

# SUPREME COURT OF THE UNITED STATES

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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. )  
- - - - -

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.       )  
9       - - - - -

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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 -- the  
19 Court said that partnership is -- an accepted  
20 basis for joint and several liability even in  
21 the disgorgement context. But there's no proof  
22 or allegation here of partnership, and that  
23 theory was not --

24 JUSTICE THOMAS: So your -- your --  
25 your argument basically relies on -- it's more

1 of a formalistic argument -- relies on the fact  
2 that these -- that these businesses that are  
3 owned by one person are in a separate corporate  
4 form, as opposed to partnership or sole  
5 proprietorship?

6 MR. HUNGAR: Correct. And that's  
7 the -- that is the fundamental principle of  
8 corporate separateness that this Court has  
9 recognized in numerous cases, the Dole Foods  
10 case we cited in our brief, the Bestfoods case  
11 itself. Because of a long tradition of history  
12 and reliance to the tune of billions, if not  
13 trillions, of dollars in corporate America  
14 relying on the principle of corporate  
15 separateness and its recognition by the courts,  
16 the Court said in Bestfoods that unless Congress  
17 directly says otherwise, corporate separateness  
18 is the norm, unless you can prove the normal  
19 grounds for disregarding separate corporations,  
20 which Respondent disavowed doing here.

21 JUSTICE THOMAS: Well, I -- the -- I  
22 think the courts below thought that this  
23 looked -- if you got past the form -- again,  
24 I -- there's a comparison between partnership  
25 and corporate form, but it -- it seemed as



1     though the court was saying, look, this is one  
2     business and we'll treat it as one business and  
3     we'll ignore the corporate form of the separate  
4     businesses owned by the same person.

5             MR. HUNGAR:   Well, Your Honor, there  
6     are recognized principles and rules that govern  
7     the circumstances in which the corporate form  
8     will be disregarded.   And Respondent and the  
9     courts below expressly disavowed any reliance on  
10    those accepted principles.   At -- at trial, the  
11    Respondent's expert who theorized -- who had  
12    presented this single economic enterprise theory  
13    was asked:   You're not alleging that there's  
14    some sort of abuse of the corporate form or  
15    fraud or anything?   Answer:   No.   That's at  
16    Joint Appendix 67.

17            The district court made clear  
18    plaintiff did not allege alter ego liability and  
19    said that's of no moment.   That's at 86a of the  
20    Petition Appendix.   The court of appeals said  
21    rather than pierce the corporate veil, the  
22    district court adopted its single economic  
23    enterprise theory at Petition Appendix 43a.  
24    Even Petitioner admits in it -- in its merits  
25    brief that it did not pierce the corporate veil

1     and -- and disclaimed doing so.

2                 So there's no dispute that this -- the  
3     judgment does not rest on any accepted notion of  
4     piercing the corporate veil.  Instead, the court  
5     simply disregarded corporate entities because  
6     they're commonly owned.  But, as this Court said  
7     in Dole Food, the fact that multiple affiliated  
8     corporations are commonly owned does not mean  
9     that one corporation owns the property of the  
10    other corporation.  And the same is true here.

11                JUSTICE JACKSON:  Mr. Hungar, does the  
12    fact that we have separate entities necessarily  
13    mean that the Court can't consider the  
14    non-defendant affiliates' profits?

15                I mean, I -- I take your point that  
16    the Lanham Act does not allow for disgorgement  
17    of these separate entities' profits, but I would  
18    wonder whether or not the question really is how  
19    do you go about calculating the defendant's  
20    property -- profits in this sort of unique  
21    financial circumstance, and does that  
22    necessarily mean that the court couldn't look at  
23    the profits of the other entities to assess  
24    defendant's property -- profits as evidence, for  
25    example, under certain circumstances?

1                   MR. HUNGAR: Well, there could be  
2     circumstances in which that would be  
3     permissible. For instance, the -- the briefs  
4     talk about the Sheldon case from the Second  
5     Circuit, where the court held that because the  
6     defendant in that case was the parent  
7     corporation, it owned stock in the subsidiaries  
8     that had -- had engaged in infringement and had  
9     profited from it.

10                  And the court said we're not -- it was  
11     not attributing the -- the subsidiaries'  
12     profits, but it said the parent, because of its  
13     ownership of stock, had a financial benefit, had  
14     a financial gain, to itself that it owned  
15     because its stock was worth more, it could sell  
16     it for more money because of the profits held by  
17     the subsidiaries.

18                  JUSTICE JACKSON: So you're -- you're  
19     not saying that the defendant's own books are  
20     the only piece of evidence that can be  
21     considered by the court when it determines --

22                  MR. HUNGAR: No. Exactly. Right.  
23     And equity is clear that you can look beyond the  
24     defendant's books to get at the reality. But  
25     the key is it has to be benefit, profits owned

1 by the defendant, even if not recorded on its  
2 books, not profits owned by a separate  
3 corporation --

4 JUSTICE JACKSON: So what is your  
5 response to the Solicitor General's proposed  
6 profits calculation here that has to do with the  
7 alleged undercounting of the fees and whether or  
8 not that can be looked at or taken into account?

9 MR. HUNGAR: So threefold.

10 First of all, that was -- that --  
11 that -- that argument is forfeited in this case.  
12 It's not presented, which I would like to get  
13 back to in greater detail.

14 But, second of all, that -- if you're  
15 talking about the -- reallocating the -- the  
16 fees basically to say -- to pretend as if  
17 Petitioner had received more fees because,  
18 supposedly, it was charging below-cost fees, as  
19 a legal matter, that would not be, in our view,  
20 an accepted basis at equity because, again,  
21 equity looks only to the gain actually received  
22 by the defendant. And this Court's cases that  
23 we've cited in our brief say that over and over  
24 again.

25 In -- in this scenario, the -- the

1 government is essentially admitting these are  
2 revenues that weren't received, actually, by the  
3 defendant. They were received by the other  
4 affiliates, but we're just going to essentially  
5 treat the defendant as if it had received those  
6 additional revenues because we think that would  
7 be more in keeping with economic reality.

8 JUSTICE SOTOMAYOR: This makes no  
9 sense to me, can -- counselor.

10 The government points to an issue  
11 of -- of assignment of revenue. If you have a  
12 situation like this one, where someone is  
13 rendering services at a loss and the owner of  
14 the corporation is making up those losses over  
15 time, can't we treat the amount that the owner  
16 is putting back into the defendant as profits?

17 MR. HUNGAR: So, number one, as -- as  
18 I noted in response to Justice Jackson, that --  
19 that question was -- that argument was never  
20 made in this case and is not presented  
21 therefore. But -- but, with respect to your --

22 JUSTICE SOTOMAYOR: Counsel, that's an  
23 issue of remand. What the lower court --  
24 whether the lower court will permit the trial to  
25 be reopened or not, that's always in the

1 discretion of the courts below.

2 This is a case that's putting forth  
3 the proper way to evaluate profits, and the  
4 court below can decide whether there was an  
5 intentional waiver or forfeiture or decide  
6 whether to reopen the case. It's not for us.  
7 So just assume the theory.

8 MR. HUNGAR: So, with respect to  
9 the -- I'll -- I'll -- I'd like to come back to  
10 that if I may.

11 JUSTICE SOTOMAYOR: Mm-hmm.

12 MR. HUNGAR: But, with respect to the  
13 substance of your question, the -- I think  
14 Justice Jackson's question was on a -- the  
15 government has -- has tried to throw several  
16 different theories into this case. One --

17 JUSTICE SOTOMAYOR: No, the government  
18 has a very simple theory as I understood it.

19 MR. HUNGAR: Well, they have the --

20 JUSTICE SOTOMAYOR: Estimate how much  
21 they would have received if there had been an  
22 arm's length transaction, what would have been  
23 the value of their services, and if they would  
24 have received that, that's the profit that they  
25 would have made.

1                   MR. HUNGAR: Well, yes, Your Honor,  
2     but there -- there's the below -- there's the  
3     alleged below-market-rate expense theory.  
4     There's also the assignment theory, which  
5     Your Honor, I think, was referring to. And with  
6     respect to that theory --

7                   JUSTICE SOTOMAYOR: Well, the  
8     assignment theory, it's only the principles of  
9     an assignment theory, which is if I'm making a  
10    certain amount of money and I give it to someone  
11    else. And, here, I gave it to the affiliates  
12    because their services were worth a lot more  
13    money than they were paid.

14                  MR. HUNGAR: Right. So I have several  
15    things to say about the assignment theory.

16                  First of all, tax principles do  
17    note -- do not directly translate into equity.

18                  JUSTICE SOTOMAYOR: I don't disagree.

19                  MR. HUNGAR: And so the question would  
20    be: Is there an equitable theory under which  
21    this approach would make sense? And there --  
22    and there -- certainly, in appropriate  
23    circumstances, there would be, whether it would  
24    be, you know, a fraudulent conveyance argument  
25    or a constructive trust argument.

1                   If -- if, in fact, you had a  
2                   circumstance where the defendant had the right  
3                   to the income and transferred it to --

4                   JUSTICE SOTOMAYOR:   Well, when I offer  
5                   you --

6                   MR. HUNGAR:   -- a different party in  
7                   order to avoid --

8                   JUSTICE SOTOMAYOR:   -- when I offer  
9                   you services below market rate, it means that  
10                  you're getting a benefit from me.

11                  MR. HUNGAR:   On the below-market-rate  
12                  theory, though, again, there -- there -- there  
13                  are several reasons why that doesn't work.

14                  Number one, the -- it's undisputed  
15                  that the revenues that the government would  
16                  suggest could be reassigned to Petitioner on  
17                  that theory were actually received by the  
18                  affiliates, not by the Petitioner --

19                  JUSTICE SOTOMAYOR:   But --

20                  MR. HUNGAR:   -- and --

21                  JUSTICE SOTOMAYOR:   -- but -- we're  
22                  not asking for disgorgement here, meaning the  
23                  Court didn't order the affiliates to disgorge  
24                  anything.

