No. 23-900

In the Supreme Court of the United States

DEWBERRY GROUP, INC., FKA DEWBERRY CAPITAL CORPORATION,

Petitioner,

v.

DEWBERRY ENGINEERS INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT

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QUESTION PRESENTED

When a district court awards profits as a remedy for trademark infringement, the Lanham Act provides that "[i]f 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." 15 U.S.C. § 1117(a).

The question presented is:

Whether a district court may find a profits award "inadequate" because the award does not reflect the infringer's true financial gain from the infringement and, if so, whether the Lanham Act's grant of "discretion" permits the district court to consider affiliates' financial records when relevant to ascertaining that true gain.

TABLE OF CONTENTS

Page:

QUESTION PRESENTED i

TABLE OF AUTHORITIES..................................... iv

INTRODUCTION... 1

STATEMENT OF THE CASE 3

A. Legal Background... 3

B. Facts and Procedural History 9

SUMMARY OF ARGUMENT................................. 16

ARGUMENT 20

I. Under Section 1117(a), district courts can consider all competent and relevant evidence in imposing a judgment for the defendant's true financial gain 20

A. Section 1117(a)'s two-step process allows an award of the infringer's true financial gain.................................... 21

1. A district court may look beyond the defendant's profits when it finds an award based on step one would be "inadequate." 22

2. An amount is "inadequate" when it does not reflect the infringer's true financial gain 24

3. The just-sum provision has real limits 32

B. Where relevant, the profits of affiliated entities are admissible to prove true financial gain.......................... 33

C. Consideration of an affiliated entity's profits does not by itself disregard corporate separateness 35

II. The judgment should be affirmed................. 40

A. The Fourth Circuit properly affirmed the award of a just sum 40

1. The Fourth Circuit affirmed that an award of "defendant's profits" was "inadequate." 40

2. The Fourth Circuit correctly focused on true financial gain 41

3. The award does not exceed any statutory cap 47

B. Alternatively, the decision below should be affirmed under the "defendant's profits" provision................. 50

III. If the Fourth Circuit erred, the Court should remand 51

CONCLUSION 52

ADDENDUM

TABLE OF AUTHORITIES

Page(s):

Cases:

Agency for Int'l Dev. v.
All. for Open Society Int'l, Inc.,
591 U.S. 430 (2020) 36

Aladdin Mfg. Co. v. *Mantle Lamp Co.*,
116 F.2d 708 (7th Cir. 1941) 23

ALPO Petfoods, Inc. v. *Ralston Purina Co.*,
913 F.2d 958 (D.C. Cir. 1990) 32

Anderson v. *Abbott*,
321 U.S. 349 (1944) 36, 37

Bigelow v. *RKO Radio Pictures, Inc.,*
327 U.S. 251 (1946) 34

Birdsall v. *Coolidge*,
93 U.S. 64 (1876) 5

Bradshaw v. *Richey*,
546 U.S. 74 (2005) (per curiam)......................... 52

Campos-Chaves v. *Garland*,
144 S. Ct. 1637 (2024) 24

Champion Spark Plug Co v. *Sanders*,
331 U.S. 125 (1947) 21

Coca-Cola Co. v. *Dixi-Cola Lab'ys*,
155 F.2d 59 (4th Cir. 1946) 6

Commissioner v. *Banks*,
543 U.S. 426 (2005) 35

Commissioner v. *Sunnen*,
333 U.S. 591 (1948) 35

Container Corp. of Am. v. *Franchise Tax Bd.*,
463 U.S. 159 (1983) 35

Douglas v. *Cunningham*,
294 U.S. 207 (1935)... 8, 31

Elizabeth v. *Pavement Co.*,
97 U.S. 126 (1877) 5

F.W. Woolworth Co. v.
Contemporary Arts, Inc.,
344 U.S. 228 (1952) 27, 33, 42, 46

Fifty-Six Hope Rd. Music, Ltd. v.
A.V.E.L.A., Inc.,
778 F.3d 1059 (9th Cir. 2015)...................... 24, 32

First Nat'l City Bank v.
Banco Para El Comercio Exterior de Cuba,
462 U.S. 611 (1983) 36

Fleischmann Distilling Corp. v.
Maier Brewing Co.,
386 U.S. 714 (1967) 9, 38, 39

Getty Petroleum Corp. v.
Bartco Petroleum Corp.,
858 F.2d 103 (2d Cir. 1988)............................ 8, 31

Halo Elecs., Inc. v. *Pulse Elecs., Inc.*,
579 U.S. 93 (2016) 6, 31

Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*,
240 U.S. 251 (1916) 5, 22

Intel Corp. Investment Pol'y Comm. v. *Sulyma*,
589 U.S. 178 (2020) 48

Jack Daniel's Props., Inc. v. *VIP Prods. LLP*,
599 U.S. 140 (2023) 3

Jackson v. *Smith*,
254 U.S. 586 (1921) 52

Kars 4 Kids v. *Am. Can!*,
8 F.4th 209 (3d Cir. 2021) 33

Keystone Mfg. Co. v. *Adams*,
151 U.S. 139 (1894) 26, 27

L.P. Larson, Jr., Co. v. *Wm. Wrigley, Jr., Co.*,
277 U.S. 97 (1928) 23

Liu v. *SEC*,
591 U.S. 71 (2020) 6, 25, 31, 34, 52

Livingston v. *Woodworth*,
56 U.S. (15 How.) 546 (1853) 5

Maier Brewing Co. v.
Fleischmann Distilling Corp.,
390 F.2d 117 (9th Cir. 1968) 26

Manhattan Indus., Inc. v.
Sweater Bee by Banff, Ltd.,
885 F.2d 1 (2d Cir. 1989)............................... 49-50

Matal v. *Tam*,
582 U.S. 218 (2017) 4

Max Rack, Inc. v.
Core Health & Fitness, LLC,
40 F.4th 454 (6th Cir. 2022)................... 24, 26, 33

McLean v. *Fleming*,
96 U.S. 245 (1878) 21

Merck Eprova AG v. *Gnosis S.p.A.*,
901 F. Supp. 2d 436 (S.D.N.Y. 2012),
aff'd, 760 F.3d 247 (2d Cir. 2014) 26, 27, 34, 42

Mishawaka Rubber & Woolen Mfg. Co. v. *S.S. Kresge Co.*,
316 U.S. 203 (1942) 6, 22, 23, 34

Moseley v. *V Secret Catalogue, Inc.*,
537 U.S. 418 (2003) 4

Mowry v. *Whitney*,
81 U.S. (14 Wall.) 620 (1871) 23

Moyle v. *United States*,
144 S. Ct. 2015 (2024) 40

Park 'N Fly, Inc. v. *Dollar Park & Fly, Inc.*,
469 U.S. 189 (1985) 7

Qualitex Co. v. *Jacobson Prods. Co.*,
514 U.S. 159 (1995) 4, 7

Rubber Co. v. *Goodyear*,
76 U.S. (9 Wall.) 788 (1869) 22, 23

Sheldon v. *Metro-Goldwyn Pictures Corp.*,
106 F.2d 45 (2d Cir. 1939),
aff'd, 309 U.S. 390 (1940) 33, 34, 37, 38

Texas v. *Hardenberg*,
77 U.S. (10 Wall.) 68 (1869) 23

Thigpen v. *Roberts*,
468 U.S. 27 (1984) 47

Thompson v. *Haynes*,
305 F.3d 1369 (Fed. Cir. 2002) 32

Tilghman v. *Proctor*,
125 U.S. 136 (1888) 23

United States v. *Bestfoods*,
524 U.S. 51 (1998) 36, 52

Warner Chappell Music, Inc. v. *Nealy*,
601 U.S. 366 (2024) 39, 40

Westinghouse Elec. & Mfg. Co. v. *Wagner Elec. & Mfg. Co.*, 225 U.S. 604 (1912) 5, 6, 27, 29, 46, 50-51

Zenith Radio Corp. v. *Hazeltine Rsch., Inc.*, 395 U.S. 100 (1969) 36

Statutes:

15 U.S.C. § 37b(b)(2) 33

15 U.S.C. § 1111 21

15 U.S.C. § 1114 21

15 U.S.C. § 1117 .... 7, 48

15 U.S.C. § 1117(a) .... i, 1, 9, 16, 19, 20, 21, 22, 23, 24, 25, 27, 29, 30, 31, 32, 38, 39, 41, 43, 44, 47, 48, 49, 50, 51

15 U.S.C. § 1117(b) 48

15 U.S.C. § 1117(c) 48

17 U.S.C. § 101(b) (1946 ed. Supp. V) 27

17 U.S.C. § 1323(a) 48

28 U.S.C. § 1 30

42 U.S.C. § 14924(e) 30

1870 Patent Act, ch. 230, §§ 55, 59, 16 Stat. 198 .... 5, 8, 48

1905 Trade-Mark Act, ch. 592, 33 Stat. 724 .... 5, 6, 7, 8, 48

Act of Aug. 18, 1856, ch. 169, 11 Stat. 138 48

Act of Jan. 2, 1975,
Pub. L. No. 93-600, § 3, 88 Stat. 1955 9

Copyright Act of 1909,
§ 25(b), 35 Stat. 1081.....................8, 26, 30, 31, 48

Lanham Act,
ch. 540, 60 Stat. 427
15 U.S.C. §§ 1051 *et seq.* .... i, 1, 7, 8, 16,
18, 24, 29, 30, 31

Rules:

Fed. R. Civ. P. 4(k)(1) 28

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Fed. R. Evid. 402 33

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(2023 rev. vol.) 36, 37, 44

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Practical Standard Dictionary
(1946) 25

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Trademarks and Unfair Competition
(5th ed., rel. 9, 2019) 4

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(2d ed. 1993) 23, 31

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Unfair Competition and Trade-Marks
(2d ed. 1947) 4, 5, 7

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Trademarks and Unfair Competition
(5th ed., rel. 9, 2019) 5, 24, 31, 32

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55 L. & Contemp. Probs. 45 (1992)................ 8, 31

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(1946) 25

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(1904) 5, 6

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72 Trademark Rep. 458 (1982) 6, 7

Registration of Trade-Marks: Joint Hearings on S. 2679 Before the Comms. on Patents,
68th Cong., 2d Sess. (1925).................................. 8

Restatement (Third) of
Restitution and Unjust Enrichment
(2011) 25, 27, 33, 34, 42

S. Rep. No. 1333, 79th Cong., 2d Sess. (1946)..... 7, 25

S. Rep. No. 1400, 93d Cong., 2d Sess. (1974)............ 9

Scalia & Garner, Reading Law:
The Interpretation of Legal Texts (2012)................ 28

Trade-Marks: Hearings Before the Subcomm. on Trade-marks, H. Comm. on Patents on H.R. 102, H.R. 5461, and S. 895,
77th Cong., 1st Sess. (1941)............................... 48

Trade-Marks: Hearings on H.R. 9041 Before the Subcomm. on Trade-Marks of the H. Comm. on Patents, 75th Cong., 3d Sess. (1938) 8

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INTRODUCTION

This case does not challenge corporate separateness. Petitioner asserts that respondent and the courts below used the Lanham Act to order a defendant "to disgorge the distinct profits of legally separate non-party corporate affiliates." But that's not what happened. Respondent values and relies on corporate separateness as much as the next company. It has never argued that a court crafting a profits-based remedy under the Lanham Act could simply ignore corporate structures and make one company disgorge the profits of another solely because the companies are related.

