2015-5059

IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

WELLS FARGO & COMPANY,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

Appeal from the United States Court of Federal Claims
in Case No. 1:11-cv-00808-NBF, Judge Nancy B. Firestone

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CERTIFICATE OF INTEREST

Counsel for Plaintiff-Appellee Wells Fargo & Company certifies the following:

1. The full name of every party or amicus curiae represented by me is:

   Wells Fargo & Company

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

   N/A

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

   Wells Fargo & Company has no parent corporation, and no publicly held companies own 10 percent or more of its stock.

4. The names of all law firms and the partners or associates that appeared for the party or amicus curiae now represented by me in the trial court or agency or are expected to appear in this court are:

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Respectfully submitted,

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STATEMENT OF RELATED CASES

Wells Fargo is not aware of any cases pending before this or any other court that would directly affect the disposition of this appeal. Two cases pending in the United States Court of Federal Claims appear to touch on related issues and might be affected by the disposition of this case. Those cases are *Ford Motor Co. v. United States* (Fed. Cl. No. 14-458-CFL), and *Texaco, Inc. v. United States* (Fed. Cl. No. 00-195-JFM).

STATEMENT OF THE ISSUE

Whether, under 26 U.S.C. § 6621(d), the surviving corporation in a merger is the "same taxpayer" as the corporations it absorbs.

INTRODUCTION

This case concerns the meaning of the phrase "same taxpayer" in the interest-netting provision of 26 U.S.C. § 6621(d) in the context of a corporate merger. The question is whether the surviving corporation in a merger is the "same taxpayer" as the corporations it absorbs for purposes of netting underpayment interest and overpayment interest under § 6621(d). Supreme Court precedent about the effect of a merger on taxpayer status, decades of state merger law, the statutory precursor to § 6621(d), and consistent Internal Revenue Service (the "Service") practice in relation to a whole host of tax scenarios all demonstrate conclusively that, as the Court of Federal Claims held below, it is.

The government has conceded (at 49) that Congress did not intend to limit the application of § 6621(d) to corporations that were identical in every respect. For good reason. If Congress had intended such a limitation, § 6621(d) would have been essentially a dead letter in light of the constantly changing state of large corporations that were its intended beneficiaries. Instead, the government argues that Congress made § 6621(d) applicable to corporations that share the "relevant essentials"—a largely circular standard which it then reduces to a "same Taxpayer Identification Number" rule that allows the Service to negate the interest-netting benefits that Congress intended when it enacted § 6621(d).

The government's position defies Congress's intent. Congress did not define "same taxpayer" when it enacted § 6621(d). But the evidence, including the state merger law against which Congress acted when it passed § 6621(d), points overwhelmingly to the conclusion that Congress intended that the surviving corporation in a merger is the "same taxpayer" as the corporations it absorbs.

Federal law does not provide the means by which ordinary corporations will be created, continued, merged, or destroyed, but instead determines tax consequences atop the States' systems of corporate law. State merger law has long provided that where a merger occurs, the surviving corporation in a merger "steps into the shoes" of the absorbed company, which is regarded by law as its unbroken continuation. And likewise, the Supreme Court long ago recognized that the

surviving corporation of a merger is the same as the taxpayer that merged into it because "the corporate personality of the transferor is drowned in that of the transferee." *Helvering v. Metropolitan Edison Co.*, 306 U.S. 522, 529 (1939).

That understanding is consistent with prior congressional enactments—and with the longstanding (until recently) position of the Service itself. For decades prior to this litigation, the Service recognized, in binding revenue rulings as well as less formal letter guidance, that the continuity of corporate identity inherent in a merger makes mergers distinct from other forms of corporate acquisition.

Moreover, the pre-existing mechanism for ameliorating the difference between overpayment and underpayment interest rates, 26 U.S.C. § 6402(a), treats the surviving corporation in a merger as the "person who made the overpayment" when dealing with the pre-merger tax account of an absorbed merging entity. The government tries to steer clear of § 6402(a) in its brief. But § 6621(d) was designed to *expand* on the remedy, addressing the Service's persistent reluctance to provide relief to taxpayers who had already squared up with the Service by the time they recognized the overlap. Yet, under the government's interpretation, Congress used § 6621(d) to *retreat from* § 6402(a)'s pro-taxpayer treatment of mergers and adopted the anti-taxpayer rule proposed by the government now.

Nor is there any support for the government's position in this Court's decision in *Energy East Corp. v. United States*, 645 F.3d 1358 (Fed. Cir. 2011), or

the Court of Federal Claims' decision in *Magma Power Co. v. United States*, 101 Fed. Cl. 562 (2011). *Energy East* involved an acquisition of the sort that the Service and the courts have distinguished from mergers in conducting the "same taxpayer" analysis for decades—it broke no new ground. And *Magma Power* rejected a prior government attempt to unduly narrow § 6621(d)'s reach, without purporting to create a new test taxpayers must satisfy to come within § 6621(d).

The decision of the Court of Federal Claims should be affirmed.

BACKGROUND

I. Legal Background

A. Under Longstanding Principles Of State Merger Law, A Surviving Corporation Steps Into The Shoes Of The Merged Corporations

Federal tax law is premised upon legal relationships that are governed by state law. *See, e.g.*, *Aquilino v. United States*, 363 U.S. 509, 512-13 (1960) ("[I]t has long been the rule that 'in the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property . . . .' (citation omitted)); *United States v. Bess*, 357 U.S. 51, 55 (1958) (Federal tax law "creates no property rights but merely attaches consequences, federally defined, to rights created under state law."). Moreover, Congress is presumed to be aware of the pertinent law in the area against which it legislates, including state law. *See Goodyear Atomic Corp. v. Miller*, 486 U.S.

174, 184 (1988). State law therefore informs the backdrop against which Congress legislated when it enacted § 6621(d).

Mergers are purely a product of state law. And from the inception of corporate merger practice, the States have recognized that "[w]hen a . . . merger has taken place under the statute, the old corporations have their identity absorbed into that of the . . . one into which they were merged." *Argenbright v. Phoenix Fin. Co.*, 187 A. 124, 126 (Del. Ch. 1936). Through a merger, unlike an asset acquisition or other corporate transaction, the pre-existing corporate identity is continued in altered form, such that "the surviving corporation . . . simply stands in the same position as that occupied by the merged corporation . . . prior to the merger." *Aetna Life & Cas. v. United Pac. Reliance Ins. Cos.*, 580 P.2d 230, 232 (Utah 1978); *see also, e.g.*, *Acordia of Ohio, L.L.C. v. Fishel*, 978 N.E.2d 823, 826 (Ohio 2012) (holding that "the absorbed company becomes a part of the resulting company following merger," and it is "as if the resulting company had stepped into the shoes of the absorbed company"); *Deitrick v. Siegel*, 48 N.E.2d 698, 701, 703 (Mass. 1943) (holding that a bank was the "original payee" of a note payable to a bank that had merged into it); *Mutual Bldg. & Loan Ass'n of Pasadena v. Wiborg*, 139 P.2d 73, 74 (Cal. Ct. App. 1943) ("By virtue of the merger, the separate corporate existence of Title Guarantee suffered the fate of all merged corporations,

to wit, they become a part of the muscle and the blood stream of the mergee corporation, transfusing into the mergee all its rights and privileges.").

Because the surviving corporation in a merger carries with it the corporate identities of its corporate predecessors, state law provides that the surviving entity of a merger continues to hold all the assets and liabilities of the merged corporations by operation of law—that is, that the surviving corporation is the "same" as the corporations it absorbs for purposes of assets and liabilities. *See, e.g.*, 8 Del. Code Ann. tit. 8, § 259(a) (providing that upon a merger, "all the rights, privileges, powers, . . . property, . . . all debts . . . and all and every other interest shall be thereafter as effectually the property of the surviving corporation . . . as they were of the several and respective constituent corporations"). Indeed, federal tax law recognizes that this continuity of identity is the crucial, defining feature that distinguishes a merger from other forms of acquisition authorized under state law. *See* 26 U.S.C. § 368(a)(1)(A); Treas. Reg. § 1.368-2(b)(1)(ii); Boris I. Bittker & James S. Eustice, *Federal Income Taxation of Corporations and Shareholders* ¶ 12.22 (online ed. 2015) (A "statutory merger" occurs when "one corporation absorbs the corporate enterprise of another corporation, with the result that the acquiring company steps into the shoes of the disappearing corporation as to its assets and liabilities.").

Significantly, this understanding of the state-law backdrop is also consistent with the Supreme Court's recognition, as far back as 1939, that the surviving corporation of a merger is the same as the taxpayer that merged into it. *Metropolitan Edison*, 306 U.S. at 529. Congress also is presumed to have been aware of *Metropolitan Edison* when it enacted § 6621(d). *See, e.g.*, *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990).

B. Federal Tax Law Governing Overpayments And Underpayments Similarly Treats The Surviving Entity Of A Merger As Standing In The Shoes Of Its Predecessors

In the context of statutory mergers, Congress, the Service, and the Courts have applied a related pair of longstanding federal tax doctrines.