25                  MR. HUNGAR:   Right.   But it --



1 JUSTICE SOTOMAYOR: They ordered this  
2 defendant to pay a certain amount, and that  
3 certain amount is what they -- what they  
4 received or should have received in value for  
5 the services they rendered.

6 MR. HUNGAR: Right. But the "should  
7 have received" is the problem because this Court  
8 said -- has said over and over again in the  
9 disgorgement context in applying equitable  
10 principles, Coupe against Royer, in the Keystone  
11 case, in the Livingston case, and -- and -- and  
12 Rubber Company, all recognize that the question  
13 is the actual profits actually received by the  
14 defendant, not the profits -- not possible  
15 profits that the defendant could have received  
16 if it had structured its business differently,  
17 if it had made better deals.

18 Those cases all stand for the  
19 proposition that it's actual profits, not  
20 possible profits. And that's because of the  
21 theory of disgorgement, which is to deny the  
22 defendant the benefits it actually received from  
23 the wrongful conduct.

24 If it didn't actually receive them,  
25 even if it's because it made a bad -- bad deal,

1     you don't disgorge those from the defendant.  
2     And, again, this Court has said that over  
3     hundreds of years in the equitable context. And  
4     the same is true here.

5             The other problem is simply a factual  
6     problem. There's no finding and no basis for a  
7     finding on this record that Petitioner was  
8     actually charging below-market rates to the  
9     affiliates because it's important to understand  
10    the -- the Petitioner was also providing  
11    substantial services, noninfringing services, to  
12    its shareholder, to his charitable foundation,  
13    to other entities. That's undisputed.

14            The -- the court of appeals recognized  
15    this at -- at Pet. App. 4a and 45a. The  
16    petition -- Respondent's expert testified to  
17    this effect at -- at the trial, that there were  
18    substantial noninfringing services to  
19    Mr. Dewberry separate and apart from the  
20    services being provided to the affiliates.  
21    That's at Joint Appendix 142, 193. Respondent  
22    made the same argument at 316 and 318 of the  
23    Joint Appendix.

24            So it's clear that a substantial  
25    amount of the costs incurred by Petitioner were

1 not in -- relating to the infringing services  
2 allegedly provided to the affiliates but,  
3 rather, to independent services.

4 So you can't just infer from the fact  
5 that they had losses that -- that -- that they  
6 were charging below-market rates.

7 But -- but, again, the fundamental  
8 problem -- and I -- if I may, I would like to  
9 just point the Court back to the petition. The  
10 fundamental problem with all of these arguments  
11 that Respondent and --

12 JUSTICE SOTOMAYOR: Counsel, you've  
13 answered my question.

14 MR. HUNGAR: I -- well, I'd still like  
15 to make this --

16 JUSTICE GORSUCH: I'd like -- I'd like  
17 you to finish it.

18 MR. HUNGAR: Thank you, yes.

19 In -- in our petition, we made  
20 perfectly clear not only that there -- that this  
21 was a zero-profits case but that that was a  
22 particularly good reason why the Court should  
23 grant cert in this case, because it presented  
24 this issue so -- the legal issue so nicely and  
25 cleanly.

1           So, at Petition 5, we said:  
2     Petitioner had zero net profits. At Petition 8,  
3     we said: As Petitioner explained, the records  
4     show that the infringement generated zero  
5     profits for Petitioner. At -- at page 10, we  
6     said the same thing.

7           At page 15, we said: This case is an  
8     ideal vehicle. Why? Petitioner itself obtained  
9     zero profits. At page 35, we said: Few, if  
10    any, cases will likely present the issue so  
11    starkly or so cleanly. Petitioner generated  
12    zero profits, which eliminates any need to  
13    calculate or apportion profits attributable to  
14    infringement.

15           And Respondent never disputed those  
16    factual assertions in its brief in opposition.

17           Under this Court's Rule 15, those  
18    issues are not in the case. There's no need for  
19    a remand to address issues that were waived in  
20    the brief in opposition.

21           And this Court should enforce its --  
22    its Rule 15 because, otherwise, you're inviting  
23    Respondents and the government to try and throw  
24    issues that aren't in the case and distort the  
25    question presented. And that is contrary to

1     this Court's --

2                   JUSTICE JACKSON:   But, counsel --

3                   CHIEF JUSTICE ROBERTS:   Counsel --

4                   JUSTICE JACKSON:   -- I guess -- oh,  
5     sorry.

6                   CHIEF JUSTICE ROBERTS:   Go ahead.

7                   JUSTICE JACKSON:   I -- I was just  
8     going to say I guess that makes perfect sense to  
9     me in the world in which the defendant is the  
10    only entity and when you have a situation in  
11    which there's a defendant who is operating at a  
12    loss, they make no profit, they may infringe,  
13    but, under the Lanham Act, only profit is  
14    disgorgeable, and there we are.

15                   The concern, I think -- and maybe this  
16    is what motivated the -- the -- the district  
17    court and the lower courts -- is that we do have  
18    a constellation of entities all owned by the  
19    same individual. The others are profiting. So  
20    it is just the structure of this financial  
21    arrangement that is avoiding the ability for  
22    recovery under the Lanham Act.

23                   And it seems to me that in a situation  
24    like that, that is sort of where equity is  
25    supposed to be coming in to ensure that a

1 violation has a remedy. And, you know, Congress  
2 uses the term "equity." "Equitable nature of  
3 remedy" is in this statute.

4 And so I just worry a little bit about  
5 allowing for defendants to essentially evade  
6 responsibility for infringement by setting up  
7 corporate structures such that only the -- that  
8 the defendant proper is not "profiting."

9 MR. HUNGAR: So two responses,  
10 Your Honor.

11 First of all, it's -- it's  
12 undisputed -- both Respondent's expert and  
13 Petitioner's witnesses testified that this  
14 structure is a -- is a common typical structure  
15 in the real estate industry. That's at 46 and  
16 91 of the Joint Appendix. And this -- this long  
17 predated the alleged infringement. So there's  
18 no claim or evidence that this was somehow set  
19 up to evade, you know, proper relief.

20 And secondly, equity does provide, in  
21 appropriate circumstances, a remedy for  
22 precisely the problem you are addressing.  
23 There's piercing the corporate veil, alter ego,  
24 agency theory, any number of theories that --  
25 and -- and you can just sue the additional

1 companies if you think they are involved in the  
2 infringement and can prove secondary liability,  
3 vicarious liability, or direct liability.

4 So there are all sorts of things that  
5 Respondent could have done in order to pursue  
6 the other affiliates if it thought it had a  
7 basis for doing so. It simply made a tactical  
8 decision not to do it. And this Court should  
9 not try to fix the Respondent's tactical error.

10 CHIEF JUSTICE ROBERTS: Counsel, let's  
11 say I have a contract with somebody under  
12 which -- total stranger -- he would pay me \$500,  
13 but it turns out the services that I provide are  
14 actually worth a thousand dollars. He pays the  
15 \$500.

16 But then, a year later, he gives me  
17 another \$500, looking at the serve -- worth of  
18 the services, and just thinks that that's fair.

19 Now could a court determine that my  
20 gain from that transaction was actually a  
21 thousand dollars rather than just 500?

22 MR. HUNGAR: I think it could. I  
23 mean, if -- again, if that conduct were  
24 infringing and the court could conclude that the  
25 total -- defendant's total profits from that

1     infringing conduct was a thousand dollars, yes.

2                   CHIEF JUSTICE ROBERTS: Well, I wasn't  
3     talking about infringement at all. I just mean  
4     the concept that you can have profits from a  
5     contract even if the -- the compensation exceeds  
6     what was required under the contract for a  
7     variety of circumstances.

8                   MR. HUNGAR: Yes.

9                   CHIEF JUSTICE ROBERTS: Here, the  
10    situation that the party considered it was fair.

11                  MR. HUNGAR: Yes.

12                  CHIEF JUSTICE ROBERTS: So why can't  
13    the court treat the \$23 million of capital in  
14    this case under the same principles?

15                  MR. HUNGAR: Well, so, as a factual  
16    matter, the \$23 million is over 30 years. The  
17    alleged infringement involves only three years  
18    or -- or thereabouts. So that -- so, if you  
19    were even going to -- if you were going to make  
20    that theory, number one, you'd have to look at  
21    the relevant years, and, number two, you --

22                  CHIEF JUSTICE ROBERTS: Well, would it  
23    make a difference if the -- the extra 500 was  
24    given over two years, 250 one year, then 250  
25    another?



1                   MR. HUNGAR: Well, Your Honor, the --  
2     the capital contributions were being made for 25  
3     or more years before the alleged infringement  
4     commenced. You can't say that the capital  
5     contributions -- the -- in the infringement  
6     context and under the Lanham Act, you have to  
7     show -- if -- if you're trying to attribute  
8     revenues to the defendant as -- as, you know,  
9     disgorgeable profits, you have to show that they  
10    were related to the infringement.

11                  So millions of dollars in capital  
12    contributed to Petitioner before the  
13    infringement commenced can't in any way, shape,  
14    or form be suggested to have anything to do with  
15    the infringement and, therefore, would not be  
16    included in the calculation.

17                  Even with respect to the capital  
18    contributions that were made during the  
19    infringement period, you -- the plaintiff would  
20    have to allege and prove, which they didn't,  
21    that those were related to the infringement, as  
22    opposed to on account of something else, like  
23    the fact that Petitioner was providing millions  
24    of dollars' worth of services to Mr. Dewberry.

25                  So, again, as a factual matter,

1 Mr. Dewberry was contributing capital, and --  
2 and the corporation was providing services to  
3 him separate and apart from, totally unrelated  
4 to, the alleged infringing activities. So those  
5 are all the factual reasons why that theory  
6 doesn't work.

