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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

NANCY D. RYAN, et al.,
Plaintiffs,
v.
UNITED STATES OF AMERICA,
Defendant.

Case No. 16-CV-00164-LHK
**ORDER DENYING MOTION FOR
LEAVE TO FILE SECOND AMENDED
COMPLAINT**
Re: Dkt. No. 27

Plaintiff Nancy Ryan (“Plaintiff”) brings this action against Defendant United States of America (“Defendant”) for refund of income tax penalties assessed against the Ryans. Before the Court is Plaintiff’s Motion for Leave to File a Second Amended Complaint (“SAC”). ECF No. 27. Pursuant to Civil Local Rule 7-1(b), the Court finds this matter appropriate for resolution without oral argument and VACATES the motion hearing set for March 9, 2017. Having considered the parties’ submissions, the record in this case, and the relevant law, the Court DENIES Plaintiff’s Motion for Leave to File a Second Amended Complaint.

I. BACKGROUND

A. Factual Background

In 2000, Plaintiff and her husband, Kevin Ryan, (collectively, the “Ryans”) received a

1 large amount of capital gains income. ECF No. 12, First Amended Complaint (“FAC”) ¶ 11. The
2 Ryans invested some of the capital gains income in a foreign currency investment. *Id.* ¶ 12.
3 Plaintiff alleges that the foreign currency investment suffered losses in 2000, which were recorded
4 as a loss in the Ryans’ taxes for that year. *Id.* As a result, the Ryans paid \$1,446,434 in taxes,
5 \$20,455.24 in interest, and \$16,202.64 in late-payment penalties for the year 2000. *Id.* ¶ 14.

6 In 2004, the Internal Revenue Service (“IRS”) audited the Ryans’ 2000 tax return and
7 “disallowed the losses arising from the 2000 foreign currency investment, resulting in an increased
8 tax assessment to the Ryans.” *Id.* ¶ 17. The IRS described the foreign currency investment and
9 claimed losses as an illegal “Son of Boss” transaction because the IRS determined that the
10 “transactions lacked economic substance based on retroactive tax regulations issued by the IRS.”
11 *Id.* ¶ 20. The Ryans entered an IRS repayment program called the “Son of Boss Settlement
12 Initiative,” “which resulted in the assessment on the Ryans of \$17.5 million in taxes, interest and a
13 maximum agreed-upon 10% penalty on the underpayment.” *Id.* ¶ 21.

14 The Ryans did not have enough liquid capital on hand to pay the full \$17.5 million
15 payment at once and requested an installment agreement. *Id.* ¶ 24. On December 10, 2004, the
16 Ryans submitted Form 433-A, Collection Information Statement, to the IRS, which provided
17 information on the Ryans’ “assets, income, and monthly expenses [in order to] demonstrat[e]
18 [that] they did not have the financial resources to pay the tax liability in a single lump-sum
19 payment.” *Id.* ¶ 25. The IRS agreed to provide the Ryans an installment agreement. *Id.* The
20 installment agreement required the Ryans to pay a down payment of \$3 million by April 30, 2005,
21 a later lump-sum payment of \$2 million on July 15, 2005 from the sale of the Ryans’ second home
22 or from another source, and monthly payments of \$175,000 starting in June 20, 2005, which were
23 to increase to \$275,000 starting on June 20, 2006. *Id.* ¶ 26. In May 2005, the Ryans and the IRS
24 signed a Form 906 Closing Agreement that confirmed (1) the terms of the Son of Boss settlement
25 and installment agreement, and (2) indicated that the Ryans’ maximum penalty for underpayment
26 in 2000 would be 10%. *Id.* ¶ 30.

27 As part of the installment agreement discussions, the Ryans requested the IRS to offset the

1 amount owed for the 2000 tax year with amounts the Ryans had overpaid in 1998 (\$150,829.52)
2 and 1999 (\$427,093). *Id.* ¶¶ 148–49. Indeed, Plaintiff’s proposed SAC indicates that the Ryans
3 discovered these overpayments because the installment agreement required the Ryans to pay any
4 back taxes for the 1999 tax year to obtain the installment agreement. ECF No. 27-2 ¶¶ 163–79
5 (“Proposed SAC”).

