No. _____

In the Supreme Court of the United States

_____

UNITED STATES OF AMERICA ex rel. MICHELLE CALDERON,
Petitioner,

v.

CARRINGTON MORTGAGE SERVICES, LLC,
Respondent.

_____

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Seventh Circuit

_____

UNITED STATES OF AMERICA'S PETITION FOR WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

Did the Appellate Panel erroneously uphold the granting of summary judgment in favor of Respondent in finding no evidence of causation for a jury to consider, thereby stripping Congress' intended reach and scope of the False Claims Act (31 U.S.C. §§3729–3733); and, where a summary judgment ruling is appealed, do the damages springing from the reversal of the lower court's finding survive, herein, civil penalties from a finding of evidence of materiality?

PARTIES TO THE PROCEEDING

Petitioner Michelle Calderon is Relator for the United States of America under the False Claims Act, 31 U.S.C. 3729–3733.

Respondent is Carrington Mortgage Services, LLC.

STATEMENT OF RELATED CASES

All proceedings directly related to this petition include:

United States of America ex rel. Michelle Calderon v. Carrington Mortgage Services, LLC, No. 22-1553 (7th Cir.). Judgment entered March 9, 2022;

United States of America ex rel. Michelle Calderon v. Carrington Mortgage Services, LLC, No. 1:16-cv-00920-RLY-MJD (S.D. Ind.). Judgment entered June 14, 2023.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES, REGULATIONS, AND OTHER AUTHORITIES

OPINIONS BELOW

The Seventh Circuit's decision (Pet. App. 1-28) is reported at 7 F.4th 968. The District Court's opinion (Pet. App. 29-50) is unreported but is available at 2022 WL 1059478 (S.D. Ind. Mar. 9, 2022)

JURISDICTION

The Seventh Circuit entered judgment on June 14, 2023. Pet. App. 1-28. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 3729 of the False Claims Act, 31 U.S.C. 3729–3733, provides in relevant part:

(a) Liability for Certain Acts.

(1) In General. Subject to paragraph (2), any person who

(A) Knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

INTRODUCTION

This action was brought by Petitioner pursuant to The False Claims Act ("FCA"), 31 U.S.C. §§3729–3733, alleging fraud on the Government by Carrington Mortgage Services, LLC ("Respondent"). The Federal Housing Administration ("FHA"), as a part of the U.S. Department of Housing and Urban Development ("HUD"), is the largest insurer of residential mortgage loans in the world. Through its Direct Endorsement Lender ("DEL") program, HUD insures private lenders against losses on mortgage loans. Respondent was a qualified DEL for HUD, and was therefore a fiduciary to the Federal Government in reviewing loans for qualification under the FHA HUD program. If a homeowner defaults on an FHA insured loan, HUD, will pay the mortgage holder the shortfall of the loan after default. Petitioner filed suit alleging Respondent's fraud on the U.S. Government in systematically submitting unqualified loans for federal insurance under the HUD program, and collecting claims once the unqualified loans failed, therefore causing damage to the Government.

A Seventh Circuit Panel upheld the granting of summary judgment in favor of Respondent based solely on the element of Causation, denying the United States of America due process in having its claims heard by a jury where there exists admissible relevant evidence of causation of damages from the fraud committed by Respondent. The Panel in this case erroneously concluded that no question of fact was present in the record as to causation.

In 2017, the Seventh Circuit provided clear guidance on proximate cause under the FCA in *United*

States v. Luce, 873 F 3d. 999, 1014 (7th Cir. 2017), as follows:

> The misrepresentation is a legal cause only of those pecuniary losses that are within the foreseeable risk of harm it creates. . . Proximate cause encompasses both cause in fact and legal cause.
>
> To establish cause in fact, the plaintiff must show the defendant's conduct was a material element and a substantial factor in bringing about the injury.
>
> Legal cause on the other hand, is essentially a question of foreseeability, and we must determine whether the injury is of a type that a reasonable person would see *as a likely result* of his or her conduct.

Luce at 1011 (*internal quotations and citations omitted*; *emphasis added).* Proximate cause under *Luce's* interpretation is, therefore, cause in fact plus foreseeability.

Had Respondent not misrepresented these loans as meeting the HUD standards, the Government would not have insured the loans in the first place, therefore avoiding putting the funds at risk that would ultimately paid to Respondent. Further, Respondent's approval of loans that fell below the minimum standards required by HUD to insure loans clearly creates the foreseeability of said loans failing,

as the borrowers could not afford the loans in the first place.

Despite Petitioner, and the United States, filing Appellant and Amicus Briefs, respectively, in support of the strong evidence presented to the lower court, by way of Respondent's party admissions and direct evidence in the loan files, the Seventh Circuit issued an extreme holding that the direct evidence submitted, including Respondent's own "Reason for Default" determinations, were insufficient to create a question of fact for the jury as to causation of the defaults, and therefore, the Government's damages. Thus, under the Seventh Circuit's ruling, even an admission by the party committing the alleged fraud, that the default was caused as alleged by Petitioner, is insufficient evidence to create a question of fact for a jury.

The Seventh Circuit's holding is in direct contradiction to the standing precedent in *Luce*., and justice requires clarification on this crucial point of law by the highest court in the land. *Id*.

Further, with regard to the preservation of civil penalties damages, the Panel opined that Petitioner did not renew that argument on appeal; however, that argument was not directly appealable, as the District Court did not issue a ruling with regard to the indirect question of Civil Penalties. (28 U.S.C.A. § 1291) The court only ruled that the motion for summary judgment was granted with regard to the elements of Causation and Materiality. Petitioner's argument as to evidence of materiality of the fraud goes directly to the requirements of liability for civil penalties, before the question of causation is even addressed.

Therefore, as a question of fact as to materiality has been found, damages for civil penalties remain viable by operation of law. Now that the threshold of a question of fact as to materiality has best established, this matter should be remanded at least on the issues of the recovery of civil penalties, if not on the case as a whole.

The Panel's ruling is of exceptional importance, as competent and admissible evidence is present in the record to reach a jury, and disregarding the evidence presented prevents the reach and scope of the FCA, as intended by Congress. The Panel erroneously weighed the evidence of causation in making its determination, which is impermissible under Fed. Rule of Civil Procedure 56. The Panel's ruling creates an impossible burden on Petitioner beyond the rules of evidence, requiring presentation of indisputable evidence. Admissible evidence creating a question of fact was presented, and should reach a jury to be deliberated.

This Court should grant certiorari and overturn the incorrect precedent established below by finding the following:

1. That direct evidence of causation, consisting of clear and concise written party admissions by Respondent, and direct on point evidence in the loan file, as explained by Relator, are sufficient to defeat summary judgment, and for justice and due process to prevail in implementation of the FCA, as Congress intended; and

2. That damages, here, civil penalties, springing from the reversal of a finding of no materiality, survive the appeal and are preserved for recovery by the United States Government.

This Court should grant certiorari and reverse the 7th Circuit on its findings on causation and civil penalties recovery.

STATEMENT OF THE CASE

A. Legal Background

This action was brought pursuant to The False Claims Act ("FCA"), 31 U.S.C. §§3729–3733, alleging fraud on the Government by Respondent, when it certified that borrowers for FHA insured loans met minimum standards, when they in fact fell below the Government's risk tolerances. Though the fraud occurred in the underwriting and certification process, the fraud was not actionable until the final element of damages was triggered when the insurance claims were paid. Respondent certified that borrowers for FHA insured loans met minimum standards, when they did not meet such standards. Further, proximate cause is not necessary to collect the statutory penalty of up to $11,000 per fraudulent claim, however. *United States v. Quicken Loans Inc.*, 239 F. Supp. 3d 1014, 1040 (E.D. Mich. 2017).

The FCA is the Government's primary tool to combat fraud, and the Government long ago

recognized it needed a "more effective weapon against Government fraud." S. Rep. No. 99-345, at 3, 1986 U.S.C.C.A.N. 5266, 5266.

B. Statement of Facts and Procedural History

The underlying case herein is a civil fraud action on behalf of the United States to recover treble damages and civil penalties under the FCA, as amended, 31 U.S.C. § 3729 *et seq*., arising from fraud on HUD and the FHA, in connection with Carrington's residential mortgage lending business.

Carrington, as a fiduciary of the United States Government, was entrusted to originate loans guaranteed by the United States of America. Relator demonstrated how Carrington abused that trust and developed a scheme to churn a high volume of non-qualifying loans through its offices for FHA insurance. Carrington had knowledge it was transmitting loans for FHA insurance that did not meet FHA's minimum standards. The knowing falsity of those certifications, containing misrepresentations of data material to HUD's decision to pay, caused the loans to be accepted as insured, to thereafter fail, resulting in damages to the United States.

The Seventh Circuit Panel reversed the District Court on its finding of no evidence of Materiality. Therefore, the only element that remains in question is that of Causation. Damages are twofold in FCA cases, and "regardless of whether the submission of the claim actually causes the government any damages; even if the claim is rejected, its very submission is a basis for liability." See *United States*

ex rel. Schwedt v. Planning Research Corp., 59 F.3d 196, 199 (D.C. Cir. 1995). Therefore, as all elements have exceeded the summary judgment threshold, regardless of causation, the Civil Penalties damages are recoverable. Damages cannot stand on their own without the underlying establishment of the required elements, here, materiality. Now that a question of fact on materiality has been found, the case should be remanded, at a minimum, on civil penalties damages.