7 But, yes, as a legal matter, if the  
8 plaintiff could prove that the defendant  
9 received X dollars in revenues from the  
10 infringement directly but also, through some  
11 circumlocution and -- and -- and hidden  
12 transactions, received additional compensation  
13 for the infringing conduct, then, yes, that  
14 could be included in the profits calculation.  
15 That would be an appropriate way to make sure  
16 that the defendant is disgorging the full  
17 measure of its illicit gains. But it has to be  
18 from the infringement, not just unrelated  
19 revenues.

20 JUSTICE KAGAN: Mr. Hungar, what --  
21 what are we to make of this "just sums"  
22 provision? I mean, assume that you're right in  
23 everything you say about what it means to  
24 calculate the defendant's profits. This  
25 sentence, "If the court shall find that the

1 amount of the recovery based on profits is  
2 inadequate ..." it -- "... the court may in its  
3 discretion enter judgment for such sum as the  
4 court shall find to be just," I mean, it seems  
5 to provide a way for a court to say, look, I've  
6 done everything by the book in terms of  
7 calculating the defendant's profits, and I'm  
8 coming up with a number that seems quite unfair  
9 in the broader scheme of things, and -- and this  
10 sentence gives me a way to move it up, move it  
11 down, as you will, with very little in the way  
12 of constraint.

13 So that's the way I read this  
14 sentence.

15 MR. HUNGAR: So I would agree with  
16 everything you said except for the last part  
17 about very little constraint, and that's  
18 because, as this Court said in the Starbucks  
19 case, when a remedial provision authorizing an  
20 equitable remedy said -- gives the court  
21 discretion to enter that remedy in a manner that  
22 the court deems just, that word incorporates the  
23 traditional equitable limitations that go along  
24 with that remedy.

25 And, here, the traditional equitable

1 limitations include you only disgorge the  
2 defendant's profits, not the affiliates'  
3 profits; only actual profits, not possible  
4 profits. You don't award profits when the  
5 defendant has zero profits because that would be  
6 a penalty.

7 JUSTICE KAGAN: Well, I -- I guess two  
8 things. You know -- you know, one is that this  
9 idea of "find to be just," you can contrast that  
10 in this statute to the earlier language,  
11 "subject to the principles of equity." So they  
12 could have just repeated "subject to the  
13 principles of equity." They really didn't,  
14 which suggests to me that this idea of fairness  
15 in this latter sentence is a little bit broader  
16 than you're saying, that it really does go --  
17 you know, I'm not going to, like, stare at old  
18 equitable rules; I'm really going to try to  
19 figure out whether, in -- in arriving at the --  
20 the defendant's profits, that really is  
21 responsive to the nature of the infringing  
22 conduct here.

23 MR. HUNGAR: So two responses.

24 Number one, it clearly does not rise  
25 to the level of a direct statement abrogating

1 corporate separateness. So however you might  
2 interpret this provision with respect to other  
3 constraints, the -- the Bestfoods presumption  
4 applies to this statute and has not been  
5 overridden. So it doesn't justify disregard of  
6 corporate separateness, which is precisely what  
7 Respondent's argument requires if you're going  
8 to attribute the profits of affiliates to --  
9 that -- that Petitioner did not receive to the  
10 Petitioner. So that's point one.

11 And point two is the history of this  
12 "just sum" provision goes back to the Copyright  
13 Act. And in this Court's decision in Brady  
14 against Daly, it construed the "just sum"  
15 provision in the -- in that version of the  
16 Copyright Act, and it said that this isn't --  
17 again, the argument there was, well, that allows  
18 a penalty because, in that case, there was a  
19 statutory cap. But the statutory cap, if you --  
20 if you went up to it every time, could  
21 conceivably be a penalty. And the Court said  
22 no, it doesn't allow a penalty. It's intended  
23 to achieve full compensation. It's purely  
24 compensatory. And, therefore, since you're not  
25 allowed to go beyond what's purely compensatory,

1     it doesn't impose a penalty.

2                   And then that -- 10 years later,  
3     Congress added into the Copyright Act, codified  
4     the holding of Brady against Daly, by adding the  
5     sentence, which also appears in the Lanham Act,  
6     about how this is compensation -- shall be  
7     compensation and not a -- a penalty, or words to  
8     that effect.

9                   And so -- and -- and -- and then,  
10    again, in the -- the Douglas case, the Court  
11    again said that this provision in the Copyright  
12    Act, the "just sum" provision, is -- is to be  
13    compensatory.

14                   So the history is perfectly clear.  
15    Every court of appeals that has addressed the  
16    question under either the Copyright Act or the  
17    Lanham Act has recognized that the "just sum"  
18    flexibility is -- is cabined by the need to --  
19    for it to be compensatory, not penal.

20                   JUSTICE KAGAN: Right, but there --

21                   JUSTICE ALITO: Can you -- go ahead.

22                   JUSTICE KAGAN: I mean, there -- there  
23    can be circumstances in which that is exactly  
24    what the court wants to use this provision for.  
25    In other words, like, a full measure of

1 compensation --

2 MR. HUNGAR: Yes.

3 JUSTICE KAGAN: -- would be up here,  
4 and the defendant's profits, for whatever  
5 reason, are down here, and so we're going to  
6 make up the gap.

7 MR. HUNGAR: We agree with that. And,  
8 indeed, the -- again, the -- the legislative  
9 history also supports the "not a penalty"  
10 proposition of the Lanham Act. But -- but  
11 the -- the -- the -- the interpretation in those  
12 cases that I mentioned of the "just sum"  
13 provision was that it's primarily intended to  
14 address circumstances where what you can prove  
15 as profits or damages under the normal approach  
16 is insufficient because of evidentiary  
17 weaknesses and the like.

18 It could also address circumstances  
19 like the one I was addressing earlier, where  
20 the -- the defendant had an unrealized gain,  
21 their stock value had -- the stock that they  
22 owned was worth more, but they hadn't sold it  
23 yet, so they had an unrealized gain as a result  
24 of the infringement, but it doesn't fit into the  
25 statutory profits calculation because, remember,

1 the Lanham Act says you -- you get defendant's  
2 profits, and then it defines them for purposes  
3 of the Act as sales minus expenses that are  
4 associated with generating the sales.

5           You can have a circumstance where the  
6 defendant has -- has itself received and has a  
7 right to the profit, but it's not -- it doesn't  
8 fit within sales minus expenses, and a court can  
9 use the "just sum" provision to disgorge that as  
10 well.

11           But that has nothing to do with this  
12 case because defendant -- the Petitioner did not  
13 receive the profits. The affiliates received  
14 the profits. And under this Court's decision in  
15 the -- in the Bollinger case and under standard  
16 property law, Petitioner didn't own those  
17 profits. The -- the -- the affiliates owned the  
18 corp -- the -- the real estate. They're the  
19 lessors. They're entitled legally to the rents  
20 under the Bollinger decision. And the fact  
21 that -- that a service provider helps a corp --  
22 a business earn its rents doesn't mean that the  
23 service provider is entitled to those rents.

24           CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.



1 Justice Thomas?  
 2 Justice Alito?  
 3 Justice Sotomayor?  
 4 Justice Kagan?  
 5 Justice Gorsuch?  
 6 Justice Kavanaugh?  
 7 Justice Barrett?  
 8 Justice Jackson?

9 JUSTICE JACKSON: Yes, I have a  
 10 question. Your -- your answer to the Chief  
 11 Justice's question made me think that maybe at  
 12 least I need a better handle on the scope of  
 13 profits from the infringement here.

14 You say it has to be from the  
 15 infringement. So what happened here -- and  
 16 we've sort of skipped right into calculation of  
 17 damages, but can we back up for a moment? Are  
 18 you -- did the affiliates profit from the  
 19 infringement? I mean, I know this is against  
 20 your interests. I'm just trying to understand  
 21 what -- what -- what "profits from the  
 22 infringement" means in this scenario.

23 MR. HUNGAR: Well, what the courts of  
 24 appeals concluded what -- so the what -- the  
 25 allegation is that Petitioner, in marketing and

1 loan applications and so forth, used the  
2 infringing mark, which was, you know, Dewberry  
3 Group instead of Dewberry Capital, and,  
4 therefore, the -- the court treated 80 percent  
5 of the revenue -- the rental revenues received  
6 by the affiliates as attributable to  
7 the infringement.

8 JUSTICE JACKSON: Presumably, the  
9 affiliates were also using the mark in their  
10 materials as they --

11 MR. HUNGAR: Well --

12 JUSTICE JACKSON: -- rented the  
13 properties.

14 MR. HUNGAR: -- Petitioner was the --  
15 was -- was authorizing leasing agents to use it,  
16 if I recall the record correctly, and was itself  
17 using the mark.

18 So Petitioner serves, under contract,  
19 as the property management company for the  
20 affiliates, as a -- as a service provider.

21 JUSTICE JACKSON: Mm-hmm.

22 MR. HUNGAR: So, as a -- as a property  
23 management company, in dealing with the tenants,  
24 it would be using its new name, which the court  
25 found to be infringing.

1                   And so those were the -- those were  
2     the types of uses that the court found to be  
3     infringing. And then it said: And because of  
4     those uses, we're going to attribute 80 percent  
5     of the rental profits that received by the  
6     corporations during the infringement period to  
7     the Petitioner.

8                   JUSTICE JACKSON: I guess I'm just  
9     test -- I'm testing your -- your -- your theory  
10    that other remedies were available if the  
11    plaintiffs in this case had pled this  
12    differently.

13                  So, if they -- could they have sued  
14    the affiliates for infringement and gotten the  
15    disgorgement that the affiliates received?

16                  MR. HUNGAR: Well, they certainly  
17    could have sued them, and they could have  
18    alleged alter ego theories or whatever -- you  
19    know, all the theories that we've talked about.  
20    Whether those would have --

21                  JUSTICE JACKSON: But the defendant --  
22    the -- the -- the Petitioner is the infringer  
23    from the perspective of this record.

