UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED IN PART; DISMISSED IN PART FOR LACK OF JURISDICTION:
December 11, 2017

CBCA 5571

BANK OF AMERICA, NATIONAL ASSOCIATION,

Appellant,

v.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Respondent.

Douglas L. Patin, Robert Maddox, and Aron C. Beezley of Bradley Arant Boult Cummings LLP, Washington, DC; and Karen L. Manos, Melissa L. Farrar, and Helgi C. Walker of Gibson, Dunn & Crutcher LLP, Washington, DC, counsel for Appellant.

Jonathan English and Julie Cannatti, Office of General Counsel, Department of Housing and Urban Development, Washington, DC, counsel for Respondent.

Before Board Judges **KULLBERG**, **LESTER**, and **CHADWICK**.

Opinion for the Board by Board Judge **CHADWICK**. Board Judge **LESTER** concurs in part and dissents in part.

Bank of America, National Association (BANA or the bank) timely appealed from a contracting officer's decision denying its certified claim for almost $59 million under a contract with the respondent, Department of Housing and Urban Development (HUD), under which BANA performed "mortgage subservices" for the Government National Mortgage Association (GNMA or Ginnie Mae), a Government-owned corporation.

For reasons that should become evident—and because neither party consistently takes this view—we emphasize that BANA's contract was with HUD, not directly with Ginnie Mae, and that this appeal is before us under the Contract Disputes Act (CDA), 41 U.S.C.

§§ 7101-7109 (2012), based upon a certified claim presented to, and denied by, a HUD contracting officer acting on behalf of the United States of America.

The Board granted HUD leave to file a dispositive motion in lieu of an answer to BANA's complaint. Two of HUD's arguments in its motion are that (1) BANA released its breach of contract claim in a 2014 settlement agreement between the United States, six States, and BANA that released "the United States" and its "agents" from "any claims . . . related to" BANA's performance of this contract during the relevant years, and (2) BANA's alternative unjust enrichment claim was never presented to the contracting officer. The bank responds that (1) it "did not release any claims against GNMA" in the 2014 settlement agreement by releasing claims against "the United States"; (2) we should not read the bank's release in that agreement as barring its breach claim because "GNMA did not release its reciprocal [breach] claim against BANA"; (3) BANA's breach claim is not "related" either to its "performance" of the contract, or to "the investigation and civil prosecution thereof," as the release language further requires; (4) Ginnie Mae made a payment to BANA, after the 2014 settlement, that it would not have made, had it interpreted BANA's release as broadly as HUD now does; (5) HUD considered BANA's CDA claim for a length of time that suggests that HUD did not believe the breach claim had been released; and (6) even assuming that BANA released its breach claim, its unjust enrichment theory is properly before us.

HUD has the better arguments. We therefore grant HUD's motion in relevant part, summarily deny BANA's breach of contract claim, and dismiss BANA's unjust enrichment claim for lack of jurisdiction.

Background

I. The Contract and the Reimbursement Gap

We rely here on facts undisputed by the parties, contract-related documents submitted without objection for the appeal file under Board Rule 4 (48 CFR 6101.4 (2016)), and applicable law. HUD awarded the contract (C-OPC-23289) to Countrywide Home Loans Servicing, LLP, effective March 1, 2009. The contract and all modifications identified HUD as the contracting authority and Ginnie Mae's Washington, D.C., headquarters as the delivery location and payment office. The contract was novated to a successor company in 2009, and to BANA in November 2011. We will call all three contractors "BANA" for simplicity.

Ginnie Mae is a corporation owned solely by the United States and situated "in" HUD. 12 U.S.C. § 1717(a)(2)(A). Its primary mission is to promote home ownership by facilitating the bundling of individual mortgages into mortgage-backed securities for sale to institutional investors. *See id*. § 1717(b). In general, the HUD contract here required BANA to meet

Ginnie Mae's indefinite requirements for "the complete range of services expected of an issuer" of such securities. The services relevant to this appeal were known as "T&I." When homeowners with securitized mortgages fell behind in their payments, the contract required BANA to pay outstanding property taxes ("T") and insurance premiums ("I"), so that the mortgaged properties remained unencumbered by liens filed by tax authorities or other third parties that could increase the Government's costs of guaranteeing the mortgage-backed securities. BANA argues, and we assume without deciding (as the issue is immaterial), that the contract was ambiguous with respect to whether BANA was supposed to advance its own money for T&I, and then seek reimbursement from Ginnie Mae, or, instead, make T&I payments only with Ginnie Mae's prior approval and funding. BANA alleges, and HUD does not deny, that "BANA consistently advanced its own funds" for T&I without preapproval and was reimbursed hundreds of millions of dollars for those payments, upon requesting reimbursement "no more than ninety (90) days" after it made the payments.

In August 2009, the parties bilaterally modified the HUD contract. When another mortgage subservicer for Ginnie Mae abruptly went out of business, BANA and HUD agreed to add the other contractor's portfolio of loans to BANA's contract, dramatically increasing the number of mortgages that BANA was handling, from about 5000 to about 180,000. (The copy in the record of the task order making this change has no signature in the contractor's signature block, but other documents, including later task orders, show that the change was negotiated and mutually agreed.) According to BANA, due to the increased workload, "the manual . . . process that BANA had previously used to report (but not track) T&I shortfalls" for individual mortgages "had to be replaced with an automated [database] process."