The Panel opined that Petitioner did not renew that argument on appeal; however, that specific damages argument was not a unique separately appealable issue, as the District Court did not issue a ruling with regard to that question before it. *28 U.S.C.A. § 1291*. The Civil Penalties only exist if the Materiality finding of the District Court was reversed. Therefore, now that the threshold of a question of fact as to Materiality has been established, this matter should be remanded at least on the issues of the recovery of civil penalties, if not on the case as a whole.

With regard to Causation, as is established below, there exists in the record evidence establishing questions of fact within each and every loan file submitted by Petitioner. This evidence comes in the form of loan documents, and testimony by Relator explaining how the documents do not support the conclusions made by Carrington, therefore creating false certifications submitted to HUD. This, coupled with Carrington's own assessment for the Reasons for Default, in plain language understood by lay jurors, creates questions of fact which must reach a jury for due process to prevail.

Congress enacted the FCA to detect and potentially prevent this type of fraud leading to losses and damages to the United States Government. The effect of the Panel's Opinion would be to severely handicap the FCA reach and creates an impossible standard of absolute irrefutable proof at the summary judgment stage. Sufficient evidence was presented to create questions of fact as to Causation, and Certiorari should be granted to reinstate the reach and bite of the FCA for future detection and recovery when there exists fraud against the Government.

This petition followed.

REASONS FOR GRANTING THE WRIT

I. The Question Presented Is Frequently Recurring And Important, And Due Process Requires The Writ Be Granted.

Certiorari should be granted to ensure the False Claims Act has the reach and purpose intended by Congress in detecting and reducing fraud on, and damage to, the United States Government. The questions presented are frequently recurring and the fact pattern herein is regularly presented in FCA cases, wherein a mortgage company submits false claims for payment on failed loans, and the question as to what evidence is required to establish if the fraud was a factor in leading to the failure, and therefore the claim. As the Seventh Circuit law currently stands as a result of this appeal, direct evidence, i.e. a party admission by the mortgage company itself as to why the loan failed, is not sufficient to defeat summary judgment and reach a

jury. Under Federal Rule of Civil Procedure 56, such clear evidence surpasses the low threshold of making a showing that there exists "some evidence" from which a jury could return a verdict in favor of the United States.

a. Causation. The Panel's reasoning in finding no question of fact as to causation erroneously strips the Government of due process in presenting admissible evidence of a causal connection between the fraud committed by Carrington and the loss to the Government.

Petitioner presented substantial evidence of causation that established a question of fact to be heard by a jury in this matter. As the Panel established in its Opinion,

> Summary judgment is appropriate only when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "We draw all justifiable inferences in favor of the nonmoving party" and view the facts in the light most favorable to Calderon, the nonmovant. *Scaife v. U.S. Dep't of Veterans Affairs*, 49 F.4th 1109, 1115 (7th Cir. 2022).

Pet. App. 13-14. Further, the Panel reiterates that, "At summary judgment, the question is only whether Calderon has proffered sufficient evidence to warrant a reasonable inference in her favor." *Id.*, at 19. Additionally, the Panel focused on *Miller* and *Hibbs* in evaluating causation evidence. *United States v.*

Miller, 645 F.2d 473 (5th Cir. 1981); *United States v. Hibbs*, 568 F.2d 347 (3d Cir. 1977):

> In *Miller*, the Fifth Circuit held that "[i]n the context of a federal housing case, the United States must show that the false statements in the application were the cause of subsequent defaults." 645 F.2d at 476. And in *Hibbs*, the Third Circuit said that because it is the default that causes the loss to the United States, a plaintiff must show some connection between the false certifications and the default. 568 F.2d at 351. Where a default is caused "by a flood or some other uninsured catastrophe," a defendant's false certifications cannot be said to have caused the government's loss. *Id*. This focus seems sound to us. To ensure that the false certifications were a substantial factor in bringing about HUD's losses and that the losses were foreseeable to the defendant, the plaintiff must show that the false certifications played some role in causing or increasing the risk of a subsequent default.

Id. at 23-24. Petitioner has shown at least "some connection" between the false certifications and the default, in more than one way. Further, all 349 files evaluated and submitted by Petitioner defaulted for specific financial reasons that are linked back to the fraud in approving the loan. Not one submitted loan failed due to circumstances such as flooding or other Acts of God, as are discussed in *Hibbs*. As is required by precedent, each of the losses presented contained

evidence that the false certification was a substantial factor in bringing about HUD's losses, and that the losses were foreseeable by Respondent. There is clear record evidence in each file that the false certification played some role in causing or increasing the risk of the loan defaulting. *Id*. This standard sets the bar low with regard to evidence necessary to reach a jury, and Petitioner well exceeds that threshold with the evidence presented.

The Panel addresses the evidence of Carrington's total foreclosure rate of 10.59% in 2014 (with a 2013 rate of 16.73%), with the national foreclosure rate being only 2.15% in 2014, which was evidence submitted by Petitioner to support the false certifications causing excessive foreclosures. *Pet. App*. 19. The Panel's rejection of this evidence was based on a perceived lack of evidence of how many of Carrington's loans were FHA loans, so as to have a proper assessment of those failure numbers. However, as is established on page 10 of Exhibit N of Petitioner's summary judgment response, 89.7% of Carrington's loans were government loans, as compared to only 10.3% being conventional loans in the year 2014. Therefore, there does exist record evidence to put the foreclosure percentages into context, as the vast majority of Carrington's loans were in fact government insured, creating an inference of substantially increased foreclosures on those loans. Again, this evidence creates a question of fact for the jury. Respondent could present evidence explaining or refuting this inference, but, as is established above, and by the Panel, it is not the role of the Court to weigh evidence when making a summary judgment determination. Pet. App. 18.

Further, and more specifically focused on the loans at issue, the Panel erred in determining that there was no evidence presented rising to the level of causation sufficient to reach a jury. The Panel opines that Calderon's opinion summary for each file "would not allow [a lay factfinder] to identify whether the reported income was spot on, too high, or too low." Not only does Ms. Calderon explain, in her expert opinion, how the income was incorrect, she attached the documents supporting those findings and pinpointed the amounts for each and every file in her Affidavit. For the Panel to conclude that there is no record evidence supporting those findings is in error.

The following are specific examples of questions of fact created in the loan files and supporting documents submitted. With regard to Borrower 10, the false certification was based on "inflated income," which is explained by Relator in her Affidavit and within Petitioner's Brief, and supported by the loan documents submitted therewith. Carrington's own determination as to the Reason for Default was "Curtailment of Income." This is plain language understandable by a lay person and does not necessitate expert testimony.

> [T]he general rule is as stated by Mr. Justice Van Devanter, when circuit judge, that expert testimony not only is unnecessary but indeed may properly be excluded in the discretion of the trial judge 'if all the primary facts can be accurately and intelligibly described to the jury, and if they, as men of common understanding, are as capable of comprehending the primary facts and of

> drawing correct conclusions from them as are witnesses possessed of special or peculiar training, experience, or observation in respect of the subject under investigation.'

Salem v. U.S. Lines Co., 370 U.S. 31 (1962). At this summary judgment stage, there is enough evidence to create a question of fact as to causation, which, yes, can be challenged at trial by Respondent, but which should not be weighed by the Panel in determining summary judgment. It must also be reiterated that all inferences must be determined in the light most favorable to the non-moving party, and that all admissions must be construed against the party making the statement. *Scaife v. U.S. Dep't of Veterans Affairs*, 49 F.4th 1109, 1115 (7th Cir. 2022).

Every loan submitted by Petitioner, with Relator's explanation regarding the false certifications therein, contain evidence sufficient to defeat summary judgment and reach a jury regarding causation. Another example is Borrower 12, wherein the misrepresentation was "improperly omitted debt," which, again, is explained in Relator's Affidavit. The admitted Reason for Default from Carrington was "excessive obligations." It is nearly incomprehensible how this reason for default, coupled with the misrepresentation, does not create a jury question regarding causation. Debt of the Borrower was omitted by Carrington, and the loan failed, according to Carrington, due to excessive obligations. This file, on its face, not only meets the minimum threshold to defeat summary judgment, but actually establishes nearly irrefutable causation of the misrepresentation causing the default. Would Respondent have an

opportunity to refute said evidence at trial to question causation - Absolutely. But there is, at a minimum, a question of fact to defeat a dispositive motion. I.e. financial obligations of the borrower not reported, and the loan defaulting due to excessive obligations. To determine that there exist no questions of fact for a jury on each of these loans is erroneous, and a clear denial of due process. The Panel's determination on the issue of causation, with all due respect, necessitates Certiorari be granted in light of the record evidence.

b. Civil Penalties. In appealing the finding of no question of fact as to Materiality, Petitioner preserved the issue of recovery of civil penalties, as materiality is the pivotal hook to recovery. The civil penalties damages go dormant with no finding of materiality, and spring back to life once the materiality threshold has been achieved. The Panel determined that a question of fact as to materiality has in fact been established, thereby reversing the District Court's finding. Flowing therefore, civil penalties damages are recoverable, regardless of causation, should the jury find that Carrington submitted false claims to the Government. Damages cannot stand on their own without the underlying establishment of the required elements, here, materiality. Now that a question of fact on materiality has been determined, the case should be remanded, at a minimum, on civil penalties damages. The Panel opined that Petitioner did not renew that argument on appeal; however, that argument was not directly appealable, as the District Court did not issue a ruling with regard to the indirect question of Civil Penalties. (28 U.S.C.A. § 1291). The Court only ruled that the motion for summary judgment was granted with regard to the elements of

Causation and Materiality. Therefore, now that the threshold of a question of fact as to materiality has best established, this matter should be remanded at least on the issue of the recovery of civil penalties, if not on the case as a whole.

