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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

PAMELA NEWPORT,
Plaintiff,
vs.
DELL INC., et al.,
Defendants.

No. CIV 08-096-TUC-CKJ (JCG)

ORDER

On February 13, 2009, Magistrate Jennifer C. Guerin issued a Report and Recommendation [Doc. # 79] in which she recommended Dell Defendants' Motion to Dismiss [Doc. # 73], to which Defendant Banctec, Inc., filed a Joinder [Doc. # 72], be granted in part and denied in part. The magistrate judge advised the parties that written objections to the Report and Recommendation were to be filed within ten days of service of a copy of the Report and Recommendation pursuant to 28 U.S.C. § 636(b). Dell has filed an Objection to the Report and Recommendation [Doc. # 80] and Defendant Banctec, Inc., has filed a Joinder to the Objection [Doc. # 81].¹ Plaintiff has filed a Response. Dell has requested the Court to schedule this matter for oral argument. The Court declines to schedule this matter for oral argument.

¹The Court will refer to Dell, Inc., and Banteck, Inc., collectively as Dell.

1 *Procedural Background*

2 On November 8, 2007, Plaintiff Pamela Newport (“Newport”) filed a Complaint in
3 the Superior Court of Arizona, Pima County. The action was removed to the United States
4 District Court, District of Arizona, and assigned to the Honorable Jennifer C. Guerin. The
5 matter was subsequently reassigned to this Court and referred to Judge Guerin for all pretrial
6 proceedings.

7 Dell filed a Motion to Dismiss on April 29, 2009. This Court subsequently granted
8 in part and denied in part the motion. Newport was granted leave to amend. A Second
9 Amended Complaint (“SAC”) was filed on November 10, 2008. On December 12, 2008,
10 Dell filed a Motion to Dismiss the Second Amended Complaint. The magistrate judge has
11 issued a Report and Recommendation.

12
13 *Free of Charge*

14 Dell objects to the magistrate judge’s determination that Newport had alleged that
15 Dell offered a first-year warranty to Newport and class members “free of charge.” R & R,
16 p. 17. Dell asserts Newport did not allege in her SAC that Dell offered a warranty for free
17 or that she believed the warranty was free. Rather, Newport alleged that Dell represented the
18 first-year warranty “came standard with her computer for no additional consideration,
19 whereas an extension of this standard Warranty for two years cost an approximate additional
20 \$120.” SAC ¶ 13. Dell compares this to a hard drive that comes standard with the purchase
21 of a computer and wheels that come standard with the purchase of a car. These items are
22 included in the standard purchase price for no additional consideration. Newport asserts that
23 Dell’s semantics argument does not change the underlying allegations – that Dell charged
24 Newport for the first year service contract but failed to disclose this to Newport and Dell
25 failed to disclose that the first year service contract was optional. Newport further asserts
26 that Dell itself treats the onsite service contracts as separate and distinct from the computers
27 by selling separate onsite service contracts to its customers.

1 Dell's sale of service contracts with computers is not an intertwined bundled
2 transaction. Computers may be purchased without service contracts, and the
3 transaction price is reduced by a specified sum if the service contract is declines. Dell
service contracts are not "part of the sale" of computers, but a separate object of the
transaction at a readily ascertainable value.

4 *Dell Inc. v. Superior Court*, 71 Cal.Rptr.3d 905, 917-18 (Cal.App. 2008). Newport also
5 asserts that the magistrate judge expressly stated, "As Plaintiff points out, however, the
6 transaction at issue is not Plaintiff's purchase of the computer as a whole, but her unknowing
7 purchase of the Service contract itself." R & R, pp. 14-15. Newport asserts the magistrate
8 judge made it clear that the purchase of the Dell computer was a separate transaction, distinct
9 from the purchase of the first-year service contract.

10 The Court finds Dell's semantics argument and comparisons to be specious. In
11 walking out (or driving away) with a computer with a hard drive or a car with wheels, those
12 subparts are necessary for the performance of the product as it is designed . . . the onsite
13 service contract, while it may increase or assist the performance of the computer, is not
14 necessary for the computer's performance as it is designed. Additionally, Newport has
15 alleged that the consideration was included within the total purchase amount² – which
16 included a secret charge for the warranty for which she was not advised that she could opt
17 out of. The Court agrees with the magistrate judge that Newport has alleged an offer and its
18 terms, that Newport accepted the offer and purchased the computer, that Dell failed to honor
19 its promise by secretly charging Newport for the warranty, and that Newport paid the hidden
20 cost of the one-year warranty.

