# UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

ZAZA PACHULIA and TINATIN ALALIDZE,

Plaintiffs, Case No.: 16CV1531

v.

RANDY USOW ACCOUNTING, INC. and RANDY USOW,

Defendants.

# DEFENDANTS’ MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants, RANDY USOW and RANDY USOW ACCOUNTING, INC., by and through their attorneys, WILSON ELSER MOSKOWITZ EDELMAN & DICKER, LLP, hereby submit this Brief in Support of Motion for Partial Summary Judgment.

**INTRODUCTION AND SUMMARY**

Plaintiffs in this case bring several causes of action against Defendants, including negligence, breach of contract, breach of fiduciary duty and fraud arising out of the Defendants’ preparation of Plaintiffs’ various tax returns and handling of tax refunds. Due to the Defendants’ conduct, Plaintiffs allege they have sustained losses, including costs of attorneys in defending past audits and losses associated with funds fraudulently taken from Plaintiffs by Defendants. Plaintiffs also allege they *may* sustain losses *if* the IRS audits certain tax year returns and state revenue agencies audit those tax year returns, as well. This motion seeks dismissal of all claims for which Plaintiffs have not incurred damages, and for amounts not yet known, because such claims are not ripe for adjudication.

First, there is no dispute that the IRS has yet to complete an audit for the 2013 and 2014 tax years, 2 of the 3 years addressed by the Plaintiffs’ Amended Complaint. Similarly, it is undisputed that there has been, to date, no audit commenced by any state taxing agency in which Plaintiffs filed taxes during the relevant years. To this end, it is only hypothetical that penalties and interest will be incurred as a result of the audit of Plaintiffs’ 2013 and 2014 federal tax returns and as a result of currently nonexistent state audits.

Because there has been no conclusion as to the 2013 and 2014 federal audits, and because the Plaintiffs’ claims relative to damages hypothetically arising from the state returns are founded on the outcomes of the federal audits, the following damages claims asserted within the Plaintiffs’ Amended Complaint are not ripe and must be dismissed.

* Claims for penalties, interest, or any other tax implications relative to the federal tax returns for 2013 and 2014;
* Claims associated with any alleged tax implications, including penalties, interest, or tax obligations, associated with the filing of any state tax returns for the years 2011, 2013, and 2014; and
* Claims for damages associated with defending a state tax audit, including attorneys fees, accounting fees, and time spent addressing the issue, for the tax years 2011, 2013, and 2014.

All of the above claims relate to hypothetical damages that have not yet been (and may never be) incurred by the Plaintiffs.

These matters presently have no controversy because a party cannot base a claim on something that undisputedly has not happened. Because cases lacking a controversy, including ones where the plaintiff has not yet incurred claimed damages, are barred for lack of ripeness, this Court must dismiss each of Plaintiffs’ claims for which damages have not yet been incurred.

**FACTS**

1. **PLAINTIFFS’ COMPLAINT.**

Plaintiffs initiated this action on November 16, 2016 when they filed their Complaint. [Doc. 1-4] Thereafter, on February 15, 2017, Plaintiffs filed a First Amended Complaint. [Doc. 16] The First Amended Complaint (hereinafter, the “Complaint”) alleges several causes of action, including negligence, breach or contract, breach of fiduciary duty, and fraud. [*Id.*] Those causes of action each have various claimed damages associated with them, including damages that overlap.

Woven throughout the Complaint are implications that Plaintiffs may sustain injury due to pending IRS audits of returns prepared by Defendants for the 2013 and 2014 tax years and possible—though not commenced—state audits for tax years 2011, 2013, and 2014. [*Id.* at ¶¶ 34- 36] Given that no state audit of Plaintiffs’ tax filings has commenced, they have not sustained injury associated with such potential audit.

Nonetheless, Plaintiffs claim a right to recover because, “to the extent that any audits result in additional federal tax liability, it is likely that the multiple states in which Plaintiffs filed taxes will seek payment for additional state tax liability, as well.” [*Id.* at ¶ 36] The Plaintiffs also plead that “the 2011, 2013, and 2014 tax returns may also trigger additional audits and liability for other years in which the Defendants prepared Plaintiffs [*sic*] taxes.” [*Id.* at ¶35] In putting forth such allegations, Plaintiffs similarly claim that they will inevitably incur additional expenses in defending as-yet-commenced state audits. Plaintiffs put forth no evidence substantiating a claim that such expenditures will—at any point—actually be incurred.

