SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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DEWBERRY GROUP, INC., F/K/A)

DEWBERRY CAPITAL CORPORATION,)

Petitioner,)

v.) No. 23-900

DEWBERRY ENGINEERS INC.,)

Respondent.)

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Pages: 1 through 82

Place: Washington, D.C.

Date: December 11, 2024

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3 DEWBERRY GROUP, INC., F/K/A)

4 DEWBERRY CAPITAL CORPORATION,)

5 Petitioner,)

6 v.) No. 23-900

7 DEWBERRY ENGINEERS INC.,)

8 Respondent.)

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10

11 Washington, D.C.

12 Wednesday, December 11, 2024

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14 The above-entitled matter came on for

15 oral argument before the Supreme Court of the

16 United States at 10:04 a.m.

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1 APPEARANCES:

2 THOMAS G. HUNGAR, ESQUIRE, Washington, D.C.; on behalf

3 of the Petitioner.

4 NICHOLAS S. CROWN, Assistant to the Solicitor General,

5 Department of Justice, Washington, D.C.; for the

6 United States, as amicus curiae, supporting

7 neither party.

8 ELBERT LIN, ESQUIRE, Richmond, Virginia; on behalf of

9 the Respondent.

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1 P R O C E E D I N G S
2 (10:04 a.m.)
3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 23-900, Dewberry
5 Group versus Dewberry Engineers.
6 Mr. Hungar.
7 ORAL ARGUMENT OF THOMAS G. HUNGAR
8 ON BEHALF OF THE PETITIONER
9 MR. HUNGAR: Thank you, Mr. Chief
10 Justice, and may it please the Court:
11 The Lanham Act authorizes disgorgement
12 of the defendant's profits. Petitioner is the
13 only defendant in this case, but it had no
14 profits to disgorge. So the courts below
15 ordered Petitioner to disgorge the profits of
16 its legally distinct affiliates to the tune of
17 $43 million.
18 Nothing in the Lanham Act authorizes
19 that blatant disregard of corporate
20 separateness. Under the Act's plain language, a
21 defendant's profits do not include the profits
22 of separate corporations, but Respondent
23 asserted a "collective economic enterprise"
24 theory, persuading the courts below to treat
25 Petitioner and its affiliates as a single

1 corporate entity so as to attribute the
2 affiliates' profits to Petitioner.
3 That's classic disregard of the
4 corporate form. Yet, both Respondent and the
5 courts below disavowed any claim of
6 veil-piercing. Instead, the Fourth Circuit
7 relied on its notion of equity to justify the
8 single corporate entity approach.
9 But that assertion of unbounded
10 equitable authority violates the maxim that
11 equity follows the law, including the Bestfoods
12 presumption of corporate separateness. It also
13 contradicts the equitable principles that
14 disgorgement is limited to the defendant's
15 profits, not those of affiliates, and does not
16 allow penalties like the award here.
17 For precisely those same reasons,
18 Respondent fails in its attempt to justify the
19 award by distorting the "just sum" provision.
20 Starbucks held that the word "just" in a
21 remedial statute incorporates traditional
22 equitable limits. So rejection of the Fourth
23 Circuit's rationale as contrary to equitable
24 principles and the Bestfoods presumption
25 necessarily leads to rejection of Respondent's

1 "just sum" argument as well.

2 Courts don't respect corporate

3 separateness by treating the rental profits

4 received by separate corporations from their own

5 properties as if they belonged to the defendant.

6 The disgorgement award is unlawful under the

7 Lanham Act and should be reversed outright.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: These separate

10 corporations have the same owner, right?

11 MR. HUNGAR: Correct.

12 JUSTICE THOMAS: Would it make any

13 difference to your argument -- or what would

14 your argument be if this were in a partnership

15 form?

16 MR. HUNGAR: Well, so, in the Liu

17 case, which recognized many of the principles

18 that we're advocating here today, the Court said

19 that partnership is an accepted basis for joint

20 and several liability even in the disgorgement

21 context. But there's no proof or allegation

22 here of partnership, and that theory was not --

23 JUSTICE THOMAS: So your -- your --

24 your argument basically relies on -- it's more

25 of a formalistic argument -- relies on the fact

1 that these -- that these businesses that are
2 owned by one person are in a separate corporate
3 form, as opposed to partnership or sole
4 proprietorship?
5 MR. HUNGAR: Correct. And that's
6 the -- that is the fundamental principle of
7 corporate separateness that this Court has
8 recognized in numerous cases, the Dole Foods
9 case we cited in our brief, the Bestfoods case
10 itself. Because of a long tradition of history
11 and reliance to the tune of billions, if not
12 trillions, of dollars in corporate America
13 relying on the principle of corporate
14 separateness and its recognition by the courts,
15 the Court said in Bestfoods that unless Congress
16 directly says otherwise, corporate separateness
17 is the norm, unless you can prove the normal
18 grounds for disregarding separate corporations,
19 which Respondent disavowed doing here.
20 JUSTICE THOMAS: Well, the -- I think
21 the courts below thought that this looked -- if
22 you got past the form -- again, I -- there's a
23 comparison between partnership and corporate
24 form, but it -- it seemed as though the court
25 was saying, look, this is one business and we'll

1 treat it as one business and we'll ignore the
2 corporate form of the separate businesses owned
3 by the same person.
4 MR. HUNGAR: Well, Your Honor, there
5 are recognized principles and rules that govern
6 the circumstances in which the corporate form
7 will be disregard. And Respondent and the
8 courts below expressly disavowed any reliance on
9 those accepted principles. At -- at trial, the
10 Respondent's expert who theorized -- who had
11 presented this single economic enterprise theory
12 was asked: You're not alleging that there's
13 some sort of abuse of the corporate form or
14 fraud or anything? Answer: No. That's at
15 Joint Appendix 67.
16 The district court made clear
17 plaintiff did not allege alter ego liability and
18 said that's of no moment. That's at 86a of the
19 Petition Appendix. The court of appeals said
20 rather than pierce the corporate veil, the
21 district court adopted its single economic
22 enterprise theory at Petition Appendix 43a.
23 Even Petitioner admits in it -- in its merits
24 brief that it did not pierce the corporate veil
25 and -- and disclaimed doing so.

1 So there's no dispute that this -- the
2 judgment does not rest on any accepted notion of
3 piercing the corporate veil. Instead, the court
4 simply disregarded corporate entities because
5 they're commonly owned. But, as this Court said
6 in Dole Food, the fact that multiple affiliated
7 corporations are commonly owned does not mean
8 that one corporation owns the property of the
9 other corporation. And the same is true here.
10 JUSTICE JACKSON: Mr. Hungar, does the
11 fact that we have separate entities necessarily
12 mean that the court can't consider the
13 non-defendant affiliates' profits?
14 I mean, I -- I take your point that
15 the Lanham Act does not allow for disgorgement
16 of these separate entities' profits, but I
17 wonder whether or not the question really is how
18 do you go about calculating the defendant's
19 property -- profits in this sort of unique
20 financial circumstance, and does that
21 necessarily mean that the court couldn't look at
22 the profits of the other entities to assess
23 defendant's property -- profits as evidence, for
24 example, under certain circumstances?
25 MR. HUNGAR: Well, there could be

1 circumstances in which that would be
2 permissible. For instance, the briefs talk
3 about the Sheldon case from the Second Circuit,
4 where the court held that because the defendant
5 in that case was the parent corporation, it
6 owned stock in the subsidiaries that had -- had
7 engaged in infringement and had profited from
8 it.
9 And the court said we're not -- it was
10 not attributing the -- the subsidiaries'
11 profits, but it said the parent, because of its
12 ownership of stock, had a financial benefit, had
13 a financial gain, to itself that it owned
14 because its stock was worth more, it could sell
15 it for more money because of the profits held by
16 the subsidiaries.
17 JUSTICE JACKSON: So you're -- you're
18 not saying that the defendant's own books are
19 the only piece of evidence that can be
20 considered by the court when it determines --
21 MR. HUNGAR: No. Exactly. Right.
22 And equity is clear that you can look beyond the
23 defendant's books to get at the reality. But
24 the key is it has to be benefit, profits owned
25 by the defendant, even if not recorded on its

1 books, not profits owned by a separate
2 corporation --
3 JUSTICE JACKSON: So what is your
4 response to the Solicitor General's proposed
5 profits calculation here that has to do with the
6 alleged undercounting of the fees and whether or
7 not that can be looked at or taken into account?
8 MR. HUNGAR: So threefold.
9 First of all, that was -- that --
10 that -- that argument is forfeited in this case.
11 It's not presented, which I would like to get
12 back to in greater detail.
13 But, second of all, that -- if you're
14 talking about the -- reallocating the -- the
15 fees basically to say -- to pretend as if
16 Petitioner had received more fees because,
17 supposedly, it was charging below-cost fees, as
18 a legal matter, that would not be, in our view,
19 an accepted basis at equity because, again,
20 equity looks only to the gain actually received
21 by the defendant. And this Court's cases that
22 we've cited in our brief say that over and over
23 again.
24 In -- in this scenario, the government
25 is essentially admitting these are revenues that

1 weren't received, actually, by the defendant.
2 They were received by the other affiliates, but
3 we're just going to essentially treat the
4 defendant as if it had received those additional
5 revenues because we think that would be more in
6 keeping with economic reality.
7 JUSTICE SOTOMAYOR: This makes no
8 sense to me, counselor.
9 The government points to an issue
10 of -- of assignment of revenue. If you have a
11 situation like this one, where someone is
12 rendering services at a loss and the owner of
13 the corporation is making up those losses over
14 time, can't we treat the amount that the owner
15 is putting back into the defendant as profits?
16 MR. HUNGAR: So, number one, as -- as
17 I noted in response to Justice Jackson, that --
18 that question was -- that argument was never
19 made in this case and is not presented
20 therefore. But -- but, with respect to your --
21 JUSTICE SOTOMAYOR: Counsel, that's an
22 issue of remand. What the lower court --
23 whether the lower court will permit the trial to
24 be reopened or not, that's always in the
25 discretion of the courts below.

