IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

LODESSIA KITCHEN, Plaintiff, v. AMERIQUEST MORTGAGE COMPANY, Defendant.	CIVIL ACTION FILE NO. 1:04-CV-2750-BBM

O R D E R

This action is before the court on the Report and Recommendation ("R&R") of the Magistrate Judge [Doc. No. 23], which recommends that Defendant's Motion to Dismiss [Doc. No. 12] be denied; Plaintiff's Motion for Leave to File Surreply Brief [Doc. No. 15] be denied; and Defendant's Motion to Exceed Page Limits [Doc. No. 18] be denied. Both parties filed Objections to the R&R [Doc. Nos. 24 & 25]. The court reviews the portions of the R&R to which the parties have objected on a *de novo* basis. See 28 U.S.C. § 636(b)(1).

I. Factual and Procedural Background

The facts presented here are taken from the Amended Complaint and are considered true for purposes of evaluating Ameriquest's Motion to Dismiss. On or about September 21, 2002, Plaintiff Lodessia Kitchen ("Kitchen") entered into a

consumer credit transaction with Defendant Ameriquest Mortgage Company ("Ameriquest"), through which Ameriquest acquired a security interest in the home which Kitchen owned. Kitchen asserts that Ameriquest violated the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601, et seq., and Regulation Z, 12 C.F.R. § 226, et seq., "by not providing [her] with adequate disclosure of either the material credit terms in the Transaction or Plaintiff's right to rescind the Transaction." Due to Ameriquest's alleged nondisclosures, Kitchen states that she believed she had obtained the right to rescind the transaction, and on September 3, 2004, Kitchen attempted to effect rescission by having her attorney send a rescission demand to Ameriquest via certified mail. Ameriquest received the rescission demand on September 8, 2004, and in a letter issued the following week stated that it would not agree to a rescission of the transaction.

Kitchen further alleges that Ameriquest violated the Georgia Fair Business Practices Act ("FBPA"), O.C.G.A. § 10-1-390, et seq., because it committed an unfair or deceptive practice in the course of a consumer transaction when it "inflated the amount of Plaintiff's income on the loan application in the Transaction by adding a fictitious $1000 per month in 'employment' income," which caused the loan in the transaction to be underwritten in a far greater amount than it otherwise would have been. Because Kitchen was sixty-two years old at the time she entered into the

transaction with Ameriquest, she asserts she is entitled to the additional protections of the Georgia Unfair or Deceptive Practices Toward the Elderly Act (the "Elderly Act"), O.C.G.A. § 10-1-850, et seq. Kitchen alleges that Ameriquest's conduct is not isolated to its transaction with her, but that Ameriquest has engaged in the same illegal activity with others in order to "increase the volume of its business."

On December 9, 2004, Kitchen filed her Amended Complaint raising the claims discussed above. Kitchen seeks statutory, actual, and punitive damages, equitable relief in the form of the right to rescind the transaction, and attorney's fees and costs. Ameriquest subsequently filed a Motion to Dismiss the Amended Complaint, as well as a Motion to Exceed Page Limits, and Kitchen filed a Motion for Leave to File Surreply Brief. The motions were considered by Magistrate Judge Janet F. King, who issued an R&R in the case on March 29, 2005.

II. Applicable Legal Standards

Federal Rule of Civil Procedure 72 ("Rule 72") provides that a magistrate judge assigned to hear a dispositive pretrial matter, such as a motion to dismiss, shall enter a recommendation for disposition of the matter. Fed. R. Civ. P. 72(b). Then, "[w]ithin 10 days after being served with a copy of the recommended disposition, a party may serve and file specific, written objections to the proposed . . . recommendations." Id. Thereafter, the district judge to whom the case is assigned shall make a *de novo*

determination "of any portion of the magistrate judge's disposition to which specific written objection has been made." Id.