First, the surviving entity of a merger is responsible for the pre-merger tax underpayments (and interest thereon) of the merged corporations "not [as] a transferee," but instead as "the predecessor corporations, [such] that the income tax liabilities of such corporations [are] consequently the indebtedness of the new corporation, and that in paying such indebtedness [the merged entity is] not satisfying the indebtedness of another." *Koppers Coal Co. v. Commissioner*, 6 T.C. 1209, 1223 (1946) (citing *Adrian & James, Inc. v. Commissioner*, 4 T.C. 708 (1945)). This result follows from two subsidiary principles: (1) the surviving entity of a merger is primarily liable for the federal tax debts of the predecessor entities, *see, e.g.*, *Commissioner v. Oswego Falls Corp.*, 71 F.2d 673, 675-76 (2d

Cir. 1934); I.R.S. Chief Couns. Adv. ("C.C.A.") Mem. 201222001, 2012 WL 1961411 (Feb. 23, 2012) ("[F]ollowing a corporate merger, the surviving corporation is, in accordance with state law, primarily liable for the federal taxes of the merged corporation . . . ."); and (2) underpayment interest is treated as a tax, *see* 26 U.S.C. § 6601(e)(1); *Fisher v. United States*, 80 F.3d 1576, 1580 (Fed. Cir. 1996).

Second—the opposite side of the same coin—the surviving entity of a merger is entitled to the pre-merger tax overpayments (and interest thereon) of the merged entities because "the successor corporation is in law a continuation of the taxpayer [the merged corporation]." Internal Revenue Manual 35.8.5.1; *see also* Rev. Rul. 59-399, 1959-2 C.B. 488 (holding that the surviving entity is "in effect the same taxable entity as its absorbed constituents" with the result that the surviving entity is "legally entitled to a refund" of an overpayment made by the merged corporation). Thus, after a merged corporation has ceased its *separate* legal existence, the surviving entity can still request a refund of overpayment interest owed to that "absorbed constituent." Rev. Rul. 59-399, 1959-2 C.B. 488.

C. Congress Has Repeatedly Instructed The Service To Implement Interest Netting Broadly

Congress's treatment of overpayment and underpayment interest immediately prior to the enactment of § 6621(d) provides additional relevant

background to the specific statutory issue presented by this appeal.

Prior to 1986, and subject to a few isolated historical exceptions, there was no difference between the interest rate imposed on corporate taxpayers' underpayments of tax and the interest rate paid by the government to those same taxpayers for overpayments of tax. *See* Office of Tax Policy, Dep't of the Treasury, *Report to the Congress on Netting of Interest on Tax Overpayments and Underpayments* 7 (1997), *available at* http://www.treasury.gov/resource-center/tax-policy/Documents/t0neting.pdf (last visited June 24, 2015) (hereinafter "Treasury Report") ("Generally, . . . from 1939 until 1986 the overpayment and underpayment rates were the same for all taxes.").

In 1986, however, Congress adopted a one-percent rate differential, under which corporate taxpayers would pay the federal short-term interest rate plus 3 percent on underpayments but receive only the short-term rate plus 2 percent interest on overpayments. *See* Pub. L. No. 99-514, § 1511(a), 100 Stat. 2085, 2744 (1986). As the Senate Report explained at the time, Congress adopted the differential to address concerns that using a single rate for both overpayments and underpayments "may cause taxpayers either to delay paying taxes as long as possible to take advantage of an excessively low rate or to overpay to take advantage of an excessively high rate." S. Rep. No. 99-313, at 184-85 (1986). Congress continued to tinker with the appropriate rates over the next decade,

increasing the large corporate underpayment rate to the short-term rate plus 5 percent in 1990 (creating a 3 percent gap), *see* Pub. L. No. 101-508, § 11341(a), 104 Stat. 1388, 1388-470 to -471 (1990), and decreasing the overpayment rate for large corporations to the short-term rate plus 0.5 percent in 1994 (widening the gap to its present 4.5 percent), *see* Pub. L. No. 103-465, § 713(a), 108 Stat. 4809, 5001 (1994).

At the same time that Congress was creating the corporate interest rate differential, it also recognized that its dual-rate approach would produce inequitable results for taxpayers who had simultaneously pending overpayments and underpayments. Because of the higher interest rate on underpayments and the often lengthy process by which the Service makes assessments of taxes, a corporation that had a tax overpayment in one year and a tax underpayment of the same amount in the following year would owe underpayment interest at the end of a multi-year audit even though its net tax balance had never exceeded zero.

Accordingly, Congress repeatedly instructed the Service that it should use its existing statutory authority to mitigate those inequitable effects through a process known as "interest netting," under which interest is calculated on the *net* overpayment or underpayment balance outstanding in a given year. *See* H.R. Rep. No. 104-506, at 50 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1143, 1173 ("Congress has never adopted differential interest rates, or increased the amount of such

differential, without at the same time also encouraging the IRS to implement comprehensive interest netting procedures."); H.R. Rep. No. 101-964, at 1101 (1990) (Conf. Rep.), *reprinted in* 1990 U.S.C.C.A.N. 2374, 2807 (directing the Service to "implement the most comprehensive crediting procedures under section 6402 that are consistent with sound administrative practice"); H.R. Rep. No. 99-841, pt. 2, at 785 (1986) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 4075, 4873 (by three years after the date of enactment of the bill, "the IRS should have implemented the most comprehensive netting procedures that are consistent with sound administrative practice").

These "Congressional efforts to persuade the Treasury Department to implement broad reforms were met with inaction on the part of the Service." *Magma Power*, 101 Fed. Cl. at 563. As a result, Congress took more direct action. "[C]oncerned that the IRS ha[d] failed to implement comprehensive interest netting procedures" and "interested in learning whether the delay stems from technical difficulties or substantive questions about the scope of such interest netting procedures," H.R. Rep. No. 104-506, at 50, *reprinted in* 1996 U.S.C.C.A.N. at 1173, Congress directed the Treasury Department to conduct a study and publish a report identifying any limitations to the Service's existing interest netting procedures. *See* Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 1208, 110 Stat. 1453, 1473 (1996); *Magma Power*, 101 Fed. Cl. at 563.

After soliciting public comments, the Treasury Department delivered its required report the following year. *See* Treasury Report, *supra*. The Treasury Report explained that the Service's existing authority for addressing the rate differential was based on § 6402(a) of the Internal Revenue Code.[1] *Id.* at 1. That provision gives the Service discretion to "offset" outstanding overpayments and underpayments against each other to effectuate a zero balance for purposes of interest calculations. *Id.* at 9; *see also* 26 U.S.C. § 6601(f) (providing that "[i]f any portion of a tax is satisfied by credit of an overpayment, then no interest shall be imposed under this section on the portion of tax so satisfied" during periods in which interest would have been allowable on the overpayment). But the Treasury Department and the Service took the narrow position (in line with its decade-long foot dragging on interest netting) that offsetting was available under § 6402(a) only where *both* the overpayment and the underpayment remained unpaid at the time the taxpayer requested the offsetting. Treasury Report at 29-31. Where one of the two had already been paid, however, the Service maintained that it lacked authority

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[1] Section 6402(a) provides: "In the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall, subject to subsections (c), (d), (e), and (f) refund any balance to such person." 26 U.S.C. § 6402(a).

to "credit" one against the other, and therefore could not alleviate the inequity of the disparate interest rates. *Id.*

Nevertheless, even the Treasury Department acknowledged that "[i]t makes little sense from a policy standpoint to permit interest netting in some factual circumstances but not in others, particularly when the difference between the permissible and impermissible netting situations turns on the comparatively trivial question of whether there is a zero balance or an outstanding balance due one way or the other." *Id.* at 24. It therefore recommended that, if Congress was committed to making interest netting available beyond what was already permissible under § 6402(a) when both the underpayment and overpayment remained outstanding, it should pass new legislation authorizing that broader approach.

Congress promptly did so. In 1998, it adopted the nondiscretionary provision now codified at 26 U.S.C. § 6621(d), which provides:

> To the extent that, for any period, interest is payable under subchapter A and allowable under subchapter B on equivalent underpayments and overpayments by the *same taxpayer* of tax imposed by this title, the net rate of interest under this section on such amounts *shall be* zero for such period.

Pub. L. No. 105-206, § 3301(a), 112 Stat. 685, 741 (1998) (emphases added). At the same time, Congress passed a "Special Rule" providing that § 6621(d) would apply retroactively to interest from periods before its enactment so long as the

taxpayer submitted a netting request to the Secretary by December 31, 1999. *See id.* § 3301(c), 112 Stat. at 741.

II. Statement Of The Case

A. Wells Fargo And The Representative Interest Netting Scenarios At Issue

As the government notes (at 8), the parties have agreed that, for purposes of answering the legal question presented by this appeal, the relevant merger history of Wells Fargo can be distilled to three representative scenarios:

Situation 1: In 1993, Old Wachovia had an overpayment. In 1999, First Union had an underpayment. Old Wachovia and First Union merged in 2001.

Situation 2: In 1993, First Union had an overpayment. In 1999, after a series of mergers, First Union had an underpayment.

Situation 3: In 1992, Core States had an overpayment. In 1998, Core States merged with First Union. In 1999, the surviving corporation had an underpayment.

