-for services are best addressed under contract law,  
13 as “it is presumed that the parties to the transaction have allocated the risk of product  
14 nonperformance through the bargaining process.” *Danforth v. Acorn Structures, Inc.*, 608 A.2d  
15 1194, 1200 (Del. 1992). Here, the parties did just that—the Agreement allocates the risk of non-  
16 performance in a manner equivalent to the value of the contract. (Ex. A at 13-14.) Affinity’s  
17 claims for fraudulent inducement, fraud, equitable fraud, and negligent misrepresentation  
18 therefore fail for this additional reason so far as they depend on the alleged pre-contractual  
19 statements regarding Trustwave’s ability and intent to perform under the contract.  
20  
21

22 **5. The Alleged Pre-Contractual Misrepresentations Are, at Most,**  
23 **Opinions and Statements of Future Intent, Which Are Not Actionable**  
24 **as a Matter of Law**

25 Putting to the side Affinity’s other pleading failures, even if the alleged statements  
26 regarding Trustwave’s capabilities and intent to “investigate, diagnose, and help remedy” the  
27 data breach were pleaded with specificity and were false (which they were not), such statements  
28 would still not be sufficient to sustain claims sounding in fraud. The purported

1 misrepresentations are, at most, statements of opinion representing Trustwave’s “subjective  
 2 judgment as to the value and quality of [its] own [abilities].” See *Browne v. Robb*, 583 A.2d 949,  
 3 956 (Del. 1990) (citing the RESTATEMENT (SECOND) OF TORTS § 538A comment b  
 4 (1977)) (dismissing a fraud claim where the alleged misrepresentation regarded an attorney’s  
 5 ability to perform the work he was hired to do). “[S]uch expressions generally are recognized to  
 6 be matters upon which individual judgments may be expected to differ,” and thus cannot be the  
 7 basis for fraud. *Id*; see also *Mendez v. Fiesta Del Norte Home Owners Ass’n*, No. 2:15-CV-  
 8 00314-R CJ-NJ, 2015 WL 3507699, at \*4 (D. Nev. June 4, 2015) (dismissing claim based on  
 9 NRS 598.0915 where the alleged misrepresentation was an “opinion,” which “could not have  
 10 constituted a fraud or deception”). Likewise, declarations of Trustwave’s *future intent*, as a  
 11 matter of law, cannot form the basis for fraud. *J.C. Trading Ltd.*, 947 F. Supp. 2d at 459  
 12 (“statements of future intent do not constitute ‘false representation[s] of fact’ that would satisfy  
 13 the first element of fraudulent misrepresentation”) (quoting *MicroStrategy Inc. v. Acacia*  
 14 *Research Corp.*, 2010 WL 5550455, at \*15 (Del.Ch. Dec. 30, 2010)); *Eastern States Petroleum*  
 15 *Co. v. Universal Oil Products Co.*, 24 Del.Ch. 11, 3 A.2d 768, 775 (1939) (statements of opinion  
 16 or prediction of future events are not actionable). Because, at most, the Complaint pleads  
 17 generic statements of Trustwave’s capabilities and intent to perform, Affinity has not stated a  
 18 claim for fraudulent inducement, fraud, equitable fraud, deceptive trade practices, or negligent  
 19 misrepresentation based on Trustwave’s alleged pre-contract misrepresentations.  
 20  
 21

22 **B. Affinity’s Fraud Claims Based on Statements Made During the**  
 23 **Performance of the Contract Fail**

24 **1. Affinity’s Complaint Fails to Allege That Trustwave Knew That its**  
 25 **Performance Representations Were False**

26 Affinity’s claims for fraud, equitable fraud, and deceptive trade practices all challenge the  
 27 same series of alleged statements in connection with Trustwave’s performance under the  
 28 Agreement. (Compl. ¶¶ 87b-d, 97b-d, 110b-d.) Each of those claims fails, as Affinity does not



1 sufficiently allege that Trustwave knew, at the time, that its statements were false. Instead,  
2 Affinity alleges that Trustwave “knew or should have known it had not diagnosed and remedied  
3 the source of the data breach or the suspected backdoors.” (Compl. ¶ 88.) But this conclusory  
4 allegation not only misstates the standard for fraud, but also has inadequate factual support in  
5 Affinity’s Complaint. Affinity’s allegations regarding what its *subsequent* service provider,  
6 Mandiant, found in Affinity’s systems are not the type of allegations that could allow a court to  
7 “reasonably infer” that *Trustwave* was aware that its *own* statements were false, or was  
8 recklessly indifferent regarding falsity. *See Mkt. Am., Inc.*, 2010 WL 3156044, at \*6. Affinity  
9 alleges no facts that would allow a court “to reasonably infer that the [defendant was] in fact  
10 aware that the statements they were making to [the plaintiff] were false, or that they were  
11 recklessly indifferent as to their falsity,” and its claims for fraud, equitable fraud, and deceptive  
12 trade practices should be dismissed so far as they depend on the post-performance  
13 representations. *Id.*

14  
15 **2. The Alleged Performance Statement Regarding Remedial**  
16 **Actions Is An Opinion as to Future Events, Which Is Not Fraudulent**  
17 **as a Matter of Law**

18 In its allegations supporting its claims for fraud, equitable fraud, deceptive trade  
19 practices, and negligent misrepresentation, Affinity alleges that “Trustwave misrepresented that  
20 its recommendations on improving Affinity Gaming’s data security would help to prevent this  
21 and further data breaches from occurring. Trustwave’s alleged prediction that, *if* Affinity  
22 followed through with its recommended actions, *and* another breach was attempted, the  
23 recommended actions would “help to prevent” that breach, is an opinion as to what might happen  
24 in the future, which is not a basis for fraud as a matter of law. *Toner v. Allstate Ins. Co.*, 821 F.  
25 Supp. 276, 281 (D. Del. 1993) (“It is the general rule that mere expressions of opinion as to  
26 probable future events, when clearly made as such, cannot be deemed fraud or  
27 misrepresentations.”) (quoting *Consolidated Fisheries Co. v. Consolidated Solubles Co.*, 35  
28

1 Del.Ch. 125, 112 A.2d 30, 37, *opinion supplemented*, 35 Del.Ch. 178, 113 A.2d 576 (1955));  
2 *Eastern States Petroleum Co.*, 24 Del.Ch. 11, 3 A.2d at 775 (statements of opinion or prediction  
3 of future events are not actionable); *Phillips v. Dignified Transition Sols.*, No. 2:13-CV-2237-  
4 GMN-VCF, 2015 WL 5056406, at \*6 (D. Nev. Aug. 25, 2015) (dismissing deceptive trade  
5 practice claim based on alleged “predictions and estimates regarding future activity,” as such  
6 statements were not “false statements of existing fact”).<sup>5</sup> Each of Affinity’s claims for fraud,  
7 equitable fraud, deceptive trade practice, and negligent misrepresentation must be dismissed so  
8 far as it depends on this alleged misrepresentation.  
9

10 **III. AFFINITY’S TORT CLAIMS ARE BARRED BY THE ECONOMIC LOSS**  
11 **DOCTRINE**

12 **A. FRAUD-BASED TORTS PREMISED ON TRUSTWAVE’S ALLEGED STATEMENTS**  
13 **MADE DURING THE PERFORMANCE OF THE CONTRACT ARE BARRED BY THE**  
14 **ECONOMIC LOSS DOCTRINE**

15 Pursuant to the economic loss doctrine, in order to be cognizable, a tort claim must allege  
16 some loss beyond an “economic loss.” *McKenna v. Terminex Int’l Co.*, No. CIV.A. 04C-02-  
17 022RBY, 2006 WL 1229674, at \*2 (Del. Super. Mar. 13, 2006). Economic loss includes “any  
18 monetary loss, costs of repair or replacement, loss of employment, loss of business or  
19 employment opportunities, loss of good will, and diminution in value.” *Id.* at \*4 (internal  
20 quotations and citation omitted). Economic loss “is essentially the failure of the purchaser to  
21 receive the benefit of its bargain—traditionally the core concern of contract law.” *Id.*

22 For all of its tort claims, the only harm Affinity alleges is monetary damage, “in an  
23 amount to be proven at trial but which exceed \$100,000.” (Compl. ¶¶ 93, 103, 128.) As Affinity  
24

25  
26 <sup>5</sup> Moreover, the alleged statement by Trustwave does not promise or guarantee security,  
27 just as the parties acknowledge in the Agreement. (Ex. A at 14.) And, even if it had, the  
28 Complaint does not allege that Affinity actually followed Trustwave’s recommendations, only  
that it “began to implement” them. (Compl. ¶ 37.) This additional failing undermines any claim  
of detrimental reliance on the statement.