24                  MR. HUNGAR: Well, again, because they  
25    didn't sue any of the other defendants -- any of

1 the other affiliates, rather, they only sued  
2 Petitioner, none of this was tested.

3 I mean, presumably, the -- the -- if  
4 they had sued them under alter ego or as direct  
5 infringers or as secondary infringers or as  
6 vicarious infringers, that would have been  
7 litigated.

8 And we don't know how that would have  
9 resolved. I assume that my client would have  
10 resisted those claims. But how it would have  
11 come out, we don't know, because Petitioner --  
12 because Respondent never brought those claims.

13 And, again, it's not this Court's  
14 role, I submit, to -- to try and reinject into  
15 the case new theories that have been forfeited  
16 and waived at the --

17 JUSTICE JACKSON: Thank you.

18 MR. HUNGAR: -- at the petition stage.

19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel.

22 Mr. Crown.

23 ORAL ARGUMENT OF NICHOLAS S. CROWN FOR THE UNITED  
24 STATES, AS AMICUS CURIAE, SUPPORTING NEITHER PARTY

25 MR. CROWN: Mr. Chief Justice, and may

1     it please the Court:

2                   I'd like to pick up on some of the  
3     questions from the bench, which I think gets to  
4     the intuition that there are core, longstanding  
5     principles here. We see two of them.

6                   The first is that courts typically  
7     treat corporations as distinct entities, and the  
8     second is that a court, when ordering a  
9     defendant to relinquish its ill-gotten gains, is  
10    not bound by the defendant's self-serving  
11    ledgers.

12                  Now we agree that the monetary award  
13    in this case is not consistent with the first  
14    principle because the courts below treated  
15    Petitioner and its affiliates as a single  
16    corporate entity and then pooled their combined  
17    profits and affirmatively disclaimed relying on  
18    veil-piercing principles. For that reason, we  
19    think the award should be vacated.

20                  But we think the second principle has  
21    important things to say about how a court could  
22    calculate a defendant's profits while still  
23    maintaining corporate separateness without  
24    crossing corporate lines.

25                  Our brief identified equitable

1 background principles that we think the very  
2 purpose of those principles is to address a  
3 situation like we may have here, where a  
4 defendant is disguising economic reality.

5 In trademark cases, courts routinely  
6 reject deductions where a defendant is  
7 attempting to artificially inflate its costs to  
8 lower its profits liability. We think the  
9 outcome should be no different when a defendant  
10 tries to deflate its receipts and income, again,  
11 to reduce its profits liability.

12 I welcome the Court's questions.

13 JUSTICE THOMAS: You say that -- you  
14 suggest that the defendant is disguising its  
15 profits. Is there anything in the record to  
16 support that?

17 MR. CROWN: There is. I -- and I  
18 think the problem here is we have closely held  
19 affiliates. They're all under common ownership.  
20 We look at the rates here. There are 30 years  
21 according to the Petitioner's books. They are  
22 claiming that for the last three decades they  
23 have been operating at a loss.

24 If we just look at the economic  
25 realities, we don't think the owner of these

1 entities would allow that to happen unless, in  
2 reality, the Petitioner was generating  
3 substantial value.

4 So, Justice Thomas, here's how I would  
5 address the issue with this type of case. I  
6 don't have a position on whether the arguments  
7 have been preserved. We do think it's important  
8 to save this type of argument for the next case.

9 When we have a situation like the one  
10 here, where you have closely held affiliates,  
11 it's not clear what's happening, it looks like  
12 the defendant might be hiding its books -- the  
13 economic reality in its books, we would ask:  
14 What would the defendant have charged  
15 unaffiliated entities for the same services if  
16 it were negotiating rates at arm's length?

17 And we think there are two important  
18 insights that you might get from that type of  
19 analysis. And this gets to why we think that  
20 the Court should vacate or at least shouldn't  
21 affirm the award as it stands right now.

22 The first insight is we think, if you  
23 do that type of analysis, we would see that the  
24 Petitioner would have gained more money than the  
25 losses that they claim to have incurred over the

1 last 30 years.

2 But the second insight is we think, if  
3 you have an entity that owns land, like the  
4 affiliates here, but doesn't have management  
5 expertise in how to rent out its property, and  
6 then you have a management company like  
7 Petitioner that doesn't own land but does have  
8 the expertise, they would come to the  
9 negotiating table. Both bring something  
10 indispensable that the other one doesn't have,  
11 that is, land if you're the landowner, expertise  
12 if you're the management company, and then they  
13 would negotiate the rates.

14 But we don't think in that  
15 circumstance -- and -- and this is the error  
16 that we perceive in the decisions below -- we  
17 don't think the economically realistic  
18 transaction would mean that the landowner would  
19 say the management company should keep all \$43  
20 million worth of profit that's generated through  
21 that enterprise.

22 CHIEF JUSTICE ROBERTS: Counsel, you  
23 say that the United States takes no position on  
24 whether some of these arguments which it seems  
25 you regard as important were preserved.



1           There have been a lot of times when  
2     the United States has taken positions on whether  
3     arguments have been preserved, and I wondered if  
4     you can elucidate for us why you don't take any  
5     such position in this case.

6           MR. CROWN: In this case, it seemed  
7     like this is something that the lower courts  
8     would be particularly well suited to sort out.  
9     We think, on top of the fact it's not entirely  
10    clear which arguments the courts were grappling  
11    with below, we take the -- the Petitioner and  
12    the Respondent to be arguing over what the  
13    courts actually did below.

14           So, when you have that type of  
15    confusion, I think it would be fair to say this  
16    Court can follow its usual practice. Rather  
17    than reaching out and addressing whether  
18    arguments had been preserved, you can send the  
19    case back and let the courts below try --

20           CHIEF JUSTICE ROBERTS: Well, no,  
21    that -- that's the argument why you may not take  
22    that position or a position. But you tell us  
23    that you're not taking any position on that  
24    question.

25           MR. CROWN: Well, I do want to

1     emphasize I don't mean to speak for Respondent  
2     in terms of the arguments that they have made.  
3     Again, we don't think it's necessary for this  
4     Court to decide whether the arguments have been  
5     preserved in terms of the outcome of this case.

6             We do think there was an independent  
7     error in the profits award that was granted in  
8     this case. We think that there are other  
9     potential avenues that could have been pursued,  
10    may have been pursued, to get at the same number  
11    or a similar number on remand.

12            Again, for purposes of the question  
13    presented before this Court, we don't think you  
14    have to get into that.

15            I actually take the arguments from  
16    both sides to vehemently agree on the answer to  
17    the QP itself, that is, whether you can order a  
18    defendant to disgorge the profits of a nonparty  
19    separate entity. I think everyone says the  
20    answer to that question is no.

21            Then the question becomes: How do we  
22    calculate what the proper amount of profits  
23    should be when we are respecting corporate  
24    separateness? And we've identified background  
25    equitable principles that target that exact

1     problem when it looks like what's shown on the  
2     defendant's books, which Petitioner conceded  
3     today and in their reply brief at page 5, aren't  
4     controlling. There are various tools available  
5     to the Court to sort out that type of problem  
6     both in equity generally and in the trademark  
7     context.

8             JUSTICE ALITO: Well, if the judgment  
9     at -- at issue cannot be sustained on the ground  
10    that was adopted by the court of appeals, why  
11    would we go further and say: But there's this  
12    other theory that might have provided a basis  
13    for some relief, and we don't know whether it  
14    was preserved, but we're just going to tell you  
15    about this theory and send the case back for the  
16    court to decide whether to apply the theory in  
17    this particular case?

18            MR. CROWN: Just --

19            JUSTICE ALITO: Why should we do that?

20            MR. CROWN: Justice Alito, I want to  
21    lay down the marker again that we -- we haven't  
22    taken the position. But I do understand  
23    Respondent to be arguing that they at least have  
24    not forfeited some of the arguments that we've  
25    raised in our brief.

1                   So, again, we would leave it to the  
2                   courts below to determine what has been properly  
3                   preserved because I -- I take it that the  
4                   parties do have a dispute over what's actually  
5                   still live in the case.

6                   JUSTICE ALITO: Well, we can leave it  
7                   to the part -- to the court below to decide what  
8                   was and was not preserved, but why do we -- why  
9                   should we take the additional step of saying:  
10                  Here's a valid argument that you may want to  
11                  consider if, in fact, you find that it was  
12                  preserved?

13                  MR. CROWN: Justice Alito, if you  
14                  think that is untoward, I think we would be  
15                  happy with an opinion that answers the question  
16                  presented and then makes clear that you are not  
17                  foreclosing the other arguments that might be  
18                  appropriate under the right factual  
19                  circumstances and subject to party presentation  
20                  principles. I think we could live with that.

21                  Our modest submission here is:  
22                  Whatever the Court decides in the opinion, it  
23                  should not reach out and foreclose the other  
24                  background equitable principles and arguments  
25                  that we've identified in our brief. I -- I

1 think that would be the -- the part that we  
2 would care about.

3 JUSTICE BARRETT: But, when you  
4 say "not foreclose," just to follow up on  
5 Justice Alito's question, it seems to me I  
6 read -- and -- and Respondent can say if -- if  
7 he sees it differently -- I -- I read there to  
8 be vehement agreement on the -- the QP, the --  
9 the narrow QP too as well.

10 So why wouldn't the government be  
11 satisfied with our just answering the QP -- it  
12 seems to me that that could be a pretty short  
13 opinion -- and then just leaving it to the lower  
14 court and they can make these arguments in the  
15 lower court? And we didn't grant cert on these  
16 other questions, which were not vetted below  
17 because the Fourth Circuit took a different  
18 view.

19 I -- I guess I don't understand why --  
20 as long as we don't go further and say this is  
21 foreclosed, doesn't silence on that point  
22 suggest that it's not?