The parties stipulated to the facts underlying these scenarios. *See* Consolidated Statement of Uncontroverted Facts ("CSUF") dated October 11, 2013. A660-84. The government states in multiple places that the overpayments and underpayments at issue in Situation 1, and the overpayment in Situation 3, were "made" before the relevant mergers. *See, e.g.*, Br. 9-10, 18-20, 28-30. To be clear, while the tax years to which the overpayments and underpayment relate

ended before the mergers, the overpayments and underpayment were not assessed and paid until after the mergers had been completed.

Test Claim	**Merger Date**	**Dates of Overlapping Underpayment/ Overpayment Interest**
Situation 1: underpayment interest for First Union (Tax Year 1999) netted against overpayment interest from Old Wachovia (Tax Year 1993)	September 1, 2001	March 15, 2000 – December 26, 2001 and January 25, 2002 – March 15, 2004
Situation 3: underpayment interest for First Union (Tax Year 1999) netted against overpayment interest from CoreStates (Tax Year 1992)	April 28, 1998	March 15, 2000 – March 15, 2002

See A678-81 (CSUF ¶¶ 88-100).

B. Proceedings Below

Beginning in 2009, Wells Fargo timely filed with the Service a series of administrative claims for refund to recover, among other amounts, overpaid interest on tax underpayments pursuant to § 6621(d) of the Code (the "Interest

Netting Claims"). The Interest Netting Claims relate to underpayment periods for which Wells Fargo (including the corporations that were merged into it) was liable and overpayment periods for which the government owed a refund to Wells Fargo (including the corporations that were merged into it). A673 ¶¶ 70-73. The Service did not act upon the claims. A294-95 ¶ 2.

Wells Fargo timely filed a Complaint against the United States in this case on December 1, 2011, seeking the refund of interest in connection with the above-mentioned claims for refund pursuant to § 6621(d). A37-287. After stipulating to the dismissal of certain of these claims, Wells Fargo filed an Amended Complaint on October 22, 2012, which contained 64 claims for refund of interest pursuant to § 6621(d). A288-90; A291-511.

The parties jointly proposed cross-motions for summary judgment solely on the issue of whether Wells Fargo is the "same taxpayer" for purposes of § 6621(d) as the corporations merged into it pursuant to a statutory merger. The parties agreed that the motions would rely on the test cases described above as representing the interest netting claims at issue. The Court of Federal Claims accepted this proposal in an Order dated September 19, 2013. A33. The parties stipulated to the "test claims" and certain other facts in a Consolidated Statement of Uncontroverted Facts. A660-84.

On June 27, 2014, after extensive briefing and oral argument, the Court of Federal Claims granted Wells Fargo's Motion for Partial Summary Judgment and denied the government's Cross-Motion for Partial Summary Judgment "based on the undisputed principles of corporate law, as well as IRS rules governing statutory mergers and IRS guidance." A26. After analyzing the legislative history of § 6621(d), which "reveals that Congress intended for § 6621(d) to be remedial in nature," the Court held that "the statute must be construed broadly." A12. Further, the Court rejected the government's reliance on *Energy East* and *Magma* on the grounds that "*Energy East* and *Magma Power* involved separate but affiliated corporations." A16. The Court noted that "neither case examined the application of § 6621(d) in the context of a statutory merger, and the differences between merged corporations and consolidated corporations are critical to determining whether the proposed interest netting is by the 'same taxpayer.'" *Id.* The Court also criticized the government's current position as inconsistent with its prior position: "whenever the IRS has determined sameness in situations involving statutory mergers—as opposed to those involving consolidated groups—the IRS has found that the acquired corporation is the same taxpayer as the surviving corporation." A22.

The government moved to certify the Court of Federal Claims' ruling for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). A1945-54. After the

government conceded a secondary issue in the case on netting in the context of consolidated returns, the Court of Federal Claims granted the government's motion on October 20, 2014, and this Court allowed the interlocutory appeal on February 24, 2015. A1995-96; A1-28; Order Granting Petition to Appeal, Doc. 93.

SUMMARY OF ARGUMENT

The corporation that emerges from a merger is the "same taxpayer" for purposes of § 6621(d) as the corporations that merged into it. That conclusion follows from federal, state, and administrative authorities recognizing that the corporate identity of the merged corporation continues on in the surviving corporation. A merger carries forward not only the assets and liabilities of a corporation, but also its very history, such that the successor corporation is treated as having itself earned or incurred the assets and liabilities that transfer by operation of law. The Supreme Court has recognized this basic principle of corporate law for more than seventy years. *Metropolitan Edison,* 306 U.S. at 523. And Congress is presumed to have been aware of that principle when it enacted § 6621(d)—and indicated no intent to depart from it.

This principle of corporate continuity when two companies merge into one also has animated the Service's approach to interest offsetting under § 6402(a)—the statutory precursor to § 6621(d). The government essentially ignores § 6402(a). But before enactment of § 6621(d), Congress repeatedly told the

Service that it should expand its efforts to alleviate the effects of the interest-rate differential using its existing authority under § 6402(a)—in other words, to make interest netting *easier*. The Service's failure to do so is what prompted passage of § 6621(d), as the Service has previously recognized. Now the Service is trying to restrict the circumstances in which interest netting is allowed under § 6621(d)—inviting the very problem that led to the enactment of § 6621(d) in the first place.

Section 6402(a) is just one analogous application of the corporate continuity principle. In a whole range of other federal tax areas, too, the Service has repeatedly recognized that mergers are unlike other corporate acquisitions in that they carry on the identity of the merged corporation. In areas as varied as employment taxes, income taxes, and excise taxes, the Service has treated a surviving corporation as the same taxpayer as an entity it absorbed. The Service's position in this case stands in stark contrast with its prior positions.

Neither this Court's decision in *Energy East* nor the Court of Federal Claims' decision *Magma Power* compels a different conclusion. Neither of those cases involved a merger, and their holdings about the timing of a non-merger acquisition (*Energy East*) and the separate Taxpayer Identification Number of a separate corporation (*Magma Power*) have little significance for the case at hand. Because they did not involve mergers, both decisions are consistent with the

longstanding principle already discussed; they said nothing that would warrant the departure from that principle that the government urges here.

The government finds no support for its argument in § 381, either. That provision was adopted to eliminate the distinction between mergers and other forms of acquisitions in connection with a specifically identified subset of tax attributes; it did nothing to change the effect of pre-existing merger principles in areas (like this one) to which § 381 does not apply. And the government's remaining arguments, including its policy arguments, are unpersuasive. Interest netting is a recognized exception to annualized tax accounting, and there is no evidence of transactions motivated by a desire for interest netting.

The Court of Federal Claims properly recognized that, as a result of the mergers at issue, Wells Fargo became the "same taxpayer" responsible for all of the relevant overpayments and underpayments. Its decision should be affirmed.

ARGUMENT

I. The Corporation That Survives A Merger Is The "Same Taxpayer" As The Entity Whose Assets And Liabilities It Absorbed Through The Merger

The question in this case is whether Congress intended the corporation that survives a statutory merger to be the "same taxpayer" for purposes of § 6621(d) as the corporations that merged into it. Congress did not define "same taxpayer." And no regulations or other authoritative guidance defining that term have ever

been promulgated. Accordingly this Court approaches the question *de novo*, without deference to the government's current litigating position. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988).

The primary anticipated users of § 6621(d)'s remedial provision were "larger corporate taxpayers . . . who have multiple-year open examinations" and sufficient tax balances to make netting "worth the cost of compiling the data and performing the calculations." Treasury Report 24; *see also* Br. 24. As the government concedes (at 49), that Congressional focus on corporate taxpayers is an important guide in interpreting the interest netting regime that Congress adopted. The government, for example, recognizes that it would be implausible to read "same taxpayer" to mean a taxpayer that is identical in every respect, because "'the make-up of large corporations . . . undergo[es] regular changes'" and therefore "to require absolute identity would make interest netting generally inapplicable to 'the companies that are most likely to take advantage of interest netting.'" Br. 49 (alterations in original) (quoting *Magma Power Co. v. United States*, 101 Fed. Cl. 562, 571(2011)).

The government proposes instead to read "same" as meaning "having an identity of 'relevant essentials.'" *Id.* (quoting *Webster's Third New Int'l Dictionary* 2007 (1969)). That definition is largely circular and unhelpful—just raising the question of what is "relevant." Instead, "same taxpayer" should be

interpreted in light of the state merger law and prior Congressional enactments against which Congress acted, as well as the Service's own treatment of a nearly identical situation before it adopted its litigating position in this case. As explained, those indicia of Congressional intent point overwhelmingly to the conclusion that the surviving corporation in a merger is the "same taxpayer" as the corporations it absorbs for purposes of interest netting under § 6621(d).

A. Congress's Use Of "Same Taxpayer" Must Be Understood In Light Of The Well-Settled Corporate Law Principle That A Surviving Corporation In A Merger Accedes To The Assets And Liabilities Of A Merged Corporation

When interpreting Congressional enactments, courts "generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) (presuming Congressional knowledge of state workers' compensation statutes in interpreting meaning of federal statute). It follows that, where Congress legislates against a settled state-law backdrop, the "'absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.'" *Beck v. Prupis*, 529 U.S. 494, 500-01 (2000) (citation omitted).

