

# Trustwave Must Face Casino Co.'s Fraud Claims in Breach Row

---

Steven Trader  
09.30.2016

Law360, New York (September 30, 2016, 10:16 PM EDT) -- Casino owner Affinity Gaming LLC can proceed on its claims that forensics firm Trustwave Holdings Inc. breached its contract and acted fraudulently by failing to properly investigate and fix issues it was hired to repair after a customer data breach, a Nevada federal judge ruled Friday, though dismissing some negligence allegations.

Chief U.S. District Judge Gloria M. Navarro held that Affinity's breach of contract, fraud and fraudulent inducement claims could all remain based on Affinity's allegations that it was wrongly led by Trustwave to believe the firm had the capabilities and experience to clean up and tighten its security system, when in fact the firm failed to do so.

Affinity contends the parties entered into a valid agreement on Oct. 31, 2013, but that Trustwave breached that accord by failing to perform a proper forensic investigation that resulted in more than \$100,000 worth of injuries. Taken together, that satisfied a breach of contract pleading, Judge Navarro said.

Likewise, both the fraud and fraudulent inducement claims can remain, given that the complaint meets the heightened pleading standard "by stating with particularity the circumstances constituting fraud or mistake," Judge Navarro wrote.

Both Nevada and Delaware law may be at issue, but the judge declined to decide at this point in the litigation which one applied, because Delaware-based Trustwave's motion to dismiss questions the sufficiency of the pleadings rather than their merits, the order read.

The judge also let pass Affinity's claim for constructive or equitable fraud, finding sufficient the casino owner's claim that it held a "special relationship" with Trustwave in that the firm "claimed to possess specialized knowledge, experience and qualifications regarding security for information technology systems and data," which put Trustwave in a position of superiority over Affinity.

However, the casino owner's breach of implied covenant claim fell short, the judge found, because its complaint failed to present facts demonstrating a specific implied contractual obligation under Delaware law, or under the alternative Nevada law, how Trustwave deliberately contravened the

## Trustwave Must Face Casino Co.'s Fraud Claims in Breach Row

---

intention of their contract.

The judge also dismissed Affinity's claims for gross negligence and negligent misrepresentation, though all of the eliminated claims may be amended, according to the order.

Affinity sued Trustwave in December, saying the firm lied about conducting a thorough investigation and removing a threat from Affinity's systems after a breach of Affinity customer payment card information. Affinity owns 11 casinos, including the Silver Sevens in Las Vegas, and four others in Nevada, three in Colorado, two in Missouri and one in Iowa.

Affinity was alerted to the breach by banks and law enforcement in October 2013. Its insurance carrier offered a short list of acceptable forensics firms, which included Trustwave, and Affinity hired Trustwave on Oct. 31 of that year, Affinity says. In January 2014, Trustwave finished its work, but in April 2014, Ernst & Young told Affinity that its systems were still infected with malware, the casino owner said.

Affinity had also launched an allegation that Trustwave violated Nevada's Deceptive Trade Practices Act, which prohibits a seller from making false statements or misrepresentations about its goods or services.

Should the court ultimately decide to apply Delaware law, that claim will be dismissed, Judge Navarro said Friday, but if Nevada law applies it could be viable — thus, she kept it alive for the time being.

Counsel for Affinity declined to comment, and representatives for Trustwave late Friday didn't immediately return a request for comment.

Affinity is represented by Jonathan Missner and Robert Gilmore of Stein Mitchell Cipollone Beato & Missner LLP and I. Scott Bogatz of Reid Rubinstein & Bogatz.

Trustwave is represented by James Olson and Thomas Dillard of Olson Cannon Gormley Angulo & Stoberski and Brian Kavanaugh of Kirkland & Ellis LLP.

The case is Affinity Gaming v. Trustwave Holdings Inc., case number 2:15-cv-02464, in the U.S. District Court for the District of Nevada.