The applicable standard for a district court's *de novo* review of objections to a magistrate judge's R&R on a motion to dismiss is the standard rooted in Federal Rule of Civil Procedure 12 ("Rule 12"). A motion to dismiss is proper under Rule 12 if a plaintiff has failed "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). This court has the power to dismiss a legal action for failure to state a claim, see Fed. R. Civ. P. 12(b)(6), however, dismissal is not appropriate "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The court must accept all factual allegations in the complaint as true and make all reasonable inferences in favor of the non-moving party. Spanish Broad. Sys., Inc. v. Clear Channel Communications, Inc., 376 F.3d 1065, 1070 (11th Cir. 2004). The court may also consider any documents attached as exhibits to, integral to, or relied upon by plaintiff in filing a complaint. Brooks v. Blue Cross & Blue Shield, Inc., 116 F.3d 1364, 1368-69 (11th Cir. 1997). The "threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is exceedingly low." Quality Foods de Centro Am., S.A. v. Latin Am. Agribus. Dev. Corp., S.A., 711 F.2d 989, 995 (11th Cir. 1983). "A complaint may not be dismissed because the plaintiff's

claims do not support the legal theory [she] relies upon since the court must determine if the allegations provide for relief on *any* possible theory." Brooks, 116 F.3d at 1369. A motion to dismiss is disfavored and rarely granted. Id.

Meanwhile, Rule 72 provides that a magistrate judge's rulings on non-dispositive pretrial matters, such as a motion for leave to file excess pages, are given much greater deference than a magistrate judge's recommendation on a dispositive motion. Fed. R. Civ. P. 72(a). A magistrate judge is to enter a "written order setting forth the disposition of the [non-dispositive] matter," and, as with dispositive matters, the parties may serve and file objections to the order "[w]ithin 10 days after being served." Id. Notably, the rule provides for a magistrate judge's entry of an "order" on non-dispositive matters, rather than a "recommendation." Compare Fed. R. Civ. P. 72(a), with Fed. R. Civ. P. 72(b). Finally, the district judge reviewing a magistrate judge's non-dispositive order shall only modify or set aside the magistrate judge's order if it is "found to be clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a). The court now considers the parties' Objections to the R&R.

III. Analysis of Defendant's Objections

A. Motion to Dismiss

As noted above, the Magistrate Judge recommended denying Ameriquest's Motion to Dismiss, and Ameriquest has objected to the recommendation on several

grounds. Ameriquest states that, in considering its Motion to Dismiss, the Magistrate Judge erred in the following ways: (1) by determining that omission of the word "monthly" from TILA Disclosure is sufficient to state a claim under TILA and Regulation Z; (2) by failing to rule on Ameriquest's argument that the notice of an extended right to cancel did not violate TILA; and (3) by not dismissing Kitchen's state law claims.[1]

1. Objections to Kitchen's Claims Under TILA and Regulation Z

Congress enacted TILA to encourage the informed use of credit. See Rodash v. AIB Mortgage Co., 16 F.3d 1142, 1144 (11th Cir. 1994), abrogated on other grounds by Veale v. Citibank, F.S.B., 85 F.3d 577, 580-81 (11th Cir. 1996). The Act requires creditors to make "meaningful disclosure of credit terms." Id.; 15 U.S.C. § 1601(a). In implementing TILA, Congress delegated expansive authority to the Federal Reserve Board (the "FRB") to enact appropriate regulations to advance the purpose

[1]Ameriquest does not object to the Magistrate Judge's finding that it is possible that Kitchen could produce evidence showing that she did not receive two copies of the notice of the right to rescind, as required by TILA and Regulation Z, and that Ameriquest failed to show that not complying with this requirement would not be material, thereby making it proper not to dismiss Kitchen's claim that she was not provided adequate notice of rescission. Accordingly, the court ADOPTS the Magistrate Judge's recommendation and DENIES Ameriquest's Motion to Dismiss as it relates to Kitchen's claim that Ameriquest failed to adequately disclose her right to rescind by providing the requisite number of notices.