Congress legislated against just such a backdrop here. As explained above, a longstanding principle of state corporate law is that "[w]hen a . . . merger has taken place under the statute, the old corporations have their identity absorbed into

that of the . . . one into which they were merged." *Argenbright v. Phoenix Fin. Co.*, 187 A. 124, 126 (Del. Ch. 1936). Thus, unlike the government's non-corporate and non-statutory example (at 38 n.14) of a son serving as administrator of his father's estate not being the "same taxpayer" as his father, in a corporate merger the identity of a merged corporation is "'absorbed'" by and continues in the surviving entity even as the merged corporation "'disappears as a *distinct* legal entity.'" Br. 34 (emphasis added) (quoting *Bowers v. Andrew Weir Shipping, Ltd.*, 27 F.3d 800, 806 (2d Cir. 1994); *Frandsen v. Jensen-Sundquist Agency, Inc.*, 802 F.2d 941, 944 (7th Cir. 1986)).

By operation of law, the surviving corporation is liable for all of the merged corporation's *liabilities* (including its tax underpayments and interest thereon) and takes ownership of all its *assets* (including its tax overpayments and interest thereon). *See supra* at 7-8. This is a critical background principle. *See Magma Power*, 101 Fed. Cl. at 569 (explaining that the "central issue" is "whether the same taxpayer is, in fact, responsible for the interest accrued as a result of the underpayment and the interest due as a result of overpayments"). Indeed, the Service's early guidance on § 6621(d)—discussed in detail below—directed that "the Service should construe the terms 'underpayments and overpayments by the same taxpayer' to mean the person liable for both taxes." I.R.S. Field Serv. Adv. ("F.S.A.") Mem. 200017003, 2000 WL 1873995 (Oct. 19, 1999); *see also* F.S.A.

Mem. 200212028, 2002 WL 442928 (Jan. 16, 2002) ("I.R.C. § 6621(d) requires that the same taxpayer both be liable for the underpayment of tax, and entitled to the overpayment of tax.").

B. The Supreme Court Has Applied These Merger-Law Principles In Closely Analogous Circumstances

In applying these accepted merger principles to the question before it, the Court of Federal Claims was simply following the Supreme Court's lead. In *Metropolitan Edison*, the Court addressed the question of whether a corporation could deduct certain expenses relating to bonds that had been issued by its then-subsidiaries. 306 U.S. at 523. Between the time the bonds had been issued and were redeemed, the subsidiaries had merged into the parent corporation and their separate legal existence terminated. *Id.* at 523-24. That scenario, the Court unanimously ruled, was governed by "the principle that the corporate personality of the transferor is drowned in that of the transferee. It results that the continuing corporation may deduct unamortized bond discount and expense in respect of the obligations of the transferring affiliate." *Id.* at 529. The Court thereby "treat[ed] the surviving corporation in a merger as the same taxpayer as its components," as the Court of Claims—the predecessor court to the Court of Appeals for the Federal Circuit—subsequently explained. *Koppers Co. v. United States*, 134 F. Supp. 290, 297 (Ct. Cl. 1955); *see also South Corp. v. United States*, 690 F.2d 1368, 1370

(Fed. Cir. 1982) (en banc) (adopting Court of Claims precedent as binding on Federal Circuit panels unless overruled by the Court en banc).

Metropolitan Edison's recognition that "the corporate personality of the transferor is drowned in that of the transferee" through a merger has direct significance to the case at hand. As in *Metropolitan Edison*, the corporate identities of the merged entities here were "drowned in" the corporate identity of Wells Fargo. And as in *Metropolitan Edison*, that absorption means that Wells Fargo is now "treat[ed] . . . as the same taxpayer as [those absorbed] components." *Koppers Co.*, 134 F. Supp. at 297; *see also* Br. 60 (conceding that *Metropolitan Edison* "has been interpreted as establishing that a merger makes the surviving corporation and the absorbed corporation 'in substance the same taxpayer'" (quoting Michelle M. Arnopol, *Why Have Chapter 11 Bankruptcies Failed so Miserably? A Reappraisal of Congressional Attempts to Protect a Corporation's Net Operating Losses After Bankruptcy*, 68 Notre Dame L. Rev. 133, 141 (1992))).

Recognizing these implications of *Metropolitan Edison*, the government seeks to marginalize the decision in three ways. First, the government argues (at 57) that this Court should not follow *Metropolitan Edison* because it "reflected the minority view in case law dealing with transfers of attributes in mergers and acquisitions before Congress enacted § 381 in 1954." The government (at 58) instead casts a case decided five years before *Metropolitan Edison—New Colonial*

Ice v. Helvering, 292 U.S. 435 (1934)—as "the leading case adopting the majority rule that each separate entity is a separate taxpayer." As one might expect from any effort to cast unanimous (and never-overturned) Supreme Court precedent as a "minority rule," the government's argument does not hold up to scrutiny.

In *New Colonial Ice*, the shareholders of an existing corporation had organized a new corporation to purchase the assets and business of the existing corporation. *Id.* at 437. After the acquisition, the selling corporation continued to exist, but it was merely a shell—it had no assets, no income, and no new losses. *Id.* at 438. The Court unanimously agreed that the new corporation was not the same "taxpayer" as the still extant old corporation, holding "that in law and in fact the two corporations were not identical but distinct. This was plainly implied in the transfer of the assets and business from one to the other. That transaction was voluntary and contractual, not by operation of law." *Id.* at 441.

Far from competing lines of cases (as the government now claims), *Metropolitan Edison* and *New Colonial Ice* represent two endpoints on a continuum of taxpayer status. The points in between were sometimes blurry, eventually leading Congress to step in with revisions in § 381 that eliminated the need for courts to draw the lines in most cases. *See infra* at 47-49. But the end points, at least, were clear. Under *New Colonial Ice*, a company that purchases assets from another company that continues in existence is not the same taxpayer

as that other company. 292 U.S. at 441-42. But under *Metropolitan Edison*, a corporation that acquires all the assets and liabilities of another corporation by absorbing that corporation in a statutory merger *is* the same taxpayer. 306 U.S. at 529. Far from inconsistent, these cases just reflect the line between statutory mergers on the one hand and non-merger acquisitions on the other.[2]

Second, the government argues (at 61) that *Metropolitan Edison* in fact had nothing to do with the continuity of corporate identity, because "[p]rior to *Metropolitan Edison*, courts allowed a successor to deduct unamortized bond discount," recognizing that "the successor had incurred its *own* loss when required to pay the bonds." The government therefore half-heartedly offers (at 61) that *Metropolitan Edison* "can be read as recognizing that the successor suffered its *own* loss when it paid the bonds, as opposed to treating the surviving and acquired corporations as the same taxpayer." Whether or not the case *can* be read that way (the government points to a single 1943 Tax Court decision in making this argument), it is not the way the case *should* be read. As the Court of Claims

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[2] Even if the cases *were* inconsistent, the Supreme Court has made clear that only it has the authority to overrule its past precedents. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

explained in *Koppers Co.*, "[a]lthough the *Metropolitan Edison Co.* case may be distinguishable on the ground that the . . . expenses in respect to bond retirement was a direct expense of the surviving corporation and not a loss of the merged component, the case was not decided on that ground." 134 F. Supp. at 295.

Third, the government argues (at 62) that *Metropolitan Edison*'s directive about the effects of a merger was effectively overruled in *Libson Shops, Inc. v. Koehler*, 353 U.S. 382 (1957). Not so. *Libson Shops* involved the specific treatment of net operating losses and carryovers following a merger. The Commissioner, citing *New Colonial Ice*, had argued that "separately chartered corporations are not the same taxable entity." *Id.* at 385-86. The taxpayer, citing *Metropolitan Edison*, argued that "a corporation resulting from a statutory merger is treated as the same taxable entity as its constituents to whose legal attributes it has succeeded by operation of state law." *Id.* at 386. But the Court found it "unnecessary to discuss this issue, since an alternative argument made by the Government is dispositive of this case." *Id.*

That alternative argument was specific to Congressional treatment of net operating losses and carryovers, and derived from legislative history unique to those particular tax attributes. *Id.* (citing "the legislative history of the carry-over and carry-back provisions"). Although the statute spoke broadly to the "taxpayer," the Court held that Congress had intended the carry-over and carry-back provisions

to apply "only to the extent that . . . income is derived from the operation of substantially the same *business* which produced the loss." *Id.* (emphasis added). The Court compared Congress's treatment of carry-overs and carry-backs in the statute before it to the treatment, in the then-newly enacted § 382(a), of a corporation that is purchased and then changes its trade or business. Section 382(a), the Court pointed out, "precludes a carry-over by the *same* corporation, unless it continues to engage in 'substantially the same' trade or business as before the change in ownership." *Id.* at 388 n.7 (emphasis added). Under both statutes, the pertinent inquiry focused on the continuity of the specific line of business, rather than the corporate identity more generally.[3]

Thus, just as the government suggests (at 64-66) that this Court should not rely on *Seaboard Air Line Railway v. United States*, 256 U.S. 655 (1921), because it recognized a policy-based exception to the text of the Anti-Assignment Act, neither should this Court read *Libson Shops* as overturning the *New Colonial Ice* and *Metropolitan Edison* line of cases that it expressly declined to reach. *See Libson Shops*, 353 U.S. at 386. *Libson Shops* turned not on the text of the statute

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[3] The Court declined "to pass on situations [in which] a *single* corporate taxpayer changed the character of its business and the taxable income of one of its enterprises was reduced by the deductions or credits of another." 353 U.S. at 390 n.9.

or background principles about the impact of a merger, but rather on Congressional policy that had motivated the specific carry-over and carry-back provisions at issue in that case. Accordingly, it does not support the government here.