6 The Ryans made the initial down payment and monthly payments owed on the installment
7 agreement on time. FAC ¶ 33. However, before the \$2 million lump-sum payment was due, the
8 Ryans discovered that a burst water heater had caused extensive water damage and the growth of
9 black mold in the home they were going to sell to make the \$2 million lump-sum payment. *Id.*
10 ¶ 34. On July 20, 2005, the Ryans informed Marie Maple, the IRS collections officer overseeing
11 the Ryans’ installment agreement that the Ryans were unable to sell their second home and were
12 seeking a \$2 million home equity loan on their primary home to make the lump-sum payment. *Id.*
13 ¶ 35. However, the Ryans’ primary home had liens from both the IRS and other parties.

14 On September 28, 2005, Maple mailed the Ryans a “Notice of Defaulted Installment
15 Agreement” indicating the IRS’s “intent to terminate your installment agreement and collect the
16 entire amount of your liability if you do not meet all the conditions of your agreement.” *Id.* ¶ 38.
17 The letter stated that the Ryans needed to contact the IRS within 30 days of the notice or “your
18 installment agreement will be terminated.” *Id.* ¶ 38.

19 On October 20, 2005, the Ryans faxed Maple a letter indicating that all liens on the Ryans’
20 primary home other than the IRS liens “had been removed” and that they were seeking a \$2
21 million home equity loan. *Id.* ¶ 39. The Ryans also sought other sources of funds to make the
22 now-late \$2 million lump-sum payment. *Id.* ¶¶ 42–44. On December 12, 2005, the Ryans’
23 counsel informed Maple that the Ryans had been approved for a \$2 million home equity loan
24 subject to the IRS subordinating its lien on their primary home. *Id.* ¶ 51.

25 On January 20, 2006, the Ryans submitted an Application for Certificate of Subordination
26 of Lien with the Federal Tax Lien Unit with the IRS. *Id.* ¶ 52. Before a decision was made, the
27 Ryans’ case was transferred from Maple to another IRS collection agent, David Palmer. *Id.* ¶ 53.

1 On April 6, 2006, Palmer recommended approval of the lien subordination. *Id.* ¶ 56. However, on
2 the same day, Palmer’s supervisor rejected the lien subordination because the Ryans “did not seek
3 a line of credit equal to the full \$4.5 million value of their home.” *Id.* ¶ 58.

4 Around the same time, in late 2005 and early 2006, the Ryans’ financial circumstances
5 caused them to be unable to make the monthly payments on the installment agreement from liquid
6 assets. *Id.* ¶ 71–73.

7 In May or June of 2006, Palmer terminated the installment agreement. *Id.* ¶ 74. On May
8 24, 2006, “the IRS foreclosed liens on [the Ryans’] securities accounts and other liquid assets.”
9 *Id.* ¶¶ 69, 74. On September 30, 2007, the Ryans sold their second home and, on October 1, 2007,
10 paid the IRS \$2,713,494.47 from those funds. *Id.* ¶ 79.

11 On October 1, 2007, the IRS imposed a penalty on the Ryans in the amount of
12 \$2,414,217.74 without notice. *Id.* ¶ 85. In May 2009, the Ryans were able to withdraw funds
13 from one of his investments and made a payment of \$5,968,332.36 to the IRS. *Id.* ¶ 78. By
14 October 26, 2012, the Ryans had paid their tax liabilities from the year 2000 and the penalty in
15 full. *Id.* ¶ 96.

16 **B. Procedural History**

17 **1. Within the IRS**

18 On April 17, 2008, the Ryans sent a letter to Palmer and “requested full abatement of the
19 [October 1, 2007] Penalty,” and on July 28, 2008, sent a follow-up letter to Palmer’s supervisor.
20 *Id.* ¶ 89. On October 21, 2008, Palmer denied the request for penalty abatement. *Id.* ¶ 90. On
21 May 10, 2010, Palmer’s supervisor denied the Ryans’ July 28, 2008 request and informed the
22 Ryans that they “did not have reasonable cause to abate the penalty.” *Id.* ¶ 91.

