**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| PAUL T. LOGAN,<br><br>Plaintiff,<br><br>v.<br><br>COUNTRYWIDE HOME LOANS, a Corporation of the State of California,<br><br>Defendant. | CIVIL ACTION<br><br>No. 04-5974 |

**OPINION**

March 15, 2007,

Plaintiff Paul Logan ("Logan") claims that defendant Countrywide Home Loans ("Countrywide"): (1) wrongfully terminated him from his management position within Countrywide's Wholesale Lending Division on the basis of his age, (2) terminated him in retaliation for his complaints of workplace age discrimination, and (3) subjected him to a workplace so permeated with age-based discrimination as to constitute a hostile work environment. Logan seeks compensatory damages, attorney's fees, and other relief under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.*, and the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Stat. Ann. § 951, *et seq.*

Currently before the court are defendant's motion for summary judgment, plaintiff's opposition thereto and defendant's reply. For the reasons stated below, the

defendant's motion will be granted.

## I. FACTUAL AND PROCEDURAL BACKGROUND

Based on the record before this court,[1] a jury, or a judge acting as fact-finder, could reasonably find the following facts, which I set forth in some detail at the outset of this "fact-based inquiry," *Kautz v. Met-Pro Corp.*, 412 F.3d 463, 468 (3d Cir. 2005).

### A. Overview

Paul Logan worked for Countrywide from June 1992 until he was fired in November 2003. At the time of his termination, he was 62 years old. For most of the time he was employed by Countrywide, Logan was branch manager of Countrywide's wholesale division branch in Trevose, Pennsylvania. At the time of his termination, and for at least a year earlier, Logan reported directly to Dennis Patchett, regional senior vice president ("Patchett"). Patchett reported to Joseph Harvey, divisional executive vice president ("Harvey"), who in turn reported to Executive Vice President Brian Robinett ("Robinett")—the person who made the ultimate decision to fire Logan. Another notable

[1] The analysis in this Memorandum is based on a record including all exhibits submitted by the parties ("the summary judgment record"). Countrywide points out in its reply brief that some of the materials submitted by Logan in support of his opposition to summary judgment are not "properly authenticated or supported by affidavit on personal knowledge as required by Federal Rule of Civil Procedure 56." (Def.'s Reply Mem. Supp. Summ. J. 1.) Countrywide argues that these materials are not properly part of the summary judgment record and should not be considered by this court. Because I find that, even considering all of Logan's supporting materials as part of the summary judgment record, Countrywide is entitled to judgment as a matter of law, I find it unnecessary to rule on Countrywide's request to exclude plaintiff's exhibits C, G–V, X, Z, and 1.

player in the corporate hierarchy was Kurt Schuler ("Schuler"), who, during the relevant period, was first a regional production analyst and later a regional operations manager. Schuler was not one of Logan's supervisors—like Logan, he reported directly to Patchett—but he worked in the same office as both Harvey and Patchett, and acted as an aide-de-camp to both Patchett and Harvey. Even though he was not in Logan's direct "chain of command," Schuler was nevertheless involved in the oversight of Logan's work and could "make [Logan's] life very miserable." (Pl.'s Dep. 145.)

The record reflects that, up to 2003, Logan had a solid-to-exemplary performance record with Countrywide, consistently placing his branch in the top half of the company in terms of profitability—with particularly strong performance in the period of 2003 leading up to his termination. Moreover, the record does not indicate that Logan had any disciplinary problems with Countrywide prior to March 2003.

However, notwithstanding this seemingly solid employment record, both parties agree that, well before 2003, all was not well in the employment relationship. Logan contends that he was subject to regular, humiliating, age-based harassment starting in 1999 and lasting through 2003. For its part, Countrywide alleges that Logan engaged in substantial improprieties in approving loans through his branch office.[2] Although these

[2] In addressing defendant's motion for summary judgment, this court is, of course, obligated to view the facts in the light most favorable to the plaintiff. *E.g.*, *Moore v. City of Phila.*, 461 F.3d 331, 340 (3d Cir. 2006) (as amended). However, as discussed below, the factual basis of Countrywide's allegations is largely conceded by Logan. Moreover, as discussed below, *see infra* Part III.B.i, the question of what actually did, or did not, happen is not as important under the applicable legal standard as the question of whether

alleged improprieties were said to have occurred as early as 1999, they did not come to light until 2003.

**B. Alleged incidents of age-based discrimination by Countrywide against Logan**

Logan alleges that, despite the fact that his branch was performing well and that he had no performance or discipline problems at Countrywide prior to 2003, he was subject to age-based ridicule and harassment from 1999 to 2003, culminating with his termination.[3] Allegedly, the primary harassers were Harvey and Schuler, while Patchett laughed along with, and condoned, the behavior on at least one occasion. Logan identifies four specific incidents of harassment between 1999 and 2003, while also alleging generally that Harvey and Schuler made derogatory, age-based comments to him on many other occasions. The specific incidents alleged are these:

- In 1999, at a regional meeting where all of the participants received baseball caps bearing nicknames, Harvey gave Logan a cap that said "Pops." Patchett allegedly looked on and laughed. Prior to the incident, no one at Logan's branch referred to him as "Pops" or ever made age-related comments to him. Logan claims that all other participants at the meeting received "macho" nicknames like "Shark."

- Sometime between 2001 and 2003, Logan was late coming on to a conference call, and Schuler commented that Logan was late because he needed to get his "walker" or "cane."[4]

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Countrywide formed good-faith beliefs about what happened and acted on those beliefs.

[3] The account of the alleged harassment, as well as all of the quoted language, contained in this sub-part is drawn from Logan's deposition testimony. (*See generally* Pl.'s Dep. 199–230.)

[4] Logan's deposition describes the comment as referring to either a "walker" or a "cane," noting that he heard the comment second-hand from another manager. (Pl.'s Dep.

- During a corporate golf outing, Harvey mocked Logan's supposedly feeble golf swing by suggesting that Logan needed a "proxy" to hit the ball because he couldn't "even swing the club anymore."