C. The Pre-Existing Provision Congress Sought To Expand Upon In § 6621(d) Authorizes Offsetting In The Circumstances Presented Here

Of course, Congress is presumed familiar not only with state laws, but with federal laws as well. *See, e.g.*, *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (presuming Congressional familiarity with existing law, including judicial interpretations thereof); *Cannon v. University of Chi.*, 441 U.S. 677, 697-99 (1979) (noting that "[i]t is always appropriate to assume that our elected representatives, like other citizens, know the law," including "prior interpretation" of existing federal law). And "[g]iven that Congress is presumed to enact legislation with knowledge of the law and a newly-enacted statute is presumed to be harmonious with existing law and judicial concepts," this Court has further recognized that "the absence of any statement that the statute was designed to modify" existing standards is "telling." *Aectra Refining & Mktg., Inc. v. United States*, 565 F.3d 1364, 1370 (Fed. Cir. 2009).

This presumption of Congressional familiarity has particular force here. Congressional enactment of § 6621(d) was premised upon a Congressionally required Treasury Report that specifically described the Service's approach to

addressing underpayment and overpayment interest under § 6402. Congress acted to remove the limitations on netting described in that Report and expand the availability of netting beyond what the Service had previously allowed under § 6402(a) and, by extension, § 6601(f). And it made the connection between the new netting provision and existing offsetting practice explicit in a new sentence added to § 6601(f), which provided that that section "shall not apply to the extent that section 6621(d) applies." *See* Pub. L. No. 105-206, § 3301(b), 112 Stat. at 741.

The contours of offsetting law under § 6402(a) are thus highly relevant to understanding the meaning of § 6621(d). The Service recognized as much in a non-binding Field Service Advice published shortly after § 6621(d)'s passage. *See* F.S.A. Mem. 200017003, 2000 WL 1873995 (Oct. 19, 1999) ("In eliminating the interest rate differentials without regard to whether overpayments and underpayments are currently outstanding, Code section 6621(d) should be available in those situations where the Service would be entitled to offset.").

This backdrop seriously undermines the government's present position. Section 6402(a) provides that, "[i]n the case of any overpayment, the Secretary . . . may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment . . . and shall refund the balance to such

person." 26 U.S.C. § 6402(a), *supra* note 1. Consistent with the state-law merger principles discussed above, a surviving corporation qualifies as "the person who made the overpayment" in circumstances where a pre-merger overpayment was made by a subsequently absorbed corporation—as the government expressly conceded below. *See* A1668 ("The successor qualifies as 'such person' under § 6402(a).").

Indeed, the Service applied offsetting to Wells Fargo overpayments and underpayments that directly parallel overpayments and underpayments on which it seeks to deny netting in this appeal. *See* A677 (CSUF ¶ 87a) (offsetting overpayment of $2,060,843.32 from Fidelity's 1993 income tax account against underpayment from First Union's 2003 income tax account). The government has never suggested that the Service acted beyond its authority in allowing offsetting under § 6402(a) in those circumstances, even as it shows no hesitation to criticize the Service's past interpretations of § 6621(d) where necessary to make its present arguments. *See* Br. 7 n.7, 30 n.11, 46 n.18.[4]

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[4] The government does assert (at 46 n.18) that F.S.A. Mem. 200027026, 2000 WL 33116161 (July 7, 2000), which dealt with both netting under § 6621(d) and offsetting under § 6402(a), "is outdated in light of *Energy East* and *Magma*." That assertion is appended to its claim (at 46) that "Section 6402 [is] of little relevance to construing § 6621(d)," and appears to reject only the portion of F.S.A. Mem.

Forced to concede that § 6402(a) treats a merged corporation as the same "person who made the overpayment" when dealing with the pre-merger tax account of an absorbed merging entity, the government seeks to steer as far away from § 6402(a) as it possibly can. Dealing with § 6621(d)'s statutory precursor in a single short paragraph, the government offers (at 45-46) that "Section 6402 [is] of little relevance to construing § 6621(d)" because § 6402 makes it "possible for one entity to make a tax overpayment for another entity and thus avail itself of offsetting, without being the 'same taxpayer' as the latter entity."

That attempt to side-step § 6402(a) fails. Even accepting the government's contention that § 6402(a) is sometimes applied to circumstances where one taxpayer has made an overpayment on behalf of another, more relevant is its recognition that § 6402(a) *also* applies in the more common circumstance where (as the government put it below) a "successor by merger . . . appl[ies] for and receive[s] a refund of *a predecessor's* overpayment of tax." A1668 (emphasis added). In that circumstance, the merged entity made the overpayment, and yet the "successor" corporation is permitted to offset it because the successor corporation qualifies as "the person who made the overpayment." The government offers no

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200027026 that dealt directly with § 6621(d). The government's reasons for disagreement with F.S.A. Mem. 200027026 are discussed *infra* at 42-46.

explanation why a surviving corporation would qualify as "the person who made the overpayment," but would not qualify as the "same taxpayer" who made the overpayment. In *both* cases, the answer can only be found by reference to background principles regarding the continuity of corporate identity that a merger preserves.

In the Court of Federal Claims, the government tried to distinguish § 6402(a) with a different argument: that § 6402(a) gives the Secretary discretion, whereas § 6621(d) is mandatory. *See* A1668. The government has abandoned that argument on appeal, perhaps recognizing that § 6402(a) affords the Secretary discretion only *after* the statutory criterion—an offsetting claim by "the person who made the overpayment''—has already been satisfied. The presence or absence of discretion is thus irrelevant to the earlier-in-time inquiry of whether that criterion is satisfied by particular facts. Still, the government's jettisoned argument highlights Congress's intent to make § 6621(d) *more* favorable to taxpayers than § 6402(a) rather than less favorable, as the government would have it.

By refusing to recognize § 6621(d)'s application to merger scenarios in which § 6402(a) would allow offsetting, the government would re-introduce the anomaly that Congress sought to remedy with § 6621(d). As the Treasury Report observed, "[i]t makes little sense from a policy standpoint to permit interest netting in some factual circumstances but not in others, particularly when the difference

between the permissible and impermissible netting situations turns on the comparatively trivial question of whether there is a zero balance or an outstanding balance due one way or the other." Treasury Report 24. But that is exactly what the government asks this Court to sanction here.

As discussed above, the Service has already applied offsetting under § 6402(a) to Wells Fargo overpayments and underpayments related to the transactions at issue in this case. *See* A677 (CSUF ¶ 87a). The only pertinent difference between those *allowed* offsetting claims and the netting claims to which the government objects here is that both the overpayment and underpayment remained outstanding at the time the offsetting request was submitted, whereas one or both of the balances had been paid when the netting claims were submitted. Congress cannot have intended to punish corporate taxpayers for the timely resolution of their tax disputes, or make its remedial efforts turn on such a "trivial question."

D. The Service Itself Has Consistently Recognized That The Parties To A Statutory Merger Are The Same Entity Following The Merger

1. The Service Recognized The Continuity Of Identity After A Merger Long Before Congress Enacted § 6621(d)

It is not just in § 6402(a) that federal tax law embraces the principle that a merged entity absorbs the identities of the corporations that lose their separate

existence in a merger. The Service itself has long recognized that "where a corporation is absorbed by another corporation in a statutory merger or consolidation the resultant corporation should be regarded as the same taxpayer." Rev. Rul. 62-60, 1962-1 C.B. 186. The reason, according to the Service, is simple, and directly applicable to the present case: "the life of the absorbed corporation is deemed to continue" in the surviving entity, and therefore "there is no predecessor-successor relationship in a statutory merger or consolidation but one continuing taxpayer or employer." *Id.*

For present purposes, the most significant instances of this continuation treatment concern overpayment entitlement, underpayment liability, and the interest thereon, which the surviving corporation acquires by operation of law in the merger. *See supra* at 7-8. But the principle is hardly unique to those applications. In Revenue Ruling 62-60, the Service applied this continuity principle to taxes imposed under the Federal Unemployment Tax Act, the Federal Insurance Contributions Act, and the Withholding of Income at Source on Wages Act. *Id.* In Revenue Ruling 66-125, the Service relied on it to hold that a merged entity that had absorbed a cigarette manufacturer was the "manufacturer" of the merged entity's cigarettes and therefore entitled to a refund of excise tax. Rev. Rul. 66-125, 1966-1 C.B. 342 (surviving corporation "should be considered the 'manufacturer' within the intent of [the provision] since that corporation is the

successor to the manufacturing company and, therefore, is entitled to file claim for credit or refund").

