

No. 23-900

IN THE
Supreme Court of the United States

DEWBERRY GROUP, INC.,

Petitioner,

v.

DEWBERRY ENGINEERS INC.,

Respondent.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

JOINT APPENDIX

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IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

DEWBERRY)	
ENGINEERS INC.,)	
a New York corporation,)	
)	
Plaintiff,)	
)	
v.	)	Civil Action
DEWBERRY GROUP, INC.,	)	No. 1:20-cv-610
f/k/a DEWBERRY)	
CAPITAL)	
CORPORATION,)	
a Georgia corporation,)	
)	
Defendant.)	
)	

COMPLAINT

The Plaintiff, Dewberry Engineers Inc. (“Dewberry”), files this Complaint against the Defendant, Dewberry Group, Inc., formerly known as Dewberry Capital Corporation (“DCC”), for acts of: (1) federal trademark infringement in violation of Section 32(1) of the Lanham Act, 15 U.S.C. § 1114(1); (2) federal unfair competition in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a); (3) common law trademark infringement in violation of Virginia law; (4) common law unfair competition in violation of Virginia law; and (5) breach of a written settlement agreement resolving prior litigation between the parties.

Introduction

1. Dewberry is a nationally recognized firm headquartered in Fairfax, Virginia, with 50 offices in 18 different states, and registered to do business in all 50 states plus the District of Columbia, U.S. Virgin Islands, and Puerto Rico. It provides services in a variety of fields, including architecture, many different types of engineering, land planning, land design, land surveying, landscape architecture, interior design, road and bridge design, other transportation design, water and waste water treatment plants, flood plain mapping, disaster recovery, and other services related to the use and development of real estate. Dewberry has over 2,000 employees nation-wide, with gross revenues of more than \$470 million in 2019.

2. Dewberry brings this action to protect one of its most valuable assets: (a) its distinctive and well-known DEWBERRY name, (b) the registered DEWBERRY® word mark, and (c) the registered DEWBERRY and berry design® mark (collectively, the “DEWBERRY® Marks”). Dewberry and its predecessors have used and promoted the DEWBERRY® Marks in commerce for over 50 years. The DEWBERRY® Marks are the subject of two registrations with the United States Patent & Trademark Office (“USPTO”).

3. Through years of successful use and promotion, the DEWBERRY® Marks have come to symbolize Dewberry, its considerable goodwill, and the quality of the services it provides.

4. Dewberry is forced to seek relief from this Court because its longstanding DEWBERRY® Marks have once again come under attack by DCC.

5. DCC is infringing the DEWBERRY® Marks by: (1) adopting four closely similar marks, namely, D DEWBERRY GROUP with stylized capital letter D encircled to the left (the “Group Mark”), D DEWBERRY OFFICE with stylized capital letter D encircled to the left (the “Office Mark”), D DEWBERRY LIVING with stylized capital letter D encircled to the left (the “Living Mark”), and STUDIO Dewberry (stylized) (the “Studio Mark”), and the word form counterparts of these four marks (collectively, the “Infringing Marks”); (2) using the Infringing Marks to promote real estate services; and (3) expanding under the Infringing Marks into Virginia.

6. DCC is breaching a Confidential Settlement Agreement (the “Settlement Agreement”) entered by the parties in 2007 in resolution of an earlier trademark litigation by: (1) using the Group Mark, the Living Mark, and the Studio Mark in Virginia; and (2) using the Studio Mark in connection with architectural services in the United States.

7. DCC’s use and attempted expansion under the Infringing Marks infringe the DEWBERRY® Marks, and this threatens the reputation and goodwill that Dewberry has built up in its mark for over half a century.

8. In fact, DCC’s use of the Infringing Marks has caused and is causing actual confusion between DCC and Dewberry and its DEWBERRY® Marks.

9. In light of Dewberry’s decades-long priority with respect to its DEWBERRY® Marks, DCC is infringing Dewberry’s registered DEWBERRY® Marks, and DCC should be enjoined from any further infringement.

The Parties

10. Dewberry is a New York corporation qualified to transact business in Virginia with its principal place of business in Fairfax, Virginia.

11. DCC is a Georgia corporation with its principal place of business in Atlanta, Georgia. DCC was known as “Dewberry Capital Corporation” from 1989 until April 26, 2019, when DCC changed its name to “Dewberry Group, Inc.”

Jurisdiction and Venue

12. This Court has jurisdiction over Counts I and II of this Complaint pursuant to 28 U.S.C. §§ 1331, 1338(a), and 1338(b), and pursuant to 15 U.S.C. § 1121. Counts I and II state claims for federal trademark infringement and unfair competition under Sections 32(1) and 43(a) of the Lanham Act, 15 U.S.C. §§ 1114(1) and 1125(a). This Court has supplemental jurisdiction over Counts III, IV, and V of this Complaint pursuant to 28 U.S.C. § 1138(b) and the principles of supplemental jurisdiction as expressed in 28 U.S.C. § 1367. Counts III and IV state claims for common law trademark infringement and unfair competition under Virginia law, and Count V states a claim for breach of the Settlement Agreement. Further, section 24 of the Settlement Agreement states that the exclusive jurisdiction and venue for future disputes between the parties, including any dispute concerning the Settlement Agreement, is the United States District Court for the Eastern District of Virginia (Alexandria Division).

13. Venue in this District and Division is proper under 28 U.S.C. §§ 1391(b), 1400(a) and 1400(b) because Dewberry is a corporation headquartered in

Fairfax, Virginia, DCC is subject to personal jurisdiction here, and a substantial part of the events giving rise to Dewberry's claims occurred here, and because venue in this District and Division is mandated by section 24 of the Settlement Agreement.

Facts Common to All Counts

**(Dewberry and Its DEWBERRY Name
and DEWBERRY® Marks)**

14. Sidney O. Dewberry, the founder and chairman emeritus of Dewberry, has worked in the fields of land development and engineering since the early 1950s.

15. On April 13, 1956, in Arlington, Virginia, Mr. Dewberry launched the company that is now Dewberry. The company was initially known as GREENHORNE, O'MARA, DEWBERRY & NEALON.

16. In 1968, due in part to Mr. Dewberry's prominence and reputation in the field, the company changed its name from GREENHORNE, O'MARA, DEWBERRY & NEALON to DEWBERRY, NEALON & DAVIS.

17. In 1981, the company changed its name from DEWBERRY, NEALON & DAVIS to DEWBERRY & DAVIS.

18. In the following years, the company changed its name from DEWBERRY & DAVIS to DEWBERRY & DAVIS LLC, then to DEWBERRY CONSULTANTS LLC.

19. As of the end of 2017, Dewberry Consultants LLC merged into Dewberry Engineers Inc., with Dewberry Engineers Inc. as the surviving business entity.

20. Since 1981, the company—including related entities in the Dewberry family and under common ownership and control with Dewberry—has provided professional services and traded under a number of service marks, trade names, and corporate names, including all of the following:

DEWBERRY

DEWBERRY ENGINEERS

DEWBERRY CONSULTANTS

THE DEWBERRY COMPANIES

THE DEWBERRY COMPANIES INC.

THE DEWBERRY COMPANIES LC

DEWBERRY DESIGN GROUP
INCORPORATED

DEWBERRY INTERNATIONAL, INC.

DEWBERRY & DAVIS

DEWBERRY NEALON & DAVIS

DEWBERRY & DAVIS, INC.

DEWBERRY DESIGN GROUP
INCORPORATED

DEWBERRY DESIGN-BUILDERS INC.

DEWBERRY DEL CARIBE LLC

DEWBERRY TECHNOLOGIES INC.

DEWBERRY & DAVIS ENVIRONMENTAL
LABORATORY

DEWBERRY & DAVIS ENVIRONMENTAL
SERVICES, INC.

DEWBERRY & DAVIS INTERNATIONAL, INC.

DEWBERRY & DAVIS RISK MANAGEMENT,
INC.

DEWBERRY & DAVIS SERVICE
OPERATIONS, INC.

DEWBERRY-GOODKIND, INC.

21. In addition, beginning at least as early as 1987 and continuing to today, Dewberry has used a number of affiliated entities to provide real estate development services under a number of service marks, trade names, and corporate names, including all of the following:

DEWBERRY FAMILY LIMITED
PARTNERSHIP

DEWBERRY FAMILY LLLP

DEWBERRY INVESTMENTS LLLP

DEWBERRY III LIMITED PARTNERSHIP

DEWBERRY III LLLP

DEWBERRY IV LIMITED PARTNERSHIP

DEWBERRY IV LLLP

DEWBERRY V LIMITED PARTNERSHIP

DEWBERRY V LLLP

DEWBERRY VI LLC

22. From 1956 to the present, the one common element in all of these service marks, trade names, and corporate names has been “DEWBERRY.”

23. Beginning at least as early as 1968, “DEWBERRY” has been the first word in, and the dominant element of, all of the foregoing service marks, trade names, and corporate names.

24. Dewberry owns a valid and subsisting federal registration (Registration No. 2,991,043), on the USPTO's Principal Register, for its DEWBERRY® word mark (the "DEWBERRY® Word Mark") for a wide variety of services in International Classes 35, 37, 40, 42, and 45, including, but not limited to, real estate development, real estate site analysis and selection, building inspection, land development, construction management and supervision, real estate inspections, environmental land inspection and building inspection, architectural design services, design-build services, feasibility studies, pre-planning studies, architectural programming, interior design and space planning, master planning, construction engineering, structural engineering, building services engineering, technical consultation and research in the field of environment and land use, floodplain mapping, urban planning, land surveying, landscape architectural design, and geospatial and mapping services. The registration was issued on September 6, 2005, based on first use of the DEWBERRY® Word Mark in connection with the extensive services recited in the application in commerce at least as early as February 5, 2003. A copy of the USPTO's online record for Dewberry's DEWBERRY® Word Mark registration (including the complete identification of services therefor) is attached as Exhibit A.

25. Dewberry also owns a valid and subsisting federal registration (Registration No. 2,991,044), on the Principal Register of the USPTO, for its DEWBERRY and berry design® Mark, comprised of a stylized berry with the word "Dewberry" to the right (the "DEWBERRY & Berry Design® Mark"), in the same five International Classes, and for largely the same services, as its DEWBERRY® Word Mark. The registration was issued on September 6, 2005, based on

first use of the DEWBERRY® Word Mark in connection with the extensive services recited in the application in commerce at least as early as February 5, 2003. A copy of the USPTO's online record for Dewberry's DEWBERRY & Berry Design® Mark registration (including the complete identification of services therefor) is attached as Exhibit B. As shown in Exhibit B, the design element of the DEWBERRY & Berry Design® Mark is a fanciful representation of a dewberry fruit, which capitalizes upon and reinforces the longstanding association of the Dewberry companies with the DEWBERRY® Marks.

26. In addition, Dewberry owns a valid, subsisting, and incontestable federal registration (Registration No. 2,242,505), on the Principal Register of the USPTO, for its "dewberry" logo (the "DEWBERRY Berry Mark®") alone for a variety of services in International Class 42: engineering, architectural design for others, land surveying and landscape architectural design for others, and reviewing standards and practices to assure compliance with zoning laws and regulations. The registration was issued on May 4, 1999, based on first use of the "dewberry" logo in connection with the services recited in the application in commerce at least as early as May 1, 1980. A copy of the USPTO's online record for Dewberry's DEWBERRY Berry Mark® registration is attached as Exhibit C.

27. The Dewberry® Word Mark and the DEWBERRY & Berry Design® Mark are referred to collectively in this Complaint as the "DEWBERRY® Marks."

28. Given the strong equity in its DEWBERRY name and DEWBERRY® Marks, Dewberry has also registered—with Network Solutions, LLC, the Hern-

don, Virginia-based domain name registrar—the domain name www.dewberry.com. Dewberry uses its www.dewberry.com domain name in connection with its company Internet website.

**(Dewberry’s Promotion of Its
DEWBERRY® Brand in Commerce)**

29. Beginning in the 1950s and continuing to the present, Mr. Dewberry and the Dewberry companies have made consistent, extensive, and prominent use of their DEWBERRY® names and marks.

30. Dewberry has promoted its DEWBERRY® Marks and services in a wide range of media, including but not limited to signage, brochures, letterhead, mailings, proposals, contracts, business cards, newsletters, audio-visual materials, The Sidney O. Dewberry Collection of Surveying & Engineering Technology, and Dewberry’s website at www.dewberry.com.

31. The DEWBERRY® names and marks also appear on four editions of a book authored by Dewberry and entitled *Land Development Handbook: A Practical Guide to Planning, Engineering, and Surveying*. The book, published by McGraw-Hill and available on Amazon.com and elsewhere, is over 1,100 pages in length, is in its fourth edition, is a technical best-seller, and is used in a number of university courses. Two additional works have since been added, *Development in the Built Environment* and *Construction Practices for Land Development*, creating a three-work series.

32. In addition, the DEWBERRY® names and marks appear on a book entitled *The Dewberry Way: Celebrating 50 Years of Excellence*. The book, co-authored by Mr. Dewberry and Kathi Ann Brown, and

published by Spectrum Publishing Group, Inc. of Fairfax, Virginia, recounts Dewberry's (at that time) 50-year history. The book also explains Dewberry's core principles, which are known as "The Dewberry Way."

33. Dewberry and the DEWBERRY® names and marks have received considerable press coverage and publicity due to Dewberry's involvement in many large-scale real estate projects, development projects, and other projects around the United States, including but not limited to work for the Department of Housing and Urban Development, work for the Federal Emergency Management Agency, work for the Department of Defense, mapping work at the White House, and work on high profile developments and projects such as Pentagon City, Washington National Airport, the Dulles Greenway, and the Womack Army Medical Center at Fort Bragg, North Carolina.

**(The Success of Dewberry and Its
DEWBERRY® Brand in Commerce)**

34. Dewberry's promotion and sale of its services under its DEWBERRY® names and marks over the past five decades has been extremely successful, and the company and its DEWBERRY® brand have achieved great recognition throughout the United States.

35. Since at least as early as the mid-1970s, Dewberry has provided its real estate and real estate-related services—under its DEWBERRY® brand identity—on a national basis. For example, Dewberry has provided FEMA with mapping services covering large portions of the United States; has performed many other projects for FEMA, the Department of Defense, and other federal agencies; and has worked on other

real estate-related projects in many areas of the United States.

36. Customers for Dewberry's services have included governmental agencies at all levels, as well as corporations, real estate developers, colleges and universities, school districts, and other commercial and institutional entities.

37. Dewberry is registered to do business in all 50 states plus the District of Columbia, U.S. Virgin Islands, and Puerto Rico, has 50 offices in 18 different states, and has more than 2,000 employees nationwide. It had gross revenues of more than \$470 million in 2019.

38. Dewberry has consistently been ranked in the "Top 50" of more than 50,000 peer firms worldwide in *Engineering News-Record*, a leading industry publication, with a current ranking of number 36 worldwide.

39. Dewberry, Dewberry's founder, and various entities that Dewberry has acquired have received numerous other awards and honors recognizing the excellence of their services and of their contributions.

40. As a result of Dewberry's successful promotion and sales of services under its DEWBERRY® names and marks for several decades, the DEWBERRY® names and marks, in addition to being inherently distinctive, have acquired strong secondary meaning.

41. Dewberry's goodwill, developed over more than 70 years, is symbolized by its DEWBERRY® names and marks. As a result, the DEWBERRY® names and marks are among the company's most valuable assets.

**(DCC's Prior Infringement and
Resulting Litigation)**

42. In 2006, Dewberry was forced to file a complaint against DCC for federal trademark infringement, federal unfair competition, common law trademark infringement, and common law unfair competition. *Dewberry & Davis LLC v. Dewberry Capital Corporation*, Civil Action No. 1:06cv816 (the "Prior Litigation").

43. The Prior Litigation stemmed from DCC's two applications to register DEWBERRY CAPITAL, one for the DEWBERRY CAPITAL word mark (Application Serial No. 78/819,593) and the other for DEWBERRY CAPITAL and Design (Application Serial No. 78/819,609) with the USPTO, both filed on February 21, 2006.

44. On March 8, 2006, DCC sent a demand letter to Dewberry, entitled "Likelihood of Confusion regarding DEWBERRY Trademarks," in which DCC stated "a likelihood of confusion or mistake exists between the parties' respective marks," that the "[l]ikelihood of confusion is demonstrated by, among other factors, the similarity of the marks at issue and the relatedness of the goods and services offered under such marks," and that the parties respective marks are "extremely similar . . . because of the common use of the predominant element 'Dewberry.'" In addition, DCC stated that the parties' respective services are "legally related" and "travel in the same channels of commerce." DCC closed its demand letter by threatening Dewberry with trademark infringement, cancellation, and opposition proceedings.

45. When a resolution appeared unlikely, Dewberry filed its complaint in the Prior Litigation.

46. In response to Dewberry's complaint, DCC denied Dewberry's claims and asserted its own claims for the cancellation of Dewberry's federal trademark registrations and for common law infringement, which claims Dewberry denied.

(The Confidential Settlement Agreement)

47. On February 26, 2007, the parties entered into the Confidential Settlement Agreement ("Settlement Agreement") referred to above. A copy of the Settlement Agreement is attached as Exhibit D. Both parties agreed to voluntarily dismiss all of their claims in the Prior Litigation, and DCC agreed to (1) withdraw all pending challenges to Dewberry's federal trademark registrations, and (2) not challenge or take action against Dewberry's federal trademark registrations in the future. In addition, the Settlement Agreement included the following provisions:

- a. Paragraph B.2—"*Except as provided in Paragraph B.3, below, DCC may use the DEWBERRY CAPITAL name and mark in connection with its promotion, offering and performance of real estate development services as a real estate developer, including purchasing real property, arranging for the construction of commercial and residential building and mixed use properties, and leasing and managing properties.*" (Emphasis added).
- b. Paragraph B.3—"*To the extent that DCC performs any present or future real estate development or related services in the Commonwealth of Virginia, the State of Maryland, or the District of Columbia, it shall do so only under the name and mark DCC and not under*

the name or mark DEWBERRY CAPITAL.”
(Emphasis added).

- c. Paragraph B.4—“Dewberry may use its DEWBERRY marks and names at any time for any services or products it chooses throughout the United States and elsewhere.”
- d. Paragraph B.6—“DCC will not use the word DEWBERRY in the name of, or as a mark for, any architectural and/or engineering company, or in connection with any architecture or engineering services.”
- e. Paragraph B.17—“The parties . . . may disclose the terms and conditions of this Agreement to non-parties only to the extent necessary to: . . . (iv) prosecute or defend an action brought by or against a party to this Agreement.”
- f. Paragraph B.24—“This Agreement shall be governed by, and construed under, the laws of the Commonwealth of Virginia, and any future dispute between the Parties, including any dispute concerning this Agreement, shall be submitted to the United States District Court for the Eastern District of Virginia (Alexandria Division).”

48. Noticeably absent from the Settlement Agreement is any language permitting DCC to use any mark other than DEWBERRY CAPITAL or DCC.
To wit:

- a. Dewberry did not permit DCC to use DEWBERRY GROUP, DEWBERRY OFFICE, DEWBERRY LIVING, or STUDIO-DEWBERRY.

- b. Dewberry did not permit DCC to use DEWBERRY in any way other than the ways specifically described in Paragraph B2.

The only manner in which Dewberry permitted DCC to use DEWBERRY was specifically the “DEWBERRY CAPITAL” name and mark described in Paragraph B2 of the Settlement Agreement.

49. Dewberry compromised, in good faith, to permit DCC limited continued use of the specific DEWBERRY CAPITAL mark that it had been using before the litigation outside the Virginia, Maryland, and District of Columbia area because the CAPITAL component of that mark connotes financial-related services and thus serves to differentiate the two companies and the services they offer. Dewberry did not agree, and would not have agreed, to DCC’s use of DEWBERRY by itself or with a range of other words that may not differentiate the two companies and their services well enough to avoid a likelihood of confusion.

**(DCC’s Current Infringement of the
DEWBERRY® Names and Marks)**

50. Although DCC, either through “Dewberry Capital Corporation” or “Dewberry Group, Inc.,” is not authorized by the Virginia State Corporation Commission to transact business in Virginia as of the date of filing this action, DCC is nonetheless using the Group Mark, the Living Mark, and the Studio Mark in connection with a hotel development project in Charlottesville, Virginia. A printout of a newspaper article with depiction of an artist’s rendering submitted to the Charlottesville Board of Architectural Review in 2018 is attached as Exhibit E.

51. At some point between August 2018 and January 2019, DCC launched a new website, www.dewberrygroup.com, which uses DEWBERRY CAPITAL and its column design as the primary branding. Instead, the Group Mark, the Office Mark, the Living Mark, the Studio Mark, and their word mark counterparts are used as the primary branding and the primary means of referring to DCC and its services.

52. In addition, DCC has expanded into Virginia using “Dewberry” in complete disregard of the Settlement Agreement. DCC’s new website, www.dewberrygroup.com, contains a link to “OUR PORTFOLIO” which includes “Dewberry Hospitality,” “Dewberry Office,” and “Dewberry Living.” Dewberry hospitality lists one property in South Carolina. Dewberry Office lists two in Georgia. Lastly, Dewberry Living lists three properties, one of which is located in Virginia.

53. In describing its Virginia property, DCC states that the property will “receive the full Studio Dewberry treatment in terms of modernization and first-class amenities, its architectural provenance and integrity will be preserved and celebrated.” A copy of the relevant page from DCC’s website is attached as Exhibit F.

54. In describing “Our Team,” DCC lists the following references and information regarding Studio Dewberry:

- a. Under John K. Dewberry, DCC states “[b]eginning with collaborations with architects, preservationists and design firms on his homes . . . Studio Dewberry has expanded organically to include additional larger partnerships on design, furnishing, lighting and art commissions, for prominent developments

within the Dewberry Group’s portfolio . . . It represents yet another way to exceed corporate, residential and hospitality industry expectations.”

- b. DCC lists Lockie Brown as the Executive Vice President, Design, who “has designed key properties for major luxury hotel brands through the United States and the Caribbean.” DCC goes on to say that “Today, Mr. Brown’s focus has expanded to include Studio Dewberry, where he and a team of designers, architects and brand experts work closely with Mr. and Mrs. Dewberry collaborate [*sic*] on the design of all major development projects, as well on the Dewberry Hospitality Group’s expanding luxury hotel division.”
- c. DCC lists Jamie Brown Dewberry as a director of the Dewberry Foundation, and a Principal with Studio Dewberry.
- d. DCC lists Elizabeth Armstrong as the Director of Brand Development for Studio Dewberry, where she is “responsible not only for creating and refining The Dewberry Hotel’s communications and branding, but also for maximizing The Dewberry brand’s long-term potential, growth and profitability through strategic partnerships and experiential programming.”
- e. DCC lists Trey Howard as an associate designer with Studio Dewberry who “has been a key contributor to the advancement of Studio Dewberry.”

(DCC's Infringing Trademark Applications)

55. After the parties entered into the Settlement Agreement and prior to December 27, 2017, DCC caused federal applications to register U.S. Application Serial No. 87,601,685 for the word mark "DEWBERRY GROUP" to be filed with the USPTO, for "[c]ommercial real estate development services; commercial real estate services including property management services, leasing services, and brokerage services; and equity capital management services" based on an intent to use that mark in commerce at some point in the future. That is, the application was supported by a declaration that the "applicant has a bona fide intention to use the mark in commerce on or in connection with the goods/services in the application," but did not assert that the mark had yet been used. This application infringed on the DEWBERRY® Marks, and violated the Settlement Agreement.

56. On December 27, 2017, upon learning of this application, Dewberry sent a letter to DCC regarding U.S. Application Serial No. 87,601,685, describing how that application evidenced DCC's intent to infringe Dewberry's prior rights in its DEWBERRY® Marks. Dewberry further described how DCC's application also evidenced DCC's intent to breach the Settlement Agreement entered on February 26, 2007. The letter concluded by proposing that: DCC abandon any plans to use "DEWBERRY GROUP" in connection with real estate development services, real estate services, or related services of any kind; DCC cease and desist from any use of "DEWBERRY GROUP" in connection with real estate development services or real estate services of any kind, if any such use has begun; DCC expressly abandon Application Serial No. 87,601,685; and DCC refrain from any use of or

attempt to register the “DEWBERRY GROUP” or any other “DEWBERRY” mark for real estate development or real estate-related services in the future. A copy of this letter is attached as Exhibit G.

57. On January 11, 2018, DCC responded via its general counsel, David B. Groce. In its response, DCC stated “I’d like to assure you again that we had and have no intent to infringe your client’s valid trademark rights or to breach the terms of the settlement agreement. In order to resolve the concerns expressed in your letter, we are willing to abandon our application serial number 87,601,685. We are also willing to confirm, acknowledge and ratify the ongoing applicability of the obligations set forth in the 2007 settlement agreement. We therefore agree not to attempt to register the term DEWBERRY GROUP for real estate development services and further agree not use [sic] the term in connection with any present or future real estate development or related services in Virginia, Maryland, or the District of Columbia. If we perform such services in those areas, we will use DCC or something else that is not confusingly similar to any of your client’s marks. We regret any concern that may have been created by the filing of the above-referenced application and we trust that this resolves the matter.” A copy of this letter is attached as Exhibit H.

58. On April 3, 2018, DCC caused federal applications to register four marks which infringe on the DEWBERRY® Marks to be filed with the USPTO. The applications are for the Group Mark (U.S. Application Serial No. 87860522), the Office Mark (U.S. Application Serial No. 87860526), the Living Mark (U.S. Application Serial No. 87860533), and the Studio Mark (U.S. Application Serial No. 87860530). All four applications recite real estate-related services. Copies

of the USPTO online records for these four DCC applications are attached as Exhibits I, J, K, and L.

59. The applications for the Group Mark, Office Mark, and Living Mark were filed in the name of DCC as the applicant. The application for the Studio Mark was filed in the name of StudioDew, LLC as the applicant. The address of StudioDew, LLC was listed as the same address listed for DCC in the other three applications, namely, Suite 250, One Peachtree Pointe, 1545 Peachtree Street, Atlanta, Georgia 30309.

60. All four of these DCC applications were filed on the basis of intent to use (vs. actual use). That is, none of the applications stated a date of first use, either use in commerce which the U.S. Congress has the power to regulate or use anywhere. Instead, the applications were supported by a declaration that the “applicant has a bona fide intention to use the mark in commerce on or in connection with the goods/services in the application.”

61. On June 1, 2018, upon learning of Applications Serial Nos. 87-860,522, 87-860,533, 87-860,526, and 87-860,530, Dewberry was forced to again send a letter to DCC regarding its intent to infringe on Dewberry’s trademarks, and DCC’s intent to violate the Settlement Agreement. Dewberry included a chart containing the Application Data, along with the “Infringing Services” that included, *inter alia*, “Apartment and multi family living communities, real estate services, and consulting services in the field of interior and exterior design for real estate.” A copy of this letter is attached as Exhibit M.

62. On June 14, 2018, DCC responded via Stephen Dorvee of Arnall Golden Gregory, LLP. In its response, DCC asserted that “so long as it does not use

DEWBERRY in the name of, or as a mark for, any architectural and/or engineering company or in connection with architectural engineering services, it is otherwise free to use DEWBERRY.” Despite the infringing services, including “real estate services,” DCC maintained that “none of the pending DCC applications that you reference relate to real estate development services, architectural services or any other services listed in Dewberry’s trademarks.” DCC concluded by asserting that “to the extent that it performs real estate development, architecture or related services in Virginia, DCC will only use the term DCC. To the extent it DCC [sic] performs rental brokerage, leasing and management of commercial property, real estate services concerning leasing and management of commercial property, office and office space, and consulting services in the field of interior and exterior design for real estate, it may do so under the DEWBERRY name in those states and district. Please be advised, however, that my client does not have any intention to do so at this point.” A copy of this letter is attached as Exhibit N.

63. On July 13, 2018, Dewberry responded to DCC’s letter, reiterating that Dewberry did not and would not waive its otherwise valid trademark rights by permitting DCC’s use of only “DEWBERRY CAPITAL” in Virginia, Maryland, and Washington DC for real estate development or related services. Dewberry explained that DEWBERRY CAPITAL was acceptable to Dewberry because “CAPITAL” connoted financial-related services, but that DEWBERRY GROUP, DEWBERRY OFFICE, DEWBERRY LIVING, and STUDIO DEWBERRY do not sufficiently differentiate between the companies and their services well enough to avoid a likelihood of confusion. Dewberry also pointed out that DCC’s services listed in its offending

trademark applications are broad enough to encompass the services included in the Settlement Agreement. Lastly, Dewberry referenced various infringing references contained on DCC's website and reminded DCC of Mr. Groce's assurances to the effect that DCC would honor the Settlement Agreement and refrain from certain actions that would violate it. A copy of this letter is attached as Exhibit O.

64. As of the date of this filing, DCC has not responded to any of the issues and arguments raised in Dewberry's letter of July 13, 2018.

65. DCC is violating the Settlement Agreement by attempting to register the Group Mark, the Office Mark, and the Living Mark, as described above.

**(Processing of DCC's Infringing
Studio Mark Application)**

66. By office action dated July 25, 2018, the USPTO refused DCC's U.S. Application Serial No. 87860530 for the Studio Mark for "consulting services in the field of interior and exterior design for real estate" on the basis of likelihood of confusion with both the DEWBERRY® word mark and the DEWBERRY & Berry Design® Marks.

67. With respect to the first element of likelihood of confusion, the similarity of the marks at issue, the trademark examiner stated:

The marks of the parties are similar in sound, appearance and commercial impression as a result of the term "DEWBERRY." This term is the dominant literal element of the registered mark. It is also significant to the commercial impression of the proposed mark.

Office Action dated July 25, 2018, with respect to U.S. Application Serial No. 87860530, page 2.

68. Turning to the second element of likelihood of confusion, the similarity or relatedness of the services at issue, the trademark examiner stated:

the services of the parties are similar and related because they relate to interior design. Registrant [Dewberry] provides interior design services and applicant [StudioDew, LLC] provides consulting services concerning interior and exterior design for real estate.

In addition, applicant's services are related to the engineering and architecture design services also identified by registrant. The attached Internet evidence, consisting of third party advertising, establishes that the same entity commonly provides services in the nature of engineering, architectural design, interior and exterior design and markets the services under the same mark.

Id. at 2.

69. No response to the refusal was filed, and as a result the application for the Studio Mark was deemed abandoned as of January 28, 2019.

70. Notwithstanding the refusal and abandonment, DCC is currently using the term "Studio Dewberry" on the DCC website and has used the Studio Mark in printed material promoting DCC's real estate development services.

**(Processing of DCC's Other Three
Infringing Applications)**

71. In accordance with the required procedure, Dewberry submitted letters of protest to the U.S. Deputy Commissioner for Trademark Examination Policy against the other three relevant DCC applications, *i.e.*, those for the Group Mark, the Office Mark, and the Living Mark, accompanied by evidence of the similarity of the marks in question and the similarity and relatedness of many of the services in question. Some or all of the evidence submitted by Dewberry was forwarded to the examiners assigned to the Group Mark, the Office Mark, and the Living Mark for consideration.

72. Thereafter, the assigned trademark examiners issued final refusals to approve DCC's applications for the Group Mark, the Office Mark, and the Living Mark.

73. In issuing a final refusal to register the Group Mark, which is attached as Exhibit P, the trademark examiner stated:

THIS IS A FINAL ACTION.

...

SECTION 2(d) REFUSAL—LIKELIHOOD
OF CONFUSION

Registration of the applied-for mark is refused because of a likelihood of confusion with the mark in U.S. Registration No. 2991043 and 2991044, both owned by Dewberry Engineers Inc. Trademark Act Section 2(d), 15 U.S.C. §1052(d); *see* TMEP §§1207.01 *et seq.* Registrations were sent previously.

...

Although not all *du Pont* factors may be relevant, there are generally two key considerations in any likelihood of confusion analysis: (1) the similarities between the compared marks and (2) the relatedness of the compared goods and/or services.

...

Similarity of the Marks

...

The common term DEWBERRY is the dominant feature of the applicant's and registrant's marks because it is the distinctive term and because the design and descriptive wording are less important. When evaluating a composite mark consisting of words and a design, the word portion is normally accorded greater weight because it is likely to make a greater impression upon purchasers, be remembered by them, and be used by them to refer to or request the goods and/or services.

...

In further support of a likelihood of confusion, it is apparent that the applicant merely adds the descriptive term "group" and the design featuring the letter "D" to the registered marks. Adding a term to a registered mark generally does not obviate the similarity between the compared marks, as in the present case, nor does it overcome a likelihood of confusion under Section 2(d).

...

Accordingly, giving each feature of the marks appropriate weight, the marks when compared in their entireties are sufficiently similar to create consumer confusion or mistake as to the source of the goods and/or services despite some differences.

Similarity of the Goods and/or Services

...

The compared goods and/or services need not be identical or even competitive to find a likelihood of confusion. [Citations omitted.] They need only be “related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [the goods and/or services] emanate from the same source.”

...

Accordingly, the business and real estate services identified in the application and the registered cost assessment and real estate development services are considered related for purposes of the likelihood of confusion analysis.

Accordingly, with the contemporaneous use of highly similar marks that share the wording DEWBERRY, consumers are likely to conclude that the services originate from a single source. As such, registration is refused under Section 2(d).

74. Similar reasoning was used in the final refusals of the Office Mark and the Living Mark.

75. DCC has appealed all three refusals, but the appeals have not been ruled upon as of the date of this Complaint.

(The Confusing Similarity of the DEWBERRY® Marks, DCC, and the Infringing Marks)

76. Starting decades before DCC even claims to have come into existence, Dewberry has been using and doing business under its DEWBERRY® names and marks.

77. Dewberry's DEWBERRY® names and marks have longstanding priority over the Infringing Marks.

78. The Infringing Marks are closely similar to Dewberry's DEWBERRY® Marks in sight, sound, and meaning by virtue of the identical dominant component, DEWBERRY. As shown in DCC's March 8, 2006 demand letter to Dewberry, which is attached as Exhibit Q, DCC has admitted this in connection with its earlier Dewberry Capital marks, and DCC has admitted that some of the services provided under the Group Mark, Office Mark, and Living Mark are related to services provided under the DEWBERRY® Marks and travel in the same trade channels.

79. Dewberry has not licensed or authorized DCC to use its DEWBERRY® Marks or to use close variations of those marks.

80. The Infringing Marks create a likelihood of confusion with Dewberry's prior DEWBERRY® Marks, leading the relevant consuming groups, the relevant trades, and others to believe mistakenly that DCC is affiliated with, connected with, sponsored by, approved by, or otherwise associated with Dewberry, and/or that DCC's services are supplied by, licensed by, or associated with Dewberry.

**(Actual Confusion Between the
Parties' Names and Marks)**

81. DCC's use of the component DEWBERRY also has caused and is causing actual confusion among consumers and the public.

82. On or about August 31, 2006, a businessperson from Roswell, Georgia tripped and fell in a parking garage at the Peachtree Pointe complex in Atlanta, Georgia. That complex is a DCC development, which was developed under the Dewberry Capital mark. This businessperson mistakenly believed that DCC's parking garage was connected with Dewberry. Thus, on September 1, 2006, she sent an email to Dewberry describing the accident in the DCC parking garage. A copy of the email correspondence between the businessperson and Dewberry is attached as Exhibit R. Since receiving these emails, Dewberry has worked with this businessperson in an effort to dispel her confusion between DCC and Dewberry.

83. In August 2009, a tenant of DCC, Eduardo Guevara of Planet Smoothie, mistakenly sent a letter to Dewberry's Fairfax, Virginia office about an issue relating to his tenancy with DCC. Dewberry directed Mr. Guevara to DCC's Atlanta office and forwarded the letter to DCC.

84. On or around March 2016, Dewberry received a "Warrant in Debt" at its Fairfax office, directed at "Dewberry Capital, LLC," connected to a breach of contract action in Richmond City General District Court. Dewberry was again forced to clarify that the intended defendant, DCC, was not connected to any Dewberry company, whether headquartered in Fairfax, Virginia, or otherwise.

(Consequences of DCC's Willful Conduct)

85. As evidenced by DCC's repeated attempts to infringe the DEWBERRY® Marks and breach the Settlement Agreement, DCC's conduct has been willful and intentional. As a result, Dewberry is entitled to presumptions that its DEWBERRY® Marks are protectable, and that DCC's imitation is causing a likelihood of consumer confusion.

86. DCC's trademark infringement and unfair competition are causing irreparable injury to Dewberry by threatening to confuse and deceive actual and potential consumers, by threatening to disrupt customer relationships, and by threatening and damaging Dewberry's reputation, goodwill, and position in the marketplace.

87. In order to avoid such confusion and deception, Dewberry requests that the Court enjoin DCC from using or registering the Infringing Marks, and compensate Dewberry for its damages.

COUNT I**(Federal Trademark Infringement)**

88. Dewberry repeats the allegations made in paragraphs 1 through 87, and incorporates them into this Count.

89. By making unauthorized use of Dewberry's registered DEWBERRY® Marks, DCC is committing infringement of Dewberry's federally registered trademarks in violation of Section 32(1) of the Lanham Act, 15 U.S.C. § 1114(1).

90. DCC's unauthorized use of the registered DEWBERRY® Marks is knowing, intentional, and willful in violation of Section 32(1) of the Lanham Act, 15 U.S.C. § 1114(1).

91. As a result of DCC's trademark infringement, Dewberry is suffering irreparable harm for which there is no adequate remedy at law.

92. Unless DCC is enjoined by this Court, DCC will continue to commit trademark infringement; it will continue to cause confusion; and it will continue to inflict irreparable harm upon Dewberry.

93. Dewberry is entitled to recover from DCC its profits, any damages that Dewberry has sustained from DCC's trademark infringement, and the costs of this action pursuant to Section 35 of the Lanham Act, 15 U.S.C. § 1117.

94. Because DCC's activities are willful, Dewberry is also entitled to recover from DCC treble damages and reasonable attorneys' fees pursuant to Section 35 of the Lanham Act, 15 U.S.C. § 1117.

COUNT II

(Federal Unfair Competition)

95. Dewberry repeats the allegations made in paragraphs 1 through 94, and incorporates those allegations into this Count.

96. By making unauthorized use of the DEWBERRY® Marks, and by committing other acts of trade dress infringement and unfair competition, DCC is engaging in false designation of origin and unfair competition in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

97. DCC's unauthorized use of the DEWBERRY® Marks is knowing, intentional, and willful in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

98. As a result of DCC's unfair competition, Dewberry is suffering irreparable harm for which there is no adequate remedy at law.

99. Unless DCC is enjoined by this Court, DCC will continue to commit unfair competition; it will continue to cause confusion; and it will continue to inflict irreparable harm upon Dewberry.

100. Dewberry is entitled to recover from DCC its profits, any damages that Dewberry has sustained from DCC's unfair competition, and the costs of this action pursuant to Section 35 of the Lanham Act, 15 U.S.C. § 1117.

101. Because DCC's activities are willful, Dewberry is also entitled to recover from DCC treble damages and reasonable attorney's fees pursuant to Section 35 of the Lanham Act, 15 U.S.C. § 1117.

COUNT III

(Common Law Trademark Infringement)

102. Dewberry repeats the allegations in paragraphs 1 through 101, and incorporates those allegations into this Count.

103. By making unauthorized use of the DEWBERRY® Marks, DCC is engaging in common law trademark infringement in violation of Virginia law.

104. DCC's unauthorized use of Dewberry's DEWBERRY® Marks is knowing, intentional, and willful.

105. As a result of DCC's acts of trademark infringement, Dewberry is suffering irreparable harm for which there is no adequate remedy at law.

106. Unless DCC is enjoined by this Court, DCC will continue to commit acts of trademark infringement, and it will continue to confuse the public and cause irreparable harm to Dewberry.

107. Dewberry is entitled to recover from DCC its profits, any damages that Dewberry has sustained from DCC's infringement, and the costs of this action.

COUNT IV

(Common Law Unfair Competition)

108. Dewberry repeats the allegations in paragraphs 1 through 107, and incorporates those allegations into this Count.

109. By making unauthorized use of the DEWBERRY® Marks, DCC is engaging in common law unfair competition in violation of Virginia law.

110. DCC's unauthorized use of Dewberry's DEWBERRY® Marks is knowing, intentional, and willful.

111. As a result of DCC's unfair competition, Dewberry is suffering irreparable harm for which there is no adequate remedy at law.

112. Unless DCC is enjoined by this Court, DCC will continue to engage in unfair competition, and it will continue to confuse the public and cause irreparable harm to Dewberry.

113. Dewberry is entitled to recover from DCC its profits, any damages that Dewberry has sustained from DCC's unfair competition, and the costs of this action.

COUNT V
(Breach of Contract)

114. Dewberry repeats the allegations in paragraphs 1 through 113, and incorporates those allegations into this Count.

115. On February 26, 2007, the parties entered into the Settlement Agreement (Exhibit D).

116. Pursuant to paragraph B.2 of the Settlement Agreement, DCC agreed that subject to paragraph B.3, it would use only the “DEWBERRY CAPITAL name and mark in connection with its promotions, offering and performance of real estate development services as a real estate developer, including purchasing real property, arranging for the construction of commercial and residential buildings and mixed use properties, and leasing and managing properties.”