Additionally, Plaintiffs allege an entitlement to presumed forthcoming penalties potentially assessed by the federal government upon completion of the 2013 and 2014 tax year

audits. They claim that for 2013 and 2014, Plaintiffs “are likely” to accrue additional penalties. [*Id.* at ¶ 46] The true “likelihood” of these penalties, are undefined and of course, at this time, unknown.

The Complaint seeks recovery of some items of damage, which are ascertainable, *albeit*, disputed. e.g. costs of defending IRS audits and interest on additional taxes owed for 2011 derived from a completed 2011 IRS. But Plaintiffs also seek to recover for items, as outlined herein, that have not yet been assessed and in amounts that are not yet determinable.1 Such claims are not ripe for adjudication at this time and, as a result, should be dismissed from this present suit.

# PLAINTIFFS’ ITEMIZATION OF DAMAGES.

In Plaintiffs’ Itemization of Damages2, they provide two categories of damages that are based, in whole or in part, on speculation and conjecture. These include damages associated with presumed forthcoming audits from multiple state revenue entities and damages for federal penalties that have not yet been assigned.

Plaintiffs claim $226,957.16 in “estimated state tax exposure” in their Itemization of Damages. [*Aff. of K. Christensen*, Ex. B, *Plaintiffs’ Itemization of Damages*, pg. 3] This figure is based on a number of assumptions. First, that the 2013 and 2014 federal tax audits will result in an increase of Plaintiffs’ tax owed for those years. [*Id.* at pg. 5] Second, that the increase in tax

1 Confusingly, Plaintiffs’ expert, in support of damages flowing from the fraud allegations, opines that Plaintiffs sustained damages due to Defendants allegedly retaining state tax refunds owed to Plaintiffs. [*Aff. of K. Christensen*, Ex. A, *Report of R. Mathers*, pg. 31]. Such a claim, however, is never alleged in Plaintiffs’ Complaint and therefore was not the subject of discovery or this Motion. Plaintiffs’ expert’s report does not alter the pleadings or the actual allegations contained therein. Plaintiffs’ Complaint does not allege damages due to Defendants’ retention of any state refunds.

2 Plaintiffs, through their Rule 26(a) Initial Disclosures do not provide therein an Itemization of Damages. Rather, they reference a February 17, 2017 communication from Plaintiffs’ counsel to Defendants’ counsel wherein

Plaintiffs present a demand. As a result, Defendants herein will reference the positions articulated in such correspondence as Plaintiffs’ “Itemization of Damages”. [*Aff. of K. Christensen*, Ex. B, *Plaintiffs’ Itemization of Damages*]

owed in 2011 and, presumably, 2013 and 2014, will trigger state audits. [*Id.*] Finally that those state audits will conclude that Plaintiffs improperly reported their taxable income, resulting in a tax deficit needing to be remedied, as well as, potential penalties associated with such deficit. Plaintiffs also claim they are damaged from as-yet-unneeded retention of accountants and/or attorneys to represent them in the as-yet-uninitiated state audits.

Second, Plaintiffs estimate they may ultimately be responsible to the IRS for $77,983.89 in “Penalties, Interest, and Interest on Penalties” for tax years 2011, 2013, and 2014. [*Aff. of K. Christensen*, Ex. B, *Plaintiffs’ Itemization of Damages*, pg. 2]. However, Plaintiffs concede that such penalties may not, in fact, ever be assigned nor incurred. They note in their Itemization of Damages that “[f]ortunately for the [Plaintiffs’] (and by extension Mr. Usow), the IRS agreed to waive the penalty on the 2011 balance.” [*Id.*]

Nonetheless, in the Itemization of Damages, Plaintiffs claim to expect federal penalties in the amounts of $20,727.80 for tax year 2013 and $15,525.80 for tax year 2014. [*Id.*, pg. 5] Plaintiffs provide no allegations, nor have they brought forth any evidence, establishing that a penalty has been issued for those years. Given no penalty was ultimately sought in 2011, the likelihood of such an assumption coming to fruition for tax years 2013 and 2014 is further diminished. Rather, their Complaint states Plaintiffs “are likely to accrue additional penalties …” [Doc. 16, ¶ 46] Such an allegation, which acknowledges the inherent lack of certainty with respect to that damage claim, is not determinable and, as a result, not ripe for adjudication.