General Counsel Memoranda 35442[5] dealt with a manufacturer's excise tax that could be paid in installments. However, if such installment payment accounts were "'sold or otherwise disposed of,'" the full amount of tax would become due. I.R.S. Gen. Couns. Mem. ("GCM") 35442, 1973 WL 34430 (Aug. 16, 1973) (quoting 26 U.S.C. § 4216(e) (1958)). The memorandum instructed that if such installment payment accounts were acquired by a corporation that "is regarded as the same corporation for tax purposes as the original selling corporation," the accounts should not be treated as "disposed of" and the tax payments should not be accelerated. *Id.* at *2. It then concluded that the survivor of a statutory merger "in substance is recognized as the seller," with the result that the installment payment accounts were not "disposed of" within the meaning of the statute. *Id.* And General Counsel Memoranda 36046 recognized that "the principle that the

[5] General Counsel Memoranda are "legal memorandums from the Office of Chief Counsel prepared in connection with the review of certain proposed rulings." Internal Revenue Manual 4.10.7.2.11. They lack precedential legal effect, *Morganbesser v. United States*, 984 F.2d 560, 563 (2d Cir. 1993), but are "helpful in understanding . . . the Service's response to similar issues in the future." Internal Revenue Manual 4.10.7.2.11; *see also Taxation With Representation Fund v. IRS*, 646 F.2d 666, 682 (D.C. Cir. 1981) (GCMs are "an expression of agency policy"); *Dover Corp. v. Commissioner*, 122 T.C. 324, 341 & nn.11-12 (2004).

surviving corporation in a statutory merger may be regarded in substance as the same taxpayer as the merged corporation for tax purposes is not limited to income tax cases; but, rather, it has also been applied with respect to other Federal tax provisions." GCM 36046, 1974 WL 35818, at *2 (Oct. 9, 1974).

These authorities are just a sampling of the situations in which the Service has recognized that the surviving taxpayer in a merger is treated as the same entity as the corporation it absorbed. There are many others.[6]

2. The Service's Early Applications Of § 6621(d) Likewise Reflect The Continuity Of Identity After A Merger

In line with this accepted principle of continuity, the Service's initial

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[6] *See also, e.g.*, Rev. Rul. 72-356, 1972-2 C.B. 452 (noting "the proposition that attributes of the predecessor corporation become elements of the corporate personality of the surviving entity, and must be taken into account in determining the tax status of the surviving corporation for years subsequent to the merger"); C.C.A. Mem. 201222001, 2012 WL 1961411 ("following a corporate merger, the surviving corporation is, in accordance with state law, primarily liable for the federal taxes of the merged corporation"); GCM 37601, 1978 WL 43549, at *2 (July 10, 1978) ("It has been the long standing position of the Service that for purposes of the Federal Unemployment Tax Act . . . and F.I.C.A. no new organization is formed in a statutory merger."); I.R.S. Priv. Ltr. Rul. 9850001, 1998 WL 855386 (Aug. 31, 1998) (surviving corporation in statutory merger that receives property of like kind to property transferred by merged corporation qualifies for Code § 1031 nonrecognition of gain); GCM 37677, 1978 WL 43697, at *5 (Sept. 15, 1978) (right under 26 U.S.C. §1375(d) for an acquired corporation to make a nondividend distribution of previously taxed undistributed income should carry over to the successor acquiring corporation; "since the enactment of the 1954 Code, the Service has allowed the carryover, in statutory mergers, of a variety of tax attributes not listed in section 381").

applications of § 6621(d) also allowed interest netting by merged entities. These applications came in Field Service Advice and Chief Counsel Advice letters rather than in binding regulations (which have yet to be promulgated). But the early letter rulings show how tax experts—and, indeed, the IRS's own lawyers—at the time of § 6621(d)'s passage understood its application. *See Rowan Cos. v. United States*, 452 U.S. 247, 262 n.17 (1981) ("Although these rulings have no precedential force, they are evidence . . . ." (citations omitted)); *Xerox Corp. v. United States*, 656 F.2d 659, 660 n.3 (Ct. Cl. 1981) ("[P]rivate letter rulings . . . are helpful, in general, in ascertaining the scope of the 'service' doctrine adopted by the Service and in showing that that doctrine has been regularly considered and applied by IRS."). Tellingly, there is not a word of support in those early authorities for the government's present position.

The first such letter ruling, Field Service Advice 200017003, was published less than two years after the enactment of § 6621(d). As described above, the advice memorandum directed Service field personnel to "construe the terms 'underpayments and overpayments by the same taxpayer' to mean the person liable for both taxes." F.S.A. Mem. 200017003, 2000 WL 1873995. And contrary to the government's present dismissive view toward § 6402(a), the Advice memorandum recognized that "the legislative history of Code section 6621(d) indicates the zero interest rate is applicable in those circumstances where the Service would normally

offset [under § 6402(a)], were the underpayments and overpayments currently outstanding. In eliminating the interest rate differentials without regard to whether the overpayments and underpayments are currently outstanding, Code section 6621(d) should be available in those situations where the Service would be entitled to offset." *Id.* (citation omitted). A subsequent Chief Counsel Advice reached the same conclusion: "While section 6601(f) zeroes out overlapping underpayment and overpayment interest in cases of setoff [under § 6402(a)], the evident purpose of section 6621(d) was to extend the same relief in cases without a setoff." C.C.A. Mem. 200707002, 2007 WL 495329 (Dec. 20, 2006).[7]

The Service put those principles into practice most clearly in Chief Counsel Advice 200212028. There, the Service addressed the application of § 6621(d) to a scenario that directly parallels Situation 1 in the present case: Corporation A had an overpayment in Year 1, Corporation B had an underpayment in Year 3, and Corporations A and B merged in Year 4 with B surviving. F.S.A. Mem. 200212028, 2002 WL 442928 (describing Situation 5). The Chief Counsel Advice

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[7] A CCA is a "written determination" by the IRS that must be "open to public inspection." 26 U.S.C. § 6110(a), (b)(1)(A). Although such written determinations do not have precedential legal effect, *see id.* § 6110(k)(3), they are "helpful" in demonstrating how legal principles "ha[ve] been regularly considered and applied by IRS." *Xerox Corp.*, 656 F.2d at 660 n.3; *see also Rowan Cos.*, 452 U.S. at 262 n.17 (reviewing written determinations as "evidence" of IRS position); *Hanover Bank v. Commissioner*, 369 U.S. 672, 686-87 (1962).

explained that "I.R.C. § 6621(d) requires that the same taxpayer be both entitled to an overpayment and at the same time, be liable for an underpayment." *Id.* (¶ 5.B). Applying that interpretation to the described scenario, "B would be entitled to file a claim for interest netting" because "B is both entitled to A's Year 1 overpayment, and is liable for its Year 3 underpayment." *Id.* (¶ 5.A). The form of the transaction—a statutory merger—was significant, the Chief Counsel Advice explained, because "[i]f A were still in existence after B acquired A's stock, then B would not be entitled to interest netting, because A would be entitled to its Year 1 overpayment and B would be liable for its Year 3 underpayment." *Id.* (¶ 5.B).

The Service continued to apply this interpretation of § 6621(d) until shortly before the present suit was filed. Indeed, the Service applied this interpretation to Wells Fargo § 6621(d) interest netting requests materially indistinguishable from those at issue here as recently as 2010. *See* A1747-52. For example, the Service allowed netting of overpayment interest from First Union's 1987 tax account and underpayment interest of Old Wachovia's 1997 tax account, even though the companies' merger occurred in 2001—a result directly contradictory to the government's present position on Situation 1. A1749 ¶ 7a, 1757-64, 1769-81. And the Service allowed netting of overpayment interest from First Fidelity's 1995 tax account and underpayment interest from First Union's 1997 tax account, even though First Fidelity was merged into First Union in 1996, ceasing its separate

existence—a result directly contradictory to the government's position on Situation 3. A1750 ¶ 8a, 1757, 1765-68.

The analysis, acceptance, and application to the very facts before this Court of the background principle as to the continuity of corporate identify after a merger is strong evidence of the context within which § 6621(d) was enacted, what Congress must have meant when it used the term "same taxpayer," and how the Service has applied that term administratively to other merged corporations.

E. *Energy East* Is Readily Distinguishable

In an attempt to side-step the Service's prior guidance, the government asserts (at 7 n.7) that it is merely applying this Court's decision in *Energy East v. United States*, 645 F.3d 1358 (Fed. Cir. 2011). That is incorrect. *Energy East* involved interest netting in the non-merger context, and it therefore had no need to push aside the decades of consistent state and federal treatment of mergers that the government now claims that case resolved *sub silentio*.