117. Pursuant to paragraph B.3 of the Settlement Agreement, DCC agreed that “[to] the extent that DCC performs any present or future real estate development or related services in the Commonwealth of Virginia, the State of Maryland, or the District of Columbia, it shall do so only under the name and mark DCC and not under the name or mark DEWBERRY CAPITAL.”

118. Pursuant to paragraph B.6 of the Settlement Agreement, DCC agreed that it “will not use the word DEWBERRY in the name of, or as a mark for, any architectural and/or engineering company, or in connection with any architectural or engineering services.”

119. Despite their material obligations contained in paragraphs B.2, B.3, and B.6 of the Settlement

Agreement, DCC has: (1) used names other than “DEWBERRY CAPITAL” when promoting, offering, and performing real estate development services as a real estate developer; (2) performed real estate development or related services in the Commonwealth of Virginia, under a name other than DCC; and (3) used the word DEWBERRY in the name of, or as a mark for, architectural services.

120. Specifically, DCC has refused to abandon its plans to use DEWBERRY GROUP, DEWBERRY LIVING, DEWBERRY OFFICE, and STUDIO DEWBERRY. Further, DCC’s new website, www.dewberrygroup.com, contains numerous instances of using DEWBERRY in connection with marketing or other materials in the field of interior and exterior design for real estate, architectural design services, interior design services. This includes, but is not limited to, DCC’s project in Charlottesville, Virginia, advertised on www.dewberrygroup.com.

121. DCC assured Dewberry on both January 11, 2018 and June 14, 2018 that DCC would honor the Settlement Agreement, yet DCC maintains that it may perform “rental brokerage, leasing and management of commercial property, real estate services concerning leasing and management of commercial property, office and office space, and consulting services in the field of interior and exterior design for real estate,” under the DEWBERRY name in Virginia, Maryland, and Washington, DC.

122. These actions constitute DCC’s material breach of the Settlement Agreement. As a result of DCC’s breaches of the Settlement Agreement, DCC has caused Dewberry to incur significant damages in challenging DCC’s U.S. Trademark Applications for

all four of the Infringing Marks, and the costs and fees of this action.

REQUEST FOR RELIEF

Dewberry requests the Court to enter an Order granting it the following legal and equitable relief:

1. Adjudging that DCC has engaged in, and is engaging in, acts of federal trademark infringement and unfair competition; and common law trademark infringement, trade dress infringement, and unfair competition, pursuant to Counts I, II, III, and IV of this Complaint;

2. Preliminarily and permanently enjoining DCC and its officers, agents, servants, employees, attorneys, and all persons in active concert or participation with any of them, from engaging in the following acts, pursuant to Counts I, II, III, IV, and V of this Complaint:

- (a) using the name or mark DEWBERRY, or any other name or mark that incorporates the name or mark DEWBERRY, or is otherwise confusingly similar to the DEWBERRY® Marks on or in connection with any real estate-related products or services, including but not limited to leasing of real estate, real estate investment, real estate management, real estate development, real estate site selection, architectural services, and engineering services;
- (b) otherwise competing unfairly with Dewberry by trading off of Dewberry's goodwill and business reputation;
- (c) conducting real estate development or related services in the Commonwealth of Virginia,

the State of Maryland, or the District of Columbia under any name or mark that includes the word DEWBERRY;

- (d) using the word DEWBERRY in the name of, or as a mark for, any architectural and/or engineering company, or in connection with any architecture or engineering services, anywhere in the United States;

3. Requiring DCC to file with this Court, and to serve on Dewberry within thirty (30) days after service of such an injunction, a report in writing and under oath setting forth in detail the manner and form in which DCC has complied with the injunction, pursuant to Counts I, II, III, IV, and V of this Complaint;

4. Awarding Dewberry its actual compensatory damages as a judgment against DCC, in an amount to be determined at trial, for DCC's violations of 15 U.S.C. § 1125(a) and 15 U.S.C. § 1114(1), and for DCC's common law trademark infringement and unfair competition, pursuant to Counts I, II, III, and IV of this Complaint;

5. Awarding Dewberry treble damages and/or other enhanced damages as a judgment against DCC for its knowing, intentional, and willful violations of the Lanham Act as alleged in Counts I and II of this Complaint;

6. Awarding Dewberry its costs and reasonable attorneys' fees pursuant to the Lanham Act and other legal principles alleged in Counts I, II, III, and IV of this Complaint;

7. Awarding Dewberry its costs and reasonable attorneys' fees associated with challenging DCC's trademark applications that infringe on Dewberry's

pre-existing trademarks, in violation of the Settlement Agreement pursuant to Count V of this Complaint; and

8. Awarding Dewberry its costs any other relief that the Court may deem to be appropriate.

Dated: May 29, 2020.

DEWBERRY ENGINEERS INC.
By Counsel

_____/s/_____

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Counsel for the Plaintiff

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT
for the
Eastern District of Virginia

Dewberry Engineers Inc.)	
<i>Plaintiff(s)</i>)	
v.)	
	)	Civil Action
Dewberry Group, Inc.	)	No. 1:20-cv-610
f/k/a Dewberry Capital)	
Corporation)	
<i>Defendant(s)</i>)	

SUMMONS IN A CIVIL ACTION

	SERVE:	Douglas G. Dewberry, II,
		Registered Agent
To:		Dewberry Group, Inc.
<i>(Defendant's name</i>		f/k/a Dewberry Capital
<i>and address)</i>		Corporation
		1545 Peachtree St
		STE 250
		Atlanta, GA 30309

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it)—or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3)—you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be

served on the plaintiff or plaintiff's attorney, whose name and address are:

Alan B. Croft
Ralph M. Tener
Mark Emilio S. Abrajano
McCandlish Lillard, P.C.
11350 Random Hills Road, Suite 500
Fairfax, Virginia, 22030

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Date: 6/3/20

CLERK OF COURT

/s/
*Signature of Clerk or
Deputy Clerk*

**DAY 1—MORNING SESSION
TRANSCRIPT OF BENCH TRIAL
PROCEEDINGS**

**BEFORE THE HONORABLE LIAM O'GRADY,
UNITED STATES DISTRICT COURT JUDGE**

* * *

**[17] OPENING STATEMENT
ON BEHALF OF THE PLAINTIFF**

MR. WRIGHT: Good morning, Your Honor.

May it please the Court, Counsel. My name is Brian Wright. I'm an associate at Hunton Andrews Kurth.

* * *

[18] And the case continues to be about the reputational harm that defendant's unlawful acts have caused Dewberry to suffer.

Those issues remain paramount in this damages trial because we're seeking both a disgorgement of Dewberry Group's profits and an award of our reasonable attorneys' fees. When it comes to profits, the Lanham Act gives trial courts broad discretion in fashioning awards, as you know. Indeed, the Court can award a profits award exceeding the infringer's profits if circumstances call for it.

And among the factors to be considered are whether that infringement was intentional, the adequacy of other remedies, and the public interest in making infringement unprofitable. And when it comes to attorneys' fees, the factors to be considered include whether there's an unusual discrepancy in the

merits of the case, the infringer's unreasonable litigation tactics, and the need for both compensation and deterrence.

And we'll prove that these principles of equity, viewed through the lens of Dewberry Group's prolonged, intentional infringement and breaches of contract, establish that Dewberry should recover both profits and fees.

Turning first to the profits remedy. The Court has already held that Dewberry Group intentionally infringed. Our trial evidence—and much of it coming by way of the documentary exhibits that have just been admitted—will cement that point, although we're not going to have witnesses belaboring the point [19] throughout this week. But those exhibits will leave no doubt that the profits award is necessary, potentially one exceeding Dewberry Group's actual profits.

* * *

[27] OPENING STATEMENT
ON BEHALF OF THE DEFENDANT

MR. DORVEE: Good morning, Your Honor. May it please the Court, counsel. My name is Steve Dorvee.

* * *

Well, the evidence will show that there are no profits attributable to the use of the marks at issue in this case, and that is the key element.

Hence, the Court should not make a monetary award against the Dewberry Group, Incorporated, and it should not make an award against the separate independent property entities who are not [28] even parties to this case. They are not parties, they have

not been added, there is no alter-ego contention, there is no condition of fraud.

* * *

[36] DIRECT EXAMINATION OF ROD BOSCO

THE COURT: Good morning, Mr. Bosco. Please, go ahead.

BY MR. DEMM:

Q. Thank you. Good morning, Mr. Bosco. Would you state your full name for the record, please.

A. Rod—excuse me. Rodney James Bosco.

Q. And what is your profession?

A. I am a forensic economist.

Q. Okay. And where do you work, Mr. Bosco?

A. I work for Chess Consulting.

Q. And where is that located?

A. In Reston, Virginia.

Q. Okay. What's your job title at Chess Consulting?

[37] A. I'm a director.

Q. Okay. And what are your responsibilities as a director at Chess Consulting?

A. So I lead the commercial disputes practice at Chess, and I also engage in projects on behalf of Chess's clients related to commercial damages, government contract disputes, and other types of financial forensic matters.

Q. And are you appearing today pursuant to a subpoena?

A. Yes, I am.

Q. Okay. In this lawsuit, have you been engaged to provide expert opinions related to matters in the lawsuit?

A. Yes.

Q. And just briefly, what is the subject matter of the opinions that you're providing in connection with this lawsuit?

A. So I'll be providing opinions regarding the gross sales earned by Dewberry Group during the period in which it had used the infringing marks. And also, I'll be providing, for demonstration purposes, a measure of profits associated with those revenues.

Q. Thank you.

* * *

[48] Q. Thank you, Mr. Bosco.

Now, just generally—you've listed a lot of different materials that you reviewed—just generally, why did you review the kinds of materials that you reviewed for your work in this case?

A. So, what I was trying to do by reviewing all of these materials was to understand the nature of the activities that were undertaken by Dewberry Group during this period of time that gave rise to Dewberry Engineers making its claims that it did for trademark infringement. And as part of that, I wanted to try to understand what the economic benefit streams potentially were—and when I say “potentially,” I mean, I'm looking at this from the standpoint of gross sales before any deductions that would need to be addressed by the defendant related to and carried on as—or as a—they were received during the period of infringement, how those economic benefits were recorded in

accounting records, tax returns, and other [49] financial reporting documents by Dewberry Group, and, ultimately, these were all used to help inform the findings and opinions that I have with regard to damages in this matter.

* * *

Q. Okay. So based on all of the materials and evidence that you've reviewed, have you reached any conclusions about the [50] damages that are related to Dewberry Group's infringement of Dewberry's trademarks?

A. Yes, I have.

Q. And could you just—we're going to go through some materials that lay this out in more detail, but could you just briefly describe what your conclusions are as to damages?

A. Yes. So I have reached conclusions with regard to both the gross revenues received by Dewberry Group during the period of infringement that spans the three-year period 2018 through 2020.

Those amounts are in excess of \$17 million in 2018, in excess of \$48 million in 2019, and in excess of \$36 million in 2020.

I also reached conclusions of damages on a profits basis for demonstration purposes recognizing that Ms. Miller stated in her report that she did not perform an analysis to identify deductions related to expenses or profits.

So I prepared an analysis that would allow the Court, if it so chose, to gain some insight into potential damages related to these revenues on an operating profit basis. And those amounts were in excess of

\$9 million in 2018, \$22 million in 2019, and \$21 million in 2020.

Q. Thank you.

* * *

[68] Q. Okay. Now, remaining on this figure, I'd like to now go into some of the details and some of the backing—the support that you used to arrive at it. If we could focus first on the Property Name column. And I'd like you to, again, describe what the properties are that—just generally what the properties are that you're including and why.

A. Sure.

So, these properties are all commercial real estate properties that—for which Dewberry Group provides management services. Some of these properties are office buildings. Others are retail. Others are mixed-use, which could be a combination of office and retail, or a combination of retail and residential. And the Dewberry Charleston hotel, obviously, is a—well, it is a commercial real estate property. It's a different kind. It is a hotel.

Q. Okay. And to your knowledge, is Dewberry Group, Inc., the corporate entity involved in this litigation, the record owner of these properties in the figures that you've set forth?

A. So if you were to look at the tax returns for Dewberry Group, Incorporated, you will not find these properties or any real estate as assets of that—in those tax returns. My understanding is that Dewberry Group set these properties up under a single—different single-purpose entities, which is common in real estate.

[69] Q. Okay.

MR. DEMM: And could we turn briefly to PX 690, figure 3.

BY MR. DEMM:

Q. So could you just explain briefly what this is and how this information worked into your analysis of the properties that you included.

A. Sure.

So, this was effectively the first general inquiry that I made into the financial performance of Dewberry Group focused on the tax returns. And I'll just say that 2014 through 2019 does come from tax returns. We were not provided with a tax return for 2020, so those figures are provided—those figures come from a trial balance that was provided by Dewberry Group. But what you can see here is that, you know, over the last seven years for which we had data, the bottom line, the business income and loss is negative—there's, obviously, a loss. It's significant in amount compared to the revenue, and it shows no indication of reversing in the near future.

So in looking at that, I—you know, recognizing that, you know, John Dewberry should be behaving as a rational economic business player, you look at this and you say to yourself, you know, why is he continuing to run this business if it's generating these losses? And, in fact, what I had determined was, through 2019, John Dewberry had to contribute \$23 million of capital to cover the losses since the inception [70] of Dewberry Group and it's formerly known as Dewberry Capital entity.

So, you know, this raised a red flag to me, not in a fraudulent sense, but just as something that seemed unusual, that an entity would be in existence for 30 years generating losses. And clearly, if one viewed

Dewberry Group, Inc. as a standalone entity, it would not be considered a going concern. So the question is—but it is—it still exists, and it exists to this day. So then the question becomes, why? And that became—the “why” is basically where I then moved the focus of my inquiries to try to find out why it is that John Dewberry would maintain an entity that generates losses year after year.

Q. Okay. And so in addition to the tax return information which would show these losses on the books year after year, were there other materials that you reviewed that gave you more information as to the nature of the Dewberry Group real estate business?

A. Yes. Once I looked at this and I started to see if I could identify in the record or in the public domain other indications that might suggest or explain why we’re seeing what we’re seeing here in the tax returns, I looked at documents presented by Dewberry Group representing what it said Dewberry Group was and also looked at its website, which represents to the public what Dewberry Group is representing itself to be, and [71] found that these documents and sources were conveying a different impression of Dewberry Group than what we were seeing here in the tax returns.

Q. Okay.

MR. DEMM: If we could turn to PX 647 briefly.

BY MR. DEMM:

Q. And could you just explain what—just briefly what this is.

A. So I believe this is the main page that you go to when you go on to the Dewberry Group website.

Q. Okay.

MR. DEMM: And if we could turn to—I'd like to look at some of the statements here. I believe it's the next page. Okay. Could we then turn to—yes, if we could try to blow up that text at the top half.

BY MR. DEMM:

Q. And, Mr. Bosco, could you point the Court's attention—or is there any material here that led to your further inquiry here about the nature of the Dewberry Group business?

A. Sure.

So, this is talking about who Dewberry Group is and from its founding by John Dewberry in 1989. It talks—there are statements in here, for example, “The company maintains an extraordinarily profitable track record of success, as evidenced by”—and then there's a bullet point—“a property portfolio [72] of nearly 1.5 billion in operating assets, encompassing more than 3 million square feet, a five-star hospitality class A office, luxury multi-family residential, and prestigious retail projects.” It goes on to say, “Additionally, Dewberry Group owns entitled land on which to create over 5 billion in future developments on property along Peachtree Street in uptown and midtown Atlanta.”

Q. Okay.

MR. DEMM: Now, if we could turn briefly to PX 648, which I believe is—yeah.

BY MR. DEMM:

Q. Could you just explain briefly what your understanding of this is.

A. So, again, here it's representing that "Dewberry Group currently owns and operates a portfolio of world-class mixed-use developments."

Q. Okay.

MR. DEMM: And if we could turn briefly to PX 649.

THE WITNESS: So, again, this is looking at Dewberry Office now and saying, "Throughout its history, Dewberry Group has created a number of market leading investments in the office and workplace sector."

BY MR. DEMM:

Q. Okay. And there's some other language—

MR. DEMM: Same page, I believe.

[73] (Brief pause in proceedings.)

MR. DEMM: Okay. I think we found it. If we could move to Plaintiff's Exhibit 654 briefly.

BY MR. DEMM:

Q. And if you could just—Mr. Bosco, if you could just review this and tell the Court about your understanding of what this is.

A. So, again, this is representing—this is Dewberry Group representing who they are to the public, and it's saying that it has grown—John "has grown his company"—John being John Dewberry—"has grown his company into one of the leading commercial real estate firms in the southeast through the acquisition and development of more than 3 million square feet of property. Today, the firm's approximately one-and-a-half billion in operating assets spans from Virginia to

Florida, with additional development properties approximately 5 billion in future revenue.” So, again, it’s talking about these properties in the context of them being owned by Dewberry Group, and that’s the representation being made here.

Q. Okay. Now, in—other than the website, are there other materials that you looked at that also caused you to analyze the Dewberry Group business the way you did?

A. Yes. I also looked at loan request packages and leasing packages that were sent to lenders, potential lenders, and potential tenants, representing who Dewberry Group was.

[74] Q. Okay.

MR. DEMM: If we could turn to PX 389, please. And if we could first just go to, I believe, page 2, which I think is the cover, just to get a—

BY MR. DEMM:

Q. And could you just tell the Court briefly what this is that you reviewed from Dewberry.

A. Yeah. Yeah. This is a loan package that was sent to a potential lender. Peachtree Pointe, I believe, had an existing loan that was due to expire by the end of 2018. I believe that to be the case. And so these loan request packages were intending to seek new loan proceeds. And I also noted that the cover page that’s listed here includes the Dewberry Group logo and the Studio Dewberry logo.

Q. Okay.

MR. DEMM: And if we could now turn to, I believe, 389.

BY MR. DEMM:

Q. So now, in this loan package, could you just describe, Mr. Bosco, what you're reviewing here in terms of the Company Overview and the other information there.

A. Sure.

So here, under the Company Overview, they are explaining to the potential lender who Dewberry Group is, and it's saying that their current assets span across most of the major commercial real estate property types throughout the southeast, [75] and include approximately \$965 million of total value. Also speaks to the fact that Dewberry Group holds 250 million worth of property slated for future development, and then the pie chart below that provides a break out of the assets, which include pie pieces for office, mixed-use development, retail, parking, and hospitality.

MR. DEMM: And if we could turn now to the next page in the lease request—the loan request package.

BY MR. DEMM:

Q. And what did this tell you about the Dewberry Group company?

A. So, again, this is an extension of basically the earlier presentation, that it specifically mentions the properties that are included in the various categories. So for Office, we have Campanile and Peachtree Pointe. For Mixed-use we have Oyster Park, Ortega Park, and the Laramore in Charlottesville, Virginia. For Retail, we have Belle Isle Square, Dorchester Square, and Gallery Uptown. And Hospitality is also listed with the Dewberry Charleston.

And Parking, although listed as Future Development, they do also list the Dewberry Juniper garage and the Ansley—

Q. Okay.

A. —and Dewberry 10th Street.

MR. DEMM: And if we could turn now to the next page in this same package.

[76] BY MR. DEMM:

Q. And what is this showing or telling you about the Dewberry Group business?

A. So, again, this is communicating to the reader Dewberry Group's Midtown Atlanta holdings, and there's a—there are a bunch of numbers on the map. And there's a key at the bottom that, again, mentions properties such as Peachtree Pointe, Gallery Uptown, the Ansley, Campanile.

Q. Okay.

MR. DEMM: And if we could turn briefly to page 30 of this document—oh, I'm sorry. Okay. So if we could turn now to PX 655, please.

BY MR. DEMM:

Q. And could you just describe what this document is from Dewberry Group and how it relates to the Dewberry Group business?

A. Yeah, so this is a leasing package. And the tenant prospect is Reid's, and it's located in Oyster Park, and it includes—it appears to have been sent to Coldwell Banker Commercial—includes marks for Dewberry Living and for Studio Dewberry.

Q. Okay.

MR. DEMM: And if we could turn now to page 27—I'm sorry, page 28 of this document.

BY MR. DEMM:

[77] Q. And, again, if you could explain just briefly what this is telling you about the Dewberry Group business.

A. So here again in the Company Overview, Dewberry Group is representing itself as a company with a portfolio of properties along the Eastern Seaboard and key urban areas such as Atlanta, Charleston, Jacksonville, Charlottesville, and Richmond, Virginia. It also talks about, "Led by its in-house design firm, Studio Dewberry, Dewberry Group combines creativity, attention to detail, and hard-earned experience to create properties with a refined elegance." So, they're talking about the capabilities of Studio Dewberry as a feature that could be taken advantage of by the target tenant.

Q. Okay.

MR. DEMM: If we could turn to the next page.

BY MR. DEMM:

Q. And, again, is that a similar company overview to what we saw in the loan request package?

A. The presentation is similar. What has changed at this point—now we're in September of 2020, roughly two years later—that the asset value of the holdings, the Dewberry Group holdings, is now \$1.6 billion, and that Dewberry Group holds approximately \$350,000,000 worth of land slated for future development. But, again, it does list in the pie chart that there is office, mixed-use, hospitality, retail, and parking properties included.

[78] Q. Okay.

MR. DEMM: And if we could turn to the next page.

BY MR. DEMM:

Q. And, again, is this a similar layout of the Company Overview?

A. Yes. The only material difference is, now they've, at this point, added parking as a—not in the Future Development section, but they have listed Juniper as an existing feature that speaks to what is included in the Company Overview of its properties.

Q. Okay.

MR. DEMM: And if we could turn to the next page, please.

BY MR. DEMM:

Q. And what is this—what did this show you, again, to add to your analysis of the Dewberry Group business?

A. So as we noted, Dewberry Group listed among its holdings hospitality assets.

This is a page that speaks more specifically to what that hospitality asset includes, and it's the Dewberry hotel in Charleston, South Carolina. So it's being featured in a leasing proposal package that is directed towards Oyster Park, and yet, you know, the document felt the need—or felt it was important to highlight, as a feature of Dewberry Group, the hotel in Charleston.

Q. Okay.

[79] MR. DEMM: If we could turn to the next page briefly.

BY MR. DEMM:

Q. And what does this represent?

A. So, again, this is another one of the properties. It's actually three buildings: Peachtree Pointe One and Two and Gallery Uptown. And so—and it talks about the fact that, you know, Dewberry Group delivered One Peachtree Pointe in 1999, and then later on—Dewberry Group completed construction of Two Peachtree Pointe and then Gallery Uptown. And, again, it mentions Studio Dewberry as part of the design features that Dewberry Group is discussing in this document.

Q. Okay.

MR. DEMM: And if we could move to the next page.

BY MR. DEMM:

Q. And then what is this showing, as well?

A. So this is another one of the properties that's included in my analysis, the Campanile. And, you know, it states in the second paragraph, "Following Dewberry Group's 2010 purchase, Dewberry Group and Studio Dewberry, in collaboration with another design firm, embarked on a major renovation." So, again, they're talking about, you know, Dewberry Group acquiring this property and using Studio Dewberry in conjunction with the renovation that was being planned for Campanile.

Q. Okay.

MR. DEMM: And the next page, please.

[80] BY MR. DEMM:

Q. And then what, if anything, does this tell you about the Dewberry Group business?

A. So, what it's talking about here—this is Dewberry Living, and it's talking about, "This property in Charlottesville, Virginia is going to receive the full Studio Dewberry treatment in terms of modernization and first-class amenities."

Q. Okay.

A. And Studio Dewberry is one of the marks that is at issue here.

Q. Okay. Thank you.

Now, in addition to the website materials and loan request packages and leasing packages, is there other evidence that you saw that led to your opinions about the nature of what the Dewberry Group business is?

A. I mean, these go a long way toward identifying that Dewberry Group really is more than the accounting records that are being prepared and presented for tax purposes, and so—and actually makes sense that you could have an entity that's generating the losses that are being generated here, but that there are other related entities that are providing benefits that are not being shown here. And I think that was brought home when I reviewed the deposition transcript of Dewberry Group's executive VP for finance, John Freeman.

[81] Q. Okay.

MR. DEMM: Could we turn to PX 17 [sic]. And I believe it's page 11.

(Discussion had off the record.)

BY MR. DEMM:

Q. And you mentioned the deposition testimony of John Freeman, which is sort of the top half of the page. If we could focus—could you describe what in that gave you this further information about Dewberry Group business?

A. Sure.

So, Dewberry's attorney is questioning Mr. Freeman literally about the situation that I observed in the tax returns. And it reads as, "Dewberry Group is continuing to lose money"—"you know, basically has lost money for the last six, seven years. How is it continuing as an ongoing entity, and why is it continuing as an ongoing concern?" To which Mr. Freeman responds—and, again, recognizing this is the rough transcript that I'm reading from—"We are"—"Dewberry Group is set up to manage assets that are wholly owned by John Dewberry. We understand that there will be losses involved in this." And I think, you know, that is—that's the point, is that the way that Dewberry Group, Inc. was set up, the company understood that there would be losses involved in this.

There are also a lot of other things that Dewberry Group does, and that's highlighted here. But for what we're talking [82] about at this point—well, basically, I think that last phrasing, "It is a family office essentially managing the assets of John K. Dewberry," I think is very telling. But then the follow-on question that's basically asking, "How are the losses made up?" And the answer is, "It's being made up personally by John Dewberry."

And so, again, the final follow-up question, and, I mean he—so he is making—I mean, he is making rev-

enue or making money from the various property entities that he owns, you know, he's losing money on Dewberry Group, also shown here, but then he's using—he's able to use his personal capital to make up for the losses of Dewberry Group; is that correct? To which Mr. Freeman replied, "That's a simplified way of putting it, but, yes."

Q. Okay. And so based on all of this evidence, what did you conclude about the Dewberry Group real estate business and about how to treat the revenues shown on the books of the Dewberry Group entity and then the revenues that's shown on the books of these different real estate ownership entities?

A. So clearly, there's a recognition that there are a number of entities that have been set up by Dewberry Group under separate organizational structures, including Dewberry Group, Inc. and the various properties. However—and that's an issue for the Court to address to the extent that there are legal issues in there. But I'm looking at this as an economist and [83] trying to understand the nature of the commerce that's being conducted here. And it's clear to me that if you're going to look at the activities of Dewberry Group, and to the extent that those activities occurred during a period of infringement and are related to infringing activities, it would be appropriate to look not only at the bookkeeping that was determined to be put in place for Dewberry Group, Incorporated, but also to look at the financial performance that takes place at the properties that are also owned and controlled by the same person who is the CEO and the president of Dewberry Group, and through which Mr. Dewberry is able to keep the Dewberry Group entity afloat.

Without those properties, there does not appear to be a way for Dewberry Group, Inc. to have remained

in business. And, in fact, it appears that Dewberry Group is essentially the engine that drives the entire operation of the Dewberry Group real estate business in that the people are there, and they are performing all of the functions related to the operations, the development, the financing that goes on with respect to the properties all under the direction of the same person who owns the properties. So, again, from an economic perspective, I think it's reasonable to consider the gross sales associated with all of those entities as opposed to just what is being reported in the tax returns of Dewberry Group, Inc.

MR. DEMM: Thank you, Mr. Bosco.

**DAY 1—AFTERNOON SESSION
TRANSCRIPT OF BENCH TRIAL
PROCEEDINGS**

**BEFORE THE HONORABLE LIAM O’GRADY,
UNITED STATES DISTRICT COURT JUDGE**

* * *

**[4] CONTINUED DIRECT EXAMINATION
OF RODNEY BOSCO**

* * *

[9] MR. DEMM: Could we turn to PX 711 and this is the Exhibit S4.1. I believe it’s page 4.

* * *

Q. So, looking at this, could you just give a little bit more explanation as to how you derived the revenue figures that you derived for Dewberry Group?

A. Sure. So this is for 2019, and column A is itself a derivation, and I mentioned this earlier in my testimony. It begins with the amount included in attachment 5 to Ms. Miller’s report for this particular property—for the property in question. And that was the departure point. From there I deducted what was reported—if reported—corporate revenue, and miscellaneous revenue because, again, as I noted earlier, it [10] wasn’t clear to me what miscellaneous revenue referred to as opposed to rental income and parking income or something like that. And I did not get an opportunity to get answers to that as I sit here today, so we took those out. And then we also subtracted the management fees and the accounting fees because those are included in the revenue as recoverable expenses. So that becomes column A. And, at that point, I took that number and multiplied it by the

ownership percentage by John Dewberry based on the disclosures we had about his property holdings, which you can see in most cases is either a 100 percent or 95 percent and above.

That leads to the share to Dewberry Group that is not included in the Dewberry Group tax returns, to which we then add the management fees and the accounting fees back in because those are included in the Dewberry Group tax returns, and then in column F we get the total revenue to Dewberry Group associated with each of these properties.

* * *

[14] MR. DORVEE: Your Honor, just to shorten these proceedings, I would like to object on the basis of relevance. He's saying—he's marking these to cross-promote. It has nothing to do with his calculation of damages, and I thought that's what he was doing, is calculating damages and offering calculation of profits—

THE COURT: Well, I think—

MR. DORVEE: —and now we're going back and forth on what's promoting what and who is promoting who, and it has nothing to do with the issue at hand.

THE COURT: All right. He's—I think that he's attempting to establish that all of these locations, whether they're the leasing entities or the hotel, are using the mark. These are the revenues associated with them, this is the way that the Dewberry Group is representing that these—all of these entities make up the Dewberry Group, all to the point that you [15] raised in your—you both raised in your opening, is that what revenues should be included in an assessment of what damages are proper. So, and this is their way of

demonstrating that through a combination of Dewberry Group's advertising about what their assets are, and also the actual numbers. So I'm going to allow them to get into it, and I'll allow you to cross-examine.

* * *

[39] CROSS-EXAMINATION
OF RODNEY BOSCO

* * *

[40] Q. Thank you. Okay. Now, I wanted to ask you about your contention that the revenues of the hotel—I want to make sure we understand that. You're contending that the revenues of the hotel should be considered as damages in this case?

A. I'm considering the revenues of the hotel as a proxy for the benefit stream that Dewberry Group has earned by using the hotel in its financing and promotional activities for the benefit of the hotel and for the non-hotel properties.

Q. So, any of the profits of the Charleston hotel are not potential damages, correct?

A. Again, they reflect, in my mind, a proxy for the enrichment earned by Dewberry Group for the promotion of—

Q. Okay. I understand. But I'm talking about numbers included in revenues. You're not using those revenues to calculate damages in this case, are you?

A. I'm calculating—I'm using those numbers as indicators, again, of the potential benefit earned by Dewberry Group that's associated with using the infringement—the hotel and concert with the infringing marks for the various purposes that has used the ho-

tel. It may not be a perfect measure, but it's a reasonable measure in that these are revenues that Dewberry [41] Group earned during the course of the infringing period.

* * *

Q. And you have offered no other calculation of damages, such as lost profits of the plaintiff, correct?

[42] A. That's correct. I was not asked to look at that.

Q. Or lost revenues of the plaintiff, right?

A. That's correct.

Q. Or a reasonable royalty, correct?

A. That's correct.

Q. And you're not aware of any allegation that the plaintiff has lost a sale or prospective sale because of the Dewberry Group's conduct, correct?

A. I've made no such inquiry.

Q. And you're not aware of any actual sales plaintiff has lost because of the Dewberry Group, correct?

A. I've made no such inquiry.

Q. And you're not aware of any economic losses suffered by the plaintiff, correct?

A. I have not focused on economic losses suffered directly by the plaintiff.

Q. And I think we've established that the Dewberry Group, Incorporated management company, as opposed to the separate retail entity—or separate property-owning entities, operates at a loss, correct?

A. As reported—as the books and records are reported by Dewberry Group, they show losses.

Q. And so you do not use the revenue—or calculate the revenue of the Dewberry Group alone, right? You didn't just use those revenues alone in your analysis, did you?

[43] A. Not in my—I'm sorry. With regard to management fees and accounting fees, I did use those revenues. I did not include the other revenues.

Q. Okay. But in other words—but if you're calculating the profits, you would agree with me that the Dewberry Group has not made any profits?

A. Again, that's—the Dewberry Group, Inc. taxable entity does not record any profits based on the manner in which revenues and expenses have been allocated to it.

Q. Okay.

A. That is correct.

Q. Thank you. And to perform your damages calculation, you were asked to assume that Dewberry Group's commercial dealings with these various property-owning entities served as a conduit for infringement, correct?

A. Yes.

Q. Before this case, had you ever heard of the term "conduit for infringement"?

A. It's just another word for "linkage." I mean, basically, they work together to conduct the real estate business.

Q. So I guess that would essentially feed into your—this concept you've used in your expert report of unified business enterprise; is that right?

A. So, the—yes. It's just the simple words that they're working in unison—

[44] Q. Right.

A. —as a single business, and that is, I think, corroborated by their public disclosures and by their loan request packages and marketing materials.

Q. Okay. Unified business enterprise theory was your own creation, correct?

A. I'm sorry. I never used the word "theory."

Q. Unified business enterprise?

A. The unified business enterprise was a finding. It's not a theory.

Q. Well, it's a term you coined.

A. It's a term I coined, but it wasn't intended to be anything special. It's really just another way of saying that this is a vertically integrated business.

Q. Okay. So, as far as a theory goes, it's not an accepted theory in the field of forensic accounting, correct?

A. Again, this is not a theory. This was a finding that I made about the nature of the operations of Dewberry Group, that it involved coordination using the same people to manage both the backroom operation and the properties.

Q. Okay. But you would agree with me that the property-owning entities are separate legal entities, correct?

A. That is correct.

Q. And they have different ownership, correct?

A. Well, they all have effectively the same owner, it's—[45] or owner in common and control in common, John K. Dewberry.

Q. But there are other owners depending on the different properties, correct?

A. At this point, I think there may be two properties that have other owners. I believe the others are all owned 100 percent by Mr. Dewberry.

Q. Now, you have no—your theory that these independent legal entities should be held liable is not based on any sort of abuse of the corporate form or fraud, correct?

A. First of all, I don't have a theory of liability.

Q. Okay. Theory of—your calculation of damages. Your unified business enterprise concept.

A. Could you please repeat your question.

Q. I'm not sure I can do that.

A. I'm sorry.

Q. Your unified business concept that you've—everybody working in concert, that theory, what you've testified to here today. Are you with me so far?

A. Yeah.

Q. Okay. You're not alleging that there's some sort of abuse of the corporate form or fraud or anything?

A. No.

Q. And you're not aware of any allegation of contributory infringement, are you?

A. No.

* * *

**[66] REDIRECT EXAMINATION
OF RODNEY BOSCO**

* * *

[68] Q. Okay. I believe—Mr. Dorvee asked you some questions about the Dewberry Group tax entity and whether that has shown losses or profits during the infringement period. Do you remember that?

A. Yes.

Q. And what's the—it showed losses during the period; is that correct?

A. That's correct.

Q. But there—how about the Dewberry Group properties or the single purpose entities that own all of the Dewberry Group properties? Have they shown losses or revenues or profits [69] during the infringement period?

A. They've shown revenues and they've shown profits during the infringement years.

Q. Okay. And who decides the allocation of expenses and revenues that determines whether on paper Dewberry Group, Inc. or the properties show the losses or profits during the infringement period?

A. That would be management.

Q. And who would—I mean, essentially, who would that be?

A. Well, everything would be done under the authority of John Dewberry.

Q. Okay. And John—we—you've established—your information is that John Dewberry is the sole owner

or the majority owner and the controller of Dewberry Group and all of the property entities; is that correct?

A. Yes.

**DAY 2—MORNING SESSION
TRANSCRIPT OF BENCH TRIAL
PROCEEDINGS**

**BEFORE THE HONORABLE LIAM O'GRADY,
UNITED STATES DISTRICT COURT JUDGE**

* * *

[6] DIRECT EXAMINATION OF DAVID GROCE

* * *

[7] Q. Mr. Groce, you previously served as the general counsel for Dewberry Group: is that correct?

A. Yes, Sir.

Q. Now, there's been testimony, in this case, about Dewberry Capital Corporation. Is that the same company as Dewberry Group?

A. Yes, sir.

Q. When did the company change its name from Dewberry Capital Corporation to Dewberry Group?

A. In the spring of 2019.

[8] Q. When did you begin work at Dewberry Group, and when did you leave?

A. I began in July 2017, and I left in November 2019.

Q. So a little more than two years then?

A. Yes, sir.

Q. And why did you leave the company, sir?

A. It was in keeping with my personal plan. I had recently turned 60, and it was my goal for many years to retire from the corporate world at age 60.

* * *

[11] Q. Generally speaking, what type of business is Dewberry Group in?

A. Dewberry Group is a—I call it a corporate shared services company. It provides certain corporate functional services like my role—legal, accounting, tax, HR, treasury—to other companies that are owned or controlled by John Dewberry.

Q. Okay. Would it be accurate to refer to those other companies as “special use companies” or “affiliate companies”?

A. You could. Or operating companies, yes.

Q. Operating companies. How many operating companies does Dewberry Group have a relationship with and provide services to?

A. Well, during the time that I was employed by the company, on the order of 30. Maybe some more, maybe some less, but on the order of 30.

Q. And can you briefly describe these companies. What type of business are they in, for example?

A. So, each of the companies, except those that were set up specifically to support a particular financing on a property, most of the companies were set up to acquire and develop commercial real estate; office buildings, retail shopping [12] centers, luxury multi-family living communities, a hotel.

Q. With respect to those commercial properties, after they're developed and constructed and built out and after a prospective tenant is located for the parties, who enters into the lease with those tenants?

A. The ownership company.

Q. Does Dewberry Group itself ever enter into leases with tenants of the commercial properties?

A. It's difficult for me to, you know, answer a question that's couched in terms of "ever" because my experience with the company was only for the period of time that I've just described. But during my time with the company, that was never the case, no.

Q. Okay. And in turn, during the period of time when you were general counsel for Dewberry Group, who collects the rents from those tenants who are leasing properties from the affiliate companies?

A. The rent was payable to the company that owned the property.

Q. Okay. And in turn, Mr. Groce, what type of relationship does Dewberry Group have with the affiliate companies? In other words, is that a legal relationship? What is the legal relationship between Dewberry Group and the affiliates?

A. Dewberry Group acted as a managing representative or a managing agent on behalf of the ownership companies.

[13] Q. Okay. And does Dewberry Group have a management agreement, for the most part, with those affiliate companies?

A. Yes.

Q. And how is Dewberry Group compensated for the shared services that it provides to the affiliates?

A. Through a periodic fee that would be calculated and billed by Dewberry Group to the other company.

Q. Okay. And with respect to the shared services that you briefly described—tax, accounting, legal, that sort of thing—are there any companies to which Dewberry Group provides those type of services that are not owned and controlled by John Dewberry?

A. No, sir.

Q. Do you know, sir, how, at least during your tenure with Dewberry Group, the affiliate companies were organized? Are they LLCs, are they corporations, or is there some other type of organization for the affiliates?

A. The answer to your question is, yes. And what I mean by that is, some were LLCs, some were corporations, and some were business organizations of a different type, for example, a limited liability, limited partnership.

Q. Where are those affiliates organized?

A. Typically, in the states in which the property was located; Florida, Georgia, South Carolina.

Q. So those affiliates, then, are organized under the laws [14] of those states that you mentioned?

A. Typically, yes. Not always, but typically, yes.

Q. What is the source of revenues earned by the affiliate companies?

A. Rents and other charges payable by the tenants.

Q. And did the affiliates maintain their own books and records?

A. Yes.

Q. And are those books and records of account separate from Dewberry Group and from the other affiliate companies?

A. Yes.

Q. How did the entities report their revenue to the IRS and to the state taxing authorities?

A. By means of the applicable entity, Federal or state, or local income tax return.

Q. And to the best of your knowledge, does each of the—do each of the affiliate companies file their own separate tax returns, both Federal and state?

A. To the best of my knowledge, yes.

* * *

[50] CROSS-EXAMINATION OF DAVID GROCE

* * *

[51] Q. And you were employed—I just want to make it clear. You were employed by Dewberry Group, correct, not by any other entity, right?

A. That's correct.

Q. And your paycheck, the paycheck that you received, and the moneys that were associated with it, were paid by Dewberry Group, not by any other entity, correct?

A. Correct.

Q. And the same with the other employees of Dewberry Group that provided services. I'll give an example. John Freeman, who was the—was John Freeman the CFO of Dewberry, at some point, when you were—

or Dewberry Group, at some point, when you were there?

A. No.

Q. Was he the director of leasing?

A. Yes.

Q. Okay. And he was employed by Dewberry, correct—[52] Dewberry Group, correct?

A. Yes.

Q. And he was paid, to the best of your knowledge, by Dewberry Group, and not by another entity, correct?

A. Correct.

Q. And Kim Lavigne, what was Kim Lavigne's title?

A. Vice president of operations, I think.

Q. Okay. And she was—she oversaw the property management aspects of Dewberry Group, correct?

A. Yes, sir.

Q. Okay. And she was paid by Dewberry Group, correct?

A. To the best of my knowledge, yes.

Q. And by overseeing all those other operations, I'm referring to—and I wanted to make sure I'm correct—those other operations were the properties that were owned by these other affiliated—these other affiliated companies owned by John Dewberry, correct?