- In front of another branch manager (Butch Jefferson) Harvey said to Logan "[at] the rate you're going, you're going to be retiring with a walker."

As for the general allegations of discriminatory comments, Logan states that Harvey and Schuler: referred to him as "the old man"; told him that he couldn't remember things because he was "old" and needed to "hang it up"; asked if he wasn't "getting tired of this game"; made repeated reference to his status as the "highest paid manager in the company"; and claimed that they could "buy a manager at half [Logan's] cost." The summary judgment record reflects that Harvey made such comments "every two or three months," and Schuler "every couple months."

Logan claims that he verbally complained three to five times to Patchett about the "demeaning and insulting" actions by Schuler and Harvey,[5] but that no effective remedial

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206–208.) Despite its hearsay quality, I find that the comment is properly before this court, since the deposition provides a sufficient showing that it would be admissible at trial. *See J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1542 (3d Cir. 1990) ("[H]earsay evidence produced in an affidavit opposing summary judgment may be considered if the out-of-court declarant could later present the evidence through direct testimony, i.e., in a form that 'would be admissible at trial.'" (quoting *Williams v. Borough of W. Chester*, 891 F.2d 458, 465–66 n.12 (3d Cir. 1989))).

[5] Logan made these complaints between 2000 and 2003. In his complaint to the Pennsylvania Human Relations Commission, dated July 7, 2004, Logan states, "The last time I complained to Mr. Patchett was in or about mid July of 2003." (Pl.'s Mot. Opp'n Summ. J. Ex. 1 at 1.) However, in his July 26, 2005 deposition, Logan places the final verbal complaint in "early 2003." (Pl.'s Dep. 242–243.) For purposes of this summary judgment motion, I will assume that the final complaint was made in July 2003.

action was taken by Countrywide. Although Schuler twice called to apologize for his actions, both his and Harvey's behavior subsequently continued unchanged.

**C. Countrywide's allegations of misconduct by Logan**

While not disputing (for the purposes of this motion) the age-based comments and incidents alleged by Logan, Countrywide claims that the undisputed evidence shows it had legitimate and compelling reasons to terminate Logan.

First, in early 2003, Logan approved a loan for an amount in excess of one million dollars. Countrywide claims that Logan was only authorized to approve or "close" loans of up to $600,000 in the regular course of business, and that a specific Countrywide policy required special authorization for any loan over $1,000,000. Logan, however, claims that the policy in question was altogether unclear ("they kept writing memorandums you can do that, you can't do that") and that he understood that he was authorized to approve loans up to $750,000 and could make "reasonable exception[s]" above $1,000,000. (Pl.'s Dep. 187.) Logan says that he believed the loan in question—made on the Main Line home of a high-ranking Comcast executive with income approximating "a million dollars a month"—was a reasonable exception, and that if he had waited for authorization from the corporate underwriting office, he would have been letting the loan—and the associated profit—"walk out" the door. (Pl.'s Dep. 187, 189.) He contends that the policy regarding million-dollar loans was only clarified by conference calls that occurred *after* his approval of the Comcast executive's loan.

In June 2003, Logan was issued a written disciplinary notice (denominated as an "Employee Counseling Form") based on the million-dollar loan incident. The record does not reflect the extent to which other branch managers were approving such loans prior to the conference calls, nor whether any other branch managers were disciplined for doing so.[6]

Countrywide's second, and more serious, allegation of misconduct involves improprieties in the approval of two loans to James Dwyer, a real estate developer and acquaintance of Logan's. In September 2003, the Federal Bureau of Investigation, in the course of an investigation into Dwyer's business practices,[7] contacted Countrywide with questions about the Dwyer loans, which had been made by Logan's branch office in 1999 and 2000. Shortly thereafter, Countrywide began its own investigation into the loans, focusing on the 2000 loan, a home equity line of credit ("HELOC") secured by a junior lien on Dwyer's Petersburg, New Jersey home. The Countrywide investigation concluded that Logan had a previous acquaintance with Dwyer; that Logan had violated several company policies in approving the loans; that Logan had been involved in securing an

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[6] Logan alleges that Harvey conducted the 2003 conference calls for the purpose of issuing a "last warning" to all branch managers to "stop making those loans over [a] million dollars." (Pl.'s Dep. 193.) When Logan received the written warning, he says he asked Patchett if other branch managers were being "written up," and Patchett answered "I don't know." (Pl.'s Dep. 185.)

[7] Dwyer was eventually convicted of several counts of fraud and making material false statements to a financial institution. *See United States v. Dwyer*, No. 03-155, 2005 U.S. Dist. LEXIS 11144, 2005 WL 1364839 (D.N.J. June 9, 2005).

inflated appraisal of the Petersburg property (used to justify the HELOC); and that Countrywide stood to lose over $500,000.

Logan acknowledges that he and Dwyer were friends in high school, that they had an ongoing relationship, and that at or around the time of the loan Logan would "maybe play golf with [Dwyer] once a year." (Pl.'s Dep. 73.) Logan also does not dispute that he approved the origination of Dwyer's $500,000 HELOC by his branch office (rather than by an outside broker).[8] Countrywide claims this violated a corporate policy under which branch offices within the wholesale division could underwrite, but could not originate and process, HELOC loans. Additionally, the processing of the HELOC required review by Countrywide's California underwriters, who approved the loan subject to several conditions, one of which was a second appraisal of the property for at least $1,225,000. Logan admits that he recommended a firm for the second appraisal, which valued the property at $1,275,000.[9] Countrywide's 2003 investigation, however, valued the property at only $550,000.[10]

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[8] Although acknowledging the conduct, Logan insists that he approved the loan origination without any illicit motive, and that his conduct did not violate Countrywide policy.

[9] Again, Logan does not dispute that he ordered the appraisal, but insists that he had no control over the results, and that he recommended the appraisal group because of its sterling reputation. Both appraisals conducted in connection with the 2000 loan application valued the Petersburg property at around $1.2 million; the property had been purchased and appraised for approximately $550,000 in 1999.