This case actually concerns two more prosaic questions of statutory interpretation. First, whether a court awarding a profits-based award under 15 U.S.C. § 1117(a) may consider evidence beyond an infringer's financial records where such records do not reflect the true extent of its infringement-related economic gain. And if so, whether the court may consider revenues and profits of the infringer's affiliates where that evidence is relevant to ascertaining the infringer's true gain. Those questions describe what occurred below, and the answer to both is "yes."

As to the initial question, Section 1117(a) directs a court determining profits-based awards through two steps. First is an "assess[ment]" of "defendant's profits." Then at the second step, if the court finds an award "based on profits" to be "inadequate or excessive," the court has "discretion" to grant instead "such sum as the court shall find to be just, according to the circumstances of the case"—*i.e.*, the "just-sum provision."

At minimum, one way the assessment of profits can be "inadequate" is if the infringer's books do not reflect the infringer's true financial gain from the infringement. That understanding comports with both common sense and the ordinary meaning of "inadequate," which means "insufficient." It also serves the Act's goal of strengthening trademark protection and removing any incentive from infringement.

As for what may be considered in determining the defendant's true financial gain, the statute answers that too. The text nowhere limits the proof a court can consider, so by default the court can consider all competent and relevant evidence. That includes financial information of other entities (affiliated or not) when, but only when, that information is relevant to unearthing an infringer's true financial gain. And that evidence may not only be relevant but, as in this case, crucial. As the United States correctly explains, an infringer can easily launder ill-gotten gains through affiliates by assigning revenues to them in advance, or by receiving payments off the books.

None of this licenses courts to abandon corporate separateness. Considering an affiliated entity's finances does not itself disregard corporate separateness, so long as facts separate from the mere corporate relationship tie the second company's finances to the infringer's gain. Corporate separateness is only breached when affiliated corporations are treated as interchangeable based solely on the corporate relationship. In short, there remains a clear and enforceable boundary between disregard of corporate separateness and considering an affiliate corporation's revenues and profits (or any

other competent evidence) where such evidence is relevant to ascertaining the infringer's true economic gain.

Nor is it true that all this has been ginned up just for this Court's benefit, as petitioner suggests. In the Fourth Circuit, respondent repeatedly argued that the district court properly exercised its statutory discretion to determine an appropriate "just sum" award by considering the profits of petitioner's affiliates as relevant evidence of petitioner's true financial gain. And the Fourth Circuit agreed. It affirmed the district court's unchallenged finding—based on expert testimony—that petitioner's "tax information" did not reflect "economic reality," as well as the district court's exercise of its "discretion" to "consider[] the revenues of [the affiliates] in calculating Dewberry Group's true financial gain from its infringing activities."

The United States agrees that, under circumstances like those here, courts can assess an infringer's true gain using an affiliate's profits. The Government says this should occur (at least initially) at step one, rather than at step two as respondent advocates. Even if that is correct, the courts below acted consistent with the law in searching for and disgorging petitioner's true gain.

The judgment below should be affirmed.

STATEMENT OF THE CASE

A. Legal Background

1. A trademark "benefit[s] consumers and producers alike." *Jack Daniel's Props., Inc.* v. *VIP Prods. LLP*, 599 U.S. 140, 146 (2023). By "tell[ing] the public who is responsible for a product" or service,

ibid., trademarks provide "accurate information to the market," 1 McCarthy, McCarthy on Trademarks and Unfair Competition § 2:3, at 2-5 (5th ed., rel. 9, 2019) (McCarthy). This "protects consumers from being misled," *Moseley* v. *V Secret Catalogue, Inc.*, 537 U.S. 418, 428 (2003), and ensures producers "reap the financial, reputation-related rewards associated with a desirable product," *Qualitex Co.* v. *Jacobson Prods. Co.*, 514 U.S. 159, 164 (1995).

Trademarks have "ancient origins," and "were protected at common law and in equity at the time of the founding of our country." *Matal* v. *Tam*, 582 U.S. 218, 224 (2017). For more than a century, however, Congress has continuously strengthened those protections through several statutes.

Before the first federal trademark act, legal actions for damages were relatively "rare." Upton, A Treatise on the Law of Trade Marks 233 (1860) (Upton). Money damage awards for infringement were often "conjectural, and quite beyond the scope of positive proof." Upton 246. Despite suffering "real injury," mark holders could spend "years of effort" and "undue expense" only to receive awards that "hardly covered the expense of the court proceedings." 2 Nims, The Law of Unfair Competition and Trade-Marks 1325-1326 (2d ed. 1947) (Nims).

Mark holders therefore preferred equity. In addition to injunctions, equity allowed mark holders to collect the infringer's profits through an "accounting." Upton 233-234. That required the infringer to "account for and yield up his gains" to the plaintiff, on "a principle analogous to that which charges a trustee with the profits acquired by wrongful use" of trust property.

Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251, 259 (1916). Those profits were considered a "rough measure" of the owner's lost sales. 5 McCarthy § 30:64, at 30-202.

Although preferable to legal actions, an accounting was "surrounded with many difficulties." *Elizabeth* v. *Pavement Co.*, 97 U.S. 126, 138 (1877); accord *Westinghouse Elec. & Mfg. Co.* v. *Wagner Elec. & Mfg. Co.*, 225 U.S. 604, 617 (1912). As one 1940s commentator described, an accounting was "unnecessarily complicated and technical," and "encourage[d] use of unfair methods." 2 Nims 1390.

Thus, equity had problems too. If the infringer's poor business decisions yielded no "substantial profits," the trademark owner was left with little to no compensation. *Birdsall* v. *Coolidge*, 93 U.S. 64, 69 (1876). And accounting awards were generally capped at actual net profits, as any further recovery constituted a penalty, which equity forbade. *Livingston* v. *Woodworth*, 56 U.S. (15 How.) 546, 559 (1853).

2. a. In response to these problems, Congress liberalized both damages and profits remedies with the 1905 Trade-Mark Act, ch. 592, 33 Stat. 724 (1905 Act). Through these innovations, Congress hoped to provide trademark owners "full and complete redress." H.R. Rep. No. 3147, 58th Cong., 3d Sess. 9 (1904) (House Report).

First, the 1905 Act authorized up to three times "actual damages," "according to the circumstances of the case." §§ 16, 19, 33 Stat. 728-729. This addition was modeled on the 1870 Patent Act,[1] and helped

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[1] Ch. 230, §§ 55, 59, 16 Stat. 198, 206-207.

plaintiffs overcome "[t]he difficulty of proving exact damages in cases of this character." House Report 9.

Second, the 1905 Act introduced a new burden-shifting regime for profits awards. § 19, 33 Stat. 729. Previously, plaintiffs had to prove both components of the defendant's profits (income and expenses) "'with entire and absolute accuracy,'" even though the "'only persons having [such] knowledge'" were "'the defendant or some one in his employ.'" *Mishawaka Rubber & Woolen Mfg. Co.* v. *S.S. Kresge Co.*, 316 U.S. 203, 206 n.1 (1942) (quoting House Report 9). The 1905 Act relieved some of that burden: "the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost which are claimed." § 19, 33 Stat. 729. This regime aligned with the traditional principle that "a trustee *ex maleficio*, who ha[s] confused his own gains with those which belong[] to the plaintiff" must "suffer" the resulting confusion. *Westinghouse*, 225 U.S. at 618-619.

For forty years, however, "no reported cases" used the treble-damages provision. Koelemay, *Monetary Relief For Trademark Infringement Under the Lanham Act*, 72 Trademark Rep. 458, 480 (1982) (Koelemay). Courts construed this provision to impose a "penalty," see, *e.g.*, *Coca-Cola Co.* v. *Dixi-Cola Lab'ys*, 155 F.2d 59, 63 (4th Cir. 1946), just as this Court had construed the treble-damages provisions in earlier patent statutes, see *Halo Elecs., Inc.* v. *Pulse Elecs., Inc.*, 579 U.S. 93, 98 (2016). That created problems. In equity, penalties were prohibited. *Liu* v. *SEC*, 591 U.S. 71, 77 (2020). And in law, a heightened showing of wrongful behavior was required. *Halo Elecs.*, 579 U.S. at 98-99.

Proving profits remained difficult also. Despite the burden-shifting introduced by the 1905 Act, "[a]lmost never [could] the exact amount of [the defendant's] profits be computed," due to "[t]oo many uncertain elements." 2 Nims 1390 (noting impact of increasingly complex commerce in the early 1900s). Accordingly, plaintiffs were generally undercompensated. *Ibid.*

b. Responding to these further problems, Congress passed the Lanham Act in 1946. Ch. 540, 60 Stat. 427 (15 U.S.C. §§ 1051 *et seq.*). The Act "significantly changed and liberalized the common law to 'dispense with mere technical prohibitions'" to enforcing trademark rights. *Qualitex*, 514 U.S. at 171 (quoting S. Rep. No. 1333, 79th Cong., 2d Sess. 3 (1946) (Senate Report)). In doing so, Congress gave trademarks "the greatest protection" it could. *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U.S. 189, 193 (1985) (quoting Senate Report 6).

These changes included a new remedial provision—codified at 15 U.S.C. § 1117. § 35, 60 Stat. 439-440. The provision retained the prior treble-damages and burden-shifting provisions. 60 Stat. 440. But it added new language "to grant the courts greater flexibility to adjust the quantum of relief" for profits-based awards, Koelemay 459-60:

> 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.

§ 35, 60 Stat. 440.

This increased flexibility addressed a key critique of the Lanham Act's principal drafter, Edward Rogers, see Pet. Br. 7. Rogers believed monetary remedies under the 1905 Act were "arbitrary," *Registration of Trade-Marks: Joint Hearings on S. 2679 Before the Comms. on Patents*, 68th Cong., 2d Sess. 49 (1925), and afforded district courts "no flexibility whatever," *Trade-Marks: Hearings on H.R. 9041 Before the Subcomm. on Trade-Marks of the H. Comm. on Patents*, 75th Cong., 3d Sess. 50 (1938). The just-sum provision changed that.

The concept of a "just sum" wasn't entirely novel, but Congress did more than ever before. Prior statutes, like the Patent Act of 1870, had allowed courts to award such sums "as to the court shall appear to be just." See, *e.g.*, ch. 230, § 101, 16 Stat. 198, 214. But those awards were capped. *Ibid.* The Lanham Act was "unique" because it contained "no stated ceiling." Brown, *Civil Remedies for Intellectual Property Invasions: Themes and Variations*, 55 L. & Contemp. Probs. 45, 74 (1992) (Brown).