What happened next led to the claims asserted by BANA in this appeal. During at least some of BANA's transition from the manual reporting system to the automated database, which lasted from September 2009 until January 2011, BANA allegedly continued making T&I payments owed by mortgagors, but it stopped asking Ginnie Mae for reimbursement. According to BANA, the bank's management, at least, did not discover this oversight until September 2013—thirty-two months after BANA established the mortgage database—when BANA "compared negative [T&I] escrow balances of individual [serviced] loans . . . to the balance of the account in which GNMA deposited all of its reimbursement funds for T&I advances." Some eight months after that, in May 2014, a BANA executive made a presentation to Ginnie Mae officials in which BANA said it had made $58.9 million in unreimbursed T&I payments from September 2009 through January 2010. BANA does not allege that it approached a HUD contracting officer about the possibility of being reimbursed for these payments, far outside the usual ninety-day cycle, at this time. Ginnie Mae unilaterally ceased discussing the issue with BANA in June 2014, without explanation.

II. BANA's $9.65 Billion Settlement with the United States and Six States

Meanwhile, negotiations bearing on the HUD contract were proceeding on a separate track. Following the financial crisis that began in 2008, the U.S. Department of Justice (DOJ), HUD, the Federal Deposit Insurance Corporation, the Securities and Exchange Commission, and several State attorneys general investigated BANA and its affiliated entities for potential legal liabilities related to the markets for mortgage-backed securities and other collateralized debt obligations. In August 2014 (three months after BANA advised Ginnie Mae of the $58.9 million shortfall in the T&I accounts), BANA agreed to pay a total of $9.65 billion to resolve those investigations. The August 2014 settlement agreement stated in its first paragraph that it was "entered into between the United States acting through" DOJ, "the States of California, Delaware, Illinois, Maryland, and New York, the Commonwealth of Kentucky," and BANA and its affiliates. The agreement referred to "[t]he United States, the States, and [the bank] . . . collectively . . . as 'the Parties.'"

Several elements of the twenty-seven-page settlement agreement are pertinent here. The agreement recited that HUD had "conducted an investigation of [BANA's] performance as Master Subservicer under Contract Number C-OPC-23289 with . . . Ginnie Mae." The agreement also included in the definition of BANA's "Covered Conduct" BANA's "performance as Master Subservicer under Contract Number C-OPC-23289, with Ginnie Mae for the period March 1, 2009 through August 31, 2014." Both of these statements were partially incorrect, since, as noted above, contract C-OPC-23289 was a HUD contract, not a Ginnie Mae contract, a point that both parties here, to differing degrees, overlook as well.

BANA agreed in the August 2014 settlement agreement to pay $200 million of its $9.65 billion total payment "in settlement of potential contractual claims related to [BANA's] performance as Master Subservicer under Contract Number C-OPC-23289 with Ginnie Mae [sic]. Any amount that Ginnie Mae receives will be deposited into the Government National Mortgage Association's Financing Account."

For reasons not specified in the settlement agreement, although the agreement named "the United States" as the sole federal "Party," it included separate releases of claims by "the United States," by the Federal Housing Authority (a component of HUD), and by Ginnie Mae. "Ginnie Mae's" release stated that HUD, "acting on behalf of Ginnie Mae," released BANA "from any civil or administrative monetary claim Ginnie Mae has against [BANA] for the Covered Conduct [as defined in the quotation above] under the common law theory of breach of contract."

BANA's release stated:

> Bank of America . . . fully and finally releases the United States and the States, and their officers, agents, employees, and servants, from any claims (including attorney's fees, costs, and expenses of every kind however denominated) that Bank of America has asserted, could have asserted, or may assert in the future against the United States and the States, and their officers, agents, employees, and servants, related to the Covered Conduct to the extent released hereunder and the investigation and civil prosecution to date thereof.

The settlement agreement was signed by, among others, the Associate Attorney General (for the United States), a HUD assistant secretary and the president of Ginnie Mae (for HUD), the deputy general counsel of BANA, and the president of a BANA affiliate.

III. Further Written Communications Between Ginnie Mae and BANA About T&I

On August 28, 2014, after the $9.65 billion settlement took effect, Ginnie Mae paid BANA, in response to a T&I reimbursement form and documentation submitted by BANA under the usual procedures about one week earlier, approximately $4.9 million for T&I payments that BANA had made on behalf of borrowers in July 2014, during the period of "Covered Conduct" under the August 2014 settlement agreement.

On December 1, 2014, BANA submitted a form and supporting documentation to Ginnie Mae seeking $58,870,460.45 in reimbursement for T&I advances that BANA had made on behalf of borrowers between September 2009 and January 2010. Fifteen days later, on December 16, Ginnie Mae's government technical representative for the HUD contract advised BANA by email that Ginnie Mae believed BANA had released any such entitlement in the August 2014 settlement agreement. Thirty-seven days after that, on January 23, 2015, the government technical representative told BANA by email that "[a]fter several internal meetings[,] it ha[d] been determined" that BANA should address any further communications about Ginnie Mae's denial of the reimbursement request for September 2009 through January 2010, and the scope of BANA's August 2014 release, to the HUD contracting officer.

IV. The Claim and the Appeal

The contract expired in February 2015. In September 2015, BANA submitted a certified CDA claim to the HUD contracting officer seeking $58,870,460.45 for BANA's "overlooked" and unreimbursed T&I payments between September 2009 and January 2010. BANA alleged that "Ginnie Mae breached the contract" by not reimbursing BANA for those payments, and that, "[a]dditionally, Ginnie Mae's refusal to reimburse BANA under the

Contract results in an inequitable $58 million windfall to Ginnie Mae," as "neither party realized that BANA had never submitted billings" for the T&I payments at issue until years after the fact. "Ginnie Mae's reliance on the [August 2014] settlement agreement," BANA argued, was "misplaced."