A. Correct.

Q. And you testified, I believe, that Dewberry Group is paid fees for the services it provides to these ownership entities that are owned or controlled by John Dewberry, correct?

A. Yes, sir.

Q. Fees like a management fee? Is that one of them, to the best of your knowledge?

A. Yes, sir.

[53] Q. And occasionally, there's a development fee that's paid?

A. I always heard it referred to as a management fee.

Q. Okay. And in terms of the various services that are provided, among other things, the services that Dewberry Group provides to the ownership entities, that includes all of the back office support, the tax and accounting services, at least those portions that are done inhouse, correct?

A. Yes.

Q. They're done by Dewberry Group and not by the ownership entities, correct?

A. Yes, sir.

Q. Okay. And I think you testified that the property management services are all done by Dewberry Group, correct?

A. Yes, sir.

* * *

[56] Q. And the books of—you said there are separate books of these ownership entities. But the individuals who keep those books, the individual—individuals

who are responsible for overseeing that process and doing the back office work, those are individuals who are employed by Dewberry Group, not by the ownership entities, correct?

[57] A. Yes. I think we've established that; yes, sir.

* * *

**DAY 2—AFTERNOON SESSION
TRANSCRIPT OF BENCH TRIAL
PROCEEDINGS**

**BEFORE THE HONORABLE LIAM O'GRADY,
UNITED STATES DISTRICT COURT JUDGE**

* * *

[4] DIRECT EXAMINATION OF JOHN FREEMAN

BY MR. STEVENS:

Q. Good afternoon, Mr. Freeman. Would you please begin by stating your name for the record.

A. Yes, John Bivins Freeman.

Q. Would you please spell your middle name for the record.

A. Yeah, B-I-V-I-N-S.

Q. How are you employed?

A. Under Dewberry Group as an executive vice president of finance.

Q. How long—

[5] THE COURT REPORTER: I'm sorry, I didn't hear you.

THE WITNESS: As executive vice president of finance for Dewberry Group.

BY MR. STEVENS:

Q. How long have you been working with Dewberry Group?

A. Six years.

Q. And did you have any other roles with Dewberry Group before this one?

A. I did.

Q. What were they?

A. I was hired as their controller, and then became a director of finance, and then was director of leasing, and I'm now the executive vice president of finance.

Q. Would you please just summarize in brief your responsibilities in each of those roles.

A. Certainly.

As controller, I reported to the CFO. I was in charge of all of the accounting with an accounting staff of two people, three people. And then as director of finance, I was over the finance and the accounting roles. I had, I guess, two people in the finance team and still the three accountants. And then as director of leasing, I honestly worked by myself for two years in the leasing role. And then at the beginning of 2020, I became the executive vice president of finance over the accounting and finance department, and still the leasing, as [6] well.

Q. As executive vice president of finance, who reports to you today?

A. Yes. So I have staff—two associates on the finance side. I have a controller who reports to me who, really, the two accountants report to him, and then that's all.

Q. Would you please explain to the Court what you mean by the finance side of the business and the accounting side of the business?

A. Sure.

On the accounting side, it's really just paying the bills, debits and credits, and keeping the books. The

finance side is more of a—both financing the properties, obtaining loans, sourcing debt, and also projecting out, you know, profits for the properties.

Q. At this time, Mr. Freeman, I'd like to talk to you about the services that Dewberry Group provides and its structure, and its relationship to the entities that own real property. Would you please just in brief summarize the services that Dewberry Group, Inc. provides.

A. Yeah, both management and accounting. So when I say management, property management of the properties. And then also the accounting of the properties.

Q. Does it provide services related to leasing?

A. It does in some degree, and it's variable at different [7] properties. We manage, perhaps, is a good way to say it, the third-party brokers who lease out some—on the retail and office side.

Q. And does Dewberry Group provide any services related to human resources or legal services?

A. They have. We have general counsel at Dewberry Group, and we also have—the controller handles human resources internally.

Q. And to whom does Dewberry Group provide those services?

A. To the properties owned by the majority, JOHN DEWBERRY.

Q. Does Dewberry Group provide services to JOHN DEWBERRY personally?

A. Yeah, in a small degree, yes.

Q. Does Dewberry Group provide services to any other third parties?

A. No.

Q. Mr. Freeman, I would like to show you now what's been identified as Defendant's Exhibit 480.

Do you recognize this document?

A. Yes, I do.

Q. The parties have stipulated that this is in evidence.

MR. STEVENS: If we could cull out the middle portion there related to Management Fee Income.

BY MR. STEVENS:

Q. And first, Mr. Freeman, would you just please summarize [8] for the Court what this document is and what it shows.

A. Yeah. This is the management fees earned by Dewberry Group for its management services of the properties.

Q. How are these management fees calculated?

A. It's based on a percentage of rent.

Q. And on the far left column, what are all of these references here to 10th Street, Dorchester Square?

A. Yeah. Those are the separate properties—the separate entities that own those properties.

Q. And does Dewberry Group have a contractual relationship with these properties?

A. They do as property manager.

MR. STEVENS: If we could also cull out the bottom section, please.

BY MR. STEVENS:

Q. And, Mr. Freeman, what does this accounting fee income relate to?

A. It's similar to property management. We charge accounting fees—sorry not “we.” Dewberry Group charges accounting fees to the properties, and it's based on a percentage of the rent received.

Q. And apart from management fees and accounting fees, is there any other way that Dewberry Group is compensated for the services it provides?

A. In addition to the management fees and accounting fees, [9] on occasion, there can be a leasing fee. There hasn't been one recently, but a development fee or possibly a financing fee.

Q. And on the left—

MR. STEVENS: If we could pull that back up, please.

Thank you.

BY MR. STEVENS:

Q. On the left, you said these are references to the properties. To be clear, how are those properties known in the marketplace to prospective tenants?

A. For a retail shopping center, it would be the name of the retail shopping center. For example, say, Mount Pleasant Square—that's the shopping center, Mount Pleasant Square, which we actually rebranded a couple of years ago to Oyster Park. But we still keep the legal entity, Mount Pleasant Square. Roosevelt

Square, another example. The shopping center named Roosevelt Square.

Q. Is Dewberry Group, Inc. a parent or subsidiary of any of the entities referenced here?

A. No.

Q. And are these entities parents, or subsidiaries, or affiliates of one another?

A. No.

Q. Is it fair to call them single-purpose entities?

A. Yes, they are.

Q. So I'll reference them as single-purpose entities or the [10] ownership entities during our conversation. Could you please describe the varying ownership structures of the single-purpose entities.

A. Yeah. The majority of them are either 95 to 99 percent owned by John K. Dewberry.

Q. And what is the exception to that?

A. The hotel. Which, I believe, entity-wise, is 334 Meeting Street, LLC.

Q. And what is the ownership structure of the hotel?

A. John—JOHN DEWBERRY owns 75 percent, with outside investors owning 25 percent.

Q. Mr. Freeman, what are some of the reports or documents, or deliverables that Dewberry Group creates in the course of providing these services?

A. Yeah. So, Dewberry Group is responsible for the accounting, debits and credits per separate entity, cash management. Each of these entities have their

own bank accounts. And then also from a tax reporting perspective, Dewberry Group does the accounting and sends the accounting to our third-party accountant, Windham Brannon, who prepares tax returns and K-1s to investors.

Q. So, Dewberry Group does not prepare the tax returns for these single-purpose entities?

A. No, we rely on a third party.

Q. What is Dewberry Group's role in facilitating the [11] preparation of those tax returns?

A. Simply entering the debits and credits and providing a trial balance.

Q. To?

A. To Windham Brannon.

Q. And how long has Windham Brannon prepared the tax returns for these single-purpose entities?

A. As long as I've been here. And I think they were there several years before that, so—

Q. So how many—

A. —over six years.

Q. And Windham Brannon, that's a certified public accounting firm, correct?

A. Yeah, a fairly large regional firm.

Q. So, Mr. Freeman, when a commercial tenant executes a lease with one of these single-purpose entities, who is the landlord?

A. It would be the owner of the property, the single-purpose entity.

Q. And so rent is made payable to who?

A. The single-purpose entity.

Q. And when you execute a lease on behalf of the landlord, who do you execute the lease—

A. As an authorized representative of the single-purpose entity.

[12] Q. Now, Mr. Freeman, you're familiar with Mr. Bosco's expert opinion on behalf of the plaintiff, that Dewberry Group is, quote, "The economic engine that creates the revenue that flows to these ownership entities."

Are you familiar with that opinion?

A. Yeah, I am.

Q. Do you agree with that proposition?

A. No.

* * *

Q. In your view, what does drive the revenue that flows to [13] these ownership entities?

A. Yeah, certainly. It's the property. When you go to lease something and when a business is deciding on where they're going to be, they choose a location, and that property is owned by the special-purpose entity.

Q. Could you provide the Court with an example in which one of these single-purpose entities that owns an approved asset generates revenue on its own?

A. Yeah, it's through rent. It's through the whole process of getting a lease executed. And, obviously, a tenant's going to choose the location of the property. I mean, this is real estate. So they choose the location,

they move there, and they begin paying rent to the entity.

Q. And is there a particular example that you can provide the Court—

MR. STEVENS: If we could pull up Defendant's Exhibit 480.

BY MR. STEVENS:

Q. Of this list of entities here on the left, is there one that you could elaborate on that Dewberry Group plays a minimal role in generating the revenue?

A. Yeah, certainly. Let's just start with Roosevelt Square. It's a large shopping center down in Jacksonville, Florida owned by Roosevelt Square Associates—I believe it's LLLP. And when we sign a tenant—when I say “we”—when a lease is signed with a tenant—and if you want a specific example, let's just [14] say Publix, for example. Publix runs their demographics map, they run all their reports on where they want to go into a city. They're very strategic, it's a very smart decision on where they need to go. They decide on a property, the lease would be executed with that property, and they would begin paying rent to that property.

Q. And I believe you testified earlier that for certain properties, the leasing is managed by third-party brokers?

A. Correct.

Q. So, if a prospective tenant executes a lease in working with a third-party broker, what role does Dewberry Group play in that interaction?

A. What Dewberry Group does is, approves the rate—typically just the way—I’ll back up and just say how the leasing process works. Most tenants hire a broker, a tenant rep. That tenant rep reaches out to a landlord rep, and Roosevelt, for example, is the shopping center. Reach out to our landlord rep. Our landlord rep, landlord rep for the property, presents the terms and the space and all that to the tenant rep. There is some negotiation there, but no landlord rep can make those decisions on their own, so then they reach out to myself or another employee at Dewberry Group and says, hey, can we offer X, can we do this? As an authorized representative of the property, Dewberry Group gives them authority.

[15] Q. And if the third-party broker brings a tenant to the landlord, who pays the leasing commission?

A. The property would pay the leasing commission.

Q. Would you please explain for the Court in a little more detail how Dewberry Group maintains separate financials for the single-purpose entities?

A. Yeah. I mean, they’re all separate entities, so we have to keep separate books for every property.

Q. Physically, where are the accounts located?

A. Yeah, in a system called Yardi. But they have different accounts for each property. And then bank accounts, we try to keep them all at the same bank. Sometimes that’s hard to do. So most of the properties, they all have their own separate bank accounts, but sometimes they’re spread out between three or four different banks.

Q. What is the accounting practice that Dewberry Group follows as it maintains these separate accounts?

A. Tax basis, cash tax-based accounting.

Q. And what is tax-based accounting?

A. It's in accordance with the IRS versus GAAP, which publicly traded companies can't lease on GAAP.

MR. STEVENS: If we can go back to Exhibit 480, please, and scroll to the final page of this document. And cull out the row on net income.

BY MR. STEVENS:

[16] Q. So, Mr. Freeman, could you please explain why Dewberry Group operates at a loss each year?

A. Yeah. Several of the positions at Dewberry Group, mainly the construction side and the development side, haven't been revenue-generating in the last several years. Dewberry Group does look—is always looking to construct or develop, which we haven't done.

Q. And how is this shortfall balanced in the end?

A. JOHN DEWBERRY has to fund the shortfall so we get paid.

Q. And, Mr. Freeman, if Dewberry Group, Inc. didn't provide the services that it provided to the single-purpose entities, who would provide those services?

A. A third party. There's a handful of them.

Q. Now, Mr. Freeman, does Dewberry Group, Inc. provide services to the Dewberry Charleston hotel?

A. Limited capacity, but, yes.

Q. What are those services?

A. We do assist in investor reporting, also assist on the financing side of sourcing the debt.

Q. Does the hotel have its own employees?

A. It does.

Q. How many?

A. It fluctuates seasonally, but probably I would say 150.

Q. Could you please tell the Court about the executive management team at the hotel.

[17] A. Sure. A general manager runs the show. Under her, there's director of finance, there's director of F&B, there's going to be a director of housekeeping, going to be HR manager.

Q. Is there a counterpart to you at the hotel?

A. There is. And I want to preface that. There is a role of the counterpart to me at the hotel. Currently, we are trying to fill that role.

Q. And to be clear, the hotel maintains separate financials?

A. Correct. It's a whole separate system. They utilize M3, where we utilize Yardi.

Q. Mr. Freeman, have any of the single-purpose entities that we just reviewed, have any of those been audited by the IRS?

A. Yeah. Just recently, not one we reviewed, but Dewberry Air was just audited by the IRS and Dewberry 10th Street.

Q. And what were the results of those audits?

A. We passed. Everything was in accordance with the IRS.

Q. Has there been any review of the Dewberry Foundation?

A. Yeah. Recently, there was a review of the foundation.

Q. What was the result of that review?

A. Everything—everything passed.

Q. To your knowledge, have any enforcement actions been taken by the IRS against any of these single-purpose entities?

A. No.

Q. To your knowledge, are there any other IRS investigations that have been undertaken?

[18] A. No.

Q. Mr. Freeman, are you familiar with the structure of other commercial real estate companies?

A. Uh, yeah.

Q. Would you please summarize for the Court your background before coming to Dewberry Group.

A. Yeah, certainly.

I started my career at Ernst & Young as an auditor. I was in the oil and gas industry, so it wasn't that real estate heavy. I took a job at Morgan Stanley in Atlanta in their real estate group as an accountant. The role was fund controller, but it was really an accountant for real estate funds, which basically—just get a bunch of investor money and go buy a bunch of different buildings. And then State Street, which is, I think, one of the largest funding administrations in

the world, came and bought the 100 accountants from Morgan Stanley that we had in Atlanta. And I became an employee of State Street, servicing still the same funds that I was working on at Morgan Stanley and then was hired as Dewberry's controller.

Q. And was the structure of that prior company, Morgan Stanley, similar to the structure at Dewberry Group?

A. Yeah, it's very common. And I would say almost every real estate company does this, but the properties are all owned by individual entities.

* * *

[19] Q. Would you please describe for the Court your personal involvement in Dewberry Group's leasing activities.

A. Yeah. As director of leasing—are you talking about as my—the whole time?

Q. Sure. Director of leasing and today.

A. Yeah, certainly. So, ultimately, the third-party brokers do report to me, and I do give them guidance on whether that's—tenants were—that I believe ownership would desire and the property needs. They report to me on the status update. Every 15 days, they send a report that I review and present to ownership prospective tenants, or tenants' interest, intent towards, things of that nature.

Q. Do you interact in negotiations with prospective tenants?

[20] A. I will, certainly.

Q. Have you been involved in negotiations about renewals with current tenants?

A. Yes, definitely.

* * *

[31] CROSS-EXAMINATION OF JOHN FREEMAN

* * *

[37] Q. And then, so when you were the controller for Dewberry Group and you were doing cash management for Dewberry Group, you were performing those functions, not only for Dewberry Group, but for all of the property-owning entities; is that correct?

A. We were performing cash management for the properties, correct.

Q. And, in addition to doing the cash management for Dewberry Group and for all of the properties, you were providing those same services to John K. Dewberry as an individual, correct?

A. We maintained—yes, John's bank accounts.

Q. But when you performed those services for JOHN DEWBERRY as an individual, he didn't pay you individually, did he?

A. No. He funds the shortfalls of Dewberry Group.

Q. And you got paid—when you were doing those services for Dewberry Group, for the property-owning entities, and even for JOHN DEWBERRY individually and his family, you got paid—you got paid only by Dewberry Group, correct?

A. Correct.

Q. Okay. In fact, you've said and you discussed earlier in [38] your deposition that Dewberry Group essentially functions as a family office for JOHN DEWBERRY, for his real estate business, and for his family and personal affairs, correct?

A. Yeah. And when I say "family office"—I sit next to his wife and himself, and when you say his "family," it's—he doesn't have any kids. It's him and his wife.

* * *

Q. Yes. Okay. All right. And the salary that Dewberry Group pays you or the—they pay you salary and benefits, I take it?

A. Correct.

Q. That isn't divided up so that part of your salary can be allocated to the work you do for Dewberry Group, as opposed to the work you do for JOHN DEWBERRY individually, as opposed to the work that you do for the property entities, is it?

A. No.

Q. Okay. The property entities can't perform their own cash management functions, correct?

A. Can't—I'm sure there is a way for the properties to outsource the cash management function.

Q. Okay. The ones where you're performing these function—I know it's possible that they could, but the way the Dewberry Group business is actually run now, those property entities can't perform their own cash management functions or any [39] functions because they don't have any employees; is that correct?

A. Right, yes.

* * *

[60] Q. Okay. Now, do you recall also that during your deposition for certain topics, you're identified as a 30(b)(6) witness or basically a corporate representative on certain topics?

A. Yes.

Q. Okay. And do you recall that one of the topics that you were identified as the corporate representative on was the kinds of customers and clients that Dewberry Group serves under its Dewberry Group marks?

A. Yes.

Q. Okay. And do you recall that you testified in that capacity on behalf of Dewberry Group that your—that Dewberry Group—the clients and customers that Dewberry Group services [61] under the Dewberry Group marks would be tenants who lease space in Dewberry Group's buildings and also individuals and households who lease space at apartment buildings that Dewberry Group manages?

A. I'm assuming that's my testimony.

Q. Okay. Do we—could we turn—and I'm sorry, I'll try to find it again. This is—it's page 97 on the smaller numbers, so I will try to get us to the right spot. It looks like it's page 25 at the bottom, and—

A. I got it.

Q. Yeah, 97. Starting at line 8 where I'm asking you to identify the kinds of customers. And do you see what your answer is?

A. Yeah, I do.

Q. So, your customers that—not you personally, but Dewberry Group’s customers that it services under the Dewberry Group mark, would include tenants who lease space in the buildings, office space, those who lease retail space, and also individuals in households who would lease or rent apartment space; is that correct?

A. That’s what I testified.

Q. Okay. When you—you, in your earlier testimony—in your direct testimony, you mentioned that—I think you mentioned that the property entities get the rent or receive the rent payments. Is that—

[62] A. Correct.

Q. Now, if there is an issue with payment or if there’s nonpayment or, you know, you’ve got one that’s not performing, what happens then? Who would do things to collect the rent or to try to resolve the problem. How would that get resolved?

A. Yeah. Employees of Dewberry Group, as part of kind of that accounting function, the accounting fees that the properties pay to Dewberry Group, that’s—part of that function is collections.

* * *

[67] DIRECT EXAMINATION
OF JOHN DEWBERRY

* * *

[68] Q. And you’re self-employed as what? What do you do?

A. I'm a developer and president and founder of Dewberry Capital and Dewberry Group.

* * *

[74] Q. Now, the Dewberry Group, Incorporated, what does it do—aside from managing the various properties that you own or that you own—are the majority owner, what else does it do? Does [75] it do work for the foundation?

A. Yeah. It does work for the foundation. It, you know, manages the properties, it provides financing for our properties.

Q. Now, does it do personal stuff for you?

A. Yeah, sure it does. I mean, you know, we have an assistant down in Charleston and an assistant in Atlanta. We help run the foundation that my wife, Jaimie, is head of. We have a little, you know, horse racing business in the five-star hotel business. The horse racing business, you, too, can learn how to lose money, just join one of those two businesses. But it helps me keep those numbers together, too.

* * *

[106] CROSS-EXAMINATION
OF JOHN DEWBERRY

* * *

[142] Q. So you don't dispute that Dewberry Group is advertising that its primary goal is to, "Create five-star properties with [143] exceptional capital appreciation realized through top-flight design and patient, long-term ownership perspective. As a result, the company maintains an extraordinarily profitable track record of success"?

A. Yes, sir.

Q. That's what you're representing to the public, correct?

A. Yes, sir.

Q. And you're mentioning the portfolio of nearly 1.5 billion in operating assets. You're telling the public about that?

A. Yes, sir.

Q. Okay.

MR. SCHMALZ: And let's go down to—a little bit further on page 3 of 6, under, "Who we are." You can highlight that. I guess the "who we are" is good enough.

BY MR. SCHMALZ:

Q. And you're also touting the company's experience and acquisitions and operations to development and design, correct?

A. Yes, sir.

Q. And if you read towards the end of the sentence there at the bottom, you're talking about the services that your company provides, "Translate to value-driven solutions across all sectors and success for clients around the globe." That's what you were telling the public, correct?

A. That's on our—yes, sir, yes.

* * *

**DAY 3—MORNING SESSION
TRANSCRIPT OF BENCH TRIAL
PROCEEDINGS**

**BEFORE THE HONORABLE LIAM O'GRADY,
UNITED STATES DISTRICT COURT JUDGE**

* * *

[4] DIRECT EXAMINATION OF LISA MILLER

BY MR. DORVEE:

Q. Thank you, Your Honor. Please state your name and address for the record.

A. Lisa Geddes Miller.

Q. And how are you employed?

A. I am employed by HKA Group.

Q. And what is HKA Group?

[5] A. They are a consulting firm. They are a litigation and evaluation services firm, and they have particular groups that specialize in certain economic damage areas.

Q. What group are you in?

A. I am in the forensic accounting and commercial damages group, FACD.

Q. FACD?

A. Yes.

Q. And how long have you been employed by HKA?

A. Since May of 2020.

Q. What is your position?

A. I am a director.

Q. What are your responsibilities in your position as director?

A. I am responsible for, when engaged, serving as an expert witness or consultant in matters involving commercial damages. I also lead engagements on behalf of other partners. I help providing services and engagements involving economic damages and in other areas of the practice groups.

Q. And did you issue an expert report in this case?

A. I did.

* * *

[32] Now, let's address Mr. Bosco's report for a second. Mr. Bosco—and there's been some discussion whether it's a theory, a concept, a calculation. Mr. Bosco uses the term "unified business enterprise," correct?

A. Correct.

Q. And what is your understanding of that concept as provided by Mr. Bosco?

A. He's using it to indicate that it's one business.

Q. What's one business?

A. The Dewberry Group and the individual properties where this lease revenue is recorded is one unified business.

Q. And in the area of damage calculation, in your area of expertise, are you familiar with that concept?

[33] A. I am not.

Q. Have you ever heard of it before?

A. No.

Q. And is it a theory that is generally accepted when calculating profits in a trademark case?

A. No.

Q. In your opinion, does that concept make sense?

A. It does not make sense.

Q. Why not?

A. Because, number one, Dewberry Group, Incorporated is the named defendant.

Q. Okay.

A. Dewberry Group, Incorporated and the individual properties have separate books and records. They have separate revenues, separate and distinct revenue streams and expenses, and they are separate corporate entities that file separate tax returns.

Q. When, if ever, have you seen damages calculated against a party or against an entity that is not a party to a case?

A. I have not.

Q. Now, you indicated that there are various third parties, and those are the property-owning entities?

A. Correct.

Q. And what sort of forms do they take in terms of corporate structure?

[34] A. They're LPs, LLCs.

Q. Okay. Now, there is a relationship between Dewberry Group—a financial relationship between Dewberry Group, Incorporated and the properties, correct?

A. Correct.

Q. And what is that relationship?

A. The landlords pay Dewberry Group a management fee.

Q. Okay.

A. And for that management fee, Dewberry Group is providing property management services.

Q. Now—I would now like to address your attention just to Dewberry Group, Incorporated, okay?

A. Okay.

Q. And according to your understanding, what is—let's make it quick because it's been testified to too many times?

A. It provides—it provides property management.

Q. And according to your understanding, does Dewberry Group, Incorporated do other things?

A. They do.

Q. Such as?

A. They provide services for John K. Dewberry personally. They provide some services to the foundation, and they provide some services to John K. Dewberry's other businesses, such as his horse racing.

Q. And you said, "they provide."

[35] A. I'm sorry, Dewberry Group provides services.

Q. How did you gain that understanding?

A. That was based on discussions with Mr. Freeman, through Mr. Freeman's deposition as well as I heard it again yesterday.

Q. And did you analyze the profits of Dewberry Group, Incorporated?

A. I did.

Q. And specifically, what did you do?

A. I reviewed the revenue streams to understand what type—what are the nature of the revenues that were being recorded by Dewberry Group for years 2018 through 2020. And I also reviewed the expenses that Dewberry Group had incurred with regard to those revenues.

Q. And according to what you reviewed, did Dewberry Group, Incorporated, make a profit during any of these years?

A. They did not.

Q. And where in your—did it lose money?

A. It did.

* * *

[36] Q. I would now like to show you what's been marked previously as Defense Exhibit 511, which has been stipulated to as admissible.

Is this the corrected calculation? And let's flip through it, if we could, to the end.

A. Yes, it is.

Q. Thank you.

And this shows that there are no profits being earned by the Dewberry Group, Incorporated, correct?

A. Correct.

Q. Now, I think we talked about the unified business concept and we've talked about the revenues and so forth. Just so we're clear, even using Mr. Bosco's unified business enterprise calculation theory, whatever you want to call it, did that unified—were there any revenues attributable to the marks generated by the unified business enterprise for the unified business project?

A. No, there was not.

* * *

[53] CROSS-EXAMINATION OF LISA MILLER

* * *

[59] Q. And you also admit in your report that you did not do a profits analysis in this case; is that correct?

A. I did not do a profits analysis because I determined there was no revenue attributable to the mark.

Q. And you also acknowledged in your deposition that when a plaintiff, as was done in this case, is using profits as a measure of trademark damages, that the time period for assessing those profits is the time period of the infringement; is that correct?

A. The time period after the use of the mark began, I think, is how I worded it.

* * *

[114] MR. DORVEE: I realize this is—given your recent comments, this is ill-fated. But at this point, I think in order [115] to preserve the record, I have to make a motion pursuant to Federal—

THE COURT: Oh, absolutely, yeah.

MR. DORVEE: —Federal Rule 52(c), a motion for judgment on partial findings. And, Your Honor, as we have shown and as you have noted, the plaintiff, in this case, is attempting to obtain revenues from entities that are not defendants without any sort of allegation of alter ego, fraud, anything else, merely that the entities used the marks. If they wanted to obtain revenues from these entities, they should have sued those entities, they should have added those entities to this case. They did not. And, therefore, the revenues relating to those entities are not recoverable. And as we've shown, Dewberry Group, Incorporated does not make a profit, therefore, there are no damages.

* * *

[116] THE COURT: All right. Thank you, Mr. Dorvee.

From respondent.

[117] MR. WRIGHT: Yes, Your Honor. Thank you. Thank you, Your Honor, Brian Wright again. The record contains ample evidence to support disgorgement of Dewberry Group's profits during the infringement period. Indeed, the record contains ample evidence to—for an award exceeding Dewberry Group's profits since Dewberry Group continues to insist, it wasn't actually profitable.

* * *

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

DEWBERRY)	
ENGINEERS, INC.,)	
Plaintiff,)	
v.)	
	)	Civil Action
DEWBERRY GROUP,	)	No. 1:20-CV-610
INC. F/K/A)	
DEWBERRY CAPITAL)	
CORPORATION.)	
Defendant.)	

**EXPERT REPORT OF RODNEY J. BOSCO,
MAFF, CVA, CFE**

March 1, 2021

/s/
Rodney J. Bosco

* * *

I. Expert Qualifications

1. I am a Director with Chess Consulting LLC (“Chess”). I earned a Bachelor of Arts degree in Economics from Boston College and a Master of Arts degree in Economics from The University of Michigan. I hold professional designations as a Master Analyst in Financial Forensics (MAFF), a Certified Valuation Analyst (CVA) and a Certified Fraud Examiner (CFE).

2. Over the past 37 years I have provided economic, quantitative, and related consulting services to businesses, government entities, attorneys, and individuals. I have conducted or evaluated economic impact assessments and their underlying causes pursuant to disputes, investigations, business valuations, and regulatory proposals—including multiple class or collective action disputes involving claims of back pay and other measures of lost personal earnings for similarly situated classes of plaintiffs totaling thousands of individuals—using large-scale data analysis and statistical sampling techniques. My work has been used to proffer expert testimony in federal/state court and in arbitrations. A copy of my curriculum vitae, which includes listings of prior testimony in the past four years and publications in the past 10 years, is attached as **Exhibit 1**.

3. Chess is an independent business advisory firm that is retained by private and public entities and their legal counsel to provide expert consulting and testimony services. Chess also develops practical and effective solutions to address complex accounting, litigation, investigations, corporate governance, and regulatory compliance issues.

II. Scope of Engagement, Information Considered and Compensation

4. Chess was retained by Hunton Andrews Kurth LLP, legal counsel (“Counsel”) for Dewberry Engineers Inc. (“Dewberry”). I was asked to review discovery in this matter and prepare calculations of damages, assuming liability is found, associated with the claims by Dewberry against Defendant Dewberry Group, Inc. f/k/a Dewberry Capital Corporation (“Dewberry Group” or “Defendant”).

5. This report summarizes my observations, findings, and opinions to-date, based on discovery materials provided thus far in the case. I understand that fact and expert discovery is ongoing, and I reserve the right to supplement this report to the extent permitted by the applicable rules, and also to respond to any expert opinions offered by Defendant in response to this report. I may also provide testimony on these topics, or related topics, if requested by Counsel or the Court.

6. I have not been asked to examine liability or causation issues alleged by the parties. Therefore, I express no opinions on these issues.

7. Chess is being compensated for services rendered on an hourly basis with rates ranging from \$200 to \$525 per hour (my rate is \$525). The compensation to be received by Chess is not dependent on the outcome of this litigation.

8. A list of documents and other discovery materials considered and reviewed in preparing this Expert Report is attached as **Exhibit 2**. I have considered and evaluated the information listed in **Exhibit 2** in light of my training and experience in economics, damages analysis and related disciplines. I describe

working assumptions and judgments as required in the text of this report.

9. I have received assistance in reviewing documents, preparing analyses, and creating exhibits. These efforts were performed under my direction and supervision, in accordance with accepted standards and practices. As such, I take responsibility for the contents of this report.

10. Should the matter go to trial and I am asked to testify, selected portions of discovery materials I have relied upon may be used as exhibits. Additionally, I may prepare graphical or illustrative exhibits based on the contents of this report, the materials I have relied upon and my analysis of these materials.

11. Should I receive additional requests from Counsel, I may supplement or amend this report. Further, subject to Court approval, I may amend or supplement my opinions based on any new facts, information, or reports of other experts in this matter. Accordingly, I also reserve the right to respond to any arguments that may be advanced relating to the subject matter of my opinions.

III. Summary of Findings and Conclusions

12. Based on the reviews, consultations and analyses set forth in Sections IV through IX, I have reached the findings and opinions summarized below. My findings and opinions may change should additional information be produced and permitted to be analyzed.

13. The tax returns and trial balances produced by Dewberry Group report that the company has incurred substantial financial losses from 2014 through 2020, with cumulative losses since its 1989 founding (as reflected in Retained Earnings) in excess of \$20

million. There is no indication, based on revenue and expense trends observable in these documents, that the company will be profitable in the foreseeable future. Also, the asset schedules do not list any real estate holdings.

14. However, Dewberry Group's Web site, along with proposal documents sent to third parties, depicts a much different financial profile for the company. These sources state that Dewberry Group has had a profitable track record of success, and owns operating assets valued at more than \$1.5 billion, including "more than three million square feet of 5-star hospitality, Class 'A' office, luxury multi-family residential, and prestigious retail projects."

15. These divergent disclosures suggest that Dewberry Group is a central component of a much larger, interrelated financial and business operation whose controlling shareholder is John Dewberry. This can be seen in the inclusion of corporate overhead—such as John Dewberry's private aircraft expenses—in Dewberry Group's financial statements, as well as expenses for employees that exceed the revenues reported in the financial statements. These observations suggest that the company's financial statements do not reflect a full accounting of the revenues and expenses associated with the Dewberry Group enterprise whose actions are the subject of this litigation.

16. Dewberry Group oversees and manages real estate-related operations (including acquisition, financing, design, development, leasing and property management) for the portfolio of income producing commercial real estate properties and projects under the common control of John Dewberry. Management fees, accounting fees, development fees and licensing

commissions related to these activities are included as revenue in Dewberry Group's tax returns and trial balances. I have received documents produced in discovery that have been relied upon as support for linking the use of certain infringing trademarks with properties in Dewberry Group's portfolio, and which materials are summarized and identified in this report. I have been asked to assume that Dewberry Group's commercial dealings with these properties have served as a conduit for the infringement. As such, the analyses and findings included in this report consider the revenues from these operations, and the profits that flow from them, as measures of potential damages.

17. Dewberry Group has earned revenues from activities related to its portfolio of assets that are alleged to have infringed Dewberry's trademarks totaling \$18.1 million in 2018, \$45.1 million in 2019 and \$39.1 million in 2020. Revenues associated with these allegedly infringing activities are expected to continue during 2021, in amounts to be determined at trial.

IV. Background

A. Parties—Dewberry Engineers Inc.

18. The Plaintiff, Dewberry Engineers, Inc. ("Plaintiff" or "Dewberry") is part of a group of affiliated entities under control of the Dewberry family that dates back to 1956, and founded by Sidney O. Dewberry, who is the Chairman Emeritus of the Plaintiff and its affiliated entities.¹ Among other things, the Plaintiff and its affiliated entities perform a wide variety of services relating to real estate and

¹ Complaint filed May 29, 2020, paragraphs 14-20.

real estate development, including the services described in the Complaint.² The Plaintiff is the holder of the trademarks at issue in this case, identified and referred to in the Complaint as the “Dewberry Marks”.³

B. Parties—Dewberry Group, Inc., f/k/a Dewberry Capital Corporation

19. Dewberry Group is a Georgia corporation with its principal place of business in Atlanta. Dewberry Group had been known as Dewberry Capital Corporation from its founding in 1989 until April 26, 2019.⁴ Dewberry Group unsuccessfully attempted to register applications for the four Infringing Marks described in the Complaint with the United States Patent and Trademark Office (“USPTO”), which refused the registrations on the ground that they were likely to be confused with the Dewberry Marks.⁵ Dewberry Group has continued to use the Infringing Marks as described in the Complaint and discussed in more detail in this report below.

² Complaint filed May 29, 2020, paragraphs 1, 20-21.

³ Complaint filed May 29, 2020, paragraphs 20-23.

⁴ Complaint filed May 29, 2020, paragraph 11; 01_DG-0000081 (Certificate Name Change Amendment). Dewberry Group has admitted that it is the same entity as Dewberry Capital Corporation, which was its former name, and that Dewberry Capital Corporation’s operations have continued without interruption under the new name of Dewberry Group. Defendant’s Responses to Plaintiff’s Second Set of Interrogatories, response to Interrogatory No. 18.

⁵ Complaint filed May 29, 2020, paragraphs 58–74.

V. Plaintiff's Damages Claim for Trademark Infringement

20. Dewberry has sued Dewberry Group for infringing Dewberry's federally registered Dewberry Marks in violation of Sections 32(1) and 43(a) of the Lanham Act, 15 U.S.C. §§ 1114(1) & 1125(a).⁶ According to Dewberry's Complaint, the unlawful infringement results from Dewberry Group's adoption and use of the Infringing Marks.⁷

21. Dewberry seeks injunctive relief to prevent further infringement, as well as damages in the form of an award of Dewberry Group's profits relating to its use of the Infringing Marks under Section 35 of the Lanham Act, 15 U.S.C. § 1117.⁸ I understand the profits award to be a form of disgorgement damages related to Dewberry Group's use of the Infringing Marks. Disgorgement is defined as "the act of giving up something (such as profits illegally obtained) on demand or by legal compulsion."⁹ Awarding the defendant's profits to the plaintiff in essence makes the defendant forgo the profit it would not have earned but for the sales of the infringing product.¹⁰ In discussing the amount of a defendant's profits that may be awarded for infringement, Section 35 of the Lanham Act states that: "In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction

⁶ Complaint filed May 29, 2020, paragraphs 89-101.

⁷ Complaint filed May 29, 2020, paragraphs 88-101.

⁸ Complaint filed May 29, 2020, paragraphs 93, 101.

⁹ Black's Law Dictionary, 9th ed. 2009.

¹⁰ Weil, Roman L., Wagner, Michael J., and Frank, Peter B., *Litigation Services Handbook—The Role of the Financial Expert*, 3rd Ed. (John Wiley & Sons, Inc., 2001), page 21•16.

claimed. . . . If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case.”¹¹

22. Accordingly, I understand that, in assessing a defendant’s profits under the Lanham Act, the plaintiff is only required to prove defendant’s gross sales or revenue. The burden then shifts to the defendant to prove any sales that are not attributable to the infringement, as well as any expenses that should be deducted from sales to arrive at profits.¹²

23. In Section VI of this report, I describe the Dewberry Group economic entities that Dewberry asserts are using the Infringing Marks. In Section VII, I assess Dewberry Group’s revenues from the date of initial infringement through the present for the economic entities using the Infringing Marks, based on data and information available for inspection as of the writing of this report. In Section VII, I discuss the inconsistency in Dewberry Group’s portrayal of its financial performance and its scope of operations between its income tax filings and its representations to the public. Finally, in Section IX, I provide a preliminary discussion of expenses that may be applicable to a profit disgorgement analysis. Since it is Dewberry Group’s burden to prove costs that should be reasonably deducted from infringing sales to measure profits

¹¹ 15 U.S.C. § 1117(a)(3).

¹² J. Thomas McCarthy, 5 McCarthy on Trademarks and Unfair Competition § 30:66 (5th ed.) (“Thus, the plaintiff need only prove gross sales and it is then the infringer’s burden to prove (1) which, if any, of those sales were not attributable to the wrongful act, and (2) deductible costs and expenses to arrive at net profits.”)

owing to the infringement, a complete evaluation of Dewberry Group's expenses cannot take place until additional fact and expert discovery has been completed.

VI. Economic Entities Within Dewberry Group That are Alleged to Be Using the Infringing Marks

24. Discovery materials produced in this case have identified economic entities within Dewberry Group that have used the Infringing Marks during 2018, 2019 and 2020. These entities, and the evidence supported by the relevant discovery materials for their identification, are discussed below.

25. One example of Dewberry Group's use of the Infringing Marks is a loan request package prepared for the Peachtree Pointe properties, which was sent to a lender in September 2018. The cover page of the package lists the marks for "Dewberry Group" and "Studio Dewberry." The package includes a discussion of Dewberry Group's \$965 million in operating assets within Office, Mixed Use, Development, Hospitality, Retail, and Parking, with listings for Campanile, Peachtree Pointe (One, Two and Gallery Uptown), Oyster Park, Ortega Park, The Laramore, Belle Isle Square, Dorchester Square, and The Dewberry Charleston. The package also lists future development at Dewberry Juniper, The Ansley, 1627 Peachtree Street, Dewberry 10th Street, 1400 Peachtree, The Rhodes Uptown Tower, Uptown View and Azalea Park.¹³

¹³ 05_DG-0141343. Bates number references in this report identify only the first page of each produced document. However, for each Bates number reference listed, I considered all produced pages of that document and its family members.

26. A recent example of Dewberry Group’s use of the Infringing Marks is a loan request package prepared for Peachtree + 10th Street, which is dated September 2020. Within the “Sponsorship” section of the package is a discussion of Dewberry Group’s \$1.6 billion in operating assets within Office, Mixed Use, Development, Hospitality, Retail and Parking, with listings for Peachtree Pointe/Gallery Uptown, Campanile, Oyster Park, Ortega Park, Dewberry Living, Belle Isle Park, 930 Juniper and The Dewberry Charleston—along with future development related to The Ansley, 1627 Peachtree Street, Peachtree 10th Street, 1400 Peachtree, The Rhodes Uptown Tower, Uptown Heights and Azalea Park.¹⁴

27. The current list of entities that have used the Infringing Marks, based on the above examples and other materials produced by Dewberry Group, is provided in Figure 1.¹⁵ **Appendix A** lists, for each entity, the relevant discovery documents on which they are based. As will be shown in Section VII, each of these entities earns income, from which a portion is transferred by way of check requests and journal entries to Dewberry Group in the form of management fees and accounting fees.

¹⁴ 01_DG-0004906. 2019 revenue is listed for Peachtree 10th Street on pages 16 and 17 of 29.

¹⁵ The list reflects research conducted by Counsel as of the date of this report. As discovery is ongoing, Counsel may ask me to modify or supplement this list at a later date.