1 does not allege any damages beyond monetary, or economic, losses, it is barred from asserting its  
2 fraud, equitable fraud, and negligent misrepresentation claims under the economic loss doctrine.<sup>6</sup>

3 Moreover, for tort claims to co-exist in an action alongside contract claims, the plaintiff  
4 must allege the breach of a duty “independent of the duties imposed by the contract. [W]here an  
5 action is based entirely on a breach of the terms of a contract between the parties, and not on a  
6 violation of an independent duty imposed by law, a plaintiff must sue in contract and not in tort.”

7 *McKenna*, 2006 WL 1229674, at \*2 (internal quotations and citation omitted); *Brasby v. Morris*,  
8 No. C.A. 05C-10-022-RFS, 2007 WL 949485, at \*7-8 (Del. Super. Mar. 29, 2007) (dismissing  
9 fraud claims based on “statements and assurances about the progress . . . and completion” of  
10 services provided pursuant to contract); *Pinkert v. John J. Olivieri, P.A.*, No. CIV. A. 99-380-  
11 SLR, 2001 WL 641737, at \*5 (D. Del. May 24, 2001) (dismissing fraud claims where defendants  
12 allegedly misrepresented the nature of their work within payment applications where duty to  
13 submit these applications arose from the contract). Where, as here, plaintiffs have attempted to  
14 avoid the contracts they themselves bargained for and agreed to by characterizing conduct  
15 related to the performance of the contract as fraudulent, Delaware courts will dismiss the claims  
16 sounding in fraud. *See, e.g., Mkt. Am., Inc.*, 2010 WL 3156044, at \*7; *AJZN, Inc.*, 2015 WL  
17 331937, at \*9. Here, all of the alleged performance misrepresentations that support Affinity’s  
18 fraud, equitable fraud, and negligent misrepresentation claims relate to the services that  
19 Trustwave provided pursuant to the Agreement. (Compl. ¶¶ 87b-d, 98b-d, 122b-d.) As a result,  
20 Affinity fails to allege that Trustwave breached any duty independent of its contractual  
21 obligations, and these claims must be dismissed. *McKenna*, 2006 WL 1229674, at \*3.  
22  
23  
24  
25  
26

27 <sup>6</sup> While fraudulent inducement is an exception to the economic loss doctrine, that claim  
28 still fails for the reasons stated elsewhere herein. *See Philip A. Templeton, M.D., P.A. v. Emcare, Inc.*, 868 F. Supp. 2d 333, 340 (D. Del. 2012).

**B. AFFINITY’S GROSS NEGLIGENCE CLAIM IS BARRED BY THE ECONOMIC LOSS DOCTRINE**

1  
2 Under the economic loss doctrine, a negligence claim must be predicated on some loss  
3 beyond an “economic loss,” or it fails. *Palma, Inc. v. Claymont Fire Co., No. 1*, No.  
4 CIVA09L06121JRS, 2009 WL 3865395, at \*1 (Del. Super. Nov. 18, 2009). Like its other tort  
5 claims, the losses Affinity alleges that it suffered are purely economic. (Compl. ¶ 120.) As  
6 Affinity does not allege any damages beyond monetary, or economic, losses, it is barred from  
7 asserting its gross negligence claim under the economic loss doctrine.  
8

9 Moreover, Affinity’s gross negligence claim does not allege the breach of any duty  
10 “independent of the duties imposed by the contract.” *See* Compl. ¶ 118 (alleging Trustwave  
11 owed “a duty of care in performing its data security services”); *McKenna*, 2006 WL 1229674, at  
12 \*2 (internal quotations and citation omitted). All of the allegations that make up Affinity’s gross  
13 negligence claim relate to the services that Trustwave agreed to provide pursuant to the  
14 Agreement. (Compl. ¶ 119.) Affinity alleges that Trustwave “fail[ed] to perform the  
15 investigation” described in the Agreement with the requisite level of care. (*Id.*) As the only duty  
16 Trustwave is alleged to have breached arises out of the Agreement, Affinity’s gross negligence  
17 claim must be dismissed. *See McKenna*, 2006 WL 1229674, at \*3.  
18

19  
20 **IV. THE COMPLAINT FAILS TO PLEAD A SPECIAL RELATIONSHIP**  
21 **BETWEEN THE PARTIES NECESSARY TO SUSTAIN A CLAIM FOR**  
22 **EQUITABLE FRAUD**

23 Affinity’s Third Claim for Relief alleges equitable fraud. The elements of equitable fraud  
24 echo those for common law fraud, except that the plaintiff is not required to allege intent.  
25 Rather, the plaintiff ““must sufficiently plead a special relationship between the parties or other  
26 special equities, such as some form of fiduciary relationship or other similar circumstances.””  
27 *Kolber v. Body Cent. Corp.*, 967 F. Supp. 2d 1061, 1068 (D. Del. 2013) (quoting *Narrowstep,*  
28 *Inc.*, 2010 WL 5422405, at \*13).

1 Affinity alleges that, because Trustwave had the ability to provide a service that Affinity  
2 could not perform itself, Affinity was in a “special relationship” with Trustwave. (See Compl. ¶¶  
3 96-97.) This is not enough. The only reason parties contract with one another in the first place  
4 is because they want or need the services the other party can provide and cannot or will not  
5 perform those services themselves. Yet parties to an arms-length contract are not, by virtue of  
6 that contract, suddenly involved in a “special relationship” giving rise to heightened duties of  
7 care. *Satellite Fin. Planning Corp. v. First Nat’l Bank of Wilmington*, 633 F. Supp. 386, 401 (D.  
8 Del. 1986) *on reconsideration*, 643 F. Supp. 449 (D. Del. 1986) (a fiduciary relationship does  
9 not arise when two parties “merely enter into an arms-length contract”). This fact is highlighted  
10 by the Agreement itself, which states that “[t]he relationship between the parties to this  
11 Agreement shall be that of independent contractors.” (Ex. A at 14.) For this additional reason,  
12 Affinity’s equitable fraud count fails.  
13

14  
15 **V. NRS CHAPTER 598 DOES NOT APPLY TO CONDUCT PERFORMED**  
16 **UNDER THE AGREEMENT**

17 Affinity’s Fourth Claim for Relief alleges violations of NRS Chapter 598, Nevada’s  
18 Deceptive Trade Practices Act. The relevant portions of the act define a deceptive trade practice  
19 to include (a) knowingly making a false representation in a transaction; (b) knowingly making a  
20 false representation as to the characteristics of one’s services; and (c) knowingly failing to  
21 disclose a material fact in connection with the sale or lease of goods or services. NRS 598.0915,  
22 598.0923.  
23

24 As shown above, Delaware law applies to govern the parties’ conduct as it relates to the  
25 Agreement and the services provided under the Agreement. Affinity admits that its claims under  
26 NRS Chapter 598 are based on statements Trustwave allegedly made “[i]n the course of  
27 performing” “forensic data security investigation services” for Affinity. (Compl. ¶¶ 108-10.)  
28

1 Because the alleged conduct relates to Trustwave’s performance under the Agreement—which  
2 contains a valid Delaware choice-of-law clause—Nevada law does not govern, and NRS Chapter  
3 598 does not apply to Trustwave’s conduct. *See Fuoroli v. Westgate Planet Hollywood Las*  
4 *Vegas, LLC*, No. 2:10-CV-2191 JCM GWF, 2011 WL 1871236, at \*6-7 (D. Nev. May 16, 2011)  
5 (where a contract contained a Florida choice-of-law provision, a related claim under NRS  
6 598.0915 would “necessarily be dismissed if the court finds the contract valid and the choice of  
7 law provision stands”). Affinity’s claim under NRS Chapter 598 should be dismissed.  
8

9 **VI. AFFINITY FAILS TO STATE A CLAIM FOR DECLARATORY ACTION**

10 Affinity’s Eighth Claim for Relief is for declaratory judgment under 28 U.S.C. §§ 2201-  
11 2202. Declaratory judgment is proper only if such relief would “avoid the ‘accrual of avoidable  
12 damages to one not certain of his rights’” or “strongly affect present behavior.” *See Delaware*  
13 *State Univ. Student Hous. Found. v. Ambling Mgmt. Co.*, 556 F. Supp. 2d 367, 374 (D. Del.  
14 2008) (citation omitted); *United Mexican States v. Woods*, 126 F.3d 1220, 1223 (9th Cir. 1997)  
15 (a declaratory action is unavailable where there is no “continuing violation of law”). As such,  
16 “[a] declaratory judgment is inappropriate solely to adjudicate past conduct.” *See Delaware*  
17 *State Univ.*, 556 F. Supp. 2d at 374 (internal quotations and citation omitted).  
18  
19

20 In this case, Affinity’s claim for declaratory judgment is based solely on Trustwave’s  
21 allegedly “wrongful conduct” as it performed the services pursuant to the Agreement more than  
22 two years ago. As a result, its declaratory judgment count is wholly duplicative of its other  
23 claims and it should be dismissed.  
24

25 **CONCLUSION**

26 Each and all of the following causes of action should be dismissed for failure to plead  
27 with particularity as required by Rule 9(b), or for otherwise failing under Rules 8 and 12(b)(6) to  
28

1 allege a necessary element to state a claim sounding in fraud: fraudulent inducement, fraud,  
2 equitable fraud, violations of NRS Chapter 598, and negligent misrepresentation.