Section III of BANA's claim, titled, "Elements of BANA's Claim," had three subsections: "A. BANA Is Entitled To Be Reimbursed For The Overlooked T&I Reimbursements Under The Provisions Of The Contract"; "B. Ginnie Mae Breached The Contract By Failing To Reimburse BANA For The Amount In Dispute To Which BANA Is Entitled Under The Provisions Of The Contract"; and "C. BANA Has Quantified And Requested A Sum Certain To Which It Is Entitled." BANA concluded its claim by "request[ing] the amount of $58,870,460.45 to which it is entitled under Contract C-OPC-23289 for the reimbursement of T&I advances paid by BANA on behalf of Ginnie Mae in performance of its contractual obligations."

After further communications with BANA, the HUD contracting officer issued a decision on the claim in September 2016. After stating, in one paragraph, HUD's view of the history and merits of the claim, the contracting officer concluded in the next paragraph, which was a single sentence: "Because [BANA] failed to invoice the claimed amount until after the execution of the [August 2014] settlement agreement between [BANA] and HUD, which discharged HUD from any further claims related to [BANA's] performance under C-OPC-23289, the claim is denied." The decision did not refer to an unjust enrichment theory.

BANA filed this appeal in December 2016. Its complaint has two counts. Count I, "Contractual Entitlement to Reimbursement," alleges that "BANA is entitled under the Contract" to $58,870,460.45 in T&I reimbursements. Count II, "Unjust Enrichment and Payment by Mistake," alleges that, because BANA paid money from borrowers' T&I escrow accounts over to Ginnie Mae "under the mistaken belief" that Ginnie Mae had been properly reimbursing BANA for T&I payments that BANA had previously made, "GNMA has unjustly received a windfall from BANA valued at up to $58,870,460.45."

Discussion

I. Legal Standards

HUD filed a motion seeking dismissal of BANA's complaint on four grounds, including failure to state a claim on which we could grant relief and lack of jurisdiction over count II, or, in the alternative, summary relief on three grounds. We need only reach HUD's key arguments, with which we agree. HUD's principal attack on count I is that BANA released its claim for reimbursement under the HUD contract in the August 2014 settlement

agreement with the United States. Because the release defense is contractual but relies on documents outside the pleadings, we treat it as a request for summary relief, *see ServiTodo, LLC v. Department of Health & Human Services*, CBCA 5524, 17-1 BCA ¶ 36,672, at 178,567, which we may grant only if HUD is entitled to relief on the undisputed facts "as a matter of law." Rule 8(g)(1). HUD's main attack on count II is that we lack jurisdiction to hear it because BANA did not submit an unjust enrichment claim to the contracting officer. That argument requires us to parse BANA's certified claim, and raises an issue of law. *Lee's Ford Dock, Inc. v. Secretary of the Army*, 865 F.3d 1361, 1369 (Fed. Cir. 2017) ("Whether the Board has jurisdiction over a claim presents an issue of law[.]").

II. BANA's Breach Claim and Its August 2014 Release

Somewhat unusually for Board practice, which usually involves procurement contracts, neither party claims to have first-hand knowledge of what the negotiators of the August 2014 settlement agreement intended to accomplish, or of what the high government and corporate officials who signed the agreement understood it to mean. Both sides rely on general principles of law and English syntax in construing the agreement, as do we.

"A settlement agreement is a contract, the interpretation of which is a question of law." *Musick v. Department of Energy*, 339 F.3d 1365, 1369 (Fed. Cir. 2003). "The fundamental objective in contract interpretation is to determine the parties' intent at the time the contract was executed." *ASP Denver, LLC v. General Services Administration*, CBCA 2618, et al., 15-1 BCA ¶ 35,850, at 175,304 (2014). To do so, we apply the familiar canons of contract interpretation, reading the agreement holistically and as far as possible according to its plain and ordinary meaning. *E.g.*, *id.*; *Government Marketing Group v. Department of Justice*, CBCA 71, 08-1 BCA ¶ 33,834, at 167,454. We apply the same principles when we focus on the scope of a release. *E.g.*, *Perry Bartsch Jr. Construction Co. v. Department of the Interior*, CBCA 4865, et al., 16-1 BCA ¶ 36,576, at 178,131. We will generally examine parol or other extrinsic evidence only if the release is materially ambiguous. *See id.* If we would need to weigh such evidence in order to determine and effectuate the parties' mutual intent, we must deny summary relief. *See id.*

We agree with HUD that the August 2014 settlement agreement unambiguously released the claim of breach by nonpayment that BANA asserts in count I. While arguably not crystal clear, the language of the agreement is plain enough. In exchange for (among other consideration) the Government's release of breach claims arising from BANA's performance of the HUD contract from award through August 2014, BANA agreed to pay $200 million of its $9.65 billion total payment to Ginnie Mae (the funding source for the HUD contract) and to release the Government from breach claims under the contract related to the same period. The settling parties' intent is evident, even if not perfectly expressed in

all respects. In particular, the settling parties referred imprecisely to the HUD contract as a contract "with Ginnie Mae," and to potential government claims under that contract as potential claims that "Ginnie Mae ha[d]," but those errors do not create any ambiguity as to which contract the parties had in mind ("C-OPC-23289"), or as to their mutual intent to resolve actual and potential claims under the HUD contract through August 2014. *Cf. R.G. Robbins & Co.*, GSBCA 4748, 79-1 BCA ¶ 13,665, at 67,037 (1978) ("[A]ny ambiguity created by the [contract's] erroneous use of an upper case 'I,' rather than a lower case 'I' [in citing a specification] was cured by the furnishing of . . . references to the intended Federal Specification and the appropriate amendment thereto.").

