



U.S. COMMODITY FUTURES TRADING COMMISSION
Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581

DAVID MURRAY,

Complainant,

v.

CARGILL, INC.,

Respondent.

CFTC Docket No. 99-R040

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ORDER DISMISSING REPARATIONS COMPLAINT

"A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies."¹

Overview

This case forces to Court to determine how a reparations claim can be used to successfully defend against a pending contract claim in another forum or prevent the possible, but not yet realized, effects stemming from the resolution of such a claim. To be more precise, respondent Cargill, Incorporated ("Cargill") has filed a motion that forces the Court to

¹ National R.R. Passenger Corp. v. National Assoc. of R.R. Passengers, 414 U.S. 453, 458 (1974).

determine whether a reparations case should proceed when, if the Court were to find all facts alleged in the complaint in favor of complainant David Murray ("Murray"), the Court would still not be able to grant the only relief available in reparations, an order awarding actual damages. For the reasons set out below, the Court concludes that this case should not proceed and, therefore, dismisses Murray's complaint.

Background

In his pleadings,² Murray alleges the following. He is a farmer who, "[i]n a typical year, produces approximately 17,000 bushels of corn and 6,000 bushels of soybeans."³ During an eight-month period in 1995, Murray entered into 11 contracts "known as 'Hedge to Arrive' [("HTA")] contracts" with Cargill.⁴ Cargill, apparently based on Murray's failure to deliver under the terms of the HTA contracts, instituted arbitration proceedings during the Summer of 1996,⁵ "attempting to collect

² Complaint, filed November 23, 1998 ("Complaint"); Notice of Parallel Proceeding, filed November 23, 1998 ("Notice").

³ Complaint at 2.

⁴ Id.

⁵ Notice at 1.

damages from Murray for alleged breaches of" the 11 HTA contracts in the amount of \$54,695.⁶

Several months after Cargill initiated arbitration, Murray filed his reparations complaint.⁷ He alleges that Cargill violated certain provisions of the Commodity Exchange Act ("Act") with respect to the HTA contracts.⁸ In the Complaint, Murray claims injury in the form of the compensatory damages

⁶ Complaint at 5.

⁷ Id.

On the same day, Murray notified the Office of Proceedings that issues of this case were subject to a pending, parallel proceeding and requested an "exception" to allow the case to proceed despite the parallel proceeding. Notice; Statement in Support of Exception to Allow Reparations Complaint to Proceed, filed November 23, 1998; see 17 C.F.R. §12.24(c) ("The Director of the Office of Proceedings shall refuse to institute an elected decisional procedure concerning a reparation complaint . . . in which there is a parallel proceeding"). The Director of the Office of Proceedings never expressly addressed the parallel proceedings issue. Instead, he forwarded the Complaint for answer on November 25, 1998 and, without substantial explanation, denied Cargill's motion to reconsider the decision to forward the Complaint. Letter from R. Britt Lenz to Cargill, Incorporated, dated November 25, 1998; Motion for Reconsideration of Determination to Forward the Complaint to Respondent and in the Alternative, Answer of Respondent Cargill, Incorporated, dated January 7, 1999; Letter from R. Britt Lenz to William J. Nissen, dated January 14, 1999.

⁸ Murray claims that the Cargill employees he dealt with were not registered under the Act, that Cargill failed to make necessary risk disclosures, that Cargill failed to maintain a segregation account with respect to futures trades, and that the HTA contracts are illegal, off-exchange futures contracts. Complaint at 2-4.

that Cargill seeks in the pending arbitration, proceedings that have not awarded damages to Cargill and damages that Murray has not paid.⁹ Murray asks for the relief in the form of a determination that "the Hedge to Arrive Contracts are void, voidable, and unenforceable and [an order] requir[ing] Respondent [to] pay Complainant's attorney fees and the costs of this proceeding."¹⁰ Because he has availed himself to this forum in an attempt to avoid the unrealized "damages" of which he complains,¹¹ Murray makes no plea for an order awarding actual damages.