of TILA, Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 232 (2004), and the FRB has enacted such regulations, including Regulation Z. See 12 C.F.R. § 226, et seq. Together, TILA and Regulation Z require that a consumer be provided "clearly and conspicuously" "material disclosures" of certain terms relating to the transaction, including the annual percentage rate, the finance charge, the amount financed, the total payments, the payment schedule, and various disclosures and limitations. See 15 U.S.C. § 1638; 12 C.F.R. § 226.23(a)(3) n.48; 12 C.F.R. § 226.32(c)-(d). Additionally, TILA and Regulation Z require creditors, in transactions in which a security interest will be retained or acquired in the consumer's principal dwelling, to confer a right to rescind for a period of three business days "following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later ." 15 U.S.C. § 1635(a).

a. Omission of the Word "Monthly"

Ameriquest objects to the Magistrate Judge's determination that its Motion to Dismiss should be denied on the basis that the omission of the word "monthly" from the Disclosure Statement is a violation of TILA. Kitchen has alleged that Ameriquest failed to adequately disclose the material credit terms of the transaction. Although her Complaint does not explicitly state what terms she asserts were undisclosed, her

Response in Opposition to Motion to Dismiss reveals that she asserts the term "monthly" was missing from the Disclosure Statement. Ameriquest does not dispute that the term "monthly" was not listed, but argues that TILA does not require that the word "monthly" appear in the Disclosure Statement and thus its omission cannot constitute a per se violation of TILA. Furthermore, Ameriquest argues that even if the failure to include the word "monthly" is a violation of TILA, it is not material so as to warrant rescission under TILA.

Under TILA, a "creditor shall disclose . . . [t]he number, amount, and due dates or period of payments scheduled to repay the total of payments." 15 U.S.C. § 1638(a)(6). Regulation Z, which implements TILA, states that a creditor must disclose a payment schedule, describing "[t]he number, amounts, and timing of payments scheduled to repay the obligation." 12 C.F.R. § 226.18(g). The FRB Commentary on Regulation Z provides further guidance on disclosing the timing of payments:

> Section 226.18(g) requires creditors to disclose the timing of payments. To meet this requirement creditors may list all of the payment due dates. They also have the option of specifying the period of payments scheduled to repay the obligation. As a general rule, creditors that choose this option must disclose the payment intervals or frequency, such as "monthly" or "bi-weekly," and the calendar date that the beginning payment is due.

12 C.F.R. pt. 226, Supp. I (2005). The "[FRB] staff opinions construing the Act or Regulation [Z implementing the Act] should be dispositive . . . ." Ford Motor Credit

Co. v. Milhollin, 444 U.S. 555, 565 (1980). In the Disclosure Statement, Ameriquest disclosed the dates of the first payment, the twenty-fifth payment, and the last payment (all of which fell on the first of the month), the number of payments, and the dates when those payments began. The Disclosure Statement lists the following:

Number of Payments	Amount of Payments	Payments are Due Beginning
24	$501.49	11/01/2002
335	$513.19	11/01/2004
1	$508.70	10/01/2032

Additionally, Ameriquest notes that there were numerous other documents in the closing package that disclosed that the payments were due monthly. Ameriquest argues that the cumulative information provided to Kitchen was adequate under TILA.

Ameriquest relies on Smith v. Chapman, 614 F.2d 968 (5th Cir. 1980),[2] which states that strict compliance with TILA "does not necessarily mean punctilious compliance if, with minor deviations from the language described in the Act, there is still a substantial, clear disclosure of the fact or information demanded by the applicable statute or regulation." Id. at 972. In Shroder v. Suburban Coastal Corp.,

[2]In Bonner v. City of Pritchard, 661 F.2d 1206, 1209 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit decided before October 1, 1981.

729 F.2d 1371 (11th Cir. 1984), however, the court elaborated on its holding in Chapman, stating:

> We never stated nor intend to imply that it is unnecessary to make the disclosures in the proper technical form and in the proper locations on the contract, as mandated by the requirements of TILA and Regulation Z. Liability will flow from even minute deviations from requirements of the statute and Regulation Z.