23 MR. CROWN: I think that would be  
24 fair. I -- I also think that courts might --  
25 courts below might appreciate clarity in -- in

1 the Court just saying: We are not deciding the  
2 issue. But I wouldn't deign to tell you,  
3 Justice Barrett, how to write the opinion.

4 I think the same outcome would --  
5 would come out the same way. It would cash out  
6 the same either way.

7 JUSTICE JACKSON: Mr. Hungar, I guess  
8 I don't understand why the answer, the sort of  
9 way to handle a situation like this, is just to  
10 pierce the veil. I mean, you -- you -- you say  
11 that the defendant is disguising its profits,  
12 it's hiding economic realities, it's working  
13 with these other companies in a way that they're  
14 really operating in the marketplace as almost  
15 one entity.

16 Why wouldn't the legally responsible  
17 way to deal with this given the way we -- you  
18 know, the law has developed, to say that, in  
19 order to do this, to consider the profits of the  
20 other entities to be the profits of the  
21 defendant, the court should have pierced the  
22 veil in this situation?

23 MR. CROWN: Justice Jackson, I have  
24 four answers. If I may --

25 JUSTICE JACKSON: Yes.

1                   MR. CROWN:  -- I would like to lump  
2     into that the question why couldn't they have  
3     just sued the entities under the Lanham Act  
4     directly.  And I think --

5                   JUSTICE JACKSON:  Please.

6                   MR. CROWN:  -- all four will get to  
7     that.

8                   The first problem is you might not get  
9     jurisdiction over the other entities.  Now I  
10    take the point that all of the entities, as I  
11    understand it, are domestic, but you could  
12    imagine a circumstance where one company decides  
13    it's going to structure its affairs so it  
14    commits all of the infringement, other entities  
15    incorporated overseas are going to collect all  
16    of the money.  That, I think, would be a  
17    significant barrier.  It might not be a barrier  
18    in this case, but, in the next one that comes  
19    along, I think it would be.

20                  The second problem, the affiliates, if  
21    we're looking at substantive liability under the  
22    Lanham Act -- this is my addition to the  
23    question -- they might not be liable if you were  
24    to sue them, and there are a couple reasons why.  
25    If we're looking at direct infringement, there

1     might be a problem under the facts of this case  
2     or a similar one.  If one entity is doing all  
3     the infringing, that is, using the mark in  
4     commerce as the one that created the consumer  
5     confusion, and the other entities, all they're  
6     doing is holding the money, just holding the  
7     proceeds or the profits of infringement is  
8     usually, I don't think, going to get you to  
9     substantive liability.  And I think that might  
10    also be true if we're talking about secondary  
11    liability.

12               This Court explained in Inwood  
13    Laboratories there are a couple different ways  
14    you could get secondary liability.  If somebody  
15    is inducing someone else to infringe or if you  
16    provide your goods and services to somebody you  
17    know or have reason to believe is going to  
18    infringe, secondary liability can attach.  On  
19    the facts of this case, I'm not sure if that  
20    would be a viable theory.  I can imagine cases  
21    moving forward where it wouldn't be.

22               CHIEF JUSTICE ROBERTS:  Counsel,  
23    just --

24               MR. CROWN:  The third thing --

25               CHIEF JUSTICE ROBERTS:  -- before you



1 go on, how -- how many of your four things did  
2 you just get out?

3 MR. CROWN: Two.

4 (Laughter.)

5 CHIEF JUSTICE ROBERTS: Two. All  
6 right.

7 MR. CROWN: I've got two -- I have two  
8 more, Mr. Chief Justice.

9 CHIEF JUSTICE ROBERTS: I will -- I  
10 will allow a historically unprecedented  
11 exception to allow you to give us --

12 (Laughter.)

13 CHIEF JUSTICE ROBERTS: -- the other  
14 two promptly.

15 MR. CROWN: I appreciate it.

16 The -- the third point is alter-ego  
17 veil-piercing might not be available. Usually,  
18 the way I understand that works is you have an  
19 owner being held responsible for the conduct of  
20 its company. What I understand to be the case  
21 here is all of the entities are horizontal, that  
22 is, they don't own shares in each other, so  
23 veil-piercing might be a problem.

24 The fourth thing is we think the risk  
25 of disguising profits or manipulating your books

1 is especially acute. When you have all these  
2 entities that are closely held under common  
3 control, it's really tough to sort out what's  
4 actually happening on the ground, and  
5 veil-piercing or substantive liability might not  
6 get at that problem.

7 CHIEF JUSTICE ROBERTS: Thank you.  
8 Justice Thomas?

9 MR. CROWN: Thank you, Mr. Chief  
10 Justice.

11 CHIEF JUSTICE ROBERTS: Justice Alito?

12 JUSTICE ALITO: What -- you begin to  
13 explain the theory that you think might be  
14 applicable or that would be valid by saying that  
15 the court can go beyond the defendant's profits  
16 when that is justified by the economic realities  
17 of a transaction. That seems awfully  
18 open-ended.

19 MR. CROWN: I would tweak it a little  
20 bit and then I hope provide a palliative,  
21 Justice Alito.

22 So I would tweak it to say we're not  
23 going beyond the profits or the actual economic  
24 gain of the defendant. We're trying to train on  
25 what was the actual economic gain of the

1 defendant.

2           In terms of whether this is -- is  
3 freewheeling or open-ended, I -- I don't think  
4 so. This is something courts have dealt with in  
5 the equitable context dealing with profits  
6 awards. This Court explained in cases like City  
7 of Elizabeth -- that was one of the principal  
8 citations that the Petitioner relied on -- and  
9 in Goodyear, when a defendant is trying to lower  
10 its profits liability by asserting certain costs  
11 that it had incurred, the court can peek under  
12 the hood and say, in terms of economic  
13 realities, that's not what actually happened  
14 here.

15           In City of Elizabeth, there were  
16 claimed salary expenditures. The Court said,  
17 no, those were gratuities; the defendant has to  
18 answer to -- for them. They are part of their  
19 profits. In Goodyear, it was a salary payment  
20 that was claimed by the defendant. The Court  
21 said, no, it was actually a distribution of  
22 profits.

23           Those were patent cases, but courts of  
24 appeals have taken this Court's lead in applying  
25 the same principles in the trademark context.

1 That's the Aladdin decision, pre-Lanham Act;  
2 American Rice, Fifth Circuit, post-Lanham Act.

3 JUSTICE ALITO: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Sotomayor?

6 Justice Kagan?

7 JUSTICE KAGAN: You heard the colloquy  
8 between me and Mr. Hungar about the "just sums"  
9 provision. What do you make of that? What do  
10 you think it's there for? What do you think it  
11 allows?

12 MR. CROWN: The first thing I will say  
13 is I -- I think I heard Petitioner agree that  
14 that provision allows the full measure of  
15 compensation to the plaintiff. We agree with  
16 that. Now --

17 JUSTICE KAGAN: Yeah, I took that to  
18 be what Mr. Hungar said too, that there's some  
19 times that there's a delta between what you  
20 arrive at through the profits calculation and  
21 what you understand to be the full measure of  
22 compensation for the plaintiff, and this allows  
23 you to close that.

24 MR. CROWN: Right. And I would say  
25 two things. I -- I think, to the extent the

1     Petitioner is arguing that, this is really just  
2     a proxy for the compensation that the plaintiff  
3     lost. We think the better proxy here would --  
4     would be our theory, that is, what would the  
5     defendant have charged at arm's length in -- in  
6     providing services to unaffiliated entities.

7             The other thing I would say is -- is I  
8     take the point that the Court might think what's  
9     happening here is not exactly strictly profits  
10    in the sense of sales minus costs, but we do  
11    think the "just sum" provision can address this  
12    type of situation.

13            So -- so just to spill this -- spin  
14    this out a little bit -- Mr. Chief Justice, I  
15    will be quick -- the -- the thing, I think,  
16    that you could look at is you could say imagine  
17    the -- the Petitioner had contracted with its  
18    affiliates for a \$10 million payout, and at the  
19    last minute, at the end of the contract  
20    performance, it decides: I'm going to forgive  
21    that sum; let's just leave it with the  
22    affiliates. I don't think we would be having a  
23    debate whether that was the profits of the  
24    defendant. That's classic anticipatory  
25    assignment.

1                   I take the point here that the  
2     Petitioner, at least on these facts as I  
3     understand them, appears to have collapsed those  
4     two steps. Instead of contracting for an amount  
5     and then forgiving it, it has just said on the  
6     front end in this contractual negotiation:  
7     We're going to leave -- we're going to take  
8     below-market rates and leave the rest with the  
9     affiliates.

10                  Economically, we think that is the  
11     same outcome, and we think those two cases  
12     should be treated similarly.

13                  JUSTICE KAGAN: Thank you.

14                  MR. CROWN: And we think the "just  
15     sum" provision provides the courts a tool to do  
16     that.

17                  CHIEF JUSTICE ROBERTS: Justice  
18     Gorsuch?

19                  Justice Kavanaugh? No?

20                  Justice Barrett?

21                  Justice Jackson?

22                  Okay. Thank you, counsel.

23                  Mr. Lin.

24

25

1 ORAL ARGUMENT OF ELBERT LIN  
2 ON BEHALF OF THE RESPONDENT

3 MR. LIN: Mr. Chief -- Mr. Chief  
4 Justice, and may it please the Court:

5 The legal question governing this case  
6 is really an evidentiary one: May a court  
7 awarding a profits-type remedy under Section  
8 1117(a) ever take into account the finances of  
9 an affiliate of the defendant infringer without  
10 piercing the veil?

11 The answer is yes, the plain text  
12 authorizes it, and, also, just relying on the  
13 financials of another party does not  
14 automatically disregard corporate separateness  
15 and require piercing the veil.