BANA advances multiple reasons to read its release in the August 2014 settlement agreement narrowly enough to preserve its contract claim, none of which we find persuasive. BANA's first argument—to which both BANA and HUD devote much space in their briefs—rests on a mistaken view of the identity of the federal party to the HUD contract, the August 2014 settlement, and this appeal. As discussed, BANA formed a contract with the United States (acting through a HUD contracting officer), entered into the August 2014 settlement agreement with the United States (acting through DOJ), and is pursuing a claim against the United States (acting through HUD) before the Board.

In support of a narrow reading of its release in the settlement agreement, BANA argues at length that "the most logical interpretation of the Agreement is that a reference to 'the United States' does not imply a reference to 'Ginnie Mae'" (which, BANA argues, has an unsettled governmental status as a government corporation), "and therefore, BANA's release of claims against 'the United States' *did not release any claims against GNMA*" (emphasis added). This argument is simply irrelevant, as the claim before us under the HUD contract is ultimately against the United States, not against Ginnie Mae. *See Texas Health Choice, L.C. v. Office of Personnel Management*, 400 F.3d 895, 899 (Fed. Cir. 2005) ("[T]he CDA sets forth the process for resolving claims by a contractor against the United States relating to a contract[.]"); *Inslaw, Inc.*, DOT BCA 1609, et al., 89-3 BCA ¶ 22,121, at 111,252 (single-judge discovery order) (boards of contract appeals "hear and adjudicate claims by or against the United States arising out of contract"); *see also* 31 U.S.C. § 1304(a)(c)(3); 41 U.S.C. § 7108(b) (awards against the Government by boards of contract appeals are payable from the Department of the Treasury's permanent indefinite judgment fund); 41 U.S.C. § 7101(7) ("contractor" in the Contract Disputes Act "means a party to a Federal Government contract other than the Federal Government"); 42 U.S.C. § 3532(a) (HUD is an executive department headed by a Secretary appointed by the President); *cf.* 41 U.S.C. § 7104(b)(1); 28 U.S.C. § 1491(a) (in lieu of appealing a denial of a CDA claim to a board of contract appeals, a contractor may file suit in the United States Court of Federal Claims, which has jurisdiction to enter judgments "based . . . upon any express or implied contract with the United States"). The reference in BANA's release to "the United States"

and its "agents" plainly includes HUD in its role as the contracting agency and respondent in this CDA case.

BANA's second and third arguments for a narrow reading of its release in the August 2014 settlement agreement focus on the fact that BANA released claims against the United States "related to the Covered Conduct *to the extent released hereunder* and the *investigation and civil prosecution to date thereof*" (emphasis added). BANA argues that the words "to the extent released hereunder" mean that BANA's release in the settlement agreement is "reciprocal to" the "Ginnie Mae release" (which, we note, was actually a release by HUD on Ginnie Mae's behalf). BANA argues that, since "Ginnie Mae" released only claims "related to" *BANA*'s "performance of" the contract—and did not release claims related to *Ginnie Mae's own* performance—BANA did not release its contract claim here, which, according to BANA, "pertain[s] only to GNMA's performance," not to BANA's.

We agree that the two releases are reciprocal but otherwise reject BANA's reasoning. Each party's performance under a contract "relates to" the other party's performance by definition. All of a party's promises of performance are exchanged as consideration for all of the other party's promises. *See Restatement (Second) of Contracts* § 81 (1981); *Enron Federal Solutions, Inc. v. United States*, 80 Fed. Cl. 382, 404 (2008) (noting the "presumption that when parties enter into a contract, each and every term and condition is in consideration of all the others, unless otherwise stated"). BANA's claim "relates" as much to its own performance (making T&I payments and requesting reimbursement) as to the Government's. The 2014 settlement agreement recited that HUD had "investigat[ed]" BANA's "performance" under the mortgage subservices contract. It was natural, therefore, for the "Ginnie Mae" release—which the agreement correctly described as a release by HUD—to include within its scope breach claims based on BANA's "performance of" the contract. It would have been redundant for the Government, as the investigating party, to add that its contract claims related to its own performance.

The settlement agreement did not suggest that BANA had investigated contract claims against the Government. By releasing "the United States" from unspecified claims "related to" BANA's contract performance, "to the extent released hereunder," BANA plainly released breach claims to the same extent that the Government released claims under the same contract for the same period. The phrase "to the extent released hereunder" must refer back to "claims," not to "Covered Conduct," since only claims, not conduct, can be released. "To the extent released hereunder" must therefore be shorthand for "to the extent [HUD has] released [claims] hereunder." If the phrase referred to the bank's claims, it would be tautological. The full phrase could have been made even clearer by rearranging it to say, "claims, to the extent released hereunder, related to the Covered Conduct," and that is obviously what it means. Because no other reading makes sense in context, there is no

reason to look for extrinsic evidence of the parties' intent. *See A-Transport Northwest Co. v. United States*, 36 F.3d 1576, 1584 (Fed. Cir. 1994) ("A contract is ambiguous only when it is susceptible to two reasonable interpretations."); *see also McCann v. McGlynn Lumber Co.*, 34 S.E.2d 839, 845 (Ga. 1945) ("A contract may be so clear as not to require interpretation, but a mere lack of clarity on casual reading is not the criterion for determining whether a contract is afflicted with ambiguity within the rule as to the admission of parol evidence to explain its meaning.").