After forwarding the Complaint for answer and receiving one, the Director of the Office of Proceedings forwarded the case for a formal decisional proceeding on January 14, 1999.¹² Eight days later, Cargill moved the Court to stay discovery pending the submission and resolution of the motion to dismiss currently before the Court.¹³ The Court stayed discovery on January 26, 1999.¹⁴ Cargill filed the pending motion to dismiss

⁹ Id. at 5.

¹⁰ Id.

¹¹ See infra note 39.

¹² Notice and Order, dated January 14, 1999; see supra note 7.

¹³ Motion to Stay Discovery, dated January 22, 1999 ("Motion").

¹⁴ Order, dated January 26, 1999.

on February 11, 1999 and Murray filed a memorandum, opposing the motion, on February, 23, 1999.¹⁵ The Court now turns to Cargill's motion.

The Issues Presented And The Issue Considered

Cargill bases its motion to dismiss on two arguments. First, it claims that the Court lacks reparations jurisdiction over this case because the Complaint claims only compensable injuries that depend on contingent events that may never occur.¹⁶ In addition, Cargill asserts that the Court lacks reparations jurisdiction over it because Cargill is not registered under the Act.¹⁷ Since consideration of the first issue is sufficient to dispose of this case, the Court will limit its discussion accordingly.

Only Claims For Actual Damages Are Cognizable In Reparations

Congress created the reparations program "as a forum for aggrieved customers seeking redress for losses caused by violations of the Act committed by [certain] commodity

¹⁵ Motion to Dismiss, filed February 11, 1999.

¹⁶ Id. at 3-7.

¹⁷ Id. at 7-12.

professionals."¹⁸ Section 14 of the Act governs reparations and prescribes,

"Any person complaining of any violation of any provision of this Act or any rule, regulation, or order issued pursuant to this Act by any person who is registered under this Act may, at any time within two years after the cause of action accrues, apply to the Commission for an order awarding . . . actual damages proximately caused by such violation."¹⁹

As this passage indicates, reparations is available to persons who seeks redress, in the form of a monetary award, for "actual damages." It provides for no other form of relief.²⁰ Thus, the Court must consider the legal question of whether complaints

¹⁸ Final Rules Relating to Reparations, 49 Fed. Reg. 6602, 6605 (1984) ("Final Rules").

¹⁹ 7 U.S.C. §18(a)(1).

²⁰ Section 5(d) of the Administrative Procedure Act authorizes agencies to "issue a declaratory order to terminate a controversy or remove uncertainty." 5 U.S.C. §554(e). However, "this section applies" only in "case[s] of adjudication required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. §554(a). Neither Section 14 nor any other statutory provision requires that reparations cases be "determined on the record after opportunity for an agency hearing." See 7 U.S.C. §18. Accordingly, the Commission is "exempted . . . from the adjudicatory procedural constraints of the Administrative Procedure Act, 5 U.S.C. §554 . . . in fashioning its reparations rules." Final Rules, 49 Fed. Reg. at 6606. As it turns out, the Commission's reparations rules do not provide for declaratory order proceedings. Compare 17 C.F.R. §§12.1-12.408 with 47 C.F.R. §1.2.

that do not seek an order awarding actual damages and assert facts that, if established, do not provide a basis for such an award are cognizable in reparations. Complaints that fail to state claims cognizable in reparations are subject to dismissal under Rule 12.308(c).²¹

²¹ Rule 12.308(c) sets out the following:

"(1) . . . The Administrative Law Judge, acting on his own motion, may, at any time after he has been assigned the case:

(i) Dismiss the entire proceeding, without prejudice to counterclaims, if he finds that none of the matters alleged in the complaint state a claim that is cognizable in reparations; or

(ii) Order dismissal of any claim, counterclaim, or party from the proceeding if he finds that such claim or counterclaim (by itself, or as applied to a party) is not cognizable in reparations.

(2) . . . Any party who believes that grounds exist for dismissal of the entire complaint, of any claim therein, of any counterclaim, or of a party from the proceeding, may file a motion for dismissal specifying the claims, counterclaims, or parties to be dismissed and the reasons therefore. Upon consideration of the whole record, the Administrative Law Judge may grant or deny such motion, in whole or in part."