21 Dell also asserts that the SAC fails to allege how Newport's contract required mutual
22 performance by both parties and that the magistrate judge did not consider the law cited by
23 Dell or whether Newport's allegations comply with that law. Dell asserts that an allegation
24 of a plaintiff's performance (or excuse for non-performance) is necessary to state a claim.

25
26 ²Or, as stated by Dell, the price of the warranty is "built into the price of the product
27 that was sold," the computer with the first-year warranty included. Objections, p. 5.

1 *Wilhorn Builders, Inc. v. Cortaro Mgmt. Co.*, 82 Ariz. 48, 308 P.2d 251, 252 (Ariz. 1957)
2 (“In a bilateral contract, . . . the provisions of the contract require simultaneous performance
3 of the mutual promises.”); *Lyons v. Coxcom, Inc.*, 2009 WL 347285 *6, *7 (S.D.Cal. 2/6/09)
4 (granting motion to dismiss where plaintiff’s allegation that she “performed her obligations
5 under the contract by paying her monthly fees” to internet service provider did not state a
6 claim). Dell asserts that Newport’s conclusory allegation that she “fulfilled all of [her]
7 obligations under the Invoice and Warranty” fails to meet the required standard. SAC ¶ 62;
8 *Red Shield Ins. Co. v. Barnhill Marina & Boatyard, Inc.*, 2008 WL 3271052 *2 (N.D.Cal.
9 8/7/08) (dismissing breach of contract claim because plaintiff failed to raise right to relief
10 above the speculative level).

11 The magistrate judge, however, points out that “Plaintiff has alleged the offer and its
12 terms. Plaintiff accepted Defendants’ offer and purchased the computer; thus Plaintiff has
13 alleged her acceptance and consideration. . . . According to Plaintiff, Defendants failed to
14 honor its promise by secretly charging her for the Warranty; thus Plaintiff has alleged the
15 breach. . . . As a result, Plaintiff paid the hidden cost of the one-year warranty; thus Plaintiff
16 has alleged her damages.” R & R, p. 13.³ Dell’s reliance on *Lyons* and *Red Shield* is
17 misplaced. Unlike the situations in those cases, this case involves the terms of the contract
18 being set forth in several writings. Moreover, in *Red Shield*, the court determined that the
19 plaintiff had not raised the right to relief above the speculative level. The court did not

21 ³The magistrate judge also found that the Court has already considered and rejected
22 this claim by Dell – Dell previously argued that Newport had failed to allege each material
23 part of the contract; Dell now argues that Newport has not specifically identified the contract
24 or the mutual performance of the parties. The magistrate judge determined this was an
25 “impermissible second bite at the apple.” R & R, p. 12. Dell asserts in its objections that it
26 did not mean to circumvent previous orders, but read the previous orders to require Newport
27 to either attach the written warranty/agreement to the complaint or to identify written
28 warranty documents on which Newport relied. However, this language did not pertain to the
first-year service contract issue. Rather, it pertained to Newport’s claim regarding the parts
used.

1 discuss whether the inadequacy was based on plaintiff's allegation that it performed all
2 requirements under the agreement, plaintiff's allegation that defendant breached the express
3 and implied terms of the agreement, or both. In this case, Newport's allegations include the
4 terms of the agreement and Newport's performance under the agreement.

5 Dell also asserts that the magistrate judge failed to address the oral nature of the
6 alleged contract. Newport asserts, however, that this objection should be rejected on its face,
7 Fed.R.Civ.P. 12(g), because this issue was not raised in the motions to dismiss. Indeed, "a
8 series of motions should not be permitted because that results in delay and encourages
9 dilatory tactics." *Aetna Life Ins. Co. v. Alla Medical Services, Inc.*, 855 F.2d 1470, 1475 n.
10 2 (9th Cir. 1988), *quoting* 2A J. Moore, J. Lucas and G. Grother, *Moore's Federal Practice*
11 (2d ed. 1987) ¶ 12.22 at 12-186. Nonetheless, Dell appears to raise this issue for the first
12 time in response to conclusions reached by the magistrate judge. The Court finds it
13 appropriate to discuss this issue.