**Figure 1: Entities Within Dewberry Group
That Have Used the Infringing Marks**

ID	Property Name	Infringing Marks
		Group
188	Dewberry 10th Street	X
200	Dorchester Square	X
210	Mt. Pleasant Square (MSA)	X
215	Mt. Pleasant Square III (MSA III)	X
235	Mt. Pleasant Square II (MSA II)	X
240	Roosevelt Square LLP	X
270	Belle Isle	X
300	Dewberry Juniper	X
450	The Dewberry Charleston Hotel	X
520	1155 Peachtree/ Campanile	X
600	One Peachtree Pointe (OPPA)	X
610	Two Peachtree Pointe (TPPA)	X
625	Gallery Uptown	X
870	Dewberry Ansley	X
	The Laramore Hotel (Charlottesville)	X

ID	Property Name	Infringing Marks
		Living
188	Dewberry 10th Street	X
200	Dorchester Square	X
210	Mt. Pleasant Square (MSA)	X
215	Mt. Pleasant Square III (MSA III)	X
235	Mt. Pleasant Square II (MSA II)	X
240	Roosevelt Square LLP	X
270	Belle Isle	X
300	Dewberry Juniper	X
450	The Dewberry Charleston Hotel	X
520	1155 Peachtree/ Campanile	X
600	One Peachtree Pointe (OPPA)	X
610	Two Peachtree Pointe (TPPA)	X
625	Gallery Uptown	X
870	Dewberry Ansley	X
	The Laramore Hotel (Charlottesville)	X

ID	Property Name	Infringing Marks
		Studio
188	Dewberry 10th Street	X
200	Dorchester Square	X
210	Mt. Pleasant Square (MSA)	X
215	Mt. Pleasant Square III (MSA III)	X
235	Mt. Pleasant Square II (MSA II)	X
240	Roosevelt Square LLP	X
270	Belle Isle	X
300	Dewberry Juniper	X
450	The Dewberry Charleston Hotel	X
520	1155 Peachtree/ Campanile	X
600	One Peachtree Pointe (OPPA)	X
610	Two Peachtree Pointe (TPPA)	X
625	Gallery Uptown	X
870	Dewberry Ansley	X
	The Laramore Hotel (Charlottesville)	X

ID	Property Name	Infringing Marks
		Office
188	Dewberry 10th Street	
200	Dorchester Square	
210	Mt. Pleasant Square (MSA)	
215	Mt. Pleasant Square III (MSA III)	
235	Mt. Pleasant Square II (MSA II)	
240	Roosevelt Square LLP	
270	Belle Isle	
300	Dewberry Juniper	
450	The Dewberry Charleston Hotel	
520	1155 Peachtree/ Campanile	X
600	One Peachtree Pointe (OPPA)	X
610	Two Peachtree Pointe (TPPA)	X
625	Gallery Uptown	X
870	Dewberry Ansley The Laramore Hotel (Charlottesville)	

VII. Revenues Earned by the Economic Entities Within Dewberry Group That Have Used the Infringing Marks

28. In this section, I discuss the revenues received by each of the economic entities listed in Section VI during 2018, 2019, and 2020, beginning with the first full month after the month in which Dewberry Group first referenced the Infringing Marks (based on production forwarded to me to date).¹⁶ The calculations of revenue by property, year and source are derived in **Exhibits 3** through **Exhibit 5**; they are summarized by property and year in Figure 2.

¹⁶ For example, most of the properties listed in Figure 2 were included in a Loan Request Package sent to a lender on September 12, 2018 (05_DG-0141343). The revenues listed for these properties during 2018 include the months of October through December.

Figure 2: Revenues Earned by Dewberry Group Entities That Have Used the Infringing Marks, by Property and Year, 2018–2020

ID	Property Name	First Use Of Marks
188	Dewberry 10th Street	Sep 2018
200	Dorchester Square	Sep 2018
210	Mt. Pleasant Square (MSA)	Nov 2017
215	Mt. Pleasant Square III (MSA III)	Nov 2017
235	Mt. Pleasant Square II (MSA II)	Nov 2017
240	Roosevelt Square LLP	Sep 2018
270	Belle Isle	Mar 2018
300	Dewberry Juniper	Sep 2018
450	The Dewberry Charleston Hotel	Sep 2018
520	1155 Peachtree/ Campanile	Feb 2018
600	One Peachtree Pointe (OPPA)	Sep 2018
610	Two Peachtree Pointe (TPPA)	Sep 2018
625	Gallery Uptown	Sep 2018
870	Dewberry Ansley	Sep 2018

ID	Property Name	2018
188	Dewberry 10th Street	\$439,101
200	Dorchester Square	262,504
210	Mt. Pleasant Square (MSA)	1,106,200
215	Mt. Pleasant Square III (MSA III)	467,642
235	Mt. Pleasant Square II (MSA II)	—
240	Roosevelt Square LLP	1,244,423
270	Belle Isle	1,002,914
300	Dewberry Juniper	188,420
450	The Dewberry Charleston Hotel	4,248,700
520	1155 Peachtree/ Campanile	5,782,322
600	One Peachtree Pointe (OPPA)	850,524
610	Two Peachtree Pointe (TPPA)	2,280,027
625	Gallery Uptown	145,828
870	Dewberry Ansley	65,520
Total		\$18,084,124

ID	Property Name	2019
188	Dewberry 10th Street	\$1,686,654
200	Dorchester Square	916,044
210	Mt. Pleasant Square (MSA)	1,099,686
215	Mt. Pleasant Square III (MSA III)	425,665
235	Mt. Pleasant Square II (MSA II)	—
240	Roosevelt Square LLP	3,782,145
270	Belle Isle	1,153,152
300	Dewberry Juniper	778,828
450	The Dewberry Charleston Hotel	15,671,018
520	1155 Peachtree/ Campanile	4,891,605
600	One Peachtree Pointe (OPPA)	3,405,529
610	Two Peachtree Pointe (TPPA)	10,456,103
625	Gallery Uptown	594,062
870	Dewberry Ansley	265,325
Total		\$45,125,817

ID	Property Name	2020
188	Dewberry 10th Street	\$1,608,761
200	Dorchester Square	910,458
210	Mt. Pleasant Square (MSA)	1,143,411
215	Mt. Pleasant Square III (MSA III)	600,791
235	Mt. Pleasant Square II (MSA II)	63,666
240	Roosevelt Square LLP	3,960,403
270	Belle Isle	931,802
300	Dewberry Juniper	598,545
450	The Dewberry Charleston Hotel	6,671,717
520	1155 Peachtree/ Campanile	6,417,653
600	One Peachtree Pointe (OPPA)	3,937,758
610	Two Peachtree Pointe (TPPA)	11,330,070
625	Gallery Uptown	603,641
870	Dewberry Ansley	274,500
Total		\$39,053,176

29. The determination of revenue subject to disgorgement consideration differs by year and property, based on the data available for inspection. It begins by determining total income earned by each property

by year or month, depending on when use of the Infringing Marks began and the completeness of the data. From this gross figure, amounts are deducted for (a) dividend payments and (b) payments of management fees and accounting fees to Dewberry Group. The adjusted income amount is then multiplied by John Dewberry's ownership share (thus excluding shares held by other investor groups). This product yields, for each property, revenues earned by Dewberry Group but not reported as income on its tax returns and trial balance reports.

30. The final step is to add those income sources that are included in the tax returns and Trial Balance reports for Dewberry Group, which includes the above-cited management fees and accounting fees associated with the above properties. This summation yields, for each property that used the Infringing Marks, total revenue earned by Dewberry Group.

31. In the remainder of this section, I discuss the application of the above approach to the available data, by year and property, for 2018, 2019 and 2020.

A. Revenue by Property—2018

32. For each non-hotel property, total income net of dividends, management fees and accounting fees are compiled from the monthly Check Request Forms produced by Dewberry Group, beginning with the first full month after the first citation to one or more of the Infringing Marks as identified in **Appendix A**. The adjusted income figure is multiplied by John Dewberry's ownership percentage, after which management fees and accounting fees received by Dewberry

Group are added.¹⁷ This yields total revenue associated with Dewberry Group's use of the Infringing Marks.

33. For the Dewberry Charleston, the revenues set forth in **Exhibit 3** reflect operating revenues reported in the property's Summary Operating Statement for calendar year 2018, beginning with October 2018, the first full month after the first citation to one or more of the Infringing Marks as identified in **Appendix A**. This amount, multiplied by John Dewberry's ownership percentage (75%), is listed in Figure 2.

B. Revenue by Property—2019

34. I have received monthly Check Request Forms for each non-hotel property for the months of January through September 2019. I have also received the trial balance for Dewberry Group, which lists management fees and accounting fees received, by property, during all of calendar 2018. The Check Request Forms list what the management fee is as a percent of the income (net of dividends) received by each property. Using this information, I have calculated the total revenue, net of dividends, management fees and accounting fees, earned by each non-hotel

¹⁷ Dewberry Group also received \$1.5 million in development fees associated with Mt. Pleasant Square II (02_DG-0007436). Dewberry Group used the Infringing Marks with regard to this property, however, Figure 2 does not include this payment. The applicability of development fees to disgorgement damages will be assessed upon the completion of fact discovery from Dewberry Group witnesses knowledgeable about the nature of this income item. Dewberry Group also received \$129,325 in leasing commissions in 2018 (02_DG-0007436) which are associated with these properties but not reflected in Figure 2.

property during calendar year 2019.¹⁸ The derivation of these figures is shown in **Exhibit 4.1**. These figures are then adjusted for John Dewberry's shareholding percentage, the product of which is added to management fees and accounting fees received by Dewberry Group. This yields total revenue associated with Dewberry Group's use of the Infringing Marks.¹⁹

35. For the Dewberry Charleston, the revenues set forth in **Exhibit 4.2** reflect operating revenues reported in the property's Summary Operating Statement for calendar year 2019. This amount, multiplied by John Dewberry's ownership percentage (75%), is listed in Figure 2.

C. Revenue by Property—2020

36. As of the date of this report, I have received management fee and accounting fee revenue earned by Dewberry Group in 2020, by property, as listed on the 2020 trial balance for Dewberry Group. As noted above, the 2019 Check Request Forms list what the management fee is as a percent of the income received for each non-hotel property. Using this information, I have calculated the total revenue, net of dividends,

¹⁸ Dewberry Group also received \$1.0 million in development fees associated with The Dewberry Charleston (04_DG-0010032). Dewberry Group used the Infringing Marks with regard to this property, however, Figure 2 does not include this payment. The applicability of development fees to disgorgement damages will be assessed upon the completion of fact discovery from Dewberry Group witnesses knowledgeable about the nature of this income item. Dewberry Group also received \$27,008 in leasing commissions in 2019 (04_DG-0010032) associated with these properties but not reflected in Figure 2.

¹⁹ I understand Counsel has asked Dewberry Group to produce Check Request Forms by property and month for October 2019, November 2019, and December 2019.

management fees and accounting fees, earned by each non-hotel property during calendar year 2020.²⁰ The derivation of these figures is shown in **Exhibit 5.1**. These figures are then multiplied by John Dewberry's shareholding percentage, the product of which is added to management fees and accounting fees. This yields total revenue associated with Dewberry Group's use of the Infringing Marks.²¹

37. For the Dewberry Charleston, the revenues set forth in **Exhibit 5.2** reflect operating revenues reported in the property's Summary Operating Statement for January through November 2020. This amount, multiplied by John Dewberry's ownership percentage (75%), is listed in Figure 2.

D. Revenue by Property—2021

38. Dewberry Group's website, as well as its Interrogatory answers, indicate that its use of the Infringing Marks is ongoing. As such, disgorgement as measured by the revenue received by Dewberry Group from each property using the infringing marks is assumed to continue until trial. As shown in **Exhibit 6**, total revenues earned by Dewberry Group excluding the Dewberry Charleston have been consistent between 2018 and 2020, averaging \$30.5 million per year. Absent supplementation of financial disclosures for these properties by Dewberry Group, it is reason-

²⁰ Dewberry Group also received \$17,895 in leasing commissions in 2020 associated with these properties (04_DG-0010779) but not reflected in Figure 2.

²¹ I understand Counsel has asked Dewberry Group to produce Check Request Forms by property and month for all of 2020.

able to assume that the non-hotel properties will generate revenue of, on average, \$2.5 million (\$30 million ÷ 12 months) per month during 2021.

39. In **Exhibit 7**, I have reproduced a portion of a 2021 Summary Operating Statement forecast projection prepared by Dewberry Group for the Dewberry Charleston. Absent the production of actual revenue data by Dewberry Group between the date of this report and trial, the monthly forecasts depicted in **Exhibit 7** will be used to estimate revenue for the Dewberry Charleston during any relevant period during 2021.

VIII. Dewberry Group Has Not Produced Consolidated Profit and Loss Reports For the Entities That Have Used the Infringing Marks

40. As noted in Section V, I understand that the plaintiff is only required to prove defendant's revenue during the infringement period, with the burden of reducing this measure of disgorgement shifting to the defendant. However, I believe it would be instructive to share my initial observations regarding the financial disclosures produced by Dewberry Group to date. These observations lead me to posit that the reported performance of Defendant both prior to and during the infringing period, as measured by net profit or net cash flow, does not reflect the full set of revenue and expense categories that should be considered in assessing damages pursuant to Dewberry's claims in this matter.

A. Dewberry Group's Financial Disclosures Depict Substantial Losses Every Year

41. Dewberry Group has produced federal income tax returns covering the years 2014 through 2019 and a trial balance for 2020. These are reproduced in **Exhibit 8** and summarized in Figure 3.

Figure 3: Business Income (Loss) Reported for Dewberry Group, 2014–2020

2014	
INCOME:	
Management Fee	
Accounting Fee	
Lease Commissions	
Development Fee	
Loan Placement Fee	
Other Income	
Other (Tax Return)	
Total	\$1,628,414
DEDUCTIONS:	
Officer Compensation	\$339,853
Salaries and Wages	1,438,721
Repairs & Maintenance	499
Rents	169,149
Taxes and Licenses	113,154
Depreciation	17,782
Employee Benefit Pgms	102,078
Other Deductions	1,236,374
Total	\$3,417,610
Business Income (Loss)	\$(1,789,196)

2015	
INCOME:	
Management Fee	\$1,125,196
Accounting Fee	222,650
Lease Commissions	28,200
Development Fee	125,000
Loan Placement Fee	485,625
Other Income	1,583
Other (Tax Return)	—
Total	<u>\$1,988,254</u>
DEDUCTIONS:	
Officer Compensation	\$411,942
Salaries and Wages	1,593,091
Repairs & Maintenance	—
Rents	178,455
Taxes and Licenses	127,746
Depreciation	8,653
Employee Benefit Pgms	148,288
Other Deductions	946,712
Total	<u>\$3,414,887</u>
Business Income (Loss)	<u>\$(1,426,633)</u>

2016	
INCOME:	
Management Fee	\$1,092,407
Accounting Fee	241,490
Lease Commissions	87,661
Development Fee	—
Loan Placement Fee	—
Other Income	2,744
Other (Tax Return)	—
Total	<u>\$1,424,302</u>
DEDUCTIONS:	
Officer Compensation	\$435,214
Salaries and Wages	1,647,301
Repairs & Maintenance	3,225
Rents	171,879
Taxes and Licenses	141,702
Depreciation	10,007
Employee Benefit Pgms	201,134
Other Deductions	1,007,709
Total	<u>\$3,618,171</u>
Business Income (Loss)	<u>\$(2,193,869)</u>

2017	
INCOME:	
Management Fee	\$1,043,772
Accounting Fee	206,202
Lease Commissions	—
Development Fee	75,000
Loan Placement Fee	—
Other Income	—
Other (Tax Return)	—
Total	<u>\$1,324,974</u>
DEDUCTIONS:	
Officer Compensation	\$682,033
Salaries and Wages	1,390,606
Repairs & Maintenance	—
Rents	166,689
Taxes and Licenses	127,953
Depreciation	12,253
Employee Benefit Pgms	148,822
Other Deductions	858,881
Total	<u>\$3,387,237</u>
Business Income (Loss)	<u>\$(2,062,263)</u>

2018	
INCOME:	
Management Fee	\$995,318
Accounting Fee	200,750
Lease Commissions	175,582
Development Fee	1,500,000
Loan Placement Fee	—
Other Income	10,777
Other (Tax Return)	—
Total	\$2,882,427
DEDUCTIONS:	
Officer Compensation	\$531,203
Salaries and Wages	1,740,251
Repairs & Maintenance	—
Rents	209,100
Taxes and Licenses	155,399
Depreciation	17,072
Employee Benefit Pgms	145,390
Other Deductions	1,379,636
Total	\$4,178,051
Business Income (Loss)	\$(1,295,624)

2019	
INCOME:	
Management Fee	\$1,025,187
Accounting Fee	216,700
Lease Commissions	27,008
Development Fee	1,000,000
Loan Placement Fee	—
Other Income	—
Other (Tax Return)	66,592
Total	<u>\$2,335,487</u>
DEDUCTIONS:	
Officer Compensation	\$447,519
Salaries and Wages	1,586,847
Repairs & Maintenance	—
Rents	349,723
Taxes and Licenses	172,132
Depreciation	82,757
Employee Benefit Pgms	153,377
Other Deductions	1,596,426
Total	<u>\$4,388,781</u>
Business Income (Loss)	<u>\$(2,053,294)</u>

2020	
INCOME:	
Management Fee	\$1,133,180
Accounting Fee	227,400
Lease Commissions	34,395
Development Fee	—
Loan Placement Fee	—
Other Income	20,605
Other (Tax Return)	—
Total	\$1,415,580
DEDUCTIONS:	
Officer Compensation	\$702,802
Salaries and Wages	1,225,582
Repairs & Maintenance	—
Rents	364,326
Taxes and Licenses	274,585
Depreciation	Unknown
Employee Benefit Pgms	56,781
Other Deductions	1,179,693
Total	\$3,803,770
Business Income (Loss)	\$(2,388,189)

42. Per these documents, Dewberry Group incurred substantial earnings losses for this entity throughout the period—the 2019 tax return lists Retained Earnings of—\$23.0 million.²² Total assets are reported to be less than 2.0 million throughout this period, with no real estate assets. If this were an independent entity not supported by or affiliated with other entities that generate earnings offsetting these

²² 04_DG-0009175, Schedule L.

losses, Dewberry Group would likely have ceased operations long ago.

43. However, Dewberry Group continues to operate. The losses have been funded by John Dewberry in the form of paid-in capital that is recorded on Dewberry Group's Balance Sheet.²³ Assuming John Dewberry is conducting his commercial dealings in a rational, profit-maximizing manner, the income tax reporting entity Dewberry Group would have to be part of a larger collection of financial entities that, on a consolidated basis, produce positive earnings and cash flow over time.

44. A document produced by Dewberry Group corroborates my assertion. A report summarizing John Dewberry's financial position as of December 31, 2019 lists the following entry on a cash flow reconciliation schedule:²⁴

“add: Net JKD Income/Expense 1,535,692”

45. In a Statement of Cash Flow, an entry such as this, positioned where it is in the schedule, reflects the net income associated with operations for a business entity. Thus, John Dewberry's operating entities provided him with net income of more than \$1.5 million in 2019. This can only be the case if there are other entities, affiliated with or operating in cooperation with Dewberry Group, that generate profits in excess of the loss of \$2 million recorded on Dewberry Group's 2019 tax return.

²³ 04_DG-0010779. The account titled “Capital-J K Dewberry” shows \$22,666,159, which reflects the capital contributions made by John Dewberry to cover the losses of Dewberry Group since its inception.

²⁴ 04_DG-0009306, Schedule 7a.

B. Financial Disclosures for Dewberry Group Do Not Include All Dewberry Group Controlled Assets

46. Between September 2018 and September 2020, Dewberry Group sent at least 16 Loan Request Packages to banks and other financial institutions that included lists of operating real estate assets valued at between \$800 million and \$1.6 billion (see **Appendix A**). The language used in these documents differs only in the dollar values associated with the portfolio at any point in time. One example is a January 2020 Package for Oyster Park (01_DG-0005364), in which Dewberry Group made the following representations regarding its “Holdings”:

“Dewberry Group’s current assets span across most of the major commercial real estate property types throughout the southeast, for a total value of approximately \$1.6 billion. In addition to operating assets, Dewberry Group holds approximately \$350 million worth of land slated for future development. The company’s portfolio is comprised of office, retail, mixed-use, hospitality, parking and other investments.”

47. Dewberry Group has made the same affirmative representations in Leasing Packages sent to at least seven prospective commercial tenants.²⁵ An ad-

²⁵ 05_DG-0148337, 05_DG-0174550, 05_DG-0131287, 05_DG-0198980, 05_DG-0198110, 05_DG-0172502, and 05_DG-0197841.

ditional 14 Leasing Packages were prepared by Dewberry Group between 2018 and 2021 that contain statements about Dewberry Group's holdings.²⁶

48. The "About Dew" tab on the current Dewberry Group Web Site states that, "the company maintains an extraordinarily profitable track record of success, as evidenced by: A property portfolio of nearly \$1.5 billion in operating assets, encompassing more than three million square feet of 5-star hospitality, Class 'A' office, luxury multi-family residential, and prestigious retail projects." This portion of the Web site is reproduced in **Exhibit 9**.

49. I have also reviewed a snapshot of the Web site www.dewberrycapital.com retrieved from Internet Archive, a 501(c)(3) non-profit that captures and archives historical versions of Internet sites in a searchable digital library, as of March 28, 2018.²⁷ In the "About Us" section of the site, Dewberry Group used nearly identical language to tout "an extraordinarily profitable track record in real estate investments, as illustrated [by a] Property portfolio [that] consists of over \$700 million in operating assets encompassing over two million square feet of class 'A' office, retail, luxury apartment and industrial projects." (see **Exhibit 10**). Thus, from at least 2018 to the present, Defendant has owned real estate assets.

²⁶ 01_DG-0002261, 04_DG-0010218, 04_DG-0010479, 04_DG-0010274, 04_DG-0010429, 04_DG-0010380, 01_DG-0005235, 01_DG-0005180, 04_DG-0010353, 06_DG-0305270, 04_DG-0010315, 04_DG-0010164, 04_DG-0010051, and 04_DG-0010094. As of the date of this report, distribution of these packages to prospective tenants has not been confirmed.

²⁷ Wayback.archive.org, search term "dewberrycapital.com".

50. In contrast, the federal income tax returns for Dewberry Group for the years 2015 through 2019 list total assets of less than \$2 million each year, with fewer than \$900,000 in total assets as of the end of 2019.²⁸ The tax returns refer to a positive balance for “Buildings and other depreciable assets” on line 10a of Schedule L. However, the trial balance provides more detail: in 2018, depreciable assets included office equipment, furniture & fixtures, computer hardware and automobiles.²⁹

51. If, as indicated in Dewberry Group’s Interrogatory answers, Defendant only changed its name from Dewberry Capital to Dewberry Group and is otherwise the same entity, then the financial documents and reports produced by defendant for Dewberry Group do not represent the entirety of its economic dealings. In particular, revenues of the properties touted to be part of the Dewberry Group operating asset portfolio are not included in these disclosures.

²⁸ Form 1120S for 2015 (02_DG-0007332) shows total assets of \$1,040,977. Form 1120S for 2016 (02_DG-0006698) shows total assets of \$1,740,372. Form 1120S for 2017 (02_DG-0007128) shows total assets of \$924,779. Form 1120S for 2019 (04_DG-0009175) shows total beginning assets (i.e., as of the end of 2018) of \$1,343,067 and ending assets of \$858,701.

²⁹ 02_DG-0007436. The 2019 and 2020 trial balances (04_DG-0010032 and 04_DG-0010779, respectively) refer to its depreciable assets as “3 Year Property,” “5 Year Property,” and “7 Year Property.” Assets subject to 7-year depreciation periods (the longest listed on Dewberry Group’s trial balance) relate to office furniture and fixtures, not income-producing commercial properties.

IX. Expenses Reported for Dewberry Group and the Dewberry Group Properties Include Fixed Costs and Overhead

52. I understand that, in assessing a defendant's profits from infringement, courts have considered three alternative approach with respect to expenses. One article on the subject³⁰ describes the three approaches as follows:

- a. The "differential cost" or "marginal cost rule": Under this approach, "deductions are allowed only for expenses that would not otherwise have been incurred "but for" the manufacture and sale of the infringing product. No deductions for fixed costs and overhead, for example, would ordinarily be allowed."
- b. The "full absorption approach": Under this approach, "all expenses properly allocable to the product under generally accepted accounting principles are allowed."
- c. The "direct assistance rule": Under this approach, "all expenses which directly assisted in the manufacture and sale of the product can be deducted, including some items of overhead." This can be thought of as a hybrid of the differential and full absorption approaches.

³⁰ Koelemay, Jr., James M., A PRACTICAL GUIDE TO MONETARY RELIEF IN TRADEMARK INFRINGEMENT CASES, *The Trademark Reporter*, May-June 1995. A similar description of the three approaches is set forth in Ross, Terence P., "Intellectual Property Law: Damages and Remedies," Release 23 (2012), Law Journal Press, Section 4.03[3], pp. 4-30 through 4-31.

53. Should the Court rule that the differential cost rule applies in this matter, some of the expenses reported for Dewberry Group, as well as those incurred by the individual properties where the Infringing Marks have been used,³¹ would not be allowable offsets to the infringing revenues calculated herein. For example, the trial balance reports list expenses with the two-digit suffix “CO”—these appear to reflect allocations of corporate overhead or expenses incurred by John Dewberry. In 2020, for example, expenses with the CO suffix total more than \$1.5 million and include Salaries and Wages-CO (\$702,802), Payroll Tax Expense-CO (\$86,561), 401k Employer Match-CO (\$1,000), Group Health Insurance-CO (\$2,276), Travel—Dew Air-CO (\$720,000) and Cell Phone-JKD-CO (\$2,445).³²

54. There may be other expenses reflected in the financial statements for Dewberry Group and for the properties in the Dewberry Group asset portfolio that reflect fixed costs, including, but not limited to, property taxes, rent, insurance, interest, and debt principal payments. A full accounting of such costs cannot be assessed until fact discovery of Dewberry Group financial personnel has been conducted.

X. Concluding Remarks

55. Discovery in this matter is ongoing. Should new information become available, I may amend or supplement this report as appropriate. I also reserve

³¹ A complete set of profit and loss statements for the properties that used the Infringing Marks, apart from the Dewberry Charleston, do not appear to have been produced by Defendant, based on Counsel’s review of Defendant’s document production as of the date of this report.

³² 04_DG-0010779.

the right to respond to any arguments that may be advanced relating to the subject matter of my opinions. Finally, Counsel may ask me to perform or evaluate additional analyses, particularly in response to any reports issued by Defendant's expert.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

)	
DEWBERRY ENGINEERS,)	
INC.,)	
)	
Plaintiff,)	
)	
v.	)	Civil Action
	)	No. 1:20-CV-610
DEWBERRY GROUP, INC.)	
F/K/ADEWBERRY)	
CAPITAL CORPORATION.)	
)	
Defendant.)	
)	

**SUPPLEMENTAL EXPERT REPORT OF
RODNEY J. BOSCO, MAFF, CVA, CFE**

April 19, 2021

/s/
Rodney J. Bosco

* * *

I. INTRODUCTION

1. This report is a supplement to an Expert Report, dated March 1, 2021, I have issued in this matter (hereafter, “Supplemental Report”). As noted in paragraph 11 of my March 1, 2021 expert report:

“Should I receive additional requests from Counsel, I may supplement or amend this report. Further, subject to Court approval, I may amend or supplement my opinions based on any new facts, information, or reports of other experts in this matter. Accordingly, I also reserve the right to respond to any arguments that may be advanced relating to the subject matter of my opinions.”

2. Pursuant to events since the issuance of my March 1, 2021 expert report—which include the recording of fact witness testimony, the production of additional documents relevant to damages issues by Dewberry Group, and the issuance of a rebuttal report by Lisa G. Miller—I have been asked by Counsel to prepare and issue this Supplemental Report.

3. I incorporate herein, by reference, Sections I and II of my March 1, 2021 expert report. I have not given testimony or authored any publications since that report was issued. My current CV is attached as **Exhibit S1**. Documents I have considered in preparing this Supplemental Report are listed in **Exhibit S2**.

II. Summary of Findings and Conclusions

4. While the recording of accounting data pertaining to the operations of the entities engaged in the alleged infringing activities is relevant to assessing the quantum of damages, the underlying damages theory associated with Dewberry Group’s enrichment

owing to its use of the Infringing Marks¹ in its day-to-day activities is grounded in the reality of the economics behind the profitable unified business enterprise in which the Dewberry Group plays the key, unifying role:

- a. From an economic control perspective, John Dewberry's 100% ownership of Dewberry Group throughout the infringement period makes him and the entity, effectively, one and the same. The same can be said for John Dewberry's property holdings, for which he holds near total control of its operations and which the Dewberry Group website in fact characterizes as its own holdings. As such, the business dealings of the various entities, while they may be organized under separate legal structures, nonetheless operate in a coordinated manner as a single economic enterprise, with Dewberry Group serving as the sole entity responsible for performing all services and business operations on behalf of the various ownership entities necessary to generate revenue and employing all the staff and personnel required to perform those revenue-generating services.
- b. Admissions by Dewberry Group demonstrate that, while the revenue streams during the infringement period relate to tenants for which

¹ "Infringing Marks" refers collectively to four marks used by Dewberry Group: (1) D DEWBERRY GROUP with a stylized capital letter D encircled to the left, (2) D DEWBERRY OFFICE with a stylized capital letter D encircled to the left, (3) D DEWBERRY LIVING with a stylized capital letter D encircled to the left, and (4) STUDIO Dewberry (stylized). See Complaint, ¶ 5.

contracts may have been signed before Dewberry Group began its infringement, Dewberry Group has had significant involvement in securing and nurturing the revenue streams received during the infringement period through the property management and other supporting services it provides to the properties and to its tenants (i.e., Dewberry Group's "clients").

- c. The fact that Dewberry Group/John Dewberry has chosen to invest financial resources in this litigation to retain his use of the Infringing Marks rather than substitute a non-infringing set of marks demonstrates that there is deemed to be significant financial value associated with the Infringing Marks—currently and going forward. Indeed, Dewberry Group's own internal documents reveal that it considered adoption and implementation of the Infringing Marks to be very important, and a "top priority" to building the value of its "brand."
- d. The best measure of the economic value associated with the Infringing Marks are the profits generated since the infringement commenced. Documents produced by Dewberry Group demonstrate that it has earned operating profits at every property where the Infringing Marks have been used throughout the infringement period. Such profits are likely conservative, as they (i) do not consider profits to be received from current investments in new construction and renovations after the issuance of my report and (ii) do not

consider the returns associated with the use of the Infringing Marks in loan request packages intended to secure financing for future development.

5. Ms. Miller's rebuttal report to my March 1, 2021 expert report is fatally flawed in its focus on accounting and tax reporting conventions rather than economic inquiry for identifying potential infringing revenues.² Moreover, her report does not state that she has assumed liability in performing her analysis, instead opining on the validity of a legal theory I was asked to adopt by Counsel as part of my assumption of liability, effectively co-opting an issue of fact as an issue of accounting expertise. She admits that she has not evaluated Dewberry Group's revenues from its hotel property holding, nor has she calculated Defendant's profits. Finally, Ms. Miller's report sets forth a limited and unsupported basis for the identification of Defendant's expenses subject to damages inquiry. As a consequence, she has not offered a defensible opinion on the profits associated with any revenues that the Court may conclude are a reasonable measure associated with the alleged infringement.

² My use of the word "potential," both herein and in my March 1, 2021 expert report, reflects the legal requirement that liability must be established before infringing revenues can be considered. I am not qualifying my calculations from a professional rigor standpoint. Statements in Ms. Miller's report suggesting that the potential damages measures set forth in my March 1, 2021 expert report are admissions on my part of a lack of professional rigor mischaracterize my opinions and findings.

III. From an Economic Perspective, Dewberry Group, John Dewberry and the Properties are Part of the Same Commercial Enterprise

6. Although Dewberry Group may have its own separate organizational existence as a limited liability company, there is a substantial amount of discovery and expert opinion produced in this matter that substantiates my conclusion that, as a matter of economics, the Defendant Dewberry Group can be viewed as comprising the legal entity Dewberry Group as well as the properties that the legal entity exclusively deals with. The thread that ties all of these entities into a single economic enterprise is the ownership share and control concentrated in a single individual—John Dewberry. Examples of this interdependence of the various legal entities are listed below.

7. Carolyn Leah Grimsley, Ph.D., the Director of the Master of Science in Real Estate Development program at George Mason University, issued an expert report in this matter, dated March 1, 2021, in which she provides opinions regarding “. . . commercial real estate and real estate development industry definitions, standards, practices, processes, understandings, and services relevant to the real estate development-related operations and services of the parties and their affiliated entities” On page 9 of her expert report, she provides the following insight into the nature of entities operating in the commercial development space:

“Due to the range and overlap in services in the commercial real estate industry, there is often not a clear distinction between entities that are developers, landlord/investors, and

service providers. Indeed, many industry participants act in all three roles, wherein they may develop real estate and provide development services for their own properties, provide services related to development for other unrelated individuals or entities, retain and operate their own properties, and also lease and otherwise manage properties for other unrelated individuals or entities. This confluence makes it difficult, if not impossible, from an external perspective to know in what capacity an entity is operating or a service is being provided, both in general and as to a particular development project or operating property. In other words, it can be difficult to distinguish between (i) entities that are engaged in real estate development and/or property operations and performing related services for themselves (i.e., acting as a developer and/or property manager) and (ii) entities that are providing real estate development-related services, including property management and other operational services, for unrelated individuals or entities.

Dewberry Group, Inc. and Dewberry Engineers Inc. are entities that are each organized and operated in a similar manner as part of a unified array of real estate development related affiliated entities under common control. The Dewberry Group, Inc.-related family of affiliated entities (collectively referred to as “Dewberry Group”) are under the common ownership and control of John Dewberry and operate using the unified brand or name of “Dewberry Group.” Similarly, the Dewberry

Engineers Inc.-related family of affiliated entities (collectively “Dewberry”) are under common control and ownership of the Dewberry family and operate using the unified brand or name “Dewberry.”

8. On page 27 of her March 1, 2021 expert report, Dr. Grimsley cites to Dewberry Group’s responses to Plaintiff’s Interrogatories 4, 8 and 21 as Defendant representations supporting her opinion that “Dewberry Group operates as an integrated real estate services firm that develops and manages various types of commercial property and performs various real estate-related services in connection with those properties”:

“In particular, Dewberry Group claims to provide its services to affiliated entities owned outright or controlled by Dewberry Group’s owner and CEO, John Dewberry. For example, in response to Plaintiff’s Interrogatory #4, Dewberry Group states that it provides real estate-related services to multiple “commercial office, retail, residential, and hospitality properties in Atlanta, Charleston, Jacksonville, Richmond, and Charlottesville” and that those “properties and projects are owned by entities, which are wholly owned, or at the least are majority owned and controlled by Mr. [John] Dewberry.” The names of the various entities under the common control of Mr. Dewberry that own the projects and properties financed and serviced by Dewberry Group are listed in Dewberry Group’s answers to Interrogatory #4 & 8. Dewberry Group’s response to Interrogatory #21 of Plaintiff’s Sec-

ond Set of Interrogatories also provides further details about several of those projects and properties under the common control of Mr. Dewberry, including the percentage ownership or control that Mr. Dewberry is said to have for each of them.” [footnote deleted]

9. Further to Dewberry Group’s response to Plaintiff’s Interrogatory 8, I note that Dewberry Group stated that it has engaged in financing on behalf of Peachtree Pointe Property, LLC in Atlanta, GA; Campanile Property LLC in Atlanta, GA; Mt. Pleasant Square Associates LLC and Mt. Pleasant Square Associates II LLC in Mount Pleasant, SC; Roosevelt Square Limited Liability Partnership in Jacksonville, FL; Dewberry Juniper LLC in Atlanta, GA; Dewberry 10th Street LLC in Atlanta, GA; Belle Isle Square Associates LLC in Sandy Springs, GA; Dorchester Square Associates LLC in Mount Pleasant, SC.

10. In Dewberry Group’s response to Interrogatory 18 on page 7 of Plaintiff’s Second Set of Interrogatories, it explained that removing “Capital” from its name and replacing it with “Group” was intended to eliminate that connotation with investments or private equity and “better match the brand of John Dewberry’s properties and holdings with the real estate services provided to and by each property” In Dewberry Group’s supplemental responses to 14 and 15 of Plaintiff’s First Set of Interrogatories, Dewberry Group states that it is involved in the “procurement of financing for development purposes.”

11. In contrast, the tax returns filed for the legal entity Dewberry Group, which Ms. Miller asserts should be the sole source of accounting records for any

financial analysis of damages,³ do not list real property among its assets.⁴

12. Additionally, John Dewberry has testified that the legal entity Dewberry Group owns no property:

Q. So the company, the company known as Dewberry Group Inc. That was formally known as Dewberry Capital incorporated it doesn't own any real property does it?

A. I don't know. I don't think so.

Q. All right.

A. When I say I don't know I don't know if somewhere along the line they structured it that has a one percent ownership or something but I don't think so S it is usually just to provide property management and financing and et cetera.⁵

13. On its predecessor website, Dewberry Group (then Dewberry Capital) refers to its site acquisition

³ Expert Report of Lisa G. Miller, April 2, 2021, 4.2.1.

⁴ See Depreciation and Amortization Report included in tax returns for 2015 (02_DG-0007332, beginning at 7350), 2016 (02_DG-0006698, beginning at 6716), 2017 (02_DG-0007128, beginning at 7145), and 2019 (04_DG-0009175, beginning at 9194). Bates number references in this report, except where noted, identify the first page of each produced document. However, for each Bates number reference listed, I considered all produced pages of that document and its family members. Deposition testimony by Dewberry Group's John Freeman confirmed that the depreciable assets listed in Dewberry Group's tax returns only reflects computers, fixtures in the office and furniture. Deposition of John Freeman (ROUGH), p. 155.

⁵ Deposition of John Dewberry (ROUGH), April 14, 2021, pp. 11-12.

activities in the context of development: “Dewberry Capital has acquired over 80 acres of land across the Eastern Seaboard in key urban areas and path of progress markets such as Atlanta, Georgia; Richmond, Virginia; Charlottesville, Virginia; Jacksonville, Florida and Charleston, South Carolina. . . . Dewberry Capital plans to build premier live, work and play developments on these sites.”⁶ In **Exhibit 10** to my March 1, 2021 expert report, I included a snapshot of Dewberry Capital’s website, which touted, “an extraordinarily profitable track record in real estate investments, as illustrated [by a] Property portfolio [that] consists of over \$700 million in operating assets encompassing over two million square feet of class ‘A’ office, retail, luxury apartment and industrial projects.”

14. In paragraphs 46 through 48 of my March 1, 2021 expert report, I noted the following additional economic evidence of the integrated, interdependent nature between the legal entity Dewberry Group and the properties held by Dewberry Group’s sole owner, John Dewberry. They are reproduced in paragraphs 15 through 17 below.

15. Between September 2018 and September 2020, Dewberry Group sent at least 16 Loan Request Packages to banks and other financial institutions that included lists of operating real estate assets valued at between \$800 million and \$1.6 billion (see **Appendix A**). The language used in these documents differs only in the dollar values associated with the

⁶ Dewberry Capital Corporation website of June 27, 2017, <http://dewberriycapital.com/properties/index.html> through <https://archive.org/web/>

portfolio at any point in time. One example is a January 2020 Package for Oyster Park (01_DG-0005364), in which Dewberry Group made the following representations regarding its “Holdings”:

“Dewberry Group’s current assets span across most of the major commercial real estate property types throughout the southeast, for a total value of approximately \$1.6 billion. In addition to operating assets, Dewberry Group holds approximately \$350 million worth of land slated for future development. The company’s portfolio is comprised of office, retail, mixed-use, hospitality, parking and other investments.”

16. Dewberry Group has made the same affirmative representations in Leasing Packages sent to at least seven prospective commercial tenants.⁷ An additional 14 Leasing Packages were prepared by Dewberry Group between 2018 and 2021 that contain statements about Dewberry Group’s holdings.⁸

17. The “About Dew” tab on the current Dewberry Group website states that, “the company maintains an extraordinarily profitable track record of success, as evidenced by: A property portfolio of nearly \$1.5 billion in operating assets, encompassing more than

⁷ 05_DG-0148337, 05_DG-0174550, 05_DG-0131287, 05_DG-0198980, 05_DG-0198110, 05_DG-0172502, and 05_DG-0197841.

⁸ 01_DG-0002261, 04_DG-0010218, 04_DG-0010479, 04_DG-0010274, 04_DG-0010429, 04_DG-0010380, 01_DG-0005235, 01_DG-0005180, 04_DG-0010353, 06_DG-0305270, 04_DG-0010315, 04_DG-0010164, 04_DG-0010051, and 04_DG-0010094. As of the date of this report, distribution of these packages to prospective tenants has not been confirmed.

three million square feet of 5-star hospitality, Class ‘A’ office, luxury multi-family residential, and prestigious retail projects.” This portion of the website was reproduced in **Exhibit 9** to my March 1, 2021 expert report.

18. Perhaps the most succinct disclosure that Dewberry Group, John Dewberry and the properties are part of the same commercial enterprise comes from the testimony of John Freeman, who since 2015 has been employed by Dewberry Group as controller, director of finance, director of leasing and, currently, as its executive vice president of finance:

Q. Okay. So my question—how is it that—if Dewberry Group is continuing to lose money you know if it basically has lost money each of the last 6 years, six, seven years how is it continuing as an ongoing entity and why is it continuing as an ongoing entity?