16 Start with separateness. Disregarding  
17 corporate separateness is not an end in itself  
18 but a path or a means to an end. So, if a court  
19 relied on an affiliate's financials based on  
20 the -- the conclusion that the affiliate is one  
21 and the same with the defendant, that would  
22 disregard corporate separateness.

23 But it would not disregard  
24 separateness to rely on such evidence based on  
25 some other justification. Doing that simply

1 recognizes, as has long been held, that legally  
2 separate entities, whether affiliates or not,  
3 can still interact in ways that bear on each  
4 other.

5           Indeed, that is what the Fourth  
6 Circuit concluded happened here. It understood  
7 the district court not to have set aside  
8 separateness but rather to have relied on the  
9 affiliates' revenues as evidence of Petitioner's  
10 own, and I quote, "true financial gain."

11           And that tracks the record, which  
12 reflects that, despite some imprecise language,  
13 the district court did not view the affiliates  
14 and the Petitioner as interchangeable. To the  
15 contrary -- and these facts are important -- the  
16 district court relied on the affiliates' profits  
17 because it found that Petitioner alone had  
18 generated all those revenues through its  
19 infringing activities. And so the revenues were  
20 thus gain created by the Petitioner even though  
21 Petitioner assigned them elsewhere.

22           The other question is what part of  
23 1117(a) authorized the district court to rely on  
24 this evidence. We believe the discretion to  
25 look beyond the defendant's net profits is found



1 in the unique "just sum" provision. The U.S.  
2 reads the statute differently, but, under either  
3 approach, you get to the same place.

4 I welcome the Court's questions.

5 JUSTICE THOMAS: Mr. Lin, wouldn't --  
6 we would not be here on this if you -- if  
7 your -- if Petitioner -- or Respondent had sued  
8 all of the entities.

9 Why wasn't that the -- the approach?

10 MR. LIN: Your Honor, I understand  
11 that there were a number of practical and  
12 strategic reasons, but I think maybe the -- the  
13 easiest answer to you is, Your Honor, if you  
14 look at JA 109, which is in the expert report,  
15 it -- it notes that the Petitioner's website  
16 represented that it owned 1.5 billion in -- in  
17 properties. We didn't know, in short, that  
18 there were other ownership entities, and so we  
19 made the decision to sue what -- who we thought  
20 was the defendant, and we think that the "just  
21 sum" provision allows us to get at the  
22 defendant's true financial gain.

23 JUSTICE THOMAS: So, I guess, to some  
24 extent, you have to argue that the "just sum"  
25 provision allows you to pierce the corporate

1 veil. This would be a different case if it were  
2 a partnership or a sole proprietorship. Your  
3 argument would be much easier.

4 So how do you get past the separate  
5 corporate entities? Even to calculate income,  
6 it's not the income, technically, of the -- of  
7 Petitioner here.

8 MR. LIN: Your Honor, so my answer to  
9 you is: I would take issue with the premise  
10 that we have to argue that the "just sum"  
11 provision requires piercing the veil, and it  
12 gets to what I think is an important  
13 understanding of what "disregarding the  
14 corporate separateness" really means. I think  
15 it's a means to a certain outcome.

16 And so, really, the justification for  
17 looking at the affiliates' financials matters,  
18 this Court has said -- and -- and if I could,  
19 the Arthur Andersen case, Arthur Andersen versus  
20 Carlisle, the 2009 case, it's talking about, you  
21 know, when you can hold nonparties to a contract  
22 to be responsible, and it -- and it lists a  
23 number of ways to do that: assumption, piercing  
24 the corporate veil, alter ego, incorporation by  
25 reference, third-party beneficiary theories,

1 waiver, and estoppel.

2 And, Your Honor, my point is piercing  
3 the corporate veil and disregarding corporate  
4 separateness is one way to look at the  
5 affiliates' finances, but there are other ways.  
6 And if -- if the reason is not simply that  
7 you're concluding that the two are  
8 indistinguishable, then you're not disregarding  
9 the corporate veil at all, and there's no reason  
10 to -- to say that the "just sum" provision  
11 allows piercing the veil.

12 We're simply saying, if you look at  
13 the findings of fact here, which are  
14 unchallenged in this Court, what the court  
15 concluded -- it's somewhat of an unusual factual  
16 finding because there are unusual facts. But  
17 what the court concluded is that the Petitioner  
18 alone drove and created all of these revenues  
19 and then put them on the books of the affiliate.

20 That is not disregarding corporate  
21 separateness.

22 JUSTICE GORSUCH: Mr. Lin, I -- I  
23 would --

24 MR. LIN: Yes, Your Honor, I'm sorry.

25 JUSTICE GORSUCH: -- I'd agree with

1     you that there are many ways to skin the cat.  
2     You can sue these people. You can pierce the  
3     veil. You've got all kinds of equitable  
4     theories. You just had a great list of them a  
5     second ago.

6                 But, as I understand it, the Fourth  
7     Circuit below did none of those things. And you  
8     all actually agree with that. And you agree  
9     that on the question presented, the Fourth  
10    Circuit erred. Is that right?

11                MR. LIN: No, Your Honor. We --

12                JUSTICE GORSUCH: So the Solicitor  
13    General is wrong, there isn't total agreement  
14    here today?

15                MR. LIN: There is total -- so if I  
16    can answer that in two ways. There is total --

17                JUSTICE GORSUCH: No, pick one.

18                (Laughter.)

19                MR. LIN: Maybe I can combine them  
20    into one answer.

21                (Laughter.)

22                JUSTICE GORSUCH: Give me your best.

23                MR. LIN: There is total agreement  
24    that you cannot include in the judgment the  
25    affiliates' profits as the affiliates' profits.

1 JUSTICE GORSUCH: As such, yes.

2 MR. LIN: Right? Because that would  
3 be saying that --

4 JUSTICE GORSUCH: Right. We need some  
5 other theory to get there.

6 MR. LIN: You need some -- you need  
7 some other reason, unless you're going to pierce  
8 the veil.

9 JUSTICE GORSUCH: Right.

10 MR. LIN: And we would say that --  
11 that that other reason exists here.

12 JUSTICE GORSUCH: Okay. But that  
13 didn't happen below. That's not on which the --  
14 the -- the judgment rests in the Fourth Circuit.

15 And so perhaps maybe you preserved the  
16 arguments, maybe you didn't. The Solicitor  
17 General doesn't know. And maybe the best thing  
18 in those circumstances is for us to -- to vacate  
19 and remand, allow you to try again.

20 MR. LIN: And so what I would quarrel  
21 with, Your Honor, is that that is -- that --  
22 that the -- that there was no other reason on  
23 which the judgment below was based.

24 I think, if you -- if you look at  
25 Petitioner's Appendix 43a, what the Fourth

1 Circuit says is: We view the district court's  
2 decision differently. Rather than pierce the  
3 corporate veil, rather than disregard corporate  
4 separateness, the court considered "the revenues  
5 of entities under common ownership with Dewberry  
6 Group in calculating Dewberry Group's true  
7 financial gain." And that's a quote that  
8 Petitioner assiduously leaves out of any of  
9 their pleadings.

10 What the Fourth Circuit's basis was,  
11 was that it did not understand the district  
12 court to have just viewed the two, the  
13 affiliates and the defendant, at a -- as a  
14 single entity.

15 JUSTICE GORSUCH: I -- I -- I think  
16 what Mr. Hungar would say to you is: That's a  
17 nice little snippet, but there's no work there,  
18 that it -- it appears that the court just  
19 treated the affiliates' profits as the  
20 defendant's profits, pretty much full stop, and  
21 that that's a mistake.

22 And I think you'd agree with that,  
23 that something more needs to be done to  
24 attribute those profits to the defendant. Some  
25 work has to be done under some equitable theory.

1                   And we don't have any evidence that  
2     the Fourth Circuit did that in this case. Maybe  
3     they can. Maybe you have the facts. You had  
4     lots of theories to work with. But we don't  
5     know.

6                   MR. LIN: Two answers. One, just --

7                   JUSTICE GORSUCH: One.

8                   (Laughter.)

9                   MR. LIN: Well, I -- I -- I have to  
10    take issue with the fact that there has to be an  
11    equitable theory. We think the "just sum"  
12    provision provides a statutory basis.

13                  JUSTICE GORSUCH: Sure, sure. Throw  
14    that in the pot too of things --

15                  MR. LIN: Of course, Your Honor.

16                  JUSTICE GORSUCH: -- that might or  
17    might not be available.

18                  MR. LIN: And, yes, I agree that there  
19    has to be more work as a general matter, but I  
20    think that work was done -- so, yes, the Fourth  
21    Circuit's -- the Fourth Circuit's analysis is  
22    very short, but I think what the Fourth  
23    Circuit's analysis tracks is its understanding  
24    of the full record.

25                  And I think, if you go to the

1 record -- and -- and that's what I was alluding  
2 to earlier -- and you look at the unchallenged  
3 findings of fact in this case, the unchallenged  
4 finding of fact in this case is that the  
5 defendant -- Petitioner created all of the  
6 revenues that the affiliates -- and this gets to  
7 Justice Jackson's questions -- question -- the  
8 affiliates were passive receivers. They had no  
9 employees. They did not do a single thing.

10 Now they -- they suggest in their  
11 briefs that that is wrong, but that is the  
12 unchallenged finding of fact of the district  
13 court, which you are -- which you are stuck with  
14 here.

15 JUSTICE BARRETT: But, Mr. Lin, I  
16 guess, kind of to follow up on what Justice  
17 Gorsuch is saying, is, you know, at a minimum,  
18 can we agree the Fourth Circuit's opinion isn't  
19 a model of clarity on this point?

20 MR. LIN: I think we can agree on  
21 that.

22 JUSTICE BARRETT: Okay. So, if we  
23 want to go beyond just the strict QP in the way  
24 that we've talked about, the point on which  
25 there's vehement agreement, we have to



1     articulate some theory, correct, to justify the  
2     Fourth Circuit's opinion?