23 On May 21, 2010, the Ryans filed a protest of the decision of Palmer’s supervisor with the
24 IRS Appeals Office. *Id.* ¶ 92. On January 13, 2011, Sherry Eaton of the IRS Appeals Office
25 informed the Ryans that their appeal would not be considered. *Id.* ¶ 93. The letter informed the
26 Ryans that “[the IRS Appeals Office] does not have the administrative authority to consider the
27 case because it is related to [liability for a prohibited Son of Boss transaction]. The taxpayers

1 executed a Form 906 Closing Agreement under the Son of Boss settlement initiative in which they
2 unambiguously waived all rights to [IRS Appeals Office] consideration.” *Id.* ¶ 94.

3 By October 26, 2012, the Ryans had paid their tax liabilities from the year 2000 and the
4 penalty in full. *Id.* ¶ 96. On July 1, 2013, the Ryans filed a “Claim for Refund and Request for
5 Abatement” with the IRS seeking full or partial abatement of the penalty plus interest. *Id.* ¶ 98.
6 On January 13, 2014, the IRS denied the Ryans’ claim for refund and request for abatement. *Id.*
7 ¶ 99.

8 On January 23, 2014, the Ryans filed a request for reconsideration of the denial of the
9 claim with the IRS Penalty Appeal Coordinator. *Id.* ¶ 100. On April 28, 2014, the IRS sent the
10 Ryans a letter stating that “your issues were not fully addressed by the Internal Revenue Service
11 prior to them forwarding your case to Appeals” and “that your case, along with your
12 correspondence dated January 23, 2014 has been returned for further development.” *Id.* ¶ 101.
13 The request for reconsideration was shuffled between multiple IRS offices between May 30, 2014
14 and early December of 2015. *Id.* ¶¶ 101–03.

15 In September 2015, Kevin Ryan passed away. *Id.* ¶ 72. On September 8, 2015, Plaintiff
16 “received notice of the disallowance of the reconsideration of the refund claim from the IRS office
17 in Kansas City, Missouri.” *Id.* ¶ 105. Plaintiff filed an appeal and request for reconsideration of
18 the decision on November 11, 2015 with the Kansas City IRS Appeals Office. *Id.* ¶ 109. On
19 February 25, 2016, the Kansas City IRS Appeals Office denied Plaintiff’s appeal and request for
20 reconsideration. *Id.* ¶ 112.

21 2. Before This Court

22 On January 11, 2016, Plaintiff filed the instant suit. ECF No. 1. On March 30, 2016,
23 Plaintiff filed the FAC, which removed the administrator of Kevin Ryan’s estate from the instant
24 suit. *See* FAC. The FAC alleges seven causes of action based on the application of the October 1,
25 2007 penalty and the subsequent appeal of that penalty including: (1) IRS abuse of discretion, (2)
26 breach of the implied covenant of good faith and fair dealing in the installment agreement due to
27 the IRS’s failure to grant a lien subordination, (3) wrongful denial of Plaintiffs’ appeal rights

1 before the IRS, (4) wrongful denial of abatement of the penalty, (5) contractual bar on the penalty
 2 pursuant to the Form 906, Closing Agreement, (6) request for first-time abatement of the statute of
 3 limitations for requesting offset of the Ryans’ 2000 taxes using the Ryan’s overpayment on their
 4 1998 and 1999 taxes, and (7) untimeliness of the penalty. FAC ¶ 114–61.

5 On December 15, 2016, Plaintiff filed the instant Motion for Leave to File a Second
 6 Amended Complaint. ECF No. 27 (“Mot.”). On December 29, 2016, Defendant filed an
 7 opposition, ECF No. 29 (“Opp’n”), and on January 5, 2017, Plaintiff filed a reply, ECF No. 31
 8 (“Reply”).