1 This is a case that's putting forth
2 the proper way to evaluate profits, and the
3 court below can decide whether there was an
4 intentional waiver or forfeiture or decide
5 whether to reopen the case. It's not for us.
6 So just assume the theory.
7 MR. HUNGAR: So, with respect to
8 the -- I'll -- I'd like to come back to that if
9 I may.
10 JUSTICE SOTOMAYOR: Mm-hmm.
11 MR. HUNGAR: But, with respect to the
12 substance of your question, the -- I think
13 Justice Jackson's question was on a -- the
14 government has -- has tried to throw several
15 different theories into this case. One --
16 JUSTICE SOTOMAYOR: No, the government
17 has a very simple theory as I understood it.
18 MR. HUNGAR: Well, they have the --
19 JUSTICE SOTOMAYOR: Estimate how much
20 they would have received if there had been an
21 arm's length transaction, what would have been
22 the value of their services, and if they would
23 have received that, that's the profit that they
24 would have made.
25 MR. HUNGAR: Well, yes, Your Honor,

1 but there's the below -- there's the alleged
2 below-market-rate expense theory. There's also
3 the assignment theory, which Your Honor, I
4 think, was referring to. And with respect to
5 that theory --
6 JUSTICE SOTOMAYOR: Well, the
7 assignment theory, it's only the principles of
8 an assignment theory, which is if I'm making a
9 certain amount of money and I give it to someone
10 else. And, here, I gave it to the affiliates
11 because their services were worth a lot more
12 money than they were paid.
13 MR. HUNGAR: Right. So I have several
14 things to say about the assignment theory.
15 First of all, tax principles do not --
16 do not directly translate into equity.
17 JUSTICE SOTOMAYOR: I don't disagree.
18 MR. HUNGAR: And so the question would
19 be: Is there an equitable theory under which
20 this approach would make sense? And there --
21 and there -- certainly, in appropriate
22 circumstances, there would be, whether it would
23 be, you know, a fraudulent conveyance argument
24 or a constructive trust argument.
25 If -- if, in fact, you had a

1 circumstance where the defendant had the right
2 to the income and transferred it to --
3 JUSTICE SOTOMAYOR: Well, when I offer
4 you --
5 MR. HUNGAR: -- a different party in
6 order to avoid --
7 JUSTICE SOTOMAYOR: -- when I offer
8 you services below market rate, it means that
9 you're getting a benefit from me.
10 MR. HUNGAR: On the below-market-rate
11 theory, though, again, there are several reasons
12 why that doesn't work.
13 Number one, the -- it's undisputed
14 that the revenues that the government would
15 suggest could be reassigned to Petitioner on
16 that theory were actually received by the
17 affiliates, not by the Petitioner --
18 JUSTICE SOTOMAYOR: But --
19 MR. HUNGAR: -- and --
20 JUSTICE SOTOMAYOR: -- but we're not
21 asking for disgorgement here, meaning the Court
22 didn't order the affiliates to disgorge
23 anything.
24 MR. HUNGAR: Right. But --
25 JUSTICE SOTOMAYOR: They ordered this

1 defendant to pay a certain amount, and that
2 certain amount is what they -- what they
3 received or should have received in value for
4 the services they rendered.
5 MR. HUNGAR: Right. But the "should
6 have received" is the problem because this Court
7 said -- has said over and over again in the
8 disgorgement context in applying equitable
9 principles, Coupe against Royer, in the Keystone
10 case, in the Livingston case, and -- and Rubber
11 Company, all recognize that the question is the
12 actual profits actually received by the
13 defendant, not the profits -- not possible
14 profits that the defendant could have received
15 if it had structured its business differently,
16 if it had made better deals.
17 Those cases all stand for the
18 proposition that it's actual profits, not
19 possible profits. And that's because of the
20 theory of disgorgement, which is to deny the
21 defendant the benefits it actually received from
22 the wrongful conduct.
23 If it didn't actually receive them,
24 even if it's because it made a bad -- bad deal,
25 you don't disgorge those from the defendant.

1 And, again, this Court has said that over
2 hundreds of years in the equitable context. And
3 the same is true here.
4 The other problem is simply a factual
5 problem. There's no finding and no basis for a
6 finding on this record that Petitioner was
7 actually charging below-market rates to the
8 affiliates because it's important to understand
9 the -- the Petitioner was also providing
10 substantial services, noninfringing services, to
11 its shareholder, to his charitable foundation,
12 to other entities. That's undisputed.
13 The -- the court of appeals recognized
14 this at -- at Pet. App. 4a and 45a. The
15 petition -- Respondent's expert testified to
16 this effect at the trial, that there were
17 substantial noninfringing services to
18 Mr. Dewberry separate and apart from the
19 services being provided to the affiliates.
20 That's at Joint Appendix 142, 193. Respondent
21 made the same argument at 316 and 318 of the
22 Joint Appendix.
23 So it's clear that a substantial
24 amount of the costs incurred by Petitioner were
25 not in -- relating to the infringing services

1 allegedly provided to the affiliates but,
2 rather, to independent services.
3 So you can't just infer from the fact
4 that they had losses that -- that they were
5 charging below-market rates.
6 But, again, the fundamental problem --
7 and I -- if I may, I would like to just point
8 the Court back to the petition. The fundamental
9 problem with all of these arguments that
10 Respondent and --
11 JUSTICE SOTOMAYOR: Counsel, you've
12 answered my question.
13 MR. HUNGAR: I -- well, I'd still like
14 to make this --
15 JUSTICE GORSUCH: I'd like -- I'd like
16 you to finish it.
17 MR. HUNGAR: Thank you, yes.
18 In our petition, we made perfectly
19 clear not only that there -- that this was a
20 zero-profits case but that that was a
21 particularly good reason why the Court should
22 grant cert in this case, because it presented
23 this issue so -- the legal issue so nicely and
24 cleanly.
25 So, at Petition 5, we said:

1 Petitioner had zero net profits. At Petition 8,
2 we said: As Petitioner explained, the records
3 show that the infringement generated zero
4 profits for Petitioner. At page 10, we said the
5 same thing.
6 At page 15, we said: This case is an
7 ideal vehicle. Why? Petitioner itself obtained
8 zero profits. At page 35, we said: Few, if
9 any, cases will likely present the issue so
10 starkly or so cleanly. Petitioner generated
11 zero profits, which eliminates any need to
12 calculate or apportion profits attributable to
13 infringement.
14 And Respondent never disputed those
15 factual assertions in its brief in opposition.
16 Under this Court's Rule 15, those
17 issues are not in the case. There's no need for
18 a remand to address issues that were waived in
19 the brief in opposition.
20 And this Court should enforce its Rule
21 15 because, otherwise, you're inviting
22 Respondents and the government to try and throw
23 issues that aren't in the case and distort the
24 question presented. And that is contrary to
25 this Court's --

1 JUSTICE JACKSON: But, counsel --
2 CHIEF JUSTICE ROBERTS: Counsel --
3 JUSTICE JACKSON: -- I guess -- oh,
4 sorry.
5 CHIEF JUSTICE ROBERTS: Go ahead.
6 JUSTICE JACKSON: I -- I was just
7 going to say I guess that makes perfect sense to
8 me in the world in which the defendant is the
9 only entity and when you have a situation in
10 which there's a defendant who is operating at a
11 loss, they make no profit, they may infringe,
12 but, under the Lanham Act, only profit is
13 disgorgeable, and there we are.
14 The concern, I think -- and maybe this
15 is what motivated the -- the -- the district
16 court and the lower courts -- is that we do have
17 a constellation of entities all owned by the
18 same individual. The others are profiting. So
19 it is just the structure of this financial
20 arrangement that is avoiding the ability for
21 recovery under the Lanham Act.
22 And it seems to me that in a situation
23 like that, that is sort of where equity is
24 supposed to be coming in to ensure that a
25 violation has a remedy. And, you know, Congress

1 uses the term "equity." "Equitable nature of
2 remedy" is in this statute.
3 And so I just worry a little bit about
4 allowing for defendants to essentially evade
5 responsibility for infringement by setting up
6 corporate structures such that only the -- that
7 the defendant proper is not "profiting."
8 MR. HUNGAR: So two responses,
9 Your Honor.
10 First of all, it's undisputed -- both
11 Respondent's expert and Petitioner's witnesses
12 testified that this structure is a -- is a
13 common typical structure in the real estate
14 industry. That's at 46 and 91 of the Joint
15 Appendix. And this -- this long predated the
16 alleged infringement. So there's no claim or
17 evidence that this was somehow set up to evade,
18 you know, proper relief.
19 And secondly, equity does provide, in
20 appropriate circumstances, a remedy for
21 precisely the problem you are addressing.
22 There's piercing the corporate veil, alter ego,
23 agency theory, any number of theories that --
24 and -- and you can just sue the additional
25 companies if you think they are involved in the

1 infringement and can prove secondary liability,
2 vicarious liability, or direct liability.
3 So there are all sorts of things that
4 Respondent could have done in order to pursue
5 the other affiliates if it thought it had a
6 basis for doing so. It simply made a tactical
7 decision not to do it. And this Court should
8 not try to fix the Respondent's tactical error.
9 CHIEF JUSTICE ROBERTS: Counsel, let's
10 say I have a contract with somebody under
11 which -- a total stranger -- he would pay me
12 $500, but it turns out the services that I
13 provide are actually worth a thousand dollars.
14 He pays the $500.
15 But then, a year later, he gives me
16 another $500, looking at the serve -- worth of
17 the services, and just thinks that that's fair.
18 Now could a court determine that my
19 gain from that transaction was actually a
20 thousand dollars rather than just 500?
21 MR. HUNGAR: I think it could. I
22 mean, if -- again, if that conduct were
23 infringing and the court could conclude that the
24 total -- defendant's total profits from that
25 infringing conduct was a thousand dollars, yes.