# PLAINTIFFS’ EXPERT REPORT.

Plaintiffs disclosed Robert Mathers (“Mathers”) as an accounting expert and provided his report pursuant to Federal Rule of Civil Procedure 26(2)(A). Within his report, Mathers opines on the negligent conduct of the Defendants, the alleged fraud, and the extent to which

Defendants did not meet their standard of care. [*Aff. of K. Christensen*, Ex. A, *Report of R. Mathers*, pg. 2] Mathers further addresses various damages sustained by the Plaintiffs. Given the IRS has not yet completed an audit of the 2013 and 2014 tax returns, has yet to impose any penalty, and given that no state has even initiated an audit of any tax return filed by Plaintiffs, Mather’s report only emphasizes that certain areas of Plaintiffs’ alleged damages are based on events and assessments that have yet to occur or to be incurred (or may never occur or be incurred). Such opinions are, at this point in time, merely speculative hypotheticals and not yet actual incurred damages.

For example, Mathers concedes, in attempting to determine the 2011 tax liability for various states in a potential future audit, “various state tax consequences of the United States Tax Court decision have not, as of the date of this report, been resolved.” [*Id.* at pg. 24] For tax years 2013 and 2014, Mathers concedes he is unable to discern a number of damages items based on the still pending 2013 and 2014 audits. [*Id.*] Further, given the connection between a final determination of Plaintiffs’ tax liability as determined by the IRS and the tax liability owed to various states, such an opinion is similarly, at this juncture, hypothetical. [*Id.* at pg. 25]

Mathers is also left to guess as the amount of penalties, if any, that will be assessed by both federal and state entities against Plaintiffs for the 2011, 2013 and 2014 tax years.3 [*Id.* at pgs. 24-25] The effect of the lack of ripeness for this claim (i.e. the lack of any state audits, and the lack of any conclusions of the 2013 and 2014 audits) is exposed by reference to Mathers’ report and his opinion as to potential penalties. However, Mathers’ opinions cannot create ripeness for a claim, when the event giving rise to the claim has not yet occurred. That event, in

3 In fact, the only certainty relative to the penalties is that none were imposed at the conclusion of the 2011 federal audit. Mathers would, nonetheless, need to speculate as to any forthcoming state penalties imposed as a result of the 2011 state audits (none of which have as yet been initiated), penalties imposed in the pending federal 2013 and 2014 audits, and any penalties that may or may not be imposed in the 2013 and 2014 state audits.

terms of these claims, is completion of the 2013 and 2014 federal audit, and the initiation and completion of any 2011, 2013, and 2014 state audits.

In short, Plaintiffs cannot substitute opinions for a necessary element of their cause of action. No injury exists until there is a negative repercussion resulting from Defendants’ alleged wrongdoing. One such negative repercussion does not occur as it relates to the 2013 and 2014 audit until the IRS makes a finding and issues a judgment demanding from the Plaintiffs the payment of additional taxes or penalties. As it relates to the states, Plaintiffs will have sustained no damage until—at the earliest—an audit commences, at which time money may ultimately be expended in responding thereto, or, alternatively, when an audit is complete, such that an adverse ruling is made with respect to Plaintiffs’ state tax obligations.

Ultimately, Plaintiffs’ Complaint, their Itemization of Damages, and the opinions of their own expert evidences a significant portion of their damages (though not all) can only exist when future events occur. As a result, those issues are not ripe for adjudication in this litigation. For these reasons, Defendants seek partial summary judgment dismissing those claims.

**ARGUMENT**

1. **SUMMARY JUDGMENT STANDARD**

Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *See* Fed. R. Civ. P. 56(c). A material fact is raised only “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *See* ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 248. A dispute concerning facts not material to a determinative issue does not preclude summary judgment. ***Id.***

Federal Rule of Civil Procedure Rule 56(c) mandates the entry of summary judgment against a party “who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and in which that party will bear the burden of proof at trial.” *See* ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322 (1986). Because Plaintiffs have the burden to prove their case at trial, it is their burden at the summary judgment stage to come forward with enough evidence to allow a reasonable jury to find in their favor on that issue. *See* ***Borello v. Allison***, 446 F.3d 742, 748 (7th Cir. 2006); *see also* ***Sea-Land Servs., Inc. v. Pepper Source***, 941 F.2d 519, 523 (7th Cir.1991); *see also* ***Celotex***, 477 U.S. at 322-24. They may not rest upon mere allegations. *See* ***Id.*** at 324. A scintilla of evidence in support of the non-movant’s position is not sufficient to oppose successfully a summary judgment motion; “there must be evidence on which the jury could reasonably find for the [non-movant].” ***Anderson***, 477 U.S. at 250.