Our reading of the phrase "to the extent released hereunder" is faithful to the text of the settlement agreement and does not render the phrase "useless" or "superfluous." *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 979 (Ct. Cl. 1965). We read this phrase as limiting BANA's release to the types of "common law . . . breach of contract" claims covered by HUD's release—which appears *not* to release statutory claims, such as fraud. BANA itself adopts this reading in arguing that its release does not bar its unjust enrichment claim, which is not a breach claim. (The dissent, by contrast, suggests that the phrase "to the extent released hereunder" might have significance that not even BANA, which acknowledges that it "release[d] reciprocal claims as to each of the [Government] releases," envisions. The bank does not argue, much less point to evidence, that it intended to exclude contract claims against the United States from the scope of its release.)

Because BANA's claim for reimbursement for its "overlooked" T&I payments from 2009 and 2010 is styled as a common law breach claim, it is the type of claim that BANA expressly released. Although BANA's certified claim alleged that the breach by nonpayment occurred when Ginnie Mae rejected BANA's formal payment request *after* the parties signed the settlement agreement, the breach claim "relate[s] to" the period of contract performance covered by the settlement agreement and was, as of August 2014, at least a potential claim that, in the words of the settlement agreement, the bank "may [have] assert[ed] in the future against the United States."

BANA next focuses on the words extending its release to "the investigation and civil prosecution to date" of BANA's covered conduct. BANA argues that "[b]ecause [its] Complaint does not allege that there was any investigation or civil prosecution of *BANA's claims*, the release does not extend to those claims, even if they sound in breach of contract" (emphasis added). Any other reading, BANA argues, would render its release not reciprocal to the Government's release. We simply do not read the reference to "investigation and civil prosecution" in BANA's release as having much at all to do with the HUD contract, which accounted for only about 2% of the total settlement value ($200 million out of $9.65 billion).

BANA agreed to a single release in settling a multiplicity of federal and state claims. The plain and ordinary meaning of the words "investigation and civil prosecution to date"

in the omnibus release refers to the work of the various *government* agencies in developing the potential causes of action *against BANA*, which BANA deemed worth settling for $9.65 billion. BANA released the United States and the States from "any claims . . . related to" such "investigation[s] and civil prosecution[s]," whatever those claims might have been. BANA's alternative reading is both ungrammatical and unreasonable. BANA argues that the words "the investigation and civil prosecution to date thereof" appear within a "subordinate clause that begins with 'to the extent.'" That is, BANA reads its release as covering claims related to its covered conduct, subject to the limiting clause, "to the extent released hereunder and the investigation and civil prosecution to date thereof." This reading turns the latter quoted words into an ungrammatical fragment, which BANA reads to mean that it released its contract claims only "to the extent" that BANA investigated and prosecuted breach claims relating to the claims that the Government released.

The grammatical context of the relevant words, however, starts earlier in the sentence, with the prepositional phrase "related to." Read grammatically, BANA's release states that BANA released claims "related to" two things: (1) "the Covered Conduct to the extent released hereunder" (addressed above), and (2) "the [Government's] investigation and civil prosecution to date thereof" (a phrase that is not relevant here). The sentence would have been even clearer with another "to" before the words "the investigation and civil prosecution," but it is clear enough without it. (By contrast, BANA's reading could be made grammatical only by inserting the word "of" between "and" and "the investigation," creating the phrase "to the extent . . . of.") We see no reason or basis to depart from ordinary English grammar to create a loophole in the release such that, if BANA had a potential claim under the HUD contract, but it did not investigate and prosecute the claim (whatever that means) by August 2014, BANA could later assert the claim to claw back some or all of the $200 million that BANA paid Ginnie Mae to resolve claims against the bank under the contract. Alternatively, it is undisputed that BANA began "investigating" its unreimbursed T&I payments no later than September 2013, eleven months before it signed the release. Even assuming that BANA's release was limited to breach claims that a party had investigated or prosecuted, we would find that the release encompassed BANA's claim.

BANA's final two arguments for reading the August 2014 settlement agreement as preserving its breach claim focus on actions by the Government after the settlement. Citing *Community Heating & Plumbing Co.. v. Kelso*, 987 F.2d 1575 (Fed. Cir. 1993), and similar cases, BANA argues that we should find that it did not release its breach claim because "GNMA treated the 2014 Settlement Agreement as non-dispositive of the instant claim by: (1) paying an invoice for services rendered during the covered period after the Agreement was executed, and (2) continuing to consider BANA's claim for over a year after it was filed." *Community Heating* teaches that post-release conduct can be extrinsic evidence of parties' mutual intent. "[W]here the parties continue to consider [a] claim after execution

of a release," a tribunal "may" find that "[s]uch conduct manifests an intent that the parties never construed the release as an abandonment of [an] earlier claim." *Id*. at 1581 (noting that "the Navy continued to *negotiate and audit* Community's claims *years* after they were submitted" (emphasis added)). As the Court of Claims held thirty years before *Community Heating*, "[W]here the conduct of the parties in continuing to consider a claim after the execution of the release *makes plain* that they *never* construed the release as constituting an abandonment of the claim, . . . the release will not be held to bar the prosecution of the claim." *J.G. Watts Construction Co. v. United States*, 161 Ct. Cl. 801, 807 (1963) (emphasis added), *quoted in Walsh/Davis Joint Venture v. General Services Administration*, CBCA 1460, 11-2 BCA ¶ 34,799, at 171,262. *But see Sam Bonk Uniform & Civilian Cap Co. v. United States*, 230 Ct. Cl. 926, 928-29 (1982) ("The release means what it says, and the failure of the contracting officer . . . to consider it [when deciding a claim four months after the execution of the release] does not preclude our consideration of and reliance upon it.").