1 CHIEF JUSTICE ROBERTS: Well, I wasn't
2 talking about infringement at all. I just mean
3 the concept that you can have profits from a
4 contract even if the -- the compensation exceeds
5 what was required under the contract for a
6 variety of circumstances.
7 MR. HUNGAR: Yes.
8 CHIEF JUSTICE ROBERTS: Here, the
9 situation that the party considered it was fair.
10 MR. HUNGAR: Yes.
11 CHIEF JUSTICE ROBERTS: So why can't
12 the court treat the $23 million of capital in
13 this case under the same principles?
14 MR. HUNGAR: Well, so, as a factual
15 matter, the $23 million is over 30 years. The
16 alleged infringement involves only three years
17 or -- or thereabouts. So that -- so, if you
18 were even going to -- if you were going to make
19 that theory, number one, you'd have to look at
20 the relevant years, and, number two, you --
21 CHIEF JUSTICE ROBERTS: Well, would it
22 make a difference if the -- the extra 500 was
23 given over two years, 250 one year, then 250
24 another?
25 MR. HUNGAR: Well, Your Honor, the --

1 the capital contributions were being made for 25
2 or more years before the alleged infringement
3 commenced. You can't say that the capital
4 contributions -- in the infringement context and
5 under the Lanham Act, you have to show -- if --
6 if you're trying to attribute revenues to the
7 defendant as, you know, disgorgeable profits,
8 you have to show that they were related to the
9 infringement.
10 So millions of dollars in capital
11 contributed to Petitioner before the
12 infringement commenced can't in any way, shape,
13 or form be suggested to have anything to do with
14 the infringement and, therefore, would not be
15 included in the calculation.
16 Even with respect to the capital
17 contributions that were made during the
18 infringement period, you -- the plaintiff would
19 have to allege and prove, which they didn't,
20 that those were related to the infringement, as
21 opposed to on account of something else, like
22 the fact that Petitioner was providing millions
23 of dollars' worth of services to Mr. Dewberry.
24 So, again, as a factual matter,
25 Mr. Dewberry was contributing capital, and --

1 and the corporation was providing services to
2 him separate and apart from, totally unrelated
3 to, the alleged infringing activities. So those
4 are all the factual reasons why that theory
5 doesn't work.
6 But, yes, as a legal matter, if the
7 plaintiff could prove that the defendant
8 received X dollars in revenues from the
9 infringement directly but also, through some
10 circumlocution and -- and -- and hidden
11 transactions, received additional compensation
12 for the infringing conduct, then, yes, that
13 could be included in the profits calculation.
14 That would be an appropriate way to make sure
15 that the defendant is disgorging the full
16 measure of its illicit gains. But it has to be
17 from the infringement, not just unrelated
18 revenues.
19 JUSTICE KAGAN: Mr. Hungar, what --
20 what are we to make of this "just sums"
21 provision? I mean, assume that you're right in
22 everything you say about what it means to
23 calculate the defendant's profits. This
24 sentence, "If the court shall find that the
25 amount of the recovery based on profits is

1 inadequate, it" -- "the court may in its
2 discretion enter judgment for such sum as the
3 court shall find to be just," I mean, it seems
4 to provide a way for a court to say, look, I've
5 done everything by the book in terms of
6 calculating the defendant's profits, and I'm
7 coming up with a number that seems quite unfair
8 in the broader scheme of things, and -- and this
9 sentence gives me a way to move it up, move it
10 down, as you will, with very little in the way
11 of constraint.
12 So that's the way I read this
13 sentence.
14 MR. HUNGAR: So I would agree with
15 everything you said except for the last part
16 about very little constraint, and that's
17 because, as this Court said in the Starbucks
18 case, when a remedial provision authorizing an
19 equitable remedy said -- gives the court
20 discretion to enter that remedy in a manner that
21 the court deems just, that word incorporates the
22 traditional equitable limitations that go along
23 with that remedy.
24 And, here, the traditional equitable
25 limitations include you only disgorge the

1 defendant's profits, not the affiliates'
2 profits; only actual profits, not possible
3 profits. You don't award profits when the
4 defendant has zero profits because that would be
5 a penalty.
6 JUSTICE KAGAN: Well, I guess two
7 things. You know, one is that this idea of
8 "find to be just," you can contrast that in this
9 statute to the earlier language, "subject to the
10 principles of equity." So they could have just
11 repeated "subject to the principles of equity."
12 They really didn't, which suggests to me that
13 this idea of fairness in this latter sentence is
14 a little bit broader than you're saying, that it
15 really does go -- you know, I'm not going to,
16 like, stare at old equitable rules; I'm really
17 going to try to figure out whether, in -- in
18 arriving at the -- the defendant's profits, that
19 really is responsive to the nature of the
20 infringing conduct here.
21 MR. HUNGAR: So two responses.
22 Number one, it clearly does not rise
23 to the level of a direct statement abrogating
24 corporate separateness. So however you might
25 interpret this provision with respect to other

1 constraints, the -- the Bestfoods presumption
2 applies to this statute and has not been
3 overridden. So it doesn't justify disregard of
4 corporate separateness, which is precisely what
5 Respondent's argument requires if you're going
6 to attribute the profits of affiliates to --
7 that -- that Petitioner did not receive to the
8 Petitioner. So that's point one.
9 And point two is the history of this
10 "just sum" provision goes back to the Copyright
11 Act. And in this Court's decision in Brady
12 against Daly, it construed the "just sum"
13 provision in the -- in that version of the
14 Copyright Act, and it said that this isn't --
15 again, the argument there was, well, that allows
16 a penalty because, in that case, there was a
17 statutory cap. But the statutory cap, if you --
18 if you went up to it every time, could
19 conceivably be a penalty. And the Court said
20 no, it doesn't allow a penalty. It's intended
21 to achieve full compensation. It's purely
22 compensatory. And, therefore, since you're not
23 allowed to go beyond what's purely compensatory,
24 it doesn't impose a penalty.
25 And then that -- 10 years later,

1 Congress added into the Copyright Act, codified
2 the holding of Brady against Daly, by adding the
3 sentence, which also appears in the Lanham Act,
4 about how this is compensation -- shall be
5 compensation and not a penalty, or words to that
6 effect.
7 And so -- and -- and -- and then,
8 again, in the -- the Douglas case, the Court
9 again said that this provision in the Copyright
10 Act, the "just sum" provision, is -- is to be
11 compensatory.
12 So the history is perfectly clear.
13 Every court of appeals that has addressed the
14 question under either the Copyright Act or the
15 Lanham Act has recognized that the "just sum"
16 flexibility is -- is cabined by the need to --
17 for it to be compensatory, not penal.
18 JUSTICE KAGAN: Right, but there --
19 JUSTICE ALITO: Can you -- go ahead.
20 JUSTICE KAGAN: I mean, there -- there
21 can be circumstances in which that is exactly
22 what the court wants to use this provision for.
23 In other words, like, a full measure of
24 compensation --
25 MR. HUNGAR: Yes.

1 JUSTICE KAGAN: -- would be up here,
2 and the defendant's profits, for whatever
3 reason, are down here, and so we're going to
4 make up the gap.
5 MR. HUNGAR: We agree with that. And,
6 indeed, the -- again, the -- the legislative
7 history also supports the "not a penalty"
8 proposition of the Lanham Act. But -- but
9 the -- the -- the interpretation in those cases
10 that I mentioned of the "just sum" provision was
11 that it's primarily intended to address
12 circumstances where what you can prove as
13 profits or damages under the normal approach is
14 insufficient because of evidentiary weaknesses
15 and the like.
16 It could also address circumstances
17 like the one I was addressing earlier, where the
18 defendant had an unrealized gain, their stock
19 value had -- the stock that they owned was worth
20 more, but they hadn't sold it yet, so they had
21 an unrealized gain as a result of the
22 infringement, but it doesn't fit into the
23 statutory profits calculation because, remember,
24 the Lanham Act says you -- you get defendant's
25 profits, and then it defines them for purposes

1 of the Act as sales minus expenses that are
2 associated with generating the sales.
3 You can have a circumstance where the
4 defendant has -- has itself received and has a
5 right to the profit, but it's not -- it doesn't
6 fit within sales minus expenses, and a court can
7 use the "just sum" provision to disgorge that as
8 well.
9 But that has nothing to do with this
10 case because defendant -- the Petitioner did not
11 receive the profits. The affiliates received
12 the profits. And under this Court's decision in
13 the -- in the Bollinger case and under standard
14 property law, Petitioner didn't own those
15 profits. The -- the -- the affiliates owned the
16 corp -- the -- the real estate. They're the
17 lessors. They're entitled legally to the rents
18 under the Bollinger decision. And the fact
19 that -- that a service provider helps a corp --
20 a business earn its rents doesn't mean that the
21 service provider is entitled to those rents.
22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.
24 Justice Thomas?
25 Justice Alito?