Finally, Congress expressly overcame equity's traditional prohibition on penalties—including damage awards greater than actual damages and profits-based awards greater than actual net profits—by not only authorizing these enhanced awards, but also by declaring that "[s]uch sum in either of the above circumstances shall constitute compensation and not a penalty." § 35, 60 Stat. 440. The clause was modeled on the Copyright Act of 1909, see *Getty Petro. Corp.* v. *Bartco Petro. Corp.*, 858 F.2d 103, 110 (2d Cir. 1988), which included language this Court had interpreted as serving the same purpose, *Douglas* v. *Cunningham*, 294 U.S. 207, 208-209 (1935).

c. A few decades later, Congress enhanced Section 1117(a)'s remedies again—allowing "reasonable attorney fees to the prevailing party" "in exceptional cases." Act of Jan. 2, 1975, Pub. L. No. 93-600, § 3, 88 Stat. 1955, 1955 (15 U.S.C. § 1117(a)). Not long before, this Court held that Section 1117(a)'s reference to "the principles of equity" and "costs of the action" did not allow recovery of attorney fees. *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 720-721 (1967). Understanding the importance of "encourag[ing]" private trademark enforcement and "provid[ing] a complete remedy," Congress codified such recovery. S. Rep. No. 1400, 93d Cong., 2d Sess. 5 (1974) (quoting Statement of Department of Commerce).

B. Facts and Procedural History

1. Petitioner Dewberry Group, Inc. and Respondent Dewberry Engineers Inc. provide similar real-estate development services in overlapping geographic areas. Pet. App. 3a-4a. But respondent was founded decades earlier and owns two federally registered trademarks for the name "Dewberry." Pet. App. 3a.

These parties have clashed for nearly two decades in two lawsuits for trademark infringement. The first ended in 2007 with a confidential settlement agreement memorializing respondent's superior trademark rights (the "CSA"). Pet. App. 4a-6a, 12a-14a, 30a-31a. The CSA permitted respondent to use any "Dewberry" mark it wished, anywhere it pleased. Pet. App. 5a. It allowed petitioner only one "Dewberry" mark ("Dewberry Capital") for certain services in certain geographic areas with a distinguishing column/capital logo. Pet. App. 5a-6a.

This truce was only temporary. Petitioner first violated the CSA by using "Dewberry Capital" for prohibited services, in prohibited areas, and without the required logo. Pet. App. 13a-14a. Then, in 2017, it rebranded to four different "Dewberry" marks (including "Dewberry Group"), all prohibited by the CSA. See Pet. App. 7a, 30a-31a.

In rebranding, petitioner's founder, John Dewberry, did not inform petitioner's general counsel, David Groce, "of the prior litigation or the CSA." Pet. App. 7a. Unsurprisingly, the United States Patent and Trademark Office rejected petitioner's application for a new "Dewberry Group" mark due to likelihood of confusion with respondent's marks. *Ibid.* Respondent sent a cease-and-desist letter, and Groce responded that he was unaware of the CSA, that petitioner "'had no intent to infringe [respondent's] valid trademark rights,'" and that petitioner would cease rebranding. Pet. App. 7a-8a.

But petitioner didn't stop. It applied to register four additional "Dewberry" marks, all of which were rejected as confusingly similar to respondent's. Pet. App. 8a. Respondent sent two more cease-and-desist letters, Pet. App. 8a-9a, but petitioner continued using the prohibited marks, Pet. App. 71a.

Petitioner used these marks to promote, operate, and manage numerous affiliated real-estate companies. Pet. App. 83a. These affiliates, all owned by John Dewberry, were "single-purpose entities" whose sole function was to own commercial properties serviced by petitioner. Pet. App. 82a. Although the affiliates each paid petitioner "a fee for this internal service," Pet. App. 44a, these were "non-arms' length" transactions, Pet. App. 85a, and that fee did not cover

petitioner's operating costs, Pet. App. 83a-84a. Those costs were also inflated because many were incurred for John Dewberry personally, such as for his private aircraft. J.A. 109. Accordingly, petitioner reported negative profits on its tax returns. *Ibid.*

The affiliates, on the other hand, recorded massive profits. Pet. App. 86a-88a. But the affiliates could not "perform the work and services necessary to generate [these] revenues." Pet. App. 83a. Instead, petitioner "promoted, managed, and operated all of the properties," and "did so using the Infringing Marks." *Ibid.* Accordingly, petitioner was "the engine that drives the entire operation." J.A. 60. Indeed, the affiliates had no employees at all. J.A. 93. And, "all revenues generated through [petitioner's] services show up exclusively on the affiliates' books." Pet. App. 83a. That's because petitioner's management, John Dewberry, "determines whether on paper [petitioner] or the [affiliates] show the losses or profits during the infringement period." J.A. 68.

Despite the purported losses on petitioner's books, it benefited from the infringement. To cover those losses, John Dewberry personally provided petitioner with tens of millions of dollars in "capital" contributions, none of which registered as revenue on petitioner's books. Pet. App. 84a; J.A. 156-157. Petitioner also admitted the infringing marks were a "'huge differentiator' from competing firms." Pet. App. 72a.

Petitioner's infringement caused confusion, Pet. App. 31a, and "irreparable injury" to respondent's brand, Pet. App. 16a. Indeed, many of petitioner's projects spurred "negative publicity" mistakenly attributed to respondent—one was described as "an

'eyesore' and 'blight,' a 'long-languishing' 'skeletal building,' 'violating building codes,' and containing 'so many rats' that 'it looked like the ground was moving.'" *Ibid.* (citations omitted).

2. When petitioner refused to stop using respondent's marks, respondent sued for trademark infringement and breach of the CSA. Pet. App. 9a-12a.

Respondent won summary judgment on both claims. Pet. App. 9a. The district court held that petitioner repeatedly violated the CSA and, in the process, harmed respondent by infringing its trademarks. Pet. App. 10a-11a. The court permanently enjoined petitioner from further infringement. Pet. App. 12a.

The court then held a three-day bench trial to assess monetary remedies. Pet. App. 11a. Afterward, it held that disgorgement of profits was appropriate due to petitioner's "willful, bad faith infringement." Pet. App. 86a; see Pet. App. 65a-74a (discussing a "succession" of "'red flag[s]' ... alerting" petitioner to its infringement and petitioner's "ample financial motivation" to continue). It also found the trial testimony of John Dewberry and Groce "not credible." Pet. App. 70a.

Next came calculation of the disgorgement award. Petitioner urged the court to award $0 because petitioner's tax returns reported negative overall profits. Pet. App. 82a-84a. In contrast, respondent and its expert witness, Rodney Bosco, urged the court to examine "the economic reality of how [petitioner's] business actually operates." Pet. App. 83a. And this "economic reality" required consideration of the ways

petitioner assigned revenues and profits to its affiliates. *Ibid.*

The district court agreed with respondent, adopting the economic analysis in Bosco's two expert reports and trial testimony. Pet. App. 84a. In assessing petitioner's profits, the court found that "Dewberry Group, Inc.'s tax returns, standing alone, do not tell the whole economic story" and didn't reflect "economic reality." *Ibid.* In support, it further found that "no real estate … business could continue as a going concern after decades of losses like these." *Ibid.* And it found that John Dewberry covered petitioner's purported losses with at least $23 million of his money. *Ibid.*

The court then looked at petitioner's tax returns in context, including "the revenues and profits" of petitioner's affiliates. Pet. App. 82a. These affiliates reported $53 million in profits from 2018 to 2020 alone. Pet. App. 86a-88a.[2] Yet the court found that the affiliates "do not and cannot perform the work and services necessary to generate revenues." Pet. App. 83a. Instead, the court found the revenues were generated by petitioner, who "promoted, managed, and operated all of the [affiliates'] properties … using the Infringing Marks." *Ibid.* And the court found "all revenues generated through [petitioner's] services show up exclusively on the [affiliates'] books"—books that petitioner kept for the affiliates. *Ibid.* The court expressly rejected petitioner's claim that "it is *not* the economic engine that creates the revenue that flows

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[2] The United States mistakenly refers to this $53 million as revenues, not profits. U.S. Br. 8, 9. Revenues exceeded $101 million. J.A. 184-187.

to these [affiliates]." *Ibid.* (emphasis added; citation omitted).

The district court considered this "economic reality" when determining the appropriate disgorgement award against petitioner. Pet. App. 85a-86a. To that end, the district court considered, among other evidence, the affiliates' financial statements "when calculating the revenues and profits generated by Defendant's use of the Infringing Marks." Pet. App. 85a. But it did so "conservatively" by underestimating the infringement period. Pet. App. 87a. It then further reduced the affiliates' profit figures by 20%, giving petitioner the benefit of the doubt that some of these profits might not have directly resulted from petitioner's infringement. Pet. App. 90a-91a. This came to a total of nearly $43 million. Pet. App. 94a.

The court also noted that petitioner "failed to carry" its burden of proving "non-infringement revenues." Pet. App. 91a. Although petitioner managed its own and the affiliates' financial affairs, it "did not do a profits analysis" and performed "no calculation of [petitioner's] actual profits," insisting instead that "there were zero infringement-related revenues." Pet. App. 92a (citation omitted). "That [petitioner] declined to do this analysis," the court observed, "put[] both [petitioner] and the Court at a disadvantage." *Ibid.*

The court then entered judgment against petitioner, and petitioner alone. Br. in Opp. Suppl. App. 1SA. The court did not purport to hold petitioner's affiliates liable for infringement, order petitioner's affiliates to pay, or direct petitioner to retrieve any money from them. *Ibid.* It simply

ordered petitioner to pay approximately $43 million for its infringing activities. *Ibid.*

3. Petitioner appealed, and the Fourth Circuit affirmed. Nearly all of that decision—including the court's affirmance of a disgorgement award due to petitioner's bad faith—is unchallenged. The only issue is the amount of the disgorgement award.

In reviewing this amount, the appeals court first confirmed that petitioner's "tax information" failed to reflect "economic reality." Pet. App. 40a. The majority viewed the pertinent question as "how much Dewberry Group profited from its infringing activities." Pet. App. 39a. And the majority affirmed the district court's decision to consider the finances of petitioner's affiliates "for the purpose of calculating revenues and profits generated by Dewberry Group's use of the infringing marks." Pet. App. 11a.

The majority rejected petitioner's argument that the district court had impermissibly "pierce[d] the corporate veil." Pet. App. 43a. Instead, it agreed with respondent's repeated arguments that the district court merely "considered the revenues of [the affiliates] in calculating Dewberry Group's true financial gain from its infringing activities." *Ibid.*[3]

The majority also affirmed the factual findings underlying this analysis: that petitioner, not the affiliates, generated the revenue that appeared on the affiliates' books, Pet. App. 39a-40a; that John

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[3] See, *e.g.*, Br. in Opp. Suppl. App. 54SA ("[T]he district court properly considered other financial evidence to 'tell the whole economic story.'"); Add. 1, *infra* ("[T]he very purpose of that discretion is to get after … 'true profits.'"); see also, *e.g.*, Br. in Opp. Suppl. App. 25SA, 52SA, 55SA; Add. 1-2, *infra*.