Id. at 1380. Ameriquest further requests that the court apply the more recent holding of Daniels v. Ameriquest Mortgage Co., No. 1:03-CV-0007-GET (N.D. Ga. July 2, 2004), in which Judge Tidwell affirmed the Magistrate Judge's ruling, stating that "listing the due date for the first and last payments, combined with the number of payments required, properly defines the repayment period and enables plaintiffs to determine all of the payment due dates." Id.[3] Notwithstanding the logical appeal of the argument that it should have been obvious to the consumer that payments were due on a monthly basis, it is immaterial whether the nondisclosure actually confused Kitchen. A "consumer may sue for enforcement even if she is not actually deceived or harmed." Rodash, 16 F.3d at 1145.

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[3]Other courts within this district have reached the opposite conclusion, however. Byrd v. Ameriquest Mortgage Co., 1:03-CV-219-RWS (N.D. Ga. Jan. 14, 2004) (Story, J.); Swayze v. Ameriquest Mortgage Co., 1:03-CV-733-WSD (N.D. Ga. Feb. 16, 2005) (Duffey, J.); Johnson v. Ameriquest Mortgage Co., 1:03-CV-491-TWT (N.D. Ga. Feb. 28, 2005) (Thrash, J.); and Stewart v. Ameriquest Mortgage Co., 1:03-CV-3496-TWT (N.D. Ga. Mar. 21, 2005) (Thrash, J.).

Based on the court's review of TILA, Regulation Z, relevant commentary, Schroder, and recent case law from within this district, the court finds that the fact that "monthly" was not contained in the Disclosure Statement is violative of TILA and Regulation Z.

Ameriquest argues that even if the court determines that it has failed to comply with TILA and Regulation Z by failing to delineate that payments will be due on a monthly basis, such a failure is not material. TILA provides a right of rescission to a consumer debtor who gives a security interest in her principal residence an unqualified right to rescind for three business days following the transaction or after delivery of all material disclosures. 15 U.S.C. § 1635(a). A consumer debtor may rescind for a longer period of time, up to three years, if material disclosures are not made. 15 U.S.C. § 1635(f). In other words, Kitchen had the right to rescind beyond a three-day period but within a three-year period only if Ameriquest's nondisclosures were material. Ameriquest urges the court to apply the reasoning that a nondisclosure is material if it is of the type that "a reasonable consumer would view as significantly altering the 'total mix' of information made available." Smith v. Am. Fin. Sys., Inc., 737 F.2d 1549, 1554-55 (11th Cir. 1984) (citation omitted) (holding that the lender's failure to disclose details of a security interest was not material where the same information was disclosed elsewhere in the loan documents). In 1982, however,

Congress defined "material nondisclosures," to include the disclosure of "the total of payments, the number and amount of payments, [and] the due dates or periods of payments scheduled." 15 U.S.C. § 1602(u). Based on the express language of TILA, the court finds that Ameriquest has failed to meet its burden of showing that its failure to expressly disclose the timing of payments is not a material violation of TILA and Regulation Z.

In addition to the issue of whether Ameriquest's failure to disclose that payments were due monthly is a material violation for which Kitchen may rescind the transaction, the Complaint suggests there could be other items that were not disclosed. In it, Kitchen alleges vaguely that "Ameriquest violated TILA and Regulation Z by not providing Plaintiff with adequate disclosure of either the material credit terms in the Transaction or Plaintiff's right to rescind the Transaction." Only in her response to Ameriquest's Motion to Dismiss does Kitchen specify that Ameriquest failed to denote that payments would be due monthly. The court finds, at least in the current procedural posture of this case, that naming a particular nondisclosure does not necessarily mean that there are no other material nondisclosures for which Kitchen could show she is entitled to rescission.

Because it is possible for Kitchen to demonstrate that Ameriquest's failure to include the term "monthly" was a material violation of TILA and Regulation Z, and

because it is possible for Kitchen to show that Ameriquest failed to provide additional material disclosures, either of which would give rise to an extended period for rescission, the court ADOPTS the Magistrate Judge's recommendation and DENIES Ameriquest's Motion to Dismiss.