1 Justice Sotomayor?
2 Justice Kagan?
3 Justice Gorsuch?
4 Justice Kavanaugh?
5 Justice Barrett?
6 Justice Jackson?
7 JUSTICE JACKSON: Yes, I have a
8 question. Your -- your answer to the Chief
9 Justice's question made me think that maybe at
10 least I need a better handle on the scope of
11 profits from the infringement here.
12 You say it has to be from the
13 infringement. So what happened here -- and
14 we've sort of skipped right into calculation of
15 damages, but can we back up for a moment? Are
16 you -- did the affiliates profit from the
17 infringement? I mean, I know this is against
18 your interests. I'm just trying to understand
19 what -- what -- what "profits from the
20 infringement" means in this scenario.
21 MR. HUNGAR: Well, what the courts of
22 appeals concluded -- so the -- the allegation is
23 that Petitioner, in marketing and loan
24 applications and so forth, used the infringing
25 mark, which was, you know, Dewberry Group

1 instead of Dewberry Capital, and, therefore,
2 the -- the court treated 80 percent of the
3 revenue -- the rental revenues received by the
4 affiliates as attributable to the infringement.
5 JUSTICE JACKSON: Presumably, the
6 affiliates were also using the mark in their
7 materials as they --
8 MR. HUNGAR: Well --
9 JUSTICE JACKSON: -- rented the
10 properties.
11 MR. HUNGAR: -- Petitioner was the --
12 was -- was authorizing leasing agents to use it,
13 if I recall the record correctly, and was itself
14 using the mark.
15 So Petitioner serves, under contract,
16 as the property management company for the
17 affiliates, as a -- as a service provider.
18 JUSTICE JACKSON: Mm-hmm.
19 MR. HUNGAR: So, as a -- as a property
20 management company, in dealing with the tenants,
21 it would be using its new name, which the court
22 found to be infringing.
23 And so those were the -- those were
24 the types of uses that the court found to be
25 infringing. And then it said: And because of

1 those uses, we're going to attribute 80 percent
2 of the rental profits received by the
3 corporations during the infringement period to
4 the Petitioner.
5 JUSTICE JACKSON: I guess I'm just
6 test -- I'm testing your -- your -- your theory
7 that other remedies were available if the
8 plaintiffs in this case had pled this
9 differently.
10 So, if they -- could they have sued
11 the affiliates for infringement and gotten the
12 disgorgement that the affiliates received?
13 MR. HUNGAR: Well, they certainly
14 could have sued them, and they could have
15 alleged alter ego theories or whatever -- you
16 know, all the theories that we've talked about.
17 Whether those would have --
18 JUSTICE JACKSON: But the defendant --
19 the -- the -- the Petitioner is the infringer
20 from the perspective of this record.
21 MR. HUNGAR: Well, again, because they
22 didn't sue any of the other defendants -- any of
23 the other affiliates, rather, they only sued
24 Petitioner, none of this was tested.
25 I mean, presumably, the -- if they had

1 sued them under alter ego or as direct
2 infringers or as secondary infringers or as
3 vicarious infringers, that would have been
4 litigated.
5 And we don't know how that would have
6 resolved. I assume that my client would have
7 resisted those claims. But how it would have
8 come out, we don't know, because Petitioner --
9 because Respondent never brought those claims.
10 And, again, it's not this Court's
11 role, I submit, to -- to try and reinject into
12 the case new theories that have been forfeited
13 and waived at the --
14 JUSTICE JACKSON: Thank you.
15 MR. HUNGAR: -- at the petition stage.
16 Thank you.
17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.
19 Mr. Crown.
20 ORAL ARGUMENT OF NICHOLAS S. CROWN FOR THE UNITED
21 STATES, AS AMICUS CURIAE, SUPPORTING NEITHER PARTY
22 MR. CROWN: Mr. Chief Justice, and may
23 it please the Court:
24 I'd like to pick up on some of the
25 questions from the bench, which I think gets to

1 the intuition that there are core, longstanding
2 principles here. We see two of them.
3 The first is that courts typically
4 treat corporations as distinct entities, and the
5 second is that a court, when ordering a
6 defendant to relinquish its ill-gotten gains, is
7 not bound by the defendant's self-serving
8 ledgers.
9 Now we agree that the monetary award
10 in this case is not consistent with the first
11 principle because the courts below treated
12 Petitioner and its affiliates as a single
13 corporate entity and then pooled their combined
14 profits and affirmatively disclaimed relying on
15 veil-piercing principles. For that reason, we
16 think the award should be vacated.
17 But we think the second principle has
18 important things to say about how a court could
19 calculate a defendant's profits while still
20 maintaining corporate separateness without
21 crossing corporate lines.
22 Our brief identified equitable
23 background principles that we think the very
24 purpose of those principles is to address a
25 situation like we may have here, where a

1 defendant is disguising economic reality.
2 In trademark cases, courts routinely
3 reject deductions where a defendant is
4 attempting to artificially inflate its costs to
5 lower its profits liability. We think the
6 outcome should be no different when a defendant
7 tries to deflate its receipts and income, again,
8 to reduce its profits liability.
9 I welcome the Court's questions.
10 JUSTICE THOMAS: You say that -- you
11 suggest that the defendant is disguising its
12 profits. Is there anything in the record to
13 support that?
14 MR. CROWN: There is. And I think the
15 problem here is we have closely held affiliates.
16 They're all under common ownership. We look at
17 the rates here. There are 30 years according to
18 the Petitioner's books. They are claiming that
19 for the last three decades they have been
20 operating at a loss.
21 If we just look at the economic
22 realities, we don't think the owner of these
23 entities would allow that to happen unless, in
24 reality, the Petitioner was generating
25 substantial value.

1 So, Justice Thomas, here's how I would
2 address the issue with this type of case. I
3 don't have a position on whether the arguments
4 have been preserved. We do think it's important
5 to save this type of argument for the next case.
6 When we have a situation like the one
7 here, where you have closely held affiliates,
8 it's not clear what's happening, it looks like
9 the defendant might be hiding its books -- the
10 economic reality in its books, we would ask:
11 What would the defendant have charged
12 unaffiliated entities for the same services if
13 it were negotiating rates at arm's length?
14 And we think there are two important
15 insights that you might get from that type of
16 analysis. And this gets to why we think that
17 the Court should vacate or at least shouldn't
18 affirm the award as it stands right now.
19 The first insight is we think, if you
20 do that type of analysis, we would see that the
21 Petitioner would have gained more money than the
22 losses that they claim to have incurred over the
23 last 30 years.
24 But the second insight is we think, if
25 you have an entity that owns land, like the

1 affiliates here, but doesn't have management
2 expertise in how to rent out its property, and
3 then you have a management company like
4 Petitioner that doesn't own land but does have
5 the expertise, they would come to the
6 negotiating table. Both bring something
7 indispensable that the other one doesn't have,
8 that is, land if you're the landowner, expertise
9 if you're the management company, and then they
10 would negotiate the rates.
11 But we don't think in that
12 circumstance -- and -- and this is the error
13 that we perceive in the decisions below -- we
14 don't think the economically realistic
15 transaction would mean that the landowner would
16 say the management company should keep all $43
17 million worth of profit that's generated through
18 that enterprise.
19 CHIEF JUSTICE ROBERTS: Counsel, you
20 say that the United States takes no position on
21 whether some of these arguments which it seems
22 you regard as important were preserved.
23 There have been a lot of times when
24 the United States has taken positions on whether
25 arguments have been preserved, and I wondered if

1 you can elucidate for us why you don't take any
2 such position in this case.
3 MR. CROWN: In this case, it seemed
4 like this is something that the lower courts
5 would be particularly well suited to sort out.
6 We think, on top of the fact it's not entirely
7 clear which arguments the courts were grappling
8 with below, we take the -- the Petitioner and
9 the Respondent to be arguing over what the
10 courts actually did below.
11 So, when you have that type of
12 confusion, I think it would be fair to say this
13 Court can follow its usual practice. Rather
14 than reaching out and addressing whether
15 arguments had been preserved, you can send the
16 case back and let the courts below try --
17 CHIEF JUSTICE ROBERTS: Well, no,
18 that -- that's the argument why you may not take
19 that position or a position. But you tell us
20 that you're not taking any position on that
21 question.
22 MR. CROWN: Well, I do want to
23 emphasize I don't mean to speak for Respondent
24 in terms of the arguments that they have made.
25 Again, we don't think it's necessary for this

1 Court to decide whether the arguments have been
2 preserved in terms of the outcome of this case.
3 We do think there was an independent
4 error in the profits award that was granted in
5 this case. We think that there are other
6 potential avenues that could have been pursued,
7 may have been pursued, to get at the same number
8 or a similar number on remand.
9 Again, for purposes of the question
10 presented before this Court, we don't think you
11 have to get into that.
12 I actually take the arguments from
13 both sides to vehemently agree on the answer to
14 the QP itself, that is, whether you can order a
15 defendant to disgorge the profits of a nonparty
16 separate entity. I think everyone says the
17 answer to that question is no.
18 Then the question becomes: How do we
19 calculate what the proper amount of profits
20 should be when we are respecting corporate
21 separateness? And we've identified background
22 equitable principles that target that exact
23 problem when it looks like what's shown on the
24 defendant's books, which Petitioner conceded
25 today and in their reply brief at page 5, aren't

1 controlling. There are various tools available
2 to the Court to sort out that type of problem
3 both in equity generally and in the trademark
4 context.
5 JUSTICE ALITO: Well, if the judgment
6 at -- at issue cannot be sustained on the ground
7 that was adopted by the court of appeals, why
8 would we go further and say: But there's this
9 other theory that might have provided a basis
10 for some relief, and we don't know whether it
11 was preserved, but we're just going to tell you
12 about this theory and send the case back for the
13 court to decide whether to apply the theory in
14 this particular case?
15 MR. CROWN: Just --
16 JUSTICE ALITO: Why should we do that?
17 MR. CROWN: Justice Alito, I want to
18 lay down the marker again that we haven't taken
19 the position. But I do understand Respondent to
20 be arguing that they at least have not forfeited
21 some of the arguments that we've raised in our
22 brief.
23 So, again, we would leave it to the
24 courts below to determine what has been properly
25 preserved because I -- I take it that the