II. The Decision Below is Incorrect and Creates Bad Law

Flowing from the arguments set forth in Section I above, Certiorari should be granted to protect the integrity of Federal Rule of Civil Procedure 56, and the standard of evidence required to defeat summary judgment motions in the Seventh Circuit. As the law currently stands following this ruling, Rule 56 becomes nearly futile. The Panel was presented with relevant, admissible evidence, much of which were the actual determinations of Carrington, which were literally titled "Reason for Default." However, it was determined that said evidence did not meet minimum standards of the low threshold that is established in the rule to defeat summary judgment and reach a jury for consideration.

This determination creates dangerous law that is far reaching and damages the very fabric of civil litigation throughout the Seventh Circuit. Should this law stand, in order to defeat summary judgment, a party would presumably be required to obtain affidavits from each borrower, and from each Carrington Serving representative with sworn testimony as to what occurred in the borrower's life and throughout the life of the loan that lead to the default. That standard goes well beyond what the Federal Rules require under Rule 56, and even goes beyond what would be required to meet the more

likely than not burden at trial. One hundred percent certainly is never the threshold, especially in evaluating dispositive motions.

The opinion herein, as is stands, creates bad law that is far reaching, well beyond the context of the FCA or fraud claims. Causation is a key element in all tort, contract, fraud, and many other actions that present themselves daily in courts throughout the Midwest. Justice requires that this overbearing opinion be reviewed by the highest Court of the land to correct the overreach, give the intended teeth back to the FCA, and reestablish the intended threshold requirements to defeat summary judgment motions, not only in FCA cases, but broadly across the Seventh Circuit.

CONCLUSION

For the forgoing reasons, Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment of the 7th Circuit Court of Appeals.

September 12, 2023 Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Case No.
Case Name: *United States of America ex rel. Michelle Calderon v. Carrington Mortgage Services*
Title: Petition for Writ of Certiorari

Pursuant to Rule 33.1(h) of the Rules of this Court, I certify that the accompanying Petition for Writ of Certiorari, which was prepared using Century Schoolbook 12-point typeface, contains 3903 words, excluding the parts of the document that are exempted by Rule 33.1(d). This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word) used to prepare the document.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 9th day of August, 2023.

Respectfully submitted,

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TABLE OF APPENDICES

Page

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 22-1553

United States of America ex rel.

Michelle Calderon,

Plaintiff-Appellant,

v.

Carrington Mortgage Services, LLC,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:16-cv-00920-RLY-MJD – Richard L. Young, Judge.

Argued November 30, 2022 – Decided June 14, 2023

Before Wood, Jackson-Akiwumi, and Lee, Circuit Judges.

Wood, Circuit Judge.

Michelle Calderon sued Carrington Mortgage Services on behalf of the United States for alleged violations of the False Claims Act. Calderon is a former employee of Carrington. She alleges that Carrington made false representations to the U.S. Department of Housing and Urban Development (HUD) in the course of certifying residential mortgage loans for insurance coverage from the Federal Housing Administration (FHA).

Carrington moved for summary judgment on the basis that Calderon did not meet her evidentiary burden on two elements of False Claims Act liability. First, it asserted that she could not show that the allegedly false representations were material to HUD's decisions to pay out various claims under the federal mortgage insurance program. Second, it contended that she could not show that the false representations caused HYD to suffer a monetary loss.

The district court sided with Carrington on both elements and granted summary judgment, disposing of Calderon's lawsuit. Though we conclude that Calderon does have sufficient proof of materiality, we agree that she has not met her burden of proof on the element of causation. We therefore affirm the district court's decision.

I

A

Federal mortgage insurance is designed to create a path to homeownership for borrowers who might be considered too risky to qualify for a traditional mortgage because of their lack of savings, poor credit history, or low income. The Direct Endorsement Lender program is one through which HUD covers the losses of private lenders in the event of a loan default to encourage the issuance of these higher risk mortgages. Carrington has been a Direct Endorsement Lender for many years.

If a potential Direct Endorsement Lender such as Carrington wishes to cover a loan with federal mortgage insurance it must first submit to an underwriting process during which it assesses the prospective borrower's eligibility for federal insurance. HUD publishes handbooks that provide the underwriting guidelines for lenders and promulgates regulations that govern Direct Endorsement lending.[1] Carrington hires its own Direct Endorsement Underwriters and operates its own quality control system. Its goal is to ensure that it properly evaluates a borrower's financial information, determines

[1] See, e.g., HUD, 4155-1, Mortgage Credit Analysis for Mortgage Insurance, at https://www.hud.gov/sites/documents/4- 1551HSGH.PDF ("HUD 4155-1"); HUD, 4155-2, Lender's Guide to the Single Family Mortgage Insurance Process, at https://www.hud.gov/sites/documents/41552HSGH.PDF ("HUD 4155-2").

that degree of risk involved in issuing the loan, and complies with all federal requirements. After the lender approves the loan, the lender submits the loan to HUD for review and endorsement. Through this submission, the lender certifies to HUD that the borrower meets the minimum standards of HUD's underwriting guidelines. HUD relies on these certifications to issue the necessary insurance coverage.

Next, all loans submitted for federal insurance are subject to a pre-endorsement review by HUD. The parties dispute the scope of that review, but HUD's own regulations indicate that the agency is focused on verifying that all necessary documents are present, rather than on assuring the accuracy of the information it finds in the loan file. See HUD, 4155-2, Lender's Guide to the Single Family Mortgage Insurance Process 8.C.1.b (2010). Once the loan passes pre-endorsement review, HUD issues federal insurance to the lender for that loan. If a loan file is missing some of the required documentation, the lender instead receives a notice of return that specifies the deficiencies and corrective action needed before the loan can be federally insured.

HUD may conduct further examination, even after it issues the insurance for the lender. It subjects approximately 5 percent of loans to a post-endorsement technical review in which it evaluates the loan using the federal underwriting requirements and confirms the accuracy of the information in the loan file. When

a post-endorsement review reveals material noncompliance with HUD's underwriting guidelines, HUD will require the lender to agree to an indemnification agreement, under which the lender must abstain from filing an insurance claim in the case of default or reimburse HUD if HUD makes a payment on an insurance claim for that mortgage. Federal regulations define which violations may qualify as "serious and material." 24 C.F.R. § 203.255(g)(3).[2]

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[2] Because materiality is central to this appeal, we furnish the full text of section 203.255(g)(3) here:

(3) Serious and material violation. The mortgagee shall indemnify HUD for and FHA insurance claim paid within 5 years of mortgage insurance endorsement, fi the mortgagee knew or should have known of a serious and material violation of FHA origination requirements, such that the mortgage loan should not have been approved and endorsed by the mortgagee and irrespective of whether the violation caused the mortgage default. Such a serious and material violation of FHA requirements in the origination of the mortgage may occur if the mortgagee failed to, among other actions:

(i) Verify the creditworthiness, income, and/or employment of the mortgagor in accordance with FHA requirements;

(ii) Verify the assets brought by the mortgagor for payment of the required down payment and/or closing costs in accordance with FHA requirements; or

(iii) Address property deficiencies identified in the appraisal affecting the health and safety of the occupants

B

Calderon worked at Carrington from March 2013 to March 2015 as a Direct Endorsement Underwriter. During that time, HUD classified loans in one of four ways following a post-endorsement review: conforming, deficient, unacceptable, or mitigated. Deficient loans were those with documentation deficiencies or processing errors that presented only low-risk issues. Unacceptable loans contained high-risk error or omission and did not meet the basic eligibility requirements for federal mortgage insurance. Once a loan was deemed unacceptable, lenders had an opportunity to explain or correct the identified deficiencies. If they were able to rectify the problem, the loan was reclassified as mitigated. If not, HUD issued an indemnification agreement.

Concerned about what she was seeing on the job, including allegedly reckless and inappropriate underwriting practices, Calderon brought this lawsuit against Carrington under the False Claims Act. See 31 U.S.C. § 3729. The

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or the structural integrity of the property in accordance with FHA requirements, or

(iv) Ensure that the appraisal of the property serving as security for the mortgage loan satisfies FHA appraisal requirements, in accordance with § 203.5(e) [the regulation governing appraisals in the Direct Endorsement process].

Act allows a private party to sue for violations on behalf of the government; successful suits result in a payment to the initiator. *Id.* § 3730. A Plaintiff such as Calderon must plead and ultimately prove four elements: 1) the defendant made a false statement (falsity); 2) the defendant knew the statement was false (knowledge); 3) the false statement was material to the government's payment decision (materiality); and 4) the false statement cause the government's loss (causation). *United States v. Molina Healthcare of Ill., Inc.,* 17 F.4th 732, 739-40 (7th Cir. 2021).

Understanding the process by which federal mortgage insurance is issued clarifies how a company such as Carrington might be held liable under the False Claims Act. The alleged false statements occur if Carrington wrongly certifies that a loan meets federal underwriting requirements. If HUD would have withheld federal insurance or issued an indemnification agreement had it known of the noncompliance, then the false certification of compliance is material to HUD's payment decision. And if the loan defaults and HUD covers the cost of the default, then the false certification of compliance causes the government's loss when the loan's noncompliance is the foreseeable cause of the default.