As discussed above, the Service's prior guidance on § 6621(d) allowed interest netting after statutory mergers and disallowed interest netting after non-merger corporate acquisitions. *See supra* at 38-41. *Energy East* dealt only with the latter situation, in which the Service had *always* said it would not allow netting. There, a parent corporation had made underpayments, and two subsidiaries—before being acquired by the parent—had made overpayments during overlapping

tax years. *Energy East*, 645 F.3d at 1359. With all three corporations still extant, the parent company sought to net the interest on its own underpayment with the interest on overpayments by its subsidiaries before it acquired them. *Id.* at 1360. Neither party contended that the entities were the "same taxpayer" in the tax year of the overpayment and underpayment, but Energy East argued that the acquisition nonetheless qualified it for interest netting under § 6621(d). *Id.* at 1361. This Court, quite correctly, rejected Energy East's argument because—unlike the corporate merger situation here—the parent and subsidiaries had not been the "same taxpayer" at the relevant point in time. *See id.* at 1363.

The government now argues that, even though *Energy East* concerned only separate corporations that were not the same taxpayer "when their respective underpayments and overpayments were made," *id.* at 1361, the case's holding somehow expanded beyond the facts before the Court to encompass merger scenarios that the Service had previously recognized should be treated differently. Not so. In *Energy East*, the taxpayers did not even argue that they qualified as the same taxpayer at the relevant point in time. *See id.* ("The parties do not dispute that [the corporations] were not the 'same taxpayer,' under any definition, when their respective underpayments and overpayments were made."). Such an argument would have been impossible on those facts, because an acquisition in

which the corporations remain *separate* involves no absorption of corporate identity.

But a statutory *merger* does, and therefore requires a different result. That was the consistent mandate of the Service's original guidance on § 6621(d)'s application, and was the basis for the Court of Federal Claims' holding below. In claiming that *Energy East* resolved that question on facts that did not present it, the government attempts to parlay one taxpayer's concession into a binding rule that would govern other taxpayers in fundamentally different circumstances. *Energy East* cannot bear the weight the government must put on it.

F. *Magma Power* Is Distinguishable As Well

The government also relies heavily on *Magma Power Co. v. United States*, 101 Fed. Cl. 562 (2011). There, the corporate taxpayer (Magma Power) had an underpayment on its 1993 tax account, which was not determined until 2002. In 1995, Magma Power was acquired by another company, but—unlike in a merger—retained its separate existence. *See id.* at 565. Following the acquisition, Magma Power was included on its parent company's consolidated income tax return, and the consolidated group had a series of overpayments in 1995-98 which were attributable to Magma Power. *Id.* Magma Power then sought to net the interest on its 1993 underpayments with the interest on the overpayments in 1995-98. *Id.*

The Court of Federal Claims ordered the Service to *allow* the netting. *Id.* at 576. The "central issue," it explained, is "whether the same taxpayer is, in fact, responsible for the interest accrued as a result of the underpayment and the interest due as a result of overpayments." *Id.* at 569. The government argued that the netting should not be allowed "since those overpayments applied to the consolidated group as a whole not to Magma Power individually." *Id.* The court rejected that argument, pointing out that Magma Power had retained its separate identity, as indicated by its separate Taxpayer Identification Number. *Id.* "For purposes of our plain meaning analysis," the court explained, "we are concerned only with the individual member of that group, as identified by its [Taxpayer Identification Number], which is responsible for equivalent amounts of underpayments and overpayments in separate tax years." *Id.* at 570. It was in this context that the court stated that "there seems no better plain meaning of the term 'same taxpayer' than 'same taxpayer identification number.'" *Id.* at 569.

The government now seeks to convert *Magma Power* from a pro-taxpayer restriction on the Service's ability to *disallow* netting into a pro-Service restriction on taxpayers' ability to *obtain* netting. In its view, the quality that was *sufficient* to demonstrate "same taxpayer" status in *Magma Power* is also *necessary* to showing "same taxpayer" status after a merger. *Magma Power* established no such requirement. And in pushing one on its own, the government once again fails to

recognize the significance of merger law as distinct from other types of acquisitions. Unlike *Magma Power*, where the taxpayer remained separate from its parent and its entitlement to netting depended on demonstrating that separation, here the predecessor corporations have merged into a single surviving corporation and the netting results from that absorption.

The fact that the corporation that survives a merger uses just one of the two (or more) Taxpayer Identification Numbers that the merging companies used is a happenstance of administrative convenience and the development of the Taxpayer Identification Number system long before the passage of § 6621(d). Taxpayer Identification Numbers exist to facilitate the Service's recordkeeping; before now, the government has never claimed—or intended—that they capture the nuances of a taxpayer's identity in every scenario. And in light of the other considerations discussed above, it is clear that they do not. Accordingly, this Court should reject the government's attempt to shoehorn the interest netting question in this case into a numbering system that was designed with wholly different objectives in mind.[8]

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[8] In basing the application of § 6621(d) entirely on the Service's requirements about when to require a new Taxpayer Identification Number and which existing Taxpayer Identification Number to use, moreover, the government is in effect seeking judicial deference, notwithstanding its failure to promulgate notice-and-comment rules governing the application of § 6621(d). *But see United States v. Mead Corp.*, 533 U.S. 218, 229-31 (2001). On the government's theory, if the

G. The Government's Remaining Objections Lack Merit

The government raises a number of subsidiary arguments in its attempt to narrow Congress's provision for interest netting in § 6621(d). None withstands scrutiny.

1. Section 381's Catch-All Treatment Of Certain Tax Attributes Does Not Speak To The Availability Of Interest Netting Under § 6621(d)

The government argues (at 56) that § 6621(d) should be interpreted not in light of the state-law merger doctrines and Supreme Court precedent discussed above, but instead "against the backdrop of § 381, which contemplates transfer of attributes from one corporation to another in a merger." Developing that theme, the government claims (at 44) that the fact that § 381 affirmatively provides for the transfer of certain tax attributes in a merger must mean that Congress rejected *Metropolitan Edison*'s understanding that the surviving corporation was the "same

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Service decides to create rules that allow a surviving corporation to retain the same Taxpayer Identification Number—as it does in a reorganization under § 368(a)(1)(F) and for the surviving entity in a statutory merger under § 368(a)(1)(A)—then that corporation is the "same taxpayer" as its predecessor. However, if the government should revise these largely informal rules such that the corporation must apply for a new Taxpayer Identification Number, it would not be the same corporation. Such a change is not unprecedented. *See* Treas. Reg. §301.6109-1(d)(2)(iii) (indicating a change in rule of whether a partnership must obtain a new Taxpayer Identification Number).

taxpayer" as a corporation it subsumed. Otherwise, the government suggests (at 44), there would have been no need for § 381 to cover mergers.

This argument fails. As explained above, § 381 represented Congress's attempt to simplify determinations about the treatment of net operating losses and other tax attributes so that courts would not have to decide whether each case that came before them was more like *New Colonial Ice* or more like *Metropolitan Edison*.[9] It stated an intentionally broad rule that provided for the transfer of tax attributes both in circumstances that would *not* have been allowed under *New Colonial Ice* and in circumstances that *would* have been allowed under *Metropolitan Edison*. Thus, in *Koppers Co.* the Court of Claims correctly

[9] Similarly, Congress's provision for the filing of a short-year return by the merged entity, 26 U.S.C. § 443(a)(1), adopted at the same time as § 381, avoids the need to make an administrative determination about the continuity of corporate identity. While the government suggests (at 43) that the short-year return demonstrates the merged corporation's separate identity for purposes of all pre-merger activity, the law erects no impermeable barrier between the pre- and post-merger periods. To the contrary, the surviving entity assumes the pre-merger liabilities (including tax underpayments) and pre-merger assets (including refunds of tax overpayments) of the merged corporation. *See supra* at 7-8. And the surviving entity files claims in its name for overpayments relating to the company merged into it. *John Wanamaker Philadelphia Inc. v. United States*, 175 Cl. Ct. 169 (1966). Overpayment interest continues to accrue on such overpayments without regard to the survival of the merged company, and the surviving corporation is liable for the unpaid tax liabilities—including the interest thereon—of the merged corporation. *Commissioner v. Oswego Falls Corp.*, 71 F.3d 673, 676 (2d Cir. 1934); C.C.A. Mem. 201222001, 2012 WL 1961411.

recognized that § 381 applied to some situations in which tax attributes would already have passed under *Metropolitan Edison* even without its adoption. *See Koppers Co.*, 134 F. Supp. at 297 ("We feel that [§ 381], to the extent that it specifically allows carry-overs, reflects a continuation of the previous realistic approach to corporate reorganization problems . . . ."). Congress's express authorization of the transfer of specified tax attributes whenever the requirements of § 381 were met did not reflect an understanding that they necessarily *would not* have passed without § 381, as the government suggests, but rather an intent to make it unnecessary to decide whether they would have.

For this reason, the legislative history recognized that "[n]o inference is to be drawn from the enactment of this section whether any item or tax attribute may be utilized by a successor or a predecessor corporation under existing law." S. Rep. No. 83-1622, at 277 (1954), *reprinted in* 1954 U.S.C.C.A.N. 4621, 4915. Treasury Regulations make the same point. *See* Treas. Reg. § 1.381(a)-1(b)(3) (directing that "no inference is to be drawn from the provisions of Section 381 as to whether any item or tax attribute shall be taken into account by the successor corporation"). And the government's brief offers no reason for a different approach here.