For purposes of this Motion, Defendants accept all allegations in the Complaint as true. In doing so, it is abundantly clear that certain damages claimed by the Plaintiffs are not yet ripe for adjudication.

# PLAINTIFFS’ DAMAGES ARISING FROM AS-YET COMPLETED AUDITS HAVE NOT YET BEEN INCURRED AND, AS A RESULT, ARE NOT RIPE FOR ADJUDICATION.

A “claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” ***Texas v. United States***, 523 U.S. 296, 300 (1998).4 Further, for a claim and the resulting injuries to be ripe, “the plaintiff must have

4 Wisconsin courts have similarly found that where the facts on which a trial court is to make a judgment are contingent or uncertain, such lack of ripeness requires dismissal. *See* ***Putnam v. Time Warner Cable of Southeastern Wisconsin***, 2002 WI 108, P44, 255 Wis. 2d 447, 649 N.W.2d 626. Wisconsin courts have clarified that “contingency and uncertainty come in a variety of shapes and sizes. Webster's Dictionary defines ‘contingent’ as ‘of possible occurrence: likely but not certain to happen.’ ” ***Olson v. Town of Cottage Grove***, 2007 WI App 19, 298 Wis. 2d 548, 727 N.W.2d 373 (*quoting* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 493 (1993)).

sustained a ‘concrete’ injury, ‘distinct and palpable … as opposed to merely abstract.’ ” ***Schmier***

1. ***United States Court of Appeals for the Ninth Circuit***, 279 F.3d 817, 821 (9th Cir. 2002) (*quoting* ***Whitmore v. Arkansas***, 495 U.S. 149, 155 (1990)). As stated by the U.S. Supreme Court, the rationale for requiring “ripeness” is “to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.” ***Abbott Laboratories v. Gardner****,* 387 U.S. 136, 148, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967). Further, the ***Schmier*** court aptly noted that “hypothetical, speculative, or other ‘possible future’ injuries do not count in the standing calculus.” ***Schmier***, 279 F.3d at 821.5

In ***Daines v. Alcatel, S.A.***, 105 F.Supp.2d 1153 (E.D. Wash. 2000), as here, the plaintiff sought damages for tax obligations that were not yet imposed by any taxing authority. There, the plaintiff, Bernard Daines, filed suit to address a tax obligation regarding $6 million that was held in an escrow account. ***Id.*** at 1154. While no IRS audit had been initiated, Daines believed an audit was imminent. ***Id.*** The ***Daines*** court noted that Article III of the U.S. Constitution “restricts the jurisdiction of the federal courts to “causes or controversies”. ***Id.*** at 1154-55. Ripeness, as a jurisdictional question, evaluates whether an actual controversy exists. ***Id.*** at 1155 (*citing* ***Lee v. State of Oregon***, 107 F.3d 1382, 1387 (9th Cir. 1997)).

In evaluating whether Daines could pursue damages he had not yet incurred, the court concluded, “Plaintiff’s request that this court order Defendants to ‘advance’ him the money to cover his potential tax liability is clearly unripe.” ***Id.*** Like here, Daines presented evidence, via an opinion from his accountant, that it was “more likely than not” he would be audited. ***Id.*** at 1156. The court found that it lacked jurisdiction to determine whether Defendants had an

5 The U.S. District Court in ***Vander Kley v. Acstar Ins. Co.***, 2005 WL 139078, noted that, while the ***Schmier*** case addresses the issue of standing, the question of ripeness and standing merge, and “the injury in fact requirements of standing [are] applicable to the ripeness inquiry raised here.” ***Vander Kley***, at n.2 (*citing* ***Thomas v. Anchorage Equal Rights Comm’n***, 220 F.3d 1134, 1139 (9th Cir. 2000)). .

obligation to the Plaintiff for a tax liability he might incur. ***Id.*** For identical reasons, this Court should dismiss those claims put forth by Plaintiffs that—accepting Plaintiffs’ allegations as true—have not yet been incurred.

* 1. **TO THE EXTENT PLAINTIFFS ALLEGE DAMAGES ARISING OUT OF THE FILING OF STATE TAX RETURNS, SUCH CLAIMS ARE SUBJECT TO DISMISSAL FOR LACK OF RIPENESS.**

# Plaintiffs’ Complaint, While Mentioning The Potential For State Tax Audits, Acknowledges The As Yet Incurred Nature Of Such Damages.