C

Calderon asserts that during her time at Carrington she observed "reckless and

inappropriate underwriting practices at Carrington," including the false certification of several loans as meeting HUD's minimum underwriting guidelines. Essentially, she alleges, if HUD had known of the errors in Carrington's loan files, it would not have endorsed those loans for federal insurance or, in the alternative, if all Carrington's loans had been subjected to a full post-endorsement review, many of them would have been characterized as unacceptable and HUD would have issued indemnification agreements. Further, if Carrington had complied with HUD's underwriting guidelines, fewer of its federally insured loans would have defaulted because only borrowers with appropriate risk levels would have received loans.

To meet her evidentiary burden, Calderon provided a sample "re-underwrite" of 349 federally insured loans that Carrington issued between 2013 and 2015; all of those loans later defaulted. Calderon's analysis identifies several alleged deficiencies in these loan files, to which we refer as the "reviewed loans." The flaws included instances where Carrington overstated the borrower's income or provided insufficient documentation. Calderon also gives examples where the original underwriter improperly omitted borrower debt, failed to assess creditworthiness, permitted excessive debt-to-income ratios, or improperly assessed compensating factors – that is, borrower

characteristics that can offset a bad credit score, such as documented cash reserves, no discretionary debt, significant additional income, or residual income.

Calderson also offered herself as an expert and intended to testify about the shortcomings in Carrington's quality control department, as well as about the elements of materiality and causation. But the district court excluded the bulk of her expert opinion. After Calderon was precluded from testifying about certain aspects of materiality and causation, Carrington moved for summary judgment on just those elements, arguing that Calderon could not meet her evidentiary burden on the available record. The district court granted the motion, agreeing with Carrington that as a matter of law Calderon could not prove either materiality or causation. Calderon has appealed.

II

Calderon first challenges the district court's decision under Federal Rule of Evidence 702 to exclude portions of her own proffered expert testimony. Calderon also disputed the district court's decision to admit the testimony of Carrington's expert, Kori Keith. We decide independently whether the district court followed Rule 702's framework. *United States v. Brown, 973* F.3e 667, 703 (7th Cir. 2020). We review the court's decision to admit or exclude expert testimony for abuse of discretion. *Id.*

Federal Rule of Evidence 702 governs the admissibility of expert testimony and requires that the district court determine that a witness is qualified as an expert by her "knowledge, skill, experience, training, or education." Rule 702 then sets out four factors to determine admissibility:

> (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) The testimony is based on sufficient facts or data;
> (c) The testimony is the product of reliable principles and methods; and
> (d) The expert has reliably applied the principles and methods to the facts of the case.

The district court held that Calderon could not offer her opinion about the effectiveness of Carrington's quality control program because she never worked in the quality control department, did not review any manuals or procedures governing that department, and did not compare Carrington's quality control processes to those required by HUD. In so ruling, the court probably overdid it by insisting that Calderon needed to have worked in Carrington's own quality control department to develop the necessary expertise. Nonetheless, its overall criticisms of Calderon's methods are sound. Given that Calderon did not read any of the

materials that detailed Carrington's policies and practices, she is not qualified to opine on their effectiveness. The court was well within its rights to exclude this portion of her proffered expert testimony.

The district court also excluded the bulk of Calderon's opinions on materiality and causation, finding them "too speculative." It reasoned that because Calderon never worked for HUD or in loan servicing, she could not opine about "what is material to HUD's decision to pay out claims," nor could she suggest that all of Carrington's false statements caused a loss to HUD. But the district court did permit Calderon to testify from her own experience and explain what happened when she saw HUD reject loans or require indemnification.

Again, the district court placed too much weight on where Calderon worked. Rule 702 does not suggest that specialized knowledge can be developed only in certain ways, and the Supreme Court's decision in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999), points in the opposite direction – experts and expertise come in many different forms. For present purposes, working for HUD is not the sole path for a proffered expert to become sufficiently knowledgeable about HUD's decision-making processes or the causes of its payments on federal insurance claims. Many people with long careers in the residential mortgage industry can and do

develop this expertise. Nevertheless, the district court did not abuse its discretion in its ultimate ruling. Both materiality and causation are determined through nuanced, multi-factored analyses. The district court correctly recognized that Calderon cannot testify about the existence of a conclusive list of what is material to HUD's insurance-endorsement decisions or requests for indemnification. Nor could she opine that certain defects always cause losses to HUD.

On appeal, Calderon claims that the scope of her expert testimony was narrower than the district court intimated. For example, as to materiality, she says that her opinion would be "that a particular loan was insured with a material defect that she has seen in her experience to result in rejection when HUD is aware of the defect." In our view, the district court's order contemplated the admission of such testimony. The district court said that Calderon "can discuss her experience and why her loans have been rejected in the past" and that she could "give her opinions on [the reviewed] loans so long as they stem from her experience as an underwriter" and do not "in-vade[] the province of the jury." Otherwise, the court was well within its discretion to confine Calderon's expert opinions to the bounds of her actual experience. The court reasonably prevented her from offering

more sweeping conclusions about materiality and causation.

Finally, the district court admitted Carrington's rebuttal expert, Kori Keith, even though Keith lacked some of the underwriting qualifications that Calderon has. Calderon argues that if Calderon's testimony was excluded, Keith's testimony must be excluded too. But the scope of Keith's expert testimony was different from the scope of Calderon's. Keith was called to testify about underwriting practices generally and the purpose of the federal mortgage insurance program. She also planned to rebut the process Calderon followed when she evaluated the reviewed loans. The district court did not abuse its discretion when it determined that Keith's twenty- plus years of experience in the residential mortgage industry qualified her as an expert, and that her review of the complaint, the reviewed loans, and the applicable HUD regulations were sufficient to support her proffered opinion.

III

This brings us to the heart of the appeal: Calderon's challenge to the grant of summary judgment in favor of Carrington. Our examination of that decision is *de novo*. *Dunlevy v. Langfelder*, 52 F.4th 349, 353 (7th Cir. 2022). Summary judgment is appropriate only when

"there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "We draw all justifiable inferences in favor of the nonmoving party" and view the facts in the light most favorable to Calderon, the nonmovant. *Scaife v. U.S. Dep't of Veterans Affairs*, 49 F.4th 1109, 1115 (7th Cir. 2022).

Calderon's primary evidence of both materiality and causation comes from her review of the 349 loans. The district court concluded that her evidence failed to support both of these elements. We look first at materiality, and then at causation.

A

Under the False Claims Act, a false claim is "material" if it has a "natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 31 U.S.C. § 3729(b)(4). In *Universal Health Services, Inc. v. United States ex rel. Escobar*, the Supreme Court clarified that a false claim would be material in "two circumstances": "(1) '[if] a reasonable man would attach importance to [it] in determining his choice of action in the transaction'; or (2) if the defendant knew or had reason to know that the recipient of the representation attaches importance to the specific matter 'in determining his choice of

action,' even though a reasonable person would not." 579 U.S. 176, 193 (2016) (alterations in original) (quoting the Restatement (Second) of Torts § 538 (1976)).

Escobar did not end with the identification of those two circumstances; it also provided additional guidance on how to approach materiality in these cases. For example, it confirmed that mere regulatory violations, even if the regulation is labeled by the government as "material" to governmental decision-making, are not automatically material for the purposes of the Act without additional evidence that the government "consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement." *Id.* at 195. Additionally, "if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material." *Id.*

The district court held that Calderon had failed to establish materiality because she did not present evidence that would permit a reasonable factfinder to conclude that HUD viewed the alleged underwriting deficiencies as important. It also criticized her for failing to rebut the possibility that HUD was aware of

Carrington's potential violations but took no action. Although the question is close, we conclude that when all permissible inferences are properly drawn in Calderon's favor, there is enough evidence of materiality to clear the summary judgment hurdle.

Calderon proffered evidence that (if believed) would show that the deficiencies she identified in the reviewed loans are material under 24 C.F.R. § 203.255(g). As we noted earlier, that regulation explains that "serious and material violation[s]" will require the lender to indemnify HUD because, but for those violations, "the mortgage loan should not have been approved and endorsed." *Id.* § 203.255(g)(3). Relevant material violations include the failure to:

> (i) verify the creditworthiness, income, and/or employment of the mortgagor in accordance with FHA requirements; (ii) verify the assets brought by the mortgagor for payment of the required down payment and/or closing costs in accordance with FHA requirements….

Id. § 203.255(g)(3)(i)–(ii). In the reviewed loans, Calderon found several instances of overstated income, improperly omitted debt, and

insufficient documentation of assets, income, and debt—problems that mirror the material violations identified in the regulation. And even though *Escobar* instructs that simply labeling these violations as "material" in the regulation does not establish materiality without further proof, that does not mean that the regulatory evidence is beside the point. The regulations provide some guidance, in HUD's own voice, about the false certifications that would improperly induce the issuance of federal insurance, and those are precisely the false certifications present here.

Calderon also proffered evidence that HUD issued indemnification agreements to Carrington when faced with similar loan deficiencies in the past. She did so with her own expert testimony. As the district court ruled, Calderon may testify that she has seen certain types of underwriting deficiencies in her experience, and that those deficiencies resulted in re- quests for indemnification from HUD. On top of that, Calderon proffered a series of letters that HUD sent to Carrington, detailing material loan deficiencies that HUD identified during its post-endorsement technical review of nine Carrington loans. HUD explained that it would issue an indemnification agreement if the deficiencies were not addressed. The types of material deficiencies that HUD identified in those letters— improper sourcing of closing

funds, failure to explain large deposits, inadequate closing funds, failure to analyze debts correctly, overstated income, and inadequate documentation for credit analysis—are akin to the deficiencies that Calderon identified in the reviewed loans. These letters therefore confirm that HUD "refuses to pay claims … based on noncompliance" with these kinds of underwriting requirements. See *Escobar*, 579 U.S. at 195. The letters also show that Carrington was on notice about which false certifications were serious in HUD's eyes and "had reason to know that the recipient of the representation attaches importance to the specific matter." *Id.* at 193.