2. The Government's Reliance On General Rules About Annual Tax Calculations Are Misplaced In The Context Of Interest Netting

Next, the government takes up the Court of Federal Claims' holding that "'the law treats the acquired corporation as though it had always been part of the surviving entity.'" Br. 40 (quoting A17). That understanding, the government argues (at 41), "is not consistent with federal tax law," which is "based on annual accounting principles that, with limited exceptions, are based on each unique taxpayer's income and losses for a specified year." But the government overlooks that this case falls squarely into one of the recognized exceptions—as the Treasury Department made perfectly clear in the 1997 Report that presaged the enactment of § 6621(d).

The Treasury Report noted that "the IRS has generally adhered to the concept that every tax liability for a single tax year is separate and distinct." Treasury Report 6. But it went on to explain that, "[i]n urging 'the most comprehensive netting procedures . . . consistent with sound administrative practice,' Congress has implicitly endorsed several long-term policy shifts . . . . For example, *expanded use of netting represents a further erosion of the concept of separate tax liabilities*—a shift that Congress has undertaken elsewhere . . . only after serious policy consideration is given to the consequences." *Id.* at 22-23 (second alteration in original) (emphasis added). If Congress meant to embrace

that result, the Treasury Department warned, "the shift to such a system should be deliberate and recognized for what it is." *Id.* at 23.

Congress could not have missed that its adoption of broader interest netting procedures like those grudgingly described in the Treasury Report would represent an exception to the Tax Code's general use of annual accounting principles. And yet it adopted them anyway. In that light, the government's argument that the Court of Federal Claims' decision is "not consistent with federal tax law" because it represents an exception to annual accounting principles rings hollow.

The "retroactive[]" effect the government complains of (at 42) is not only the product of Congress's intentional departure from annual accounting principles in § 6621(d), but also consistent with established application of merger doctrine in other areas. When two corporations merge, the surviving corporation inherits the entire *history* of the absorbed corporation. Thus, for example, punitive damages can be imposed on the surviving company in a merger for actions taken by its absorbed predecessor. The surviving company not only takes, by operation of law, all the assets and liabilities of the merged corporation—it is treated as having generated those assets and liabilities itself. As one court explained, "the universal rule applicable to mergers or consolidations is that, by operation of law, the successor corporation assumes all debts and liabilities of the predecessor corporation precisely as if it had incurred those liabilities itself." *Krull v. Celotex*

Corp., 611 F. Supp. 146, 148 (N.D. Ill. 1985). "That rule is inherent in the concept of a merger, under which the surviving corporation stands in the shoes of the disappearing corporation in every respect." *Id.*; *see also, e.g.*, *Celotex Corp. v. Pickett*, 490 So. 2d 35, 38 (Fla. 1986) ("Celotex, as the present embodiment of Philip Carey/Panacon, is being punished for the [pre-merger] reckless conduct giving rise to this suit."). It is hardly surprising that Congress would apply the same concept here, such that the merger that makes a taxpayer directly liable for underpayments and entitled to recover overpayments would also allow that taxpayer to net those overpayments and underpayments against each other.

3. The Government's Policy Arguments Provide No Basis For Narrowing § 6621(d)'s Application

Finally, the government closes its brief with a naked policy argument, suggesting (at 67) that to allow merged corporations to net the overpayment and underpayment interest for which they are liable "might create a non-business incentive to combine corporate entities." The government points out that Congress, based on evidence of abuses in connection with net operating loss carryovers and some other tax attributes, enacted specific prohibitions in sections 381 and 382, and essentially invites this Court to do the same for § 6621(d). Br. 67 (noting that § 382 was "enacted in response to an advertisement 'touting the advantages of buying a business with [net operating loss] carryovers'" (alteration

in original) (citation omitted)). The government offers no such evidence of trafficking in interest netting, however. And for good reason: it is simply implausible to believe that major corporations would expose themselves to the unlimited liability that a merger carries with it solely in order to reduce the interest rate on their tax underpayments.

To the extent that abuses could arise, moreover, they are for Congress, not this Court, to address. And in any event, existing doctrines are more than capable of addressing any isolated abuses that do arise. In particular, the "economic substance doctrine" has long "required disregarding, for tax purposes, transactions that comply with the literal terms of the tax code but lack economic reality." *Coltec Indus., Inc. v. United States*, 454 F.3d 1340, 1352 (Fed. Cir. 2006). A merger carried out solely in order to facilitate interest netting could be addressed through that more targeted doctrine, without the need to artificially constrain the application of § 6621(d).

H. Any Possible Doubt About The Meaning Of § 6621(d) Should Be Construed In Favor Of Taxpayers

If, after weighing all of the foregoing arguments, the Court concludes that § 6621(d) remains ambiguous, the proper course would be to resolve the ambiguity in favor of Wells Fargo's interest netting request. As the Second Circuit has recognized, it is "clear that section 6621(d) . . . [is] best understood as [a] remedial

provision[], and should therefore be interpreted broadly to effectuate Congress's remedial goals." *Exxon Mobil Corp. & Affiliated Cos. v. Commissioner*, 689 F.3d 191, 204 (2d Cir. 2012) (citing *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 268 (1977)); *see also Magma Power*, 101 Fed. Cl. at 576 (recognizing that the "remedial goal [of § 6621(d) is] to limit taxpayer obligations to interest only on the amount they actually owe").

The government argues otherwise in a single footnote (at 53 n.19), claiming that the statute's ambiguity should be "strictly construed in the Government's favor" because § 6621(d) represents a waiver of sovereign immunity. The Court need not reach this argument, for "arguments raised in footnotes are not preserved." *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006). If the Court nevertheless chooses to reach the argument, it is meritless. The Supreme Court has made clear that the strict construction rule for waivers of sovereign immunity does not apply to separate, substantive provisions. *See United States v. Mitchell*, 463 U.S. 206, 218-19 (1983); *Gomez-Perez v. Potter*, 553 U.S. 474, 491 (2008). That principle applies squarely here: As the government's brief acknowledges (at xiv), the Tucker Act supplied the waiver of sovereign immunity authorizing Wells Fargo's refund suit in the Court of Federal Claims. *See* 28 U.S.C. § 1491. The strict construction canon therefore does not

apply to the substantive provision of the Tax Code on which Wells Fargo's claim is based—§ 6621(d).

The government ignores this Supreme Court precedent and points to *Federal National Mortgage Association v. United States*, 379 F.3d 1303 (Fed. Cir. 2004). That decision does not, of course, override the rule the Supreme Court applied in *Gomez-Perez* four years after it was decided. And, in any event, *Federal National Mortgage* involved not § 6621(d) itself but rather an uncodified rule that allows retroactive application of § 6621(d). Because the uncodified rule provided an authorization for backward-looking suits that the Tucker Act would not otherwise have allowed, it arguably did not come within *Mitchell's* holding. But the government points to no similar feature that would carry this suit, brought without reference to the special rule, out of *Mitchell's* orbit.[10]

Accordingly, the benefit of any doubt must go to the taxpayer, not the government. *See Northeast Marine Terminal*, 432 U.S. at 268 (holding that "an expansive view of the extended coverage . . . is appropriate for . . . remedial legislation"); *United States v. Merriam*, 263 U.S. 179, 188 (1923) ("If the words of [the Internal Revenue Code] are doubtful, the doubt must be resolved against the

[10] In *Exxon Mobil*, the Second Circuit expressly disagreed with *Federal National Mortgage's* "conclusion that the special rule must be strictly construed in favor of the Commissioner." 689 F.3d at 201-02.

Government and in favor of the taxpayer"); *United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 839 (2001) (Thomas, J., concurring) (citing cases).

II. The Court Of Federal Claims Properly Held That Wells Fargo Is Entitled To Net Interest Under § 6621(d) In Each Of The Three Merger Scenarios

For the reasons discussed above, the Court of Federal Claims properly concluded that the surviving corporation in a merger is the "same taxpayer" as the corporations it absorbs for purposes of netting underpayment interest and overpayment interest under § 6621(d). As such, applying § 6621(d) to the test cases identified below is straightforward: because Wells Fargo has subsumed in one corporate form the corporate identities of the several corporations that have been merged into it—becoming by operation of law liable for their underpayments (and interest thereon) and entitled to refunds of their overpayments (and interest thereon)—the "same taxpayer" made each of the overpayments and underpayments at issue in the case. As the Court of Federal Claims correctly recognized, there is no need to distinguish between the three situations based on the Taxpayer Identification Number originally printed on the returns that generated the overpayment and underpayment. The Service, following longstanding principles of state corporate law and federal tax law, has never employed that approach in applying § 6402(a), and the government offers no reason to think that Congress intended it to start that new practice in § 6621(d).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Federal Claims should be affirmed.

Dated: June 25, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 25, 2015, the foregoing BRIEF FOR APPELLEE was filed electronically using the CM/ECF system, which will send notification of such filing to counsel of record.

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

Counsel for Appellee Wells Fargo & Company hereby certify that:

1. This Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B): The Brief contains 13,276 words (as calculated by the word processing system used to prepare this brief), excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b).

2. This Brief complies with the type face requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The Brief has been prepared in proportionally spaced typeface using Microsoft Word in 14 point Times New Roman style font.

Dated: June 25, 2015

Respectfully submitted,

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