14 In effect, the SAC alleges that a written offer was made by Dell and Plaintiff orally
15 accepted that written offer. Arizona has recognized that an acceptance does not necessarily
16 have to be in writing. *See e.g.* A.R.S. § 47-2201 (must be signed by party against whom
17 enforcement is sought); *see also* 72 Am.Jur.2d Statute of Frauds § 280 ("it is no ground of
18 objection that [agreement] was not also signed by the party seeking to enforce the contract").
19 Dell acknowledges that the magistrate judge stated that "the promise of a free one-year
20 warranty was memorialized in several writings[.]" R & R, p. 13.⁴ Indeed, a "contract need
21 not be contained in a single writing." 17 C.J.S. Contracts § 71; *see also* *Passey v. Great*
22 *Western Associates II*, 174 Ariz. 420, 850 P.2d 133 (App. 1993). The Court agrees with the
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25 ⁴Newport's allegations of oral statements made by Dell representatives do not appear
26 to contradict the terms of the agreement and, therefore, the Court notes that parole evidence
27 *may* ultimately be admissible to aid in determining the parties' intent. *Taylor v. State Farm*
28 *Mut. Auto. Ins. Co.*, 175 Ariz. 148, 854 P.2d 1134 (1993). That admission, however, does
not alter the fact that the offer was made in writing.

1 magistrate judge that Newport alleged “several writings” by Dell and an oral acceptance by
2 Newport. The Court finds Newport has stated a claim for a breach of a written agreement.
3 *See Graham v. Asbury*, 112 Ariz. 184, 185, 540 P.2d 656, 657 (Ariz. 1975) (“To bring an
4 action for the breach of the contract, the plaintiff has the burden of proving the existence of
5 the contract, its breach and the resulting damages.”); *Commercial Cornice & Millwork, Inc.*
6 *v. Camel Construction Services Corp.*, 154 Ariz. 34, 739 P.2d 1351 (App. 1987). *Savoca*
7 *Masonry Co. v. Homes and Son Constr. Co.*, 112 Ariz. 392, 394, 542 P.2d 817, 819 (1975)
8 (“for an enforceable contract to exist, there must be an offer, acceptance, consideration, and
9 sufficient speculation of terms so that the obligations involved can be ascertained”).

10 Dell requests the Court to confirm what written agreement is at issue in this case. The
11 agreement between the parties, however, is “not [] contained in a single writing.” 17 C.J.S.
12 Contracts § 71. Rather, as alleged by Newport, the agreement of the parties was expressed
13 in several writings, including the acknowledgment invoice and Dell’s website.

14
15 *Fraud (Counts I and V)*

16 Dell also asserts that Newport’s fraud claims are based on Dells’ alleged
17 representation that “no additional consideration [was] required” for Dell’s standard warranty.
18 SAC ¶ 67. Dell asserts that, to state a claim for common law or statutory fraud, a plaintiff
19 must allege a “false” statement. *Echols v. Beauty Built Homes*, 132 Ariz. 498, 450, 647 P.2d
20 629, 631 (1982). Dell asserts that the magistrate judge’s determination that the
21 representation that the warranty was free constitutes a falsity was inappropriate because that
22 is not what Newport alleged Dell represented to her. Rather, Newport alleged that Dell
23 represented “the first year of the onsite Warranty came standard with her computer for no
24 additional consideration, whereas an extension of this standard Warranty for two years cost
25 an additional \$120.” SAC ¶ 13. Dell asserts Newport has not alleged that Dell made any
26 false representations and that Newport has not alleged that she paid any consideration past
27 the price initially quoted to her for the computer and the warranty. Dell asserts that, because
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1 Newport has not pointed to or alleged that she paid “additional consideration,” she has not
2 stated a fraud claim.

3 Newport asserts, however, that she has alleged that Dell falsely represented that she
4 would not be charged for the first-year onsite service contract. Further, Newport asserts that
5 she has alleged that Dell failed to inform its customers it charges them for their first year
6 onsite service contracts and that Dell failed to disclose that a customer may elect not to have
7 a service contract which would reduce the overall price of his or her computer purchase.
8 SAC ¶¶ 12, 13, 14, and 18. Newport asserts that by Dell not quoting a price for the first-year
9 onsite repair service and not quoting a price for the computer only, Dell led Newport (and
10 other customers) to believe that the price of the first year onsite service contract was \$0.00.
11 Newport asserts these false representations and/or omissions are sufficient to support
12 Newport’s claims for fraud.

13 Dell also asserts that the magistrate judge improperly added an allegation to the SAC
14 by inferring that the warranty had a value of \$60. Dell asserts that Newport never made this
15 allegation – rather, Newport only vaguely alleged a cost range for the warranty and never
16 identified this range as “additional consideration.” SAC ¶ 20. Dell asserts that the fact that
17 it may assign an internal cost to a line item does not mean a consumer has paid “additional
18 consideration” beyond the standard package price – value and additional consideration are
19 not the same thing.