[10] The 2003 valuation was based on a "drive-by" (external only) appraisal. (Def.'s Mot. Summ. J. Ex. A-1 at 2.) Logan contends, however, that Dwyer had made significant

Finally, due to the borrower's statutory, three-day right of rescission there is normally a 72-hour waiting period before loan funds are accessible to the borrower, but Dwyer requested waiver of this waiting period on his HELOC, citing an immediate need to use the funds to close on another property. Logan approved this waiver, allowing Dwyer to access the HELOC funds at once.[11] Countrywide claims, again, that this violated corporate policy.

After the FBI contacted Countrywide in 2003, the Dwyer loan file was reviewed first by Kurt Schuler and then by an independent investigator, Kaye Feller, who was a Countrywide risk-management specialist located in California. Each reported findings to Harvey, and Harvey forwarded their reports to Robinett. Schuler concluded that Logan had violated Countrywide policies by originating the loan from his own branch and by approving the waiver of the rescission period. Schuler stated that Logan had "helped create the illusion" that an outside brokerage had originated the loan, and Schuler added that Logan "was involved" in ordering the second appraisal, which Schuler characterized as "grossly overstated." (Def.'s Mot. Summ. J. Ex. G-2.) Schuler concluded that Countrywide "stands to lose close to $500,000." (Ex. G-2.)

Kaye Feller's conclusions were essentially the same: the right of rescission was

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improvements by renovating and reconstructing the interior of the home—changes not visible from the outside—and that these improvements justified the increase in appraisal value between 1999 and 2000 described *supra* in note 9 and the accompanying text.

[11] Logan admits that he approved the waiver, but disputes that this was inappropriate or contrary to Countrywide policy in place at that time.

improperly waived without approval from Countrywide's legal department; Dwyer's assets and income were not properly substantiated; Logan's failure to refer the transaction to a broker for processing "may be an indication that he knew the loan was not supportable"; a "manager [with] . . . any familiarity with the subject property . . . would have known that the property was not worth anything close to a million dollars," regardless of the appraisals; and Logan "had to know who to order the appraisal from to get the value he needed." (Def.'s Mot. Summ. J. Ex. A-1 at 2.) She further concluded that "our loss will exceed $600,000 with lost income, carrying costs and marketing times"[12] and that "Paul [Logan] has been in this business too many years to not fully understand what he was doing and what the borrower was asking."[13] (Ex. A-1 at 2.)

**D. Logan's termination**

In late October or early November 2003, after receiving the Schuler and Feller reports and after consulting with Harvey and Schuler and Patchett, Robinett decided to terminate Logan. Robinett had floated the idea of demoting, rather than firing, Logan, but ultimately decided against this option (after Harvey recommended against it).

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[12] The record is not clear as to why Countrywide felt it would suffer essentially a full loss on the loan.

[13] Logan disputes many of these conclusions (as to both Schuler and Feller), as well as whether his actions can fairly be said to have violated Countrywide policy. However, as discussed *infra* at Part III.B.i, the crux of this decision is not whether the facts and allegations in these reports are true but whether these reports: a) were actually made; b) were made in good faith; and c) were relied upon in good faith by Countrywide in terminating Logan.

Harvey, Patchett and Schuler were sent to fire Logan on November 6, 2003, but—bad news having traveled with its customary speed—Logan had already heard they were coming and why, and chose to stay home. Therefore, Logan never received the second written disciplinary notice prepared by Countrywide, describing the conclusions of the internal investigation and recommending that Logan's employment be terminated effective November 6, 2003.

Logan was replaced by Stephen Gatter, who was 49 or 50 years old at the time he replaced Logan. Within months, Logan obtained similar employment with Bank of America, although he states that the position is not as satisfactory or remunerative as his job at Countrywide. In July 2004, Logan filed a charge of discrimination with the EEOC and the Pennsylvania Human Relations Commission ("PHRC"). He filed the instant district court action on December 22, 2004, seeking to recover from Countrywide under the ADEA and the PHRA on the grounds that he was subjected to (1) a hostile work environment and (2) retaliation for his complaints of discrimination. Although Logan did not specifically plead a claim for (3) wrongful termination on account of his age, both parties have proceeded as if he had done so, and I will therefore include that claim in my analysis. The parties have conducted extensive discovery under the customary excellent supervision of Magistrate Judge Angell, and Countrywide now moves for summary judgment on all of the above claims.

## II. SUMMARY JUDGMENT STANDARD

A court must grant a party's motion for summary judgment if the pleadings and evidence in the record "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). However, in considering such a motion, the court must neither resolve factual disputes nor make judgments of credibility; instead, "[i]nferences should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true." *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992).

## III. WRONGFUL TERMINATION CLAIM[14]

### A. The *McDonnell Douglas* framework

Logan's disparate treatment claim for wrongful termination is analyzed under the familiar, three-step framework articulated by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–804 (1973).[15] The application of this framework to

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[14] Like the rest of the analysis below, this section applies equally to both Logan's ADEA and PHRA claims. *See, e.g.*, *Kautz*, 412 F.3d at 466 n.1 ("The same legal standard applies to both the ADEA and the PHRA and therefore it is proper to address them collectively.").

[15] *McDonnell Douglas* applies to indirect evidence cases like Logan's. Although Logan also asserts the existence of "direct" evidence in his memorandum, he does not articulate a direct evidence/mixed motive theory. In addition, even if the argument is properly before the court, I find that Logan has not produced "[w]hat is required" to prove a direct evidence case—"direct evidence that *decisionmakers* placed substantial negative reliance on an illegitimate criterion *in reaching their decision*." *Price-Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring) (emphases added) (noting that "stray remarks in the workplace" are insufficient to make such a showing).

the ADEA context was summarized by the Third Circuit in *Brewer v. Quaker State Oil Refining Corp.*:

> In order to establish a *prima facie* case, Brewer must show that he: (1) is over 40; (2) is qualified for the position in question; (3) suffered an adverse employment decision; and (4) was replaced by a sufficiently younger person to permit an inference of age discrimination. This showing creates a presumption of age discrimination that the employer can rebut by stating a legitimate nondiscriminatory reason for the adverse employment decision. The plaintiff then has the opportunity to demonstrate that the employer's stated reason was not its true reason, but merely a pretext for discrimination.