Dewberry owned and controlled both petitioner and its affiliates, Pet. App. 3a-4a; and that John Dewberry "contributed at least $23 million to cover [petitioner's] extensive losses," Pet. App. 40a. So, "while [petitioner] did not receive the revenues from its infringing behavior directly, it still *benefited* from its infringing relationship with its affiliates." Pet. App. 45a.

The Fourth Circuit explained that this award is "'subject to the principles of equity,' 15 U.S.C. § 1117(a), and is ultimately a matter of the court's discretion." Pet. App. 45a. And it found that "[a]ny arbitrariness" in the district court's award "can be traced back to [petitioner's] litigation strategy to deny *any* connection between its affiliates' revenues and its infringing marks" and refusal to distinguish "between infringing and non-infringing revenues." Pet. App. 46a (emphasis in original).

Judge Quattlebaum dissented. He believed the district court should not have "use[d] revenues from [the affiliates] … to assess the profits of the Dewberry Group" without either suing those affiliates or "pierc[ing] the Dewberry Group's corporate veil." Pet. App. 58a-59a.

Rehearing en banc was denied without a poll. Pet. App. 121a.

SUMMARY OF ARGUMENT

I. The Lanham Act prescribes a two-step process for calculating profits-based awards and grants district courts discretion, when appropriate, to award a just sum that represents the defendant's true financial gain. In doing so, courts may consider all competent evidence, including profits of affiliated

entities when relevant. This does not violate principles of corporate separateness.

A. 1. At step one, the court must "assess" the "defendant's profits," using a statutory burden-shifting regime. This analysis is based primarily on the defendant's revenues and costs.

At step two, the court decides whether "recovery based on profits is either inadequate or excessive." If so, the court has "discretion" to instead award a higher or lower "sum as the court shall find to be just, according to the circumstances of the case."

2. A "recovery based on profits" can be "inadequate" if it understates the infringer's true gain. The infringer may have obscured this gain through creative accounting practices, accrued intangible benefits, or withheld evidence needed to calculate profits on the books. In those circumstances, the just-sum provision allows courts to look at more than the defendant's books in isolation and estimate true gain based on other evidence.

The United States agrees that courts may look at more than the defendant's books to estimate true gain. But it asserts that this can occur at either or both of the two steps. Respondent disagrees in part, though the outcome is ultimately the same under the Government's theory. Indeed, if this Court adopts the Government's view of the statute, it can and should still affirm.

For its part, petitioner claims that, at either step, the court can consider only the named defendant's books. The just-sum provision, in petitioner's view, may only be used to overcome "proof problems" in understanding the infringer's own books. That is

wrong. An award is "inadequate or excessive" if "the amount of recovery" is too low or too high to capture the infringer's true gain. Proof problems of the kind petitioner identifies may be *one* reason that is true, but not the only one.

3. That said, the just-sum provision does have limits. The court must find that recovery "based on [defendant's] profits" is "inadequate or excessive." It must then select an amount that is "just, according to the circumstances of the case." These findings are discretionary, but they must be supported by the record.

B. In assessing an infringer's true gain, courts may consider profits of affiliated entities when relevant. Nothing in the Lanham Act alters the default principle that a court may consider all competent and relevant evidence.

Profits of an affiliate may be relevant for several reasons. As one example, the infringer may have directed revenues to an affiliate in exchange for benefits not reflected on the infringer's books. Affiliates can easily transfer benefits among themselves in ways that avoid detection.

C. Using an affiliate's profits as evidence does not disregard corporate separateness. A court cannot just assume an affiliate's profits reflect the infringer's true gain based solely on the fact of the corporate relationship. But if other facts establish a sufficient causal connection, then nothing prevents courts from using an affiliate's revenues and profits to calculate an award against the infringer. Petitioner's claim that courts can only look at an affiliate's profits after piercing the corporate veil is incorrect.

II. The judgment should be affirmed.

A. The decision below properly affirmed the award of a just sum.

1. The decision first properly concluded that an award of "defendant's profits" was "inadequate." It correctly affirmed the finding that petitioner's tax records didn't reflect "economic reality." In doing so, it correctly affirmed the district court's decision to look elsewhere for petitioner's true financial gain.

2. The decision below then properly affirmed the choice to use the profits that petitioner assigned to its affiliates as evidence of petitioner's true gain. As the United States correctly argues, a company can't disguise its own revenues by assigning them somewhere else in advance. That's what happened here. Petitioner generated the affiliates' revenue through its infringement, directed that revenue to the affiliates instead of itself, and then received off-the-books benefits in return.

3. Petitioner is wrong that the award exceeded some fictional statutory cap. The text of the just-sum provision includes no cap, unlike the near-by damages provision or the many other statutes that expressly impose one. Nor would a cap make sense, as it would only reward infringers for greater manipulation of their books. Instead, the award need only be "just," meaning, as relevant here, that it reflects the infringer's true gain.

B. The United States' understanding of Section 1117(a) provides an alternative basis to affirm the decision below. The Government would task district courts with ascertaining true financial gain, at least initially, at step one of the profits-based analysis.

Even under that understanding, the courts acted consistent with the law. Under the Government's approach, an infringer who generates and controls income "may fairly be viewed as having profited" from assigning that income to someone else. Here, petitioner generated all of the affiliates' revenue. And despite step one's burden-shifting framework, petitioner did not even try to untangle its own assigned income from any income generated by the affiliates themselves.

III. The decision below should be affirmed. But even if the Fourth Circuit erred, remand is appropriate to allow respondent to pursue alternative legal arguments in support of its award.

ARGUMENT

I. Under Section 1117(a), district courts can consider all competent and relevant evidence in imposing a judgment for the defendant's true financial gain.

Provided that several threshold requirements are met, Section 1117(a) of the Lanham Act prescribes two steps for determining profits-based awards. The first is an "assess[ment]" of "defendant's profits." 15 U.S.C. § 1117(a). The second allows the court, when appropriate, to look beyond "defendant's profits" to other evidence that captures the defendant's true financial gain from the infringement and to calculate instead "such sum as the court shall find to be just, according to the circumstances of the case." *Ibid.*

In imposing a judgment at step two for the defendant's true financial gain, the court may look to any competent and relevant evidence. Contrary to petitioner's suggestion, principles of corporate

separateness do not require singling out the financial information of affiliated entities as uniquely off-limits.

A. Section 1117(a)'s two-step process allows an award of the infringer's true financial gain.

The text of the Lanham Act authorizes a profits-based award subject to several threshold requirements:

> [T]he plaintiff shall be entitled, subject to the provisions of sections 1111 and 1114 of this title, and subject to the principles of equity, to recover … defendant's profits … .

15 U.S.C. § 1117(a). Sections 1111 and 1114 carve out situations in which monetary relief is unavailable. "[P]rinciples of equity" likewise may preclude monetary awards when "an injunction will satisfy the equities of the case," *Champion Spark Plug Co* v. *Sanders*, 331 U.S. 125, 131 (1947), or when the defendant can invoke laches or acquiescence, *McLean* v. *Fleming*, 96 U.S. 245, 257 (1878).

Once past these requirements, Section 1117(a) lays out two steps for calculating the profits-based award—the only issue before this Court. First:

> The court shall assess such profits … or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed.

15 U.S.C. § 1117(a). And second:

> 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.

Ibid.

As discussed below, these instructions make clear that, at step two, a district court may look beyond "defendant's profits" and instead award the defendant's true financial gain.

1. A district court may look beyond the defendant's profits when it finds an award based on step one would be "inadequate."

Step one is an "assess[ment]" of "defendant's profits." 15 U.S.C. § 1117(a). "Profits," as long understood in equity, are "the gain made upon any business or investment, when both the receipts and payments are taken into account." *Rubber Co.* v. *Goodyear*, 76 U.S. (9 Wall.) 788, 804 (1869).

Under the Lanham Act's burden-shifting scheme, the plaintiff need prove "sales only." 15 U.S.C. § 1117(a). "The plaintiff of course is not entitled to profits demonstrably not attributable to the unlawful use of his mark." *Mishawaka*, 316 U.S. at 206. Even so, because it is often "inherently impossible" for a plaintiff to disaggregate which sales are "attributable" to trademark infringement, *Hamilton-Brown Shoe*, 240 U.S. at 261, Congress has placed the

burden to apportion those sales on the defendant, *Mishawaka*, 316 U.S. at 206. The defendant may then counter with any "elements of cost or deduction claimed" to offset those sales. § 1117(a).

To be clear, that does not mean an infringer whose books are "in the red" has no profits to disgorge. Equity's understanding of "the gain made upon any business or investment," *Rubber Co.*, 76 U.S. (9 Wall.) at 804, includes an "advantage in cost," *Mowry* v. *Whitney*, 81 U.S. (14 Wall.) 620, 651 (1871); see 2 Dobbs, Law of Remedies § 6.4(4), at 89 (2d ed. 1993) (Dobbs). So even if the benefits from infringement only mitigated defendant's losses, that mitigation is "equivalent to an equal gain." *Tilghman* v. *Proctor*, 125 U.S. 136, 147 (1888) (citation omitted).

Similarly, because equity prioritizes substance over form, *Texas* v. *Hardenberg*, 77 U.S. (10 Wall.) 68, 89 (1869), courts need not take a defendant's "elements of cost or deduction," 15 U.S.C. § 1117(a), at face value. For example, overhead expenses (like salaries) are deductible in profits calculations. *L.P. Larson, Jr., Co.* v. *Wm. Wrigley, Jr., Co.*, 277 U.S. 97, 100 (1928). But distributions of profits as dividends are not. *Aladdin Mfg. Co.* v. *Mantle Lamp Co.*, 116 F.2d 708, 713 (7th Cir. 1941). A creative infringing corporation could disguise "dividends of profit" as "salaries" and seek to deduct them, *Rubber Co.*, 76 U.S. (9 Wall.) at 803, but equity would smoke that out, *Aladdin Mfg.*, 116 F.2d at 713.

After assessing "defendant's profits," the court moves to step two, in which it may look beyond "defendant's profits" and instead award "in its discretion" "such sum as the court shall find to be just." 15 U.S.C. § 1117(a); see 2 Dobbs § 6.4(4), at 88

(Section 1117(a) allows court to "discard" the inadequate or excessive award). But to invoke that discretion, the court must first consider whether a recovery based solely on step one would be "inadequate or excessive … according to the circumstances of the case." § 1117(a). If the answer is no (which it usually will be, p. 32, *infra*), that ends the analysis.