A. That’s a good question. We are Dewberry Group is set up to manage assets that are wholly owned by John K. Dewberry. We understand that there will be losses involved this that but what you are not taking is we would be spending more money at the property level to hire outside third party vendors. **There is also a lot of stuff not stuff but a lot of Dewberry group what we do is we manage John K. Dewberry personal financials so we prepare his personal tax returns we pay all his bills we manage his houses his insurance everything It is a family office essentially managing the assets of John K. Dewberry.**

Q. Okay. So with—with these—with the losses that are being shown here does capital have to come in to sort of balance this or make up for this?

A. Exactly right. Yes and it is all personal John Dewberry.

Q. Okay. And I just—so he is to—so he is making—I mean he is making revenue or making money from the various property entities that he owns you know he is losing money on Dewberry Group also shown here but then he is using—he is able to use his personal capital to kind of make up for the losses of Dewberry Group is that correct?

A. That's a simplified way of putting it, yes.⁹
[emphasis added]

IV. Dewberry Group Has Provided Management Services to the Properties and its Tenants Coincident With it Receiving Revenue From These Sources During the Infringement Period

19. The accounting revenues reported by the legal entity Dewberry Group and the properties during the period of infringement appear to relate to contracting activities, primarily lease agreements which were entered into before Dewberry Group began its infringement.¹⁰ However, as admitted to by Dewberry Group in its Interrogatory responses and testimony from its designated 30(b)(6) witnesses, Dewberry

⁹ Deposition of John Freeman (ROUGH), April 14, 2021, pp. 151-153.

¹⁰ Expert Report of Lisa G. Miller, April 2, 2021, 4.2.4.b.

Group participates in its property and tenant relationships pursuant to its generation of revenue from these sources through its provision of management services. Further, such interactions during the infringement period have incorporated the Infringing Marks. In this section, I set forth examples of Dewberry Group's admissions in this regard.

20. One example of Dewberry Group's admissions regarding its involvement with tenant relations is set forth in Dewberry Group's Responses to Plaintiff's Second Set of Interrogatories, No. 18, page 7:

"Specifically, Dewberry Living develops and project-manages Mr. Dewberry's mixed-use (retail and multi-family) properties/companies in Atlanta, Jacksonville, and Charleston and, alongside Dewberry Group, interfaces with tenants, prospective tenants, and guests in a property management function. Dewberry Office develops and project manages Mr. Dewberry's Class-A office properties in Atlanta and, alongside Dewberry Group, also interfaces with those properties' tenants, prospective tenants, and guests in a property management function." [emphasis added]

21. More generally, Dewberry Group's Supplemental Responses to Plaintiff's First Set of Interrogatories, No. 4, pages 5-6, show that Dewberry Group provides a wide range of services to the properties and their tenants and prospective tenants:

"Since 1989, John Dewberry and his company, formerly Dewberry Capital Corporation, now Dewberry Group, have engaged in the acquisition, development, leasing and management of commercial office, retail, residential, and

hospitality properties in Atlanta, Charleston, Jacksonville, Richmond, and Charlottesville using the term and mark “Dewberry” on a continuous basis. These properties and projects are owned by entities, which are wholly owned, or at the least are majority owned and controlled by Mr. Dewberry.

Specifically, Dewberry Living under the Living Mark develops and project manages Mr. Dewberry’s mixed-use (retail and multi-family) properties/companies and interfaces with tenants, prospective tenants, and guests at Mr. Dewberry’s Mt. Pleasant Square Associates II, LLC property known as Oyster Park in Mt. Pleasant, South Carolina. Mr. Dewberry intends to utilize Dewberry Living and the Living Mark at his Roosevelt Square Associates LLP property soon to be known as Ortega Park in Jacksonville, Florida, but has not rebranded that property as of yet. Dewberry Office develops and projects manages Mr. Dewberry’s Class-A office properties in Atlanta and also interfaces with those properties’ tenants, prospective tenants, and guests at Mr. Dewberry’s Peachtree Point and Campanile properties. Dewberry Group and Studio Dewberry provide service to Mr. Dewberry related to design, project management, and property management for all of Mr. Dewberry’s active developments and properties. Studio Dewberry does not offer these services to unaffiliated entities for a fee or otherwise. The office, retail, and residential projects all go by names other than an iteration of, or a title including, “Dewberry” and are known as

such by the public and their tenants/consumers (i.e., Peach Pointe, Oyster Park, etc.)” [emphasis added]

22. Corroboration for Dewberry Group’s representations in its Interrogatory responses is provided in deposition testimony provided by Kim Lavigne, designated by Dewberry Group as its 30(b)(6) witness to testify about Dewberry Group’s property management services.¹¹ Ms. Lavigne testified that communications from Dewberry Group during the period of infringement utilized the Dewberry Group name:

Q. But let me ask—so let’s—if you are e-mailing back and forth with a tenant, a prospective tenant, a governmental agency and authority, utility provider, aren’t—isn’t your signature in your e-mail identifying you as part of Dewberry Group?

A. My e-mails identify me as part of Dewberry Group, but when I’m referring to a specific property with tenants, typically, I always say, you know, the landlord.¹²

23. Ms. Lavigne also testified that, at one point, Dewberry Group was running a shuttle with the Dewberry Group mark on it to transport “corporate tenants” from the Campanile building to a surface parking lot or lunch stops:

Q. Again, it’s several pages forward, there is a page with “Dewberry Group, Shuttle” at the

¹¹ Deposition of Kim Lavigne, March 22, 2021, pp. 17-18. I understand from Counsel that testimony by persons in a 30(b)(6) capacity are imputed to the designated party as an admission, rather than personal belief or understanding.

¹² Deposition of Kim Lavigne, March 22, 2021, p. 63.

top. Is there a Dewberry Group shuttle that has the Dewberry Group Mark on it?

A. Yes, there is a shuttle that we—I guess you could say, we have a vendor agreement with, and it does have that logo on it, when it's in operation.

Q. Is it in operation currently?

A. Currently, it is not.

Q. When was it in operation?

A. It has not been—it's probably easier to say it has not been in operating during COVID due to tenancy in the buildings being down.

Q. When it was in operation, what was the—what did it do; what service did it provide?

A. It specifically provides our existing tenants rides between the building and our surface parking lot or to various stops at lunch in the local nearby areas. It's solely for the use of our corporate tenants.¹³

24. Ms. Lavigne was shown a chart, produced by Dewberry Group as part of its Supplemental Responses to Plaintiff's First Set of Interrogatories, No. 8, pages 11-12, which shows "services . . . provided out of Dewberry Group's offices in Atlanta, GA and directed to potential tenants in Atlanta, Jacksonville, and Charleston" for 11 non-hotel properties.¹⁴ When asked about this chart, Ms. Lavigne confirmed that current tenants are the customers/clients of Dewberry

¹³ Deposition of Kim Lavigne, March 22, 2021, pp. 88-89.

¹⁴ The chart is reproduced in **Exhibit S6**.

Group's services offered at these 11 non-hotel properties:

Q. So the customers or the clients for these different types of services that were described would include businesses or entities that are renting office space; is that right?

A. Yes.

Q. And it would also include businesses or entities that rent retail space; is that right??

A. Where applicable, yes. (Clarification requested by the Court Reported.) Where applicable. Where applicable.

Q. It would also—the multi-family would—the clients or the customers there would be individuals or families or households; right?

A. Individuals and families, yes, rent the multi-family units.

Q. Okay. For the parking services, would—are the clients—would the clients or customers there be anyone who might park in one of the facilities?

A. Correct.

Q. Okay. So that would include individuals driving their cars and needing a parking spot; is that correct?

A. Correct.¹⁵

25. In Dewberry Group's Responses to Plaintiff's Second Set of Interrogatories, No. 20, on page 12,

¹⁵ Deposition of Kim Lavigne, March 22, 2021, pp. 43-44.

Dewberry Group represented that ‘Property Management’ includes the services Dewberry Group provides to Mr. Dewberry’s properties including (i) oversight over maintenance; (ii) interacting with tenants, governmental agencies and authorities, utility providers; (iii) leasing, applicant screening, and showing; (iv) rent collection, (v) lease drafting, negotiation, review, and enforcement; (vi) and financial accounting and reporting to ownership; among other related services typically associated with managing multifamily, retail, and office properties.” Ms. Lavigne was asked about this in her deposition, and she testified that this representation was accurate:

Q. Could you look at that definition provided and let me know if that’s accurate?

A. The property management includes services, including oversight over maintenance, interacting with tenants, government agencies, authorities, utility providers, leasing, applicant screening, and showings. I would say property management, that’s more the leasing arm of services provided, but property management, yes, handles rent collection. Property management is involved in the lease drafting and negotiations, review and enforcement. And financial accounting and reporting to ownership, among other related services typically associated with managing multifamily retail and office. Correct.

Q. So that—that’s an accurate description of the property management services that Dewberry Group provides?

A. I would be less inclined to say property management does a lot of—we are not heavily

involved in leasing or showing the units. That's more the leasing department. But I'd certainly, under property management, weigh in on leasing—potential leasing tenants and where they're looking to to in the center and how that may interact with things like operations as far as is there a dumpster close by for a restaurant or would they not be in a good position to lease that specific unit because it's so far from common trash can and things like that.

Q. Okay. Thank you.

Q. Okay. And, again, in sub (ii) there, it talks about Dewberry Group, with respect to property management, "Interacting with tenants, governmental agencies and authorities, and utility providers." Again, just to make sure I'm clear, the tenants and potential tenants for Dewberry Group could include families, retail stores or retail outlets, and those who would rent office space; is that right?

A. Yes, it would include retail, potential retail, tenants as well as potential—or existing, I should say, office tenants, office and retail tenants, and, yes, potential—our existing residential—we call them residents, not tenants, but, yest, in multi-family—families.¹⁶

26. Ms. Lavigne also testified that Dewberry Group interacts with maintenance-related vendors while engaging in property management services at the properties:

¹⁶ Deposition of Kim Lavigne, March 22, 2021, pp. 56-58.

Q. Okay. Are there—in addition to utility providers, are there other vendors or suppliers that Dewberry Group interacts with in connection with property management?

A. Yes. We interact with vendors related to the oversight of the maintenance and services provided at the property.

Q. Any others you can think of or is that pretty much it?

A. Listing out vendors that we interact with?

Q. Yes.

A. I mean, we interact with all sorts of vendors, from landscaping, sweeping companies, electrical repairs for lighting, asphalt companies, for parking lot maintenance and repair, roofing vendors for roof leaks.¹⁷

27. Ms. Lavigne repeated her definition of property management services provided by Dewberry Group by reference to the Infringing Marks:

A. What is the nature of our property management services offered under Dewberry Group or its marks?

Q. Yes.

A. Property management services. I think we previously defined those as interactions with our tenants, with vendors regarding the maintenance, and repair, with government agencies, and utility providers, weigh in—

¹⁷ Deposition of Kim Lavigne, March 22, 2021, p. 60.

property management can weigh in on leasing. I think that's—encompasses the majority of it.¹⁸

28. In 2020, DG's Ortega Park property in Jacksonville, FL experienced severe parking lot flooding due to ongoing renovation and construction failures at the site. Panera Bread—a tenant—sent a letter complaining about the flooding and its impact on the business. Panera addressed the letter to Ms. Lavigne and Dewberry Group's General Counsel, identifying them as part of Dewberry Group.¹⁹ When asked about this, Ms. Lavigne acknowledged the current tenant (Panera) did not address its letter to the ownership entity for the property:

Q. This letter from Panera was—obviously, it was sent to you as executive vice president, operations of Dewberry Group, and to Sam Lyddan as general counsel of Dewberry Group; is that right?

A. Yes. That's who it was sent to.

Q. How—did these issues with Panera Bread get resolved?

A. Yes.

Q. What was the resolution?

A. The area has been raised up, and it's not flooding any longer.²⁰

29. When asked about tenant complaints related to flooding at Ortega Park, Ms. Lavigne testified that

¹⁸ Deposition of Kim Lavigne, March 22, 2021, p. 125.

¹⁹ See 10_DG-0323665.

²⁰ Deposition of Kim Lavigne, March 22, 2021, pp. 188-189.

Dewberry Group interacts with the tenants in a property management context:

Q. One of the reasons they were seeking your help is their—they have contracts and relationships with you, right, not with RLH or a construction firm; isn't that right?

A. They have contracts and relationships with the landlord, and we are the landlord's management company that interacts and is that interaction with tenants.

Q. I'm sorry. I spoke over you, and I missed what—could you—I'm sorry, could you repeat what you just said because I missed it. I apologize?

A. That we are the interaction with the tenants as the property management company.²¹

30. Moreover, testimony from John Freeman, Dewberry Group's executive vice president of finance, reveals that the property entities appear to have few, if any, direct employees, and that property-related services are almost entirely provided by Dewberry Group employees:

Q. When you were doing that work with the leasing you know trying to I guess increase the amount of space that was leased and also dealing with tenants and renewals an things like that you were doing that as an employee of Dewberry Group right?

A. Yeah Dewberry Capital Dewberry Group whatever it was at the time, yes.

²¹ Deposition of Kim Lavigne, March 22, 2021, pp. 170-171.

Q. You were—were you ever an employee of any of those—of the different property holding entities?

A. No.

Q. Did those to your knowledge—sorry. Did those entities have any employees?

A. I don't want to say no. It because I do believe we pay some people direct. For the mother part it's more vendors though you know. Not direct employees.

Q. Sorry I'm not sure I understand. Could you explain what you mean by more vendors. I'm not sure I understand?

A. Yeah I mean I just don't want to say there are no employees. I think of one property in particular we do pay security so if you are referring to the police officers that is it in a shopping center in a cop car in a public parking lot we pay them, yes. I just don't want to—I would go on the record to say no they don't have employees. I do think that's a vendor but I don't want to be miss lady leading.

Q. Thank you. To your knowledge do those different property owning entities do they have their own offices or addresses or are they at the same office where Dewberry Capital and Dewberry Group are?

A. They are at the same offices here and the addresses are here.²²

²² Deposition of John Freeman (ROUGH), April 14, 2021, pp. 15-16.

...

Q. I think it does. But and if I understand correctly you are saying that Dewberry Group could either provide these services or it could contract with somebody. It could out source the providing of those services?

A. That is what I am saying, yes.

Q. Okay. And but the specific property owner and again I am just using Peachtree Pointe property LLC as one example because it's the first one they couldn't provide these services or do the outsourcing of the service themselves because they don't really have any employees or operations that, correct?

A. They have an owner T owner can make that decision.

Q. Okay.

Q. And the owner is John Dewberry right?

A. Correct.²³

...

Q. Well, how would they—like for instance how would Peachtree Pointe if they don't have any employees or anything like that how would they do—how would they do leasing?

A. They hire third party brokerage to do the leasing.

Q. Okay. I see?

²³ Deposition of John Freeman (ROUGH), April 14, 2021, pp. 39-40.

A. We hire our attorney to write the lease and then John K. Dewberry would sign the lease as owner or manager as Peachtree Pointe LLC.

Q. So it could be set up that way but the way Mr. Dewberry has chosen to set it up is that he has got Dewberry Group and Dewberry Group provides all of these services to the different property owners is that fair?

A. That's fair.²⁴

31. According to Dewberry Group's Supplemental Response to Plaintiff's First Set of Interrogatories, No. 10, on page 15, "Following the official roll out of the D DEWBERRY Marks on Dewberry Group's website on or about January 2019, Dewberry Group implemented use of the D DEWBERRY Marks." Dewberry Group's deployment of the marks in connection with the rollout of the website was also discussed in its Responses to Plaintiff's Second Set of Interrogatories, No. 18, on page 8: "The overhaul of the website, conversion of Dewberry Capital's emails and digital presence, as well as letter head and business card and miscellaneous items bearing the Dewberry Capital logo conversion occurred on or after January 2019 and consummated the official rebrand."

32. Dewberry Group states in its Supplemental Responses to Plaintiff's First Set of Interrogatories, No. 10, on page 14, that ". . . the Group Mark and Studio Mark have been used on Dewberry Group's website . . ." Ms. Lavigne was asked about the properties listed on the website in association with the marks:

²⁴ Deposition of John Freeman (ROUGH), April 14, 2021, pp. 40-41.

Q. Are those properties also promoted or marketed in connection with the Dewberry Group Marks?

A. I'm not sure what you're asking.

Q. Are—the—have you seen any Dewberry Group marketing materials, which would include the website, that describe or depict these properties adjacent to or under the Dewberry Group Marks?

A. These properties are listed, to my knowledge, on the Dewberry Group website as properties that we provide property—I know for—specifically that we provide property management services to.

Q. So these properties are listed on the Dewberry Group website; that's correct, isn't it?

A. I believe each of those are listed on the Dewberry Group website for services provided.

Q. The Dewberry Group Mark is featured at the Dewberry Group website, isn't it?

A. The Dewberry Group Mark is on a website, Dewberry Group website, yes.²⁵

33. I discussed Dewberry Group's use of the Infringing Marks on its website in my March 1, 2021 expert report, including attaching a snapshot of Dewberry Group's website evidencing Dewberry Group's use of the marks in **Exhibit 9** to that report. I did not address in that report who the target audience(s) of the website is. Since the issuance of my March 1, 2021

²⁵ Deposition of Kim Lavigne, March 22, 2021, pp. 40-41.

expert report, however, Dewberry Group has made admissions regarding the target audiences for the web site.

34. Elizabeth Armstrong, designated by Dewberry Group as its 30(b)(6) witness to testify about Dewberry Group's branding efforts, testified that the website constitutes a "digital billboard":

Q. So what would you call the Dewberry Group website? You said that Dewberry Group doesn't participate in traditional advertising. Is the [website] not traditional advertising or at least what is commonplace today?

A. Sure. That's a good distinction. I mean when I was referencing traditional advertising that typically it encompasses TV radio and print. You can look at our website as a way do you know as a digital billboard if you will or you know our digital foot print so yes you can interpret that as such.²⁶

35. Lockie Brown, designated by Dewberry Group as its 30(b)(6) witness to testify about Studio Dewberry, testified that the website is conveying a high-quality image to "the people that we serve":

Q. Well is the website intended to be directed internally just to Mr. Dewberry and the individuals who like yourself and others who are employed by Studio Dewberry? Is that the function of the website the presence of Studio Dewberry?

²⁶ Deposition of Elizabeth Armstrong (ROUGH), April 7, 2021, pp. 55-56.

A. I'm sure it's not.

Q. So who is Studio Dewberry trying to reach to convey this high quality Mercedes like image of its design expertise?

A. Well, it would be—it would be the people that we serve which would be any type of someone who is looking for leasing a space or a retailer that was looking for a space inside of a shopping center or it could be the guest of the hotel or it could be somebody looking for employment. I don't know of any other reason.²⁷

36. In a Q&A with the third-party firm hired to redesign Dewberry Group's website, Dewberry Group identified its clients and the target audience of the website. Items 4 and 5 of the Q&A are reproduced below.²⁸ Clients are represented as "... our tenants leasing space within our properties," as well as, "Within our hospitality division (currently 1 hotel in Charleston) our clients are our hotel guests." The primary target audience is listed as prospective tenants.

²⁷ Deposition of Lockie Brown (ROUGH), April 5, 2021, p. 58.

²⁸ See 05_DG-0246955.

<p>4. Who are Dewberry's main clients?</p> <ul style="list-style-type: none"> - Our clients are our tenants leasing space within our properties and these tenants vary considerably: <ul style="list-style-type: none"> o Corporate offices from a range of industries (marketing agencies, financial institutions, real estate agencies, healthcare offices, architecture firms, design offices, law firms, and beyond) o Retail tenants o Restaurants o Other businesses...fitness studios, salons, even an art gallery and a high-end gas station - We recently opened our 1st mixed use development which includes residential apartments, so clients now include apartment residents - Within our hospitality division (currently 1 hotel in Charleston) our clients are our hotel guests <p>5. Who is the target audience of the website?</p> <ul style="list-style-type: none"> - Anyone seeking out more information about Dewberry Group- primarily prospective tenants but also the general interested public as well as members of the media
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37. The internal emails and deposition testimony of Dewberry Group's Director of Branding, Elizabeth Armstrong, reveal that the company valued the Infringing Marks, particularly the "Studio Dewberry" mark:

- An internal recap of a meeting of Dewberry Group's rebranding team in February 2018 noted the need to "highlight 'Studiodeberry' on any item we design, building the brand **is top priority and differentiator**."²⁹ [emphasis added]
- In responding to a question from a consultant hired to design Dewberry Group's new website (using the Infringing Marks) asking 'What needs aren't being met currently on the Dewberry website? Where does the Dewberry site fall short?', Dewberry Group stated, "Our

²⁹ 05_DG-0247064.

website doesn't address 'Studio Dewberry' which is **a huge differentiator for us from our competitors.**³⁰ [emphasis added]

- And in response to the consultant's question asking "What differentiates Dewberry from your competitors?", Dewberry Group responded:

As owner and developer of urban high-rise real estate across the Southeast, John [Dewberry] is responsible for the acquisition, concepting, development, leasing and management of premier mixed use live, work, and play assets. Over Dewberry Group's 29-year history, the firm has become the largest private owner of land on or adjoining Peachtree Street, the backbone of the commercial business district in Atlanta, Georgia, as well as a respected presence in Florida, Virginia, South Carolina, and beyond.

John's unique ability to understand the intersection of architecture, design, and development is his hallmark, and Studio Dewberry grew organically as yet another way to exceed corporate and residential residences', as well as hospitality guests' expectations Studio Dewberry soon expanded to include additional larger partnerships on design, furnishing, lighting and art commissions, for prominent developments within the Dewberry

³⁰ 05_DG-0246955.

Group's Atlanta portfolio—including Midtown Atlanta high-rise office developments, Campanile and Peachtree Pointe.

Studio Dewberry formally expanded in conjunction with in-house architect Lockie Brown in 2016 after John opened the world-class hotel, The Dewberry, in Charleston, South Carolina. In short order, John recognized Mr. Brown's considerable talent and vast experience in hospitality design was transferrable to Dewberry's other product types. Oyster Park, a luxury mixed-use multifamily and retail project in Mount Pleasant, South Carolina, soon followed and with it, a growing team of dedicated designers and project managers, numbering seven presently, who now add their passion and skill to John's extraordinary vision."³¹

38. In her deposition testimony, Ms. Armstrong explained that adopting and building the Studio Dewberry operations and expertise as part of Dewberry Group's service offerings is a top priority and differentiator:

Q. And what was the importance of highlighting Studio Dewberry as a—as a top priority. Can you explain for me why that was a top priority that was identified?

A. Well I think I didn't write these recap notes so the way I recall the meeting going is

³¹ *Id.* The questionnaire consistently used the term "Dewberry," which Dewberry Group, in its responses, treated as including not only Dewberry Group itself, but all of the real estate development operations and properties controlled by John Dewberry.

building the Dewberry brand is remains a top priority and Studio Dewberry as our in-house team we are the in-house filter to sort of get things down that relates to anything with design. It could be a pencil ice cube I mean it's really spans the gamut of things so I believe that that was in reference building the Dewberry it doesn't say this but I believe this to have meant building the Dewberry brand is a top priority and differentiator and I believe that you know we felt like having different members of our team all with different skill sets working together in-house on various amounts of projects really differentiates us from other companies that may hire multiple different third parties to do these things versus having ate small assembled team in-house.

Q. I just wanted to see if I understand because you mentioned a bunch of other names and brands except for studio dewberry. There is no other name that is listed in this bullet point that we were—that is highlighted and we were discussing the that is to be highlighted as a top priority other than Studio Dewberry, correct?

A. Right. I did mention that 6789 I said is it not listed here but when we reference the brand what that means is the Dewberry brand.

Q. I guess I am still not following you because it is saying that Studio Dewberry is to be highlighted on any item we design building the brand is the top priority and differentiator and it is using that in the context of Studio

Dewberry. How is Studio Dewberry a differentiator for the building of the Dewberry brand you are trying to build?

A. So I believe I covered that but I will say it again. Having an in-house team that is comprised of people that you know have graphic design experience branding experience marketing product development sourcing sketching, you know the interior decor having this small assembled team differentiates us from a lot of other companies because we have a small in-house team that filters all of this through for John's different props so building the Dewberry brand is top priority and this is what from the beginning John has believed his vision would set him apart from other real estate developers or hotelers that having [this in] house team that he is so closely overseas is a differentiator.³²

39. This collection of admissions leads me to the following conclusions regarding Dewberry Group's activities during the period of alleged infringement:

- a. Dewberry Group has performed property management and other services that allow it to directly interface with its customers and clients, defined as businesses or entities that are renting office space, businesses renting retail space, individuals and families that rent multi-family units, hotel guests, and vendors hired pursuant to Dewberry Group's oversight of the maintenance and services

³² Deposition of Elizabeth Armstrong (ROUGH), April 7, 2021, pp. 165-167.

provided at the properties. Correspondence by Dewberry Group with or involving these customers, clients, vendors and/or the properties in which these groups are affiliated have included the Infringing Marks.

- b. Dewberry Group has created and operated a publicly viewable website that contains the Infringing Marks and whose target audience is “the people that we serve,” including prospective tenants.
- c. As a consequence, the revenue earned by Dewberry Group and the properties during this period are economically linked to activities involving Dewberry Group’s use of the Infringing Marks.

V. Dewberry Group’s Decision to Invest Financial Resources to Retain the Use of the Infringing Marks Is Indicative of Their Value and, By Extension, Enrichment Earned by Dewberry Group

40. In Section VIII of my March 1, 2021 expert report, I presented and discussed the substantial losses incurred by the taxable entity Dewberry Group, particularly in recent years both prior to and during the infringement period. I assumed that Dewberry Group’s sole owner, John Dewberry, conducted his commercial dealings in a rational, profit-maximizing manner, consistent with basic economic theory. If so, the only logical way an otherwise non-going concern, as represented by the Dewberry Group’s income tax returns, would continue to operate is if it were part of a larger collection of economic entities that, on a consolidated basis, produce positive earnings and cash

flow over time. I then noted that a report summarizing John Dewberry's financial position as of December 31, 2019 listed \$1.5 million in positive net income from his businesses in 2019, evidencing that his consolidated holdings, including the legal entity Dewberry Group, did generate a positive net income.

41. The same basic economic logic as set forth in my March 1, 2021 expert report can be applied to the situation as of the date of issuance of this Supplemental Report. Discovery by Dewberry Group, through its retained counsel, has been conducted through April 15, 2021. The less costly alternative to such activity would have been for Dewberry Group to offer alternatives to its current names and marks that would facilitate a settlement and end its investment in legal fees. However, as of the date of this Supplemental Report I am not aware of any such offer by Dewberry Group.

42. Value can be measured in a number of ways. A business can measure value from its day-to-day operations through various profit and cash flow measures. Those same businesses can measure the value of acquisitions through the addition of assets to its Balance Sheet, even if those acquisitions or purchases have yet to yield positive cash flows or profits. Finally, investments of funds for which accounting and/or tax filing rules do not require a disclosure of the firm's perceived or expected returns can also have value. The above-cited examples from Dewberry Group's internal rebranding-related documents, and testimony of its representatives demonstrate that Dewberry Group and John Dewberry considered the adoption and implementation of the Infringing Marks to add value to the combined economic real estate development-related operations.

43. Another example of such a situation would be decisions made with respect to the conduct of lawsuits. Dewberry Group has sought to continue investing in pursuing a legal ruling that it is entitled to use the Infringing Marks, with the risk that the Court may find for Plaintiff and award monetary damages. I am not challenging or judging Dewberry Group's choice in any way. I am merely observing that in electing to act as it has to date, Dewberry Group is acknowledging that it views the Infringing Marks as having value, through which it is being and will continue to be enriched. For a damages expert such as Ms. Miller to argue that the use of the Infringing Marks has not enriched Dewberry Group by a single dollar is to substitute her own concept of value for that of the Defendant. It also demonstrates that her approach to measuring enrichment in this matter is flawed.

VI. Valuing the Enrichment to Dewberry Group

A. Revenue Enrichment to Dewberry Group

44. Valuing the enrichment perceived by Dewberry Group, in my opinion, begins with an inquiry into how the commercial dealings at issue are conducted. This is discussed in the expert report of Dr. Grimsley, which describes how real estate development begins with site selection and acquisition, gaining access to financing. The financing is used to fund the real estate development opportunity through a process that includes architecture and design, engineering, and construction of a new project or the renovation of an existing property so as to maintain or enhance its value. During and after construction, efforts are made to lease the space and provide ongoing

services to clients and tenants.³³ Pro forma income statements included in Dewberry Group's loan request packages list multiple years of projected post-construction/ renovation revenue streams.³⁴

45. Documents produced by Dewberry Group show that it has used the Infringing Marks in association with securing financing for both renovation and new construction projects (see **Appendix A**). Thus, to the extent Dewberry Group perceives the use of the Infringing Marks, and the demand-generating characteristics it has imbued to each, to further its financing pursuits during the infringement period, the economic value can be measured as either the maintenance of, or the maintenance plus growth in, the financial performance (as measured by profitability) of the Dewberry Group enterprise. I have chosen to use just the maintenance of current revenues and profitability rather than add the projected positive returns set forth in the pro forma statements Dewberry Group has included within its financing proposal documents, as I am not in a position to assess the accuracy of Dewberry Group's forecast methodology. In proceeding in this manner, I believe I am giving the benefit of doubt to Dewberry Group in terms of the value associated with the Infringing Marks.

³³ This process is discussed by Dr. Grimsley on pages 20-21 and in section 5.2.1 of her March 1, 2021 expert report. Testimony by John Dewberry corroborated Dr. Grimsley's process. Deposition of John Dewberry (ROUGH), April 13, 2021, pp. 20-27 and Exhibit 579.

³⁴ Examples can be found in **Appendix A**. See, for example, 05_DG-0202455, 05_DG-0141379, 04_DG-0010585, and 05_DG-0200711.

46. My use of the revenues received by Dewberry Group and the properties during the infringement period is also supported by the admissions made by Dewberry Group in its Interrogatory responses and its 30(b)(6) testimony that Dewberry Group actively participated with the properties and their tenants and guests throughout the infringement period through its property management function, and that such participation involved the use of the Infringing Marks.

47. Ms. Miller's report includes schedules (Attachments 5A through 5J) showing the revenue associated with each of the properties that have used the Infringing Marks for the years 2018, 2019 and 2020. I will stipulate to the accuracy of those amounts for purposes of my damages analysis.³⁵ Thus, under a damages theory that the use of the Infringing Marks has allowed Dewberry Group to at least maintain its existing level of profit for the enterprise as a whole, revenues during the damages period are the best available proxy measure for Dewberry's enrichment. These calculations are summarized in Figure 1.

³⁵ I did not have access to all of the documents produced by Dewberry Group and used by Ms. Miller in preparing her Attachments 5A through 5J prior to the issuance of her report.

Figure 1: Revenue From Dewberry Group Entities Using the Infringing Marks, 2018-2020³⁶

ID	Property Name	First Use Of Marks
188	Dewberry 10th Street	Sep 2018
200	Dorchester Square	Sep 2018
210, 215, 235	Mt. Pleasant Square	Nov 2017
240	Roosevelt Square LLP	Sep 2018
270	Belle Isle	Mar 2018
300	Dewberry Juniper	Sep 2018
870	Dewberry Ansley	Sep 2018
520	1155 Peachtree/ Campanile	Feb 2018
600, 610, 625	Peachtree Pointe/Gallery Uptown	Sep 2018
450	The Dewberry Charleston Hotel	Sep 2018
Total		

³⁶ Sources: **Exhibit S3.3**, **Exhibit S4.3**, and **Exhibit S5.3**.

ID	Property Name	2018
188	Dewberry 10th Street	\$408,808
200	Dorchester Square	309,400
210, 215, 235	Mt. Pleasant Square	1,574,092
240	Roosevelt Square LLP	1,307,810
270	Belle Isle	1,096,908
300	Dewberry Juniper	264,127
870	Dewberry Ansley	86,586
520	1155 Peachtree/ Campanile	6,607,397
600, 610, 625	Peachtree Pointe/Gallery Uptown	4,006,232
450	The Dewberry Charleston Hotel	4,248,700
Total		\$19,910,059

ID	Property Name	2019
188	Dewberry 10th Street	\$1,838,020
200	Dorchester Square	996,494
210, 215, 235	Mt. Pleasant Square	1,602,848
240	Roosevelt Square LLP	4,115,413
270	Belle Isle	1,153,877
300	Dewberry Juniper	778,779
870	Dewberry Ansley	269,010
520	1155 Peachtree/ Campanile	4,893,036
600, 610, 625	Peachtree Pointe/Gallery Uptown	15,058,410
450	The Dewberry Charleston Hotel	15,420,026
Total		\$46,125,912

ID	Property Name	2020
188	Dewberry 10th Street	\$1,609,753
200	Dorchester Square	910,466
210, 215, 235	Mt. Pleasant Square	1,755,534
240	Roosevelt Square LLP	3,940,999
270	Belle Isle	786,188
300	Dewberry Juniper	416,154
870	Dewberry Ansley	270,810
520	1155 Peachtree/ Campanile	6,094,160
600, 610, 625	Peachtree Pointe/Gallery Uptown	16,523,275
450	The Dewberry Charleston Hotel	6,587,994
Total		\$38,895,332

48. Revenues for the legal entity Dewberry Group reflect amounts taken from the tax returns and trial balances produced by Dewberry Group that were

identified as being associated with the properties that have used the Infringing Marks. The revenues for the non-hotel properties are taken from Attachments 5A through 5J of Ms. Miller’s report, excluding “miscellaneous revenue” and “interest income.”³⁷ The revenues for the hotel are taken from the profit and loss statements (actual and budgeted) produced by Dewberry Group.³⁸ The revenues listed reflect John Dewberry’s percentage ownership of each entity.

B. Expenses Associated With Dewberry Group’s Enrichment

49. The determination of the appropriate method for accounting for expenses as an offset to revenues attributable to alleged trademark infringement is a critical part of damages analysis in such matters. As noted in paragraph 51 of my March 1, 2021 expert report, there are three alternative methods courts have considered:³⁹

- a. The “differential cost” or “marginal cost rule”: Under this approach, “deductions are allowed only for expenses that would not otherwise have been incurred “but for” the manufacture

³⁷ Interest income was excluded as it is not a source of operating revenue. Miscellaneous income was excluded as the nature of the amounts listed cannot be ascertained by reference to the title given.

³⁸ Sources: Expert Report of Rodney J. Bosco, March 1, 2021, **Exhibit 3.5**, **Exhibit 4.2**, and **Exhibit 5.2**.

³⁹ Koelemay, Jr., James M., A PRACTICAL GUIDE TO MONETARY RELIEF IN TRADEMARK INFRINGEMENT CASES, *The Trademark Reporter*, May-June 1995. A similar description of the three approaches is set forth in Ross, Terence P., “Intellectual Property Law: Damages and Remedies,” Release 23 (2012), Law Journal Press, Section 4.03[3], pp. 4-30 through 4-31.

and sale of the infringing product. No deductions for fixed costs and overhead, for example, would ordinarily be allowed.”

- b. The “full absorption approach”: Under this approach, “all expenses properly allocable to the product under generally accepted accounting principles are allowed.”
- c. The “direct assistance rule”: Under this approach, “all expenses which directly assisted in the manufacture and sale of the product can be deducted, including some items of overhead.” This can be thought of as a hybrid of the differential and full absorption approaches.

50. My understanding, corroborated by Ms. Miller in her report, is that “defendant must prove all elements of cost or deduction claimed.”⁴⁰ As it pertains to the elements of cost applicable to this analysis, Ms. Miller states on page 21 of her report that, “I understand that the Fourth Circuit has applied the full absorption approach for the deductibility of expenses.” She lists in footnote 41 of her report, attached to the end of the quoted sentence, a 1987 decision from the U.S. Court of Appeals for the Fourth Circuit titled *Polo Fashions, Inc. v. Craftex, Inc.* (“Polo/Craftex”)

51. Ms. Miller does not list the Polo/Craftex decision as a document she considered in reaching her opinions, suggesting that she has not reviewed the decision to determine its applicability to the facts and circumstances in this matter. If she had reviewed the decision, she would have seen the following passage:

⁴⁰ Expert Report of Lisa G. Miller, April 2, 2021, 4.2.1.

“In the plaintiff’s appeal, it contests the district court’s computation of the defendants’ profits. It contends that, in computing those profits, the defendants should have been given credit only for Craftex’s marginal costs, rather than its total costs, including such things as allocable overhead. **In a different context, we might find some merit in this contention, but the district court, as fact finder, was called upon to assess the plaintiff’s damages, not just the defendants’ profits, and the damages found were to be trebled. Under those circumstances, we cannot say the district court’s finding was clearly erroneous.**”
[emphasis added]

52. A plain reading of this part of the opinion does not suggest that the Fourth Circuit considered the full absorption method as the appropriate way to consider trademark infringement damages in all circumstances. The Fourth Circuit does not even state that the full absorption method was the only way, or even the proper way, for the district court to have considered trademark damages in the case before it. Instead, the Fourth Circuit stated only that it could not state, for the specific case before it, that the district court’s use of a full absorption approach was “clearly erroneous.” In any event, as noted in the emphasized text, the court accepted the approach used by the District Court in the Polo/Craftex case due to circumstances that do not exist in this matter, i.e., Dewberry is not seeking a trebling of lost profits damages. Thus, Ms. Miller’s consideration in her report of only the full absorption approach to expenses and not a marginal cost or direct assistance approach is unsupported and should not be considered as reasonable expert inquiry.

53. Legal scholars have also commented on the Polo/Craftex decision and have interpreted the decision differently than Ms. Miller. One example is the article by Koelemay, which I cited both in my March 1, 2021 expert report and earlier in this section. The rest of the quotation associated by Koelemay with the differential or marginal cost rule, which includes a citation to the Polo/Craftex matter, reads as follows:

“This rule results in the largest recovery for the trademark owners, and is consistent with modern business school management theory, which holds that transactions are profitable if they yield a positive contribution to overhead. It is also consistent with the test for predatory pricing widely followed in antitrust cases. Many recent trademark and patent decisions favor this approach.”

54. Moreover, the Court has considered what are and are not allowable expenses in trademark infringement matters. In *The Teaching Co. Ltd. Partnership v. Unapix Entertainment, Inc.*, 87 F. Supp. 2d 567, 589 (E.D. Va. 2000), the Court ruled that “gross profits” was the appropriate measure of unjust enrichment received by the Defendant. Gross profit does not include all costs incurred by the Defendant, as would be the case under the full absorption approach. This is demonstrated by a plain reading of the decision, which notes that the Court rejected testimony from Unapix’s corporate controller that it had lost money on the infringing product sales. Instead, the court accepted certain expense showings while rejecting others,

yielding a profit rate associated with the infringement in excess of 40% of infringing revenues.⁴¹

55. Based on the methodology set forth in the decision whereby the Court assessed allowable expenses and characterized the resulting profit measure as “gross profits,” I conclude that the Court was utilizing the direct assistance rule in determining which costs should be considered in reducing the infringing revenue to derive unjust enrichment damages. Defendant bears the burden of providing proof of allowable expenses under such an approach (or under the marginal cost approach should the Court rule that to be the relevant method). Ms. Miller, Defendant’s damages expert, clearly states in her April 2, 2021 report that, “. . . I am not calculating defendant’s profits at this time.” Thus, I have no basis to evaluate Defendant’s assessment of infringement-related expenses apart from what has been discussed in this Section regarding the apparent lack of exclusivity as to the use of the full absorption method by courts in the Fourth Circuit generally and by this Court specifically.

56. Even if one were to assume that full absorption was the appropriate expense deduction methodology to employ in this matter, Ms. Miller has failed to demonstrate that the total expenses of the legal entity Dewberry Group are all attributable to the revenue producing activities of the company in its role of providing project management and accounting services to properties owned by John Dewberry. In fact,

⁴¹ The Court concluded that infringing revenues through the date of trial were \$2.0 million, while allowable expenses totaled \$1,162,583.11. The resulting profits from the infringing acts of the defendant, \$837,416.89, represented 41.9% of infringing revenues.

testimony from John Freeman reveals that the expenses included in the accounting records of the legal entity Dewberry Group also relate to activities not associated with its revenue-generating function:

Q. Okay. So my question—how is it that—if Dewberry Group is continuing to lose money you know if it basically has lost money each of the last 6 years, six, seven years how is it continuing as an ongoing entity and why is it continuing as an ongoing entity?

A. That's a good question. We are Dewberry Group is set up to manage assets that are wholly owned by John K. Dewberry. We understand that there will be losses involved this that but what you are not taking is we would be spending more money at the property level to hire outside third party vendors. **There is also a lot of stuff not stuff but a lot of Dewberry group what we do is we manage John K. Dewberry personal financials so we prepare his personal tax returns we pay all his bills we manage his houses his insurance everything.** Obviously we will not charge John Dewberry for those services so this is a lot of stuff that goes on here. **It is a family office essentially managing the assets of John K. Dewberry. All of those assets are not churning out fees. The people here are paid for foundation work they are paid for a lot of things that don't generate income.**⁴²
[emphasis added]

⁴² Deposition of John Freeman (ROUGH), April 14, 2021, pp. 151-152.