17 C.F.R. §12.308(c). "For purposes of ruling on a motion to dismiss . . . both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." Warth v. Seldin, 422 U.S. 490, 501 (1975).

Complaints That Only Seek Declaratory Orders And Not Orders
For Actual Damages Are Not Cognizable In Reparations

As noted above, Murray primarily seeks an adjudication of the legality of his HTA contracts and their enforceability. To be more precise, Murray asks the Court to "determine the Hedge to Arrive Contracts are void, voidable, and unenforceable."²² He does not expressly ask the Court for an order awarding actual damages.²³ Rather, he seems to plead the existence of damages

²² Complaint at 5.

²³ Murray made the following claim of "damages" and plea for relief:

"15. Cargill is attempting to collect damages from Murray for alleged breaches of two (2) [HTA] contracts in the amount of \$10,000 and additional damages on the remaining nine (9) [HTA] contracts in the amount of \$44,695. Damages are thus in excess of \$30,000.

16. No civil court litigation involving Respondent, based on the same set of facts set forth herein, has been instituted. Respondent, however, has commenced an arbitration proceeding before the National Grain and Feed Association, based on the same set of facts herein.

17. Respondent is not the subject of receivership or bankruptcy proceedings presently pending according to complainant's knowledge.

18. Complainant elects decisional procedure pursuant to subpart E - Rules Applicable to Formal Decisional Proceedings.

(continued...)

for no other reason than to have his complaint forwarded for a formal adjudication that would result in a declaratory order.²⁴

In his opposition to Cargill's motion to dismiss, Murray does not seem to argue that the Commission is authorized or required to conduct, in reparations, procedures akin to a declaratory judgment action in federal court.²⁵ Perhaps, it is to his credit that he did not make that argument since it would have failed.²⁶ The Court's analysis of Section 14, in general

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19. Complainant requests an exception pursuant to §12.24(e) and has separately filed its statement in support thereof.

WHEREFORE, Complainant, David Murray, requests the Commission to grant him an exception to proceed before this Commission and to determine the Hedge to Arrive Contracts are void, voidable, and unenforceable and require Respondent pay Complainant's attorney fees and the costs of this proceeding."

Complaint at 5 (emphasis added).

²⁴ Given that Murray explicitly asks for some relief, a declaratory order in addition to attorney's fees and costs, and that three attorneys represent him, it is difficult to believe that the failure to ask for an award of "actual damages" resulted from oversight. See id.

²⁵ See Murray's Response at 2-3.

²⁶ Although, his use of "damages" allegations does raise the question of good faith given Section 14(a)'s unambiguous language.

and with regard to the relief available under it, "begins, as with the interpretation of any legislative enactment, with the language of the Act" ²⁷ The Court does not presume that, when Congress drafts laws, it does so willy-nilly. Rather, the Court "presume[s] that Congress chose its words with as much care as [a] judge himself brings to bear on the task of statutory interpretation." ²⁸

Section 14 permits persons to file complaints that seek an order awarding actual damages. It makes no provision for declaratory orders. The language of 5 U.S.C. §554(e) and 28 U.S.C. §2201(a) clearly demonstrate Congress' ability, when it intended to make the remedy of declaratory orders available, to find words that clearly express that intent. Accordingly, the Court can infer with substantial confidence, that Section 14

²⁷ Salomon Forex, Inc. v. Tauber, 8 F.3d 966, 975 (4th Cir. 1993). Accord International Brotherhood of Teamsters v. Daniel, 439 U.S. 551, 558 (1979) ("The starting point in every case involving the construction of a statute is the language itself."); T.S. v. Board of Educ. of Town of Ridgefield, 10 F.3d 87, 89 (2d Cir. 1993) ("Plain meaning is ordinarily our guide to the meaning of a statutory or regulatory term."); Grandview Holding Corp. v. NEA, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,996 at 44,809 (CFTC Mar. 18, 1997).