Carrington responds that "HUD's conclusion that a specific defect is material when reviewing one loan cannot support a reasonable inference that similar defects will always be material for all loans." But this line of argument asks us to weigh the evidence, a task that is best reserved for a fact-finder. For example, Calderon says that overstated income in a particular borrower's loan file is a serious deficiency; Carrington responds that overstated income occurs in varying degrees and does not, in every instance, constitute major non-compliance. Carrington's rebuttal does not entitle it to summary judgment, because the degree of the deficiency is genuinely disputed.

Similarly, Carrington points out that it was able to mitigate several of the deficiencies identified in the letters and was forced to indemnify only one loan in the nine that were reviewed. It argues that the relative ease with which it could have mitigated any alleged deficiency is significant because, once mitigated, HUD will make payments on any insurance claims; HUD's willingness to issue payment undermines the materiality of the violation. But again, the fact-intensive job of evaluating the identified deficiencies and deciding which ones could have been mitigated is a job best left to the jury.

At summary judgment, the question is only whether Calderon has proffered sufficient evidence to warrant a reasonable inference in her favor. We do not doubt that Carrington might be able to convince a rational trier of fact that the defects in the reviewed loans are factually distinguishable from the material defects identified in HUD's letters or are capable of correction. But that does not warrant summary judgment. Calderon has identified several false certifications in 349 loans, she has shown that those false certifications are mate- rial according to federal regulations and her own underwriting experience, and she has proffered evidence that HUD has in the past deemed similar violations material. A factfinder would be permitted to infer materiality from this evidence.

We are also concerned that the district court placed too much weight on its belief that HUD knew about Carrington's false certifications. If HUD had knowledge of the false certifications and nonetheless issued the insurance (or refrained from demanding indemnification), *Escobar* instructs that this would be strong evidence that the certifications were not material. The district court was impressed by HUD's pre-endorsement review of all Carrington's loan files, the selective post-endorsement technical reviews of a sizable sample, and Calderon's own allegations, which she reported to HUD when she initiated this lawsuit.

But the extent of HUD's knowledge is contested. The record does not establish that HUD's pre-endorsement review would have revealed widespread underwriting violations. HUD's own regulations suggest that the pre-endorsement review looks only to see if the required documents are all in the file; the content of those documents is not examined. For that matter, HUD's post-endorsement reviews provide information on only a select sample of Carrington's loans and do not show that HUD possessed a broad awareness of all alleged deficiencies in Carrington's federally insured loans. Finally, the record is unclear as to how much HUD learned from Calderon; in her deposition, she could not remember what she had

told government representatives in those initial conversations.

In *United States ex rel. Yannacopoulos v. General Dynamics*, we rested our materiality ruling on the fact that the agency had "actually learned of the supposed misrepresentation." 652 F.3d 818, 831 (7th Cir. 2011). Such certainty of knowledge is a far cry from the district court's conclusion here that "HUD was likely aware of any violation." To infer HUD's knowledge is to draw an inference in the moving party's favor from a heavily disputed set of facts. A juror could reasonably conclude that HUD was unaware of Carrington's alleged culture of reckless underwriting. The extent of HUD's knowledge is thus still up for grabs; that issue was not suitable for summary judgment.

B

Turning now to causation, we must briefly address the False Claims Act's damages provisions. Some circuits have interpreted the Act as creating "two sorts of liability." See *United States ex rel. Schwedt v. Planning Research Corp.*, 59 F.3d 196, 199 (D.C. Cir. 1995). As they see it, the first form of liability can be found in the Act's civil penalty, which, according to *Schwedt*, may be imposed "regardless of whether the submission of the claim actually causes the government any damages; even if the claim is rejected, its very submission is a basis for liability." *Id.* The second form of liability they

identify is the Act's provision of treble damages, which is triggered only "for damages that the government sustains because of the submission of the false claim." *Id.* Under this understanding, Calderon's claims could move forward as claims for civil penalties, based on her satisfaction of the other three elements of a claim under the Act.

Though Calderon suggested to the district court that she should proceed to trial even without sufficient evidence of causation (*i.e.*, by using the first approach mentioned above), she has not renewed that argument on appeal. Because she has not asked us to do so, we do not consider the possibility of a claim limited to civil penalties. Whether we agree with the *Schwedt* approach is a question we leave for another day.

In order to avoid summary judgment, therefore, Calderon had to proffer evidence covering all four elements of the claim, including causation. Indeed, since *United States v. Luce*, we have required a plaintiff to establish both actual and proximate cause to recover under the Act. 873 F.3d 999, 1014 (7th Cir. 2017). Carrington's false certifications to HUD must not only be material, they also must cause a foreseeable harm: "a type that a reasonable person would see *as a likely result* of his or her conduct." *Id.* at 1012 (emphasis in original) (quoting *Blood v. VH-1 Music First*, 668 F.3d 543, 546 (7th Cir. 2012)). Simple but-for causation is not enough.

To show proximate causation, Calderon had to put forward evidence indicating that the false certifications in the reviewed loans were the foreseeable cause of the later defaults. We focus on the defaults because that is what triggers HUD's payment obligations under the federal insurance program. We recognize that when we adopted the proximate-cause standard in *Luce*, we did not explicitly state that proving proximate cause in cases about federal mortgage insurance requires proving the causes of defaults. We did, however, rely heavily on the Fifth Circuit's reasoning in *United States v. Miller*, 645 F.2d 473 (5th Cir. 1981), and the Third Circuit's reasoning in *United States v. Hibbs*, 568 F.2d 347, 351 (3d Cir. 1977). In both of those cases, the courts made explicit statements about the need to prove what caused the defaults.

In *Miller*, the Fifth Circuit held that "[i]n the context of a federal housing case, the United States must show that the false statements in the application were the cause of subsequent defaults." 645 F.2d at 476. And in *Hibbs*, the Third Circuit said that because it is the default that causes the loss to the United States, a plaintiff must show some connection between the false certifications and the default. 568 F.2d at 351. Where a default is caused "by a flood or some other uninsured catastrophe," a defendant's false certifications cannot be said to have caused the government's loss. *Id.* This focus seems sound to

us. To ensure that the false certifications were a substantial factor in bringing about HUD's losses and that the losses were foreseeable to the defendant, the plaintiff must show that the false certifications played some role in causing or increasing the risk of a subsequent default.

The parties dispute how Calderon might meet that burden. Calderon argues that she should be allowed to extrapolate causation from a generalized statistical analysis of Carrington's federally insured loans. Carrington responds that Calderon had to proceed loan-by-loan through the 349 loans and show how each allegedly false statement caused each loan's default. But because we find that Calderon did not meet her burden under either method, we do not resolve which method was appropriate.

We consider the statistical method first. Calderon claims to have offered proof of causation in the form approved in *United States v. Hodge*, 933 F.3d 468 (5th Cir. 2019). There the Fifth Circuit found sufficient evidence to support a jury verdict against the defendant where the government showed that the defendant maintained a culture of "reckless underwriting" and that this culture resulted in elevated default rates for its federally insured loans when contrasted with the national default rate for such loans. *Id.* at 475–76. Calderon and Carrington dispute whether Calderon has provided sufficient proof of reckless underwriting

practices at Carrington. But Calderon can avail herself of this method of proof only if she proffers evidence on which a trier of fact could rely to find that Carrington had an elevated default rate.

To support this fact, Calderon points us to Carrington's 2014 annual financial report, where it disclosed a total foreclosure rate of 10.59 percent. That rate is 500 percent higher than the national foreclosure rate of 2.15 percent, and so it might seem to be a strong support for her position. But the problem is that the report provides little information about the performance of Carrington's federally insured loans. Calderon needed to identify the total number of federally insured loans that Carrington serviced, determine Carrington's default rate for those loans, and then compare that to the national default rate of federally insured loans. Having failed to do that, Calderon's attempted statistical analysis falls short. Without some evidence that Carrington had a higher-than- average default rate for its federally insured loans, a jury could not find that Carrington's underwriting practices, reck- less or not, had any effect on subsequent loan performance.

Turning to the loan-by-loan method, Calderon proffers her analysis of the 349 reviewed loans, in combination with Carrington's documented reason for each loan default. The

reason for default is recorded in code form. Calderon asserts that the codes, which identified problems such as "Excessive Obligations," were plain-English descriptions that were accessible to any jury. Perhaps so, but that was not the problem with them. The sticking point is vagueness: the codes do not contain any information that would permit a reasonable fact-finder to determine the cause of default. For example, as Carrington argues, a code such as "Curtailment of Income" would not explain whether the default was caused by a false statement regarding income in the borrower's file or by recent unemployment.

