

# 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. )  
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Pages: 1 through 82  
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Petitioner, )

v. ) No. 23-900

DEWBERRY ENGINEERS INC., )

Respondent. )

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Washington, D.C.

Wednesday, December 11, 2024

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

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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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 23-900, Dewberry Group versus Dewberry Engineers.

Mr. Hungar.

ORAL ARGUMENT OF THOMAS G. HUNGAR

ON BEHALF OF THE PETITIONER

MR. HUNGAR: Thank you, Mr. Chief Justice, and may it please the Court:

The Lanham Act authorizes disgorgement of the defendant's profits. Petitioner is the only defendant in this case, but it had no profits to disgorge. So the courts below ordered Petitioner to disgorge the profits of its legally distinct affiliates to the tune of \$43 million.

Nothing in the Lanham Act authorizes that blatant disregard of corporate separateness. Under the Act's plain language, a defendant's profits do not include the profits of separate corporations, but Respondent asserted a "collective economic enterprise" theory, persuading the courts below to treat 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. But that  
9 assertion of unbounded equitable authority  
10 violates the maxim that equity follows the law,  
11 including the Bestfoods presumption of corporate  
12 separateness. It also contradicts the equitable  
13 principles that disgorgement is limited to the  
14 defendant's profits, not those of affiliates,  
15 and does not allow penalties like the award  
16 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 case,  
17 which recognized many of the principles that  
18 we're advocating here today, the Court said that  
19 partnership is an accepted basis for joint and  
20 several liability even in the disgorgement  
21 context. But there's no proof or allegation  
22 here of partnership, and that theory was not --

23 JUSTICE THOMAS: So your -- your --  
24 your argument basically relies on -- it's more  
25 of a formalistic argument -- relies on the fact

1 that these -- that these businesses that are  
2 owned by one person are in a separate corporate  
3 form, as opposed to partnership or sole  
4 proprietorship?

5 MR. HUNGAR: Correct. And that's  
6 the -- that is the fundamental principle of  
7 corporate separateness that this Court has  
8 recognized in numerous cases, the Dole Foods  
9 case we cited in our brief, the Bestfoods case  
10 itself, because of a long tradition of history  
11 and reliance to the tune of billions, if not  
12 trillions, of dollars in corporate America  
13 relying on the principle of corporate  
14 separateness and its recognition by the courts.

15 The Court said in Bestfoods that  
16 unless Congress directly says otherwise,  
17 corporate separateness is the norm, unless you  
18 can prove the normal grounds for disregarding  
19 separate corporations, which Respondent  
20 disavowed doing here.

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



1 was saying, look, this is one business and we'll  
2 treat it as one business and we'll ignore the  
3 corporate form of the separate businesses owned  
4 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 briefs talk  
4 about the Sheldon case from the Second Circuit,  
5 where the court held that because the defendant  
6 in that case was the parent corporation, it  
7 owned stock in the subsidiaries that had -- had  
8 engaged in infringement and had profited from  
9 it.

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

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 a  
19 legal matter, that would not be, in our view, an  
20 accepted basis at equity because, again, equity  
21 looks only to the gain actually received by the  
22 defendant. And this Court's cases that we've  
23 cited in our brief say that over and over again.

24 In -- in this scenario, the government  
25 is essentially admitting these are revenues that

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

7 JUSTICE SOTOMAYOR: This makes no  
8 sense to me, counselor.

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

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

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

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

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

10                  JUSTICE SOTOMAYOR: Mm-hmm.

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

16                  JUSTICE SOTOMAYOR: Well, the  
17                  government has a very simple theory as I  
18                  understood it.

19                  MR. HUNGAR: Well, they have --

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's the below -- there's the alleged  
3 below-market-rate expense theory. There's also  
4 the assignment theory, which Your Honor, I  
5 think, was referring to. And with respect to  
6 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 not --  
17 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, the -- there are several  
13                  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, and --

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

23                  MR. HUNGAR: Right. But --

24                  JUSTICE SOTOMAYOR: They ordered this  
25                  defendant to pay a certain amount, and that



1 certain amount is what they -- what they  
2 received or should have received in value for  
3 the services they rendered.

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

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

22 If it didn't actually receive them,  
23 even if it's because it made a bad -- bad deal,  
24 you don't disgorge those from the defendant.  
25 And, again, this Court has said that over

1 hundreds of years in the equitable context. And  
2 the same is true here.

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

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

22           So it's clear that a substantial  
23 amount of the costs incurred by petitioner were  
24 not relating to the infringing services  
25 allegedly provided to the affiliates but,

1 rather, to independent services.