3             You're -- you're giving us some --  
4     some mechanism for doing that, but the Fourth  
5     Circuit didn't spell that reasoning out. It  
6     sounds like you're pretty confident in your  
7     position. And Justice Gorsuch said you have a  
8     bunch of theories.

9             If the Fourth Circuit believed that,  
10    it can presumably make pretty quick work of this  
11    on remand, and then maybe you walk away and you  
12    win quickly. But we would be kind of wading  
13    into uncertainty if we spell out all of those  
14    theories that the Fourth Circuit never  
15    addressed.

16            MR. LIN: I -- I understand the  
17    question, Your Honor, I -- and here's how I  
18    would respond to that.

19            I think, if you conclude, a majority  
20    of this Court concludes, that you're uncertain  
21    about what the Fourth Circuit did, whether the  
22    record supports the idea that there was no  
23    disregard of corporate separateness, that  
24    then -- then I do think that you should vacate  
25    and remand and allow the lower courts to spell

1 out what they did and whether that was  
2 permissible.

3 But I think, Your Honor, if you agree  
4 with us that the record is clear on its face --  
5 and -- and we think that the -- I think, if you  
6 look at the unchallenged factual findings, I  
7 don't think there's another way to read the  
8 record, and I think, if that's true, then you do  
9 have to go on and address the other questions --

10 JUSTICE BARRETT: So you would say,  
11 like, this is kind of a quibble between a  
12 vacate -- if we have uncertainty about the  
13 Fourth Circuit opinion, you're just trying to  
14 make sure we vacate and remand and don't -- not  
15 reverse? Is that kind of the way I --

16 MR. LIN: Well, yes, Your Honor. I  
17 mean, I -- I don't think that this Court should  
18 reach out and decide what the amount of the  
19 judgment should be, which I think is what you  
20 would have to decide if you were to just  
21 straight-up reverse and not allow any further  
22 proceedings below.

23 I think the -- if -- if you have  
24 uncertainty as to what the courts below did,  
25 then I think the answer is to -- you could

1     decide the QP. I think you could provide some  
2     further guidance -- to Justice Jackson's  
3     question, I think I would say it's not  
4     categorically impermissible to look at the  
5     financial evidence of affiliates -- and then  
6     allow this to go back down and -- and for the --  
7     the courts to further explain what they did and  
8     why that was on --

9             JUSTICE SOTOMAYOR: When I read --

10            JUSTICE BARRETT: So it's like a scope  
11     of the remand question, kind of what we say  
12     about all that?

13            MR. LIN: Yes, Your Honor.

14            JUSTICE SOTOMAYOR: When I read the  
15     Petitioner's brief, and not until the reply, he  
16     seemed to be saying -- and I think that he's  
17     disavowed that now. If you disagree, let me  
18     know -- that you looked only at the defendant's  
19     tax returns basically.

20            And I think he's now disavowed that  
21     theory and admitted that you can look at the  
22     revenues enough -- of an affiliate in some  
23     circumstances, correct?

24            MR. LIN: Yes, Your Honor. I -- I  
25     read the briefs the same way. We -- and we

1     understood them to be arguing below as well that  
2     the tax returns are what provide the measure of  
3     their profits.

4             I do think that in the reply and today  
5     my friend is -- is saying that there are  
6     circumstances where you could not only look  
7     beyond the tax returns to receipts maybe that  
8     are not -- not recorded but also potentially to  
9     the --

10            JUSTICE SOTOMAYOR:  You said something  
11     earlier, was that Dewberry Group had basically  
12     taken the revenues of the affiliate.  But,  
13     actually, this is a horizontal situation.  
14     Dewberry Group had no power to order the  
15     affiliates to do anything, correct?

16            MR. LIN:  Yes, Your Honor.  And if  
17     that's what I said, let me -- let me  
18     clarify what I meant.

19            JUSTICE SOTOMAYOR:  That -- I thought  
20     that's what you said.  And -- and that's the  
21     complication in this case, which is what  
22     Mr. Crown pointed to, that this is a horizontal  
23     situation, where it's really the owner, John  
24     Dewberry, that could order anybody to do  
25     anything, correct?  And he's not a defendant

1 here.

2 MR. LIN: I -- I don't -- I don't  
3 think that's what -- again, I don't think that's  
4 what the factual findings reflect. And if I  
5 could, Your Honor --

6 JUSTICE SOTOMAYOR: Mm-hmm.

7 MR. LIN: -- I can -- I think there's  
8 three sort of key factual findings, and I can  
9 point you to where they are in the record.

10 The first is that the district court  
11 held -- and so it's not that the Dewberry Group  
12 took the revenues. What the district court held  
13 is that the district court generated all of the  
14 revenues, that the affiliates added no value,  
15 did no work, that the -- the revenues and the  
16 gain was created by the Petitioner. And that's  
17 at Petitioner Appendix 83a, where it not only  
18 held that but rejected -- and my friend said  
19 today that there was no testing of whether the  
20 affiliates had contributed any value.

21 At Petitioner Appendix 83a, the  
22 district court rejects Petitioner's argument,  
23 and I quote, it is -- that "it is not the  
24 economic engine that creates the revenue." They  
25 had argued that the Petitioner -- that the

1 affiliates, through their ownership of the  
2 property, had somehow added some value. And the  
3 district court specifically rejected that. So  
4 Finding of Fact Number One, unchallenged, the  
5 Petitioner generated all the revenue.

6 The second is that the Petitioner  
7 controlled the allocation of the revenues.  
8 That's at 83a, where the district court says  
9 that the Petitioner was responsible for the  
10 accounting and cash management, and it adopted  
11 Dewberry's expert, what -- who said in the  
12 testimony at JA 68 that Petitioner's "management  
13 determines whether, on paper, Petitioner or the  
14 affiliates show the losses or the profits."

15 So we have the finding that they drove  
16 the revenues, created the revenues. We have the  
17 finding that they controlled where the revenues  
18 are recorded.

19 And then, third, the third finding is  
20 also at 83a, that Petitioner's tax returns don't  
21 tell the whole story and that all revenues  
22 generated through Dewberry Group show up on the  
23 ownership entity's books.

24 So I think, if you look at those  
25 three, what you have is, again, admittedly, some

1 unusual factual findings, but they're supported  
2 by the record and they're not challenged.  
3 Dewberry Group, the defendant, created all the  
4 revenues; Dewberry Group, the defendant, decided  
5 where they were recorded; and Dewberry Group,  
6 the defendant, had them recorded on the  
7 ownership entity's books.

8           So what you have is not the idea that  
9 they are indistinguishable, the Petitioner and  
10 the affiliates. It's to the contrary. It's a  
11 recognition that they are separate entities and  
12 that only one of them drove and created the  
13 gain.

14           And the "just sum" provision allows  
15 for a district court to look and say: Look, I  
16 think the net profits are inadequate. I'm going  
17 to look for the true gain. I have to do it in a  
18 way that doesn't disregard corporate  
19 separateness, and I've done that here.

20           JUSTICE JACKSON: Wouldn't the way to  
21 do that, though, is to recognize the two steps  
22 in the statute? So, to the extent we're looking  
23 only at Dewberry Group, shouldn't the court have  
24 said zero, which is what they said, and then we  
25 move to the second step using the "just"

1 provision and adjust it in the way that you're  
2 talking about?

3 MR. LIN: I -- I -- I think it did do  
4 that. Again, I think, if you look at -- if I  
5 can remember where. I think, if you look at --  
6 I think it's 83a as well. What the -- what the  
7 district court says is -- 84a -- Dewberry  
8 Group's tax returns standing alone do not tell  
9 the whole economic story. I think that's step  
10 one. I think they were present -- the district  
11 court -- I'm sorry -- the district court was  
12 presented with the -- the notion that the  
13 profits are zero based on the tax returns, and  
14 the district court said that doesn't tell the  
15 whole economic story.

16 I think that's enough of a -- of a --  
17 of a finding to support a finding of inadequacy  
18 under step one, right? You then go to the "just  
19 sum" provision, and the district court says what  
20 are the true gains? And, again, I can't, right,  
21 you can't disregard corporate separateness. You  
22 can't simply say they are indistinguishable  
23 entities. But, if there's evidence that the  
24 true gains are a certain amount, I can look at  
25 the financial records and determine that. And,



1 here, again, the unchallenged factual finding is  
2 that the Petitioner created all of the revenues.

3 This case might seem a little bit less  
4 unusual, to be honest, if the finding were that  
5 the Petitioner created half the revenues, right,  
6 25 percent of the revenues. Then we would have  
7 a much smaller "just sum" judgment. And I don't  
8 think anybody would be saying, wow, this number  
9 looks a lot like the full amount of the profits.  
10 But the reason that we have what kind of appears  
11 like an unusual is because we have unusual facts  
12 and an unusual factual finding.

13 On the "just sum" provision, Justice  
14 Kagan, you had asked, you know, what does that  
15 encompass? And -- and we had understood our  
16 friends to have argued that you can't go beyond  
17 net profits, that the "just sum" provision is  
18 only about, you know, a situation where we can't  
19 figure out the net profits.

20 I think I heard my friend say today  
21 that you can, that there could be a delta  
22 between net profits and gains, and that the  
23 "just sum" provision could allow a court to get  
24 at that. And I think that makes -- that's the  
25 only way that the "just sum" provision can be

1       squared with its text, because the text  
2       specifically says that if a district court finds  
3       inadequate or excessive the amount of an award  
4       of profits, it can award a sum that is just.

5               And I think, textually, what that  
6       means is the "just sum" provision is about  
7       providing for an award that goes beyond profits.

8               JUSTICE GORSUCH:   Mr. -- Mr. Lin --

9               JUSTICE KAGAN:   I think Mr. Hungar --

10              JUSTICE GORSUCH:   Sorry.   Go, please.

11              JUSTICE KAGAN:   I think Mr. Hungar  
12       might say, well, I -- there was an important  
13       qualification in what I said, which is that you  
14       can't do this in a way that treats the defendant  
15       just the same as these other corporate entities  
16       and that that is an -- an important limit in  
17       this case at any rate.