Plaintiffs claim they may sustain injury due to possible future state audits for tax years 2011, 2013, and 2014. [Doc. 16 at ¶¶ 34-36]. These damages include costs associated with defending the hypothetical audits, as well as any amounts owed as the result of an order arising from the completion of the audit. Such audits, pursuant to the Plaintiffs’ Complaint, will only occur when the IRS concludes its own audits. [*Id.* at ¶ 45] Even in such a case, Plaintiffs’ Complaint highlights the speculative nature of that contention, alleging that they “may also be required” to pay state tax obligations. [*Id*]6 Such an obligation is fully contingent on the ultimate result of the 2013 and 2014 tax year audits. Those are not yet complete.

Plaintiffs’ Itemization of Damages is of no greater assistance in providing an amount certain for Plaintiffs’ damages. [*Aff. of K. Christensen*, Ex. B, *Plaintiffs’ Itemization of Damages*, pg. 3] There, Plaintiffs can only estimate state tax exposure, based on assumptions made from the IRS’s handling of Plaintiffs’ federal tax returns, and state tax refunds for which Plaintiffs “may ultimately be liable”. [*Id.*] Mathers, through his expert report concedes that many of his opinions are contingent on other conclusions not yet reached, including a finding by the IRS that

6 Similar language is used in Plaintiffs’ Complaint in Paragraph 35 (“the issues with the 2011, 2013, and 2014 tax returns may also trigger additional audits”) and in Paragraph 36 (“to the extent that any of the audits result in additional federal tax liability, it is likely that multiple states in which Plaintiffs filed taxes will seek payment for additional state tax liability, as well”). [Doc. 16 at ¶¶ 35-36]

Plaintiffs’ tax obligation was underreported. [*Aff. of K. Christensen*, Ex. A, *Report of R. Mathers*, pg. 24, n.14-15]

Plaintiffs’ claims are akin to a lawsuit alleging personal injury arising from defective brakes on a vehicle that has not yet caused an accident. A court would never agree that this hypothetical plaintiff should be able to successfully claim, “it is likely the defective brakes on that car will eventually injure me”. Similarly, Plaintiffs’ claims, while potentially viable in the future, are for the time being based wholly on hypothetical scenarios and a series of contingent factors.

# Claims That Only Arise When Future Contingencies Are Met Are Not Ripe For Adjudication.

The U.S. Supreme Court in ***Texas v. United States***, held that the State of Texas ’ lawsuit challenging a scheme put into place by the Texas Legislature that held local school boards accountable to the State for student achievement was not ripe for adjudication. ***Texas***, 523 U.S.

296. The Court’s rejection of Texas’ claims arose from a layer of contingencies that could ultimately—though not certainly—result in sanctions being imposed on school districts. ***Id.*** at 297-298. The contingencies included a series of steps the legislation authorized the State Commissioner of the Education to take to help failing schools. ***Id.*** at 300. First, to trigger the elements of the student achievement plan, a school district would need to fall below the state standards. ***Id.*** at 297-298. Next, where that happens, the Commissioner could select from ten

(10) possible sanctions that were listed in order of ascending severity. ***Id.*** at 298. The most severe is the appointing of a special master or management team to oversee the district’s operations. ***Id.*** It was this available sanction that was challenged by the lawsuit. At the time the suit was initiated by Texas, no district had yet confronted such a sanction (the appointment of a master or management team). ***Id.*** at 300.

The Court held Texas’ claim was not ripe because, in part, it had “no idea” whether a threatened sanction would ever be issued pursuant to the Commissioner’s authorized tools and, therefore, such a claim was not “fit for adjudication”. ***Id.*** The Court explained even if there were “greater certainty regarding the ultimate implementation of the sanctions”, such a claim would still not be ripe given that no concrete controversy had yet arisen. ***Id.*** at 300-301.7

This case is strikingly similar to ***Texas*** in that Plaintiffs’ claimed damages with respect to potential state audits are contingent on a number of factors. First, the IRS would need to make an adverse finding with respect to Plaintiffs’ 2013 and 2014 tax returns. Second, such a finding would need to trigger an audit at the state level on state taxes filed by the Plaintiffs. Third, such state tax audits would need to be adverse to the Plaintiffs. And lastly, a final determination of the audit must be assessed, in light of the potential for a negotiated resolution. There remain levels of uncertainty as to the outcome of each of the contingencies necessary to establish the actual effect (damage) to Plaintiffs. Perhaps if these events occur and the conclusions reached are adverse to Plaintiffs, then, but only then, would Plaintiffs’ claims be ripe.