9 **II. LEGAL STANDARD**

10 Under Rule 15(a) of the Federal Rules of Civil Procedure, “[t]he court should freely give
 11 leave [to amend] when justice so requires,” bearing in mind “the underlying purpose of Rule
 12 15 . . . [is] to facilitate decision on the merits, rather than on the pleadings or technicalities.”
 13 *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc). Nonetheless, a district court may
 14 deny leave to amend a complaint due to “undue delay, bad faith or dilatory motive on the part of
 15 the movant, repeated failure to cure deficiencies by amendments previously allowed, undue
 16 prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of
 17 amendment.” *See Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Leadsinger, Inc. v. BMG*
 18 *Music Publ’g*, 512 F.3d 522, 532 (9th Cir. 2008). Of these considerations, “it is the consideration
 19 of prejudice to the opposing party that carries the greatest weight.” *Eminence Capital, LLC v.*
 20 *Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (per curiam). “Absent prejudice, or a strong
 21 showing of any of the remaining *Foman* factors, there exists a *presumption* under Rule 15(a) in
 22 favor of granting leave to amend.” *Id.* (emphasis in original). Nevertheless, a proposed
 23 amendment may be denied as futile “if no set of facts can be proved under the amendment to the
 24 pleadings that would constitute a valid and sufficient claim or defense.” *See Miller v. Rykoff-*
 25 *Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988). Ordinarily, however, “courts will defer
 26 consideration of challenges to the merits of a proposed amended pleading until after leave to
 27 amend is granted and the amended pleading is filed.” *Netbula, LLC v. Distinct Corp.*, 212 F.R.D.

1 534, 539 (N.D. Cal. 2003).

2 **III. DISCUSSION**

3 As noted above, as part of the 2005 installment agreement for the payment of the Ryans’
4 2000 taxes, the Ryans were required to pay any owed back taxes from 1999. Proposed SAC
5 ¶ 163–79. The Ryans discovered that the Ryans had overpaid their 1998 and 1999 taxes and
6 requested an offset from their 2000 tax liability in the overpaid amount. *Id.* The IRS denied the
7 request because the statute of limitations for requesting a refund on the 1998 and 1999 taxes had
8 passed. *Id.*

9 In Plaintiff’s proposed SAC, Plaintiff seeks to add two additional causes of action:

10 (1) breach of the implied covenant of good faith and fair dealing in the installment agreement as a
11 result of the IRS’s failure to offset the Ryan’s underpayment of taxes in 2000 with overpayments
12 from the Ryans’ 1998 and 1999 taxes (“Proposed Count VIII”); and (2) a claim for equitable
13 recoupment based on the IRS’s failure to offset the Ryan’s the underpayment of taxes in 2000
14 with overpayments from the Ryans’ 1999 taxes (“Proposed Count IX”). Proposed SAC ¶¶ 163–
15 79.

16 Defendant argues that filing an amended complaint in the instant case would be improper
17 because (1) amending the complaint with the new claims would be futile, and (2) amendment
18 would cause Defendant prejudice. The Court finds amendment would be futile and therefore does
19 not reach Defendant’s argument concerning prejudice.

20 A district court may deny a motion for leave to amend where amendment would be futile.
21 *Miller*, 845 F.2d at 214; *see Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995) (“Futility of
22 amendment can, by itself, justify the denial of a motion for leave to amend.”). “[A] proposed
23 amendment is futile only if no set of facts can be proved under the amendment to the pleadings
24 that would constitute a valid and sufficient claim or defense.” *Miller*, 845 F.2d at 214. The Ninth
25 Circuit has alternatively stated that the test of whether amendment would be futile is “identical to
26 the one used when considering the sufficiency of a pleading challenged under Rule 12(b)(6).” *Id.*
27 (citing 3 J. Moore, Moore’s Federal Practice ¶ 15.08[4] (2d ed. 1974)).