b. Notice of Right to Cancel

Ameriquest objects to the R&R because the Magistrate Judge did not address the issue of whether its Notice of Right to Cancel was ineffective because it gave a one-week cancellation right to borrowers in addition to the statutorily required three-day right to rescind under TILA. The consumer's right to rescission must be "clearly" disclosed. 12 C.F.R. 226.23(b)(1). Kitchen asserts that because Ameriquest provided a notice with a caption of "One Week Cancellation Period," which included different information from that contained in the Notice of Right to Cancel, Ameriquest did not clearly disclose Kitchen's right to rescind. More specifically, Plaintiff argues that "an Ameriquest customer who waited beyond this three-day TILA period and rescinded on the fourth or fifth day . . . would have a contractual right of rescission but would no longer have a statutory right of rescission (absent some TILA violation extending the rescission period)," which would preclude the consumer from the remedy of an action for statutory damages, attorney's fees, and actual damages under TILA. See 15 U.S.C. § 1640. In Freeman v. Ameriquest Mortgage Co., No. 1:04-CV-0791-TWT

(March 3, 2005) (Thrash, J.) and Stewart v. Ameriquest Mortgage Co., No. 1:03-CV-3496-TWT (March 21, 2005) (Thrash, J.), the court adopted the recommendation of the Magistrate Judge to grant the Defendant's motion to dismiss based upon a finding that a lender's decision to allow a borrower additional time for rescission beyond the three days required by TILA does not constitute a violation of the Act.

In this case, Kitchen has presented no authority and the court has otherwise found none which would demonstrate that Ameriquest's provision of additional time to rescind beyond that required by TILA in any way vitiates Kitchen's rights under TILA to rescind within three business days. In fact, the notice captioned "One Week Cancellation Period" expressly recognizes the three-day period of rescission under TILA: "You have the right under Federal or state law to three (3) business days during which you can cancel your loan for any reason." The form further provides,

> Ameriquest Mortgage Company believes that a loan secured by your home is one of the most important financial decisions you can make. To give you more time to study your loan documents, obtain independent advice and/or shop for a loan that you believe suits you better, we provide you with one-week (which includes the day you sign the loan documents) to cancel the loan with no cost to you.

The court finds that Ameriquest did not fail to comply with its duty to clearly disclose rescission rights to Kitchen by extending her rescission time. Accordingly, the court GRANTS Ameriquest's Motion to Dismiss and holds that Kitchen cannot sustain a

claim under TILA arising out of Ameriquest's granting of an extended period of time for rescission. As noted above, however, Kitchen's claim under TILA based on the allegation that she did not receive the requisite number of notices of her right to rescind remains in the case.

2. State Law Claims

a. FBPA

Ameriquest objects to the R&R, asserting the Magistrate Judge erred by refusing to dismiss Kitchen's state law claims, which arise under Georgia's FBPA and the Elderly Act. The purpose of FBPA is "to protect consumers and legitimate business enterprises from unfair or deceptive practices in the conduct of any trade or commerce in part or wholly in the state." O.C.G.A. § 10-1-391(a). Under the Elderly Act, "individuals who violate the FBPA are subject to additional civil penalties if the violation is committed against elder . . . persons." Brogden v. Nat'l Healthcare Corp., 103 F. Supp. 2d 1322, 1336 (N.D. Ga. 2000); O.C.G.A. § 10-1-851. Ameriquest contends that FBPA and the Elderly Act do not apply to mortgage loan transactions, such as the one at issue here because: (1) Kitchen's mortgage loan is a heavily regulated transaction that is exempted from coverage of these statutes; and (2) even

if the loan is not exempt, the transaction between Ameriquest and Kitchen was private and had no potential for harm to the consuming public generally.[4]

FBPA states that nothing in the act shall apply to "[a]ctions or transactions specifically authorized under laws administered by or rules and regulations promulgated by any regulatory agency of this state or the United States." O.C.G.A. § 10-1-396(a). "[T]he legislature 'intended that the Georgia FBPA have a restricted application only to the unregulated consumer marketplace and that the FBPA not apply in regulated areas of activity, because regulatory agencies provide protection or the ability to protect against the known evils in the area of the agency's expertise.'" Brogdon, 103 F. Supp. 2d at 1336 (citation omitted). Ameriquest argues that the home mortgage industry is heavily regulated by the provisions and regulations of TILA, the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601, et seq., and Regulation X, 24 C.F.R. § 3500.1, et seq. Kitchen, on the other hand, argues that FBPA exemption applies if the challenged conduct has been regulated, and, in this case, Ameriquest's conduct has not been regulated. The Magistrate Judge determined that