* 1. **PLAINTIFFS' CLAIMS OF PENALTIES FOR THE 2013 AND 2014 TAX YEARS ARE SIMILARLY UNCERTAIN AND, AS SUCH, NOT RIPE FOR ADJUDICATION.**

Additionally, Plaintiffs allege damages for “Penalties, Interest, and Interest on Penalties”. As to the 2011 tax return and IRS audit, no dispute exists that Plaintiffs have incurred no such penalty because the IRS waived that penalty. [*Aff. of K. Christensen*, Ex. B, *Plaintiffs’ Itemization of Damages*, pg. 2] Given the IRS has not concluded its audits of the 2013 and 2014

7 This concept of a lack of ripeness when a claim is based on the contingency of a series of future events has been used as a basis for dismissing claims in this Court in recent years. *See e.g.,* ***Casual Dining Dev., Inc. v. QFA Royalties, LLC***, No. 07-CV-726, 2008 U.S. Dist. LEXIS 70586, at 13-14 (E.D. Wis. Sep. 5, 2008); ***Lyman v. St.***

***Jude Medical S.C., Inc.****,* 423 F. Supp. 2d 902, 905 (E.D.Wis. 2006).

tax returns, there has been no penalty, interest or interest on penalties assessed. There is certainly no means, beyond hypothesizing, to not only conclude there will be, but also to assess the specific amount, particularly in light of the fact that such determination is a subject of future negotiations. Any such claim for this alleged damage is merely hypothetical at this point and contingent on a number of as-yet undetermined findings by the IRS.

In short, Plaintiffs’ demand for compensation for as-yet assigned penalties for the 2013 and 2014 tax years by the IRS is not ripe for adjudication in this litigation.

# ALLOWING PLAINTIFFS TO PROCEED WITH CLAIMS BEFORE THEY ARE RIPE POSES AN UNJUST BURDEN ON DEFENDANTS AND IS CONTRARY TO THE INTERESTS OF JUSTICE.

Lastly, to allow Plaintiffs’ claims on the state audit assumptions and presumed IRS penalties before they occur or are incurred would result in unavoidable prejudice to Defendants. In both cases, Defendants would be unable to conduct discovery on an event that has not yet occurred. To defend Defendants’ conduct with respect to a prior audit, Defendants need to ascertain the purpose for the given adjustments, for example, and ascertain the cause of such improper valuations.

Here, where no audit has either taken place (in the case of the states) or has not yet concluded (in the case of the IRS), no adjustments are yet defined, and Defendants cannot undertake discovery in any meaningful manner as to those claims. Plaintiffs’ assertion of these claims at this point, without a conclusion upon which discovery can be conducted, forecloses the Defendants’ right to discovery of whether the basis for such conclusion is causally related to any wrongful act on the part of the Defendants. Similarly, whether the IRS ultimately imposes a penalty and/or interest on the Plaintiffs, such an assessment is based on a number of factors. Defendants cannot possibly ascertain those factors without, first, a finding.

Further, imagine if these claims proceed in this lawsuit and that, only of the eve of trial, the IRS issues its decisions on the 2013 and 2014 tax years. Such a decision may ultimately differ in many meaningful respects with the position of the parties at that time. There, Defendants would be in a position where no opportunity for discovery on the finding is available, and where any potentially appropriate dispositive motion practice triggered by the ruling would be foreclosed by the timing of the decision. Adjudicating a controversy that does not actually arise until proximate to a trial would cause the fairness and orderliness of the process under which this Court operates to be compromised. The requirement of ripeness ensures this concern is avoided.

For these reasons, and because of the nature of the premature timing of these claims, these areas of Plaintiffs’ damage claims should be dismissed at this time.

**CONCLUSION**

For the reasons outlined herein, Plaintiffs’ claims as to potential state audits, and the costs incurred associated therewith, and the potential imposition of penalties and interest resulting from the 2013 and 2014 federal audits are not ripe for adjudication at this time. As a result, those portions of Plaintiffs’ claim should be dismissed.

Dated this 20th day of July, 2017

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