1 parties do have a dispute over what's actually
2 still live in the case.
3 JUSTICE ALITO: Well, we can leave it
4 to the part -- to the court below to decide what
5 was and was not preserved, but why do we -- why
6 should we take the additional step of saying:
7 Here's a valid argument that you may want to
8 consider if, in fact, you find that it was
9 preserved?
10 MR. CROWN: Justice Alito, if you
11 think that is untoward, I think we would be
12 happy with an opinion that answers the question
13 presented and then makes clear that you are not
14 foreclosing the other arguments that might be
15 appropriate under the right factual
16 circumstances and subject to party presentation
17 principles. I think we could live with that.
18 Our modest submission here is:
19 Whatever the Court decides in the opinion, it
20 should not reach out and foreclose the other
21 background equitable principles and arguments
22 that we've identified in our brief. I -- I
23 think that would be the -- the part that we
24 would care about.
25 JUSTICE BARRETT: But, when you

1 say "not foreclose," just to follow up on
2 Justice Alito's question, it seems to me I
3 read -- and -- and Respondent can say if -- if
4 he sees it differently -- I -- I read there to
5 be vehement agreement on the -- the QP, the --
6 the narrow QP too as well.
7 So why wouldn't the government be
8 satisfied with our just answering the QP -- it
9 seems to me that that could be a pretty short
10 opinion -- and then just leaving it to the lower
11 court and they can make these arguments in the
12 lower court? And we didn't grant cert on these
13 other questions, which were not vetted below
14 because the Fourth Circuit took a different
15 view.
16 I -- I guess I don't understand why --
17 as long as we don't go further and say this is
18 foreclosed, doesn't silence on that point
19 suggest that it's not?
20 MR. CROWN: I think that would be
21 fair. I -- I also think that courts might --
22 courts below might appreciate clarity in -- in
23 the Court just saying: We are not deciding the
24 issue. But I wouldn't deign to tell you,
25 Justice Barrett, how to write the opinion.

1 I think the same outcome would --
2 would come out the same way. It would cash out
3 the same either way.
4 JUSTICE JACKSON: Mr. Hungar, I guess
5 I don't understand why the answer, the sort of
6 way to handle a situation like this, is just to
7 pierce the veil. I mean, you -- you -- you say
8 that the defendant is disguising its profits,
9 it's hiding economic realities, it's working
10 with these other companies in a way that they're
11 really operating in the marketplace as almost
12 one entity.
13 Why wouldn't the legally responsible
14 way to deal with this given the way we -- you
15 know, the law has developed, to say that, in
16 order to do this, to consider the profits of the
17 other entities to be the profits of the
18 defendant, the court should have pierced the
19 veil in this situation?
20 MR. CROWN: Justice Jackson, I have
21 four answers. If I may --
22 JUSTICE JACKSON: Yes.
23 MR. CROWN: -- I would like to lump
24 into that the question why couldn't they have
25 just sued the entities under the Lanham Act

1 directly. And I think --
2 JUSTICE JACKSON: Please.
3 MR. CROWN: -- all four will get to
4 that.
5 The first problem is you might not get
6 jurisdiction over the other entities. Now I
7 take the point that all of the entities, as I
8 understand it, are domestic, but you could
9 imagine a circumstance where one company decides
10 it's going to structure its affairs so it
11 commits all of the infringement, other entities
12 incorporated overseas are going to collect all
13 of the money. That, I think, would be a
14 significant barrier. It might not be a barrier
15 in this case, but, in the next one that comes
16 along, I think it would be.
17 The second problem, the affiliates, if
18 we're looking at substantive liability under the
19 Lanham Act -- this is my addition to the
20 question -- they might not be liable if you were
21 to sue them, and there are a couple reasons why.
22 If we're looking at direct infringement, there
23 might be a problem under the facts of this case
24 or a similar one. If one entity is doing all
25 the infringing, that is, using the mark in

1 commerce as the one that created the consumer
2 confusion, and the other entities, all they're
3 doing is holding the money, just holding the
4 proceeds or the profits of infringement is
5 usually, I don't think, going to get you to
6 substantive liability. And I think that might
7 also be true if we're talking about secondary
8 liability.
9 This Court explained in Inwood
10 Laboratories there are a couple different ways
11 you could get secondary liability. If somebody
12 is inducing someone else to infringe or if you
13 provide your goods and services to somebody you
14 know or have reason to believe is going to
15 infringe, secondary liability can attach. On
16 the facts of this case, I'm not sure if that
17 would be a viable theory. I can imagine cases
18 moving forward where it wouldn't be.
19 CHIEF JUSTICE ROBERTS: Counsel,
20 just --
21 MR. CROWN: The third thing --
22 CHIEF JUSTICE ROBERTS: -- before you
23 go on, how many of your four things did you just
24 get out?
25 MR. CROWN: Two.

1 (Laughter.)
2 CHIEF JUSTICE ROBERTS: Two. All
3 right.
4 MR. CROWN: I've got two -- I have two
5 more, Mr. Chief Justice.
6 CHIEF JUSTICE ROBERTS: I will -- I
7 will allow a historically unprecedented
8 exception to allow you to give us --
9 (Laughter.)
10 CHIEF JUSTICE ROBERTS: -- the other
11 two promptly.
12 MR. CROWN: I appreciate it.
13 The third point is alter-ego
14 veil-piercing might not be available. Usually,
15 the way I understand that works is you have an
16 owner being held responsible for the conduct of
17 its company. What I understand to be the case
18 here is all of the entities are horizontal, that
19 is, they don't own shares in each other, so
20 veil-piercing might be a problem.
21 The fourth thing is we think the risk
22 of disguising profits or manipulating your books
23 is especially acute. When you have all these
24 entities that are closely held under common
25 control, it's really tough to sort out what's

1 actually happening on the ground, and
2 veil-piercing or substantive liability might not
3 get at that problem.
4 CHIEF JUSTICE ROBERTS: Thank you.
5 Justice Thomas?
6 MR. CROWN: Thank you, Mr. Chief
7 Justice.
8 CHIEF JUSTICE ROBERTS: Justice Alito?
9 JUSTICE ALITO: Well, you begin to
10 explain the theory that you think might be
11 applicable or that would be valid by saying that
12 the court can go beyond the defendant's profits
13 when that is justified by the economic realities
14 of a transaction. That seems awfully
15 open-ended.
16 MR. CROWN: I would tweak it a little
17 bit and then I hope provide a palliative,
18 Justice Alito.
19 So I would tweak it to say we're not
20 going beyond the profits or the actual economic
21 gain of the defendant. We're trying to train on
22 what was the actual economic gain of the
23 defendant.
24 In terms of whether this is -- is
25 freewheeling or open-ended, I don't think so.

1 This is something courts have dealt with in the
2 equitable context dealing with profits awards.
3 This Court explained in cases like City of
4 Elizabeth -- that was one of the principal
5 citations that the Petitioner relied on -- and
6 in Goodyear, when a defendant is trying to lower
7 its profits liability by asserting certain costs
8 that it had incurred, the court can peek under
9 the hood and say, in terms of economic
10 realities, that's not what actually happened
11 here.
12 In City of Elizabeth, there were
13 claimed salary expenditures. The Court said,
14 no, those were gratuities; the defendant has to
15 answer to -- for them. They are part of their
16 profits. In Goodyear, it was a salary payment
17 that was claimed by the defendant. The Court
18 said, no, it was actually a distribution of
19 profits.
20 Those were patent cases, but courts of
21 appeals have taken this Court's lead in applying
22 the same principles in the trademark context.
23 That's the Aladdin decision, pre-Lanham Act;
24 American Rice, Fifth Circuit, post-Lanham Act.
25 JUSTICE ALITO: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Sotomayor?
3 Justice Kagan?
4 JUSTICE KAGAN: You heard the colloquy
5 between me and Mr. Hungar about the "just sums"
6 provision. What do you make of that? What do
7 you think it's there for? What do you think it
8 allows?
9 MR. CROWN: The first thing I will say
10 is I think I heard Petitioner agree that that
11 provision allows the full measure of
12 compensation to the plaintiff. We agree with
13 that. Now --
14 JUSTICE KAGAN: Yeah, I took that to
15 be what Mr. Hungar said too, that there's some
16 times that there's a delta between what you
17 arrive at through the profits calculation and
18 what you understand to be the full measure of
19 compensation for the plaintiff, and this allows
20 you to close that.
21 MR. CROWN: Right. And I would say
22 two things. I think, to the extent the
23 Petitioner is arguing that, this is really just
24 a proxy for the compensation that the plaintiff
25 lost. We think the better proxy here would --

1 would be our theory, that is, what would the
2 defendant have charged at arm's length in
3 providing services to unaffiliated entities.
4 The other thing I would say is -- is I
5 take the point that the Court might think what's
6 happening here is not exactly strictly profits
7 in the sense of sales minus costs, but we do
8 think the "just sum" provision can address this
9 type of situation.
10 So -- so just to spill this -- spin
11 this out a little bit -- Mr. Chief Justice, I
12 will be quick -- the -- the thing, I think,
13 that you could look at is you could say imagine
14 the -- the Petitioner had contracted with its
15 affiliates for a $10 million payout, and at the
16 last minute, at the end of the contract
17 performance, it decides: I'm going to forgive
18 that sum; let's just leave it with the
19 affiliates. I don't think we would be having a
20 debate whether that was the profits of the
21 defendant. That's classic anticipatory
22 assignment.
23 I take the point here that the
24 Petitioner, at least on these facts as I
25 understand them, appears to have collapsed those