Calderon proffered no expert who could interpret the codes, explain common causes of defaults, or discuss the defaults in the reviewed loans. Nor has Calderon herself undertaken the kind of analysis of the loan servicing records that would permit her to opine to the jurors about the events that caused a "Curtailment of Income" and whether those events were related to the initial false statement. While the district court agreed to let Calderon testify about the underwriting errors that led in her experience to defaults, she has not shown how that experience-based testimony would help a jury. For example, Calderon's re-underwrite of Borrower 14's loan file revealed an inflated income and a default code of "Curtailment of Income." But a lay factfinder reviewing the loan file would find no

evidence that would allow her to identify whether the reported income was spot on, too high, or too low. Pay stubs in the file revealed what a reasonable person might calculate as $7,801.40 in monthly income; the total income reported by Carrington was $7,659. Calderon's re-underwrite provides scant guidance on how to assess or recreate her findings. Further, that same lay factfinder would have no information about what "Curtailment of Income" meant for Borrower 14 and why that borrower stopped being able to make their monthly payments. The inference that Calderon is asking the jury to draw as to causation in loan files like this one is speculative and impermissible.

Other courts have noted that misrepresentations about a borrower's income, debt, and assets foreseeably increase the risk of default by their very nature. See, *e.g.*, *United States v. Spicer*, 57 F.3d 1152, 1159 (D.C. Cir. 1995) (holding that the defendant's intentional misrepresentations about the size of borrower down payments foreseeably caused HUD's losses when the loans defaulted, even where there was limited evidence to explain each default and even though other factors might have played a role). But we are reluctant to extend that reasoning to this case. On the present record, it is not clear how a factfinder would even spot the alleged false statement in each loan file, let alone evaluate its

seriousness and scope. And though Calderon asserts that the misrepresentations in this case are of the type identified in *Spicer*, we do not see much in the record to support that point other than Calderon's assertions. Without more evidence from which a jury could conclude that Carrington's alleged misrepresentations in each loan caused the subsequent defaults, the nature of those misrepresentations is not enough to get past summary judgment.

IV

Because Calderon did not proffer evidence that would permit a reasonable trier of fact to find that Carrington's violations of the False Claims Act caused any harm to HUD, we AFFIRM the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION
No. 1:16-cv-00920-RLY-MJD

UNITED STATES OF AMERICA,)
Plaintiff,)
)
v.)
)
CARRINGTON MORTGAGE SERVICES)
Defendant.)
)
_____)
)
MICHELLE CALDERON,)
Relator.)

ENTRY GRANTING CARRINGTON MORTGAGE'S MOTION FOR SUMMARY JUDGMENT

This lawsuit concerns mortgage insurance fraud. Michelle Calderon contends her former employer, Carrington Mortgages Services, LLC, violated the False Claims Act, 31 U.S.C. §§ 3729 *et seq*., by fraudulently collecting mortgage insurance on hundreds of loans that defaulted. Calderon's chief complaint is that Carrington knowingly and falsely certified these loans complied with applicable federal regulations, approved them despite knowing their deficiencies, and then submitted claims to the government and collected insurance when the loans inevitably defaulted.

Carrington moves for summary judgment arguing Calderon cannot show any purported false certification was material to the government's payment decision or that any purported false certification proximately caused the government's payment decision and subsequent loss. For the reasons that follow, the court agrees. Carrington's motion for summary judgment is therefore **GRANTED**.

I. Background

This case is complex and has a long procedural history. The background therefore proceeds in four parts. Part A discusses the False Claims Act. Part B discusses the Department of Housing and Urban Development's ("HUD's")

lending program. Part C discusses the parties, and Calderon's allegations of fraud. Part D discusses this lawsuit's procedural history.

The facts are undisputed unless otherwise noted. Where there is a dispute, the court presents the facts in the light most favorable to Calderon, *Stark v. Johnson & Johnson*, 10 F.4th 823, 825 (7th Cir. 2021), assuming them to be true and not necessarily vouching for their truth. *Reid Hospital and Health Care Servs., Inc. v. Conifer Revenue Cycle Solutions, LLC*, 8 F.4th 642, 645 (7th Cir. 2021).

A. The False Claims Act

The False Claims Act, 31 U.S.C. § 3729 *et seq*., is an anti-fraud statute that penalizes individuals who defraud the government. *Univ. Health Servs., Inc. v. United States*, 579 U.S. 176, 180 (2016). The Act imposes liability on anyone who "knowingly presents . . . a false or fraudulent claim for payment or approval" as well as anyone who "knowingly makes [or] uses . . . a false record or statement material to a false or fraudulent claim." § 3729(a)(1)(A) and (B); *see also United States ex rel. Presser v. Acacia Mental Health Clinic, LLC*, 836 F.3d 770, 777 (7th Cir. 2016) (citing *United States ex rel. Yannacopoulos v. General Dynamics*, 652 F.3d 818 (7th Cir. 2011)). "Under the Act, private individuals . . . referred to as 'relators,' may file civil actions know as *qui tam* actions on behalf of the United States to recover money that the government paid as a

result of conduct forbidden under the Act." *Yannacopoulos*, 652 F.3d at 822. The Act permits relators to collect a percentage of any money recovered on behalf of the government. *United States ex rel. Mamalakis v. Anesthetix Management LLC*, 20 F.4th 295, 301 (7th Cir. 2021) (citing 31 U.S.C. § 3730(d)(1) – (2)).

To prevail on a claim under the Act, a relator must prove: (1) the defendant made a false statement in order to receive money from the government; (2) the defendant knew the statement was false; (3) the statement was material to the government's payment decision to issue payment; and (4) the false statement proximately caused the government's loss. *Id.*; *United States v. Luce*, 873 F.3d 999, 1012 (7th Cir. 2017).

A "false statement" can include falsely certifying compliance with a statute or regulation as a condition to government payment. *See United States ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166, 1171 (9th Cir. 2006); *see also Luce*, 873 F.3d at 1007 – 08. And a mortgage lender may be liable by falsely certifying loans meet certain requirements in order to induce the federal government to insure the loan. *E.g. United States v. Wells Fargo Bank, N.A.*, 972 F.Supp.2d 593, 623 – 24 (S.D. N.Y. 2013); *see also United States v. Quicken Loans Inc.*, 239 F.Supp.3d 1014, 1021 – 22 (E.D. Mich. 2017).

B. HUD's Direct Endorsement Lender Program

HUD is the federal department responsible for overseeing housing and development and administering federal housing statutes. *Quicken Loans*, 239 F.Supp.3d at 1019. One of its primary tasks is insuring mortgages to increase access to homeownership. *Id.* It does this through the Federal Housing Administration ("FHA"), which is a component agency within HUD. *Id.* The FHA is "the Federal Government's single largest program to extend access to homeownership to individuals and families who lack the savings, credit history, or income to qualify for a conventional mortgage." (Filing No. 222-1, Expert Report of Kori Keith ("Keith Rep.") at 7).

The FHA insures lenders against losses on mortgage loans that default. *Quicken Loans*, 239 F.Supp.3d at 1019. In the event of a default, FHA pays the lender the balance of the loan, assumes ownership of the property, and manages the foreclosure proceeding. *Wells Fargo Bank*, 972 F.Supp.2d at 600. One of the goals of FHA is to "extend[] opportunity for homeownership to a much broader segment of the population" especially first-time homebuyers and middle-class families who may have little credit and carry more risk. (Filing No. 221-2, Written Testimony of Edward L. Golding, Principal Deputy Assistant Secretary for HUD at 1). To that end, HUD's guidelines are far more

permissive than a private lender's guidelines, (Keith Rep. at 7 – 8), and lenders exercise considerable discretion to allow marginal borrowers access to homeownership. (Filing No. 222-7, Foreword to HUD Handbook 4155.1; *see also* Filing No. 222-8, HUD Fiscal Year 2008 Performance and Accountability Report at 70 (noting during the financial crisis "much of [HUD's] effort[s were] focused on finding creative ways to address the nation's housing crisis")).

One of HUD's mortgage insurance programs is called the "Direct Endorsement Lender Program." (Filing No. 145, Answer ¶ 6); *see also Wells Fargo Bank*, 972 F.Supp.2d at 600. This program authorizes approved lenders, referred to as Direct Endorsement Lenders, to underwrite mortgage loans pursuant to FHA guidelines and certify loans for FHA mortgage insurance. *Wells Fargo Bank*, 972 F.Supp.2d at 600. Direct Endorsement Lenders are required to follow HUD regulations and requirements. *Id.*; *see also* 24 C.F.R. § 203.5 (Direct Endorsement Process). These include requirements that the underwriter certify the truth, accuracy, and completeness of information and documentation to support each loan and that the lender annually certify compliance with the program's requirements. (Filing No. 222-9, Form HUD-92900-A, Aug. 1, 2016); *Wells Fargo Bank*, 972 F.Supp.2d at 600.

Direct Endorsement Lenders can underwrite loans in one of two ways: they can

manually underwrite loans in accordance with HUD's underwriting guidelines or they can use a HUD-approved Automated Underwriting System, which is software that recommends whether to approve a particular borrower. *Quicken Loans*, 239 F.Supp.3d at 1019 – 20. The recommendation is based on data that the underwriter must verify: the borrower's credit report, the borrower's liabilities and debt, the borrower's effective income, the borrower's assets and reserves, an adjusted value, and the borrower's total mortgage payment. Filing No. 22-10, HUD Handbook 4000.1, II.A.1). The system's recommendation comes in the form of a "TOTAL"

[1] rating. (Keith Rep. at 6). A TOTAL rating of "accept/approve" means that the loan is approved subject to certain conditions. *Quicken Loans*, 239 F.Supp.3d at 1020. A TOTAL rating of "refer" means the loan must be manually underwritten. *Id.* Even when a lender uses an automated system, however, the underwriters must still review the loan's information and verify it complies with HUD guidelines. (Filing No. 22-10, HUD Handbook 4000.1, II.A.4.a.iii). A lender cannot simply approve a loan solely based on a TOTAL rating. *Id.*; *see also* 24 C.F.R. § 203.5(d) (explaining Direct Endorsement process).