72 F.3d 326, 330 (3d Cir. 1995) (citations omitted).

For the purposes of this motion, Countrywide concedes that Logan has established his prima facie case. The next question is whether Countrywide has presented substantial evidence that it terminated Logan for a "legitimate[,] nondiscriminatory reason." It is uncontroverted that a loan authorized by Logan to his high school friend James Dwyer embroiled Countrywide in an FBI investigation. More important, Countrywide's independent reviewer—Kaye Feller—concluded that Logan made serious misjudgments, that he "had to know" what he was doing, and that the resulting loss could be as much as $600,000. This is more than sufficient to meet defendant's "relatively light" burden. *Fuentes v. Perskie*, 32 F.3d 759, 763 (3d Cir. 1994); *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000) ("This burden is one of production, not persuasion; it 'can involve no credibility assessment.'" (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993))).

Accordingly, the viability of Logan's age discrimination claim turns on the question of pretext—whether Logan has produced "sufficient evidence from which a jury could conclude that the purported reasons for defendant's adverse employment actions were in actuality a pretext for intentional . . . discrimination." *Jones v. Sch. Dist. of Phila.*, 198 F.3d 403, 412 (3d Cir. 1999).

**B. The *Fuentes-Sheridan* pretext standard**

Under the test laid out by Judge Becker in *Fuentes v. Perskie*, Logan may establish pretext, and defeat summary judgment, by "point[ing] to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons[] or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." *Fuentes*, 32 F.3d at 764; *see also Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1067–72 (3d Cir. 1996) (en banc) (reaffirming and examining *Fuentes* standard). While "the analysis of pretext is designed to focus . . . on whether the defendant's proffered reason is the real reason" for the employment decision, *DiFederico v. Rolm Co.*, 201 F.3d 200, 206 (3d Cir. 2000), the plaintiff retains the ultimate burden to persuade the trier of fact that the proffered reason is a pretext *for discrimination*. *See id.* at 206 & n.2; *St. Mary's Honor Ctr.*, 509 U.S. at 511. I will first examine whether the summary judgment record would allow a reasonable jury to "disbelieve [Countrywide's] articulated legitimate reasons" for terminating Logan.

**i. *Fuentes-Sheridan*, prong one**

"In order to avoid summary judgment [under prong one], *Fuentes* requires a plaintiff to put forward 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them unworthy of credence.'" *Kautz*, 412 F.3d at 467 (quoting *Fuentes*, 32 F.3d at 765). The nonmoving plaintiff must point to "evidence contradicting the *core facts* put forward by the employer as the legitimate reason for its decision." *Id.* (emphasis added). Applying this standard, I find that Logan has not produced evidence from which a factfinder could reasonably disbelieve Countrywide's reasons.

The core facts in this case arise from Countrywide's investigation into the Dwyer loan, which concluded that Logan had—at the very least—made serious errors in judgment, violated company policies and potentially caused his employer to suffer a loss of at least $500,000 and perhaps $600,000. These conclusions were based not only on the report of Kurt Schuler (who, based on the alleged facts, might be seen by a factfinder as a biased accuser), but also on the findings of Kaye Feller, the California risk-management specialist. There is no allegation that Feller had any involvement with or knowledge of the harassment allegedly suffered by Logan.

Logan argues that the Dwyer loan was, in fact, justified and that he did not, in fact, violate Countrywide policy, and there does appear to be a genuine issue of fact as to

whether, or to what extent, Logan was at fault. But this determination is only marginally relevant to the pretext inquiry. An employer is entitled to be hasty, ill-informed, mercurial, or just wrong in its employment decisions; what an employer may not do is base employment decisions on age (or any other protected criterion) in contravention of civil rights law. *See Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1108–1109 (3d Cir. 1997) (en banc). Therefore, it is the integrity and good faith of Countrywide's investigation—not the correctness of its results—that Logan must contradict.[16] *Cf. id.* at 1109. This court "'do[es] not sit as a super-personnel department that reexamines an entity's business decisions. . . . [N]o matter how high-handed [a company's] decisional process, no matter how mistaken the firm's managers, the ADEA does not interfere. Rather, [the pretext] inquiry is limited to whether the employer gave an honest explanation of its behavior.'" *Brewer*, 72 F.3d at 332 (quoting *McCoy v. WGN Cont'l Broad. Co.*, 957 F.2d 368, 373 (7th Cir. 1992)).

Given Kaye Feller's report to Robinett, which is not alleged to be a *post hoc* fabrication or otherwise disingenuous (as opposed to erroneous) in its conclusions, no

[16] I note that the correctness of the investigation's results does have some, limited potential relevance, because an inference that Countrywide acted in bad faith could be supported by a showing that the conclusions reached by Feller and Robinett were obviously mistaken. *See Jones*, 198 F.3d at 413 (stating that a plaintiff "may satisfy [the first *Fuentes* prong] by demonstrating . . . that the employer's articulated reason was not merely wrong, but that it was 'so plainly wrong that it cannot have been the . . . real reason'"(quoting *Keller*, 130 F.3d at 1109)). However, even viewed in the light most favorable to Logan, Feller's conclusions cannot reasonably be considered to be "plainly" wrong.

reasonable jury could find that Logan has contradicted the core facts alleged by Countrywide as its legitimate reason for his termination: that Robinett was in receipt of facially credible evidence that Logan had made serious errors in judgment, violated company policy, and exposed the firm to large potential losses.