1 two steps. Instead of contracting for an amount
2 and then forgiving it, it has just said on the
3 front end in this contractual negotiation:
4 We're going to leave -- we're going to take
5 below-market rates and leave the rest with the
6 affiliates.
7 Economically, we think that is the
8 same outcome, and we think those two cases
9 should be treated similarly.
10 JUSTICE KAGAN: Thank you.
11 MR. CROWN: And we think the "just
12 sum" provision provides the courts a tool to do
13 that.
14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch?
16 Justice Kavanaugh?
17 Justice Barrett?
18 Justice Jackson?
19 Okay. Thank you, counsel.
20 Mr. Lin.
21 ORAL ARGUMENT OF ELBERT LIN
22 ON BEHALF OF THE RESPONDENT
23 MR. LIN: Mr. Chief -- Mr. Chief
24 Justice, and may it please the Court:
25 The legal question governing this case

1 is really an evidentiary one: May a court
2 awarding a profits-type remedy under Section
3 1117(a) ever take into account the finances of
4 an affiliate of the defendant infringer without
5 piercing the veil?
6 The answer is yes, the plain text
7 authorizes it, and, also, just relying on the
8 financials of another party does not
9 automatically disregard corporate separateness
10 and require piercing the veil.
11 Start with separateness. Disregarding
12 corporate separateness is not an end in itself
13 but a path or a means to an end. So, if a court
14 relied on an affiliate's financials based on the
15 conclusion that the affiliate is one and the
16 same with the defendant, that would disregard
17 corporate separateness.
18 But it would not disregard
19 separateness to rely on such evidence based on
20 some other justification. Doing that simply
21 recognizes, as has long been held, that legally
22 separate entities, whether affiliates or not,
23 can still interact in ways that bear on each
24 other.
25 Indeed, that is what the Fourth

1 Circuit concluded happened here. It understood
2 the district court not to have set aside
3 separateness but rather to have relied on the
4 affiliates' revenues as evidence of Petitioner's
5 own, and I quote, "true financial gain."
6 And that tracks the record, which
7 reflects that, despite some imprecise language,
8 the district court did not view the affiliates
9 and the Petitioner as interchangeable. To the
10 contrary -- and these facts are important -- the
11 district court relied on the affiliates' profits
12 because it found that Petitioner alone had
13 generated all those revenues through its
14 infringing activities. And so the revenues were
15 thus gain created by the Petitioner even though
16 Petitioner assigned them elsewhere.
17 The other question is what part of
18 1117(a) authorized the district court to rely on
19 this evidence. We believe the discretion to
20 look beyond the defendant's net profits is found
21 in the unique "just sum" provision. The U.S.
22 reads the statute differently, but, under either
23 approach, you get to the same place.
24 I welcome the Court's questions.
25 JUSTICE THOMAS: Mr. Lin, wouldn't --

1 we would not be here on this if you -- if
2 your -- if Petitioner -- or Respondent had sued
3 all of the entities.
4 Why wasn't that the approach?
5 MR. LIN: Your Honor, I understand
6 that there were a number of practical and
7 strategic reasons, but I think maybe the -- the
8 easiest answer to you is, Your Honor, if you
9 look at JA 109, which is in the expert report,
10 it -- it notes that the Petitioner's website
11 represented that it owned 1.5 billion in -- in
12 properties. We didn't know, in short, that
13 there were other ownership entities, and so we
14 made the decision to sue who we thought was the
15 defendant, and we think that the "just sum"
16 provision allows us to get at the defendant's
17 true financial gain.
18 JUSTICE THOMAS: So, I guess, to some
19 extent, you have to argue that the "just sum"
20 provision allows you to pierce the corporate
21 veil. This would be a different case if it were
22 a partnership or a sole proprietorship. Your
23 argument would be much easier.
24 So how do you get past the separate
25 corporate entities? Even to calculate income,

1 it's not the income, technically, of the -- of
2 Petitioner here.
3 MR. LIN: Your Honor, so my answer to
4 you is: I would take issue with the premise
5 that we have to argue that the "just sum"
6 provision requires piercing the veil, and it
7 gets to what I think is an important
8 understanding of what "disregarding the
9 corporate separateness" really means. I think
10 it's a means to a certain outcome.
11 And so, really, the justification for
12 looking at the affiliates' financials matters,
13 this Court has said -- and -- and if I could,
14 the Arthur Andersen case, Arthur Andersen versus
15 Carlisle, the 2009 case, it's talking about, you
16 know, when you can hold nonparties to a contract
17 to be responsible, and -- and it lists a number
18 of ways to do that: assumption, piercing the
19 corporate veil, alter ego, incorporation by
20 reference, third-party beneficiary theories,
21 waiver, and estoppel.
22 And, Your Honor, my point is piercing
23 the corporate veil and disregarding corporate
24 separateness is one way to look at the
25 affiliates' finances, but there are other ways.

1 And if -- if the reason is not simply that
2 you're concluding that the two are
3 indistinguishable, then you're not disregarding
4 the corporate veil at all, and there's no reason
5 to -- to say that the "just sum" provision
6 allows piercing the veil.
7 We're simply saying, if you look at
8 the findings of fact here, which are
9 unchallenged in this Court, what the court
10 concluded -- it's somewhat of an unusual factual
11 finding because there are unusual facts. But
12 what the court concluded is that the Petitioner
13 alone drove and created all of these revenues
14 and then put them on the books of the affiliate.
15 That is not disregarding corporate
16 separateness.
17 JUSTICE GORSUCH: Mr. Lin, I would --
18 MR. LIN: Yes, Your Honor, I'm sorry.
19 JUSTICE GORSUCH: -- I'd agree with
20 you that there are many ways to skin the cat.
21 You can sue these people. You can pierce the
22 veil. You've got all kinds of equitable
23 theories. You just had a great list of them a
24 second ago.
25 But, as I understand it, the Fourth

1 Circuit below did none of those things. And you
2 all actually agree with that. And you agree
3 that on the question presented, the Fourth
4 Circuit erred. Is that right?
5 MR. LIN: No, Your Honor. We --
6 JUSTICE GORSUCH: So the Solicitor
7 General is wrong, there isn't total agreement
8 here today?
9 MR. LIN: There is total -- so if I
10 can answer that in two ways. There is total --
11 JUSTICE GORSUCH: No, pick one.
12 (Laughter.)
13 MR. LIN: Maybe I can combine them
14 into one answer.
15 (Laughter.)
16 JUSTICE GORSUCH: Give me your best.
17 MR. LIN: There is total agreement
18 that you cannot include in the judgment the
19 affiliates' profits as the affiliates' profits.
20 JUSTICE GORSUCH: As such, yes.
21 MR. LIN: Right? Because that would
22 be saying that --
23 JUSTICE GORSUCH: Right. We need some
24 other theory to get there.
25 MR. LIN: You need some -- you need

1 some other reason, unless you're going to pierce
2 the veil.
3 JUSTICE GORSUCH: Right.
4 MR. LIN: And we would say that --
5 that that other reason exists here.
6 JUSTICE GORSUCH: Okay. But that
7 didn't happen below. That's not on which the --
8 the judgment rests in the Fourth Circuit.
9 And so perhaps maybe you preserved the
10 arguments, maybe you didn't. The Solicitor
11 General doesn't know. And maybe the best thing
12 in those circumstances is for us to -- to vacate
13 and remand, allow you to try again.
14 MR. LIN: And so what I would quarrel
15 with, Your Honor, is that that is -- that --
16 that the -- that there was no other reason on
17 which the judgment below was based.
18 I think, if you -- if you look at
19 Petitioner's Appendix 43a, what the Fourth
20 Circuit says is: We view the district court's
21 decision differently. Rather than pierce the
22 corporate veil, rather than disregard corporate
23 separateness, the court considered "the revenues
24 of entities under common ownership with Dewberry
25 Group in calculating Dewberry Group's true

1 financial gain." And that's a quote that
2 Petitioner assiduously leaves out of any of
3 their pleadings.
4 What the Fourth Circuit's basis was,
5 was that it did not understand the district
6 court to have just viewed the two, the
7 affiliates and the defendant, at a -- as a
8 single entity.
9 JUSTICE GORSUCH: I -- I -- I think
10 what Mr. Hungar would say to you is: That's a
11 nice little snippet, but there's no work there,
12 that it -- it appears that the court just
13 treated the affiliates' profits as the
14 defendant's profits, pretty much full stop, and
15 that that's a mistake.
16 And I think you'd agree with that,
17 that something more needs to be done to
18 attribute those profits to the defendant. Some
19 work has to be done under some equitable theory.
20 And we don't have any evidence that
21 the Fourth Circuit did that in this case. Maybe
22 they can. Maybe you have the facts. You had
23 lots of theories to work with. But we don't
24 know.
25 MR. LIN: Two answers. One, just --

1 JUSTICE GORSUCH: One.
2 (Laughter.)
3 MR. LIN: Well, I -- I -- I have to
4 take issue with the fact that there has to be an
5 equitable theory. We think the "just sum"
6 provision provides a statutory basis.
7 JUSTICE GORSUCH: Sure, sure. Throw
8 that in the pot too of things --
9 MR. LIN: Of course, Your Honor.
10 JUSTICE GORSUCH: -- that might or
11 might not be available.
12 MR. LIN: And, yes, I agree that there
13 has to be more work as a general matter, but I
14 think that work was done -- so, yes, the Fourth
15 Circuit's -- the Fourth Circuit's analysis is
16 very short, but I think what the Fourth
17 Circuit's analysis tracks is its understanding
18 of the full record.
19 And I think, if you go to the
20 record -- and -- and that's what I was alluding
21 to earlier -- and you look at the unchallenged
22 findings of fact in this case, the unchallenged
23 finding of fact in this case is that the
24 defendant -- Petitioner created all of the
25 revenues that the affiliates -- and this gets to