57. Ms. Miller states in her report that she had conversations with Mr. Freeman and Ms. Lavigne regarding the profit and loss statements prepared for each of the properties.⁴³ She could have also used those conversations to learn about the dual responsibilities of Dewberry Group employees and its assets to perform not only property management functions but also to manage John Dewberry's personal and charitable dealings. However, it does not appear she has done so. Instead, she has included in her report Attachment 8, which captures all of the expenses reported by Dewberry Group on its trial balances without any attempt to apportion such expenses between property management and other activities that are not within the scope of the alleged infringing activities—such as, for example, more than \$600,000 per year for John Dewberry's private airplane (referred to as "Dewberry Air"). Based on the above, it is my opinion that Ms. Miller disclosures as it relates to expenses should not be considered sufficient expert inquiry, and that the expenses set forth in Attachment 8 of her report should not be considered as reflecting an accounting of allowable expenses to deduct from the gross revenue figures that I have calculated in my analysis.

58. In any event, and without conceding that all or any portion of the raw, unexplained expenses reflected in any attachments to Ms. Miller's report are appropriately applied to the gross revenue calculations I have made, for demonstrative purposes only, in the event it may be helpful to the Court, I have conducted an analysis of Dewberry Group's possible infringement-related expenses based on the application

⁴³ Expert Report of Lisa G. Miller, April 2, 2021, 4.3.1.c.

of the direct assistance rule. My analysis is set forth below.

59. The Profit & Loss Statements presented in Attachments 5A through 5J of Ms. Miller's report list expenses by category for each property. I am not in a position to determine the direct contribution of each cost item to the infringing activities, as I have not been given access to those within Dewberry Group who would have such knowledge. However, a conservative assumption would be to adopt total operating expenses as the measure of direct assistance cost, relative to what a more in-depth inquiry would yield. This measure excludes certain obvious fixed and overhead costs such as Corporate Expense and Debt Service, which would have been incurred by Dewberry Group even if it had not used the Infringing Marks. The calculation of profit earned by the Dewberry Group properties based on this analysis is summarized in Figure 2.

Figure 2: Expenses From Dewberry Group Entities Using the Infringing Marks, 2018–2020⁴⁴

ID	Property Name	First Use Of Marks
188	Dewberry 10th Street	Sep 2018
200	Dorchester Square	Sep 2018
210, 215, 235	Mt. Pleasant Square	Nov 2017
240	Roosevelt Square LLP	Sep 2018
270	Belle Isle	Mar 2018
300	Dewberry Juniper	Sep 2018
870	Dewberry Ansley	Sep 2018
520	1155 Peachtree/ Campanile	Feb 2018
600, 610, 625	Peachtree Pointe/Gallery Uptown	Sep 2018
450	The Dewberry Charleston Hotel	Sep 2018
Total		

⁴⁴ Sources: **Exhibit S3**, **Exhibit S4**, and **Exhibit S5**.

ID	Property Name	2018
188	Dewberry 10th Street	\$140,077
200	Dorchester Square	139,502
210, 215, 235	Mt. Pleasant Square	561,172
240	Roosevelt Square LLP	495,878
270	Belle Isle	335,987
300	Dewberry Juniper	55,978
870	Dewberry Ansley	31,897
520	1155 Peachtree/ Campanile	2,779,056
600, 610, 625	Peachtree Pointe/Gallery Uptown	2,019,021
450	The Dewberry Charleston Hotel	3,650,137
Total		\$10,208,705

ID	Property Name	2019
188	Dewberry 10th Street	\$358,449
200	Dorchester Square	418,852
210, 215, 235	Mt. Pleasant Square	524,982
240	Roosevelt Square LLP	1,479,487
270	Belle Isle	387,723
300	Dewberry Juniper	176,347
870	Dewberry Ansley	98,048
520	1155 Peachtree/ Campanile	2,796,718
600, 610, 625	Peachtree Pointe/Gallery Uptown	5,826,784
450	The Dewberry Charleston Hotel	11,486,983
Total		\$23,554,372

ID	Property Name	2020
188	Dewberry 10th Street	\$376,063
200	Dorchester Square	219,449
210, 215, 235	Mt. Pleasant Square	553,406
240	Roosevelt Square LLP	1,364,669
270	Belle Isle	339,928
300	Dewberry Juniper	273,968
870	Dewberry Ansley	95,888
520	1155 Peachtree/ Campanile	3,039,865
600, 610, 625	Peachtree Pointe/Gallery Uptown	5,134,992
450	The Dewberry Charleston Hotel	5,585,593
Total		\$16,983,822

60. A different situation exists with regard to interpreting the tax returns and trial balances associated with the legal entity Dewberry Group. There are

expenses listed for a number of functions performed by employees that are included therein that, based on information produced by Dewberry Group to-date, cannot be split out between potentially infringing activities (associated with performing property management functions) and non-infringing activities (including managing the personal and charitable affairs of John Dewberry, his foundation, and other non-revenue generating holdings, as testified to by John Freeman and discussed above). Ms. Miller's report does not provide expert analysis on these expenses to allow for a reasonable determination of eligible expenses, which she has acknowledged is her burden. Such an analysis would involve a detailed review of the underlying journals, invoices, payment vouchers, checks, etc. that feed into the Trial Balances produced by Dewberry Group. Thus, I have not included any of the expenses recorded for the legal entity Dewberry Group in my analysis.

C. Valuing the Profit to Dewberry Group

61. The net enrichment to Dewberry Group would be equal to the gross enrichment less eligible expenses. This is set forth in Figure 3 for the period 2018 through 2020. I understand that the infringement is ongoing—I can supplement this calculation for 2021, through the date of trial, should I receive additional financial data from Dewberry Group for the legal entity Dewberry Group and its affiliated properties.

Figure 3: Profit From Dewberry Group Entities Using the Infringing Marks, 2018–2020⁴⁵

ID	Property Name	First Use Of Marks
188	Dewberry 10th Street	Sep 2018
200	Dorchester Square	Sep 2018
210, 215, 235	Mt. Pleasant Square	Nov 2017
240	Roosevelt Square LLP	Sep 2018
270	Belle Isle	Mar 2018
300	Dewberry Juniper	Sep 2018
870	Dewberry Ansley	Sep 2018
520	1155 Peachtree/Campanile	Feb 2018
600, 610, 625	Peachtree Pointe/Gallery Uptown	Sep 2018
450	The Dewberry Charleston Hotel	Sep 2018
Total		

⁴⁵ Sources: **Exhibit S3**, **Exhibit S4**, and **Exhibit S5**.

ID	Property Name	2018
188	Dewberry 10th Street	\$268,730
200	Dorchester Square	169,897
210, 215, 235	Mt. Pleasant Square	1,012,920
240	Roosevelt Square LLP	811,932
270	Belle Isle	760,921
300	Dewberry Juniper	208,149
870	Dewberry Ansley	54,689
520	1155 Peachtree/ Campanile	3,828,341
600, 610, 625	Peachtree Pointe/Gallery Uptown	1,987,211
450	The Dewberry Charleston Hotel	598,563
Total		\$9,701,354

ID	Property Name	2019
188	Dewberry 10th Street	\$1,479,571
200	Dorchester Square	577,641
210, 215, 235	Mt. Pleasant Square	1,077,866
240	Roosevelt Square LLP	2,635,926
270	Belle Isle	766,154
300	Dewberry Juniper	602,432
870	Dewberry Ansley	170,962
520	1155 Peachtree/ Campanile	2,096,318
600, 610, 625	Peachtree Pointe/Gallery Uptown	9,231,626
450	The Dewberry Charleston Hotel	3,933,043
Total		\$22,571,540

ID	Property Name	2020
188	Dewberry 10th Street	\$1,233,690
200	Dorchester Square	691,017
210, 215, 235	Mt. Pleasant Square	1,202,127
240	Roosevelt Square LLP	2,576,329
270	Belle Isle	446,260
300	Dewberry Juniper	142,186
870	Dewberry Ansley	174,922
520	1155 Peachtree/ Campanile	3,054,295
600, 610, 625	Peachtree Pointe/Gallery Uptown	11,388,283
450	The Dewberry Charleston Hotel	1,002,401
Total		\$21,911,510

VII. Evaluation of the Expert Report of Lisa G. Miller

62. Ms. Miller has issued an expert report on damages, dated April 2, 2021, which contains a number of criticisms of my analysis of potential unjust enrichment revenues associated with the alleged infringement by Dewberry Group, based on the discovery materials produced as of the issuance of my March 1, 2021 expert report. I have already addressed some of Ms. Miller's critiques in earlier sections of this Supplemental Report to the extent they relate directly to my affirmative opinions and findings. In this section I re-address these critiques briefly, as well as discuss other shortcomings and omissions in Ms. Miller's consideration of my March 1, 2021 expert report.

A. Bosco Did Not Do His Own Analysis to Identify Properties That Used the Infringing Marks for Purposes of His Revenue Analysis

63. Ms. Miller appears to challenge the methodology used to identify participants (i.e., properties) to the alleged infringement, as set forth in **Appendix A** to my March 1, 2021 expert report, as well as my role in such identification. Specific critiques are set forth below:

“Bosco relied on his Appendix A to identify all of the relevant entities for purposes of identifying revenue numbers. Bosco describes and explains Appendix A to be a schedule which “lists, for each entity, the relevant discovery

documents on which they are based.” He indicated “the list reflects research conducted by Counsel as of the date of this report . . .”⁴⁶

“It is not clear whether Bosco conducted any independent review of the content of the documents listed in his Appendix A, or merely relied on research conducted by counsel to form the basis for his analysis of revenue.”⁴⁷

“These dates were based on Bosco’s Appendix A which it does not appear Bosco reviewed.”⁴⁸

“It is still not clear if Bosco did his own analysis to identify the properties to include in his analysis independently or was provided the information by Counsel to use Dewberry Charleston.”⁴⁹

64. Ms. Miller’s reasoning that I did not independently review the material contained in **Appendix A** appears to be based on footnote 15 of my March 1, 2021 expert report which stated, “The list [Appendix A] reflects research conducted by Counsel as of the date of this report.” Whatever the reason, I provide additional clarity to the analysis that yielded **Appendix A** below.

65. I asked Counsel to review the discovery documents produced in this matter and forward documents evidencing use of the Infringing Marks. Counsel sent us a collection of documents along with an outline that listed each document in the collection along

⁴⁶ Expert Report of Lisa G. Miller, April 2, 2021, 4.2.2. (p. 12)

⁴⁷ Expert Report of Lisa G. Miller, April 2, 2021, 4.2.2.b. (p. 12)

⁴⁸ Expert Report of Lisa G. Miller, April 2, 2021, 4.2.3.a. (p. 14)

⁴⁹ Expert Report of Lisa G. Miller, April 2, 2021, 4.2.7.a. (p. 19)

with the page reference(s) where the Infringing Marks and properties appeared. I and my team reviewed each document to confirm that the Infringing Marks and properties appeared on the specific pages identified by Counsel, modifying the outline where necessary.

66. Upon completing our initial review, I asked Counsel if there were additional examples for specific properties. Upon receiving additional documents, we conducted our review and appended the materials and descriptive data to my **Appendix A**. I was not attempting to capture all such documents; just enough to provide a reasonable basis to include the property, and its revenues, in an analysis of infringement damages.

67. I did not evaluate whether the documents constituted evidence of infringement on the part of Defendant. Such an effort would constitute liability analysis, which as I stated in my March 1, 2021 report and included herein by reference was not part of my scope of work on this matter.

B. Non-Hotel Revenues Related to Pre-Infringement Leasing Agreement Executions Should be Excluded from Infringing Revenue Consideration

68. Ms. Miller opines that ALL of the non-hotel revenue earned by Dewberry Group during the infringement period, either directly received by the legal entity or through the operation of the non-hotel properties represented by Dewberry Group to be included among its holdings, should be excluded from damages consideration as they are the byproduct of leases or leasing activity where contracts may have been signed before Dewberry Group began using the Infringing

Marks. This opinion is set forth in a number of places in Ms. Miller's report, many of which are listed below:⁵⁰

"I reviewed the leasing packages listed on Appendix A, identified the prospective tenants if available, and found *not one of those prospective tenants* for which leasing packages were created and contained the alleging infringing marks had actually entered into leases with those properties as of February 28, 2021. His [Bosco's] failure to consider this evidence casts doubt on the reliability of Bosco's assumption above [that Dewberry Group's commercial dealings with these properties have served as a conduit for the infringement]."⁵¹

"There is nothing in his report to indicate Bosco acknowledged, or even considered, whether any of the revenues he has identified could be attributable to Dewberry Group's commercial dealings which occurred prior to the alleged infringement and therefore, **should not be included in his analysis.**"⁵²
[emphasis added]

"Additionally, Bosco appears to assume the only factor attributable to the revenue is the use of the marks. However, the email communications as part of the documentation Plaintiff's Counsel reviewed for Bosco's Appendix A identify the factors that prospective tenants

⁵⁰ The quoted passages are reproduced from Sections 4.1 and 4.2 of Ms. Miller's report, which comprises 15 pages (pages 6-20) of her 24-page rebuttal report.

⁵¹ Expert Report of Lisa G. Miller, April 2, 2021, 4.1.1.a.

⁵² Expert Report of Lisa G. Miller, April 2, 2021, 4.1.1.b.

considered to be important which include abut are not limited to location, size, timing and availability of space, and approved uses of the space. Also, his Exhibit 3.2, a monthly summary of property revenues for January through December 2018 and his Exhibit 8 disclose an existing, historical pattern of revenues prior to September 2018, the date of the first use of the marks or alleged infringement date for nine of the 14 properties.”⁵³

“There is no indication that Bosco . . . considered that many of the sources that form the basis of his opinion show that revenue was being generated *prior to the use of the alleged marks.*” This evidence casts doubt on the reliability of his opinion with regard to the accuracy of the identification by Bosco of the revenue attributable to the use of the alleged infringing marks with regard to property income, management fees, and accounting fees.”⁵⁴

“Attachments 3A and 3B and 4A-4I demonstrate that there is monthly revenue *not attributable* to the alleged infringing marks as explained above. Bosco erroneously accounted for those revenues from these pre-existing leases, failing to exclude that portion of revenues from his analysis; thus, greatly overstating the revenues he presented.”⁵⁵

⁵³ Expert Report of Lisa G. Miller, April 2, 2021, 4.1.1.e.p. 9

⁵⁴ Expert Report of Lisa G. Miller, April 2, 2021, 4.2.2.b.

⁵⁵ Expert Report of Lisa G. Miller, April 2, 2021, 4.2.3.a.

“Revenue from Dewberry Group stems from the fees collected from the properties. Based on Attachment 3A and 3B, the majority of the leasing related revenue from the properties is attributable to leases or negotiations, which began prior to the first use date, and should accordingly be excluded.”⁵⁶

“My rent roll analyses by property identified and categorized these tenant leases from 2018 through February 28, 2021. Based on my review and categorization of the leases from the rent roll analysis as explained in 4.(a.) above, I determined that a large majority of the tenant revenue was in fact based solely on leases which either commenced or communications began prior to the alleged first use fo the marks. For these reasons, **any revenues associated with those tenant leases should be excluded from revenue related to the properties attributable to alleged infringing marks.**”⁵⁷ [emphasis added]

“For the reasons I have identified for *Exclusions from Revenue* in this damage calculation of defendant’s profits associated with the alleged infringing marks, **there are no property related revenues associated with the infringing use of the marks for any of the non-hotel properties.**”⁵⁸ [emphasis added]

⁵⁶ Expert Report of Lisa G. Miller, April 2, 2021, 4.2.3.c.

⁵⁷ Expert Report of Lisa G. Miller, April 2, 2021, 4.2.4.b.

⁵⁸ Expert Report of Lisa G. Miller, April 2, 2021, 4.2.4.d.

“For the reasons explained in 4.2 (5.), **revenue that Bosco attributed to Dewberry Group specifically and not the properties should be excluded in its entirety** since it flowed from leasing activity which I identified and determined should be excluded in large part due to lease commencement/communication dates, outside parking by non-tenants, and income from related Dewberry entities or service providers based on my analyses on Attachment 3A, 3B, and 4A-4I.”⁵⁹ [emphasis added]

69. I do not dispute the fact that the accounting revenues reported by the legal entity Dewberry Group and the Dewberry Group properties during the period of infringement relate to business activity that relates to contracts that were signed before Dewberry Group’s trademark infringement. However, Ms. Miller fails to consider that it is not just the **timing** of the commencement of the tenant relationships that is relevant but also the **ongoing participation by Dewberry Group in the tenant relationships** during the infringement period that matters when considering revenue enrichment received Dewberry Group.

70. The crux of Ms. Miller’s rebuttal is her supposition that once a rental or leasing agreement is executed with a tenant, the expected revenues are locked in for the term of the relationship with no ongoing involvement by Dewberry Group to secure or protect the revenue stream. This hypothesis is contradicted by disclosures, testimony and documents reviewed by, or available for inspection by, Ms. Miller prior to the is-

⁵⁹ Expert Report of Lisa G. Miller, April 2, 2021, 4.2.5.a.

suanance of her April 2, 2021 report. I discuss these disclosures, testimony and documents in Section IV above, which shows that Dewberry Group was, and is, involved in its relations with the properties and its tenants, and that the Infringing Marks have been incorporated into these interactions during the infringement period. As a result, Ms. Miller's analysis of infringing revenues is fatally flawed.

C. Revenues Pursuant to the Infringement Should be Limited to the Legal Entity Dewberry Group

71. Ms. Miller asserts that the damages analysis should only consider the legal entity Dewberry Group, the accounting for which is set forth in its tax returns:

“Bosco has ignored the facts of the case and erroneously assumed the named defendant in the Complaint, **Dewberry Group**, is a group of companies which include the properties (i.e., the individual LPs and LLCs) and Dewberry Group, [sic] Dewberry Group is a separate corporate entity and its revenue is earned through miscellaneous fees including management fees, accounting fees, development fees, licensing fees and leasing all associated with its management services activities for the development, leasing, and management of the properties acquired by John K. Dewberry.”⁶⁰

“The Complaint names solely Dewberry Group as the defendant, yet Bosco includes Dewberry Group entities which include other

⁶⁰ Expert Report of Lisa G. Miller, April 2, 2021, 4.2.1.a.

entities and an individual not named in the Complaint.”⁶¹

72. These statements appear to constitute legal opinions for which Ms. Miller does not cite to guidance from Dewberry Group’s counsel. They also ignore the fact that Dewberry Group’s business, including its alleged trademark infringement, is a unified business enterprise in which Dewberry Group plays a key, unifying role and in which the properties and property entities also play their defined roles in the operation. Thus, Ms. Miller is co-opting issues of fact with her own interpretation of what activities and actors are relevant or not relevant to adjudicating the matter.

73. Moreover, her over-arching statements ignore a number of relevant economic and accounting issues associated with such a limited scope of analysis:

- a. Ms. Miller is aware that the tax returns for Dewberry Group show an entity that has lost more than \$23 million since 1989 and more than \$1 million in each of the last six years. By any rational accounting standard, the Dewberry Group entity reflected in these tax returns is not a going concern. Unless John Dewberry believes that Dewberry Group is a charitable organization, it must be the case that the relevant economic entity includes more than just this single legal entity. This conclusion was confirmed by testimony by Dewberry Group executive vice president of finance John Freeman,⁶² whom Ms. Miller

⁶¹ Expert Report of Lisa G. Miller, April 2, 2021, 4.2.1.d.

⁶² Deposition of John Freeman (ROUGH), April 14, 2021, pp. 151-153. Mr. Freeman’s testimony is set forth in paragraph 18 above.

had discussions with prior to the issuance of her report.⁶³

- b. Ms. Miller represents that Dewberry Group's mission is to provide management services for the properties acquired by John K. Dewberry. Her characterization of the properties is factually incorrect; each property has its own legal artifice associated with their ownership, many of which have, during the infringement period, had partners apart from John Dewberry.
- c. Notwithstanding the previous point, if Ms. Miller believes that the properties are owned by John K. Dewberry, then why doesn't she note in her report that Dewberry Group is also owned by John Dewberry? And, given the common ownership and the fact that Dewberry Group only provides services to the properties, how can Ms. Miller argue that these are not related economic entities for purposes of their commercial endeavors?
- d. Dewberry Group's website lists the properties "purchased by John K. Dewberry" as part of Dewberry Group's holdings, just as Dewberry Capital did in its website prior to the name change.⁶⁴ The same is true of loan request packages submitted by Dewberry Group to obtain financing for commercial development

⁶³ Ms. Miller cites to conversations with Mr. Freeman in a number of places in the Expert Report of Lisa G. Miller, April 2, 2021, including footnotes 6, 8, 9, 28, 32, 34, 35 and 4.3.1.c.

⁶⁴ Pages from these websites were included as **Exhibit 9** and **Exhibit 10** of my March 1, 2021 expert report.

during the period of infringement—the properties are represented to be assets of Dewberry Group, not John Dewberry.⁶⁵ Ms. Miller considered these documents in preparing her report.

- e. Finally, the second quote cited in paragraph 11 of Ms. Miller’s report (section 4.2.1.d) makes no sense. How many Dewberry Group entities are there, and which ones reflect/do not reflect the Defendant?

74. Ultimately, the definition of the “Defendant” will be determined by the Court, as well as the scope of activities that are attributable to said Defendant. It is my opinion that, for purposes of considering damages in this matter, the legal entity Dewberry Group and the properties are co-dependent, economically related entities whose activities are coordinated by the same leader—John Dewberry—a portion of whose allocated costs (including Officer’s Salary, Dewberry Air—an aircraft owned by John Dewberry—and other “CO” or “Chairman’s Office” expenses) are included in the Dewberry Group tax returns and trial balance reports.

⁶⁵ Examples can be found in **Appendix A**. See, for example, 05_DG-0202455, pp. 27, 31, 34 and 35; 04_DG-0010585, pp. 35, 39, 41 and 43; 05_DG-0139392, pp. 39-50; 05_DG-0141379 (“Sponsorship” section); Package 05_DG-0183753 (same); and 05_DG-0148397 (same).

D. Management and Accounting Fees Received by Dewberry Group Should be Reduced to Reflect John Dewberry's Property Ownership Percentages

75. Ms. Miller notes in her report that I allocated a portion of the revenues earned by the property partnerships to Dewberry Group, reflecting the ownership share of each property held by John Dewberry. However, she opines that I erred in not also reducing the amount of management and accounting fee revenue Dewberry Group received from the properties to reflect only John Dewberry's ownership percentages. In fact, she cites this "error" on my part on at least five separate occasions in her report,⁶⁶ positioning it as one of her three summary opinions that she asserts reflect "a reasonable degree of professional certainty."⁶⁷

76. Ms. Miller's opinion is not only nonsensical from an accounting perspective, but she also fails to recognize that my treatment of the management and accounting fees received by the legal entity Dewberry Group is a logical extension of my allocation of the infringing revenue to Defendant, which was based on John Dewberry's ownership shares in the various entities. It is uncontroverted that the legal entity Dewberry Group accrued and received every dollar of management fees and accounting fees incurred by the properties for the services provided, and such amounts are recorded in the Trial Balance and Tax Return documents at amounts equal to the amounts authorized for payment via check requests prepared

⁶⁶ Expert Report of Lisa G. Miller, April 2, 2021: 2.4, 4.1.1.e (three times), and 4.2.3.a.

⁶⁷ Expert Report of Lisa G. Miller, April 2, 2021, 2.4.

by the individual properties.⁶⁸ John Dewberry owns 100% of Dewberry Group. Therefore, there is no need to reduce the management and accounting fees received by the legal entity Dewberry Group to reflect John Dewberry's ownership share.

77. Not only does Ms. Miller criticize my "failure" to allocate the fees directly received by the legal entity Dewberry Group to reflect John Dewberry's ownership shares in the various properties, but she also questions why I allocated the property revenues to Dewberry Group using John Dewberry's ownership shares to begin with:

"To allocate the revenue based on the ownership percentage would appear to mean that only a percentage of the property revenues stem from the use of the alleged infringing marks because Bosco only includes that in his revenue. This cannot be the case because the revenues all stem from the leasing activity."⁶⁹

". . . I do not agree with Bosco's approach to derive his property income"⁷⁰

"Bosco's use of the ownership percentage to apportion property income for the non-hotel properties is flawed for the reasons explained in 4.1(1)e above. Although Bosco appears to be attempting to apportion the revenue due to the use of the infringing marks, this approach disregards the nature of the revenues which

⁶⁸ I note that year-to-year variances may exist for some properties due to timing differences between the accrual and remittance of payments.

⁶⁹ Expert Report of Lisa G. Miller, April 2, 2021, 4.1.1.e, p. 9.

⁷⁰ Expert Report of Lisa G. Miller, April 2, 2021, 4.1.1.e, p. 9.

all stem from similar leasing activities. This revenue represents the revenue derived from the operations of these properties which are in the business of leasing office or retail space and would require a lease or agreement between the landlord and a tenant. That revenue is not likely impacted due any specific ownership interest, particularly when the leasing packages did not contain this information. Bosco has not explained why the ownership percentage has any effect on the revenue attributable to the marks.”⁷¹

78. I agree with Ms. Miller that all of the revenues generated by the properties are subject to infringement damages consideration if they are found to be the result of infringing acts committed by Defendant. As explained in detail, above, Dewberry Group was and is responsible for all of the property management and services (and employing virtually all of the employees who perform such services) necessary to generate all the revenues from the various commercial properties, and it did so using the Infringing Marks. Moreover, as I made clear in my March 1, 2021 expert report, the additional key driver of my theory of infringement damages—the reason that the legal entity Dewberry Group and the properties are able to operate as a single, interdependent economic enterprise—is the common control exerted by John Dewberry. As such, I have only considered as unjust enrichment the portion of the total revenues accruing to John Dewberry, the sole owner of Defendant, as opposed to any other property investors who may or may

⁷¹ Expert Report of Lisa G. Miller, April 2, 2021, 4.2.6.a.

not have actively participated in Defendant's infringing activities.⁷²

E. Ms. Miller Excludes Property-Sourced Parking Revenue From Damages Consideration Without Support

79. Ms. Miller discusses in her report that revenues were earned by the properties associated with the provision of parking services. Ms. Miller opines that such revenues should be excluded in their entirety from damages consideration, however, no underlying analysis is provided, other than her noting that some of the revenue is generated from tenants at the properties. The excluded revenues appear as categories in the column headings listed in Attachment 3A (2019) and Attachment 3B (2020)⁷³ of Ms. Miller's report under the following labels:

- Parking Convenience for non-tenant
- Parking Rent—Monthly Tenants
- Parking—Transient
- Parking—Validation
- Parking—Valet Services

⁷² This criticism by Ms. Miller has little practical significance. Documents in the record show that, with the exception of the hotel and the Dorchester Square property, John Dewberry owns between 95% and 100% of the shares of the other properties where the Infringing Marks have been used. See DG's Ownership Percentages Spreadsheet 02_DG-0007206. Further, Mr. Freeman has testified that John Dewberry, as of April 2021, had bought out investors at all non-hotel properties except for Dorchester Square. Deposition of John Freeman, April 14, 2021, p. 10.

⁷³ Ms. Miller has not produced an attachment depicting an analysis for 2018.

- Parking—Other Income

80. John Dewberry testified that Dewberry Group employees are utilized in the provision of all parking services, including value—none of it is outsourced:

Q. All right. And let me see here. Just so I am clear in terms of the—not necessarily titles or positions but in terms of the basic types of services and what the company does now versus what Dewberry Capital did back say a dozen years ago or so it's relatively similar in terms of the services that are being provided?

A. We probably add parking. **We run our own parking as well.** We actually run our own valet. We are a hospitality company even if you are in an office setting. If you show up at our building today at Peachtree Pointe not during COVID but we will park your car for you and the ambassadors as we call them will walk you to you know if it's late at night you know we will our ambassadors which are really secure guards but we call them asbestos ambassadors because I say whether or not they are securing highway don't they help pick pickup truck trash and make it's clean and speak to the guest we will walk you to your car we will value late it for you we run full-time valet at our office building. I don't know anybody is do that anywhere so we are basically a hospitality company. When you get on our property we want to look after you and so we probably did not have that. I know we didn't at the time of 2004. **We were doing some parking, yeah, we were probably doing the parking in this building** which

we only had one building at the time because I think that before or right as we were starting 2 Peachtree Pointe if that article is 2004 I don't think we opened 2 and the Invesco tower until 06, 07 but yeah so that's expanded and **I know we are doing the parking and whatever is related to parking and again that falls under Kim [Lavigne]**. She is a pretty amazing gal.⁷⁴ [emphasis added]

81. Loan request and leasing packages list parking as a feature in Dewberry Group's property descriptions. Examples are included in **Appendix A**.⁷⁵

82. There are also examples of Dewberry Group using signage incorporating the Infringing Marks at its property parking facilities. Examples are listed below:

- As discussed in paragraph 23, Ms. Lavigne testified that Dewberry Group ran a shuttle with the Dewberry Group mark on it to transport corporate tenants from the Campanile building to a surface parking lot (possibly Dewberry 10th Street) or lunch stops. A photo of the shuttle with the Infringing Marks is provided in 05_DG-0257937. Depictions of parking facility signage at Campanile contain the Infringing Marks.⁷⁶

⁷⁴ Deposition of John Dewberry (ROUGH), April 14, 2021, pp. 26-27.

⁷⁵ See, for example, 05_DG-0148397 (pages 05_DG-0148401 and 20-21); 05_DG-0205714 (page DG-0205716); and 05_DG-0192031 (page DG-0192036).

⁷⁶ 02_DG-0007122 and 02_DG-0007123.

- In November 2018, an email to Ms. Lavigne advises that Dewberry Group valet signs are ready to be printed for Peachtree Pointe; attachments to the email showed depictions of the signs with the Infringing Marks.⁷⁷ Dewberry Group's Supplemental Responses to Plaintiff's Interrogatories, No. 10, states that, "The D DEWBERRY GROUP and D DEWBERRY OFFICE Marks have been used since the Winter of 2018-Early 2019 at Peachtree Pointe (Peachtree Pointe Property, LLC, Atlanta, GA) on signage."
- Dewberry Group's Supplemental Responses to Plaintiff's Interrogatories, No. 10, states that, "The D DEWBERRY GROUP and D DEWBERRY LIVING Mark has been used since on or about the Fall/Winter 2018 in connection with Oyster Park (Mt. Pleasant Square Associates, LLC; Mt. Pleasant Square Associates II, LLC, d/b/a Oyster Park, Mt. Pleasant, SC) on signage."
- A document titled "Studio Dewberry Projects Status Report" and dated January 1, 2020 lists, under Project "DEW GROUP RE-BRANDING," Property "ALL," that, "DEWBERRY-BRANDED VALET ACTIVATED IN OCTOBER [2019]."⁷⁸

83. The aforementioned testimony, loan request packages, leasing packages and signage examples counter Ms. Miller's contention that parking revenue should be excluded from damages consideration.

⁷⁷ 05_DG-0253643.

⁷⁸ 04_DG-0009279.

F. Ms. Miller Excludes All Revenues Earned by the Legal Entity Dewberry Group From Damages Consideration Due to a Flawed Emphasis on “Sales” Rather Than “Services”

84. Ms. Miller dedicates a single paragraph of her report to a discussion of the eligibility of revenue generated by the legal entity Dewberry Group for infringement damages:

“For the reasons explained in 4.2 (4.), revenue that Bosco attributed to Dewberry Group specifically and not the properties should be excluded in its entirety since it flowed from leasing activity which I identified and determined should be excluded in large part due to lease commencement/communication dates, outside parking by non-tenants, and income from related Dewberry entities or service providers based on my analyses on Attachment 3A, 3B, and 4A-4I.”⁷⁹

85. As I discussed earlier in this Supplemental Report, Ms. Miller’s theory for determining the eligibility of revenue during the infringement period fails due to her emphasis on new or incremental sales (i.e., rental agreements with new tenants) during the infringement period rather than focusing on Dewberry Group’s service mission to its properties and their tenants and guests, which was continuous throughout the infringement period and which include numerous admissions that such services included interactions with existing tenants. Moreover, the interactions included documentation that contained the Infringing

⁷⁹ Expert Report of Lisa G. Miller, April 2, 2021, 4.2.5.a.

Marks. As such, Ms. Miller has not provided a reasonable basis to conclude that the revenues reported by the legal entity Dewberry Group in its tax returns and trial balances should be excluded from damages consideration in their entirety.

G. Ms. Miller Assumes that the Full Absorption Expense Approach is Applicable in This Matter Based on a Single Court Case with a Different Set of Damages Circumstances

86. Ms. Miller assumes the full-absorption approach should be used to identify the breadth of expenses to be deducted from infringing revenues to derive damages. As discussed in Section VI.B, I have established that Ms. Miller's opinion is not supported by her limited reference to a single, 34-year-old court decision, which she apparently did not read, that contains a different damages fact set than exists here. Moreover, I have identified a case decided in this Court that did not adopt the full-absorption approach in identifying offsetting expenses. Thus, in my opinion she has not met her professional burden to provide a defensible analysis of expenses attributable to the alleged infringing revenue.

87. Even if the full-absorption approach were found to be relevant to this matter, Ms. Miller has failed to evaluate the expenses associated with the legal entity Dewberry Group to isolate revenue-generating expenses from expenses incurred to provide services to John Dewberry personally, his foundation, and his other non-revenue generating endeavors (see discussion in Section VI.B). Thus, in my opinion Ms. Miller has not met her professional burden with regard to this part of the expense inquiry.

H. Ms. Miller Has Not Calculated Defendant's Profits

88. Ms. Miller states, in Section 4.3.1.a of her report, the following:

“Based on my analysis of revenues described above, I have provided basis and reasons for the *exclusion from revenues* I have determined which results in **no revenues** left that apply to the alleged use of the marks. See Attachment 3A and 3B for years 2019 through 2020 (and apply to 2018) which have identified the reasons for exclusion which is based on the total income of the property for each year. Therefore, I am not calculating defendant's profits at this time.”

89. Notwithstanding the arguments and bases I have set forth in my March 1, 2021 expert report and throughout this Supplemental Report suggesting that her conclusions regarding the total ineligibility of Dewberry Group's revenues from damages consideration are flawed, I note the following shortcomings in Ms. Miller's remarks in this section of her report.

90. Ms. Miller admits, in Section 4.2.7.a of her report, that “I have not been asked to evaluate the revenue Bosco claims for Dewberry Charleston.” She then appears to perform an evaluation of said revenue. It is not clear to me whether she is representing that she has nonetheless performed a sufficient professional inquiry into the matter or whether she is simply casting aspersions on my analysis based on some observations. Whichever it is, she has made some specious comments:

- a. **“It is still not clear if Bosco did his own analysis to identify the properties to include in his analysis independently or was provided the information by Counsel to use Dewberry Charleston.”** As I have discussed in Section VII.A, we were provided documents from Counsel related to Dewberry Group’s use of the Infringing Marks. We reviewed those documents as well as other documents in our possession, and created **Appendix A**, which includes a summary that lists the uses of the Infringing Marks we observed by property, with references, as well as attaching the underlying sources. I did not opine as to whether each document evidenced an alleged infringing act, as that would have entailed performing a liability analysis—which I have stated was not part of my scope of work in this matter.
- b. **“Bosco’s Appendix A lists Dewberry Charleston being identified with leasing packets where the marks were used. His reliance on this seems misplaced since a hotel guest would not view those items.”** While a hotel guest may indeed not review a leasing packet when choosing to stay at the Dewberry Charleston, Ms. Miller cannot deny that the leasing packets reflect attempts by Dewberry Group to conduct commercial activity with interested parties that involved the hotel and the use of the Infringing Marks. She also fails to acknowledge that there was also a loan request package discussed in 2019 regarding a refinancing of the hotel, which

John Freeman testified about.⁸⁰ Whether guests stayed at the hotel because they saw the leasing packets is not determinative of whether infringing activity may have taken place. Again, this is a liability issue that Ms. Miller is co-opting by applying her personal judgment.

- c. **“Additionally, Bosco has failed to acknowledge there was existing, regular revenue earned prior to the alleged infringement date of September 2018, similar to the flaw in his non-hotel analysis of property revenues discussed above”** The premise of her non-hotel exclusion analysis was that customer relationships commenced prior to the first use date. That is clearly not the case with the hotel, for which most of its clients have relationships that span days rather than years. Even if her non-hotel premise is found to have merit by the Court, it has no natural correlation with regard to the hotel.
- d. **“Bosco’s assumption is that the Dewberry Groups’ commercial dealings serve as a conduit for the infringement. However, the Dewberry Group received no management fee with regard to Dewberry Charleston, unlike with the non-hotel properties.”** Had Ms. Miller included the hotel in her discussions with Mr. Freeman, she would have learned that Dewberry

⁸⁰ Deposition of John Freeman (ROUGH), April 14, 2021, pp. 119-121 and Exhibits 674-675.

Group does provide services to the hotel, including regular reporting to investors about what is going on with the financials,⁸¹ even though no fees appear to have been recorded in Dewberry Group's Trial Balances. Notwithstanding this fact, Ms. Miller's rejection of Counsel's commercial dealings as a conduit for the infringement theory is opinion related to a legal issue that should not be considered as authoritative rebuttal based on Ms. Miller's stated areas of expertise.

VIII. Concluding Remarks

91. Expert discovery is ongoing. Should new information become available, I may amend or supplement this report as appropriate. I also reserve the right to respond to any arguments that may be advanced relating to the subject matter of my opinions. Finally, Counsel may ask me to perform or evaluate additional analyses, particularly in response to any testimony issued by Defendant's expert.

⁸¹ Deposition of John Freeman (ROUGH), April 14, 2021, p. 10. See also 05_DG-0027565 (October 2019 email correspondence, using infringing marks, from Dewberry Group's Director of Branding, Elizabeth Armstrong, to The Dewberry Hotel's investors sending Q3-2019 Owners' report and describing details of forthcoming refinancing of existing loan on the property). In her deposition, Ms. Armstrong also acknowledged that, though employed solely by Dewberry Group she is responsible for communicating with the Hotel's investors with regard to loan refinancings (i.e., loan request packages) being pursued for the hotel. See Deposition of Elizabeth Armstrong (ROUGH), April 7, 2021, pp. 1, 232-236.

**Revenue From Dewberry Group Properties
Using the Infringing Marks: 2018**

ID	Property Name	First Use of Marks
188	Dewberry 10th Street	Sep 2018
200	Dorchester Square	Sep 2018
210, 215, 235	Mt. Pleasant Square	Nov 2017
240	Roosevelt Square	Sep 2018
270	Belle Isle	Mar 2018
300	Dewberry Juniper	Sep 2018
870	Dewberry Ansley	Sep 2018
520	1155 Peachtree/ Campanile	Feb 2018
600, 610, 625	Peachtree Pointe/ Gallery Uptown	Sep 2018
450	The Dewberry Charleston Hotel	Sep 2018

		A
ID	Property Name	Not Included in Dewberry Capital Tax Returns
		Property Income Not Included Dewberry Capital Financials
188	Dewberry 10th Street	\$1,169,231
200	Dorchester Square	1,085,147
210, 215, 235	Mt. Pleasant Square	1,554,154
240	Roosevelt Square	3,945,909
270	Belle Isle	1,313,054
300	Dewberry Juniper	775,255
870	Dewberry Ansley	245,594
520	1155 Peachtree/ Campanile	7,002,467
600, 610, 625	Peachtree Pointe/ Gallery Uptown	11,932,412
450	The Dewberry Charleston Hotel	19,074,570
Total		\$48,097,793

ID	Property Name	B
		Not Included in Dewberry Capital Tax Returns
		Property Income Allocated Based on First Use of Marks
188	Dewberry 10th Street	\$292,308
200	Dorchester Square	271,287
210, 215, 235	Mt. Pleasant Square	1,554,154
240	Roosevelt Square	986,477
270	Belle Isle	984,791
300	Dewberry Juniper	193,814
870	Dewberry Ansley	61,399
520	1155 Peachtree/ Campanile	5,835,389
600, 610, 625	Peachtree Pointe/ Gallery Uptown	2,983,103
450	The Dewberry Charleston Hotel	5,664,933
Total		\$18,827,654

		C
ID	Property Name	Not Included in Dewberry Capital Tax Returns
		John Dewberry Ownership Marks
188	Dewberry 10th Street	100.00%
200	Dorchester Square	81.00%
210, 215, 235	Mt. Pleasant Square	95.00%
240	Roosevelt Square	95.00%
270	Belle Isle	95.00%
300	Dewberry Juniper	100.00%
870	Dewberry Ansley	100.00%
520	1155 Peachtree/ Campanile	100.00%
600, 610, 625	Peachtree Pointe/Gallery Up- town	98.00%
450	The Dewberry Charleston Hotel	75.00%

		D = B x C
ID	Property Name	Not Included in Dewberry Capital Tax Returns
		Share Dewberry Group
188	Dewberry 10th Street	\$292,308
200	Dorchester Square	219,742
210, 215, 235	Mt. Pleasant Square	1,476,446
240	Roosevelt Square	937,153
270	Belle Isle	935,551
300	Dewberry Juniper	193,814
870	Dewberry Ansley	61,399
520	1155 Peachtree/ Campanile	5,835,389
600, 610, 625	Peachtree Pointe/ Gallery Uptown	2,923,441
450	The Dewberry Charleston Hotel	4,248,700
Total		\$ 17,123,943

		E
ID	Property Name	Included in Dewberry Capital Tax Returns
		Manage- ment Fees
188	Dewberry 10th Street	\$17,564
200	Dorchester Square	12,810
210, 215, 235	Mt. Pleasant Square	65,246
240	Roosevelt Square	52,272
270	Belle Isle	42,107
300	Dewberry Juniper	4,709
870	Dewberry Ansley	2,621
520	1155 Peachtree/ Campanile	173,469
600, 610, 625	Peachtree Pointe/ Gallery Uptown	97,811
450	The Dewberry Charleston Hotel	—
Total		\$468,609

		F
ID	Property Name	Included in Dewberry Capital Tax Returns
		Accounting Fees
188	Dewberry 10th Street	\$1,500
200	Dorchester Square	3,600
210, 215, 235	Mt. Pleasant Square	32,400
240	Roosevelt Square	6,000
270	Belle Isle	15,300
300	Dewberry Juniper	1,000
870	Dewberry Ansley	2,100
520	1155 Peachtree/ Campanile	15,000
600, 610, 625	Peachtree Pointe/ Gallery Uptown	10,500
450	The Dewberry Charleston Hotel	—
Total		\$87,400

		G = D + E + F
ID	Property Name	Included in Dewberry Capital Tax Returns
		Total Revenue to Dewberry Group
188	Dewberry 10th Street	\$311,372
200	Dorchester Square	236,152
210, 215, 235	Mt. Pleasant Square	1,574,092
240	Roosevelt Square	995,425
270	Belle Isle	992,958
300	Dewberry Juniper	199,522
870	Dewberry Ansley	66,120
520	1155 Peachtree/ Campanile	6,023,858
600, 610, 625	Peachtree Pointe/ Gallery Uptown	3,031,752
450	The Dewberry Charleston Hotel	4,248,700
Total		\$17,679,951

Source For Property. Income Not Included in Dewberry Capital Financials

Exhibit 3.2. Allocation calculated based on number of months, except for Hotel, which comes from Exhibit 3 of Bosco Report dated March 1, 2021.