**ii. *Fuentes-Sheridan*, prong two**

Turning to the second route to establish pretext under *Fuentes*, Logan has also failed to identify evidence justifying a finding that an "invidious discriminatory reason was," in fact, "more likely than not a motivating or determining cause" of his termination. *See Fuentes*, 32 F.3d at 764. To establish pretext based on the second *Fuentes* prong, "the plaintiff may show that the employer has previously discriminated against [the plaintiff], that the employer has previously discriminated against other persons within the plaintiff's protected class or within another protected class, or that the employer has treated more favorably similarly situated persons not within the protected class." *Simpson v. Kay Jewelers*, 142 F.3d 639, 645 (3d Cir. 1998). But Logan has advanced almost no admissible evidence of discrimination against others or that others similarly situated were treated more favorably than he, apart from his testimony that Patchett "[did]n't know" if other branch managers were written up for making loans above $1,000,000. Likewise, no evidence of previous discrimination against Logan in specific employment actions is proffered, and, as explained below, the alleged discriminatory comments of Logan's superiors are insufficient to justify an inference of animus *in the challenged employment*

*decision* (the termination). I therefore find that none of the *Simpson* factors listed above justifies an inference of discrimination.

However, the *Simpson* factors are merely illustrative; they do not define the limits of potential proof in this context. More generally, the plaintiff may undertake to establish an inference that discrimination is the real reason for the challenged employment decision either with overt evidence of discriminatory animus or indirect evidence of an ulterior, actionable motive for the adverse employment action. For example, in *Brewer v. Quaker State Oil Refining Corp.*, the court reversed a grant of summary judgment because the evidence created "sufficient doubt" as to the employer's true motivation where Brewer's termination was asserted by the employer to be based on "poor job performance in areas which the company had long overlooked or tolerated," and additional evidence also pointed to the employer's impermissible consideration of a protected criterion. 72 F.3d at 332–33; *see also Sempier v. Johnson & Higgins*, 45 F.3d 724, 731–32 (3d Cir. 1995) (finding that employer's failure to document plaintiff's alleged poor performance until negotiations over plaintiff's termination had commenced raised an inference of *post hoc* fabrication). But whereas, in *Brewer* and *Sempier*, the employer had tolerated certain deficiencies in performance for some time and then purported to rely on those same deficiencies to justify an adverse employment action, here there is a long record of satisfactory-to-excellent performance punctuated by at least one incident viewed by Countrywide as an egregious and unprecedented failure of judgment. There is no

indication that the alleged conflict of interest and procedural irregularities in approving the Dwyer loan constituted behavior of a type previously tolerated, or that Countrywide's behavior was otherwise inconsistent with past practice. Indeed, there is no circumstantial evidence of an ulterior motive by Countrywide, aside from the alleged age-related comments of Harvey, Schuler and Patchett.

"[D]iscriminatory comments by nondecisionmakers, or statements temporally remote from the decision at issue, may properly be used to build a circumstantial case of discrimination [by the decision-maker]." *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1214 (3d Cir. 1995). In addition, for the purposes of this analysis, the jury would be entitled to attribute the discriminatory comments and animus of Harvey, Schuler and Patchett to the ultimate decision-maker, Robinett.[17] However, even if analytically attributed to Robinett, the comments of the three middle managers here—while certainly relevant—are not sufficient, without more, to support an inference that age-based animus was a motivating

[17] While there is no evidence that Robinett harbored any discriminatory animus, or was even aware of the alleged harassment (Logan states that he did not report the conduct to Robinett because he did not "trust the system" (Pl.'s Dep. 228)), Harvey clearly had access to and influence over Robinett's decision-making process, and a reasonable jury could infer that Patchett and Schuler did as well. On these facts, a jury could impute to Robinett discriminatory animus held by the other managers. *See Potence v. Hazleton Area Sch. Dist.*, 357 F.3d 366, 371 (3d Cir. 2004) ("[P]ersons who have the direct ability to influence hiring and firing decisions may be held liable for discrimination." (internal quotation marks omitted)); *McKinnie v. Conley*, No. 04-932, 2006 U.S. Dist. LEXIS 40124, at *32–33, 2006 WL 1687037, at *10 (E.D. Pa. June 12, 2006) (noting that a jury may make such an attribution where "those exhibiting discriminatory animus influenced or participated in the decision to terminate" (quoting *Abramson v. William Paterson Coll.*, 260 F.3d 265, 286 (3d Cir. 2001))).

factor in Logan's termination. *Cf. Waldron v. SL Indus., Inc.*, 56 F.3d 491, 502 (3d Cir. 1995) (noting that comment by decision-maker five months before termination was "*not* irrelevant," but that "standing on its own it would likely be insufficient to demonstrate" that "age discrimination was more likely than not a determinative factor in [the] decision to terminate"). As discussed below, *see infra* Part V.B, the alleged incidents were relatively isolated, and, in this context, their probative value is further attenuated[18] by the lack of a substantial nexus between the age-related comments and the employment decision: there was a significant temporal gap between the latest alleged comments (in or before July 2003) and the November 2003 termination;[19] none of the comments was

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[18] While I must not weigh the credibility of the evidence in deciding a motion for summary judgment, I am required to determine what probative value the evidence—*taken as true*—could have for a reasonable factfinder in support of the nonmoving party. *Cf. Reeves*, 530 U.S. at 148–49 ("Whether judgment as a matter of law [under Fed. R. Civ. P. 50] is appropriate in any particular case will depend on a number of factors. . . . includ[ing] the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law."); *id.* at 150 ("[T]he standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'" (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250–251 (1986))).