3 Additionally, the following causes of action should be dismissed with prejudice pursuant  
4 to Rules 8 and 12(b)(6), as they are barred by the economic loss doctrine: fraud, equitable fraud,  
5 gross negligence, and negligent misrepresentation.

6 Likewise, the following causes of action should be dismissed with prejudice pursuant to  
7 Rules 8 and 12(b)(6), as the alleged misrepresentations they rely on are not actionable as a matter  
8 of law: fraudulent inducement, fraud, equitable fraud, deceptive trade practice, and negligent  
9 misrepresentation.  
10

11 Affinity's deceptive trade practices claim should be dismissed with prejudice for the  
12 additional reason that NRS Chapter 598 is not applicable to the services rendered by Trustwave  
13 and therefore the Complaint fails to state a claim under Rules 8 and 12(b)(6) as to this cause of  
14 action.

15 Affinity's breach of contract claim should be dismissed as well, as Affinity has failed to  
16 state a claim as required by Rule 12(b)(6) and Rule 8.


17 Finally, Affinity's declaratory action claim should be dismissed with prejudice, as  
18 Affinity cannot state a cognizable claim against Trustwave.  
19

20 ///  
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1 For the foregoing reasons, and as explained more fully above, Trustwave respectfully  
2 requests that the Court enter an Order granting this Motion, dismissing Affinity's Complaint in  
3 its entirety, and awarding such other relief as is just and equitable.

4 DATED this 29 day of February, 2016.

5 OLSON, CANNON, GORMLEY,  
6 ANGULO & STOBERSKI

7 By 

8 JAMES R. OLSON, ESQ.  
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CERTIFICATE OF SERVICE

1  
2 I HEREBY CERTIFY that on the 29 day of February, 2016, I served the above  
3 MOTION TO DISMISS AND MEMORANDUM IN SUPPORT through the CM/ECF system of  
4 the United States District Court for the District of Nevada (or, if necessary, by U.S. Mail, first  
5 class, postage pre-paid), upon the following:  
6

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\_\_\_\_\_  
An Employee of Olson Cannon Gormley  
Angulo & Stoberski

**Exhibit A**



## Incident Response Agreement

Presented To:

**HGI – Lakeside, LLC dba Lakeside Hotel & Casino**

10/28/2013

Prepared By:

**Grayson Lenik**

**Fax: 888.822.8426**

Proprietary Information: This document may only be used for evaluating the planned services designated herein, and may contain information that is privileged, confidential or otherwise protected from disclosure. Dissemination distribution or copying of this proposal or the information herein is prohibited without prior written permission of Trustwave.

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**TRUSTWAVE PROPRIETARY INFORMATION**  
Ver. 1.0 - 21JAN13

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## About Trustwave SpiderLabs

Trustwave's SpiderLabs provide clients with support services with the following engagement principles:

- Work product built on the foundation of Trustwave's industry expertise;
- Well-defined engagement model to ensure consistent client's experience;
- Clarity of communication to ensure client's understanding of complex technical findings;
- A rigorous quality assurance process to ensure standardized deliverables on a global scale;
- Prompt notification on identifying material, high, or critical risk issues affecting our clients;
- Controlled assessments and methodologies;
- People, process, and technological innovation to continually improve our capability maturity;
- Work will be conducted in accordance with an agreement between Trustwave and the client;
- Engagements are, unless otherwise mutually agreed, conducted within locally accepted business hours, with a minimum of continuous 8-hour window required.

## Agreement

This Forensics Investigation Agreement ("Agreement") is made by and between Trustwave Holdings, Inc. and HGI-Lakeside, LLC dba Lakeside Hotel & Casino ("Client") and shall be effective as of the date of execution by both parties.

The parties understand and agree that this forensics investigation is solely for Client's internal purposes. As such, Client shall not submit the resulting report to any third party without the express written consent of Trustwave.

## Service Description

### PCI Forensic Investigation (PFI)

PCI Forensic Investigations (PFIs) are conducted on behalf of organizations that have a suspected compromise of their cardholder data environment. The PCI Security Standards Council (PCI SSC) lays out the requirements of a PFI; only companies who meet stringent requirements of the PCI SSC are able to carry out PFIs. Trustwave are approved to carry out PFIs globally.

PCI Forensic Investigations are designed to identify if, how what, and for how long cardholder data has been compromised and to provide recommendations to increase security. This aids the Payment Industry in reducing fraud and assists merchants and service providers in improving security.

Trustwave perform PCI PFI through a combination of investigative techniques, digital forensic imaging and malware reverse engineering to determine, where reasonably possible, the following material aspects of a data compromise:

- Intrusion Analysis
  - What was the initial point of intrusion used to gain a foothold into the environment
  - What sequence of security controls were circumvented by the attacker
  - What and how unauthorized access was gained to ultimately compromise the data in question
- Data Harvesting/Aggregation
  - The nature of the cardholder data was exposed
  - How was the information cardholder data harvested
  - Over what time-frames was the cardholder data at risk (window of exposure)
- Exfiltration
  - How the data in question was successfully extracted from the victim environment

As part of the PCI Forensic Investigation, access to a monthly external vulnerability scanning (PCI ASV Scan) service is provided for a period of twelve months via the Trustwave TrustKeeper portal.

Trustwave is responsible for the secure handling of evidence in its possession and will securely destroy all evidence in-line with the Trustwave Incident Response data retention policy.

### Important Pre-Engagement Guidance

Trustwave should be notified as soon as possible in the event of a suspected data compromise. This allows SpiderLabs experts to provide advice and, if necessary, arrive on site as soon as possible.

In order to assist in the investigation, Trustwave recommends the following pre-engagement activities are performed:

Action	Description
<input type="checkbox"/> Create a timeline of events	Document all past, current and planned events relating to the incident.
<input type="checkbox"/> Quarantine impacted systems (if feasible)	Remove impacted systems from the network. It is not recommended that impacted systems are powered down.
<input type="checkbox"/> Obtain network diagrams and process flows	Ensure documentation is current and available to gain insight into the environment
<input type="checkbox"/> Validate log availability and retention	Ensure relevant system and application logs are retained and available for potentially impacted systems and surrounding network devices
<input type="checkbox"/> Identify key players	Document roles, responsibilities and contact strategies for all involved personnel.

**Important PFI Requirements**

For authorized PCI Forensic Investigations the following points must be understood and accepted:

- Trustwave is being engaged to establish an understanding of the extent of the potential compromise as required by Visa, MasterCard, American Express, Discover, and JCB.
- As part of a PFI engagement Trustwave has an obligation to provide regular updates to Visa, MasterCard, American Express, Discover, JCB and the acquiring bank (if the compromised entity is a merchant) on request, as well as a copy of the final deliverable.

**Scope and Project Phases**

**Project Scoping**

Trustwave scopes PCI Forensic Investigations in order to meet the requirements of the PCI Forensic Investigation program. Primarily, this means ensuring that sufficient data is collected and the data is investigated to sufficient depth in order to provide the necessary information for the PCI Forensic Report. The PCI Forensic Report template is published and made available by the PCI Security Standards Council.

Trustwave scopes PCI Forensic Investigations based on information gathered from the compromised entity and statements of understanding based on these. Trustwave provides a quote for a PCI Forensic Investigation based on the statements of understanding being true. The compromised entity should confirm that these statements are correct as if evidence shows that they are not it may be necessary to reevaluate the scope of the investigation that may require additional Statements of Work.