[4]In its Motion to Dismiss, Ameriquest also argued that Kitchen's FBPA claim should be dismissed because Kitchen was the one who "disclosed her income for underwriting the loan." The Magistrate Judge reviewed the Complaint, which contradicts Ameriquest's statement, and, applying the motion to dismiss standard, accepted the allegations of the Complaint as true, holding that Kitchen's claim should not be dismissed on this basis. Ameriquest has not objected to this portion of the R&R, which the court now ADOPTS.

while "the mortgage *industry* as a whole is subject to state and federal regulations, [Ameriquest] has not shown that the *conduct* about which Plaintiff complains 'is being regulated by an administrative agency.'"

The relevant inquiry is "whether there is sufficient state or federal regulation of the defendant's alleged conduct so as to exempt the action from the FBPA." Taylor v. Jacques (*In re* Taylor), 292 B.R. 434, 439 (Bankr. N.D. Ga. 2002). Kitchen's Amended Complaint alleges that Ameriquest "deceptively and without Plaintiff's knowledge inflated the amount of Plaintiff's income on the loan application in the Transaction by adding a fictitious $1000 per month in 'employment' income." Kitchen further states that the company's "insertion of the fictitious additional income into the loan application . . . caused the loan in the Transaction to be underwritten in a far greater amount than otherwise; this in turn made the amount of the loan payments much larger than Plaintiff could afford." In its Motion to Dismiss, Ameriquest states that "the very alleged violation that Plaintiff complains of – improprieties with Plaintiff's loan application – are expressly and specifically regulated by RESPA" and cites to the "Definitions" portion of RESPA. See 12 U.S.C. § 2602(3). The court has reviewed this portion of RESPA and acknowledges that "settlement services" as defined in RESPA include "the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications,

loan processing, and the underwriting and funding of loans)," yet Ameriquest does not cite to any portion of RESPA that actually regulates settlement services. In other words, the fact that a statute defines a practice does not necessarily mean it regulates the defined practice. The court has not yet been presented with sufficient information to determine whether, and to what extent, RESPA does in fact regulate settlement services such as those at issue in this case, and Ameriquest may present further argument to the court on this issue in the future. However, at the motion to dismiss stage, the burden to show dismissal is proper is on Ameriquest, and Ameriquest has failed to show the court that the alleged conduct about which Kitchen complains is regulated.

The court's evaluation of whether FBPA applies to this case does not end here, because Ameriquest also argues that FBPA is inapplicable because Kitchen's loan was a private transaction that had no potential for harm to the consuming public generally. "[The FBPA] does not encompass suits based upon allegedly deceptive or unfair acts or practices which occur in an essentially private transaction." Zeeman v. Black, 156 Ga. App. 82, 84, 273 S.E.2d 910, 914 (1980) (holding that a real estate agent's oral misrepresentation regarding property acreage in an individual homeowner's sale was a private transaction and thus the purchaser did not have a cause of action under FBPA).

> In analyzing whether a defendant's allegedly wrongful activities are in violation of the FBPA to protect the public or an "isolated" incident not covered under the statute, "two factors are determinative: (a) the medium through which the act or practice is introduced into the stream of commerce; and (b) the market on which the act or practice is reasonably intended to impact. It is only when the application of both those factors indicates that the act or practice occurred within the context of the consumer marketplace that the fairness or deceptiveness of the act or practice need be examined."

Id. at 85, 915.