[19] *Compare, e.g.*, *Keller*, 130 F.3d at 1111–12 (considering, as factor weighing against inference of pretext, that discriminatory comment by decision-making CEO "occurred four or five months prior to the time when [the CEO] decided that Keller should be discharged"), *with Armbruster v. Unisys Corp.*, 32 F.3d 768, 783 (3d Cir. 1994) (considering, as factor weighing in favor of inference of pretext, that the "alleged comments were made contemporaneously with the transfer . . . or within a few weeks after"), *abrogated on other grounds by O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308 (1996), *as recognized in Showalter v. Univ. of Pittsburgh Med. Ctr.*, 190 F.3d 231, 235–36 (3d Cir. 1999); *cf. infra* Part IV.B.

directly related to the employment decision;[20] and, even though Robinett consulted the allegedly discriminatory managers when considering Logan's termination, he based his final decision in large part on non-suspect data, namely the independent report of Kaye Feller. In this factual context, I find that the alleged incidents are "too stray and too remote from the [termination] decision to support a reasonable indirect inference of age discrimination" as a motivation for Logan's termination. *Sosky v. Int'l Mill Serv., Inc.*, No. 94-2833, 1996 U.S. Dist. LEXIS 791, at *28, 1996 WL 32139, at *8 (E.D. Pa. Jan. 24, 1996) (Mem.).

**C. The wrongful termination claim**

Even in the light most favorable to Logan, the summary judgment record cannot support a reasonable inference that Logan was terminated because of his age. To the contrary, the uncontested facts show that the impetus for the termination was the FBI investigation and Countrywide's subsequent conclusion that Logan had committed substantial improprieties in relation to the Dwyer loan—"a situation in which the employer should have been able to take adverse employment actions against the employee without fear of being embroiled in an expensive law suit." *Jones*, 198 F.3d at 414. I find that Logan has not raised a genuine issue of material fact on the issue of pretext and will

[20] *Compare, e.g.*, *Armbruster*, 32 F.3d at 783 (reversing order of summary judgment for employer where record included, among other evidence, "evidence of remarks and age notations with specific reference to the age of persons selected for transfer"), *with Keller*, 130 F.3d at 1111–12 (citing, as factor weighing against finding of pretext, fact that supervisor's "remark did not refer to the question whether Keller should be retained or fired but instead concerned the hiring of other employees to assist him").

accordingly grant summary judgment for Countrywide on the claim of wrongful termination.

## IV. RETALIATION CLAIM

### A. The burden-shifting framework

Logan's claim for unlawful retaliation is analyzed under the same basic burden-shifting framework applied to his discrimination claim. The Third Circuit has outlined this analysis as follows:

> To obtain summary judgment, the employer must show that the trier of fact could not conclude, as a matter of law, (1) that retaliatory animus played a role in the employer's decisionmaking process and (2) that it had a determinative effect on the outcome of that process. This may be accomplished by establishing the plaintiff's inability to raise a genuine issue of material fact as to either: (1) one or more elements of the plaintiff's prima facie case or, (2) if the employer offers a legitimate non-retaliatory reason for the adverse employment action, whether the employer's proffered explanation was a pretext for retaliation.

*Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 501 (3d Cir. 1997) (analyzing ADA retaliation claim); *see also Schmidt v. Montgomery Kone, Inc.*, 69 F. Supp. 2d 706, 713 (E.D. Pa. 1999) (applying *Krouse* to ADEA claim). To establish a prima facie case of retaliation under the ADEA, *see* 29 U.S.C. § 623(d) (ADEA retaliation provision), Logan "must show: '(1) protected employee activity; (2) adverse action by the employer either after or contemporaneous with the employee's protected activity; and (3) a causal connection between the employee's protected activity and the employer's adverse action.'" *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 567–68 (3d Cir. 2002) (quoting

*Krouse*, 126 F.3d at 500).

For the purposes of this motion there is no dispute that Logan complained to his supervisor about age-related, derogatory comments (a protected activity) and that he suffered an adverse employment action (termination[21]). *See supra* Parts I.B, I.D. For reasons already discussed, *see supra* Part III.A, I also find that Countrywide has offered a legitimate, non-retaliatory reason for terminating Logan. Therefore, the salient issues as to Logan's claim of retaliation are (1) whether Logan has made his prima facie case by producing sufficient evidence to justify the inference of a causal connection between his complaints of discrimination and his termination, and, (2) if so, whether Logan has then produced sufficient evidence for a jury to infer that Countrywide's legitimate, non-retaliatory explanation is a mere pretext for retaliation.

**B. Causation**

The "timing alone" of an alleged retaliatory action may "be sufficient to establish a causal link," but only if that timing is "'unusually suggestive' of retaliatory motive." *Krouse*, 126 F.3d at 503 (quoting *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1302 (3d Cir. 1997)). "Generally, . . . if at least four months pass after the protected action without employer reprisal, no inference of causation is created,'" and even much shorter time

[21] Although the definition of "adverse employment action" for the purpose of a retaliation claim can be broader than for a disparate treatment claim, *see Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2414 (2006), Logan has not argued that any other action—such as the disciplinary notice regarding the million-dollar loan, *see supra* Part I.C—had a retaliatory purpose.

periods may be sufficient to defeat the inference. *Urey v. Grove City Coll.*, 94 Fed. App'x 79, 81 (3d Cir. 2004) (not precedential) (quoting *Woods v. Bentsen*, 889 F. Supp. 179, 187 (E.D. Pa. 1995)); *see also Woods*, 889 F. Supp. at 187 n.14–15 (collecting cases). Here, the time lapse was at least three-and-a-half to four months.[22] I find that, standing on its own, the temporal relation between Logan's complaints of discrimination (a "protected action") and his termination is quite attenuated and could not justify a reasonable jury in finding a causal connection between the complaint and the termination. *Cf. Williams v. Phila. Hous. Auth. Police Dep't*, 380 F.3d 751, 760–61 (3d Cir. 2004) (agreeing with district court that termination "occurring over two months after the request for an accommodation . . . [is] not suggestive of a causal connection")

Where the timing itself is not "unduly suggestive," a prima facie case of causation may also be established by "timing plus other evidence." *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 280 (3d Cir. 2000). The other evidence may be a post-protected-action "pattern of antagonism"or "other evidence gleaned from the record as a whole from which causation can be inferred." *Id.* at 281. "Moreover, we have been willing to explore the record in search of evidence, and our caselaw has set forth no limits on what we have been willing to consider." *Id.*. On the other hand, "[t]his searching inquiry . . . will not cure the absence of any evidence that the decision-makers were aware of the

[22] As above, *see supra* note 5, I give Logan the benefit of the "mid-July 2003" time frame—the later of the two dates upon which he claims to have engaged in his final "protected action" (i.e., his final complaint about age discrimination).

employee's protected activity and were motivated, at least in part, by a desire to retaliate." *Hall v. Pa. Dep't of Corr.*, No. 02-1255, 2006 U.S. Dist. LEXIS 68670, at *11-12, 2006 WL 2772551, at *4 (M.D. Pa. Sept. 25, 2006) (Mem.).