1 Justice Jackson's questions -- question -- the
2 affiliates were passive receivers. They had no
3 employees. They did not do a single thing.
4 Now they -- they suggest in their
5 briefs that that is wrong, but that is the
6 unchallenged finding of fact of the district
7 court, which you are -- which you are stuck with
8 here.
9 JUSTICE BARRETT: But, Mr. Lin, I
10 guess, kind of to follow up on what Justice
11 Gorsuch is saying, is, you know, at a minimum,
12 can we agree the Fourth Circuit's opinion isn't
13 a model of clarity on this point?
14 MR. LIN: I think we can agree on
15 that.
16 JUSTICE BARRETT: Okay. So, if we
17 want to go beyond just the strict QP in the way
18 that we've talked about, the point on which
19 there's vehement agreement, we have to
20 articulate some theory, correct, to justify the
21 Fourth Circuit's opinion?
22 You're -- you're giving us some --
23 some mechanism for doing that, but the Fourth
24 Circuit didn't spell that reasoning out. It
25 sounds like you're pretty confident in your

1 position. And Justice Gorsuch said you have a
2 bunch of theories.
3 If the Fourth Circuit believed that,
4 it can presumably make pretty quick work of this
5 on remand, and then maybe you walk away and you
6 win quickly. But we would be kind of wading
7 into uncertainty if we spell out all of those
8 theories that the Fourth Circuit never
9 addressed.
10 MR. LIN: I understand the question,
11 Your Honor, and here's how I would respond to
12 that.
13 I think, if you conclude, a majority
14 of this Court concludes, that you're uncertain
15 about what the Fourth Circuit did, whether the
16 record supports the idea that there was no
17 disregard of corporate separateness, that
18 then -- then I do think that you should vacate
19 and remand and allow the lower courts to spell
20 out what they did and whether that was
21 permissible.
22 But I think, Your Honor, if you agree
23 with us that the record is clear on its face --
24 and -- and we think that the -- I think, if you
25 look at the unchallenged factual findings, I

1 don't think there's another way to read the
2 record, and I think, if that's true, then you do
3 have to go on and address the other questions.
4 JUSTICE BARRETT: So you would say,
5 like, this is kind of a quibble between a
6 vacate -- if we have uncertainty about the
7 Fourth Circuit opinion, you're just trying to
8 make sure we vacate and remand and not -- not
9 reverse? Is that kind of the way I --
10 MR. LIN: Well, yes, Your Honor. I
11 mean, I -- I don't think that this Court should
12 reach out and decide what the amount of the
13 judgment should be, which I think is what you
14 would have to decide if you were to just
15 straight-up reverse and not allow any further
16 proceedings below.
17 I think the -- if -- if you have
18 uncertainty as to what the courts below did,
19 then I think the answer is to -- you could
20 decide the QP. I think you could provide some
21 further guidance -- to Justice Jackson's
22 question, I think I would say it's not
23 categorically impermissible to look at the
24 financial evidence of affiliates -- and then
25 allow this to go back down and for the -- the

1 courts to further explain what they did and why
2 that was on --
3 JUSTICE SOTOMAYOR: When I read --
4 JUSTICE BARRETT: So it's like a scope
5 of the remand question, kind of what we say
6 about all that?
7 MR. LIN: Yes, Your Honor.
8 JUSTICE SOTOMAYOR: When I read the
9 Petitioner's brief, and not until the reply, he
10 seemed to be saying -- and I think that he's
11 disavowed that now. If you disagree, let me
12 know -- that you looked only at the defendant's
13 tax returns basically.
14 And I think he's now disavowed that
15 theory and admitted that you can look at the
16 revenues of an affiliate in some circumstances,
17 correct?
18 MR. LIN: Yes, Your Honor. I -- I
19 read the briefs the same way. We -- and we
20 understood them to be arguing below as well that
21 the tax returns are what provide the measure of
22 their profits.
23 I do think that in the reply and today
24 my friend is -- is saying that there are
25 circumstances where you could not only look

1 beyond the tax returns to receipts maybe that
2 are not -- not recorded but also potentially to
3 the --
4 JUSTICE SOTOMAYOR: You said something
5 earlier, was that Dewberry Group had basically
6 taken the revenues of the affiliate. But,
7 actually, this is a horizontal situation.
8 Dewberry Group had no power to order the
9 affiliates to do anything, correct?
10 MR. LIN: Yes, Your Honor. And if
11 that's what I said, let me -- let me
12 clarify what I meant.
13 JUSTICE SOTOMAYOR: I thought that's
14 what you said. And that's the complication in
15 this case, which is what Mr. Crown pointed to,
16 that this is a horizontal situation, where it's
17 really the owner, John Dewberry, that could
18 order anybody to do anything, correct? And he's
19 not a defendant here.
20 MR. LIN: I -- I don't -- I don't
21 think that's what -- again, I don't think that's
22 what the factual findings reflect. And if I
23 could, Your Honor --
24 JUSTICE SOTOMAYOR: Mm-hmm.
25 MR. LIN: -- I can -- I think there's

1 three sort of key factual findings, and I can
2 point you to where they are in the record.
3 The first is that the district court
4 held -- and so it's not that the Dewberry Group
5 took the revenues. What the district court held
6 is that the district court generated all of the
7 revenues, that the affiliates added no value,
8 did no work, that the revenues and the gain was
9 created by the Petitioner. And that's at
10 Petitioner Appendix 83a, where it not only held
11 that but rejected -- and my friend said today
12 that there was no testing of whether the
13 affiliates had contributed any value.
14 At Petitioner Appendix 83a, the
15 district court rejects Petitioner's argument,
16 and I quote, it is -- that "it is not the
17 economic engine that creates the revenue." They
18 had argued that the Petitioner -- that the
19 affiliates, through their ownership of the
20 property, had somehow added some value. And the
21 district court specifically rejected that. So
22 Finding of Fact Number One, unchallenged, the
23 Petitioner generated all the revenue.
24 The second is that the Petitioner
25 controlled the allocation of the revenues.

1 That's at 83a, where the district court says
2 that the Petitioner was responsible for the
3 accounting and cash management, and it adopted
4 Dewberry's expert, what -- who said in the
5 testimony at JA 68 that Petitioner's "management
6 determines whether, on paper, Petitioner or the
7 affiliates show the losses or the profits."
8 So we have the finding that they drove
9 the revenues, created the revenues. We have the
10 finding that they controlled where the revenues
11 are recorded.
12 And then, third, the third finding is
13 also at 83a, that Petitioner's tax returns don't
14 tell the whole story and that all revenues
15 generated through Dewberry Group show up on the
16 ownership entity's books.
17 So I think, if you look at those
18 three, what you have is, again, admittedly, some
19 unusual factual findings, but they're supported
20 by the record and they're not challenged.
21 Dewberry Group, the defendant, created all the
22 revenues; Dewberry Group, the defendant, decided
23 where they were recorded; and Dewberry Group,
24 the defendant, had them recorded on the
25 ownership entity's books.

1 So what you have is not the idea that
2 they are indistinguishable, the Petitioner and
3 the affiliates. It's to the contrary. It's a
4 recognition that they are separate entities and
5 that only one of them drove and created the
6 gain.
7 And the "just sum" provision allows
8 for a district court to look and say: Look, I
9 think the net profits are inadequate. I'm going
10 to look for the true gain. I have to do it in a
11 way that doesn't disregard corporate
12 separateness, and I've done that here.
13 JUSTICE JACKSON: Wouldn't the way to
14 do that, though, is to recognize the two steps
15 in the statute? So, to the extent we're looking
16 only at Dewberry Group, shouldn't the court have
17 said zero, which is what they said, and then we
18 move to the second step using the "just"
19 provision and adjust it in the way that you're
20 talking about?
21 MR. LIN: I -- I think it did do that.
22 Again, I think, if you look at -- if I can
23 remember where. I think, if you look at -- I
24 think it's 83a as well. What -- what the
25 district court says is -- 84a -- Dewberry

1 Group's tax returns standing alone do not tell
2 the whole economic story. I think that's step
3 one. I think they were present -- the district
4 court -- I'm sorry -- the district court was
5 presented with the -- the notion that the
6 profits are zero based on the tax returns, and
7 the district court said that doesn't tell the
8 whole economic story.
9 I think that's enough of a -- of a --
10 of a finding to support a finding of inadequacy
11 under step one, right? You then go to the "just
12 sum" provision, and the district court says what
13 are the true gains? And, again, I can't, right,
14 you can't disregard corporate separateness. You
15 can't simply say they are indistinguishable
16 entities. But, if there's evidence that the
17 true gains are a certain amount, I can look at
18 the financial records and determine that. And,
19 here, again, the unchallenged factual finding is
20 that the Petitioner created all of the revenues.
21 This case might seem a little bit less
22 unusual, to be honest, if the finding were that
23 the Petitioner created half the revenues, right,
24 25 percent of the revenues. Then we would have
25 a much smaller "just sum" judgment. And I don't

1 think anybody would be saying, wow, this number
2 looks a lot like the full amount of the profits.
3 But the reason that we have what kind of appears
4 like an unusual is because we have unusual facts
5 and an unusual factual finding.
6 On the "just sum" provision, Justice
7 Kagan, you had asked, you know, what does that
8 encompass? And -- and we had understood our
9 friends to have argued that you can't go beyond
10 net profits, that the "just sum" provision is
11 only about, you know, a situation where we can't
12 figure out the net profits.
13 I think I heard my friend say today
14 that you can, that there could be a delta
15 between net profits and gains, and that the
16 "just sum" provision could allow a court to get
17 at that. And I think that makes -- that's the
18 only way that the "just sum" provision can be
19 squared with its text, because the text
20 specifically says that if a district court finds
21 inadequate or excessive the amount of an award
22 of profits, it can award a sum that is just.
23 And I think, textually, what that
24 means is the "just sum" provision is about
25 providing for an award that goes beyond profits.