²⁸ United States v. Wooten, 688 F.2d 941, 950 (4th Cir. 1982).

does not provide a forum to litigate pleas for declaratory orders.²⁹

Rather than arguing that declaratory judgments are available in reparations, Murray makes the case that he is entitled to the next best thing. Specifically, Murray takes the position that, once he alleges a violation of the Act or appropriate rule and claims some form of injury (be it actual, contingent, hopelessly speculative or hypothetical), the Commission and the courts thereunder are bound to determine whether a violation occurred before considering whether the claims and underlying facts justify a reparations award.³⁰ In support of this argument, Murray invokes case law that is not only distinguishable on its facts but case law that statutory amendments rendered inapposite more than 15 years ago.³¹

²⁹ "This principle of statutory construction reflects an ancient maxim -- expressio unius est exclusio alterius." National R.R. Passenger Corp., 414 U.S. at 458.

³⁰ Murray Response at 2-3.

³¹ Murray relies on Schultz v. CFRC, 716 F.2d 136, 139 (2d Cir. 1983), for the notion that reparations proceedings must go forward, even where there are no damages. Id. at 2. This reliance is misplaced for two reasons. First, the Schultz complainant claimed that he incurred an actual injury, in the form of monetary losses, that was not contingent on any event that had not and may never have occurred. 716 F.2d at 138. In addition, Schultz primarily relied on portions of Section 14 of the Act that were repealed some time ago.

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Although there was once a set of procedural rules that were read

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Prior to the Futures Trading Act of 1982, Section 14 set out certain procedural requirements. These included Section 14(c)'s requirement that the Commission determine whether a violation occurred and Sections 14(e)'s provision that a determination of whether a violation occurred was a condition precedent to determining the issue of damages. 7 U.S.C. §14(c)-(e) (1976). In the proceeding underlying Schultz, the Commission skipped over the question of whether violations occurred and went directly to the question of causation. 716 F.2d at 138. The Commission found no damages that would have been the result in fact of the violations that were found to have occurred in the initial decision and, on that basis, dismissed the complaint. Id. at 138-39. Upon review, the Second Circuit found fault with the Commission's failure to address the question of whether a violation occurred before moving on to the issue of damages. Id. at 139. It did so, in large part, on the basis of Section 14(c)'s and 14(e)'s procedural provisions that, read literally, required the issue of violations to be addressed and, after a hearing, precluded disposing of a case, upon a finding of no proximately caused damages, without making findings as to whether any violations occurred. Id.

The Futures Trading Act of 1982 changed the basic nature of reparations procedures and refined the language that went to standing. The 1983 amendments eliminated virtually all of the procedural language. Futures Trading Act of 1982, Pub. L. No. 97-444, §231, 96 Stat. 2294, 2319 (1983). In its place, Congress charged the Commission with responsibility to create reparations procedural rules. Id.; 7 U.S.C. §18(b). Accordingly, the statutory language upon which Schultz based its criticism no longer applies. Moreover, the Commission's rules of practice that replaced the statutory language now provide procedures, for ferreting out non-cognizable claims, that do not require adjudicatory tribunals to address every issue raised before disposing of certain cases when appropriate. See 17 C.F.R. §§12.308(c) and 12.310(e). In addition, Section 14(a) now makes it clearer that the reparations forum is available to only those who seek "an order awarding . . . actual damages proximately caused by" a violation of the Act. 7 U.S.C. §18(a).

as requiring the consideration of preliminary issues before determining whether compensable, actual and proximately caused injuries occurred, those rules have been replaced. Today, neither the Commission's rules of practice, Section 14 nor any other governing rule require the Court to visit the issue of whether a violation of the Act or regulation occurred with respect to complaints that fail to set out claims that are cognizable in reparations due to some other infirmity.³²