Source For John Dewberry Ownership Percentages:

04_DG-0009306 (Site 210 is 95% ownership and Site 215 and 235 are both 99.35% ownership. However, for purposes of this analysis, 95% is used).

Source For Management Fees and Accounting Fees

Exhibit 3 of Bosco Report dated March 1, 2021. These amounts are based on the first use of marks.

Revenue From Dewberry Group Properties
Using the Infringing Marks: 2019

ID	Property Name	First Use of Marks
188	Dewberry 10th Street	Sep 2018
200	Dorchester Square	Sep 2018
210, 215, 235	Mt. Pleasant Square	Nov 2017
240	Roosevelt Square LLP	Sep 2018
270	Belle Isle	Mar 2018
300	Dewberry Juniper	Sep 2018
870	Dewberry Ansley	Sep 2018
520	1155 Peachtree/ Campanile	Feb 2018
600, 610, 625	Peachtree Pointe/ Gallery Uptown	Sep 2018
450	The Dewberry Charleston Hotel	Sep 2018

		A
ID	Property Name	Not Included Dewberry Capital Tax Returns
		Property Income Not Included in Dewberry Capital Financials
188	Dewberry 10th Street	\$1,764,554
200	Dorchester Square	1,157,298
210, 215, 235	Mt. Pleasant Square	1,586,491
240	Roosevelt Square	4,133,223
270	Belle Isle	1,142,177
300	Dewberry Juniper	749,614
870	Dewberry Ansley	249,997
520	1155 Peachtree/ Campanile	4,728,288
600, 610, 625	Peachtree Pointe/ Gallery Uptown	14,865,442
450	The Dewberry Charleston Hotel	20,560,035
Total		\$50,937,118

		B
ID	Property Name	Not Included Dewberry Capital Tax Returns
		John Dew- berry Own- ership Marks
188	Dewberry 10th Street	100.00%
200	Dorchester Square	81.00%
210, 215, 235	Mt. Pleasant Square	95.00%
240	Roosevelt Square	95.00%
270	Belle Isle	95.00%
300	Dewberry Juniper	100.00%
870	Dewberry Ansley	100.00%
520	1155 Peachtree/ Campanile	100.00%
600, 610, 625	Peachtree Pointe/ Gallery Uptown	98.00%
450	The Dewberry Charleston Hotel	75.00%

		C = A x B
ID	Property Name	Not Included Dewberry Capital Tax Returns
		Share to Dewberry Group
188	Dewberry 10th Street	\$1,764,554
200	Dorchester Square	937,411
210, 215, 235	Mt. Pleasant Square	1,507,166
240	Roosevelt Square	3,926,562
270	Belle Isle	1,085,068
300	Dewberry Juniper	749,614
870	Dewberry Ansley	249,997
520	1155 Peachtree/ Campanile	4,728,288
600, 610, 625	Peachtree Pointe/ Gallery Uptown	14,568,133
450	The Dewberry Charleston Hotel	15,420,026
Total		\$44,936,820

		D
ID	Property Name	Included in Dewberry Capital Tax Returns
		Manage- ment Fees
188	Dewberry 10th Street	\$67,466
200	Dorchester Square	44,682
210, 215, 235	Mt. Pleasant Square	63,282
240	Roosevelt Square	158,851
270	Belle Isle	48,409
300	Dewberry Juniper	23,365
870	Dewberry Ansley	10,613
520	1155 Peachtree/ Campanile	146,748
600, 610, 625	Peachtree Pointe/ Gallery Uptown	448,277
450	The Dewberry Charleston Hotel	—
Total		\$44,936,820

ID	Property Name	E
		Included in Dewberry Capital Tax Returns
		Accounting Fees
188	Dewberry 10th Street	\$6,000
200	Dorchester Square	14,400
210, 215, 235	Mt. Pleasant Square	32,400
240	Roosevelt Square	30,000
270	Belle Isle	20,400
300	Dewberry Juniper	5,800
870	Dewberry Ansley	8,400
520	1155 Peachtree/ Campanile	18,000
600, 610, 625	Peachtree Pointe/ Gallery Uptown	42,000
450	The Dewberry Charleston Hotel	—
Total		\$177,400

		F = C + D + E
ID	Property Name	Total Revenue to Dewberry Group
188	Dewberry 10th Street	\$1,838,020
200	Dorchester Square	996,494
210, 215, 235	Mt. Pleasant Square	1,602,848
240	Roosevelt Square	4,115,413
270	Belle Isle	1,153,877
300	Dewberry Juniper	778,779
870	Dewberry Ansley	268,010
520	1155 Peachtree/ Campanile	4,893,036
600, 610, 625	Peachtree Pointe/ Gallery Uptown	15,058,410
450	The Dewberry Charleston Hotel	15,420,026
Total		\$46,125,912

Source For Property Income Not Included in Dewberry Capital Financials

Exhibit 4.2

Source For John Dewberry Ownership Percentages:

04_DG-0009306 (Site 210 is 95% ownership and Site 215 and 235 are both 99.35% ownership. However, for purposes of this analysis, 95% is used).

Source For Management Fees and Accounting Fees

Exhibit 4 of Bosco Report dated March 1, 2021.

Revenue From Dewberry Group Properties
Using the Infringing Marks: 2020

ID	Property Name	First Use Of Marks
188	Dewberry 10th Street	Sep 2018
200	Dorchester Square	Sep 2018
210, 215, 235	Mt. Pleasant Square	Nov 2017
240	Roosevelt Square LLP	Sep 2018
270	Belle Isle	Mar 2018
300	Dewberry Juniper	Sep 2018
870	Dewberry Ansley	Sep 2018
520	1155 Peachtree/ Campanile	Feb 2018
600, 610, 625	Peachtree Pointe/ Gallery Uptown	Sep 2018
450	The Dewberry Charleston Hotel	Sep 2018

		A
ID	Property Name	Not Included Dewberry Capital Tax Returns
		Property Income Not Included in Dewberry Capital Financials
188	Dewberry 10th Street	\$1,539,403
200	Dorchester Square	1,051,428
210, 215, 235	Mt. Pleasant Square	1,735,161
240	Roosevelt Square	3,935,443
270	Belle Isle	764,926
300	Dewberry Juniper	392,197
870	Dewberry Ansley	251,430
520	1155 Peachtree/ Campanile	5,883,630
600, 610, 625	Peachtree Pointe/ Gallery Uptown	16,315,905
450	The Dewberry Charleston Hotel	8,783,992
Total		\$40,653,516

		B
ID	Property Name	Not Included Dewberry Capital Tax Returns
		John Dewberry Ownership Marks
188	Dewberry 10th Street	100.00%
200	Dorchester Square	81.00%
210, 215, 235	Mt. Pleasant Square	95.00%
240	Roosevelt Square	95.00%
270	Belle Isle	95.00%
300	Dewberry Juniper	100.00%
870	Dewberry Ansley	100.00%
520	1155 Peachtree/ Campanile	100.00%
600, 610, 625	Peachtree Pointe/ Gallery Uptown	98.00%
450	The Dewberry Charleston Hotel	75.00%

		C = A x B
ID	Property Name	Not Included Dewberry Capital Tax Returns
		Share to Dewberry Group
188	Dewberry 10th Street	\$1,539,403
200	Dorchester Square	851,657
210, 215, 235	Mt. Pleasant Square	1,638,403
240	Roosevelt Square	3,738,671
270	Belle Isle	726,679
300	Dewberry Juniper	392,197
870	Dewberry Ansley	251,430
520	1155 Peachtree/ Campanile	5,883,630
600, 610, 625	Peachtree Pointe/ Gallery Uptown	15,989,587
450	The Dewberry Charleston Hotel	6,587,994
Total		\$37,609,652

		D
ID	Property Name	Included in Dewberry Capital Tax Returns
		Manage- ment Fees
188	Dewberry 10th Street	\$64,350
200	Dorchester Square	44,609
210, 215, 235	Mt. Pleasant Square	74,731
240	Roosevelt Square	166,328
270	Belle Isle	39,108
300	Dewberry Juniper	17,956
870	Dewberry Ansley	10,980
520	1155 Peachtree/ Campanile	192,530
600, 610, 625	Peachtree Pointe/ Gallery Uptown	491,688
450	The Dewberry Charleston Hotel	—
Total		\$44,936,820

ID	Property Name	E
		Included in Dewberry Capital Tax Returns
		Accounting Fees
188	Dewberry 10th Street	\$6,000
200	Dorchester Square	14,400
210, 215, 235	Mt. Pleasant Square	32,400
240	Roosevelt Square	36,000
270	Belle Isle	20,400
300	Dewberry Juniper	6,000
870	Dewberry Ansley	8,400
520	1155 Peachtree/ Campanile	18,000
600, 610, 625	Peachtree Pointe/ Gallery Uptown	42,000
450	The Dewberry Charleston Hotel	—
Total		\$183,600

		F = C + D + E
ID	Property Name	Total Revenue to Dewberry Group
188	Dewberry 10th Street	\$1,609,753
200	Dorchester Square	910,466
210, 215, 235	Mt. Pleasant Square	1,755,534
240	Roosevelt Square	3,940,999
270	Belle Isle	7886,188
300	Dewberry Juniper	416,154
870	Dewberry Ansley	270,810
520	1155 Peachtree/ Campanile	6,094,160
600, 610, 625	Peachtree Pointe/ Gallery Uptown	16,523,994
450	The Dewberry Charleston Hotel	6,587,994
Total		\$38,895,332

Source For Property Income Not Included in Dewberry Capital Financials

Exhibit 5.2

Source For John Dewberry Ownership Percentages:

04_DG-0009306 (Site 210 is 95% ownership and Site 215 and 235 are both 99.35% ownership. However, for purposes of this analysis, 95% is used).

Source For Management Fees and Accounting Fees

Exhibit 5 of Bosco Report dated March 1, 2021.

Account Number	Account Title	2018
	Total Revenue	\$(2,882,427.19)
5496-000	Valet Wages	-
4850-000	Investment Gain/(Loss)	-
5110-000	Custodial - Supplies	-
5650-000	Insur - Prop & Liab.	79,876.25
5802-000	Payroll Tax Expense	-
5841-000	Telephone Expense	-
5842-000	Office Supplies	-
5850-000	Travel Expenses	-
6275-000	Building - Other Maintenance	-
6814-000	Bank Charges	-
6820-000	Business License/Permits	-
6823-000	Legal Fees	-
6829-000	Accounting/Tax Preparation Fees	-
6831-000	Courier/Postage	-
6833-000	Other Taxes and Licenses	-

Account Number	Account Title	2018
6836-000	Other Expenses	-
6890-070	Computer Hardware/ Software	-
6850-000	Travel Expenses	-
7020-000	Salaries & Wages	46,175.00
7020-010	Salaries & Wages - PM	152,222.08
7020-020	Salaries & Wages - LE	191,459.07
7020-030	Salaries & Wages - FIN	656,414.11
7020-040	Salaries & Wages - DEV	693,980.40
7020-050	Salaries & Wages - CO	531,203.02
7025-020	Salaries - Commissions - LE	-
7030-000	Payroll Tax Expense	11,598.76
7030-010	Payroll Tax Expense - PM	9,538.90
7030-020	Payroll Tax Expense - LE	11,974.32

Account Number	Account Title	2018
7030-030	Payroll Tax Expense - FIN	42,082.12
7030-040	Payroll Tax Expense - DEV	42,275.88
7030-050	Payroll Tax Expense - CO	34,175.33
7040-000	401K Employer Match	-
7040-010	401K Employer Match - PM	-
7040-020	401K Employer Match - LE	-
7040-030	401K Employer Match - FIN	-
7040-040	401K Employer Match - DEV	-
7040-050	401K Employer Match - CO	-
7045-000	401K Employer Costs	10,800.00
7050-000	Group Health Insurance	136,236.80
7050-050	Group Health Insurance - CO	-
100-7028.000	Medcom HRA use	2,420.00

Account Number	Account Title	2018
100-7039.000	Disability Ina S/T & L/T	(81,139.40)
7051-000	HSA Employer Costs	-
7052-000	HRA Employer Costs	-
100-7060.000	Payroll Benefits Allocate	30,400.88
100-7060.010	Payroll Benefits - PM	5,212.49
100-7060.020	Payroll Benefits - LE	7,561.78
100-7060.030	Payroll Benefits - FIN	24,001.17
100-7060.040	Payroll Benefits - DEV	5,485.04
100-7060.050	Payroll Benefits - CO	4,411.45
7070-000	Payroll Fees	-
7080-000	Training	-
7080-010	Training - PM	-
7080-020	Training - LE	-
7080-030	Training - FIN	-
7110-000	Meals and Entertainment	25,309.03

Account Number	Account Title	2018
7110-030	Meals and Entertainment - FIN	1,412.09
7110-040	Meals and Entertainment - DEV	370.14
7115-000	Meals and Entertainment - 100 percent	-
100-7100.050	Meals & Entertain - CO	15,068.50
100-7110.000	Travel/Mileage Expense	2,006.00
7120-000	Travel	843.53
7120-020	Travel - LE	724.39
7120-030	Travel - FIN	3,528.04
7120-040	Travel - DEV	3,585.77
7120-050	Travel - Dew Air - CO	605,000.00
100-7120.030	FIN - Auto	381.69
100-7120.040	Auto - DEV	382.29
100-7120.050	Auto - CO	207.91

Account Number	Account Title	2018
100-7130.000	Parking Fees	12.00
100-7130.010	Parking Fees-PM	5,819.00
100-7130.020	Parking Fees-LE	2,840.00
100-7130.030	Parking Fees-FI	7,282.00
100-7130.040	Parking Fees-DEV	4,048.00
100-7130.050	Parking Fees-CO	5,566.00
7210-000	Rent	209,097.38
100-7190.020	Commission Exp-LE	110,313.76
7212-000	Office Supplies	13,276.92
7230-000	Kitchen Supplies	6,838.97
7240-000	Postage	3,081.17
7245-000	Express Mail	2,518.76
7250-000	Offsite Storage	11,059.90
7300-000	Telephone Expense	8,880.74
7301-000	Cell Phone	-
7301-090	Cell Phone - JKD - CO	4,288.64

Account Number	Account Title	2018
7310-000	Network Maintenance	13,134.32
	PC Maintenance	1,078.43
7325-000	Computer Hardware	-
7330-000	Software Programs	22,399.35
	Copier Maintenance	13.91
7340-000	Copier Rental	9,686.33
7360-000	Outside Printing	-
7410-000	Legal Fees	20,477.89
100-7400.030	Legal Fees - FIN	790.64
7410-050	Legal Fees - CO	-
7420-000	Consulting Fees	-
100-7410.030	Consulting Fee-FIN	19,778.80
100-7420.000	Accounting/ Tax Fees	220.40
7430-000	Accounting/ Tax Fees - FIN	4,000.00
100-7440.000	Payroll Service Fees	11,744.03
100-7500.000	PC Supplies	367.40

Account Number	Account Title	2018
7510-000	Marketing Expense	12,908.26
7511-000	DCC Leasing Expense	-
7520-000	Website Expense	25,783.64
7530-000	Dues	-
7540-000	Gifts and Flowers	1,100.05
100-7650.000	Political Contributions	5,000.00
100-7700.020	Seminars & Meeting - LE	75.00
100-7700.030	Seminars & Meeting - FI	3,448.00
	Dues	7,360.00
	Subscriptions	1,514.12
7610-000	Taxes and Licenses	-
7610-100	Federal Income Tax	-
7610-300	FICA Taxes	-
7610-400	Property Taxes	-
7610-700	Business License/Permits	4,251.65
100-7760.000	Personal Property/Net Wo	2,834.77

Account Number	Account Title	2018
7610-900	Other Taxes and Licenses	-
7620-001	Insurance - Liability	-
7625-900	Health Insurance Premium - JKD	-
100-7770.000	Other Taxes & Licenses	919.00
7635-000	Bank Fees	10,837.99
7639-000	Other Expenses	-
7693-000	Personal Expense	-
8888-888	1099 Suspense Account	-
Total Expenses		3,881,832.05
(Net Profit) / Net Loss		999,404.86

Account Number	Account Title	2019
	Total Revenue	\$(2,268,896.61)
5496-000	Valet Wages	62.00
4850-000	Investment Gain/(Loss)	-
5110-000	Custodial - Supplies	-
5650-000	Insur - Prop & Liab.	-
5802-000	Payroll Tax Expense	-
5841-000	Telephone Expense	-
5842-000	Office Supplies	154.20
5850-000	Travel Expenses	-
6275-000	Building - Other Maintenance	-
6814-000	Bank Charges	-
6820-000	Business License/ Permits	-
6823-000	Legal Fees	6,639.50

Account Number	Account Title	2019
6829-000	Accounting/Tax Preparation Fees	-
6831-000	Courier/Postage	-
6833-000	Other Taxes and Licenses	-
6836-000	Other Expenses	23,066.38
6890-070	Computer Hardware/Software	-
6850-000	Travel Expenses	-
7020-000	Salaries & Wages	9,042.04
7020-010	Salaries & Wages - PM	120,850.94
7020-020	Salaries & Wages - LE	193,388.81
7020-030	Salaries & Wages - FIN	614,077.32
7020-040	Salaries & Wages - DEV	649,425.74
7020-050	Salaries & Wages - CO	447,519.21

Account Number	Account Title	2019
7025-020	Salaries - Commissions - LE	18,525.16
7030-000	Payroll Tax Expense	39,685.93
7030-010	Payroll Tax Expense - PM	8,624.23
7030-020	Payroll Tax Expense - LE	13,751.86
7030-030	Payroll Tax Expense - FIN	41,086.50
7030-040	Payroll Tax Expense - DEV	43,840.05
7030-050	Payroll Tax Expense - CO	23,540.06
7040-000	401K Employer Match	(158.77)
7040-010	401K Employer Match - PM	2,998.08
7040-020	401K Employer Match - LE	4,528.66
7040-030	401K Employer Match - FIN	17,761.63
7040-040	401K Employer Match - DEV	5,216.54
7040-050	401K Employer Match - CO	-

Account Number	Account Title	2019
7045-000	401K Employer Costs	10,281.00
7050-000	Group Health Insurance	107,616.81
7050-050	Group Health Insurance - CO	-
100-7028.000	Medcom HRA use	-
100-7039.000	Disability Ina S/T & L/T	-
7051-000	HSA Employer Costs	2,333.38
7052-000	HRA Employer Costs	2,800.00
100-7060.000	Payroll Benefits Allocate	-
100-7060.010	Payroll Benefits - PM	-
100-7060.020	Payroll Benefits - LE	-
100-7060.030	Payroll Benefits - FIN	-
100-7060.040	Payroll Benefits - DEV	-
100-7060.050	Payroll Benefits - CO	-

Account Number	Account Title	2019
7070-000	Payroll Fees	20,550.95
7080-000	Training	725.00
7080-010	Training - PM	100.00
7080-020	Training - LE	945.00
7080-030	Training - FIN	3,657.57
7110-000	Meals and Entertainment	213.34
7110-030	Meals and Entertainment - FIN	1,537.53
7110-040	Meals and Entertainment - DEV	748.41
7115-000	Meals and Entertainment - 100 percent	171,957.41
100-7100.050	Meals & Entertain - CO	-
100-7110.000	Travel/Mileage Expense	-
7120-000	Travel	2,945.63
7120-020	Travel - LE	2,145.15
7120-030	Travel - FIN	2,940.26
7120-040	Travel - DEV	5,126.22
7120-050	Travel - Dew Air - CO	685,000.00

Account Number	Account Title	2019
100-7120.030	FIN - Auto	-
100-7120.040	Auto - DEV	-
100-7120.050	Auto - CO	-
100-7130.000	Parking Fees	-
100-7130.010	Parking Fees-PM	-
100-7130.020	Parking Fees-LE	-
100-7130.030	Parking Fees-FI	-
100-7130.040	Parking Fees-DEV	-
100-7130.050	Parking Fees-CO	-
7210-000	Rent	349,722.78
100-7190.020	Commission Exp-LE	
7212-000	Office Supplies	6,632.77
7230-000	Kitchen Supplies	4,790.39
7240-000	Postage	3,147.00
7245-000	Express Mail	2,124.72

Account Number	Account Title	2019
7250-000	Offsite Storage	18,228.65
7300-000	Telephone Expense	19,006.42
7301-000	Cell Phone	565.07
7301-090	Cell Phone - JKD - CO	2,288.94
7310-000	Network Maintenance	19,841.01
	PC Maintenance	-
7325-000	Computer Hardware	1,103.76
7330-000	Software Programs	53,816.04
	Copier Maintenance	-
7340-000	Copier Rental	10,441.31
7360-000	Outside Printing	205.82
7410-000	Legal Fees	58,723.41
100-7400.030	Legal Fees - FIN	-
7410-050	Legal Fees - CO	8,906.00
7420-000	Consulting Fees	68,496.20

Account Number	Account Title	2019
100-7410.030	Consulting Fee-FIN	-
100-7420.000	Accounting/ Tax Fees	-
7430-000	Accounting/ Tax Fees - FIN	34,854.25
100-7440.000	Payroll Service Fees	-
100-7500.000	PC Supplies	-
7510-000	Marketing Expense	675.00
7511-000	DCC Leasing Expense	1,308.00
7520-000	Website Expense	404.87
7530-000	Dues	8,544.00
7540-000	Gifts and Flowers	690.54
100-7650.000	Political Contributions	-
100-7700.020	Seminars & Meeting - LE	-
100-7700.030	Seminars & Meeting - FI	-
	Dues	-

Account Number	Account Title	2019
	Subscriptions	-
7610-000	Taxes and Licenses	200.00
7610-100	Federal Income Tax	-
7610-300	FICA Taxes	-
7610-400	Property Taxes	1,383.06
7610-700	Business License/ Permits	419.00
100- 7760.000	Personal Property/ Net Wo	-
7610-900	Other Taxes and Licenses	20.00
7620-001	Insurance - Liability	68,113.90
7625-900	Health Insurance Premium - JKD	-
100- 7770.000	Other Taxes & Licenses	-
7635-000	Bank Fees	7,105.67
7639-000	Other Expenses	264.41

Account Number	Account Title	2019
7693-000	Personal Expense	-
8888-888	1099 Suspense Account	-
Total Expenses		4,057,272.72
(Net Profit) / Net Loss		1,788,376.11

Account Number	Account Title	2020
	Total Revenue	\$(1,468,054.56)
5496-000	Valet Wages	-
4850-000	Investment Gain/(Loss)	52,474.30
5110-000	Custodial - Supplies	120.00
5650-000	Insur - Prop & Liab.	60,218.02
5802-000	Payroll Tax Expense	(794.90)
5841-000	Telephone Expense	1,136.82
5842-000	Office Supplies	383.65
5850-000	Travel Expenses	-
6275-000	Building - Other Maintenance	-
6814-000	Bank Charges	5,558.11
6820-000	Business License/ Permits	-
6823-000	Legal Fees	6,053.50

Account Number	Account Title	2020
6829-000	Accounting/Tax Preparation Fees	21,786.89
6831-000	Courier/Postage	14.62
6833-000	Other Taxes and Licenses	3,165.00
6836-000	Other Expenses	-
6890-070	Computer Hardware/Software	21,957.71
6850-000	Travel Expenses	-
7020-000	Salaries & Wages	971.29
7020-010	Salaries & Wages - PM	123,535.01
7020-020	Salaries & Wages - LE	202,763.59
7020-030	Salaries & Wages - FIN	399,957.20
7020-040	Salaries & Wages - DEV	498,354.97
7020-050	Salaries & Wages - CO	702,802.24

Account Number	Account Title	2020
7025-020	Salaries - Commissions - LE	-
7030-000	Payroll Tax Expense	30,664.44
7030-010	Payroll Tax Expense - PM	13,648.39
7030-020	Payroll Tax Expense - LE	22,737.18
7030-030	Payroll Tax Expense - FIN	44,203.61
7030-040	Payroll Tax Expense - DEV	64,659.47
7030-050	Payroll Tax Expense - CO	86,561.29
7040-000	401K Employer Match	(21,939.05)
7040-010	401K Employer Match - PM	3,333.43
7040-020	401K Employer Match - LE	11,842.70
7040-030	401K Employer Match - FIN	5,733.73
7040-040	401K Employer Match - DEV	3,839.03
7040-050	401K Employer Match - CO	999.96

Account Number	Account Title	2020
7045-000	401K Employer Costs	-
7050-000	Group Health Insurance	50,361.92
7050-050	Group Health Insurance - CO	2,276.11
100-7028.000	Medcom HRA use	-
100-7039.000	Disability Ina S/T & L/T	-
7051-000	HSA Employer Costs	333.36
7052-000	HRA Employer Costs	-
100-7060.000	Payroll Benefits Allocate	-
100-7060.010	Payroll Benefits - PM	-
100-7060.020	Payroll Benefits - LE	-
100-7060.030	Payroll Benefits - FIN	-
100-7060.040	Payroll Benefits - DEV	-
100-7060.050	Payroll Benefits - CO	-

Account Number	Account Title	2020
7070-000	Payroll Fees	7,055.86
7080-000	Training	-
7080-010	Training - PM	-
7080-020	Training - LE	-
7080-030	Training - FIN	-
7110-000	Meals and Entertainment	454.73
7110-030	Meals and Entertainment - FIN	-
7110-040	Meals and Entertainment - DEV	-
7115-000	Meals and Entertainment - 100 percent	773.77
100-7100.050	Meals & Entertain - CO	-
100-7110.000	Travel/Mileage Expense	-
7120-000	Travel	1,773.60
7120-020	Travel - LE	-
7120-030	Travel - FIN	-
7120-040	Travel - DEV	177.06
7120-050	Travel - Dew Air - CO	720,000.00

Account Number	Account Title	2020
100-7120.030	FIN - Auto	-
100-7120.040	Auto - DEV	-
100-7120.050	Auto - CO	-
100-7130.000	Parking Fees	-
100-7130.010	Parking Fees-PM	-
100-7130.020	Parking Fees-LE	-
100-7130.030	Parking Fees-FI	-
100-7130.040	Parking Fees-DEV	-
100-7130.050	Parking Fees-CO	-
7210-000	Rent	364,325.61
100-7190.020	Commission Exp-LE	-
7212-000	Office Supplies	7,453.98
7230-000	Kitchen Supplies	3,467.70
7240-000	Postage	2,849.94
7245-000	Express Mail	3,063.88

Account Number	Account Title	2020
7250-000	Offsite Storage	14,546.00
7300-000	Telephone Expense	13,734.42
7301-000	Cell Phone	266.74
7301-090	Cell Phone - JKD - CO	2,445.28
7310-000	Network Maintenance	21,815.75
	PC Maintenance	-
7325-000	Computer Hardware	3,630.70
7330-000	Software Programs	40,543.90
	Copier Maintenance	-
7340-000	Copier Rental	7,776.03
7360-000	Outside Printing	-
7410-000	Legal Fees	153,529.33
100-7400.030	Legal Fees - FIN	-
7410-050	Legal Fees - CO	-
7420-000	Consulting Fees	-

Account Number	Account Title	2020
100-7410.030	Consulting Fee-FIN	-
100-7420.000	Accounting/ Tax Fees	-
7430-000	Accounting/ Tax Fees - FIN	-
100-7440.000	Payroll Service Fees	-
100-7500.000	PC Supplies	-
7510-000	Marketing Expense	-
7511-000	DCC Leasing Expense	-
7520-000	Website Expense	90.85
7530-000	Dues	375.00
7540-000	Gifts and Flowers	644.59
100-7650.000	Political Contributions	-
100-7700.020	Seminars & Meeting - LE	-
100-7700.030	Seminars & Meeting - FI	-
	Dues	-

Account Number	Account Title	2020
	Subscriptions	-
7610-000	Taxes and Licenses	-
7610-100	Federal Income Tax	9,373.74
7610-300	FICA Taxes	541.35
7610-400	Property Taxes	1,145.41
7610-700	Business License/ Permits	329.00
100- 7760.000	Personal Property/ Net Wo	-
7610-900	Other Taxes and Licenses	721.46
7620-001	Insurance - Liability	49,939.01
7625-900	Health Insurance Premium - JKD	166.38
100- 7770.000	Other Taxes & Licenses	-
7635-000	Bank Fees	3,519.29
7639-000	Other Expenses	-

Account Number	Account Title	2020
7693-000	Personal Expense	-
8888-888	1099 Suspense Account	-
Total Expenses		3,856,243.95
(Net Profit) / Net Loss		2,388,189.39

Account Number	Account Title	2018
5496-000	Valet Wages	0.00%
4850-000	Investment Gain/(Loss)	0.00%
5110-000	Custodial - Supplies	0.00%
5650-000	Insur - Prop & Liab.	-2.77%
5802-000	Payroll Tax Expense	0.00%
5841-000	Telephone Expense	0.00%
5842-000	Office Supplies	0.00%
5850-000	Travel Expenses	0.00%
6275-000	Building - Other Maintenance	0.00%
6814-000	Bank Charges	0.00%
6820-000	Business License/ Permits	0.00%
6823-000	Legal Fees	0.00%
6829-000	Accounting/ Tax Preparation Fees	0.00%

Account Number	Account Title	2018
6831-000	Courier/ Postage	0.00%
6833-000	Other Taxes and Licenses	0.00%
6836-000	Other Expenses	0.00%
6890-070	Computer Hardware/ Software	0.00%
6850-000	Travel Expenses	0.00%
7020-000	Salaries & Wages	-1.60%
7020-010	Salaries & Wages - PM	-5.28%
7020-020	Salaries & Wages - LE	-6.64%
7020-030	Salaries & Wages - FIN	-22.77%
7020-040	Salaries & Wages - DEV	-24.08%
7020-050	Salaries & Wages - CO	-18.43%
7025-020	Salaries - Commissions - LE	0.00%

Account Number	Account Title	2018
7030-000	Payroll Tax Expense	
7030-010	Payroll Tax Expense - PM	6.27%
7030-020	Payroll Tax Expense - LE	6.25%
7030-030	Payroll Tax Expense - FIN	6.41%
7030-040	Payroll Tax Expense - DEV	6.09%
7030-050	Payroll Tax Expense - CO	6.43%
7040-000	401K Employer Match	0.00%
7040-010	401K Employer Match - PM	0.00%
7040-020	401K Employer Match - LE	0.00%
7040-030	401K Employer Match - FIN	0.00%
7040-040	401K Employer Match - DEV	0.00%

Account Number	Account Title	2018
7040-050	401K Em- ployer Match - CO	0.00%
7045-000	401K Em- ployer Costs	0.48%
7050-000	Group Health Insurance	6.00%
7050-050	Group Health Insurance - CO	0.00%
100- 7028.000	Medcom HRA use	0.11%
100- 7039.000	Disability Ina S/T & L/T	-3.57%
7051-000	HSA Employer Costs	0.00%
7052-000	HRA Employer Costs	0.00%
100- 7060.000	Payroll Benefits Allocate	-1.34
100- 7060.010	Payroll Benefits - PM	-3.42%
100- 7060.020	Payroll Benefits - LE	-3.95%
100- 7060.030	Payroll Benefits - FIN	-3.66%

Account Number	Account Title	2018
100- 7060.040	Payroll Benefits - DEV	-0.79%
100- 7060.050	Payroll Benefits - CO	-0.83%
7070-000	Payroll Fees	0.00%
7080-000	Training	0.00%
7080-010	Training - PM	0.00%
7080-020	Training - LE	0.00%
7080-030	Training - FIN	0.00%
7110-000	Meals and Entertainment	-0.88%
7110-030	Meals and Entertainment - FIN	-0.05%
7110-040	Meals and Entertainment - DEV	-0.01%
7115-000	Meals and Entertainment - 100 percent	0.00%
100- 7100.050	Meals & Entertain - CO	-0.52%
100- 7110.000	Travel/Mileage Expense	-0.07%
7120-000	Travel	-0.03%
7120-020	Travel - LE	-0.03%

Account Number	Account Title	2018
7120-030	Travel - FIN	-0.12%
7120-040	Travel - DEV	-0.12%
7120-050	Travel - Dew Air - CO	-20.99%
100- 7120.030	FIN - Auto	-0.01%
100- 7120.040	Auto - DEV	-0.01%
100- 7120.050	Auto - CO	-0.01%
100- 7130.000	Parking Fees	0.00%
100- 7130.010	Parking Fees- PM	-0.20%
100- 7130.020	Parking Fees- LE	-0.10%
100- 7130.030	Parking Fees- FI	-0.25%
100- 7130.040	Parking Fees- DEV	-0.14%
100- 7130.050	Parking Fees- CO	-0.19%
7210-000	Rent	-7.25%
100- 7190.020	Commission Exp-LE	-3.83%
7212-000	Office Supplies	-0.46%

Account Number	Account Title	2018
7230-000	Kitchen Supplies	-0.24%
7240-000	Postage	-0.11%
7245-000	Express Mail	-0.09%
7250-000	Offsite Storage	-0.38%
7300-000	Telephone Expense	-0.31%
7301-000	Cell Phone	0.00%
7301-090	Cell Phone - JKD - CO	-0.15%
7310-000	Network Maintenance	-0.46%
	PC Maintenance	-0.04%
7325-000	Computer Hardware	0.00%
7330-000	Software Programs	-0.78%
	Copier Maintenance	0.00%
7340-000	Copier Rental	-0.34%
7360-000	Outside Printing	0.00%
7410-000	Legal Fees	-0.71%
100-7400.030	Legal Fees - FIN	-0.03%

Account Number	Account Title	2018
7410-050	Legal Fees - CO	0.00%
7420-000	Consulting Fees	0.00%
100- 7410.030	Consulting Fee-FIN	-0.69%
100- 7420.000	Accounting/ Tax Fees	-0.01%
7430-000	Accounting/ Tax Fees - FIN	-0.14%
100- 7440.000	Payroll Service Fees	-0.41%
100- 7500.000	PC Supplies	-0.01%
7510-000	Marketing Expense	-0.45%
7511-000	DCC Leasing Expense	0.00%
7520-000	Website Expense	-0.89%
7530-000	Dues	0.00%
7540-000	Gifts and Flowers	-0.04%
100- 7650.000	Political Contributions	-0.17%

Account Number	Account Title	2018
100-7700.020	Seminars & Meeting - LE	0.00%
100-7700.030	Seminars & Meeting - FI	-0.12%
	Dues	-0.26%
	Subscriptions	-0.05%
7610-000	Taxes and Licenses	0.00%
7610-100	Federal Income Tax	0.00%
7610-300	FICA Taxes	0.00%
7610-400	Property Taxes	0.00%
7610-700	Business License/ Permits	-0.15%
100-7760.000	Personal Property /Net Wo	-0.10%
7610-900	Other Taxes and Licenses	0.00%
7620-001	Insurance - Liability	0.00%
7625-900	Health Insurance Premium - JKD	0.00%

Account Number	Account Title	2018
100-7770.000	Other Taxes & Licenses	-0.03%
7635-000	Bank Fees	-0.38%
7639-000	Other Expenses	0.00%
7693-000	Personal Expense	0.00%
8888-888	1099 Suspense Account	0.00%

Account Number	Account Title	2019
5496-000	Valet Wages	0.00%
4850-000	Investment Gain/(Loss)	0.00%
5110-000	Custodial - Supplies	0.00%
5650-000	Insur - Prop & Liab.	0.00%
5802-000	Payroll Tax Expense	0.00%
5841-000	Telephone Expense	0.00%
5842-000	Office Supplies	-0.01%
5850-000	Travel Expenses	0.00%
6275-000	Building - Other Maintenance	0.00%
6814-000	Bank Charges	0.00%
6820-000	Business License/ Permits	0.00%
6823-000	Legal Fees	-0.29%
6829-000	Accounting/ Tax Preparation Fees	0.00%

Account Number	Account Title	2019
6831-000	Courier/ Postage	0.00%
6833-000	Other Taxes and Licenses	0.00%
6836-000	Other Expenses	-1.02%
6890-070	Computer Hardware/ Software	0.00%
6850-000	Travel Expenses	0.00%
7020-000	Salaries & Wages	-0.40%
7020-010	Salaries & Wages - PM	-5.33%
7020-020	Salaries & Wages - LE	-8.52%
7020-030	Salaries & Wages - FIN	-27.07%
7020-040	Salaries & Wages - DEV	-28.62%
7020-050	Salaries & Wages - CO	-19.72%
7025-020	Salaries - Commissions - LE	-0.82%

Account Number	Account Title	2019
7030-000	Payroll Tax Expense	
7030-010	Payroll Tax Expense - PM	7.14%
7030-020	Payroll Tax Expense - LE	7.11%
7030-030	Payroll Tax Expense - FIN	6.69%
7030-040	Payroll Tax Expense - DEV	6.75%
7030-050	Payroll Tax Expense - CO	5.26%
7040-000	401K Employer Match	-0.01%
7040-010	401K Employer Match - PM	2.48%
7040-020	401K Employer Match - LE	2.34%
7040-030	401K Employer Match - FIN	2.89%
7040-040	401K Employer Match - DEV	0.80%

Account Number	Account Title	2019
7040-050	401K Employer Match - CO	0.00%
7045-000	401K Employer Costs	0.51%
7050-000	Group Health Insurance	5.29%
7050-050	Group Health Insurance - CO	0.00%
100- 7028.000	Medcom HRA use	0.00%
100- 7039.000	Disability Ina S/T & L/T	0.00%
7051-000	HSA Employer Costs	0.11%
7052-000	HRA Employer Costs	0.14%
100- 7060.000	Payroll Benefits Allocate	0.00%
100- 7060.010	Payroll Benefits - PM	0.00%
100- 7060.020	Payroll Benefits - LE	0.00%
100- 7060.030	Payroll Benefits - FIN	0.00%

Account Number	Account Title	2019
100- 7060.040	Payroll Benefits - DEV	0.00%
100- 7060.050	Payroll Benefits - CO	0.00%
7070-000	Payroll Fees	-1.01%
7080-000	Training	-0.03%
7080-010	Training - PM	0.00%
7080-020	Training - LE	-0.04%
7080-030	Training - FIN	-0.16%
7110-000	Meals and Entertainment	-0.01%
7110-030	Meals and Entertainment - FIN	-0.07%
7110-040	Meals and Entertainment - DEV	-0.03%
7115-000	Meals and Entertainment - 100 percent	-7.58%
100- 7100.050	Meals & Entertain - CO	0.00%
100- 7110.000	Travel/Mileage Expense	0.00%
7120-000	Travel	-0.13%
7120-020	Travel - LE	-0.09%

Account Number	Account Title	2019
7120-030	Travel - FIN	-0.13%
7120-040	Travel - DEV	-0.23%
7120-050	Travel - Dew Air - CO	-30.19%
100- 7120.030	FIN - Auto	0.00%
100- 7120.040	Auto - DEV	0.00%
100- 7120.050	Auto - CO	0.00%
100- 7130.000	Parking Fees	0.00%
100- 7130.010	Parking Fees- PM	0.00%
100- 7130.020	Parking Fees- LE	0.00%
100- 7130.030	Parking Fees- FI	0.00%
100- 7130.040	Parking Fees- DEV	0.00%
100- 7130.050	Parking Fees- CO	0.00%
7210-000	Rent	-15.41%
100- 7190.020	Commission Exp-LE	0.00%
7212-000	Office Supplies	-0.29%