The Magistrate Judge found that the facts of this case and the facts in Marrale v. Gwinnett Place Ford, 609 S.E.2d 659 (Ga. App. 2005) were similar. In Marrale, a car buyer attended a car dealer's tent sale and purchased a car, which the salesman falsely stated had never been in an accident and was still under warranty. Id. at 662. In determining whether the buyer could maintain a claim pursuant to FBPA, the court concluded that, although the car dealer had not advertised the particular car the buyer purchased, "misrepresentations of this nature can harm the general consuming public" and therefore determined the transaction was not private. Id. at 665. Ameriquest criticizes the Magistrate Judge's reliance on Marrale because the facts of the case and the instant matter are distinguishable. Ameriquest asserts that the transaction between it and Kitchen was "inherently private – there is no allegation that Ameriquest falsely advertised the loan to Plaintiff or that Ameriquest made a misrepresentation to her at an 'open house' or through some other marketing

gimmick designed to attract consumers." Ameriquest has requested that the court find Kitchen cannot show that the types of misrepresentations Ameriquest allegedly made can harm the general public. However, in her Amended Complaint, Kitchen asserts that Ameriquest's

> conduct is not an isolated instance, confined to Plaintiff's situation. Other persons in the Atlanta metropolitan area, including other elderly persons, have been similarly abused by Ameriquest. The identity of some of these persons is known by Plaintiff's counsel. This kind of abuse by Ameriquest has resulted from Ameriquest's aggressive campaign to increase the volume of its business. Ameriquest has let its zeal to gain market share and maximize profits . . . override concern for the best interests of its customers. Worst of all, Ameriquest has attempted to exploit the special vulnerabilities of elderly, low-income homeowners who lack financial sophistication.

This court has reviewed Marrale and Zeeman, in which those courts carefully weighed the facts before them at the summary judgment stage after the completion of discovery. The facts of the instant case are not sufficiently developed for the court to reach a determination on the issue of whether the transaction at issue was private or public in nature. Furthermore, the court is mindful of its duty to accept all factual allegations in the Complaint as true, and in doing so finds that Ameriquest has failed to show that Kitchen could not prove some set of facts that shows an action brought pursuant to FBPA could serve the public interest. Accordingly, the court ADOPTS the R&R and DENIES Ameriquest's Motion to Dismiss Kitchen's claim arising under

FBPA.

b. Elderly Act

Ameriquest asserts that Plaintiff's claim under the Elderly Act should be dismissed because the plain language of the statute requires a showing that Ameriquest violated FBPA against more than one elderly person to trigger liability. O.C.G.A. § 10-1-851 provides that "[w]hen any person who is found to have conducted business in violation of [the FBPA] is found to have committed said violation against elder . . . persons[5] . . . the court may impose an additional civil penalty." Although the court agrees with Ameriquest that O.C.G.A. § 10-1-851 discusses elderly persons in the plural form only, the court does not otherwise find Ameriquest's argument persuasive. Within other sections of the Elderly Act, the Georgia legislature used the term "elder person" in the singular form, see O.C.G.A. §§ 10-1-850, 10-1-853, or used the singular and plural forms interchangeably. See O.C.G.A. § 10-1-852. Furthermore, O.C.G.A. § 1-3-1, which outlines general guiding principles for statutory construction, states that "[t]he singular or plural number each includes the other, unless the other is expressly excluded." O.C.G.A. § 1-3-1(d)(6). The court has reviewed the Elderly Act and cannot find that the statute requires the

[5]In fact, the "Definitions" portion of the act defines the term "[e]lder person" as "a person who is 60 years of age or older."

narrow interpretation proposed by Ameriquest. The court therefore finds that the Elderly Act is applicable in situations involving one elderly person, such as in the instant matter, and the court therefore DENIES Ameriquest's Motion to Dismiss Kitchen's claim under the Elderly Act.

B. Motion for Leave to File Excess Pages

Finally, Ameriquest objects to the Magistrate Judge's denial of its Motion to Exceed Page Limits, which it filed March 2, 2005, requesting leave to exceed the page limit for a document filed on January 28, 2005. In reviewing a magistrate judge's non-dispositive order, the court shall only modify or set aside the magistrate judge's order if it is "found to be clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a). The Magistrate Judge did not provide reasons for her decision to deny Ameriquest's Motion to Exceed Page Limits, and Ameriquest is therefore unclear whether all of the arguments contained in its Reply brief were considered.