³² Murray could have made an argument, similar to the reasoning of Schultz, on the basis of the Commission's reparations rules. Rule 12.314(b) governs the content of initial decisions in reparations. 17 C.F.R. §12.314(b). The rule's text seems to mandate that initial decisions include "a determination of whether or not the respondent has violated any provision of the . . . Act, or rule or order thereunder." 17 C.F.R. §12.314(b)(2). As it turns out, this argument would not have been very persuasive. First, the rule does not appear to have been applied in such a literal matter. See, e.g., Fauter v. Alfonso, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,999 at 37,709 (CFTC Jan. 31, 1991) (finding a prima facie showing of fraud, but not finding if fraud was established by a preponderance of evidence, before dismissing the claim on statute of limitations grounds). In addition, Rule 12.314(b) does not govern the disposition of cases in which no cognizable claims are proffered. Rule 12.308(c) authorizes the Court to dismiss complaints when "none of the matters alleged in the complaint state a claim that is cognizable in reparations." 17 C.F.R. §12.308(c)(1)(i). With respect to orders of dismissal, Rule 12.308(c)(3) imposes specific content requirements. It requires only a "brief statement of the findings and conclusions which serve as a basis for the order." 17 C.F.R. §12.308(c)(3). In other words, when a case is dismissed on narrow grounds, such as a failure to plead causation or facts from which no causation can be inferred, an order of dismissal need address only the narrow issues, the resolution of which are sufficient to expose the complaint as not cognizable in reparations.

**Because Murray Fails To Plead The Existence Of
Or The Basis For Actual Damages, His Claims
Are Not Cognizable In Reparations**

Reparations is a forum for those who seek an award of "actual damages."³³ Accordingly, complainants who have not suffered -- or, at this stage, not alleged the existence of -- actual damages "lack[] . . . standing to bring a reparations claim."³⁴ As explained above, Murray clearly asked for certain relief but did not ask for an order awarding "actual damages." Accordingly, when the Director of Proceedings decided to forward this case for adjudication, he must have read the allegation of damages as implicitly pleading for an award of damages. The Court will likewise disregard, arguendo, the plain meaning of

³³ In Keller v. Scoular-Bishop of Missouri, Inc., [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,477 at 30,120 (ALJ Jan. 17, 1985), the complainants, in the cases consolidated for review, filed reparations complaints "not so much to obtain reparations from respondents as to determine complainants' liability for . . . account deficits." Rather than contesting jurisdiction, the respondents litigated a counterclaim. Id. Upon review, the Commission noted that the complaints at issue essentially sought declaratory relief rather than actual damages. Keller v. Scoular-Bishop of Missouri, Inc., [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶23,128 at 32,334 n.1 (CFTC June 26, 1986). On that basis, it questioned whether the complaints "state causes of action pursuant to Section 14(a) of the . . . Act." Id. Because respondents did not raise the issue, the Commission deemed it "waived" and, therefore, did not consider it. Id.

³⁴ Patch v. Concorde Trading Group, Inc., [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,253 at 42,125 (ALJ Oct. 31, 1994).

Murray's clearly written complaint in order to consider whether the Complaint's allegations could be reorganized in such a manner that they would state a cause of action cognizable in reparations.

While, somewhat a term of art, the term "actual damages" means pretty much what it says. Actual damages are "[c]ompensation for actual injuries or loss."³⁵ "Such damages make good or replace the loss caused by the wrong or injury."³⁶ An "actual" injury or loss is one that is "[r]eal; substantial; existing presently in [f]act; having a valid objective existence as opposed to that which is merely theoretical or possible."³⁷

Murray complains of one type of injury only, his liability for money damages based on the outcome of the Cargill-initiated arbitration. There is just one problem. The arbitration is still pending and it is possible that Cargill will not prevail. Accordingly, the injury Murray complains of is certainly possible. However, it cannot be characterized as "existing

³⁵ Black's Law Dictionary 33 (5th ed. 1979); accord Wiley v. Earl's Pawn & Jewelry, Inc., 950 F. Supp. 1108, 1114 (S.D. Ala. 1997).

³⁶ Wiley, 950 F. Supp. at 1114 (internal quotations omitted).

³⁷ Black's Law Dictionary 33.

presently in fact." Rather, it is undeniably contingent.³⁸ In other words, Murray's complaint does not allege any present injury and, therefore, does not allege a basis for an award of "actual damages."³⁹ Thus, the Complaint fails to make any claim that is cognizable in reparations and should be dismissed.

³⁸ Not only is the injury complained of contingent on the arbitration ending with an order awarding damages to Cargill, it depends on Murray actually paying the judgment in some fashion.