20 The Court agrees with the magistrate judge that Newport has adequately alleged fraud
21 claims. Newport has alleged that Dell’s representation that the warranty was available for
22 no additional consideration was misleading, despite Dell having identified a separate price
23 for the warranty that could, in theory, be deducted from the total cost of the computer – but
24 failed to inform Newport of this option. *See Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir.
25 1993) (Fed.R.Civ.P. 9(b) pleading requirement is relaxed with respect to matters within the
26 opposing party’s knowledge such that plaintiffs cannot be expected to have personal
27 knowledge of the relevant facts).

1 *Fraud by Nondisclosure (Count VI)*

2 Dell asserts that, under Arizona law, Newport had to allege with specificity why Dell
3 owed her a duty and how she would have acted differently had Dell disclosed the “facts.”
4 Dell asserts that the magistrate has implicitly adopted Newport’s unsupported standard that
5 a seller has a duty to disclose all component prices for items offered as a “standard” package.
6 *See Universal Inv. Co. v. Sahara Motor Inn, Inc.*, 127 Ariz. 213, 215, 619 P.2d 485, 487
7 (App. 1980) (“generally no duty to disclose exists between a buyer and seller”). Dell asserts
8 that Newport has failed to alleged how Dell had a duty to disclose every line-item cost of its
9 standard package, or every possible deviation from that package.

10 Dell asserts that the law rejects a duty to disclose based on the allegations in
11 Newport’s SAC. Newport alleged that Dell failed to disclose “the option to purchase the
12 computer for less money if [Newport] chose not to have” the first-year warranty SAC ¶ 12.
13 Dell asserts, however, that a seller does not have a duty to disclose available discounts to
14 consumers. *See Buller v. Sutter Health*, 160 Cal.Appl.4th 981, 991-92 (2008) (affirming
15 rejection of omission theory because plaintiff’s “arguments would effectively require a
16 business to disclose all discretionary discounts it might offer”).⁵ Dell further asserts that a
17 seller does not have a duty to disclose a breakdown of the prices or profits derived from the
18 sale of a standard package. *See e.g., Ford Motor Credit Co. v. Adamson Ford, Inc.*, 717
19 So.2d 781, 787 (Ala. 1997) (“We decline to recognize a common law duty that would require
20 the seller of a good or service, absent special circumstances, to reveal to its purchaser a
21 detailed breakdown of how the seller derived the sales price of the good or service, including
22 the amount of profit to be earned on the sale.”)⁶; *Berryman v. Merit Prop. Mgmt., Inc.*, 152

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24 ⁵Newport distinguishes this case as one involving discretionary discounts and where
25 the complaint did not allege plaintiff was improperly charged.

26 ⁶Newport asserts that *Ford* involved the failure of a dealership to disclose a 3%
27 commission agreement with a credit company while this case does not involve disclosure of
28 how Dell’s profits are derived or its arranges with outside entities. Rather, Newport asserts

1 Cal.App.4th 1544, 1557 (2007) (affirming demurrer without leave to amend because the
2 amended complaint did “not allege any affirmative duty [for defendant] to disclose a
3 breakdown of its fees”). Dell also asserts the broad standard Newport proposes is practically
4 unenforceable because it would require businesses of all stripes to make almost limitless
5 disclosures regarding the costs and attributes of the various components of every standard
6 package. Dell asserts that courts have recognized that it “is simply not realistic to expect
7 manufacturers to make such an immense, and perhaps, boundless disclosure.” *Johnson v.*
8 *Mitsubishi Digital Elecs. Am., Inc.*, 578 F.Supp.2d 1229, 1240 (C.D.Cal. 2008) (rejecting
9 fraudulent concealment claim).⁷

10 Newport asserts, however, that Dell’s duty to disclose in this case arises out of a
11 “judicial policy promoting honesty and fair dealing in business relationships,” such that
12 “nondisclosure of a fact known to one party may be equivalent to the assertion that the fact
13 does not exist.” *Hill v. Jones*, 151 Ariz. 81, 84, 725 P.2d 1115 ,1118 (App. 1986); *State v.*
14 *Coddington*, 135 Ariz. 480, 481, 662 P.2d 155, 156 (App. 1983) (“When one conveys a false
15 impression by the disclosure of some facts and the concealment of others, such concealment
16 is in effect a false representation that what is disclosed in the whole truth.”).