2. An amount is "inadequate" when it does not reflect the infringer's true financial gain.

At minimum, a just-sum inquiry and award is warranted if the step-one assessment fails to capture the defendant's true financial gain from the infringement. *E.g.*, *Max Rack, Inc.* v. *Core Health & Fitness, LLC*, 40 F.4th 454, 473 (6th Cir. 2022); *Fifty-Six Hope Rd. Music, Ltd.* v. *A.V.E.L.A., Inc.*, 778 F.3d 1059, 1077 (9th Cir. 2015). As discussed below, this understanding comports with the statute's text and purpose and is consistent with the views of the United States. Petitioner's contrary insistence that the only numbers that matter are those on the infringer's ledgers, *e.g.*, Pet. Br. 45-46, is flawed many times over.[4]

a. Begin, as always, with the text. *Campos-Chaves* v. *Garland*, 144 S. Ct. 1637, 1647 (2024). At the time of the Lanham Act's enactment, "inadequate" meant "insufficient." Webster's New International

[4] There may be additional bases to deem a profits award inadequate. For example, some lower courts have used the just-sum provision to provide adequate compensation or deterrence. See, *e.g.*, 5 McCarthy § 30:91, at 30-257; U.S. Br. 33 n.6. Because this case was decided based on "true financial gain," Pet. App. 43a, these alternative theories need not concern the Court now.

Dictionary 1254 (2d ed. unabr. 1939) (Webster's); 1 Funk & Wagnall's New Practical Standard Dictionary 18, 671 (1946) (Funk & Wagnalls). Its companion in the statute, "excessive," meant "being in … excess," 1 Funk & Wagnalls 462, or "exceeding what is usual or proper," Webster's 889. These adjectives invite the question: how does a court measure inadequacy or excessiveness?

True financial gain provides one appropriate measurement. The basic purpose of a profits award is to "strip wrongdoers of their ill-gotten gains." *Liu*, 591 U.S. at 79; accord Restatement (Third) of Restitution and Unjust Enrichment § 51(4), at 203 (2011) (Restatement). Where "the amount of the recovery based on profits" does not capture the defendant's true financial gain, it is insufficient to accomplish that purpose and necessarily "inadequate." 15 U.S.C. § 1117(a); see Fowler, A Dictionary of Modern English Usage 261 (1946) ("inadequate" refers to the "notion [of] (un)equal to requirements").

Measuring true financial gain also furthers the Lanham Act's objective of protecting mark owners and the public against "pirates and cheats," as well as "making infringement and piracy unprofitable." Senate Report 3. The statute does so by making trademark registrations "stronger" and "dispens[ing] with mere technical prohibitions" to make "relief against infringement prompt and effective." *Ibid.* Restricting profits-based awards to an infringer's book profits, while blinding them to an infringer's true financial gain, would achieve the opposite.

b. It is not difficult to imagine how an award based solely on book profits may not capture true financial gain.

First, an infringer may obscure its true financial gain through "creative accounting practices." U.S. Br. 19. Not all benefits turn up on financial records. An infringer may conceal its true gain by receiving *indirect* payments for its infringement "through a separate transaction." U.S. Br. 13. Or an infringer could "direct[] or agree[]" that the infringer's own gain be realized by another entity, U.S. Br. 22, and then receive valuable services from that entity free of charge.

Second, an infringer may have accrued "intangible benefits" that cannot be precisely calculated. *Merck Eprova AG* v. *Gnosis S.p.A.*, 760 F.3d 247, 263 (2d Cir. 2014). These might include a "'usurpation of … market share,'" *ibid.* (citation omitted), or a "free ride on" the plaintiff's goodwill, *Maier Brewing Co.* v. *Fleischmann Distilling Corp.*, 390 F.2d 117, 122 (9th Cir. 1968); see also 1 Dobbs § 4.1(4), at 566 n.1 (restitution includes recovery of "intangible" benefits).

Third, the infringer might withhold critical financial evidence and prevent the court from calculating "defendant's profits" at all. *Max Rack*, 40 F.4th at 473 ("discovery 'stonewalling'"); see *Keystone Mfg. Co.* v. *Adams*, 151 U.S. 139, 148-149 (1894) (defendant did not "disclos[e] the condition of his business").

For these last two types of inadequacy, the just-sum provision can play a particularly critical role. As this Court explained regarding a similar provision in the Copyright Act: when "the rules of law render

difficult or impossible … discovery of profits," the just-sum provision "vest[s] in the trial court broad discretion to determine whether it is more just to allow a recovery based on a calculation of … profits, as found from evidence, or one based on a necessarily somewhat arbitrary estimate." *F.W. Woolworth Co.* v. *Contemporary Arts, Inc.*, 344 U.S. 228, 231-232 (1952) (citation omitted); see 17 U.S.C. § 101(b) (1946 ed. Supp. V). Courts can, and in some instances must, rely on estimates and ballpark figures. *E.g.*, *Merck Eprova*, 760 F.3d at 263. That flexibility can spell the difference between full compensation and mere "nominal damages." See *Keystone Mfg. Co.*, 151 U.S. at 149.

This is consistent also with well-settled principles of unjust enrichment and restitution. When the defendant is "a conscious wrongdoer," it is sufficient for plaintiffs to establish a "'[r]easonable approximation'" of the defendant's gains. Restatement § 51, cmt. i, at 221. The "conscious wrongdoer" then "bears the risk of uncertainty arising from the wrong." *Ibid.*; see also *Westinghouse*, 225 U.S. at 618 (discussing the "trustee *ex maleficio*, who had confused his own gains with those which belonged to the plaintiff"). So if "the true measure of unjust enrichment is an indeterminable amount" in a particular range, "liability in disgorgement" will be fixed at the high end of the range absent countervailing evidence from the wrongdoer. Restatement § 51, cmt. i, at 221.

c. The United States' understanding of the statute largely aligns with respondent's. The Government agrees that under Section 1117(a), courts may award "an amount that reflects the infringer's true financial gain." U.S. Br. 13. And while the Government

appears to favor courts mainly doing such an analysis at step one under the rubric of "defendant's profits," it acknowledges that true financial gain may be awarded "alternative[ly]" at step two as a just sum. U.S. Br. 33. The Government stresses that courts may not simply skip step one, *ibid.*, but does not dispute that step one will sometimes fail to capture true financial gain, see *ibid.*, or that missing evidence may preclude such an estimation, see U.S. Br. 33 n.6; accord Pet. Br. 37-38.

The Government and respondent disagree, however, on the meaning of "profits." Given the statutory reference to "equity" and the history of trademark remedies, respondent draws on "common-law meanings." Scalia & Garner, Reading Law: The Interpretation of Legal Texts 320 (2012); pp. 22-23, *supra*. The United States begins instead with 1946-era dictionary definitions. U.S. Br. 22-23. Nevertheless, in this case, both approaches lead to the same place. See Section II.B, *infra*.

The Government is also correct that there may be more than one way "to recover from one defendant ill-gotten monies that flowed to a separate entity" in a given case. U.S. Br. 26. Petitioner and some *amici* list their preferred strategies for looking at an affiliate's profits. Pet. Br. 48-49; AIPLA Br. 10; INTA Br. 16-18. Those strategies will not always be available, however; for example, a plaintiff cannot join an affiliate outside the court's jurisdiction as a co-defendant. See Fed. R. Civ. P. 4(k)(1), 19(a)(1).[5] But more important, those options "are not the *exclusive* means of identifying the defendant's true financial

[5] Here, for example, petitioner's affiliates are out-of-state. J.A. 152, 158, 176.

gain as contemplated by the Lanham Act." U.S. Br. 26.

d. Petitioner wrongly rejects any consideration of "true financial gain." In petitioner's view, "defendant's profits" are inadequate at step two *only* when "proof problems" or "evidentiary difficulties" make it "'impossible to make a mathematical or approximate apportionment' of profits." Pet. Br. 17, 37 (quoting *Westinghouse*, 225 U.S. at 620). And by "profits," petitioner means on-the-books profits, as evidenced by petitioner's repeated assumption that its tax returns resolve any question of "evidentiary difficulties." See, *e.g.*, Pet. Br. 45-46. In other words, a just-sum award is only permitted in the limited circumstances where it is *impossible* to glean from defendant's books whether (and how much) it has reported a net gain.

i. Return to the text. Petitioner's interpretation cannot be squared with the plain meaning of "inadequate or excessive." Those terms do not describe only impossibility of proof, but the "amount of the recovery." 15 U.S.C. § 1117(a). As discussed above, the plain meaning of "inadequate" is "insufficient." Webster's 1254. And "excessive" means "[e]xceeding what is usual or proper." Webster's 889. Petitioner would rewrite the provision to say: "[i]f the court shall find that the amount of the recovery based on profits [cannot be determined] the court may in its discretion enter judgment for such sum as the court shall find [best approximates profits]."

To be sure, evidentiary difficulties may be *one* cause of an "inadequate" amount. If those difficulties make it impossible to prove defendant's profits, the

amount plaintiff is able to prove will, of course, be inadequate. But it does not follow that such evidentiary difficulties are the *only* cause for inadequacy.

Petitioner's reliance on the Copyright Act of 1909, see Pet. Br. 38, is also unavailing. Though similar in many respects to the Lanham Act's just-sum provision, this earlier provision lacked the phrase "inadequate or excessive" that dictates whether a court may award a just sum. Ch. 320, § 25(b), 35 Stat. 1075, 1081. Caselaw recognizing that "problems of proof" were the "principal[]" "concern[]" of this earlier provision, Pet. Br. 38, is thus unhelpful.

ii. Petitioner also turns to the "not a penalty" clause in Section 1117(a) to support its narrow view of the just-sum provision. Following the treble-damages and just-sum provisions, the statute provides that "[s]uch sum in either of the above circumstances shall constitute compensation and not a penalty." 15 U.S.C. § 1117(a). According to petitioner, this clause limits the just-sum provision to overcoming "proof problems" by making clear that awarding any amount beyond an infringer's book profits is a penalty. Pet. Br. 40, 46-47.

Petitioner misunderstands the clause. It's not a limitation on the treble-damages and just-sum provisions, but a declaration that those enhanced awards are deemed, as a matter of law, "not a penalty" even if they might otherwise be. Just as in numerous other federal statutes using the words "shall constitute," see, *e.g.*, 28 U.S.C. § 1 ("[A]ny six [Supreme Court Justices] shall constitute a quorum."); 42 U.S.C. § 14924(e) (certain conduct

"shall constitute substantial noncompliance"), the clause declares a legal fact.

Without the clause, Section 1117(a) would present a "seeming contradiction." Brown 74-76. On one hand, it expressly incorporates "principles of equity," 15 U.S.C. § 1117(a), which prohibited "punitive sanctions," *Liu*, 591 U.S. at 74, including any award above "net profits," *id*. at 84, or actual damages, see *Halo Electronics*, 579 U.S. at 98-99. Yet on the other hand, the provision expressly permits both treble damages and an increased award when "defendant's profits" are deemed "inadequate." See Brown 74-76 ("How can tripling actual damages not penalize the defendant?").