Local Rule 7.1 provides that "[a]bsent prior permission of the court, briefs filed in support of a motion or in response to a motion are limited in length to twenty-five (25) pages." L.R. 7.1D., N.D. Ga. Motions for leave to exceed page limits are not granted in this court as a matter of right. However, when a party does not seek prior permission from the court to exceed page limits, the court's ability to meaningfully consider the motion for leave to exceed the page limits is undercut, as denying the

motion to exceed the page limits in that situation would entail striking the motion that exceeds the page limits and would be a generally inefficient use of judicial resources. Because this court has considered all of the arguments set forth in Ameriquest's expanded brief, the Motion for Leave to File Excess Pages is GRANTED. The parties are ADVISED that no further motions to exceed page limits will be granted unless prior permission is sought.

IV. Analysis of Plaintiff's Objections

A. Interpretation of FBPA

Kitchen has also filed Objections to the Magistrate Judge's R&R. Although Kitchen obviously does not disagree with the Magistrate Judge's recommendation to deny Ameriquest's Motion to Dismiss, she does disagree with a portion of the discussion of FBPA contained in the R&R. Specifically, Kitchen takes issue with footnote 3 of the R&R, which states:

> Plaintiff first argues that the FBPA exemption only applies if the challenged (and allegedly unfair) conduct has been "specifically authorized." [Doc. 13 at 5-6]. This interpretation has been rejected "'as anomalous, for what administrative agency would authorize an unfair trade practice?'" In re Taylor, 292 B.R. 434, 437 (Bankr. N.D. Ga. 2002) (quoting Taylor v. Bear Stearns & Co., 572 F. Supp. 667, 674 (N.D. Ga. 1983)). The court "held that the phrase 'specifically authorized' in the exemption meant 'specifically regulated.'" Id. at 438 (citing Taylor, 572 F. Supp. at 675). Thus, the court found a second interpretation to be proper, which "'would exempt conduct that is being regulated by an

administrative agency.'" Id. at 437-38 (quoting Taylor, 572 F. Supp. at 674).

Kitchen asserts that the term "specifically authorized" is not anomalous because "[a] regulatory agency frequently tolerates or 'permits' activities which do not conflict with the interests which that agency is charged to protect, with no pretense of concern whether those activities might harm other interests." William Rothschild, A Guide to Georgia's Fair Business Practices Act of 1975, 10 Ga. L. Rev. 917, 920-21 (1976). For purposes of determining whether the Magistrate Judge properly ruled that Ameriquest's Motion to Dismiss should be denied, the court finds it is unnecessary to evaluate Kitchen's argument that the interpretation of FBPA dismissed as anomalous by the Magistrate Judge is actually a proper interpretation. Kitchen's claims pursuant to FBPA have survived, for now, notwithstanding the meaning given to those words by the Magistrate Judge.

B. Motion for Leave to File Surreply Brief

Kitchen also objects to the Magistrate Judge's denial of her Motion for Leave to File Surreply Brief. Because the court has GRANTED Ameriquest's Motion to Exceed the Page Limits, and Kitchen's Surreply Brief responds to some of the arguments presented in Ameriquest's Reply to its Motion to Dismiss, which exceeded page limits, the court finds it proper to also GRANT Ameriquest's Motion for Leave

to File Surreply Brief. However, the parties are advised that the Rules of this court do not provide for the routine filing of surreply briefs, and the court will not accept them as a matter of practice.

V. Summary

For the foregoing reasons, the R&R [Doc. No. 23] is ADOPTED IN PART. The court DENIES IN PART and GRANTS IN PART Defendant's Motion to Dismiss [Doc. No. 12]. Specifically, all of Plaintiff's claims survive, with the exception of her claim that Ameriquest's grant of an extended right to rescind violates TILA. Additionally, the court GRANTS Plaintiff's Motion for Leave to File Surreply Brief [Doc. No. 15] and GRANTS Defendant's Motion to Exceed Page Limits [Doc. No. 18]. Ameriquest is ORDERED to file its Answer within twenty days of the date of this Order.

IT IS SO ORDERED, this 29th day of April, 2005.

s/Beverly B. Martin
BEVERLY B. MARTIN
UNITED STATES DISTRICT JUDGE