Neither the routine T&I reimbursement by Ginnie Mae under the contract in August 2014, nor the amount of time that the HUD (not Ginnie Mae) contracting officer took to decide BANA's certified claim, is evidence of the kind of negotiation, auditing, or other active consideration of the merits of BANA's claim that could raise doubt as to whether the United States, acting here through HUD, construed BANA's release in the 2014 settlement agreement in accordance with what we have found to be the release's plain meaning. *Compare Ahtna Environmental, Inc. v. Department of Transportation*, CBCA 5456, 17-1 BCA ¶ 36,600, at 178,306-07 (2016) (finding that a prior release did not bar a claim where the agency "expended considerable effort in reviewing [the claim] on its merits, requesting additional information, and preparing a decision . . . identifying a potential entitlement to [recovery]"), *and Walsh/Davis Joint Venture*, 11-2 BCA at 171,263-64 (denying summary relief based on evidence that the agency "consider[ed] inefficiency claims of other subcontractors, notwithstanding modification language which appeared to waive such claims," which was evidence "that the parties never intended the language to preclude the claims") *with Trataros Construction, Inc. v. General Services Administration*, GSBCA 15344, 03-1 BCA ¶ 32,251, at 159,466 (enforcing a release where the agency "wasted no time in asserting accord and satisfaction" upon receiving a claim and "never expressed any intention to increase the contract price in a way that conflicted with the intent expressed in" the release), *and Meridian Engineering Co. v. United States*, 122 Fed. Cl. 381, 412 (2015) (enforcing releases where "there were no negotiations of [plaintiff's] claims after" it signed them, "and there is no evidence the parties discussed the matter further").

Ginnie Mae's payment of $4.9 million to BANA in August 2014 as reimbursement for T&I payments made in July 2014 tells us nothing about whether BANA released its breach claim, because the payment was not for a breach claim. BANA argues vigorously, and we agree, that it released common law breach claims against the United States in the

August 2014 settlement agreement. BANA did not release its entitlement to be paid for performing the HUD contract. A "routine request for payment" under a contract, such as BANA's request for T&I reimbursement in August 2014, is not a claim, either under the CDA or in common parlance. *James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1542 (Fed. Cir. 1996). "'A routine request for payment is made under the contract, not outside it,' . . . while a non-routine request [i.e., a claim] seeks 'compensation because of unforeseen or unintended circumstances.'" *Kellogg Brown & Root Services, Inc. v. Murphy*, 823 F.3d 622, 627 (Fed. Cir. 2016) (quoting *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575, 1577 (Fed. Cir. 1995) (en banc)). Even assuming, without deciding, that we might impute *Ginnie Mae's* understanding of the 2014 settlement agreement to *HUD*, a routine payment by Ginnie Mae after the effective date of the settlement agreement for services rendered before the effective date is not evidence of the Government's view of the scope of BANA's release of "claims." This routine transaction under the contract contrasts sharply with BANA's *non*-routine interest in belated reimbursement for its "overlooked" T&I payments from 2009 and 2010, an interest that ripened into a potential claim well before August 2014.

That it took the HUD contracting officer a year to deny BANA's certified claim also does not suggest to us that we should not read BANA's release in the August 2014 settlement agreement to mean what it says. The Government "wasted no time in asserting" the release defense here. *Trataros*, 03-1 BCA at 159,459. The Ginnie Mae technical representative cited the release in writing in December 2014, fifteen days after BANA submitted its formal invoice for the T&I payments from 2009 and 2010. Five weeks later, after the winter holidays, Ginnie Mae properly referred BANA to the HUD contracting officer for further inquiries about this contractual matter. When BANA submitted its certified claim in September 2015, it specifically argued that Ginnie Mae had erred by denying its reimbursement request based on BANA's release in the 2014 settlement agreement. While we do not know why it took the contracting officer another year to decide that BANA had indeed released its claim, BANA cites no triable evidence that HUD affirmatively acted during that year as if the claim was not released. We certainly do not wish to discourage communications between contracting officers and contractors about pending claims by creating a "shelf life" during which the Government must either issue a final decision asserting a release defense or lose it. Nothing about HUD's conduct after the $9.65 billion settlement in August 2014 could be seen as "manifest[ing] an intent that the parties never construed [BANA's] release [in the settlement agreement] as an abandonment of [BANA's contract] claim." *Community Heating*, 987 F.2d at 1581.

We therefore grant HUD's motion for summary relief as to count I.

III. BANA's Unjust Enrichment Claim and the Board's Jurisdiction

The Board's CDA jurisdiction may attach only after a CDA claim is presented to the contracting officer and denied, or deemed denied. 41 U.S.C. §§ 7103, 7104(a); *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982); *EnergX, LLC v. Department of Energy*, CBCA 3060, 17-1 BCA ¶ 36,633, at 178,415 ("The lack of a claim cannot be cured [during appeal]."). This means, among other things, that a claim in litigation "must be 'based on the same claim previously submitted to and denied by the contracting officer.'" *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003) (quoting *Cerberonics, Inc. v. United States*, 13 Cl. Ct. 415, 417 (1987)). A litigated claim differs from a claim presented to the contracting officer if it asserts a new theory of relief involving "'a different or unrelated set of operative facts.'" *Lee's Ford Dock*, 865 F.3d at 1369 (quoting *Placeway Construction Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990)).

We agree with HUD that we lack jurisdiction to adjudicate BANA's count II, "Unjust Enrichment and Payment by Mistake," because, to the extent that count II asserts a claim other than breach, BANA did not present that claim to the HUD contracting officer. BANA's certified claim used the words "inequitable" and "windfall," but BANA argued in the claim that it was entitled to $58.9 million in T&I reimbursement "under the provisions of the contract." BANA did not present any non-contractual theories of relief to the contracting officer. Now, BANA argues that its unjust enrichment claim is an "alternative claim theor[y]" that could not have been released in the August 2014 settlement agreement, because it is not a common law breach claim. BANA further argues, in response to HUD's motion on the merits of count II, that "the scope of the Contract *did not cover* payments advanced by BANA on GNMA's behalf during the period of extreme volatility that surrounded the 2008-10 financial crisis," and that factual circumstances at that time "required BANA to perform effectively *extra-contractually* (and at times truly *without contract*)" (emphasis added). These are new factual, as well as legal, grounds for relief.