³⁹ In the diversity case C.L. Maddox, Inc. v. Benham Group, Inc., 88 F.3d 592, 604 (8th Cir. 1996) (citations, brackets, ellipsis and internal quotations omitted and emphasis added), the court described the relationship between contingent injuries and actual damages, stating

"[P]roof of actual damages is required for a party to recover for a breach of contract. It is well settled that contingent, speculative, or merely possible consequences are not proper to be considered . . . in ascertaining the damages, for it would be plainly unjust to compel one to pay damages for results that may or may not ensue. To recover damages, a plaintiff must make more than just a showing that damages are possible or even probable developments."

Accord Lui Ciro, Inc. v. Ciro, Inc., 895 F. Supp. 1365, 1378 (D. Haw. 1995) ("that the Luis are currently at risk of loss does not equate with the concrete showing of actual financial loss").

Although the Court assumes otherwise in order to flesh-out this issue, Murray's argument belies the notion (or aspiration) that his reparations complaint was filed for any reason other than to obtain a declaratory order addressing his contractual obligations to Cargill. Citing Schaefer v. Cargill, Inc., [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,962 (JO Feb. 27, 1997), Murray reminds the Court that whether damages occurred is an issue of fact. Murray response at 2. Having stated this rather unremarkable principle, he goes on to assert
(continued...)

If Murray Had Filed A Complaint That Asked For An Order
Awarding Actual Damages, The Case Would Not Have
Been Ripe For Adjudication

Even if the Court were to have found that Murray's complaint met the statutory requirements of standing, that conclusion would not have precluded consideration of whether this case should go forward. In addition to the question of whether cases meet the bare requirements of standing, courts

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that he "did allege monetary damages . . . which Respondent is attempting to collect from Murray for an alleged breach of contract. See Complaint at 5. A complainant should not be required to pay the disputed claim at issue as a prerequisite to filing a reparations proceeding to then have the complainant adjudged not liable for the claimed amount." Id. at 3 (emphasis added). In a sense, he not only should not have to wait, he does not have to wait. However, until the case ripens, he will have to take his claim elsewhere. As discussed above, unlike the federal district courts, this is not a forum for declaratory orders with respect to private disputes.

Schaefer does not help Murray's case on the issue of actual injuries. Unlike the complainant in this case, Schaefer filed a complaint that alleged a present, albeit difficult to measure, injury that was not contingent on future events that might not ever occur. Schaefer, ¶26,962 at 44,664. Murray's failure to make similar claims could stem from his inability to do so. If he breached the contracts at issue, it may have been because the breach was efficient. If that was the case, profits from the breach may have mitigated, in advance, any injury that might result should Cargill prevail in arbitration. Of course, this is unsubstantiated speculation. Worse yet, it is completely superfluous since the Court must, in determining the sufficiency of Murray's complaints, limit its analysis to the content of the record before it. In this case, Murray alleges no present injury, however speculative, difficult to quantify or beyond the fringe of proximate causality.

also consider whether cases should proceed on prudential grounds.⁴⁰ Justiciability, like standing, is generally considered to be an Article III concept. However, administrative tribunals have employed the prudential doctrine of ripeness.⁴¹ In general, claims of injuries that are

⁴⁰ Wyoming Outdoor Council v. United States Forest Serv., No. 97-5317, 1999 WL 12762, at *6 (D.C. Cir. Jan. 15, 1999) ("the ripeness requirement dictates that courts go beyond constitutional minima and take into account prudential concerns which in some cases may mandate dismissal even if there is not a constitutional bar to the exercise of our jurisdiction"); Ernst & Young v. Depositors Econ. Protection Corp., 862 F. Supp. 709, 713 (D.R.I. 1994).