**Data Acquisition**

Data from suspected compromised systems will be collected in a forensic manner. Forensic data collection techniques commonly include full forensic imaging of suspected hard drive(s) and volatile memory of the in-scope system(s) in order to capture the current system state(s) and preserve evidence. Other types of data collection may be appropriate depending on the types of systems involved and the access available. The forensic images are copies on a bit-level basis. This stage can be performed onsite or remotely depending on access limitations.

Reasonable costs associated with storage media for collected evidence will be re-charged.

**Forensic Analysis**

Off-line analysis of all the forensically acquired data is performed. The volume and type of compromised data will be expertly assessed. Further analysis includes the identification of unauthorized files and programs including attacker tools such as root kits, malware and exploit code. As part of this process operating system and application logs are reviewed to understand the extent of the potential exposure.

An itemized list of the at-risk cardholder data resident on the investigated systems will be collated.

#### **Communication Requirements**

It is important to both verify the investigation scope and for some parts of the PCI Forensic Investigation report to gain an understanding of the environment both before and after compromise notification. In order to achieve this it is crucial that the relevant information is provided to Trustwave. This will usually be in the form of interviews conducted on site or via telephone. This commonly comprises:

- Interviews with key stakeholders regarding the notification of the potential compromise.
- Discussions with parties responsible for compromised systems to understand the network topology and data processing flows.
- Documents that describe the cardholder data environment's configuration and cardholder data flow.
- Details of the security improvements made since compromise notification to reduce the risk to cardholder data.
- A debriefing meeting or conference call to understand the remediation efforts that have taken place to date.

#### **Payment Card Stakeholder Liaison**

A SpiderLabs representative will assume the role of liaison and advisor for communications related to this incident between the authorized stakeholders, including but not limited to:

- The card brands, Visa, MasterCard, American Express, Discover, and JCB.
- The merchant or acquiring bank of the compromised entity.

#### **Monthly Vulnerability Scans**

Access to the Trustwave TrustKeeper portal for 12 months is included in the PCI Forensic Investigation service. The TrustKeeper account allows monthly ASV scans to be scheduled. The results of these scans can be obtained on a self-service basis via the portal. Helpdesk support for the portal is included as part of this service.

#### **Deliverables**

At the end of the engagement a PCI Forensic Investigation Report will be completed. The report is in line with PCI Security Standards Council requirements. The areas covered by the report will include:

- Background and description of the cardholder data processing environment and cardholder data flow.
- The forensic acquisition techniques used and the data collected
- The forensic analysis performed on the data
- The technical findings including extracts of relevant data sources
- The conclusions of the investigation; has a compromise occurred; if so, what the evidence shows was the cause of the compromise; what data is at risk.



## Scope

Client is engaging Trustwave to establish an understanding of the extent of the potential compromise as required by Visa, MasterCard, American Express, Discover, and JCB.

Trustwave understands the Client environment has the following traits:

- Client has one (1) location where the breach may have occurred.
- Client is a brick and mortar merchant consisting of a restaurant and gift shop located inside of a hotel and casino.
- The environment includes eight (8) systems (7 terminals and a single BOH server) that are facilitating the flow of cardholder data for authorisation and settlement. The environment does have an MPLS/VPN connection back to a corporate headquarters, the connectivity will be examined but systems at headquarters are not under the scope of this contract.
- The cardholder data on these systems may include cardholder names, account numbers, and expiration dates, track or CVV2/CVC2/CID data.
- Client processes card transactions via a third party, named Shazam.

## Pricing

Trustwave Service	Hours	TOTAL
PCI Forensic Investigation (PFI)	[REDACTED]	[REDACTED]

\* All hours are estimated based upon the information that was provided to Trustwave. If additional hours are required to complete a specific component they will be billed at the hourly rate of [REDACTED] hour.

\*\* Excludes Disk Imaging Equipment Fees when applicable (hard drives, cables, etc.).

\*\*\* Any hours purchased hereunder not used within the twelve months following the execution of this Agreement will expire.

### Scheduling

After execution of this Agreement, Client shall submit written request to Trustwave outlining the project. Trustwave will then schedule a security advisor to begin the project. Any terms and conditions that are not included within the terms and conditions section of this Agreement, including without limitation, those submitted with or contained within a purchase order, shall be null and void for all purposes.

Trustwave shall not begin to provide the Services as described in this Agreement until Client has returned this signed Agreement and a purchase order (or purchase order exemption form) for the total amount of the services selected (full contract amount). All terms and conditions included in a purchase order or submitted with a purchase order shall be null and void for all purposes.

### Wire Transfer Instructions:

Bank Name:

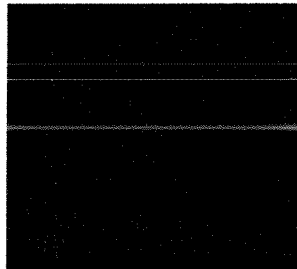
Location:

ABA No.:

Payable To:

Account #:

Reference:



### Overnight Delivery or USPS Instructions:

Trustwave Holdings, Inc.

Attn: Accounts Receivable

70 West Madison Street, Suite 1050

Chicago, IL 60602

312-873-7500

### **Travel and Expenses**

Travel and expenses are not included in the fees listed above and will be billed separately. Trustwave will use reasonable efforts to travel as efficiently and cost effectively as possible given timing and travel requirements. Valid expenses typically include parking, meals (unless a per diem is agreed upon), lodging, photocopying, shipping, and communication costs. Travel costs include airfare, mileage (if a personal car is used) and automobile rental. Mileage will be reimbursed at the standard IRS mileage rate for the year in which the travel occurred.

### **Incidental Fees**

Client shall immediately notify Trustwave if Client knows or has reason to believe that Trustwave has been or will be required, as a result of activity arising out of or related to this Agreement or the services contemplated hereunder, by the PCI Security Standards Council, any court or administrative agency of the United States or any state or by any legal process to respond to any subpoena, search warrant, discovery or other directive under the authority of such court, administrative agency, governmental inquiry or process in connection with any proceeding or investigation in which Client or any of its Affiliates, officers, directors, agents, employees, or subcontractors is involved. Whether or not such notice is given by Client, Client shall directly assist Trustwave in Trustwave's attempt to reduce the burdens of compliance with any such directive, and Client shall reimburse any and all reasonable expenses incurred by Trustwave and its Affiliates in complying with any such directive, including, but not limited to, attorneys' fees and Trustwave's outside counsel attorneys' fees for representation and advice, travel and lodging expenses and an hourly labor rate of [REDACTED] per hour, unless otherwise set forth herein, for all time spent by Trustwave in responding to such matters.

## Contact Information

### Client's Primary Contact

Name: Elizabeth Guth

Title: VP Insurance & Benefits

Phone: [REDACTED]

Fax: \_\_\_\_\_

Email: [REDACTED]

### Client's Billing Contact

Name: same as above

Title: \_\_\_\_\_

Phone: \_\_\_\_\_

Fax: \_\_\_\_\_

Email: \_\_\_\_\_

### Client's Legal Contact

Name: James Prendergast

Title: \_\_\_\_\_

Phone: [REDACTED]

Fax: \_\_\_\_\_

Email: [REDACTED]

## Dependencies and Assumptions

This Agreement was developed based on the following dependencies and assumptions, which if not accurate or adhered to, may require a change in the scope of services. Any change in services and fees will be mutually agreed to in writing by both parties. The dependencies and assumptions include:

1. Client must complete several tasks. Specifically, Client is responsible for:

Customer Responsibility	Deadline
Sign this Agreement	Before Start Date can be assigned
Provide Purchase Order (or Purchase Order Exemption Form) for Amount of Service	Before Start Date can be assigned
Make payment of retainer	By Start Date
Provide Executive sponsor, Management sponsor and Primary contact points	By Start Date
Create a written log/timeline of past, current and future related events	By Start Date

2. Client Primary Contact (PC) or their designee must be available to Trustwave during the entire engagement. The representative must have sufficient authority to schedule testing and deal with issues that may arise.
3. Client will make reasonable efforts to provide facilities for the Trustwave service team when on-site, including desks, chairs, phones, and access to copy machines and fax machines.
4. Trustwave will have onsite access to the systems being tested as necessary. Before any system access is allowed it must be in compliance with Client security standards.
5. During the investigation, the configuration of Client's network will be kept as stable as possible (i.e., no new systems will be added or configuration changes performed). If changes must be made to the network configuration during the investigation, Client and Trustwave team will work out an acceptable testing schedule.
6. During the investigation, additional items may be uncovered that can lead to additional hours being performed by Trustwave. These hours may be able to be borrowed from other aspects of the investigation or may require an overage of the original estimate.