Account Number	Account Title	2019
7230-000	Kitchen Supplies	-0.21%
7240-000	Postage	-0.14%
7245-000	Express Mail	-0.09%
7250-000	Offsite Storage	-0.80%
7300-000	Telephone Expense	-0.84%
7301-000	Cell Phone	-0.02%
7301-090	Cell Phone - JKD - CO	-0.10%
7310-000	Network Maintenance	-0.87%
	PC Maintenance	0.00%
7325-000	Computer Hardware	-0.05%
7330-000	Software Programs	-2.37%
	Copier Maintenance	0.00%
7340-000	Copier Rental	-0.46%
7360-000	Outside Printing	-0.01%
7410-000	Legal Fees	-2.59%
100-7400.030	Legal Fees - FIN	0.00%

Account Number	Account Title	2019
7410-050	Legal Fees - CO	-0.39%
7420-000	Consulting Fees	-3.02%
100-7410.030	Consulting Fee-FIN	0.00%
100-7420.000	Accounting/Tax Fees	0.00%
7430-000	Accounting/Tax Fees - FIN	-1.54%
100-7440.000	Payroll Service Fees	0.00%
100-7500.000	PC Supplies	0.00%
7510-000	Marketing Expense	-0.03%
7511-000	DCC Leasing Expense	-0.06%
7520-000	Website Expense	-0.02%
7530-000	Dues	-0.38%
7540-000	Gifts and Flowers	-0.03%
100-7650.000	Political Contributions	0.00%

Account Number	Account Title	2019
100-7700.020	Seminars & Meeting - LE	0.00%
100-7700.030	Seminars & Meeting - FI	0.00%
	Dues	0.00%
	Subscriptions	0.00%
7610-000	Taxes and Licenses	-0.01%
7610-100	Federal Income Tax	0.00%
7610-300	FICA Taxes	0.00%
7610-400	Property Taxes	-0.06%
7610-700	Business License/Permits	-0.02%
100-7760.000	Personal Property/Net Wo	0.00%
7610-900	Other Taxes and Licenses	0.00%
7620-001	Insurance - Liability	-3.00%
7625-900	Health Insurance Premium - JKD	0.00%

Account Number	Account Title	2019
100-7770.000	Other Taxes & Licenses	0.00%
7635-000	Bank Fees	-0.31%
7639-000	Other Expenses	-0.01%
7693-000	Personal Expense	0.00%
8888-888	1099 Suspense Account	0.00%

Account Number	Account Title	2020
5496-000	Valet Wages	0.00%
4850-000	Investment Gain/(Loss)	-3.57%
5110-000	Custodial - Supplies	-0.01%
5650-000	Insur - Prop & Liab.	-4.10%
5802-000	Payroll Tax Expense	0.05%
5841-000	Telephone Expense	-0.08%
5842-000	Office Supplies	-0.03%
5850-000	Travel Expenses	0.00%
6275-000	Building - Other Maintenance	0.00%
6814-000	Bank Charges	-0.38%
6820-000	Business License/Permits	0.00%
6823-000	Legal Fees	-0.41%
6829-000	Accounting/Tax Preparation Fees	-1.48%

Account Number	Account Title	2020
6831-000	Courier/ Postage	0.00%
6833-000	Other Taxes and Licenses	-0.22%
6836-000	Other Expenses	0.00%
6890-070	Computer Hardware/ Software	-1.50%
6850-000	Travel Expenses	0.00%
7020-000	Salaries & Wages	-0.07%
7020-010	Salaries & Wages - PM	-8.41%
7020-020	Salaries & Wages - LE	-13.81%
7020-030	Salaries & Wages - FIN	-27.24%
7020-040	Salaries & Wages - DEV	-33.95%
7020-050	Salaries & Wages - CO	-47.87%
7025-020	Salaries - Commissions - LE	0.00%

Account Number	Account Title	2020
7030-000	Payroll Tax Expense	
7030-010	Payroll Tax Expense - PM	11.05%
7030-020	Payroll Tax Expense - LE	11.21%
7030-030	Payroll Tax Expense - FIN	11.05%
7030-040	Payroll Tax Expense - DEV	12.97%
7030-050	Payroll Tax Expense - CO	12.32%
7040-000	401K Employer Match	-1.14%
7040-010	401K Employer Match - PM	2.70%
7040-020	401K Employer Match - LE	5.84%
7040-030	401K Employer Match - FIN	1.43%
7040-040	401K Employer Match - DEV	0.77%

Account Number	Account Title	2020
7040-050	401K Employer Match - CO	0.14%
7045-000	401K Employer Costs	0.00%
7050-000	Group Health Insurance	2.61%
7050-050	Group Health Insurance - CO	0.12%
100- 7028.000	Medcom HRA use	0.00%
100- 7039.000	Disability Ina S/T & L/T	0.00%
7051-000	HSA Employer Costs	0.02%
7052-000	HRA Employer Costs	0.00%
100- 7060.000	Payroll Benefits Allocate	0.00%
100- 7060.010	Payroll Benefits - PM	0.00%
100- 7060.020	Payroll Benefits - LE	0.00%
100- 7060.030	Payroll Benefits - FIN	0.00%

Account Number	Account Title	2020
100- 7060.040	Payroll Benefits - DEV	0.00%
100- 7060.050	Payroll Benefits - CO	0.00%
7070-000	Payroll Fees	-0.37%
7080-000	Training	0.00%
7080-010	Training - PM	0.00%
7080-020	Training - LE	0.00%
7080-030	Training - FIN	0.00%
7110-000	Meals and Entertainment	-0.03%
7110-030	Meals and Entertainment - FIN	0.00%
7110-040	Meals and Entertainment - DEV	0.00%
7115-000	Meals and Entertainment - 100 percent	-0.05%
100- 7100.050	Meals & Entertain - CO	0.00%
100- 7110.000	Travel/Mileage Expense	0.00%
7120-000	Travel	-0.12%
7120-020	Travel - LE	0.00%

Account Number	Account Title	2020
7120-030	Travel - FIN	0.00%
7120-040	Travel - DEV	-0.01%
7120-050	Travel - Dew Air - CO	-49.04%
100- 7120.030	FIN - Auto	0.00%
100- 7120.040	Auto - DEV	0.00%
100- 7120.050	Auto - CO	0.00%
100- 7130.000	Parking Fees	0.00%
100- 7130.010	Parking Fees- PM	0.00%
100- 7130.020	Parking Fees- LE	0.00%
100- 7130.030	Parking Fees- FI	0.00%
100- 7130.040	Parking Fees- DEV	0.00%
100- 7130.050	Parking Fees- CO	0.00%
7210-000	Rent	-24.82%
100- 7190.020	Commission Exp-LE	0.00%
7212-000	Office Supplies	-0.51%

Account Number	Account Title	2020
7230-000	Kitchen Supplies	-0.24%
7240-000	Postage	-0.19%
7245-000	Express Mail	-0.21%
7250-000	Offsite Storage	-0.99%
7300-000	Telephone Expense	-0.94%
7301-000	Cell Phone	-0.02%
7301-090	Cell Phone - JKD - CO	-0.17%
7310-000	Network Maintenance	-1.49%
	PC Maintenance	0.00%
7325-000	Computer Hardware	-0.25%
7330-000	Software Programs	-2.76%
	Copier Maintenance	0.00%
7340-000	Copier Rental	-0.53%
7360-000	Outside Printing	0.00%
7410-000	Legal Fees	-10.46%
100-7400.030	Legal Fees - FIN	0.00%

Account Number	Account Title	2020
7410-050	Legal Fees - CO	0.00%
7420-000	Consulting Fees	0.00%
100- 7410.030	Consulting Fee-FIN	0.00%
100- 7420.000	Accounting/ Tax Fees	0.00%
7430-000	Accounting/ Tax Fees - FIN	0.00%
100- 7440.000	Payroll Service Fees	0.00%
100- 7500.000	PC Supplies	0.00%
7510-000	Marketing Expense	0.00%
7511-000	DCC Leasing Expense	0.00%
7520-000	Website Expense	-0.01%
7530-000	Dues	-0.03%
7540-000	Gifts and Flowers	-0.04%
100- 7650.000	Political Contributions	0.00%

Account Number	Account Title	2020
100- 7700.020	Seminars & Meeting - LE	0.00%
100- 7700.030	Seminars & Meeting - FI	0.00%
	Dues	0.00%
	Subscriptions	0.00%
7610-000	Taxes and Licenses	0.00%
7610-100	Federal Income Tax	-0.64%
7610-300	FICA Taxes	-0.04%
7610-400	Property Taxes	-0.08%
7610-700	Business License/ Permits	-0.02%
100- 7760.000	Personal Property/ Net Wo	0.00%
7610-900	Other Taxes and Licenses	-0.05%
7620-001	Insurance - Liability	-3.40%
7625-900	Health Insurance Premium - JKD	-0.01%

Account Number	Account Title	2020
100-7770.000	Other Taxes & Licenses	0.00%
7635-000	Bank Fees	-0.24%
7639-000	Other Expenses	0.00%
7693-000	Personal Expense	0.00%
8888-888	1099 Suspense Account	0.00%

	2018	2019	2020
Total Salaries & Wages	2,271,453.68	2,034,304.06	1,928,384.30

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**

Alexandria Division

DEWBERRY)	
ENGINEERS INC.,)	
)	
Plaintiff,	)	Civil Action No.
v.	)	1:20-cv-610-LO-IDD
DEWBERRY GROUP,)	
INC.)	
f/k/a/ DEWBERRY	)	FILED UNDER
CAPITAL	)	SEAL
CORPORATION,)	
)	
Defendant.)	

**PLAINTIFF DEWBERRY ENGINEERS INC.'S
PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

* * *

B. Dewberry Group’s intentional infringement generated substantial ill-gotten gains.

i. *Dewberry’s expert witness presented credible evidence establishing Dewberry Group’s revenues and profits during the infringement period.*

44. Dewberry’s damages expert, Rodney Bosco, MAFF, CVA, CFE, opined on Dewberry Group’s revenues and profits while it was infringing the Dewberry Marks. In denying Defendant’s pretrial motion to exclude, the Court found Bosco to be “highly qualified to provide his expert opinion on the issue of damages,” given his undergraduate and graduate degrees in economics, “almost forty years of experience” and multiple professional certifications in his field. Order, Dkt. 167 at 4. Bosco’s complete credentials are listed in Exhibit 1 to his report (PX 690), and described in his testimony. Day 1 A.M. Tr. 38:23–42:6. The Court admitted Bosco as an expert with no objection from Defendant. Day 1 A.M. Tr. 42:23–43:9.

(a) Bosco’s opening and rebuttal reports.

45. Bosco’s two detailed reports explained his opinions about Defendant’s revenues and profits received while using the Infringing Marks, PX 690; PX 710, which the Court has reviewed. PX 763 at 12. His opinions relied on financial data, tax returns and other business records Defendant prepared and/or maintained for itself as well as for its founder and owner, John Dewberry, and numerous single-purpose real estate companies he controls, together with De-

fendant's deposition testimony and discovery responses, all of which are listed in his reports and testimony. PX 690, Ex. 2; PX 710, Ex. S2; Day 1 A.M. Tr. 45:18–47:10.

46. Bosco's initial report calculated only Dewberry Group's revenues received while using the Infringing Marks between 2018 and 2020; he did not calculate deductions or profits because Dewberry Group had not provided sufficient information for such calculation, and he understood, correctly, that it was Dewberry Group's burden to prove such deductions. PX 690, ¶¶21–23, ¶28 & Fig. 2, ¶41 & Fig. 3; Day 1 A.M. Tr. 44:11–45:1, 51:9–22. He did, however, identify several very large expense items that appeared to be inappropriately allocated to Dewberry Group, such as John Dewberry's private jet ("Dew Air," \$720,000 for 2020 alone). PX 690, ¶¶15, 53; PX 691, Ex. 8.2.

47. Bosco's supplemental report responded to Defendant's expert, Lisa Miller, and considered additional documents produced by Defendant and deposition transcripts that were not previously available. PX 710, Ex. S2; Day 1 A.M. Tr. 47:12–48:9. He refuted Miller's criticisms of his initial report and explained why her analysis was erroneous and unreliable. PX 710, ¶¶49–90. Also, because Miller did no profits or expense analysis (despite having the burden to do so), Bosco did his own based on the limited information Defendant had provided. *Id.*, ¶¶5, 43, 47–61, 86–90 & Figs. 1–3, 62–90; Day 1 A.M. Tr. 44:16–45:6, 51:23–52:18 (Bosco).

(b) In assessing Dewberry Group’s revenues, Bosco considered the economic reality of Dewberry Group’s real estate business.

48. The parties disagree whether the Court should consider, as Defendant urges, only the revenues and profits reported on the tax returns of the single corporate entity Dewberry Group, Inc., or as Plaintiff argues, the revenues and profits that were generated and collected by the Dewberry Group real estate business, through the services and managerial efforts of Dewberry Group and its employees and ultimately distributed to affiliated, single-purpose entities owning properties managed and serviced by Dewberry Group (collectively, the “Ownership Entities”). It is undisputed that John Dewberry owns outright and/or controls Dewberry Group and the Ownership Entities.¹¹

49. In Bosco’s opinion, when the evidence of Dewberry Group’s business and financial operations is considered from an economic perspective, it supports consideration of the total revenues and profits of the combined Dewberry Group real estate business. This includes profits generated by Dewberry Group, Inc. and its employees during the infringement period that were ultimately distributed to the Ownership Entities and John Dewberry. *E.g.*, PX 690, ¶¶12–17, 23–31, 41–51; PX 710, ¶¶4–61; Day 1 A.M. Tr. 80:13–83:23; Day 1 P.M. Tr. 9:16–22:6; 24:4–32:16. Bosco explained that Dewberry Group’s real estate business is structured so that it and its employees promoted,

¹¹ He owns 100% of Dewberry Group, 75% of the Dewberry Charleston Hotel, and 95–99% of each of the Ownership Entities. PX 409; Day 2 P.M. Tr. 9:25–11 (Freeman).

managed and operated all of the properties owned by the Ownership Entities, and did so using the Infringing Marks. *Id.* Dewberry Group’s Executive Vice President of Finance, John Freeman, provided testimony consistent with Bosco’s conclusions. Day 2 P.M. Tr. 6:7–10:21; Freeman Dep. Tr. [Dkt. 218-5] at 68:12–70:9, 81:8–82:22, 91:14–92:8, 97:4–99:6, 103:13–105:17, 135:1-13. Defendant even manages all of John Dewberry’s personal financial affairs, including paying his bills, “manag[ing] his houses his insurance everything [I]t is a family office essentially managing the assets of John K. Dewberry” that uses its employees for his “foundation” as well as “a lot of thing [sic] that don’t generate income.” Freeman Dep. Tr. [Dkt. 218-5] at 242:22–244:7.

50. The Ownership Entities do not promote, manage, or operate the Dewberry Group properties, and are incapable of doing so. With only a couple of minor exceptions (e.g., some hotel staff), the Ownership Entities have no employees. PX 710, ¶¶4–10, 15–39; Day 2 A.M. Tr. 137:12–138:9 (Groce); Day 2 P.M. Tr. 33:16–23 (Freeman). The Ownership Entities also have no offices of their own, as their registered address is Dewberry Group’s headquarters in Atlanta. Day 2 P.M. Tr. 33:25–34:8 (Freeman). Indeed, Groce referred to Dewberry Group as a “corporate shared services company” that, using its employees, performed or managed all the services necessary to develop, operate, promote, manage, and lease all the properties owned by the Ownership Entities. Day 2 A.M. Tr. 50:4–53:14, 137:25–138:9.

51. Even though the Ownership Entities do not and cannot perform the work and services necessary to generate revenues (but for limited exceptions at the hotel), all revenues generated through Dewberry

Group, Inc.’s services show up exclusively on the Ownership Entities’ books. PX 690, ¶¶28–39; PX 691; PX 710, ¶¶44–47, Fig. 1; PX 711; Day 1 A.M. Tr. 57:7–58:5; 68:17–25; Day 1 P.M. Tr. 9:9–10:17 (Bosco).

52. Dewberry Group Inc.’s revenues shown on its own tax returns and books are comprised of fees paid by the Ownership Entities in return for all the services that Defendant provides to them. PX 690, ¶41 & Fig. 3; Day 2 P.M. Tr. 7:25–8:21 (Freeman). Bosco explained that these fees are so low (and/or its expenses incurred to perform those services are so high) that Dewberry Group, Inc., as a stand-alone entity, consistently shows huge losses on its books—nearly \$8 million between 2017 and 2020 alone, based on expenses of \$15.8 million against fee revenue of only \$7.9 million. PX 690 ¶41, Fig. 3; Day 1 A.M. Tr. 69:2–70:13; PX 760. Freeman admitted that, as a stand-alone entity, “Dewberry Group is losing money.” Day 2 P.M. Tr. 52:14–18; *see also* Freeman Dep. Tr. [Dkt. 218-5] at 241:17–245:4.

53. In stark contrast, “John Dewberry is not losing money.” Day 2 P.M. Tr. 52:14–18 (Freeman). Bosco’s analysis shows that the combined Dewberry Group business, while using the Infringing Marks between 2018 and 2020, generated ***more than \$100 million of revenue and over \$50 million of profit.*** PX 710, ¶61, Fig. 3; PX 711; Day 1 A.M. Tr. 50:4–22.

54. John Dewberry has contributed at least \$23 million to cover Dewberry Group, Inc.’s massive losses over the past 30 years. PX 690, ¶42; PX 710, ¶73; Day 2 P.M. Tr. 16:1–9 (Freeman). Because no real estate or other business could continue as a going concern after decades of losses like these, Bosco rationally concluded that Dewberry Group, Inc.’s tax returns, standing alone, do not tell the whole economic story.

PX 690, ¶¶12–17; 40–51; PX 710, ¶¶40–43; Day 1 A.M. Tr. 69:4–70:13. Bosco’s analysis is supported by ample evidence.

55. For example, by prominently using the Infringing Marks on its website and other marketing and business materials, Defendant consistently presents Dewberry Group as a single, unified, and profitable real estate enterprise:

- “The company maintains an extraordinarily profitable track record of success, as evidenced by . . . a property portfolio of nearly \$1.5 billion in operating assets, encompassing more than 3 million square feet, a five-star hospitality class A office, luxury multi-family residential, and prestigious retail projects Additionally, Dewberry Group owns entitled land on which to create over \$5 billion in future developments on property along Peachtree Street in uptown and midtown Atlanta.” PX 647 at 2; PX 648 at 1 (“Dewberry Group currently owns and operates a portfolio of world-class mixed-use developments.”); PX 649 at 1 (“Throughout its history, Dewberry Group has created a number of market-leading investments in the office and workplace sector”); Day 1 A.M. Tr. 71:5–72:22 (Bosco);¹²

¹² These properties include the income-producing office and mixed-use properties in Atlanta, Jacksonville, and Charleston included in Bosco’s analysis, as well as the eyesore Charlottesville project that Defendant boasts will “receive the full Studio Dewberry treatment.” PX 647, 648. Both John Dewberry and Miller acknowledge this. Day 2 P.M. Tr. 142:24–147:10 (J. Dewberry); Day 3 A.M. Tr. 70:5–72:16 (Miller).

- “[John Dewberry] has grown his company into one of the leading commercial real estate firms in the Southeast through the acquisition and development of more than three million square feet of property. Today, the firm’s approximately \$1.5 billion in operating assets spans from Virginia to Florida” PX 654; Day 1 A.M. Tr. 73:2–19 (Bosco).

56. Defendant frequently makes similar representations to actual and prospective lenders and to tenants in loan and leasing packages using the Infringing Marks:

- “Dewberry Group’s current assets span across most of the major commercial real estate property types throughout the southeast, and includes approximately \$965 million of total value,” and all the “office,” “mixed-use,” “retail,” “hospitality,” and “parking” properties at issue are listed as included in the “Company Overview.” PX 389 at 19–20; Day 1 A.M. Tr. 73:20–76:8 (Bosco);
- “Dewberry Group is a design-centric development company . . . with a portfolio of properties along the Eastern Seaboard and key urban areas such as Atlanta, Charleston, Jacksonville, Charlottesville, and Richmond, Virginia. . . . Dewberry Group’s current assets . . . [have] a total value of approximately \$1.6 billion. In addition . . . Dewberry Group holds approximately \$350 million worth of land

slated for future development.” PX 655 at 27–28; Day 1 A.M. Tr. 76:10–77:25 (Bosco).¹³

57. These materials demonstrate that Dewberry Group’s real estate business is far more successful and profitable than the tax returns of Dewberry Group, Inc., in isolation, appear to show. They further explain why Dewberry Group, Inc. has stayed in business despite the sea of red ink on its tax returns. The explanation, in short, is that Dewberry Group, Inc. is the economic engine at the heart of a larger, unified Dewberry Group real estate business—a business enterprise that is profitable overall, but for which Dewberry Group, Inc. is allocated virtually all of the costs of performing the essential services, while the Ownership Entities receive the vast majority of the revenues and all of the profits. Day 1 A.M. Tr. 80:13–25 (Bosco).

58. The economic reality behind Bosco’s collective economic enterprise opinion is further bolstered by admissions in Defendant’s Interrogatory responses, documents, and deposition testimony quoted and discussed in Bosco’s supplemental report. PX 710, ¶¶9–38. They show that John Dewberry controls both Defendant and the Ownership Entities; that Defendant manages the real estate (and other matters) and performs the necessary support services using its employees; that Dewberry Group, Inc. shows losses on its books but the Ownership Entities make large profits from the real estate assets managed by Defendant; and that John Dewberry then uses those profits to

¹³ The complete list of loan and leasing packages bearing Infringing Marks that Bosco relied on for his analysis is contained in his opening report. PX 690, ¶¶24–27 & App. A; PX 692. Many of these were admitted as Plaintiff’s trial exhibits. *Supra* notes 9–10.

make up for the losses shown by Dewberry Group, Inc. *Id.*; Day 2 A.M. Tr. 80:23–82:24 (Bosco).

(c) Bosco conservatively evaluated the infringement period specific to each Dewberry Group property.

59. Having determined *what* revenues to count, Bosco next determined *when* to count them. He relied on the settled principle that a trademark infringement profits award is based on all revenues that the infringer received during the infringement period. PX 690, ¶¶22-27. Defendant’s damages expert, Miller, agreed with that principle and that Bosco followed it. Day 3 A.M. Tr. 81:25–82:3.

60. Bosco determined a starting date for the infringement at each of the Dewberry Group properties relying on Defendant’s loan and leasing materials (among other materials) bearing the Infringing Marks, and identifying each starting date in his report. PX 690, ¶¶27–31, Fig. 1, 2 & App. A (PX 692); Day 1 P.M. Tr. 6:9–8:9. Bosco did not start the infringement period for any Dewberry Group property until the month *after* the first documented use of the Infringing Marks that he observed at each property. Day 1 A.M. Tr. 52:19–54:6, 55:18–56:6. Bosco could not use start dates prior to January 2018 because Dewberry Group did not produce profit-and-loss statements for any periods before January 2018. Day 1 A.M. Tr. 5:21–6:3.

61. With these limitations in mind, Bosco set out to confirm Dewberry Group’s use of the Infringing Marks for each Dewberry Group property in 2018 or later, reviewing loan packages, leasing packages, web pages, and other materials displaying the Infringing Marks. PX 690, ¶¶24–40.

62. Bosco observed evidence showing first uses of the Infringing Marks for properties that were earlier than the dates reflected in his reports (e.g., PX 343 for Peachtree Pointe; PX 347 for Dorchester Square; PX 379 for Ortega Park). Day 1 P.M. Tr. 16:9–19:1. Infringement was also occurring throughout 2017 at some properties,¹⁴ and by April 2018, the Infringing Marks were used on “all new leasing materials,” *supra*, ¶31, and on Defendant’s website and for all properties by January 2019. *Supra*, ¶40; Day 1 P.M. Tr. 8:22–9:8 (Bosco). Thus, the infringement start dates in Bosco’s reports understate Dewberry Group’s actual revenues and profits during the infringement period.

63. The December 31, 2020 end date for Bosco’s calculation of Dewberry Group’s revenues and profits is also conservative, as the infringement has continued through today. Dewberry Group did not produce any profit-and-loss statements for 2021. Day 1 P.M. Tr. 4:23–5:2, 19:2–6. Bosco, however, found the average of Dewberry Group’s non-hotel revenues for 2018–20 to be \$2.5 million per month (\$30 million/yr), but he did not include estimated revenues for 2021 in his calculations. PX 690, ¶38 & Ex. 6; Day 1 P.M. Tr., 19:17–20:5.

(d) Bosco’s revenue and profit calculations.

64. Applying the above methodology, during 2018–20, Bosco calculated revenues received and reported by *just* the Dewberry Group, Inc. tax entity as \$6,633,494, comprising \$2,882,427 for 2018; \$2,335,487 for 2019; and \$1,415,580 for 2020. Day 1 P.M. Tr. 11:9–21; PX 690, ¶41, Fig. 3. Including 2017,

¹⁴ *E.g.*, *supra* ¶29; PXs 235; 278–79; 283–84; 291; 311; 314; 317.

when Defendant was already infringing, *supra* ¶62, its stand-alone revenues increase to \$7.9 million. *Id.* Including the collective enterprise of all the properties and entities served by Defendant, Bosco concluded that total revenues during 2018–20 were more than \$100 million, comprising \$17 million in 2018, over \$48 million in 2019, and more than \$36 million in 2020. PX 690, ¶¶28–29 & Fig. 2; PX 710, ¶¶47–48 & Fig. 1; Day 1 A.M. Tr. 50:4–22.¹⁵

65. Dewberry Group’s expert did not calculate profits. *Infra*, ¶68. Thus, Bosco undertook to identify Dewberry Group’s deductible costs in his supplemental report, so the Court would have a basis to assess profits during the infringement period. Bosco applied a “direct assistance” approach to convert revenues to profits. PX 710, ¶¶49–60. Also known as “direct contribution,” this approach is a middle ground between (1) the “full absorption approach,” which deducts all expenses incurred in compliance with Generally Accepted Accounting Principles (whether related to infringement or not), and (2) the “incremental cost approach,” which deducts only costs that vary directly with revenue created by the infringing product or service, and would not include fixed costs. *Id.*; Day 1 P.M. Tr. 32:21–35:10.

66. Bosco thus calculated the total profits attributable to Dewberry Group’s use of the Infringing Marks during the infringement period to be

¹⁵ Before trial, Bosco, in a third set of schedules, corrected a pro-ration calculation error of certain Dewberry Group revenues, expenses, and profits for 2018. Day 1 A.M. Tr. 51:11–54:6. The adjustment reduced Dewberry Group’s 2018 revenues by \$2,230,108, its expenses by \$1,765,361 and its profits by \$464,747. *Id.*, 64:21–67:12; PX 710, Figs. 1–3. Dewberry Group did not object to Bosco’s third set of schedules.

\$53,719,657. PX 710, ¶61 & Fig. 3 (Revised); Day 1 A.M. Tr. 50:4–22.

* * *

B. Dewberry Group’s infringement generated profits, which shall be disgorged.

99. Dewberry was required to establish only Dewberry Group’s sales or revenues during the infringement period. 15 U.S.C. § 1117(a); McCarthy § 30:70 (“Generally, the accounting period should be co-extensive with the period of infringement.”) (citation omitted). “It is assumed that all of the infringer’s sales were due to the infringer’s use of the . . . mark.” *Hosp. Int’l v. Mahtani*, No. CIV.A.2:97-CV-87, 1998 WL 35296447, at *8 (M.D.N.C. Aug. 3, 1998) (citing *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203 (1942)). Indeed, the “plaintiff’s burden to establish defendant’s sales is minimal because the defendant ‘is in the better position to ascertain exact sales and profits . . .’” *Hosp. Int’l*, 1998 WL 35296447, at *8 (collecting cases); see also *Louis Vuitton S.A. v. Spencer Handbags Corp.*, 765 F.2d 966, 973 (2d Cir. 1985) (“[W]here . . . the defendant controls the most satisfactory evidence of sales the plaintiff needs only establish a basis for a reasoned conclusion as to the extent of injury caused by the deliberate and wrongful infringement.”) (citation omitted).

100. Through Bosco’s expert opinions and marshalled evidence, Dewberry satisfied its burden for all of the reasons previously discussed. *Supra* ¶¶44–88. After Dewberry proved Dewberry Group’s revenues during the infringement period, the burden shifted to Dewberry Group to prove (1) any costs or deductions from those revenues, 15 U.S.C. § 1117(a) and (2) any revenues that had “no relation” to the infringement.

Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co., 316 U.S. 203, 206–07 (1942) (“The burden is the infringer’s to prove that his infringement had no cash value in sales made by him.”).

101. Dewberry Group failed to carry its twin burdens of proof on deductions (such as reasonable expenses) and non-infringement revenues. Defendant’s expert did no analysis of Defendant’s expenses, and her result-oriented attempts to exclude all of Dewberry Group’s revenues as non-infringing were unsupported and speculative for the reasons explained earlier. *Supra* ¶¶67–88.

102. Practical and equitable concerns further undermine Dewberry Group’s causation argument and burden-flipping efforts. It is nearly impossible for a plaintiff to prove which portions of infringing sales are due to infringement and which are potentially due to other factors: “Congress did not put upon the despoiled [i.e., the trademark owner] the burden—as often as not impossible to sustain—of showing that but for the defendant’s unlawful use of the mark, particular customers would have purchased the plaintiff’s goods.” *Mishawaka*, 316 U.S. at 206. And “it would be casting an intolerable burden upon the complainant . . . if, after proving the fraud, the infringement and the profits, he were compelled to enter the realms of speculation and prove the precise proportion of the infringer’s profits attributable to his infringement.” Callman on Unfair Competition, Trademarks, and Monopolies [hereinafter “Callmann”] §23:63 (4th ed. 2021) (quoting *Saxlehner v. Eisner & Mendelson Co.*, 128 F. 222, 24 (2d Cir. 1905)). Any uncertainty as to apportionment is borne by the infringer. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 262

(1916) (where “difficulty lies in ascertaining what proportion of the profit is due to the trade-mark . . . it is more consonant with reason and justice that the owner of the trade-mark should have the whole profit than that he should be deprived of any part of it by the fraudulent act of the defendant”); *accord* McCarthy § 30:66 (“Any doubts about the actual amount of gross sales or profits will be resolved against the infringing party.”).

i. *Dewberry Group’s attempt to exclude revenues flowing from its properties is inconsistent with principles of equity and legal precedent.*

103. As noted, the Court found Bosco’s analysis and conclusions to be persuasive and consistent with the evidence, including his methodology that considered all revenues and profits of the combined business operations, the vast majority of which were handled or managed by Defendant and its employees using the Infringing Marks. *Supra* ¶¶48–58. By contrast, Miller’s result-oriented analysis and conclusions were inconsistent with that evidence. *Supra* ¶¶68–84.

104. The law also supports Bosco’s methodology, as shown by the way courts have calculated an infringer’s profits for disgorgement when its books appear to show that it was not actually profitable, or that it had already distributed ill-gotten profits to affiliates. At least three U.S. Courts of Appeals have applied an equitable approach to award Lanham Act profits after considering non-arms’ length intra-corporate dealings by an infringer.

105. In *American Rice, Inc. v. Producers Rice Mill, Inc.*, 518 F.3d 321 (5th Cir. 2008), a trademark-infringing cooperative argued against disgorging its

profits because, like Defendant, it showed no profits on its tax returns, and had passed those profits onto its affiliates (non-party members). *Id.* at 338–39. Applying the same six factors in *Synergistic*, the Fifth Circuit declined to insulate the infringer from disgorging a profits award. The court observed that (1) the infringing business as a whole was profitable; (2) the fact that the infringer “passe[d] the profits on to its patrons [was] irrelevant in the context of a Lanham Act profits award”; and (3) the infringer could “cite[] no authority for the proposition that tax treatment is relevant to the Lanham Act remedies.” *Id.* at 339. The court disgorged \$1,256,635 in profits, not the \$227 urged by the infringer. *Id.* Although the infringer “produce[d] evidence of its taxable income, through its tax return and the testimony of its CEO, to show that it made no profit,” other evidence, including its Secretary-Treasurer’s testimony, suggested that the infringer actually was profitable. *Id.* at 338–39. The same is true in the present case. *Supra* ¶¶48–66, 74–79.

106. *American Rice* has been cited favorably by McCarthy, who observes that “profits earned by . . . a cooperative are ‘profits’ for purposes of the Lanham Act, regardless of how they may be passed on to members or how they are taxed.” McCarthy § 30:69 (citing *Am. Rice*, 518 F.3d 321). Callmann’s treatise also endorses *American Rice*, noting that the court “refused to approve modifying the statutory method of calculation or otherwise lower[] the disgorgement” even though “profits were made on the infringing sales **but not by the defendant** . . .” Callmann 23:62 (citing *Am. Rice*, 518 F.3d 321) (emphasis added).

107. Other courts follow the same reasoning. In *Aladdin Manufacturing Co. v. Mantle Lamp Co.*, 116 F.2d 708 (7th Cir. 1941), the Seventh Circuit held that an infringer cannot reduce the profits it must pay for infringement by distributing those profits to partners or shareholders. *Id.* at 713. Compensation paid to an infringer’s stockholders qualified as a distribution of profits, which must be counted as profits, and not as deductible costs. *Id.* And in *Fifty-Six Hope Road Music, Ltd. v. A.V.E.L.A., Inc.*, 778 F.3d 1059 (9th Cir. 2015), the Ninth Circuit upheld the district court’s refusal to reduce an infringer’s profit disgorgement based on royalty fees paid to another entity where “[t]he royalty fee arrangement was not an arms’ length transaction” and the sole shareholder of the entity receiving the royalty was the girlfriend of the defendant’s principal. *Id.* at 1076.

108. The equitable purpose underlying the Lanham Act’s disgorgement remedy is to prevent unjust enrichment and “take all the economic incentive out of trademark infringement.” *Am. Rice*, 518 F.3d at 340; *see also Black & Decker (U.S.) Inc. v. Pro-Tech Power Inc.*, 26 F. Supp. 2d 834, 855 (E.D. Va. 1998) (“unjust enrichment” is an appropriate theory for awarding profits). Consistent with the ample and apposite legal and equitable authority cited above, this Court will not allow the non-arms’ length corporate dealings and tax treatment of Dewberry Group’s business enterprise to trump the economic reality of its profitable infringement. That John Dewberry chooses to account for leasing revenues by attributing them to Ownership Entities instead of the entity actually responsible for generating them—the Defendant, which receives only losses—will not shield those revenues

from disgorgement. To hold otherwise would undermine the equitable purposes of the Lanham Act's disgorgement remedy by enabling the entire Dewberry Group enterprise to evade the financial consequences of its willful, bad faith infringement.

109. That Dewberry did not name the Ownership Entities as defendants or allege contributory infringement or alter-ego liability is of no moment. The courts in *American Rice*, *Aladdin*, and *Fifty-Six Hope Road Music* and the other cases cited above did not impose such requirements. Moreover, the award requested by Dewberry seeks only that Defendant be ordered to pay the judgment, not the Ownership Entities; the award of profits is calculated based on the infringement-related revenues and profits that were generated through Defendant's services performed for the Ownership Entities while using the Infringing Marks.

110. Courts have also reached similar results outside of the trademark context, including in patent and copyright cases and SEC civil enforcement actions. In *Providence Rubber Co. v. Goodyear*, 76 U.S. 788, 803 (1869), the Supreme Court affirmed a master's refusal to consider "extraordinary salaries" that had been paid out as allowable deductions in a patent-infringement case, as they represented "dividends of profit under another name, and put in that guise for concealment and delusion." *Id.* In the copyright context, in *Fair Isaac Corp. v. Federal Insurance Co.*, 447 F. Supp. 3d 857 (D. Minn. 2020), an alleged infringer

argued that plaintiff FICO could not recover disgorgement profits from non-parties. *Id.* at 895 n.20.¹⁷ The court dismissed that argument as “unavailing,” however, because “[r]egardless of whether the disputed profits were earned in part by nonparties, the question remains as to whether any such profits may fairly be considered profits of the infringer subject to FICO’s disgorgement claim.” *Id.*; accord *MPAY Inc. v. Erie Custom Computer Applications, Inc.*, No. CV 19-704, 2021 WL 3661507, at *3 (D. Minn. Aug. 18, 2021) (“While Defendants fault MPAY for not seeking to join Taslar or other entities in this action, the law is clear that MPAY is not required to pursue all potential defendants in a single action.”). See also *Craig v. UMG Recordings, Inc.*, 380 F. Supp. 3d. 324, 333–34 (S.D.N.Y. 2019) (denying summary judgment on liability to a defendant record distributor because “a reasonable jury could find that [defendant] committed a domestic infringement that enabled its foreign affiliates to commit further infringements abroad, [so defendant] can be liable for those further infringements under the governing law” and denying summary judgment on damages because defendant’s damages calculation failed to count sales by its foreign affiliates) (citation omitted).

111. In an SEC civil enforcement action, the Second Circuit evaluated “whether an insider trader can be required to disgorge not only the profit that he personally enjoyed from his exploitation of inside information, but also the profits of such exploitation that

¹⁷ The Copyright Act is similar to the Lanham Act insofar as a profit-seeking plaintiff must prove only the infringer’s gross revenue. *Id.* (citing 17 U.S.C. § 504(b)).

he channeled to friends, family, or clients” who were not named defendants. *S.E.C. v. Contorinis*, 743 F.3d 296, 302 (2d Cir. 2014). Answering that such profits were subject to disgorgement, the court emphasized a district judge’s broad equitable discretion to fashion a disgorgement remedy: “[d]isgorgement serves to remedy securities law violations by depriving violators of the fruits of their illegal conduct”; and, while not punitive, disgorgement “has the effect of deterring subsequent fraud.” *Id.* at 301 (citations omitted). Thus the court rejected the defendant’s argument that “one can only ‘disgorge’ what one has personally ‘swallowed,’” explaining that “prior cases indicate that an insider trader may be ordered to disgorge not only the unlawful gains that accrue to the wrongdoer directly, but also the benefit that accrues to third parties whose gains can be attributed to the wrongdoer’s conduct.” *Id.* at 302.

112. The profits award sought by Dewberry based on the evidence presented here is also supported by the above-referenced equitable purposes of disgorgement under the Lanham Act, and the Court’s broad equitable powers to grant appropriate relief in accordance with the specific circumstances here. “Once invoked, ‘the scope of a district court’s equitable powers . . . is broad, for breadth and flexibility are inherent in equitable remedies.’” *Brown v. Plata*, 563 U.S. 493, 538 (2011) (citation omitted). Indeed, such broad equitable powers even include awarding profits from an unprofitable infringer. *Hosp. Int’l v. Mahtani*, No. CIV.A.2:97-CV-87, 1998 WL 35296447, at *10 (M.D.N.C. Aug. 3, 1998); *Otis Clapp & Son, Inc. v. Filmore Vitamin Co.*, 754 F.2d 738, 744 (7th Cir. 1985)

(awarding 15% of the infringer's sales even though defendant had lost money, reasoning "that the plaintiff should not be prejudiced by the defendant's inefficiency."); *KFC Corp. v. Lilleoren*, 821 F.Supp. 1191, 1192 (W.D. Ky. 1993) (awarding 10% of gross revenues even though the infringer lost more than \$202,000).

113. Additionally, "[d]eterring future misconduct is one 'circumstance' often used to justify enhanced damages" *PBM Prod., LLC v. Mead Johnson & Co.*, No. 3:09-CV-269, 2010 WL 723739, at *5 (E.D. Va. Mar. 2, 2010); accord *Choice Hotels Int'l, Inc. v. A Royal Touch Hosp., LLC*, No. 7:17-CV-381, 2019 WL 4781879, at *3 (W.D. Va. Sept. 30, 2019) ("An award to the plaintiff of the defendant's profits, even if plaintiff's actual sustained losses may have been less, is appropriate under theories of unjust enrichment or deterrence."); *Teaching Co. P'ship.*, 87 F. Supp. 2d at 588 (rationales for profits awards include "unjust enrichment, deterrence, and compensation"); McCarthy § 30:64 ("[A] trademark infringer's profits will be awarded if defendant is unjustly enriched, or if the plaintiff sustains damage, or if an accounting is necessary to deter a willful infringer from doing so again."). Dewberry Group's willful and bad-faith infringement justifies a profits disgorgement award to deter future infringement.

* * *

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**

Alexandria Division

Dewberry Engineers Inc.)	
)	
Plaintiff,	)	Civil Action
v.	)	No. 1:20-cv-00610-
	)	LO-IDD
Dewberry Group, Inc)	
)	
Defendant)	
)	

JUDGMENT

Pursuant to the Order of this Court entered on May 6, 2022 and in accordance with Federal Rules of Civil Procedure 58, JUDGMENT is hereby entered in favor of the Plaintiff Dewberry Engineers Inc. and against the Defendant Dewberry Group, Inc. in the amount of \$42,975,725.60.

FERNANDO GALINDO,
CLERK OF COURT

By: _____ /s/

Samantha Williams
Deputy Clerk

Dated: 5/6/2022
Alexandria, Virginia