⁴¹ See, e.g., Conrad v. Chicago Board of Trade, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,817 at 36,853 (CFTC Mar. 22, 1990); Job Line Constr., Inc., Contract No. DE-AC-93BP0791, 1994 WL 706148 (EBCA Dec. 8, 1994) ("Moreover, where claims are not sufficiently developed, boards, . . . may decline to hear a case which does not justify the effort required to decide it. . . . Boards also need not expend effort to decide cases where the rights of a party are undeniably contingent on outside factors."); Parker v. Ingalls Shipbuilding, Inc., BRB No. 93-473, 1994 WL 712528, at *1-2 (DOL Nov. 29, 1994); In re Rice College, Docket No. 91-102-SA, 1993 WL 940007, at *18 n.17 (Ed. O.H.A. Dec. 29, 1993); Trans Alaska Pipeline Sys., Docket No. OR89-2-000, 1991 WL 307040, at *56 (FERC Nov. 19, 1991); In re Amoco Oil Co., RCRA Appeal No. 84-5, 1985 WL 287129, at *2 n.8 (EPA May 17, 1985); Lucas Coal Co., 81 Interior Dec. 430, 435 (DOI July 16, 1974).

A panel on the First Circuit briefly described the difference between standing and the doctrine of ripeness by stating, "the standing doctrine is concerned with who may bring a particular suit, while ripeness doctrine is concerned with when a party may bring a suit." Ernst & Young v. Depositors Econ. Protection Corp., 45 F.3d 530, 534 n.6 (1st Cir. 1995); accord Armstrong World Indus., Inc. v. Adams, 961 F.2d 405, 411 n.13 (3rd Cir. 1992).

(continued...)

contingent upon the outcome of another litigation are not ripe for adjudication.⁴² This case is no different.

Ripeness relates to the temporal fitness of issues for judicial decision. Its consideration involves a two-part inquiry.⁴³ First, the Court must consider whether the proceeding is fit for review.⁴⁴ In addition, the Court considers the

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Courts and commentators have not resolved the question of whether ripeness is an Article III case and controversy requirement or a self-imposed prudential limitation. Adams, 961 F.2d at 411 n.12. When administrative tribunals apply ripeness it is more easily characterized as a prudential doctrine given the degree to which statutes authorizing administrative proceedings exceed Article III's case and controversy language in specificity. See Job Line Constr., 1994 WL 706148.

⁴² Lane v. Stephenson, No. 96 C 5565, 1996 WL 715535, at *3 (N.D. Ill. Dec. 4, 1996); cf. Thrifty Rent-A-Car Sys., Inc. v. Thrifty Auto Sales of Charleston, Inc., 849 F. Supp. 1083, 1085-86 (D.S.C. 1991) ("The ripeness doctrine dictates that a federal court should not decide a controversy grounded in uncertain and contingent events that may not occur as anticipated or may not occur at all."); Ciszewski v. Milas, 871 F. Supp. 1065, 1068 (E.D. Wis. 1994).

⁴³ Adams, 961 F.2d at 411; Hotel & Restaurant Employees Union, Local 25 v. Attorney General, 804 F.2d 1256, 1266 (D.C. Cir. 1986).

⁴⁴ Texas v. United States, 523 U.S. 296, ___, 118 S. Ct. 1257, 1260 (1998); Adams, 961 F.2d at 411; Hotel & Restaurant Employees Union, Local 25, 804 F.2d at 1266.

hardship of withholding court consideration.⁴⁵ The Court will evaluate the factors in reverse order.

In compensatory proceedings, the hallmark of cognizable hardship is usually direct, immediate and irremediable harm.⁴⁶ In Lincoln House, Incorporated v. Dupre, the plaintiff alleged that RICO violations caused him injury.⁴⁷ The injury, however, was contingent on the outcome of a state court contract case that the plaintiff was prosecuting against the defendant.⁴⁸ In performing the prejudice portion of its ripeness analysis, Lincoln House held that, "since the only damages alleged by Lincoln cannot yet be proven, never having been incurred -- and since they may never be incurred -- Lincoln can hardly claim hardship if consideration of them is currently withheld."⁴⁹ In a

⁴⁵ Texas, 118 S. Ct. at 1260; Adams, 961 F.2d at 411; Hotel & Restaurant Employees Union, Local 25, 804 F.2d at 1266.