## Terms and Conditions

### 1. Definitions

"Client Premises Equipment" or "CPE" means any equipment licensed to Client by Trustwave and used by Trustwave for provision of the Services.

"Purchase Order" means a purchase order or purchase order exemption form, as the same may be amended in writing by Client and Trustwave from time to time.

### 2. Effective Date/Term

This Agreement shall have an Effective Date of the later date of signatures with an Initial term of one (1) year.

### 3. Obligations

- a. Trustwave shall provide to Client the services and deliverables (collectively, the "Services") described in this Agreement.
- b. Client shall provide to Trustwave the information described in this Agreement as Trustwave may from time to time reasonably request in order to perform the Services.
- c. Client acknowledges that Trustwave will rely upon the accuracy of information provided by Client and that Trustwave's performance is dependent on Client's timely and effective satisfaction of all of Client's responsibilities hereunder and timely decisions and approvals by Client.
- d. Annualized Services must be used each year during the term of this Agreement and such Services cannot be used and/or credited in subsequent years. Any Services not used within such timeframes shall be forfeited.

### 4. Compensation

- a. Fees: Client shall pay to Trustwave the fees and expenses set forth in this Agreement and the applicable Purchase Order.
- b. Taxes, Shipping, Title, & Risk of Loss: Client shall be responsible for all taxes (except for taxes on Trustwave's income), such as sales, use or excise taxes, and similar charges of any kind imposed by any governmental entity for Services provided under this Agreement. All products shipped within the United States will be shipped by Trustwave F.O.B. Shipping Point (Freight Prepaid and Added). All products shipped to a final destination outside of the United States will be shipped by Trustwave EXW (Ex Works) Incoterms 2010. Client is responsible and will pay for freight, shipping, handling, insurance and other transportation charges, including, but not limited to all applicable import and export fees, customs, duties and surcharges. Notwithstanding the foregoing, title to any CPE or software delivered in connection with the Services shall remain with Trustwave. Title and risk of loss to any purchased hardware shall pass to Client upon shipment; title to software shall remain with Trustwave.

### 5. Proprietary Rights

- a. Trustwave Technology and IP: All technology used by Trustwave in connection with performing the Services, including software, portals, data processing systems (each of the foregoing, in object code and source code form), report templates, and CPE (collectively, "Trustwave Technology"), and any Trustwave intellectual property ("Trustwave IP"), and any derivative works of or modifications to the Trustwave Technology or Trustwave IP, is the sole and exclusive property of, and is valuable, confidential and proprietary to, Trustwave or its licensors. Except as otherwise expressly provided herein, Client shall not acquire any rights in any Trustwave Technology or Trustwave IP as a result of receiving the Services. The sale of any equipment conveys no right or license to manufacture, duplicate or otherwise copy or reproduce any of the equipment. Client shall not remove any proprietary notices on equipment delivered hereunder and may not co-brand or otherwise add any branding or marking to such equipment or its packaging.
- b. Data: In the course of providing the Services, Trustwave may collect information relating to activities on Client's network (the "Data") including, but not limited to, network configuration, TCP/IP packet headers and contents, log files, malicious codes, and Trojan horses. Trustwave retains the right to use the Data or aggregations thereof for any reasonable purpose, provided such data does not contain information identifying Client or disclose any of Client's confidential information.
- c. Publicity, Trademarks and Logo: Without prior written approval signed by an authorized representative of Trustwave, Client shall not, directly or indirectly, (i) use Trustwave's name or any of Trustwave's trademarks, service marks or logos, (ii) make any public announcement related to this Agreement or the Services or (iii) disclose to any third party the fact that Trustwave is Client's service provider.

### 6. Confidentiality

- a. "Confidential Information" means any information disclosed by either party to the other (including without limitation, documents, data centers, prototypes, samples, equipment, all software, benchmark tests, specifications, trade secrets, object code and machine-readable copies, including Trustwave's service portals). Confidential Information shall not, however, include any information which (i) was in the public domain when disclosed; (ii) becomes publicly known after disclosure through no action or inaction of the receiving party; (iii) is already in the possession of the receiving party at the time of disclosure; (iv) is obtained by the receiving party from a third party without a breach of such third party's obligations of confidentiality; (v) is independently developed by the receiving party without use of the disclosing party's Confidential Information; or (vi) is required by law to be disclosed by the receiving party, provided that the receiving party gives the disclosing party prompt written notice of such requirement prior to such disclosure and assistance in obtaining a protective order.
- b. Each party agrees not to use any Confidential Information of the other party for any purpose other than as contemplated by this Agreement. Each party agrees not to disclose any Confidential Information of the other party to third parties or to such party's employees, except to those employees of the receiving party who are required to have the information in order to evaluate or

engage in discussions concerning the contemplated business relationship. Neither party shall reverse engineer, disassemble or decompile any prototypes, software or other tangible objects which embody the other party's Confidential Information and which are provided to the party hereunder. Each party agrees that it shall take reasonable measures to protect the secrecy of and avoid disclosure and unauthorized use of the Confidential Information of the other party.

- c. The parties acknowledge that either party's breach of its obligations of confidentiality may cause the other party irreparable injury for which it would not have an adequate remedy at law. In the event of a breach, the non-breaching party shall be entitled to seek injunctive relief in addition to any other remedies it may have at law or in equity.
- d. Notwithstanding the foregoing, Client acknowledges that Trustwave is contractually bound to provide this Agreement and any amendments, Client's reports, attestation of compliance, work papers and information related to the Services to the PCI Security Standards Council, Client's Acquirer, if applicable, and the payment card associations. As such, Client authorizes Trustwave to release this Agreement and any amendments, all such Client reports work papers, and information related to the services and status to the Client's merchant acquiring bank, if applicable, the PCI Security Standards Council, and the payment card associations. In the event the Services are sponsored by a third party, such as an acquiring bank, management company, or franchisor, Client hereby authorizes Trustwave to disclose information related to the Services and resulting reports to such third party sponsor.
7. **Termination**
- a. **Termination for Cause.** This Agreement may, by written notice, be terminated by a party for cause if any of the following events occur:
- Either party is in material breach of any term, condition or provision of this Agreement, which breach, if capable of being cured, is not cured within thirty (30) days after a party gives the other party written notice of such breach; or
  - As to any Service Trustwave delivers to Client from a third-party vendor, such vendor removes or disables access to all or any portion of such Service, ceases to do business or otherwise terminates its business operations; or
  - Client fails to pay any amount due Trustwave within thirty (30) days after Trustwave gives Client written notice of such nonpayment; or
  - Client (i) terminates or suspends its business, (ii) becomes insolvent, admits in writing its inability to pay its debts as they mature, makes an assignment for the benefit of creditors, or becomes subject to direct control of a trustee, receiver or similar authority, or (iii) becomes subject to any bankruptcy or insolvency proceeding under federal or state statutes.
- b. **Licensed CPE Return.** Within ten (10) business days after the date of termination or discontinuance of this Agreement for any reason, Client agrees to return, at its sole expense without setoff to any fees owed, any CPE(s) to Trustwave. Client shall retain the risk of loss until such CPE is delivered to Trustwave's premises. Client shall be solely responsible for, and shall reimburse Trustwave for, any damage caused to the CPE while it is installed at Client's facilities, except to the extent such damage is caused by Trustwave personnel. If the CPE(s) are not timely returned or are not in the same condition in which received by Client (except for normal wear and tear), Client agrees to pay a fee of \$5,000 per CPE.
- c. **Effect of Termination.** If Client terminates this Agreement for any reason, Client agrees to pay Trustwave within 30 days for all services performed by Trustwave up to the date of cancellation that have not previously been paid. Additionally, if Client terminates this Agreement other than for cause, then Client shall pay to Trustwave, as a cancellation fee and not as a penalty, an amount equal to the sum of the service charges for the remainder of the term of this Agreement.
8. **Warranties**
- a. **Trustwave Services.** Trustwave warrants that the Services provided under this Agreement shall be performed with that degree of skill and judgment normally exercised by recognized professional firms performing services of the same or substantially similar nature. The exclusive remedy for any breach of the foregoing warranty shall be that Trustwave, at its own expense, and in response to written notice of a warranty claim by Client within 90 days after performance of the Services at issue, re-perform the Services to conform to this standard.
- b. **Licensed Equipment (CPE).** In the event of a defect in the materials or workmanship of the CPE, Client shall have the right to return such defective CPE to Trustwave, and Trustwave shall, at Trustwave's election and expense, either repair or replace such defective CPE. Client shall be solely responsible for all costs associated with repairing or replacing any CPE damaged by accident; unusual physical, electrical or electromagnetic stress; neglect; misuse; failure of electric power, air conditioning or humidity control; causes other than ordinary use; or any damage resulting from a breach of Client's obligations hereunder.
- c. **By Client.** Client represents and warrants to Trustwave that possession and use of information, specifications and data provided by Client to Trustwave under the terms and conditions of this Agreement will not constitute an infringement upon any patent, copyright, trade secret, or other intellectual property right of any third party.
9. **Limitation of Liability & Disclaimer of Warranties**
- a. TRUSTWAVE SHALL NOT BE LIABLE TO CLIENT FOR (1) ANY ACTS OR OMISSIONS WHICH ARE NOT THE RESULT OF TRUSTWAVE'S GROSS NEGLIGENCE, RECKLESSNESS OR WILLFUL MISCONDUCT, (2) ANY AMOUNTS IN EXCESS OF ANY FEES PAID TO TRUSTWAVE BY CLIENT IN THE TWELVE MONTHS PRECEDING THE CLAIM, (3) ANY OUTAGES OR SLOW DOWNS OF CLIENT'S COMPUTER SYSTEMS RESULTING FROM THE PERFORMANCE OF ANY SERVICES UNLESS SUCH ARE THE RESULT OF TRUSTWAVE'S GROSS NEGLIGENCE, RECKLESSNESS OR WILLFUL MISCONDUCT, OR (4) ANY LOSSES, COSTS, DAMAGES OR EXPENSES INCURRED BY CLIENT RESULTING FROM THE PERFORMANCE OF ANY TEST, UNLESS SUCH ARE THE RESULT OF TRUSTWAVE'S GROSS NEGLIGENCE OR WILLFUL MISCONDUCT.
- b. NOTWITHSTANDING ANY PROVISION IN THIS AGREEMENT, IN NO EVENT WILL TRUSTWAVE BE LIABLE FOR ANY LOSS OF PROFITS, LOSS OF USE, BUSINESS INTERRUPTION, LOSS OF DATA, COST OF COVER OR INDIRECT, SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES OF ANY KIND IN CONNECTION WITH OR ARISING OUT OF THE FURNISHING, PERFORMANCE OR USE OF THE SERVICES PERFORMED HEREUNDER, WHETHER ALLEGED AS A BREACH OF CONTRACT OR TORTIOUS CONDUCT,