Recognizing that Section 1117(a) displaces this particular application of equity "explain[s]" the contradiction. Brown 75-76; see 2 Dobbs § 6.4(8), at 114 (but for the not-a-penalty clause, treble-damages award "may be regarded as … punitive. Here, the Copyright Act of 1909 *does* provide guidance, as "[t]he 'compensation and not a penalty' clause borrows language" from that earlier statute. *Getty Petro.*, 858 F.2d at 110. And in 1935—well before the Lanham Act—this Court had found *that* not-a-penalty clause "was adopted to avoid the strictness of construction incident to a law imposing penalties." *Douglas*, 294 U.S. at 209. In the Lanham Act, Congress similarly sought to provide "a green light for the judicial increase of damages or profits" so long as there is a "remedial" purpose in doing so. 5 McCarthy § 30:91, at 30-257; Brown 76.

Petitioner is therefore wrong that the not-a-penalty clause supports a narrow view of the just-sum provision and hamstrings a court from awarding more than an infringer's on-the-books profits. Pet. Br. 46-47. Though some courts have endorsed petitioner's view, see, *e.g.*, *ALPO Petfoods, Inc.* v. *Ralston Purina Co.*, 913 F.2d 958, 970 (D.C. Cir. 1990); *Thompson* v. *Haynes*, 305 F.3d 1369, 1380 (Fed. Cir. 2002), they engaged with neither the clause's history and context nor the ordinary meaning of "shall constitute."

3. The just-sum provision has real limits.

The discretion authorized by the just-sum provision is "wide," 5 McCarthy § 30:90, at 30-252, but not "'unlimited,'" Pet. Br. 39 (brackets omitted). Petitioner accuses respondent of advancing an "expansive reading" that empowers a court to "throw all that effort" of assessing defendant's profits "out the window and impose any award, based on anybody's profits, that the court deems appropriate." Pet. Br. 41; accord Pet. Br. 39. Not so.

First, as discussed above, a district court can use the discretionary just-sum provision only by finding that an award based on the step-one assessment would be inadequate (or excessive) in the particular case. 15 U.S.C. § 1117(a). And that finding must be supported by the record. But in most cases, the profits award calculated at step one will be adequate, *Fifty-Six Hope Rd.*, 778 F.3d at 1077, and the analysis will end there.

Second, the sum must be "just, according to the circumstances of the case." 15 U.S.C. § 1117(a). Like inadequacy, a "just" finding must be fact-specific. At minimum, a sum is just under the circumstances when it reflects the defendant's true financial gain

from the infringement. *E.g.*, *Kars 4 Kids* v. *Am. Can!*, 8 F.4th 209, 223 (3d Cir. 2021); *Max Rack*, 40 F.4th at 473; see Restatement § 51(4), at 203.

Third, courts of appeals review every finding and conclusion—at both steps one and two—for abuse of discretion. *E.g.*, Pet. App. 35a. And that is a test courts can fail. See, *e.g.*, *Max Rack*, 40 F.4th at 474.

B. Where relevant, the profits of affiliated entities are admissible to prove true financial gain.

Absent a rule or statute to the contrary, all "[r]elevant evidence is admissible." Fed. R. Evid. 402. As this Court has observed regarding copyright damages, "it cannot hurt and may aid the exercise of discretion to hear any evidence on the subject that has probative value." *F.W. Woolworth*, 344 U.S. at 231. Congress can instruct otherwise. *E.g.*, 15 U.S.C. § 37b(b)(2) (deeming "[e]vidence of" certain conduct "not … admissible in Federal court to support any claim" of an antitrust violation). It didn't in the Lanham Act.

In various circumstances, the financial activities of another entity may be relevant to estimating the infringer's financial gain. Consider the increased value of shares owned by the infringer in another company (affiliated or not). If the infringement benefited that other company's bottom line, thus increasing the value of those shares, the infringer would benefit. See *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 106 F.2d 45, 52 (2d Cir. 1939) (L. Hand, J.), aff'd, 309 U.S. 390 (1940). Or the infringer may have provided infringing products to another company for a nominal amount and then "received additional revenues" or benefits from that other

company (*e.g.*, free office space) "through a separate transaction." U.S. Br. 13. Or the infringer's "market position" vis-à-vis a competitor may have "improved … solely as a result of its false advertising"—which would be difficult to prove absent evidence of the competitor's corresponding "loss of market share." *Merck Eprova AG* v. *Gnosis S.p.A.*, 901 F. Supp. 2d 436, 460 (S.D.N.Y. 2012), aff'd, 760 F.3d 247; see also *Bigelow* v. *RKO Radio Pictures, Inc.,* 327 U.S. 251, 260 (1946) (finding that "receipts of [the] plaintiff's competitor" "tended to show damage").

In all these cases, the plaintiff must show a causal connection between the infringement and the infringer's financial gain, and following that chain of events requires consideration of the other company's financials. For example, *Sheldon* involved the increased value of the infringers' shares in movie theaters following distribution of a copyright-infringing film. 106 F.2d at 52. A court in that situation must determine that the increased share value can be traced to the theaters' playing of that particular film. See *Mishawaka*, 316 U.S. at 206 ("The plaintiff of course is not entitled to profits demonstrably not attributable to the unlawful use of his mark."). As the Restatement (followed by the Court in *Liu*, 591 U.S. at 79) explains, the plaintiff need only show that the causal chain is not "unduly attenuated." Restatement § 51, cmt. f, at 211. Nevertheless, even this showing would likely require looking at the sources of the theaters' income.

These other entities might be unaffiliated with the defendant. Or, as in *Sheldon*, the entity and the infringer may be affiliated or under common ownership. See 106 F.2d at 52 (looking at defendant's

"theatre-subsidiaries" and "its shares held by the defendants").

Indeed, affiliated corporations may have the easiest time obscuring one another's true financial gain. In the tax context, when "intimately related" parties transfer funds among one another it is uniquely likely that "the transfer give[s] rise to informal and indirect benefits to the transferor." *Commissioner* v. *Sunnen*, 333 U.S. 591, 605 (1948). For that reason, "the mere assignment of the right to receive income is not enough to insulate the assignor from income tax liability"; further factual inquiry is required. *Id.* at 604; U.S. Br. 20 (discussing "anticipatory assignment doctrine"). Whoever "retains dominion over the income-generating asset" is properly taxed notwithstanding his diversion of "'payment from himself to others as the means of procuring the satisfaction of his wants.'" *Commissioner* v. *Banks*, 543 U.S. 426, 434 (2005) (citation omitted). Similarly in the corporate context, "closely related corporations can engage in a transfer of values that is not fully reflected in their formal ledgers." *Container Corp. of Am.* v. *Franchise Tax Bd.*, 463 U.S. 159, 190 (1983).

C. Consideration of an affiliated entity's profits does not by itself disregard corporate separateness.

Petitioner responds that even using its affiliates' profits as "an evidentiary shortcut" to prove its true financial gain is a categorically impermissible "junior-varsity form of" disregarding corporate separateness. Pet. Br. 45; see also Pet. Br. 36, 39, 41, 43. But "junior-varsity" is a give-away. Even petitioner knows, at bottom, that merely using affiliates' profits

as evidence relevant to *petitioner's* own gain is not a disregard of corporate separateness.

1. Corporate law dictates that "separately incorporated organizations are separate legal units with distinct legal rights and obligations." *Agency for Int'l Dev.* v. *All. for Open Society Int'l, Inc.*, 591 U.S. 430, 435 (2020) (*AOSI*); see 1 Fletcher, Fletcher Cyclopedia of the Law of Corporations §§ 26-40, at 85-142 (2023 rev. vol.) (Fletcher). That is so even for parent and subsidiary corporations or affiliated corporations. *United States* v. *Bestfoods*, 524 U.S. 51, 62-63 (1998); 1 Fletcher § 26, at 85-88. Unless equity dictates otherwise, the corporations are treated as legally distinct. *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 629-630 (1983).

This respect for corporate separateness is "bedrock" in American law. *AOSI*, 591 U.S. at 433. It is on these principles that "large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted." *Anderson* v. *Abbott*, 321 U.S. 349, 362 (1944).

A court disregards corporate separateness when it assumes that, simply because of the parent-subsidiary relationship or affiliation, there is "an identity of corporate interest between the two companies" or a "relationship of principal and agent, or representative, or alter ego between the two." 1 Fletcher § 26, at 88. For example, a court's jurisdiction over one affiliate is not jurisdiction over all, see *Zenith Radio Corp.* v. *Hazeltine Rsch., Inc.*, 395 U.S. 100, 110-111 (1969); affiliated corporations cannot assert each other's legal rights, 1 Fletcher § 36, at 126; see *AOSI*, 591 U.S. at 435, and limited

liability generally protects one corporation from being held liable for the acts of its affiliates, *Anderson*, 321 U.S. at 362.

2. That separateness is not breached, however, when facts beyond the corporate relationship itself show that an affiliate's finances are relevant to the infringer's true financial gain. Those facts are the key guardrail protecting corporate separateness. It is those facts, *not any assumed identity of interest*, that makes the affiliate's finances relevant.

Consider *Sheldon* again. See 106 F.2d at 52. If increased revenues from the infringing film caused a spike in the theaters' share price, then those revenues have a factual connection to the infringer's financial gain. That is true whether or not the infringer is a parent corporation of the theaters. And examining the theaters' ticket sales to decide whether that gain is also connected to the infringement would not assume an "identity of corporate interest" between the two corporations. 1 Fletcher § 26, at 88. If, however, the theaters were subsidiaries of the infringer and evidence showed that the increased share price had *no* reasonable connection to the subsidiaries' ticket sales, then a court likely *would* disregard corporate separateness by treating the theaters' profits from sales as a financial gain to the infringer simply because of the parent-subsidiary relationship.

There may be cases in which a proper inquiry into true financial gain yields the same result that a court would (or could) reach by disregarding corporate separateness. In *Sheldon*, for example, Judge Hand issued alternative holdings that would justify looking at "the profits of the defendant Loew's theatre-

subsidiaries." 106 F.2d at 52. The first was just as explained above: the "enhance[d] … value of" the defendants' shares in one defendant's subsidiaries as a result of the infringement was a gain to the defendants. *Ibid.* But as an alternative, Judge Hand observed that the court would be justified in treating the "subsidiaries" as "agents" of the parent company—in other words, disregarding corporate separateness. *Ibid.* Though the result would be the same, these are distinct legal theories with different requirements and burdens.

In short, there is a clear boundary between disregard of corporate separateness (presumptively impermissible) and consideration of an affiliate corporation's profits as relevant evidence (permissible). That line can and must be enforced case-by-case, by determining whether facts beyond the corporate relationship itself show an affiliate's finances are relevant to the infringer's true financial gain. But there is no basis for categorically rejecting *any* consideration of affiliates' finances under the guise of protecting corporate separateness.

3. Once petitioner's blurring of the line between considering evidence of true financial gain and disregarding corporate separateness is undone, many of petitioner's arguments reveal themselves as beside the point. See, *e.g.*, Pet. Br. 24-29, 31-32, 36-44. That includes the assertion that "*Fleischmann* all but resolves this case." Pet. Br. 42.

"The question" in *Fleischmann* was "whether federal courts have power … to award reasonable attorney's fees as a separate element of recovery" not listed in Section 1117(a). 386 U.S. at 714-715. Petitioner invokes the case to support its argument

that a blanket waiver of corporate separateness is not among the "'intricate remedies'" listed in the statute, Pet. Br. 42 (quoting *Fleischmann*, 386 U.S. at 719), and thus may not be "innovat[ed]" by this Court, Pet. Br. 43.