BANA did not demand relief from the contracting officer on grounds other than the terms of an allegedly binding contract. Indeed, as far we can tell, BANA does not now argue that it did so. In its opposition to HUD's motion and in a surreply, BANA addresses this issue only in passing, asserting that its claim and complaint rely on "essentially the same operative facts." The operative facts of a claim alleging the absence of a contract differ from the operative facts of a claim under a contract. *E.g.*, *Lumbermens Mutual Casualty Co. v. United States*, 654 F.3d 1305, 1316-17 (Fed. Cir. 2011). We lack jurisdiction to adjudicate count II of the complaint because it is a "new claim." *Lee's Ford Dock*, 865 F.3d at 1369.

Decision

HUD's motion for summary relief as to count I is granted. The appeal is **DENIED** as to the breach claim. HUD's motion to dismiss count II is granted. The claim of unjust enrichment and payment by mistake is **DISMISSED FOR LACK OF JURISDICTION**. HUD's dispositive motion is otherwise denied as moot.

KYLE CHADWICK
Board Judge

I concur:

H. CHUCK KULLBERG
Board Judge

LESTER, Board Judge, concurring in part and dissenting in part.

I agree with the majority's holding that we lack jurisdiction to entertain the unjust enrichment claim presented by appellant, BANA, not only because it is not encompassed within the certified claim that BANA submitted to the respondent agency, HUD, but also because unjust enrichment is "an equitable doctrine applied to those situations where the rights and liabilities of the parties are not defined in a valid contract." *Great Northern Forestry Service*, AGBCA 85-260-1, et al., 90-2 BCA ¶ 22,668, at 113,885 (quoting *Jack D. Higgins*, ASBCA 33086, 87-3 BCA ¶ 20,132, at 101,924). The Contract Disputes Act, 41 U.S.C. § 7101-7109 (2012), does not grant us jurisdiction to entertain that type of implied-in-law contract claim. *See, e.g.*, *Public Warehousing Co.*, ASBCA 56022, 11-2 BCA ¶ 34,788, at 171,227; *United Rentals, Inc.*, HUD BCA 03-D-100-C1, 06-1 BCA ¶ 33,131, at 164,188 (2004); *Great Northern Forestry*, 90-2 BCA at 113,884-85; *Energroup, Inc.*, EBCA 413-5-88, 89-1 BCA ¶ 21,233, at 107,105-06 (1988).

I also agree with the majority's reasoning in disposing of the bulk of BANA's challenges to the release contained in the 2014 settlement agreement. In my opinion, the majority correctly finds that, because the contract at issue here is with HUD, not Ginnie Mae, any appeal before the Board is limited to BANA's claims against HUD (as an executive

agency of the United States); that, to the extent that BANA released its claims against the United States, BANA did not somehow preserve a separate set of contractual (or non-contractual) claims against Ginnie Mae that can be presented here; that references in the 2014 settlement agreement to Ginnie Mae that should have been references to HUD are irrelevant for purposes of properly interpreting the release; that the release contained in the 2014 settlement agreement is not limited to those claims that HUD or the Department of Justice had previously investigated and prosecuted; and that the Government's post-settlement actions in paying BANA's July 2014 T&I expenses and in taking time to evaluate BANA's September 2015 certified claim did not somehow waive or invalidate the release.

Nevertheless, I disagree with the majority's position that, at the summary relief stage of proceedings, we can find the 2014 release to be sufficiently clear to encompass BANA's claim for reimbursement of those T&I expenses incurred between September 2009 and January 2010. To determine the scope of any release, we have to look at its specific language. "Because a release is contractual in nature, it is interpreted in the same manner as any other contract term or provision." *Bell BCI Co. v. United States*, 570 F.3d 1337, 1341 (Fed. Cir. 2009). We give an unambiguous release "its 'plain and ordinary' meaning," *TEG-Paradigm Environmental, Inc. v. United States*, 465 F.3d 1329, 1338 (Fed. Cir. 2006), but, "[i]f the release is ambiguous as to its scope of coverage," we must "construe its language to effect the parties' intent at the time they executed the release." *Dureiko v. United States*, 209 F.3d 1345, 1356 (Fed. Cir. 2000). Typically, "[t]he parties' intent is a question of fact." *Id.* As a result, if a release is ambiguous, "the matter is not amenable to summary resolution" to the extent that it "requir[es] weighing of external evidence." *Beta Systems, Inc. v. United States*, 838 F.2d 1179, 1183 (Fed. Cir. 1988).

By its express language, the release in the 2014 settlement agreement applies to "any claims" that BANA might have against the United States "related to the Covered Conduct," including BANA's performance as master subservicer under the contract at issue here, but only "to the extent released hereunder." The addition of that qualifier – "to the extent released hereunder" – has to mean something. *See Metric Constructors, Inc. v. United States*, 314 F.3d 578, 582 (Fed. Cir. 2002) (addressing a situation in which "the release language qualifies the extent of the release"). With due respect to the majority's reasoning, I do not read that qualifier to the release as unambiguously barring BANA's T&I reimbursement claim. To me, what the qualifier means is unclear, rendering it ambiguous.