- INCLUDING NEGLIGENCE, EVEN IF TRUSTWAVE HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN ADDITION, TRUSTWAVE WILL NOT BE LIABLE FOR ANY DAMAGES CAUSED BY DELAY IN DELIVERY OR FURNISHING THE SERVICES.
- c. EXCEPT AS EXPRESSLY PROVIDED IN THIS AGREEMENT, TRUSTWAVE DISCLAIMS ALL REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, ANY WARRANTIES REGARDING QUALITY, SUITABILITY, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE (IRRESPECTIVE OF ANY COURSE OF DEALING, CUSTOM OR USAGE OF TRADE) OF ANY SERVICES OR ANY GOODS OR SERVICES PROVIDED INCIDENTAL TO THE SERVICES PROVIDED UNDER THIS AGREEMENT. Trustwave does not warrant that the CPE or Services are offered without defect or error, or that the operation of the CPE or availability of the Services will be uninterrupted or error-free. Furthermore Client acknowledges and understands that the monitoring for availability of dynamically addressed CPE devices may result in a greater time window for device outage detection. Client understands and agrees that receiving the Services does not guarantee that Client's information systems will be secure.

**10. Terms Applicable to Certain Services**

- a. Client acknowledges and agrees that Client's use of Trustwave's services does not guarantee PCI compliance or that its' systems are secure from unauthorized access. Client is responsible for PCI compliance and notification of any suspected breach of its systems and any fines, penalties or registration fee imposed by any payment card association or its acquiring bank.
- b. Client represents and warrants that Client has full right, power, and authority to consent to have the TrustKeeper service scan for vulnerabilities the IP address and/or URL and/or domain names identified to Trustwave by Client for scanning, whether electronically or by any other means, whether during initial enrollment or thereafter. Without limiting any other remedy that Trustwave may have, Client agrees to indemnify and hold Trustwave and its affiliates harmless from and against all liabilities, losses, damages, costs and expenses, including without limitation reasonable attorney's fees and costs incurred by Trustwave resulting from Client's breach of this provision. If applicable, Client shall obtain all consents and authorizations from any third parties necessary for Trustwave to perform the Services, including without limitation, third party datacenters, co-locations and hosts. Trustwave will not be required to execute agreements with any such third parties. Client agrees that TrustKeeper, including without limitation its functionality and contents, is confidential information, and Client's use and/or access to TrustKeeper is subject to the terms of the mutual non-disclosure agreement executed by the parties. Client acknowledges and understands that accessing and scanning IP addresses and penetration testing involves inherent risks, including, without limitation, risks related to system or network performance and availability, and data corruption or loss.

**11. General**

- a. **Assignment.** Neither party may assign or otherwise transfer this Agreement, in whole or in part, without the prior written consent of the other party; provided, however, that no written consent shall be required to assign this Agreement to any parent or wholly owned subsidiary of a party, and further provided that Trustwave may assign this Agreement without Client's prior written consent to a successor by way of a merger, acquisition, sale, transfer or other disposition of all or substantially all of its assets. Subject to the foregoing, this Agreement will bind and inure to the benefit of the parties, their respective successors and permitted assigns.
- b. **Force Majeure.** Neither party shall be liable for any default or delay in the performance of its obligations hereunder (except for payments) if and to the extent such default or delay is caused, directly or indirectly, by acts of God, governmental acts, accidents, wars, terrorism, riots or civil unrest, fires, storms, earthquakes, floods or elements of nature, or any other similar cause beyond the reasonable control of such party, provided such default or delay could not have been prevented by reasonable precautions and cannot reasonably be circumvented by the non-performing party through the use of commercially reasonable alternative sources, workaround plans or other means.
- a. **Notice.** Except as otherwise provided in this Agreement, all notices, consents, or approvals required by this Agreement shall be in writing sent by certified or registered mail, postage prepaid, or by electronic mail (receipt confirmed) to, (i) in the case of Trustwave, 70 W. Madison Street, Suite 1050, Chicago, IL 60602, Attn: Legal Department, Email: legal@trustwave.com, and (ii) in the case of Client, the address and email address set forth on the signature page hereto. Notices shall be deemed effective on the date of mailing (for certified or registered mail) or the date that receipt is confirmed (for electronic mail). Client agrees to accept communications from Trustwave via email.
- c. **Relationship.** The relationship between the parties to this Agreement shall be that of independent contractors. Nothing in this Agreement shall be construed to create or imply a partnership, joint venture, agency relationship or contract of employment.
- d. **No Third Party Beneficiaries.** Nothing herein expressed or implied is intended to or shall be construed to confer upon or give any person or entity, other than the parties hereto and their respective successors and permitted assigns, any rights or remedies under or by reason of this Agreement.
- e. **Subcontractors.** Client expressly consents to Trustwave's right to use of subcontractors in connection with the performance of Services hereunder, provided that Trustwave shall remain responsible for its obligations under this Agreement.
- f. **No Solicitation.** During the term of this Agreement and for a period of one (1) year thereafter, Client shall not, directly or indirectly, hire or solicit to be hired any employee of Trustwave or any of its affiliates. If Client breaches this provision, Client shall pay Trustwave two times (2X) the salary paid by Trustwave to such employee so hired. The parties agree that said amount is a reasonable estimate of the costs and expenses that Trustwave will incur as a result of training and replacing such employee.
- g. **Waiver.** Any waiver of the provisions of this Agreement or of a party's rights or remedies under this Agreement must be in writing to be effective.
- h. **Severability.** If any provision in this Agreement is found to be invalid, unlawful or unenforceable, the parties shall agree in good faith to such amendments as will preserve the intent of this Agreement. If the parties fail to so agree, such invalid provision will be severed from this Agreement, which will continue in full force and effect.
- c. **Governing Law.** 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. The parties agree that any legal action or proceeding relating to this