But as respondent has explained, none of that bears on the legal principles at issue here. A just sum *is* among the "intricate remedies" listed in the statute. Pet. Br. 42. And respondent does not advocate reading that provision to require or authorize "courts to abandon corporate separateness." Pet. Br. 40. So there is nothing to "innovat[e]." Pet. Br. 43.

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This case is not what petitioner has led the Court to believe. Petitioner asks whether Section 1117(a) permits a court to disregard corporate separateness, *e.g.*, Pet. i, but that "sidesteps the logically antecedent question" whether there was necessarily a disregarding of corporate separateness at all. *Warner Chappell Music, Inc.* v. *Nealy*, 601 U.S. 366, 374 (2024) (Gorsuch, J., dissenting). And the answer to that unasked threshold question is "no." Considering its affiliates' profits as evidence of petitioner's true financial gain—which even petitioner ultimately cannot deny is all that happened here[6]—is permitted by the plain text of the statute and not, by itself, a disregard of corporate separateness. Because that answer moots petitioner's question, this Court should consider dismissing the writ of certiorari as

[6] Petitioner repeatedly suggests the courts below ordered it to disgorge the actual profits of its affiliates, see, *e.g.*, Pet. Br. 20, but acknowledges in moments of candor that the award was, at most, "*based on* profits of non-party affiliates," Pet. Br. 36 (emphasis added).

improvidently granted. *Id.* at 376; see also *Moyle* v. *United States*, 144 S. Ct. 2015, 2021 (2024) (Barrett, J., concurring).

II. The judgment should be affirmed.

The decision below correctly applied the "just-sum" provision when considering the profits of petitioner's affiliates. But even if, as the United States claims, these profits should have been considered at step one instead, the Court should still affirm.

A. The Fourth Circuit properly affirmed the award of a just sum.

The Fourth Circuit correctly affirmed the district court's use of the affiliates' revenues "in calculating Dewberry Group's true financial gain" based on extensive fact-finding not challenged here. Pet. App. 43a. It did not allow the district court to disregard corporate separateness. And, contrary to petitioner's and the United States' reading, the Fourth Circuit did rely on the just-sum provision. It first confirmed the district court's finding that an award of "defendant's profits" would be "inadequate," and then it affirmed the award of a just sum.

1. The Fourth Circuit affirmed that an award of "defendant's profits" was "inadequate."

The Court of Appeals began by confirming that an award of "defendant's profits" as reflected on petitioner's books would have been "inadequate." The decision below affirmed the finding, supported by substantial expert testimony, that petitioner's "tax information" failed to reflect "'economic reality,'" Pet. App. 40a. Petitioner's reported losses stemmed from assigning all its revenues to its affiliates while

simultaneously shouldering inflated operating costs. Pet. App. 83a; J.A. 215. In other words, the "tax information" failed to reflect petitioner's "true financial gain." Pet. App. 40a, 43a. That unaccounted-for "gain" included the ability to survive "as a going concern" despite "decades of [on-the-books] losses," thanks to tens of millions of dollars in capital contributions from John Dewberry that did not register as revenue on petitioner's books. Pet. App. 84a.

The district court did not need to calculate a precise figure representing "defendant's profits" before moving to step two and finding the assessment inadequate. When courts cannot accurately deduce "defendant's profits"—whether because of "stonewalling" through litigation tactics or unreliable books, see p. 26, *supra*—a court can reasonably conclude that the resulting calculation will necessarily be "inadequate or excessive." Here, the calculation based on petitioner's own books would have been inaccurate because the evidence of petitioner's revenues and costs didn't reflect "'economic reality.'" Pet. App. 40a. Accordingly, the court properly "assess[ed]" the evidence of "defendant's profits" and concluded that such an award would be "inadequate." 15 U.S.C. § 1117(a).

2. The Fourth Circuit correctly focused on true financial gain.

After affirming the finding of inadequacy, the Fourth Circuit correctly affirmed the district court's assessment of "Dewberry Group's true financial gain," Pet. App. 43a, because "while [petitioner] did not receive the revenues from its infringing behavior directly, it still *benefited* from its infringing relationship with its affiliates," Pet. App. 45a. At step

two, courts can (and sometimes must) rely on estimates, so long as they adequately explain how they arrived there. *Merck Eprova*, 760 F.3d at 263; see *F.W. Woolworth*, 344 U.S. at 232; see also Restatement § 51, cmt. i, at 221 (a "[r]easonable approximation" is sufficient for a conscious wrongdoer). That is true here. The lower courts' reasoning maps to tax law's anticipatory-assignment doctrine and was amply supported by findings not challenged in this Court.

a. As discussed above, corporations (particularly affiliated ones) can engage in transfers of value with ease, including by pre-assigning revenues to one another. Section I.B, *supra*. When that transfer benefits the infringer, it is no less part of the infringer's true financial gain than direct receipts from infringing sales. Here, the findings below confirm that petitioner (1) generated the affiliates' revenue, (2) directed that revenue to the affiliates rather than itself, and (3) benefited from doing so.

First, petitioner, not its affiliates, generated the affiliates' revenue through unlawful infringement by "promot[ing], manag[ing], and operat[ing] all of the [affiliates'] properties … using the Infringing Marks." Pet. App. 39a. The affiliates "do not and cannot perform the work and services necessary to generate revenue." Pet. App. 40a. Accordingly, the court agreed that the affiliates' revenues were "generated by [petitioner's] use of infringing marks." Pet. App. 39a-40a.

Second, the court agreed that petitioner controlled the allocation of these revenues. Petitioner was "responsible for the accounting and cash management" for all the affiliates. Pet. App. 39a. As

respondent's expert testified, petitioner's "management," John Dewberry, "determines whether on paper [petitioner] or the [affiliates] show the losses or profits during the infringement period." J.A. 68.

Petitioner exercised that control "not [to] receive the revenues from its infringing behavior directly," but rather to pre-assign them to the affiliates. Pet. App. 45a. In turn, the affiliates paid petitioner only nominal fees that failed to cover even petitioner's operating costs—despite petitioner performing *all* the work necessary to generate their revenues. Pet. App. 40a. For that reason, petitioner's "tax information" did not reflect "economic reality," Pet. App. 11a, while the affiliates recorded massive profits—$53 million from 2018 to 2020 alone, Pet. App. 11a, 86a-88a.

Third, petitioner benefited from the assignment. After receiving profits from the affiliates (generated by petitioner's infringement), John Dewberry paid petitioner millions "to cover [petitioner's purported] extensive losses." Pet. App. 40a. The "economic reality [is] that, but-for the revenue" flowing into the affiliates' coffers, petitioner "would [no longer] exist." Pet. App. 84a.

b. Both petitioner and the United States disagree that the award below reflected petitioner's true financial gain. But their arguments are unpersuasive.

i. Petitioner claims the Fourth Circuit looked not to the just-sum provision, but to Section 1117(a)'s "principles of equity" as a source of "broad 'discretion'" to "dispense with corporate separateness … based on their case-specific 'weigh[ing]' of 'the equities.'" Pet. Br. 29 (quoting Pet. App. 45a; brackets in original). This argument warrants two responses.

First, the Fourth Circuit's holding was premised on the just-sum provision, not "principles of equity." The court recognized a profits-based award "is 'subject to the principles of equity' ... *and* is ultimately a matter of the court's discretion." Pet. App. 45a (emphasis added). Petitioner tortures the two independent parts of that sentence into saying that the Fourth Circuit "read [the former] phrase to invest district courts with broad 'discretion' to dispense with corporate separateness." Pet. Br. 29. But the better reading is also the more obvious one: that the separate and express reference to "discretion" is invoking the just-sum provision—the only place in Section 1117(a) that mentions "discretion."

Second, the court below honored petitioner's corporate separateness from its affiliates. The court never assumed an "identity of corporate interest" between the two corporations or treated them as an agent and principal or alter egos. 1 Fletcher § 26, at 88. The corporations' relationship is not the *reason* the court affirmed the district court's consideration of the affiliates' profits. Instead, that relationship merely provided the *factual context* needed to understand why petitioner organized its business as it did and how the affiliates' profits reflected petitioner's true financial gain. See U.S. Br. 21 ("[A] court could fairly infer that the petitioner was content with below-market rates *because* it performed services only for affiliated entities ... ."). Nor did the court hold petitioner liable for the acts or profits of the affiliates. 1 Fletcher § 33, at 115-118. The judgment ordered petitioner to pay from its own coffers money reflecting the true financial gain petitioner received from its own infringing actions. See Br. in Opp. Suppl. App. 1SA.

Petitioner points to the statement that the district court treated "petitioner and its non-party affiliates 'as a single corporate entity for the purpose of calculating revenues.'" *E.g.*, Pet. Br. 25 (quoting Pet. App. 39a). But that court treated these entities as a "single corporate entity" only "for the purpose of *calculating* revenues *generated by Dewberry Group's use of infringing marks*." Pet. App. 39a-40a (emphases added). Or as the Fourth Circuit put it, the district court merely "considered the revenues of entities under common ownership with Dewberry Group in calculating Dewberry Group's true financial gain." Pet. App. 43a.

ii. For its part, the United States agrees that *some* of the affiliates' profits "might be viewed as the practical equivalent of a pre-assignment of [petitioner's] anticipated income" but denies any "persuasive rationale for treating *all* of the nearly $43 million ... as the profits of petitioner." U.S. Br. 21, 30-31. Specifically, the United States argues that the "court did not distinguish between the profits that petitioner had generated and the profits its affiliates had produced." U.S. Br. 30.

To the contrary, the Fourth Circuit affirmed the district court's factual finding that *all* of the affiliates' revenues reflected petitioner's true financial gain. Petitioner had argued that it was "not the economic engine that creates the revenue that flows to [the affiliates]," and instead that the "improved, commercial property" owned by the affiliates "generates the revenue." Appellant's Brief in Nos. 22-1622, 22-1845 (4th Cir.), p. 43; Def.'s Proposed Findings of Fact and Conclusions of Law in No. 1:20-cv-00610 (E.D. Va.), ECF 238, p. 22. But as the Fourth Circuit explained, the district court found

otherwise after "weighing the expert testimony," concluding that "the [affiliates] do not and cannot perform the work and service necessary to generate revenues." Pet. App. 40a. Those findings are unchallenged in this Court.

Far from overinclusive, the district court's assessment of these profits was "conservative." Pet. App. 46a. Though it was authorized to pick "a necessarily somewhat arbitrary estimate," *F.W. Woolworth*, 344 U.S. at 232, the district court took care to exclude revenues not attributable to the infringement, Pet. App. 90a-91a, and even then only looked at profits from 2018 to 2020, despite petitioner's infringement both before and after that period, Pet. App. 87a-88a.