Upon a proper evaluation and weighing of the parties' evidence regarding intent (something that we cannot do at the summary relief stage), it may well turn out that the majority's interpretation of the release as barring BANA's current claim is correct. Unlike the majority, though, I do not read HUD's waiver of, and release of BANA from, all common

law breach of contract claims that Ginnie Mae might have against BANA under this contract (as set forth in paragraph 7 of the settlement agreement) as automatically meaning that BANA has similarly, and reciprocally, released the Government from all common law breach of contract claims that BANA itself might have against the Government. BANA's argument that its release was limited to any claims that it might have that are directly associated with the specific claims being released by the United States and the various states is, on its face, not implausible. Although the majority suggests that, unless BANA was releasing all of its own potential breach claims under the contract, BANA's release would be essentially meaningless (or at least far from equal to the Government's),[1] we cannot read equities into the release language, but must interpret it as written. The parties are free to agree to unequal releases, and we should not presume that they intended fully reciprocal releases covering all possible claims that each might have against the other unless the release language says that.

Further, the idea that BANA's release might be less all-encompassing than the Government's may make sense in the context in which the 2014 settlement was reached. The recitals in the 2014 settlement agreement make clear that the impetus behind the agreement was the resolution of numerous claims *by* the United States and others *against* BANA, several involving potential *qui tam* complaints against BANA, in an effort being spearheaded by the Department of Justice. Even though the settlement agreement contains a lengthy list of claims *against* BANA that the parties were intentionally resolving, there is no mention of any affirmative monetary claims *by* BANA in the agreement. To the extent that BANA was discussing its request for reimbursement of T&I expenses (incurred from September 2009 to January 2010) in 2014, it was doing so on a separate track, outside the context of the Department of Justice effort, through direct discussions with HUD/Ginnie Mae, at least until June 2014 when HUD/Ginnie Mae suddenly stopped those negotiations. The documentation in the record does not appear to indicate that the parties ever intentionally merged the HUD/BANA T&I cost discussions into the Department of Justice's August 2014 settlement

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[1] The majority suggests that its interpretation of the release as barring all BANA contract claims against the Government does not render superfluous or meaningless the "to the extent released hereunder" limitation upon what otherwise would read as a general release because BANA would retain statutory claims, such as those involving fraud. Yet, the settlement release language encompasses numerous potential fraud claims by the United States, including those by HUD, against BANA. To the extent that the "to the extent released hereunder" qualifier means that BANA has released all contract claims against the Government simply because the Government has released all of its contract claims against BANA, I do not understand why BANA would similarly not have released its fraud claims against the Government in light of the Government's release of fraud claims against BANA. To me, the majority's reading of the "to the extent hereunder released" qualifying language appears to render that language meaningless and as creating no qualifier at all.

effort. Coupled with BANA's declarations and explanations about its intent in negotiating with the Government, I believe that, on a motion for summary relief, we cannot rule in HUD's favor on the 2014 settlement release.[2]

There is another release that HUD has raised in its motion for summary relief, contained in modification no. 27 to the contract and executed on March 20, 2012, that I would find separately precludes BANA's current T&I claim, at least through December 23, 2009. The modification 27 release was part of a settlement of BANA's claim for costs incurred in support of Taylor Bean & Whitaker (TBW) mortgage default services under the contract at issue, allegedly incurred as a result of BANA's takeover of the TBW work in 2009 through December 23, 2009. Pursuant to that release, BANA "release[d] the Government from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances giving rise to this claim." Appeal File, Exhibit 44 at 269. Although BANA argues that this release does not bar its current T&I claim because BANA is seeking breach damages here rather than an equitable adjustment to its contract price, the Supreme Court has cautioned that "[s]tipulations of this kind are not to be shorn of their efficiency by any narrow, technical, and close construction." *United States v. William Cramp & Sons Ship & Engine Building Co.*, 206 U.S. 118, 128 (1907). Because, to interpret the scope of the release, we must look to the claim to which the release language in modification 27 refers, and because BANA has pointed to evidence suggesting that costs incurred for the TBW services after December 23, 2009, may not be encompassed with that claim, I would leave to further proceedings the determination of the extent to which the

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[2] The majority asserts that this dissent suggests a limitation upon the scope of the release that BANA itself has not argued, stating that "[t]he bank does not argue, much less point to evidence, that it intended to exclude contract claims against the United States from the scope of its release." I disagree with the majority's interpretation of BANA's argument. In its response to HUD's motion for summary relief, BANA argued that the inclusion of the phrase "to the extent released hereunder" in the 2014 settlement agreement release "limits BANA's release to no more than GNMA's reciprocally released claims," which BANA defined as dealing solely with "Bank of America's . . . performance" under the contract. Appellant's Opposition to Motion for Summary Relief at 10. BANA asserted that, under the settlement, it was paying $9.65 billion to resolve other entities' claims against BANA, with each of those entities expressly releasing its claims against BANA. *Id.* at 11-12. BANA argued that, under the settlement, "GNMA did not release any claims related to [GNMA's] own performance under the Contract" and that, because the only claims that BANA released in the 2014 settlement agreement were those associated with BANA's own performance deficiencies, the release excluded any "claims [that] pertain only to GNMA's performance" and GNMA's purported contract breaches. *Id.* at 10.

release in modification 27 barred BANA's T&I claim after December 23, 2009, as well as HUD's argument that BANA's claim should be barred by laches.

For the foregoing reasons, I concur in the majority's dismissal of BANA's unjust enrichment claim for lack of jurisdiction, but dissent from its decision to grant summary relief in HUD's favor based upon the release contained in the 2014 settlement agreement.

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HAROLD D. LESTER, JR.
Board Judge