1 Defendant argues that Plaintiff’s proposed new claims fail for three reasons. First,
2 Defendant argues that the “doctrine of variance” eliminate this Court’s subject matter jurisdiction
3 over the new claims. Second, Defendant argues that Plaintiff’s Proposed Claim VIII for breach of
4 the implied covenant of good faith and fair dealing and Proposed Claim IX for equitable
5 recoupment fail in their own right. The Court finds that the doctrine of variance bars Plaintiff’s
6 proposed claims, and therefore the Court need not address Defendant’s other arguments.

7 The Court thus turns to consider the doctrine of variance. The United States “is immune
8 from suit, save as it consents to be sued . . . and the terms of its consent to be sued in any court
9 define that court’s jurisdiction to entertain the suit.” *Quarty v. United States*, 170 F.3d 961, 972
10 (9th Cir. 1999). Under 26 U.S.C. § 7422(a), a taxpayer “seeking a refund must first file an
11 administrative claim with the Secretary of the Treasury before filing suit in federal court.” *Dunn*
12 *& Black, P.S. v. United States*, 492 F.3d 1084, 1091 (9th Cir. 2007). “Treasury Regulation
13 § 301.6402–2(b)(1), in turn, provides that the administrative claim ‘must set forth in detail each
14 ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner
15 of the exact basis thereof.’” *Id.* (quoting 26 C.F.R. § 301.6402–2(b)(1)). This exhaustion
16 requirement is “an inseverable condition on Congress’s waiver of sovereign immunity.” *Id.*

17 “[I]n the absence of a waiver by the government, the taxpayer cannot recover in its suit for
18 refund on a different ground than set forth in the claim for refund.” *Quarty*, 170 F.3d at 972
19 (quoting *Bear Valley Mut. Water Co. v. Riddell*, 493 F.2d 948, 950–51 (9th Cir. 1974)). Stated
20 more specifically, “[i]f the [refund] claim on its face does not call for investigation of a question,
21 the taxpayer may not later raise that question in a refund suit.” *Boyd v. United States*, 762 F.2d
22 1369, 1371 (9th Cir. 1985); *see also Commissioner v. Lundy*, 516 U.S. 235, 240, 244, 252 (1996)
23 (noting that under 26 C.F.R. § 301.6402–2(b)(1), a claim for refund in district court must state the
24 ground for a refund with specificity). If these requirements are not satisfied, the Court lacks
25 subject matter jurisdiction. *Quarty*, 170 F.3d at 972.

26 “The government may waive compliance with the specificity requirements of Treasury
27 Regulation § 301.6402–2(b)(1) if it has investigated the merits of a claim and taken action upon

1 it.” *Quarty*, 170 F.3d at 973 (citation omitted). Waiver can be established if the IRS “has in fact
2 seen fit to dispense with [its] formal requirements and to examine the merits of the claim. It is not
3 enough that in some roundabout way the facts supporting the claim may have reached [the IRS].”
4 *Id.* (citation omitted).

5 Plaintiff concedes that the issues of the 1998 and 1999 tax overpayments were not part of
6 Plaintiff’s claim for refund before the IRS. *See Reply* at 9 (“While not mentioned, the IRS’s
7 refusal to credit the \$577,000 overpayments against the 2000 tax liabilities was an adverse
8 financial setback that impaired the Ryans’ ability to satisfy the Installment Agreement.”), 9–10
9 (“While not mentioned, the Ryans’ substantial overpayment of taxes for 1998 and 1999 and the
10 failure of the IRS to credit such overpayments in 2005 when requested by them diminished the
11 cash available to the Ryans to satisfy their obligations and avoid imposition of the penalty.”); *see*
12 *also* ECF No. 31-6 (administrative claim).

13 Moreover, Plaintiff does not argue that waiver occurred as a result of the IRS actually
14 considering the merits of the claim. In fact, Plaintiff concedes that the IRS did not address the
15 1998 and 1999 tax overpayments. *See Reply* at 10–11 (“[T]he IRS considered only one of the
16 eight claims-Number 8-and, that claim appears to have been dealt with cursorily without
17 investigation or understanding by the IRS.”). Accordingly, under *Quarty*, because there is no
18 argument or allegation that the IRS actually addressed the 1998 and 1999 tax offset issue, the IRS
19 did not waive these claims.