In this case, the plaintiff offers no evidence, other than "conclusory suppositions" in his memorandum opposing summary judgment, to support a causal connection between his complaints and his termination.[23] *See King v. Sch. Dist. of Phila.*, No. 00-2503, 2001 U.S. Dist. LEXIS 10710, at *17, 2001 WL 856948, at *5 (E.D. Pa. July 26, 2001) (Mem.) ("Plaintiff's own conclusory suppositions . . . are insufficient to create a genuine issue of material fact as to [causation]."). My own review of the record likewise fails to identify any basis for a causal connection between the alleged complaints and Robinett's decision to fire Logan.

**C. Pretext**

Even assuming Logan could establish a causal connection sufficient to establish a prima facie case of retaliation, for the reasons cited above in regard to Logan's disparate treatment claim, *see supra* Part III.B.i–ii, he has not produced evidence from which a jury could infer that Countrywide's explanation is a pretext. If anything, Logan has offered less evidence that Countrywide's true motive was retaliation. Logan does not allege that

[23] Logan's entire argument as to the element of causation appears to be as follows: "As for the third prong of Logan's *prima facie* case of retaliation, there is a genuine issue of material fact as to whether there is a causal link between Logan's complaint (protected activity) and the Defendant's adverse action. *See Parrillo* [*v. Lower Bucks County Joint Mun. Auth.*], [No. 02-0413], 2003 WL 23162434, at *7 [(E.D. Pa. Dec. 30, 2003) (Mem.)]." (Pl.'s Mem. Opp'n Summ. J. 27.)

any of the comments made to him by Harvey, Schuler or Patchett made reference to his complaints of discrimination, nor that his treatment in the workplace became worse after his complaints, and he does not specifically allege any harassment or discriminatory comments in the last several months of his employment at Countrywide.

Indeed, Robinett was not aware of Logan's complaints, and there is nothing to indicate any retaliatory intent among the lower managers with influence on Robinett, other than a bare inference from their alleged knowledge of Logan's complaints. Even assuming *arguendo* that this knowledge should be attributed to Robinett, *see supra* note 17, it is insufficient, standing alone, to survive a motion for summary judgment. *Cf. Mesnick v. Gen. Elec. Co.*, 950 F.2d 816, 828–29 (1st Cir. 1991) ("[G]iven the defendant's forceful articulation of a legitimate, nondiscriminatory reason justifying its actions . . . . [K]nowledge on an employer's part, without more, cannot itself be sufficient to take a retaliation case to the jury.").

## V. HOSTILE WORK ENVIRONMENT CLAIM

### A. The cause of action

Under the hostile work environment doctrine, "sufficiently abusive harassment adversely affects a 'term, condition, or privilege' of employment within the meaning of" the relevant antidiscrimination statute, giving rise to a claim for discrimination. *Crawford v. Medina Gen. Hosp.*, 96 F.3d 830, 834 (6th Cir. 1996) (citing race, national origin and sex discrimination cases under Title VII and applying hostile work environment doctrine

in ADEA context); *see also Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (reaffirming viability of Title VII hostile work environment doctrine). Although the Third Circuit has not specifically held that a hostile work environment claim is available under the ADEA, district courts in this Circuit have assumed the viability of such a claim. *See, e.g.*, *Tate v. Main Line Hosps.*, No.03-6081, 2005 U.S. Dist. LEXIS 1814, at *59–60, 2005 WL 300068, at *18 (E.D. Pa. Feb. 8, 2005) (Mem.); *Jackson v. R.I. Williams & Assocs.*, No. 98-1741, 1998 U.S. Dist. LEXIS 8805, at *4, 1998 WL 316090, at *2 (E.D. Pa. June 8, 1998) (Mem.) (noting that "the rationale underlying Congress' decision to condemn ageism in the workplace is the same as its decision to outlaw racism" and that therefore "courts routinely employ Title VII and ADEA case law interchangeably").

Under the Third Circuit hostile work environment framework, Logan must prove that: (1) he suffered intentional discrimination on account of his age; (2) the discrimination was "severe or pervasive"; (3) the discrimination detrimentally affected him; (4) such discrimination would detrimentally affect a reasonable person of the same age in the same position; and (5) a basis for vicarious liability exists. *See Jensen v. Potter*, 435 F.3d 444, 449 (3d Cir. 2006),[24] *abrogated on other grounds by Burlington N. & Santa Fe Ry. Co.*, 126 S. Ct. at 2414, *as recognized by Moore*, 461 F.3d at 341; *see also, e.g.*,

[24] The Third Circuit had previously used the language "pervasive and regular" in describing the second element of a hostile work environment claim. *See, e.g.*, *Cardenas v. Massey*, 269 F.3d 251, 260 (3d Cir. 2001). In *Jensen*, the Third Circuit resolved a conflict with Supreme Court precedent by changing this formulation to "severe *or* pervasive." 435 F.3d at 449 n.3 (quoting *Pa. State Police v. Suders*, 542 U.S. 129, 133 (2004) (emphasis added by *Jensen* court)).

*Tate*, 2005 U.S. Dist. LEXIS 1814, at *60–61 (applying Title VII elements to ADEA claim). The Supreme Court has emphasized the holistic nature of the inquiry; therefore, this court considers the employment context as a whole in determining whether Logan has established the elements of the claim. *See Harris*, 510 U.S. at 23; *Cardenas v. Massey*, 269 F.3d 251, 260–61 (3d Cir. 2001).