⁴⁶ See Thrifty Rent-A-Car Sys., 849 F. Supp. at 1086 ("It is not enough that a threat of possible injury currently exists; the mere threat of potential injury is too contingent or remote to support present adjudication."); see infra note 50.

⁴⁷ 903 F.2d 845, 847 (1st Cir. 1990).

⁴⁸ Id.

⁴⁹ Id. at 848. Accord Massachusetts Assoc. of Afro-American Police, Inc. v. Boston Police Dep't, 973 F.2d 18, 21 (1st Cir. 1992) (per curiam) ("The Federation can hardly claim hardship since the injury it alleges cannot yet be proven and may never occur."); Ciszewski, 871 F. Supp. at 1068; Terra Nova Ins. Co. Ltd. v. Distefano, 663 F. Supp. 809, 812 (D.R.I. 1987).

suit for money damages, Murray cannot make a substantially better case with respect to prejudice.⁵⁰ There is simply no generally cognizable prejudice that stems from waiting for the occurrence of an actual, monetary injury when an actual injury is a prerequisite for relief.

Not only is there no prejudice in not carrying this proceeding forward, the issues presented are not fit for review. "[T]he most important consideration in determining whether a claim is ripe for adjudication is the extent to which the claim involves uncertain and contingent events."⁵¹ In general, when "[t]he only injury" set out in a complaint "is clearly contingent on events that may not occur as anticipated or may not occur at all," the claim is not currently fit for

⁵⁰ "To meet the hardship requirement, a litigant must show that withholding review would result in 'direct and immediate' hardship and would entail more than possible financial loss." Winter v. California Med. Review, Inc., 900 F.2d 1322, 1325 (9th Cir. 1990).

⁵¹ Lincoln House, 903 F.2d at 847 (internal quotations omitted). This principle "reflects an institutional awareness that the fitness requirement has a pragmatic aspect: issuing opinions based on speculative facts or a hypothetical record is an aleatory business, at best difficult and often impossible." Ernst & Young, 45 F.3d at 536.

Federal courts are positioned to view this prong more liberally, when the contingent event is related to the existence of actual damages, because they can grant substantive relief that does not depend on the existence of actual injury. See Adams, 961 F.2d at 412.

resolution.⁵² The outcome of a potential or pending litigation is one of the types of uncertain and contingent events that tends to render claims unripe.⁵³

Murray's limits his claimed injuries to damages that Cargill seeks in a pending arbitration. The outcome of the arbitration is unknown and unknowable with the requisite degree of certainty. Murray may actually prevail in the arbitration. In the event he comes out on the short end of the arbitration, the award may be an amount less than Cargill seeks. Moreover, Murray may not pay any resulting judgment. Accordingly, because the injury claimed depends upon events that may not ever occur or occur predictably, the issues relating to the liability, necessary for a damages award, are not fit for review. Given the lack of fitness for review and the lack of prejudice to Murray for withholding review, this case is not fit for adjudication. Therefore, even if Murray met the bare

⁵² Lincoln House, 903 F.2d at 847.

⁵³ In Lincoln House, the plaintiff asserted a RICO claim. 903 F.2d at 847. The injury complained of was an "inability to recover" from the defendant if the complainant "obtain[ed] a judgment" in a "pending state court breach of contract action." Id. Because the plaintiff may not have prevailed in its state court action, the court found that case was unripe for adjudication and affirmed the trial court's dismissal of the case. Id. at 847-49. This was not an unusual outcome. See, e.g., Terra Nova Ins., 663 F. Supp. at 810-12.

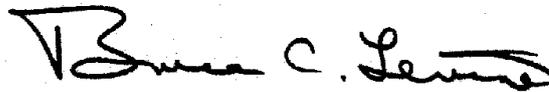
requirements of standing, this is not a case that should proceed based on his complaint.

Conclusion

For the reasons set about above, the Court finds that Murray's complaint did not state a cause of action cognizable in reparations. Moreover, he did not plead a case that is ripe for adjudication. Accordingly, the Complaint is **DISMISSED** without prejudice.

IT IS SO ORDERED.

On this 4th day of March, 1999



Bruce C. Levine
Administrative Law Judge