18              MR. LIN:   Understood.   And -- and we  
19       would agree with that.   We don't think that you  
20       can use the "just sum" provision in a way that  
21       simply treats the entities as indistinguishable.  
22       And that is why, to answer Justice Thomas's  
23       question, we don't have to show that the "just  
24       sum" provision would permit disregarding  
25       corporate separateness.

1                   But, again, I think our -- our point  
2                   here is that we don't think the district court,  
3                   when you look at the record, in fact, ignored  
4                   corporate separateness in using the "just sum"  
5                   provision.

6                   JUSTICE ALITO: Could you take just a  
7                   moment to address the SG's argument that the --  
8                   the courts below offered no persuasive  
9                   justification for awarding all of the revenues  
10                  that Petitioner's affiliates received?

11                  MR. LIN: Of course, Your Honor.  
12                  There's two answers to that, and the first one  
13                  comes back to the factual finding. The factual  
14                  finding is that the Petitioner and the  
15                  Petitioner alone created all of the revenues and  
16                  then put those revenues on the books of the  
17                  affiliates.

18                  So, number one, I think the factual  
19                  finding says that all of those revenues and,  
20                  therefore, all of the profits are the true gain  
21                  of the defendant.

22                  The second answer is, to the extent  
23                  that there is any uncertainty or a quarrel about  
24                  whether some portion of that number is not  
25                  attributable to the infringement or should have

1     been reduced by costs, the burden for that,  
2     whether statutorily at what I would call step  
3     one, or equitably under the "just sum" provision  
4     because of the word "just," the burden for that  
5     disentanglement falls on the defendant. That  
6     goes all the way back to the Westinghouse case  
7     and the doctrine of trustee ex maleficio, where,  
8     once we have shown -- basically made a prima  
9     facie showing of what the -- what the -- the  
10    gain from the infringement is, which I think is  
11    supported by the factual finding, then the  
12    burden of disentangling, you know, anything that  
13    might -- we might not be entitled to, that falls  
14    on the trustee, right? That's the doctrine  
15    of -- of accounting of profits.

16               And so -- and they -- again, as the  
17    district court and the Fourth Circuit  
18    recognized, they refused to engage with that  
19    because they simply said we don't think any of  
20    these affiliate profits have any relevance  
21    whatsoever to what our true gain is, and so that  
22    risk falls on the defendant.

23               CHIEF JUSTICE ROBERTS: Thank you,  
24    counsel.

25               Justice Thomas, anything further?

1 JUSTICE THOMAS: Would it matter in  
2 our consideration of whether or not the  
3 affiliate income should be counted that the  
4 affiliate -- that this practice is typical or  
5 atypical in the real estate industry or whether  
6 the tax assessed by the -- say, the IRS reflects  
7 your thinking or that of Mr. Hungar?

8 In other words, that the affiliates  
9 pay separate tax or that this is a typical  
10 practice in the real estate industry to keep the  
11 businesses separate?

12 MR. LIN: Your Honor, I think it --  
13 the -- the short answer to your question is I  
14 don't think it should particularly matter. I  
15 think the question here is whether -- you know,  
16 who drove the revenues. And, I mean, you can  
17 have separate entities where maybe the  
18 affiliates are doing more work in a different  
19 case than in this case.

20 And, again, that gets back to my  
21 explanation before about why this judgment might  
22 look a little bit unusual, but that's because  
23 the facts here were that this Petitioner drove  
24 and created all of the revenues and then put  
25 those revenues on the books of the affiliate.

1 CHIEF JUSTICE ROBERTS: Justice Alito?  
2 Justice Sotomayor?  
3 Justice Kagan?  
4 Justice Kavanaugh?  
5 Justice Barrett?  
6 Justice Jackson, anything further?

7 JUSTICE JACKSON: Would -- would  
8 piercing have been an option here for the court  
9 from your perspective? The SG said -- came up  
10 with a number of reasons why piercing wouldn't  
11 have resolved this issue.

12 MR. LIN: Your Honor, I think you may  
13 appreciate that I'm hesitant to commit one way  
14 or the other. I don't want to prejudge whether  
15 piercing could be shown or not. Our -- our  
16 position was that we didn't have to -- have to  
17 do it --

18 JUSTICE JACKSON: Yes. Right.

19 MR. LIN: -- and that the "just sum"  
20 provision would amount for it. I think, if this  
21 were to go back and there was a contention -- if  
22 the Fourth Circuit concluded, or the district  
23 court, that the "just sum" provision couldn't be  
24 used in this way, we would then address that  
25 question.

1 JUSTICE JACKSON: Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 MR. LIN: Thank you, Your Honor.

5 CHIEF JUSTICE ROBERTS: Rebuttal,  
6 Mr. Hungar.

7 REBUTTAL ARGUMENT OF THOMAS G. HUNGAR  
8 ON BEHALF OF THE PETITIONER

9 MR. HUNGAR: Thank you, Your Honor.

10 So, with respect to the argument that  
11 Petitioner generated the profits, as a matter of  
12 law, the fact that a corporation, through its  
13 employees, agents, or independent contractors,  
14 as here, uses other people to generate its  
15 profits does not mean that those service  
16 providers own the profits so generated.

17 This Court held precisely that even in  
18 the tax -- tax context in Commissioner against  
19 Banks at the government's urging. The argument  
20 there was that the lawyer who generated the  
21 proceeds of the lawsuit, who did all the work to  
22 make that lawsuit profitable, wasn't -- was the  
23 owner of the income that was shared that had  
24 been assigned to him. And the Court said no,  
25 the owner of the property, the cause of action,

1 owns the proceeds of that property, the  
2 settlement award, and the fact that the lawyer  
3 did all the work doesn't mean that he gets --  
4 that he's the owner or the recipient of the  
5 income. That's why the taxpayer, the owner of  
6 the claim, had to pay taxes on the full amount.

7           Precisely the same is true here and  
8 for every corporation. Every corporation makes  
9 its -- generates its profits through the work of  
10 agents or independent contractors, but that  
11 doesn't mean that the independent contractors  
12 own the profits. The -- the -- the affiliates  
13 own the property. They are the lessors. They  
14 receive and are legally entitled to the rents.  
15 So you can't treat those rents received by the  
16 affiliates on property that they own as if they  
17 were owned -- as if those rents -- rental  
18 proceeds were owned by Petitioner without  
19 disregarding the corporate form for -- on one of  
20 the many -- many grounds that one could have  
21 done that.

22           The problem is they didn't do that  
23 here. So that arguing about who generated the  
24 profits proves nothing, and -- and this Court's  
25 decision in Banks and Bollinger establish



1     precisely that.

2                     So, with respect to the -- the  
3     question whether there's vehement agreement, I  
4     think you heard Respondent vehemently disagree  
5     with our position. They -- they say that courts  
6     can do what the court of appeals did here. And,  
7     again, there is no doubt -- there is no doubt  
8     that what the courts below accepted and what  
9     Respondent argued below was not what they're  
10    arguing now, but, rather, pay no attention to  
11    the corporate form, we don't have to pierce the  
12    corporate veil, but these are all owned by the  
13    same guy and they're all involved in an  
14    interrelated enterprise and, therefore, we  
15    should treat all the profits of the -- this  
16    collective economic enterprise, as their expert  
17    said at -- at page -- at -- sorry, single --  
18    single economic enterprise, at page 146, 149,  
19    and 218 of the Joint Appendix. They argued  
20    collective economic enterprise in their proposed  
21    findings -- 319, 322, 325, and so forth -- that  
22    the -- the district court found that it would  
23    treat Petitioner and its affiliates as a single  
24    corporate entity. The court of appeals did the  
25    same thing, single corporate entity.

1                   That is disregard of corporate  
2     separateness, plain and simple. That is the  
3     only theory that is argued -- was argued below.  
4     It's the only theory that was accepted by the  
5     courts below. And Respondent is trying to run  
6     away from it and pretend that they don't want to  
7     treat the affiliates and Petitioner as  
8     interchangeable. That -- that was -- those were  
9     his words today. But that's precisely what they  
10    argued below and persuaded the courts below to  
11    accept, and that's precisely what this Court  
12    should reject.

13                  And it should reject it not only as to  
14    the principles of equity and based on the  
15    language of the defendant's profits in the  
16    statute, but it should also reject the "just  
17    sum" argument for precisely the same reasons,  
18    because "just sum" is subject to the same  
19    equitable constraints and can't impose a penalty  
20    and for precisely the same reasons therefor, and  
21    it's also subject to the Bestfoods presumption,  
22    which requires Congress to speak clearly to  
23    override corporate separateness, which it didn't  
24    do.

25                  So, for all those reasons, the Court

1     should reverse as to the rationale adopted by  
2     the court of appeals and reject the "just sum"  
3     argument that Respondent is offering in an  
4     attempt to -- to defend that illicit rationale.

5             And there's no need for a remand,  
6     again, because this is not a question of whether  
7     it was -- of not -- it's not only a question of  
8     whether it was failed -- they failed to raise  
9     any of these arguments below. They failed to  
10    raise them in the brief in opposition and they  
11    failed to dispute the assertion that Petitioner  
12    had zero profits from the infringement.

13            So, as a matter of Rule 15, which this  
14    Court has a responsibility and the authority to  
15    enforce, not the court of appeals, as a matter  
16    of Rule 15, those issues are not in the case, so  
17    there's nothing to remand.

18            For all these reasons, we ask that the  
19    judgment of the court of appeals be reversed,  
20    full stop.

21            CHIEF JUSTICE ROBERTS: Thank you,  
22    counsel.

23            The case is submitted.

24            (Whereupon, at 11:16 a.m., the case  
25    was submitted.)

## Official

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