TOTAL, which stands for Technology Open to Approved Lenders Mortgage Scorecard, is FHA's underwriting algorithm. (Keith Rep. at 6).[1]

HUD reviews loan files at different stages. First, HUD conducts a pre-endorsement review at the outset where it reviews every loan file.[2] (Filing No. 22-13, HUD Handbook 4155.2, 8.C.1.d). During this review, HUD verifies the loan complies with FHA requirements, ensures the required forms and certifications are properly executed, and confirms the integrity of the loan's data. *Id.* HUD's review also includes a review for fraud. (*See* Filing No. 22-13, HUD Handbook 4155.2, 8.C.1.d). If there is any inconsistency in the data or the documentation requirements are not satisfied, HUD can reject the loan. (Filing No. 222-10, HUD Handbook 4000.1, II.A.7.a). When it rejects the loan, HUD sends a "Notice of Return" to the lender. (Gillis Dep. 68:13 – 22). The Notice explains the defects in the loan, and the lender is required to resolve those defects in order to insure the loan. (Filing No. 222-14, HUD Case Processing Support Functions at 4). Second, HUD also conducts a "Post-Endorsement Technical Review" on a sample of loans submitted by lenders. (Gillis Dep. at 103:1 – 22); *see also* HUD Handbook4155.2, 8.C-4 – 8.C-6, https://www.hud.gov/program_offices/administration/hudclips/handbooks/hsgh/4155.2 5 (last visited Mar. 8, 2022). A Post-Endorsement

[2] Certain lenders can forgo this pre-endorsement review by participating in the Lender Insurance program, HUD Handbook 4000.1, II.C.1.a, but Carrington has never participated in this program. (Filing No. 222-4, Deposition of Jeff Gillis, at 102:15 – 20).

Technical Review is a complete re-underwrite of the loan to ensure the Lender has complied with FHA requirements. (*Id.*). HUD will classify the loan as "conforming" or "unacceptable." (HUD Handbook 4155.2, 9.C.2.b). A loan initially classified as "unacceptable" may be later classified as "mitigated" if the lender provides further explanation or documentation. (*Id.*). If the loan is unacceptable, HUD will require that the lender indemnify HUD for any claims submitted on the loan. (*Id.*; *see also* Filing No. 228-3, Letter issued to Carrington on Mar. 26, 2014).

C. The Parties

Carrington is a mortgage lender organized under the laws of the State of California. (Answer ¶ 12). Carrington operates an office in Fishers, Indiana, which is in the Southern District of Indiana. (*Id.* ¶ 11). For the relevant time period in this case, 2013 – 2015, Carrington participated in the Direct Endorsement Lender program and was authorized to underwrite loans that could be approved for FHA insurance. (*Id.* ¶ 6).

Calderon is a lending professional who started in the industry in 1992. (Filing No.222-5, Deposition of Michelle Calderon ("Calderon Dep.") at 12:3 – 4). She has worked as a wholesale manager, underwriting manager, and account representative for various financial companies. (*Id.* at 13:10 – 13). From 2013 to 2015, she worked as an underwriter at Carrington in the Fisher's office. (*Id.* at 83:8 – 23).

Calderon generally alleges Carrington committed fraud by routinely certifying loans for government insurance that did not meet HUD's applicable underwriting requirements. (*See* Filing No. 79, Second Amended Complaint ¶ 6). These false certifications purportedly misled HUD into believing that thousands of loans had been properly underwritten (and were eligible for FHA insurance) when they, in fact, were high-risk and did not qualify for insurance. (*Id.* ¶ 7). After the loan defaulted, Carrington then submitted a claim and collected FHA insurance. (*Id.*).

Calderon's theory is that Carrington created a culture of approving ineligible loans for insurance. Carrington pressured underwriters to approve loans, (Filing No. 228-20, Affidavit of Susan Stein ("Stein Aff.") ¶ 4), and then provided incentives to them based on the number of loans approved. (Filing No. 228-14, Carrington Incentives Program). If an underwriter was unwilling to sign off on a risky loan file, Carrington "churned" the loan file through its underwriting department and found an underwriter who would be willing to sign off on it. (Filing No. 229, Affidavit of Michelle Calderon ¶ 10). Underwriters who did not approve the loans were then labeled as "problem employees" and eventually terminated. (Stein Aff. ¶¶ 8, 9). Carrington refused to allow a hard copy of the FHA guidelines to be maintained at the Fisher's office. (Calderon Aff. ¶ 9).

The loans, according to Calderon, were not eligible for FHA insurance because they did not meet FHA insurance guidelines. (*See* Calderon Aff. ¶ 6). This includes HUD regulations which identify "serious and material" violations, for which a lender is required to indemnify HUD. *See* 24 C.F.R. § 203.255(g)(3)(i) – (iv). This also includes FHA guidelines found in the HUD Handbook. (*See* Calderon Aff. ¶ 6).

D. This Lawsuit

While still working at Carrington in 2014, Calderon began collecting documents and communicating with counsel regarding "things [she believed] weren't right" at Carrington. (Calderon Dep. 182:9 – 183:8). She left Carrington in the Spring of 2015. (Calderon Dep. 73:10 – 12). Calderon commenced this lawsuit on April 25, 2016. (Filing No. 1). She met with officials from HUD and the Department of Justice and presented all of her evidence of alleged fraud. (Calderon Dep. at 208:16 – 211:9; 367:6 – 11). The government, however, declined to intervene on January 27, 2017, *see* Filing No. 10, and so Calderon has continued to litigate this matter. *See* 31 U.S.C. § 3730(c)(3).

This case then proceeded through multiple motions to dismiss. Carrington first moved to dismiss Calderon's complaint on April 24, 2017, and Calderon responded with an Amended Complaint. (Filing Nos. 25, 40). Carrington

moved to dismiss the Amended Complaint, and the court granted that motion. (Filing Nos. 48, 75). The court reasoned that Calderon had failed to identify a false claim, failed to plausibly allege Carrington acted with knowledge or recklessness, and failed to plausibly allege materiality. (*See* Filing No. 75). The court granted Calderon leave to file another complaint, and she filed her Second Amended Complaint on January 31, 2018. (Filing No. 79). Carrington once again filed a motion to dismiss. (Filing No. 90). The court, however, denied this motion. (Filing No. 141, Order Denying Motion to Dismiss Second Amended Complaint). The court explained Calderon had adequately *alleged* a violation of the False Claims Act but would still need sufficient *evidence* later in the case. (*Id.* at 13 – 15).

The case then proceeded through a round of summary judgment. The court granted Carrington's motion for summary judgment insofar as it held Calderon had to prove her case on a loan-by-loan basis and was required to submit such evidence at summary judgment. (*See* Filing No. 205, Order on Carrington's Motion for Summary Judgment). The court denied the rest of Carrington's motion without prejudice. (*Id.* at 1).

The court then ruled on the parties competing *Daubert* motions. (*See* Filing No. 212, Order on *Daubert* Motions). The court ruled Calderon could not opine on (1) Carrington's

quality control department, (2) whether certain defects in loans are material to HUD's decision to pay, and (3) whether the false certifications proximately caused the government harm. (*Id.* at 5 – 6). The court reasoned Calderon had no experience working in the quality control department, HUD, or in Carrington's post-closing groups, and so, any opinions offered on those topics would be based on speculation. (*Id.* at 5 – 7). The court also struck the testimony of Calderon's other proposed expert, Ernest Simmons, because he was not qualified as an expert. (*Id.* at 7). The court denied Calderon's motion to strike Carrington's expert, Kori Keith. (*Id.* at 10).

Given the *Daubert* rulings and the summary judgment ruling, Carrington requested the court stay the case and entertain a summary judgment motion on two elements of Calderon's claims: materiality and causation. (*See* Filing No. 215). The court stayed the case on August 12, 2020. (*See* Filing No. 216). Carrington then filed its summary judgement motion on September 3, 2020. (Filing No. 220). Calderon responded on October 8, 2020, and Carrington filed its reply on November 12, 2020. (Filing Nos. 228, 242). The motion is fully briefed and ripe for ruling.

II. Legal Standard

Summary judgment is appropriate when there is no genuine dispute as to any material fact, and the moving party is entitled to judgment

as a matter of law. Fed. R. Civ. P. 56(a); *Pack v. Middlebury Com. Schools*, 990 F.3d 1013, 1017 (7th Cir. 2021). A "genuine dispute" exists when a reasonable factfinder could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[T]o survive summary judgment, the nonmoving party must present evidence sufficient to establish a triable issue of fact on all essential elements of [her] case . . . If there is no triable issue of fact on even one essential element of the nonmoving party's case, summary judgment is appropriate." *Burton v. Kohn Law Firm, S.C.*, 934 F.3d 572, 579 (7th Cir. 2019) (internal quotations and citation omitted).

When reviewing a motion for summary judgment, the court views the record and draws all reasonable inference from it in the light most favorable to the nonmoving party. *Khungar v. Access Community Health Network*, 985 F.3d 565, 572–73 (7th Cir. 2021). The court is only required to consider the materials cited by the parties, *see* Fed. R. Civ. P. 56(c)(3); it is not required to "scour every inch of the record" for evidence that is potentially relevant. *Grant v. Trustees of Ind. Univ.*, 870 F.3d 562, 573 – 74 (7th Cir. 2017).