- Agreement may be instituted in a state or federal court in Cook County, Illinois, and agree to submit to the jurisdiction of, and agree that venue is proper in, these courts in any such action or proceeding.
- j. **Directives.** Client shall immediately notify Trustwave if Client knows or has reason to believe that Trustwave has been or will be required, as a result of activity arising out of or related to this Agreement or the services contemplated hereunder, by any court or administrative agency of the United States or any state, by the Payment Card Industry Security Standards Council, or by any legal process to respond to any subpoena, search warrant, discovery or other directive under the authority of such court, administrative agency, governmental inquiry or process in connection with any proceeding or investigation in which Client or any of its affiliates, officers, directors, agents, employees, or subcontractors is involved. Whether or not such notice is given by Client, Client shall directly assist Trustwave in Trustwave's attempt to reduce the burdens of compliance with any such directive, and Client shall reimburse any and all reasonable expenses incurred by Trustwave and its affiliates in complying with any such directive, including, but not limited to, attorneys' fees and Trustwave's outside counsel attorneys' fees for representation and advice, travel and lodging expenses and an hourly labor rate of \$275 per hour for all time spent by Trustwave in responding to such matters.
  - k. **Export Control.** Client agrees to comply with all applicable U.S. and foreign export laws, restrictions, and regulations and not to export or re-export or allow the export or re-export of any product, technology or information it obtains or learns pursuant to its relationship with Trustwave in violation of any such laws, restrictions or regulations. Client shall bear all expenses relating to any necessary licenses and/or exemptions with respect to the export from the U.S. of the equipment purchased from Trustwave to any location in compliance with all applicable laws and regulations prior to the delivery thereof by Client. Client shall indemnify and hold Trustwave harmless from all claims, damages and related expenses (including reasonable attorneys' fees) incurred by Trustwave that result from Client's breach of this provision. TRUSTWAVE SHALL NOT BE LIABLE FOR CLIENT'S VIOLATION OF ANY EXPORT OR IMPORT LAWS, WHETHER UNDER THE UNITED STATES OR FOREIGN LAW.
  - l. **Entire Agreement; Amendment.** This Agreement, together with any software end-user license agreement (EULA) and any non-disclosure agreement executed between the parties, constitutes the entire agreement between Trustwave and Client regarding the subject matter hereof. All prior or contemporaneous agreements, proposals, understandings and communications between Trustwave and Client regarding the subject matter hereof, whether oral or written, are superseded by and merged into this Agreement. This Agreement may not be modified or amended except by a written instrument executed by both Trustwave and Client. Notwithstanding, in the event Trustwave performs Payment Card Industry-related services for Client, Trustwave may update this Agreement in the event that the PCI Data Security Standard, the Payment Application Data Security Standard, or other applicable standards are changed or updated, including without limitation material changes in scope based on PCI SSC or the card associations' interpretations. The terms of any Client purchase order are accepted for accounting convenience only. No terms or conditions contained in any purchase order shall amend this Agreement or shall otherwise constitute an agreement between the parties.
  - m. **Dependencies.** Client acknowledges that the provision of Services is dependent upon the performance of Client, and its affiliates, and that Trustwave shall not be liable for its failure to perform to the extent such failure is due to (i) a failure by Client or any third party retained by, or under the control of, Client to provide data or materials that Client or such third party is required to provide to Trustwave or required by Trustwave to perform the services under this Agreement, (ii) a failure by Client to timely and accurately perform its responsibilities as set forth in this Agreement, or (iii) a failure by Client to obtain consents, approvals or access for Trustwave.
  - n. **Insurance.** Trustwave shall provide insurance coverage as per Client's Insurance Rider which is attached to this Agreement as an Exhibit and incorporated by reference and made a part hereof.

## Signatures

IN WITNESS WHEREOF, the Parties below have executed this Agreement as of the date indicated below.

Trustwave: As a duly elected officer authorized to enter into agreements and contracts on behalf of Trustwave, I hereby provide and accept this Agreement.

Signature: Robert J. McCullen  
Print Name: Robert J McCullen  
Title: CEO  
Effective Date: October 31, 2013



HGI-  
Lakeside, LLC dba Lakeside Hotel & Casino: As a duly authorized representative with the authority to enter into agreements and contracts on behalf of Client, I hereby accept this Agreement for the designated services.

Signature: Donna Lehmann  
Print Name: Donna Lehmann  
Title: MANAGER  
Date: Oct 30, 2013

## Affinity Gaming

Prior to the final approval of your contract, you (and any sub-tiers) must comply with the following insurance requirements.

**These insurance requirements will apply, as of the date of your signature below and continuing thereafter indefinitely, to any and all agreements between you and Affinity Gaming, (as defined below), its subsidiaries and affiliates, unless mutually agreed otherwise.**

You shall at all times during the contract period, provide and take commercially reasonable efforts to maintain the following insurance at your own expense. .

In no event shall work/project/service be performed until the required evidence of Insurance is provided and approved by Affinity Gaming. ("Affinity Gaming").

1. All insurance shall be procured from reputable insurers authorized to do business in the State in which the work/project/service is taking place and having an A.M. Best Rating of at least A- Class VIII.
2. Deductible/Self Insured Retention on any policy greater than \$50,000 requires approval from Affinity Gaming.
3. All insurance required herein, shall be written on an "occurrence" basis and not a "claims-made" basis. For Professional Liability "claims-made" coverage is acceptable.

All insurance coverages required shall apply on a primary and non-contributory basis and in excess of any insurance or self-insurance program carried by the Affinity Gaming.

Contractor shall require that all policies include provisions that allow for waiver of recovery in favor of Affinity Gaming, under subrogation or otherwise where permitted by state law.

4. You shall provide at least thirty (30) days prior written notice to Affinity Gaming in the event coverage is canceled or non-renewed. In the event of cancellation or non-renewal in coverage(s), it is your responsibility to replace coverage to comply with these requirements so there is no lapse of coverage for any time period.
5. Upon request, you shall provide Affinity Gaming with Certificates of Insurance, evidencing the insurance coverage listed below, prior to the start of the work/project/service.

Certificates of Insurance shall be provided to: Affinity Gaming, Attn: Risk Management, 3755 Breakthrough Way, Suite 300, Las Vegas, NV 89135.

Failure of the Company to demand such certificate or other evidence of full compliance with these insurance requirements or failure of the Company to identify a deficiency in evidence that is provided shall not be construed as a waiver of Contractors obligation to maintain such insurance.

## Affinity Gaming

6. Commercial General Liability Insurance:

- a) Coverages:
  - i. Coverage is to be provided by the standard Commercial General Liability insurance policy ("Occurrence Form", edition 1998 or later);
  - ii. Policy shall provide for contractual liability or contain no provision that otherwise limits coverage for indemnity provisions set forth in this agreement.
  
- b) Minimum Limits of Liability
  - \$1,000,000 Each Occurrence
  - \$2,000,000 Products/Completed Operations Aggregate
  - \$1,000,000 Personal Injury and Advertising Injury
  - \$2,000,000 General Aggregate

7. Business Automobile Liability Insurance Covering All Non-Owned and Hired Automobiles:

- a) Minimum Limits of Liability: \$1,000,000 Per Accident for Bodily Injury and Property Damage Combined Single Limit;

8. Workers Compensation and Employer's Liability:

- a) Coverage A, Workers Compensation – Statutory benefits as required by the Workers Compensation Laws of the State in which this work/project/service is taking place, covering all employees;
  
- b) Coverage B, Employer's Liability Minimum Limits:
  - \$500,000 Each Accident
  - \$500,000 Disease – Each Employee
  - \$500,000 Disease – Policy Limit;
  
- c) Blanket Waiver of Subrogation, where permitted by state law;

9. Commercial Umbrella Liability Insurance:

- a) Following Form Basis of the underlying Commercial General Liability, Business Automobile Liability, and Employer's Liability coverage; and
  
- b) Minimum Limit of Liability: \$2,000,000 Per Occurrence and \$2,000,000 Aggregate Limit.

10. Cyber Liability Insurance:

### Affinity Gaming

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- a) Network security liability insurance covering unauthorized access to, use of, or tampering with computer systems, hacker attacks or inability of an authorized third party to gain access to [Affinity Gaming's] network services, unless caused by a mechanical or electrical failure;
  - b) Third party liability coverage, including privacy liability and notification expense, arising from: theft, dissemination, loss, and or use of confidential information or personal identifiable information; damage to computer hardware, computer system, network or similar computer related property and the data, software, and programs thereon
  - a) Minimum Limit of Liability: \$3,000,000 Per Occurrence or Event and \$3,000,000 Aggregate Limit.
11. Crime: Fidelity/Crime coverage (including third party liability) providing coverage for infidelity, fraud, dishonesty, or criminal acts of the Vendor's employees, agents, officers, or directors in the amount of \$1,000,000 per occurrence
12. Professional/Errors and Omissions Liability Insurance: Professional/errors and omissions liability insurance to include technology services in an amount not less than \$2,000,000 Per Claim and \$2,000,000 Aggregate shall be maintained.
13. Additional Insured Provision: The insurance policies identified in paragraphs (6), (7), (9), (10) and (12) shall include an endorsement naming the following as Additional Insureds: Affinity Gaming, subsidiaries and affiliated companies including their respective directors, officers, agents and employees are to be named as additional insureds with respect to the general liability auto liability and excess liability. These policies are primary and non-contributory. Waiver of subrogation applies to all.