20 Nonetheless, Plaintiff argues that its new claims are “derived from or [are] integral to the
21 ground[s] timely raised in the refund claim.” *Cencast Servs., L.P. v. United States*, 94 Fed. Cl.
22 425, 440 (2010). Courts have allowed relief on issues not explicitly mentioned in an
23 administrative claim where “the auditing agent, during his investigation of the claims, necessarily
24 considered the facts which underlie these additional grounds.” *Union Pac. R. Co. v. United States*,
25 389 F.2d 437, 444 (Ct. Cl. 1968); *see also Davis v. United States*, 2016 WL 6997168, at *13 (N.D.
26 Cal. Sept. 6, 2016) (considering whether the “disputed issue was ‘part and parcel’ of the
27 administrative refund claims”). However, the United States Supreme Court has held that where a

1 claim refers to multiple specific facts as the basis of a claim, it does not “call for [a] general audit
2 of the taxpayer’s affairs.” *United States v. Andrews*, 302 U.S. 517, 525 (1938) (“[The
3 administrative claim] was as specific as it could be made and pointed unerringly to the items the
4 Commissioner must consider.”). A different rule would violate the requirement that the taxpayer
5 must set forth “in detail each ground upon which a credit or refund is claimed and facts sufficient
6 to apprise the Commissioner of the exact basis thereof.” 26 C.F.R. § 301.6402–2(b)(1).

7 Plaintiff argues that the doctrine of variance does not prevent the addition of Proposed
8 Claim VIII for breach of the implied covenant of good faith and fair dealing in the installment
9 agreement or Proposed Claim IX for equitable recoupment. The Court addresses each claim in
10 turn.

11 Under Proposed Claim VIII, Plaintiff alleges that the IRS’s refusal to offset the Ryans’
12 2000 tax payments with Plaintiff’s 1998 and 1999 overpayments interfered with the Ryans’ ability
13 to comply with the installment agreement, and thereby constituted a breach of the implied
14 covenant of good faith and fair dealing. Plaintiff argues that the standard found in *Cencast* and
15 *Union Pacific* has been met because there are allegations in the administrative claim that “assert[]
16 the [same] theory” that underlies Proposed Claim VIII. Reply at 9. For example, claim 6 of the
17 administrative claim asserts that the IRS’s “arbitrary and unreasonable refusal to grant the
18 Subordination of Lien contributed to the Ryans’ default on the installment agreement and the
19 IRS’s eventual termination of it and imposition of the penalty.” ECF No. 31-6 at 11. Moreover,
20 Plaintiff asserts that other facts in the administrative claim indicate IRS actions that “frustrated the
21 Ryans’ performance of the Installment Agreement and ultimately led to IRS wrongful termination
22 of the Installment Agreement and imposition of the penalty.” Reply at 9. Essentially, Plaintiff
23 argues that by asserting multiple specific examples of the IRS’s interference with Plaintiff’s ability
24 to comply with the installment agreement, the IRS necessarily considered *all* of the IRS actions
25 that could potentially have interfered with Plaintiff’s ability to comply with the installment
26 agreement, including the issue of the 1998 and 1999 tax overpayments.

27 However, Plaintiff provides no basis to conclude that the IRS would have “necessarily

1 considered the facts which underlie” Proposed Claim VIII—the refusal to offset the 2000 taxes by
2 the 1998 and 1999 overpayment of taxes—based on allegations made about other, completely
3 distinct IRS actions. *Union Pacific*, 389 F.2d at 444. The IRS’s refusal to offset the 1998 and
4 1999 overpayment of taxes bears no direct relation to the other alleged acts of interference by the
5 IRS, such as the refusal to subordinate the liens on the Ryans’ home. Moreover, Plaintiff’s
6 administrative claim’s allegation of multiple specific IRS actions did not intrinsically “call for [a]
7 general audit of the taxpayer’s affairs” by the IRS that included the 1998 and 1999 tax
8 overpayments. *Andrews*, 302 U.S. at 525. Accordingly, because Plaintiff did not raise Proposed
9 Claim VIII or its underlying facts in the administrative claim, the doctrine of variance bars
10 Plaintiff from bringing that claim in the instant suit.