17 Dell asserts that the magistrate judge failed to analyze the “duty” aspect of Newport’s
18 “fraud by nondisclosure” claim under Fed.R.Civ.P. 9(b). Dell asserts Newport was required
19 to plead that element with specificity and she failed to do so. *See Baldwin v. Laurel Ford*
20 *Lincoln-Mercury, Inc.*, 21 F.Supp.2d 894, 899-900 (S.D.Miss. 1998) (applying Rule 9(b) to
21 fraudulent omission claim). Dell asserts Newport failed to alleged how or why she would
22 have acted differently had Dell disclosed the cost of its standard warranty. *See Oestreicher*
23 *v. Alienware Corp*, 544 F.Supp.2d 964, 971 (N.D.Cal. 2008) (dismissing claim based on

24 _____
25 this inquiry in this case is whether Dell had an obligation to disclose to its customers that
26 they were being charged for a service they were led to believe was free.

27 ⁷Newport asserts this case is completely irrelevant, as the case involved the ability of
28 a televisions to receive signals as advertised.

1 allegation that if plaintiff had “known of the defect, he would not have purchased the
2 computer or would have demanded a lower price”); *see also Johnson*, 578 F.Supp.2d at 1240
3 (plaintiff did not show that “he would have acted any differently” had defendant made the
4 disclosure; plaintiff “got . . . exactly what he sought to purchase”). Dell asserts that
5 Newport’s conclusory allegation that had she “known the true facts, [she] would not have
6 taken such action[,]” SAC ¶ 79, fails to alleged how she would have acted differently (e.g.,
7 purchase a different computer, sought another brand, etc.).

8 Newport asserts, however, that even if she was required to allege how and why she
9 would have acted differently, she has done so:

10 Plaintiff and plaintiff class members were ignorant of the falsity of Defendants’
11 representations at the time they were made and at the time they purchased their
12 computers and Warranties, and believed them to be true. In reasonable reliance on
13 these representations, Plaintiff and plaintiff class members were induced to and did
14 purchase the computers and Warranties to their detriment. Had Plaintiff and plaintiff
15 class members known the true facts, they would not have taken such action.
16 Plaintiff’s and plaintiff class members’ reliance on Defendants’ representations was
17 justified because Defendants were the ones offering the Warranties for sale, and
18 possessed superior knowledge of the facts, as they were peculiarly within the
19 knowledge of Defendants.

20 SAC ¶ 79. Further, the Court advised Newport of the deficiencies of the First Amended
21 Complaint that needed to be cured and the magistrate judge appropriately found Newport had
22 adequately cured all such deficiencies.

23 The Court agrees with the magistrate judge that Newport has adequately alleged facts
24 which, if true, demonstrate that Dell owed a duty to Newport because Dell knew the price
25 of the warranty and Newport had no access to the information. The cases relied upon by Dell
26 do not present a situation similar to this case where a defendant includes a charge in the
27 standard price that is actually optional, but that option is not disclosed. Further, Newport has
28 adequately alleged the how and why she would have acted different if Dell had disclosed the
cost of the standard warranty.

After an independent review, the Court finds dismissal of the breach of warranty claim
as set forth by the magistrate judge to be appropriate. Counts 2 and 3 will be dismissed

1 without leave to amend and with prejudice. *See DCD Programs v. Leighton*, 833 F.2d 183,
2 186 (9th Cir. 1987); *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994); *Moore v. Kayport*
3 *Package Exp., Inc.*, 885 F.2d 531, 538 (9th Cir. 1989) (failure to cure deficiencies by
4 previous amendments is factor to be considered). Further, the Court agrees with the
5 magistrate judge Newport has adequately alleged claims of breach of contract, fraud, and
6 fraud by nondisclosure.

7 Accordingly, IT IS ORDERED:

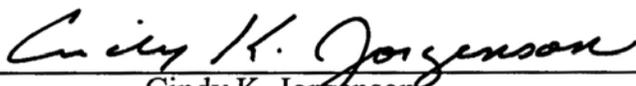
8 1. The Report and Recommendation [Doc. # 79] is ADOPTED;

9 2. Dell's Motion to Dismiss [Doc. # 73] is GRANTED IN PART AND DENIED
10 IN PART.

11 3. Newport's claims for breach of warranty, Counts 2 and 3, are DISMISSED
12 WITH PREJUDICE.

13 4. This matter is referred back to Magistrate Judge Jennifer C. Guerin for further
14 pretrial proceedings and report and recommendation in accordance with the provisions of 28
15 U. S. C. § 636(b)(1) and L.R.Civ. 72.1 and 72.2.

16 DATED this 5th day of June, 2009.

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19 _____
20 Cindy K. Jorgenson
21 United States District Judge
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