1 JUSTICE GORSUCH: Mr. -- Mr. Lin --
2 JUSTICE KAGAN: I think Mr. Hungar --
3 JUSTICE GORSUCH: Sorry. Go, please.
4 JUSTICE KAGAN: I think Mr. Hungar
5 might say, well, there was an important
6 qualification in what I said, which is that you
7 can't do this in a way that treats the defendant
8 just the same as these other corporate entities
9 and that that is an -- an important limit in
10 this case at any rate.
11 MR. LIN: Understood. And -- and we
12 would agree with that. We don't think that you
13 can use the "just sum" provision in a way that
14 simply treats the entities as indistinguishable.
15 And that is why, to answer Justice Thomas's
16 question, we don't have to show that the "just
17 sum" provision would permit disregarding
18 corporate separateness.
19 But, again, I think our -- our point
20 here is that we don't think the district court,
21 when you look at the record, in fact, ignored
22 corporate separateness in using the "just sum"
23 provision.
24 JUSTICE ALITO: Could you take just a
25 moment to address the SG's argument that the --

1 the courts below offered no persuasive
2 justification for awarding all of the revenues
3 that Petitioner's affiliates received?
4 MR. LIN: Of course, Your Honor.
5 There's two answers to that, and the first one
6 comes back to the factual finding. The factual
7 finding is that the Petitioner and the
8 Petitioner alone created all of the revenues and
9 then put those revenues on the books of the
10 affiliates.
11 So, number one, I think the factual
12 finding says that all of those revenues and,
13 therefore, all of the profits are the true gain
14 of the defendant.
15 The second answer is, to the extent
16 that there is any uncertainty or a quarrel about
17 whether some portion of that number is not
18 attributable to the infringement or should have
19 been reduced by costs, the burden for that,
20 whether statutorily at what I would call step
21 one, or equitably under the "just sum" provision
22 because of the word "just," the burden for that
23 disentanglement falls on the defendant. That
24 goes all the way back to the Westinghouse case
25 and the doctrine of trustee ex maleficio, where,

1 once we have shown -- basically made a prima
2 facie showing of what the -- what the -- the
3 gain from the infringement is, which I think is
4 supported by the factual finding, then the
5 burden of disentangling, you know, anything that
6 might -- we might not be entitled to, that falls
7 on the trustee, right? That's the doctrine
8 of -- of accounting of profits.
9 And so -- and they -- again, as the
10 district court and the Fourth Circuit
11 recognized, they refused to engage with that
12 because they simply said we don't think any of
13 these affiliate profits have any relevance
14 whatsoever to what our true gain is, and so that
15 risk falls on the defendant.
16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.
18 Justice Thomas, anything further?
19 JUSTICE THOMAS: Would it matter in
20 our consideration of whether or not the
21 affiliate income should be counted that the
22 affiliate -- that this practice is typical or
23 atypical in the real estate industry or whether
24 the tax assessed by the -- say, the IRS reflects
25 your thinking or that of Mr. Hungar?

1 In other words, that the affiliates
2 pay separate tax or that this is a typical
3 practice in the real estate industry to keep the
4 businesses separate?
5 MR. LIN: Your Honor, I think the --
6 the short answer to your question is I don't
7 think it should particularly matter. I think
8 the question here is whether -- you know, who
9 drove the revenues. And, I mean, you can have
10 separate entities where maybe the affiliates are
11 doing more work in a different case than in this
12 case.
13 And, again, that gets back to my
14 explanation before about why this judgment might
15 look a little bit unusual, but that's because
16 the facts here were that this Petitioner drove
17 and created all of the revenues and then put
18 those revenues on the books of the affiliate.
19 CHIEF JUSTICE ROBERTS: Justice Alito?
20 Justice Sotomayor?
21 Justice Kagan?
22 Justice Kavanaugh?
23 Justice Barrett?
24 Justice Jackson, anything further?
25 JUSTICE JACKSON: Would -- would

1 piercing have been an option here for the court
2 from your perspective? The SG said -- came up
3 with a number of reasons why piercing wouldn't
4 have resolved this issue.
5 MR. LIN: Your Honor, I think you may
6 appreciate that I'm hesitant to commit one way
7 or the other. I don't want to prejudge whether
8 piercing could be shown or not. Our -- our
9 position was that we didn't have to -- have to
10 do it --
11 JUSTICE JACKSON: Yes. Right.
12 MR. LIN: -- and that the "just sum"
13 provision would amount for it. I think, if this
14 were to go back and there was a contention -- if
15 the Fourth Circuit concluded, or the district
16 court, that the "just sum" provision couldn't be
17 used in this way, we would then address that
18 question.
19 JUSTICE JACKSON: Thank you.
20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.
22 MR. LIN: Thank you, Your Honor.
23 CHIEF JUSTICE ROBERTS: Rebuttal,
24 Mr. Hungar.
25

1 REBUTTAL ARGUMENT OF THOMAS G. HUNGAR
2 ON BEHALF OF THE PETITIONER
3 MR. HUNGAR: Thank you, Your Honor.
4 So, with respect to the argument that
5 Petitioner generated the profits, as a matter of
6 law, the fact that a corporation, through its
7 employees, agents, or independent contractors,
8 as here, uses other people to generate its
9 profits does not mean that those service
10 providers own the profits so generated.
11 This Court held precisely that even in
12 the tax -- tax context in Commissioner against
13 Banks at the government's urging. The argument
14 there was that the lawyer who generated the
15 proceeds of the lawsuit, who did all the work to
16 make that lawsuit profitable, was -- was the
17 owner of the income that was shared that had
18 been assigned to him. And the Court said no,
19 the owner of the property, the cause of action,
20 owns the proceeds of that property, the
21 settlement award, and the fact that the lawyer
22 did all the work doesn't mean that he gets --
23 that he's the owner or the recipient of the
24 income. That's why the taxpayer, the owner of
25 the claim, had to pay taxes on the full amount.

1 Precisely the same is true here and
2 for every corporation. Every corporation makes
3 its -- generates its profits through the work of
4 agents or independent contractors, but that
5 doesn't mean that the independent contractors
6 own the profits. The -- the -- the affiliates
7 own the property. They are the lessors. They
8 receive and are legally entitled to the rents.
9 So you can't treat those rents received by the
10 affiliates on property that they own as if they
11 were owned -- as if those rents -- rental
12 proceeds were owned by Petitioner without
13 disregarding the corporate form for -- on one of
14 the many grounds that one could have done that.
15 The problem is they didn't do that
16 here. So that arguing about who generated the
17 profits proves nothing, and this Court's
18 decision in Banks and Bollinger establish
19 precisely that.
20 So, with respect to the -- the
21 question whether there's vehement agreement, I
22 think you heard Respondent vehemently disagree
23 with our position. They say that courts can do
24 what the court of appeals did here. And, again,
25 there is no doubt -- there is no doubt that what

1 the courts below accepted and what Respondent
2 argued below was not what they're arguing now,
3 but, rather, pay no attention to the corporate
4 form, we don't have to pierce the corporate
5 veil, but these are all owned by the same guy
6 and they're all involved in an interrelated
7 enterprise and, therefore, we should treat all
8 the profits of this collective economic
9 enterprise, as their expert said at -- at
10 page -- at -- sorry, single -- single economic
11 enterprise, at page 146, 149, and 218 of the
12 Joint Appendix. They argued collective economic
13 enterprise in their proposed findings -- 319,
14 322, 325, and so forth -- that the district
15 court found that it would treat Petitioner and
16 its affiliates as a single corporate entity.
17 The court of appeals did the same thing, single
18 corporate entity.
19 That is disregard of corporate
20 separateness, plain and simple. That is the
21 only theory that is argued -- was argued below.
22 It's the only theory that was accepted by the
23 courts below. And Respondent is trying to run
24 away from it and pretend that they don't want to
25 treat the affiliates and Petitioner as

1 interchangeable. That was -- those were his
2 words today. But that's precisely what they
3 argued below and persuaded the courts below to
4 accept, and that's precisely what this Court
5 should reject.
6 And it should reject it not only as to
7 the principles of equity and based on the
8 language of the defendant's profits in the
9 statute, but it should also reject the "just
10 sum" argument for precisely the same reasons,
11 because "just sum" is subject to the same
12 equitable constraints and can't impose a penalty
13 and for precisely the same reasons therefor, and
14 it's also subject to the Bestfoods presumption,
15 which requires Congress to speak clearly to
16 override corporate separateness, which it didn't
17 do.
18 So, for all those reasons, the Court
19 should reverse as to the rationale adopted by
20 the court of appeals and reject the "just sum"
21 argument that Respondent is offering in an
22 attempt to -- to defend that illicit rationale.
23 And there's no need for a remand,
24 again, because this is not a question of whether
25 it was -- of not -- it's not only a question of

1 whether it was failed -- they failed to raise
2 any of these arguments below. They failed to
3 raise them in the brief in opposition and they
4 failed to dispute the assertion that Petitioner
5 had zero profits from the infringement.
6 So, as a matter of Rule 15, which this
7 Court has a responsibility and the authority to
8 enforce, not the court of appeals, as a matter
9 of Rule 15, those issues are not in the case, so
10 there's nothing to remand.
11 For all these reasons, we ask that the
12 judgment of the court of appeals be reversed,
13 full stop.
14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.
16 The case is submitted.
17 (Whereupon, at 11:16 a.m., the case
18 was submitted.)
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