III. Discussion

Carrington argues summary judgment is appropriate because Calderon cannot raise a genuine dispute as to two elements of her claims:

materiality and causation. Calderon responds that there is enough evidence for a jury to find in her favor on both elements. The court considers each in turn.

Materiality. Calderon must show the alleged false certification and defects in the loan were "material to the government's payment decision." *Univ. Health Servs., Inc. v. United States*, 579 U.S. 176, 181 (2016). This means Calderon must have evidence that HUD's decision would likely or actually have been different had it known of Carrington's alleged non-compliance with HUD's underwriting guidelines. *See United States v. Sanford-Brown, Limited*, 840 F.3d 445, 447 – 48 (7th Cir. 2016). This standard is "rigorous" and "demanding." *Univ. Health Servs.*, 579 U.S. at 192, 194.

Here, Calderon has not offered any evidence from which a factfinder could infer that the alleged defects are ones that HUD would have considered so important as to "likely or actual[ly]" change its decision to pay Carrington's claims for FHA insurance. *See Univ. Health Servs.*, 579 U.S. at 193. The key point is that there is no evidence on how HUD decides to pay claims or how a loan proceeds through the post-closing process. Calderon has not, for example, introduced documents or testimony from HUD "concerning types of claims [HUD] usually did or did not pay." *United States ex rel. Kietzman v. Bethany Circle of King's Daughters of Madison, Indiana*, 305 F.Supp.3d

964, 977 (S.D. Ind. 2018) (Barker, J.). Nor has she introduced evidence of "what the government's compliance priorities were" or the "severity" that HUD would assign to any underwriting defect. *Id.* Calderon has not retained an expert to connect the underwriting defects to HUD's decision to pay or not pay claims. *See* Order on *Daubert* Motions at 5 – 7 (striking Calderon's testimony on post-closing process as speculative). And Calderon has not shown Carrington was aware that HUD "consistently refuse[d] to pay claims in the mine run of cases based on noncompliance" with HUD's regulations. *Univ. Health Servs.*, 579 U.S. at 195. There simply is a lack of evidence in this record to demonstrate materiality—a necessary element in Calderon's claims.

What's more, the evidence in the record demonstrates that HUD was likely aware of any violation. First, HUD conducted a pre-endorsement review on *every* loan underwritten and approved by Carrington. (Gillis Dep. 68:13 – 15; *see also* Calderon Dep. 134:15 – 24 ("I believe every file is reviewed.")). Second, HUD conducted a Post- Technical Endorsement Technical Review—a full re-underwrite—on many of Carrington's files. (Filing No. 222-33, Declaration of Leslie Donovan ¶ 9) (explaining that 71 of the purported 346 fraudulent loans identified by Calderon had been subject to a Post-Endorsement Technical Review by HUD). Third, HUD, on occasion, has required Carrington to

indemnify it, (*see* Filing No. 228-3, Violation Letters at 1 – 10) (detailing four instances where Carrington had to indemnify HUD), or has identified defects and given Carrington the opportunity to fix them. (*Id.* at 11 – 18) (four letters identifying defects). Fourth, HUD met with Calderon and received her allegations of fraud. (Calderon Dep. 182:9 – 183:8; *see also id.* at 209:16). Despite all of that evidence, Carrington remains a HUD-approved Direct Endorsement Lender, and HUD continues to endorse and pay claims on loans underwritten by Carrington. (Filing No. 222-16, Affidavit of Jeff Gillis ¶¶ 13-15).[3]

All this shows any purported defects in Carrington's underwriting were immaterial. *See Univ. Health Servs.*, 579 U.S. at 195 ("[I]f the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material."); *Sanford-Brown Ltd.*, 840 F.3d at 447 (upholding summary judgment for lack of materiality where "the subsidizing agency and federal agencies" had "already examined

[3]On top of that, in 2019, HUD and the Department of Justice entered into a Memorandum of Understanding that states violations of the false claims act will be primarily enforced through HUD's administrative proceedings. (Filing No. 222-21, Memorandum of Understanding at 2 – 3).

[defendant] multiple times over" and concluded "neither administrative penalties nor termination was warranted.") (internal quotations omitted; *United States ex rel. Janssen v. Lawrence Mem'l Hosp.*, 949 F.3d 533, 542 (10th Cir. 2020) (upholding summary judgment for lack of materiality, in part because of the government's "inaction in the face of detailed [fraud] allegations from a former employee" suggested violations were immaterial);); *cf. Luce*, 873 F.3d at 1008 (upholding finding of materiality where government acted quickly, and there was no "prolonged period of acquiescence"); *see also D'Agostino v. ev3, Inc.*, 845 F.3d 1, 7 (1st Cir. 2016) ("The fact that [the government] has not denied reimbursement for [defendant] in the wake of [relator's] allegations raises serious doubt on the materiality of the fraudulent representations that [relator] alleges."); *United States ex rel. Berg v. Honeywell Int'l, Inc.*, 740 F.App'x 535, 538 (9th Cir. 2018) (relators failed to raise a triable issue as to the element of materiality where government paid claims for five years after becoming aware of fraud allegations).

Calderon resists this conclusion. She insists *every* false certification was material because each one violated HUD underwriting guidelines and regulations—which explicitly identify "material" violations in the direct endorsement lender program. *See* 24 C.F.R. § 203.255(g)(3)(i) – (iv). But the Supreme Court has explicitly rejected the notion that "any statutory, contractual, or regulatory violation is

material so long as the defendant knows the government would be entitled to refuse payment were it aware of the violation." *Univ. Health Servs.*, 579 U.S. at 195. This is true despite the regulation, itself, defining "material" violations. *Id.* ("What matters is *not* the label that the government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is material to the government's payment decision.") (emphasis added). While the guidelines and regulations do some of the work, there still must be evidence connecting the false certifications to HUD's payment decision. There is a lack of evidence of that in this record.[44]

Accordingly, Calderon has not demonstrated a triable issue of fact on the element of materiality.

Causation. Turning now to causation, Calderon must also show Carrington's alleged false certifications was a substantial factor in bringing about the government's loss and that the loss is a type that a reasonable person would see as a likely result of Carrington's conduct. *Luce*, 873 F.3d at 1012. If the loss would have likely occurred had the certifications been accurate, then the causation element is not

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[4] Calderon attempts to rely on Carrington's expert to demonstrate materiality, but this attempt falls short because Keith's report does not opine that HUD found certain violations to be material.

satisfied. *See United States v. Hibbs*, 568 F.2d 347, 352 (3d. Cir. 1977), cited with approval in *Luce*, 873 F.3d at 1013.

Here, there is no evidence showing the false certifications were a substantial factor in bringing about the government's loss or that the government's payment decision was a "likely result" of Carrington's certifications. The court previously struck Calderon's only proffered expert testimony on causation as speculative. (Opinion on *Daubert* motions at 5 – 7). And there is no other evidence—expert or otherwise—from which a jury could trace the reason for a loan's default to the alleged false certifications.

Calderon objects on several grounds. She first asserts causation is a jury question, and a rational jury could infer that Carrington's false certifications led to each loan's default. The premise seems to be that *every* false certification *necessarily* caused the loan to default. But the court respectfully disagrees. A loan could default for any number of other reasons: a change in employment, an increase in obligations, or an onset of illness, among others. Calderon was required to offer some evidence that shows the government's payment decision *likely* resulted from Carrington's false certifications, not just *possibly* resulted from those certifications. *See Joyce v. J.C. Penner Corp., Inc.*, 389 F. App'x 529, 531 (7th Cir. 2010) (speculation about causation will not defeat summary judgment). Put differently, there is no evidence to differentiate a

loan defaulting because of a false certification from a loan defaulting for another reason. *United States ex rel. Fago v. M & T Mort. Corp.*, 518 F.Supp.2d 108, 122 (D.D.C 2007) ("Plaintiff must be able to show damages arose because of the *falsity* of the claim[.]") (italics in original).

Second, Calderon argues causation can be inferred from Carrington's own "default codes" in its servicing files. When submitting a claim for insurance, Carrington used default codes such as "excessive obligations" or "curtailment of income" to convey to HUD the reason for a loan's default. (*See e.g.,* Filing No. 228-9, Delinquency Codes). But reliance on these codes to establish causation is problematic for a number of reasons. First, Calderon has not offered any witness who is qualified to interpret these codes and explain how they impacted HUD's decision to pay claims. Without such foundation, reliance on these codes is speculative. Second, and more to the point, these codes— which are merely phrases—do not establish a link between a loan defaulting and Carrington's purported false certifications. The key problem for Calderon is that she has not provided evidence to create a sufficient nexus between Carrington's alleged misrepresentations and the government's losses. That is fatal to the causation element of her claim. *See United States v. Luce*, No. 11-cv-5158, 2019 WL 3003300, at *9 (N.D. Ill. July 10, 2019) (granting summary judgment to defendant for lack of evidence supporting causal link between

purported misrepresentations and government's losses).

IV. Conclusion

For those reasons, Calderon has failed to create a triable issue as to the elements of materiality and causation on her claims under the False Claims Act. Carrington's motion for summary judgment (Filing No. 220) is therefore **GRANTED**. Calderon's motion for oral argument (Filing No. 227) is **DENIED as MOOT**. Final judgment shall enter accordingly.

SO ORDERED this 9th day of March 2022.