Finally, any inaccuracy in the final award stems from petitioner's own doing. "On established principles of equity, and on the plainest principles of justice, the guilty trustee cannot take advantage of his own wrong." *Westinghouse*, 225 U.S. at 620. Upon becoming a constructive trustee of respondent's marks, petitioner bore the risk of confusion regarding any resulting gain. See *ibid.* Yet petitioner provided no way to distinguish "between infringing and non-infringing revenues," Pet. App. 46a, choosing instead to assert "there were zero infringement-related revenues," Pet. App. 92a. "Any arbitrariness" in the court's award "can be traced back to [petitioner's] litigation strategy to deny *any* connection between its affiliates' revenues and its infringing marks." Pet. App. 46a; see p. 27, *supra* (discussing principles of unjust enrichment).

c. The United States also claims the courts below considered the affiliates' profits at step one rather

than step two. U.S. Br. 32. That's not true—the Fourth Circuit's analysis tracks the just-sum provision, as explained above. See Section II.A.1, *supra*. But even if it were true, the Court should consider the just-sum provision now and affirm on that alternative ground. *Thigpen* v. *Roberts*, 468 U.S. 27, 30 (1984).[7]

3. The award does not exceed any statutory cap.

Petitioner suggests that even if the award below reflected petitioner's "true financial gain," it "outstrips the limits of the just-sum provision." Pet. Br. 44-47. In petitioner's view, the just-sum provision allows only "modest tweaks" to an award of "defendant's profits." Pet. Br. 46. And, petitioner claims, an "adjustment" from $0 to $43 million is simply too large. Pet. Br. 45. This argument fails for two reasons.

a. First, the text of the just-sum provision and its surrounding context make clear there is no numerical cap on a "just sum." Nothing in the provision imposes a hard limit. To the contrary, it permits "judgment for such sum as the court shall find to be just, according to the circumstances of the case." 15 U.S.C. § 1117(a).

Moreover, there *is* a hard limit in the immediately preceding sentence. A court "may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, *not exceeding three times such amount*." *Ibid.* (emphasis

[7] Further, if the United States were correct that true gain can and must instead be considered (at least initially) at step one, this Court should also still affirm. See Section II.B, *infra*.

added). This Court "'generally presume[s] that Congress acts intentionally and purposely when it includes particular language,'" such as a numerical cap, "'in one section of a statute but omits it another.'" *Intel Corp. Investment Pol'y Comm.* v. *Sulyma*, 589 U.S. 178, 186 (2020) (citation omitted). The inference is even more justified where, as here, the distinction is between two neighboring sentences.

The history of the provision further confirms the lack of a numerical cap. Prior to the Lanham Act, copyright and patent legislation contained quantitative limits on damages enhancements. See Act of Aug. 18, 1856, ch. 169, 11 Stat. 138, 139 (1856); 1870 Patent Act, § 101, 16 Stat. 214; Copyright Act of 1909, § 25(b), 35 Stat. 1081. So too did Section 1117(a)'s predecessor in the 1905 Act. § 16, 33 Stat. 728-729 ("not exceeding three times the amount of such verdict"). And in debating earlier drafts of the Lanham Act, legislators similarly proposed a ceiling for the just-sum provision. See *Trade-Marks: Hearings Before the Subcomm. on Trade-marks, H. Comm. on Patents on H.R. 102, H.R. 5461, and S. 895*, 77th Cong., 1st Sess. 203-206 (1941) (debate). But that ceiling was rejected.

Finally, compare later-enacted statutes, including those on which petitioner relies. See Pet. Br. 42-43 (citing 15 U.S.C. § 1117(b) and (c)). Amendments to Section 1117 provide specified amounts of recovery and enhancement for cases involving counterfeit marks. See § 1117(b) (treble profits or damages), (c) (statutory damages within a particular range). And an amendment to the Copyright Act likewise allows an increase in a damages award within a numerical range. 17 U.S.C. § 1323(a). Again, the just-sum provision lacks these numerical specifications.

The "modesty" limit that petitioner suggests makes little sense in any event. It would mean the most inadequate or excessive awards are the ones least capable of fixing. And as petitioner seems to admit, the just-sum provision applies at least when courts *can't* calculate "defendant's profits" due to "discovery stonewalling." Pet. Br. 44-45 (citation omitted). If the court cannot calculate an accurate baseline, it is difficult to understand how the court could impose a "modest tweak[]" on that baseline. Pet. Br. 46.

b. Petitioner is also wrong that the district court "adjusted" the award from $0 to $43 million. Pet. Br. 45. In support, petitioner repeatedly asserts it is "undisputed" that the amount of the "defendant's profits" in this case was $0. Pet. Br. 14, 18, 20, 24, 51. But that is very much in dispute.

As explained above, the district court didn't calculate a precise figure for "defendant's profits" based on petitioner's own books because it correctly found this figure would necessarily be "inadequate." See Section II.A.1, *supra*. Accordingly, there isn't even a definitive baseline here from which to measure the "adjustment."

Regardless, had the district court completed a precise calculation, the result would not have been $0. Petitioner's reported revenues from selling its infringing services to the affiliates during the infringement period were $7,958,468. J.A. 133-136 (showing revenues from 2017 to 2020). And while the petitioner reported even greater costs, *ibid.*, petitioner bore the burden of showing which of these costs are deductible in the step one analysis. See 15 U.S.C. § 1117(a); *Manhattan Indus., Inc.* v. *Sweater*

Bee by Banff, Ltd., 885 F.2d 1, 7-8 (2d Cir. 1989) (requiring proof of "a sufficient nexus between each expense claimed and the sales of the unlawful goods"). It did not; petitioner "offered *no* calculations for cost." Pet. App. 46a.

B. Alternatively, the decision below should be affirmed under the "defendant's profits" provision.

As discussed above, the United States contends that (1) under Section 1117(a), courts can consider an infringer's true gain at step one (*i.e.*, when calculating "defendant's profits"), not just step two, pp. 27-28, *supra*; and (2) here, the courts below in fact considered the affiliates' profits at step one, pp. 46-47, *supra*. Respondent disagrees on both points. See Sections I.A.1-2, II.A.1, *supra*. But should this Court agree with the United States instead, it should still affirm the judgment below.

If the United States is right on both points, the analysis above largely still applies. See Sections II.A.1-2, *supra*. The United States agrees that the profits of petitioner's affiliates can be treated at step one as an anticipatory assignment of the petitioner's own revenue. U.S. Br. 20; see also pp. 42-43, *supra* (applying this concept at step two). The only minor difference in analysis would be the answer to the Government's concern about "distinguish[ing] between the profits that petitioner had generated and the profits its affiliates had produced." U.S. Br. 30.

In a step one analysis of "defendant's profits," that concern is addressed by Section 1117(a)'s burden-shifting regime, which would have required petitioner to identify any revenue *not* attributable to the infringement. 15 U.S.C. § 1117(a); see *Westinghouse*,

225 U.S. at 619 ("'[H]e who has wrongfully produced a confusion of goods must alone suffer.'") (citation omitted); p. 27, *supra*. Yet petitioner provided no "calculations reflecting the distinction between infringing and non-infringing revenues." Pet. App. 46a. That failure would foreclose, as a matter of law, the Government's objection that the award contains non-infringing revenues of the affiliates.

The bottom line is this: so long as true financial gain is an appropriate measure (and it is), the judgment should be affirmed whether at step two (respondent's understanding of the statute) or one (the Government's).

III. If the Fourth Circuit erred, the Court should remand.

The decision below was correct, but even if the lower court erred, petitioner's request for reversal is meritless. See Pet. Br. 51. Rather, a remand would be needed. See U.S. Br. 29, AIPLA Br. 10-15.

On remand, respondent could pursue an alternative profits-based award under several theories. If this Court agrees that Section 1117(a) allows consideration of petitioner's true financial gain, but disagrees that the award below accurately captured this, it should remand for further explanation or recalculation. For example, the district court could calculate petitioner's true financial gain based on John Dewberry's kickback payments, U.S. Br. 18-19, the real market value of petitioner's services, U.S. Br. 20-22, and any other relevant facts.

Beyond proving true financial gain, respondent could seek to hold petitioner directly liable for the

affiliates' profits as a "partner[] engaged in concerted wrongdoing." *Liu*, 591 U.S. at 90; see *Jackson* v. *Smith*, 254 U.S. 586, 588-589 (1921) (applying this principle when not all partners are parties to the lawsuit).

Respondent could recover the revenues in petitioner's own books (from which petitioner failed to prove any deductions) as receipt for selling its infringing services to the affiliates. See J.A. 130-136; pp. 49-50, *supra*. Even without consideration of the affiliates' profits, the "defendant's profits" weren't zero. *Id*.

Respondent could also successfully overcome corporate separateness. See *Bestfoods*, 524 U.S. at 62. Indeed, the district court already suggested respondent could make this showing. See Pet. App. 82a (eschewing as "inaccurate" its prior statement that the affiliates were "separated by the corporate veil").[8]

CONCLUSION

The judgment below should be affirmed, if this Court does not dismiss the writ of certiorari as improvidently granted. In the alternative, the matter should be remanded.

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[8] Respondent did not waive its ability to pierce the corporate veil simply by disclaiming the *need* to do so, as petitioner claims. Pet. Br. 24 (citing J.A. 331; Br. in Opp. Suppl. App. 55SA). Regardless, preservation is properly addressed on remand. See *Bradshaw* v. *Richey*, 546 U.S. 74, 79-80 (2005) (per curiam).

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ADDENDUM

EXCERPTS FROM FOURTH CIRCUIT ORAL ARGUMENT

The following are excerpts from argument of Mr. Elbert Lin on behalf of appellee Dewberry Engineers Inc., beginning at 36:10. See https://www.ca4.uscourts.gov/OAarchive/mp3/22-1622-20230503.mp3.

The district court, relying on our expert report, used the revenues and the profits of those other related entities as a benchmark—a measuring stick, if you will—uh for the exercise of his discretion under 1117(a), and and said this is what you—is just, right? Beyond the profits of Dewberry Group, this is what is just under the circumstances…

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You asked for other cases. If you look at the *Kars 4 Kids* case from the 3rd Circuit, 8 F.4th 209, if you look at *Max Rock*, 40 F.4th 454—and I point to these other circuits because this court doesn't have a lot of case law on 1117(a)—those courts talk about that discretion and they say, uh, one—not just a reasonable reason for exercising discretion, but really the very purpose of that discretion is to get after—and here's the quote from *Kars 4 Kids*: "true profits." And from *Max Rock*: the—that discretion's available for "concern that the award does not encompass the defendant's full profits." … And my point is simply those cases explain the purpose of this discretion, where the, the judge looks at the profits that have been shown and for the defendants and says that's—that's not just in this circumstance. I'm gonna increase that number, and one reasonable basis and

non-, you know, non-abuse-of-discretion basis is to say, you know, what do I think the true profits are? And he had an evidentiary basis for doing that here, and said that's what I'm gonna award. I'm not gonna order it from these entities, right? That's why no veil piercing is required. But I am gonna award the judgment against Dewberry Group.