11 Under Proposed Claim IX, Plaintiff asserts equitable recoupment with respect to the IRS’s
12 refusal to offset the Ryans’ 2000 taxes with their 1999 overpayment of taxes.¹ As noted above,
13 the IRS rejected the offset because a claim for refund on the 1999 overpayment was barred by the
14 statute of limitations for claims for refund. “The doctrine [of equitable recoupment] permits a
15 party to a tax dispute to raise a time barred claim [for refund] in order to reduce or eliminate the
16 money owed on [a] timely claim [brought by the IRS].” *Estate of Branson v. C.I.R.*, 264 F.3d 904,
17 909 (9th Cir. 2001) (citing *Bull v. United States*, 295 U.S. 247, 258 (1935)). In arguing that the
18 doctrine of variance does not apply to Proposed Claim IX, Plaintiff argues that the administrative
19 claim raised facts that showed that the IRS’s actions were unfair and inequitable. Reply at 9–10.
20 Plaintiff argues that Proposed Claim IX for equitable recoupment involves “the same theory and
21 reliance upon fairness, justice and equity.” *Id.*

22 Plaintiff’s argument fails for two reasons. First, as with Proposed Claim VIII, as Plaintiff
23 concedes, the administrative claim makes no mention of the IRS’s failure to offset the 1999
24 overpayment of taxes or any related facts. On that basis alone, the equitable recoupment claim is
25 barred because the allegations of other unrelated facts do not indicate that the IRS “necessarily

26
27 ¹ While Proposed Claim VIII is based on both the 1998 and 1999 overpayment of taxes, Proposed
28 Claim IX only addresses the 1999 overpayment of taxes.

1 considered the facts which underlie” the equitable recoupment claim. *Union Pacific*, 389 F.2d at
2 444.

3 Second, equitable recoupment is not based simply on principles of “fairness,” but has five
4 specific requirements: (1) “the same ‘transaction, item or taxable event’ must be subject to two
5 taxes”; (2) “the taxes must be inconsistent in that the Tax Code authorizes only a single tax”;
6 (3) ”the tax sought to be recouped must be time barred”; (4) “there must be an ‘identity of interest’
7 between the parties paying the duplicative tax”; and (5) “the court in which the recoupment claim
8 is brought must independently have jurisdiction to adjudicate the claim.” *Estate of Branson*, 264
9 F.3d at 909. Neither the doctrine of equitable recoupment nor any of these factors for its
10 application were raised in the administrative claim.²

11 Thus, the doctrine of variance bars Plaintiff’s Proposed Claim VIII for breach of the
12 implied covenant of good faith and fair dealing and Plaintiff’s Proposed Claim IX for equitable
13 recoupment. Accordingly, the Court finds Plaintiff’s proposed claims to be futile and DENIES
14 Plaintiff’s Motion for Leave to File a Second Amended Complaint.

15 **IV. CONCLUSION**

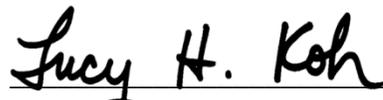
16 For the foregoing reasons, DENIES Plaintiff’s Motion for Leave to File a Second
17 Amended Complaint.

18 **IT IS SO ORDERED.**

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20 Dated: March 6, 2017

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LUCY H. KOH
United States District Judge

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² Plaintiff also argues that the IRS’s bad acts in this case require the Court to estop Defendant from asserting the doctrine of variance as to the proposed claims. Reply at 11. However, where, as here, the claims were not raised in the administrative claim with the IRS, the Court lacks subject matter jurisdiction over the claims. *Quarty*, 170 F.3d at 972. Absent subject matter jurisdiction, the Court lacks the power to provide Defendant the requested relief.