Because I find it dispositive of Logan's claim, I address only the second element of the prima facie case, whether the discrimination was "severe or pervasive."

**A. "Severe or pervasive" discrimination**

Even assuming that Logan could establish the other elements of a hostile work environment claim and taking all of the incidents alleged by Logan to be true, as a matter of law, the conduct alleged by Logan was not so severe or pervasive as to alter the terms, conditions or privileges of his employment under the ADEA. *Cf. Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) ("Of course, . . . not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII.").

As evidence of the supposed hostile work environment at Countrywide, Logan alleges that he was subject to ridicule and insults based on his age. He alleges four specific incidents of harassment between 1999 and 2003, including being given a baseball cap adorned with the nickname "Pops" at a 1999 meeting, having his golf swing mocked, and two comments in front of co-workers that Logan needed a "walker" due to his age

(age presumably being associated in the harassers' minds with physical decrepitude). Logan also alleges that Harvey and Schuler "regularly" (Pl.'s Mem. Opp'n Summ. J. 26) referred to him as "the old man," told him that he couldn't remember things because he was "old" and needed to "hang it up," asked if he wasn't "getting tired of this game," and made reference to his status as the "highest paid manager in the company." While some of these incidents are not facially discriminatory based on age, the presence of some clear incidents of invidious discrimination can cast doubt on other, facially neutral comments or incidents and allow a jury to infer an invidious motive behind the facially neutral conduct. *Cardenas*, 269 F.3d at 261–63. "Therefore, we must determine whether *all* of the alleged conduct was severe . . . [or] pervasive enough to create a hostile work environment." *Sherrod v. Phila. Gas Works*, 57 Fed. App'x 68, 76 (3d Cir. 2003) (not precedential) (emphasis added).

Even taking these allegations as true, they do not rise to the level of "severe or pervasive" under the applicable antidiscrimination precedents. The factors relevant to the this analysis "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *West v. Phila. Elec. Co.*, 45 F.3d 744, 753 (3d Cir. 1995) (quoting *Harris*, 510 U.S. at 23). Logan's deposition asserts that he spoke to Schuler three to four times a week on the phone, and to Harvey approximately monthly. Schuler made age-related comments "every couple

months," and Harvey "every two or three months." Though perhaps "regular" in the sense of "periodic," the comments were thus relatively infrequent.

As to severity, while this court does not condone the behavior alleged in this case,[25] the alleged conduct is not alleged to have been physically threatening, it did not involve profanity, and, aside from three or four instances, it occurred during private phone conversations.[26] Furthermore, while Logan alleges that Schuler made his job difficult and continuously interfered with him, Logan's own deposition indicates that the interference was not caused primarily by the ageist comments, but by Schuler's generally obnoxious personality.[27] Logan's testimony also claims that Harvey resented and "felt threatened by" Logan because of Logan's relationship with Harvey's father, and that Logan "annoyed" Harvey by "not want[ing] to participate in his [social] activities" during

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[25] *Cf. Caver v. City of Trenton*, 420 F.3d 243, 263 n.16 (3d Cir. 2005) ("It goes without saying that we strongly disapprove of the use of racial epithets, . . . but the fact that inappropriate comments were made is not enough on its own to sustain a cause of action for hostile work environment.").

[26] Although Logan asserts in his memorandum that the harassment was "usually in front of his peers" (Pl.'s Mem. Opp'n Summ. J. 26), the record evidence—chiefly Logan's own deposition testimony—indicates that, aside from the four specific incidents noted above, *see supra* Part I.B, both Schuler and Harvey typically made the alleged comments in private phone conversations. (*See* Pl.'s Dep. 199–200, 208, 213.)

[27] Logan stated at his deposition that Schuler regularly impeded Logan's work, that Schuler had a reputation among the branch managers as "a whack job . . . . arrogant . . . . argumentative . . . a hatchet type of guy" who was "abusive" and "demeaning," and that Schuler "was a very difficult person to get along with, [and that] he had trouble with other branch mangers." (Pl.'s Dep. 197, 209.) Schuler's alleged abusing and demeaning of other branch managers appears to have been unrelated to age. (*See* Pl.'s Dep. 208–209.)

business trips. (Pl.'s Dep. 219, 224.) The already minimal evidence of frequency and severity is further undermined by the plaintiff's own testimony that at least part of the alleged harassment was not on account of age, but on account of other, non-actionable causes.

"A recurring point in [Supreme Court] opinions is that . . . offhand comments[] and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). While the alleged conduct in this case was unprofessional and inappropriate, *see supra* note 25, and the work environment certainly far from ideal, I find that the alleged comments and incidents are isolated and not "extremely serious," and that they do not amount to "severe or pervasive" discrimination for the purposes of a hostile work environment claim.

Countrywide's motion for summary judgment will be granted as to the hostile work environment claims.

## VI. CONCLUSION

For the reasons set forth above, an order shall issue granting Countrywide's motion for summary judgment as to all counts.

**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| PAUL T. LOGAN,<br><br>Plaintiff,<br><br>v.<br><br>COUNTRYWIDE HOME LOANS, a Corporation of the State of California,<br><br>Defendant. | CIVIL ACTION<br><br>No. 04-5974 |

**ORDER**

AND NOW, this 15th day of March, 2007, upon consideration of defendant Countrywide Home Loans's Motion for Summary Judgment (Docket No. 28), plaintiff Paul Logan's memorandum in opposition thereto (Docket No. 34), and Countrywide's reply memorandum (Docket No. 36), and for the reasons stated in the accompanying Opinion, IT IS ORDERED that the defendant's motion for summary judgment is GRANTED, and judgment is ENTERED in favor of the defendant dismissing the plaintiff's complaint.

BY THE COURT:

/s/ Louis H. Pollak

Pollak, J.