Subcontractor's insurance: The above insurance provisions shall also apply to any subcontractors engaged to perform work outlined in this agreement. The sub-contractor shall provide certificates of insurance to Affinity Gaming evidencing coverages and requirements above, including coverage provisions naming Affinity Gaming as additional insured and waivers of subrogation. At the Affinity Gaming's sole discretion, and with written notice from Affinity Gaming, the insurance requirements for a specific Subcontractor may be modified or waived.

AGREED TO AND ACCEPTED:

Company: Trustwave Holdings

By: Robert J McCullen

Name: Robert J McCullen

Title: CEO

Date: October 31, 2013

LOOSE  
Trustwave  
TJN  
2/29/16



## **Addendum to Incident Response Agreement**

Presented To:

**HGI – Lakeside, LLC dba Lakeside Hotel & Casino**

11/18/2013

Prepared By:

**Matt Aronson**



Proprietary Information: This document may only be used for evaluating the planned services designated herein, and may contain information that is privileged, confidential or otherwise protected from disclosure. Dissemination distribution or copying of this proposal or the information herein is prohibited without prior written permission of Trustwave.

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**TRUSTWAVE PROPRIETARY INFORMATION**  
Ver. 1.0 - 21JAN13

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## Addendum

This is an Addendum ("Addendum"), dated as of the date executed below, to and governed by the Incident Response Agreement ("Agreement"), by and between Trustwave Holdings, Inc. ("Trustwave") and HGI - Lakeside, LLC dba Lakeside Hotel & Casino ("Client"), dated 10/31/13. Trustwave desires to provide the additional services identified below to Client, and Client wishes to receive such services pursuant to the terms and conditions, unless otherwise noted below, of the Agreement.

### Addendum Purpose:

The purpose of this Addendum is to add additional hours for the Forensic Investigation engagement under the Agreement dated 10/31/2013. Pricing is as follows and all other Terms and Conditions of the Agreement remain in full force and effect.

### Service Start Date

The services under this Addendum shall commence as of 11/18/2013 and will expire at the end of the one year term.



## Pricing

Trustwave Service	Hours	TOTAL
PCI Forensic Investigation (PFI)		

\* All hours are estimated based upon the information that was provided to Trustwave. If additional hours are required to complete a specific component they will be billed at the hourly rate of [REDACTED] hour.

\*\* Excludes Disk Imaging Equipment Fees when applicable (hard drives, cables, etc.).

\*\*\* Any hours purchased hereunder not used within the twelve months following the execution of this Agreement will expire.

## Scheduling

After execution of this Agreement, Client shall submit written request to Trustwave outlining the project. Trustwave will then schedule a security advisor to begin the project. Any terms and conditions that are not included within the terms and conditions section of this Agreement, including without limitation, those submitted with or contained within a purchase order, shall be null and void for all purposes.

Trustwave shall not begin to provide the Services as described in this Agreement until Client has returned this signed Agreement and a purchase order (or purchase order exemption form) for the total amount of the services selected (full contract amount). All terms and conditions included in a purchase order or submitted with a purchase order shall be null and void for all purposes.

## Wire Transfer Instructions:

Bank Name:

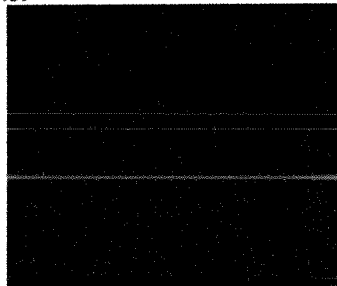
Location:

ABA No.:

Payable To:

Account #:

Reference:



## Overnight Delivery or USPS Instructions:

Trustwave Holdings, Inc.

Attn: Accounts Receivable

70 West Madison Street, Suite 1050

Chicago, IL 60602

312-873-7500

## Travel and Expenses

Travel and expenses are not included in the fees listed above and will be billed separately. Trustwave will use reasonable efforts to travel as efficiently and cost effectively as possible given timing and travel requirements.

Valid expenses typically include parking, meals (unless a per diem is agreed upon), lodging, photocopying, shipping, and communication costs. Travel costs include airfare, mileage (if a personal car is used) and automobile rental. Mileage will be reimbursed at the standard IRS mileage rate for the year in which the travel occurred.

#### **Incidental Fees**

Client shall immediately notify Trustwave if Client knows or has reason to believe that Trustwave has been or will be required, as a result of activity arising out of or related to this Agreement or the services contemplated hereunder, by the PCI Security Standards Council, any court or administrative agency of the United States or any state or by any legal process to respond to any subpoena, search warrant, discovery or other directive under the authority of such court, administrative agency, governmental inquiry or process in connection with any proceeding or investigation in which Client or any of its Affiliates, officers, directors, agents, employees, or subcontractors is involved. Whether or not such notice is given by Client, Client shall directly assist Trustwave in Trustwave's attempt to reduce the burdens of compliance with any such directive, and Client shall reimburse any and all reasonable expenses incurred by Trustwave and its Affiliates in complying with any such directive, including, but not limited to, attorneys' fees and Trustwave's outside counsel attorneys' fees for representation and advice, travel and lodging expenses and an hourly labor rate of [REDACTED] per hour, unless otherwise set forth herein, for all time spent by Trustwave in responding to such matters.

## Contact Information

### Client's Primary Contact

Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Phone: \_\_\_\_\_  
Fax: \_\_\_\_\_  
Email: \_\_\_\_\_

### Client's Billing Contact

Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Phone: \_\_\_\_\_  
Fax: \_\_\_\_\_  
Email: \_\_\_\_\_

### Client's Legal Contact

Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Phone: \_\_\_\_\_  
Fax: \_\_\_\_\_  
Email: \_\_\_\_\_

## Dependencies and Assumptions

This Agreement was developed based on the following dependencies and assumptions, which if not accurate or adhered to, may require a change in the scope of services. Any change in services and fees will be mutually agreed to in writing by both parties. The dependencies and assumptions include:

1. Client must complete several tasks. Specifically, Client is responsible for:

Customer Responsibility	Deadline
Sign this Agreement	Before Start Date can be assigned
Provide Purchase Order (or Purchase Order Exemption Form) for Amount of Service	Before Start Date can be assigned
Make payment of retainer	By Start Date
Provide Executive sponsor, Management sponsor and Primary contact points	By Start Date
Create a written log/timeline of past, current and future related events	By Start Date

2. Client Primary Contact (PC) or their designee must be available to Trustwave during the entire engagement. The representative must have sufficient authority to schedule testing and deal with issues that may arise.
3. Client will make reasonable efforts to provide facilities for the Trustwave service team when on-site, including desks, chairs, phones, and access to copy machines and fax machines.
4. Trustwave will have onsite access to the systems being tested as necessary. Before any system access is allowed it must be in compliance with Client security standards.
5. During the investigation, the configuration of Client's network will be kept as stable as possible (i.e., no new systems will be added or configuration changes performed). If changes must be made to the network configuration during the investigation, Client and Trustwave team will work out an acceptable testing schedule.
6. During the investigation, additional items may be uncovered that can lead to additional hours being performed by Trustwave. These hours may be able to be borrowed from other aspects of the investigation or may require an overage of the original estimate.

## Signatures

IN WITNESS WHEREOF, the Parties below have executed this Agreement as of the date indicated below.

Trustwave: As a duly elected officer authorized to enter into agreements and contracts on behalf of Trustwave, I hereby provide and accept this Agreement.

Signature: Robert J. McCullen  
Print Name: Robert J McCullen  
Title: CEO  
Effective Date: November 19, 2013



HGI – Lakeside, LLC dba Lakeside Hotel & Casino: As a duly authorized representative with the authority to enter into agreements and contracts on behalf of Client, I hereby accept this Agreement for the designated services.

Signature: [Handwritten Signature]  
Print Name: MARC H. RUBINSTEIN, Esq.  
Title: MANAGER  
Date: NOV 18, 2013