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

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

10 JUSTICE SOTOMAYOR: Counsel, you've  
11 answered my question.

12 MR. HUNGAR: I -- well, I'd still like  
13 to make this --

14 JUSTICE GORSUCH: I'd like -- I'd like  
15 you to finish it.

16 MR. HUNGAR: Thank you, yes.

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

24 So, at Petition 5, we said:  
25 Petitioner had zero net profits. At Petition 8,

1 we said: As Petitioner explained, the records  
2 show that the infringement generated zero  
3 profits for petitioner. At page 10, we said the  
4 same thing.

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

13 And Respondent never disputed those  
14 factual assertions in its brief in opposition.

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

19 And this Court should enforce its Rule  
20 15 because, otherwise, you're inviting  
21 Respondents and the government to try and throw  
22 issues that aren't in the case and distort the  
23 question presented. And that is contrary to  
24 this Court's --

25 JUSTICE JACKSON: But, counsel --

1 CHIEF JUSTICE ROBERTS: Counsel --

2 JUSTICE JACKSON: -- I guess -- oh,  
3 sorry.

4 CHIEF JUSTICE ROBERTS: Go ahead.

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

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

21 And it seems to me that in a situation  
22 like that, that is sort of where equity is  
23 supposed to be coming in to ensure that a  
24 violation has a remedy. And, you know, Congress  
25 uses the term "equity." "Equitable nature of

1 remedy" is in this statute.

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

7 MR. HUNGAR: So two responses,  
8 Your Honor.

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

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

1 vicarious liability, or direct liability.

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

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

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

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

20           MR. HUNGAR: I think it could. I  
21 mean, if -- again, if that conduct were  
22 infringing and the court could conclude that the  
23 total -- defendant's total profits from that  
24 infringing conduct was a thousand dollars, yes.

25           CHIEF JUSTICE ROBERTS: Well, I wasn't

1 talking about infringement at all. I just mean  
2 the concept that you can have profits from a  
3 contract even if the -- the compensation exceeds  
4 what was required under the contract for a  
5 variety of circumstances.

6 MR. HUNGAR: Yes.

7 CHIEF JUSTICE ROBERTS: Here, the  
8 situation that the party considered it was fair.

9 MR. HUNGAR: Yes.

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

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

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

24 MR. HUNGAR: Well, Your Honor, the --  
25 the capital contributions were being made for 25



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

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

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

24           So, again, as a factual matter,  
25 Mr. Dewberry was contributing capital, and --

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

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

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

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

11 So that's the way I read this  
12 sentence.

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

23 And, here, the traditional equitable  
24 limitations include you only disgorge the  
25 defendant's profits, not the affiliates'

1 profits; only actual profits, not possible  
2 profits. You don't award profits when the  
3 defendant has zero profits because that would be  
4 a penalty.

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

20 MR. HUNGAR: So two responses.

21 Number one, it clearly does not rise  
22 to the level of a direct statement abrogating  
23 corporate separateness. So however you might  
24 interpret this provision with respect to other  
25 constraints, the -- the Bestfoods presumption

1 applies to this statute and has not been  
2 overridden. So it doesn't justify disregard of  
3 corporate separateness, which is precisely what  
4 Respondent's argument requires if you're going  
5 to attribute the profits of affiliates to --  
6 that -- that Petitioner did not receive to the  
7 Petitioner. So that's point one.

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

24           And then that -- 10 years later,  
25 Congress added into the Copyright Act, codified

1 the holding of Brady against Daly, by adding the  
2 sentence, which also appears in the Lanham Act,  
3 about how this is compensation -- shall be  
4 compensation and not a penalty, or words to that  
5 effect.

6 And so -- and -- and -- and then,  
7 again, in the -- the Douglas case, the Court  
8 again said that this provision in the Copyright  
9 Act, the just-sum provision, is -- is to be  
10 compensatory. So the history is perfectly  
11 clear. Every court of appeals that has  
12 addressed the question under either the  
13 Copyright Act or the Lanham Act has recognized  
14 that the "just sum" flexibility is -- is cabined  
15 by the need to -- for it to be compensatory, not  
16 penal.

17 JUSTICE KAGAN: Right, but there --

18 JUSTICE ALITO: Can you -- go ahead.

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

24 MR. HUNGAR: Yes.

25 JUSTICE KAGAN: -- would be up here,

1 and the defendant's profits, for whatever  
2 reason, are down here, and so we're going to  
3 make up the gap.

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

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

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

20           CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel.

22           Justice Thomas?

23           Justice Alito?

24           Justice -- Justice Kagan?

25           Justice Gorsuch?



1 Justice Kavanaugh?

2 Justice Barrett?

3 Justice Jackson?

4 JUSTICE JACKSON: Yes, I have a  
5 question. Your -- your answer to the Chief  
6 Justice's question made me think that maybe at  
7 least I need a better handle on the scope of  
8 profits from the infringement here.

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

18 MR. HUNGAR: Well, what the courts of  
19 appeals concluded -- so the -- the allegation is  
20 that Petitioner, in marketing and loan  
21 applications and so forth, used the infringing  
22 mark, which was, you know, Dewberry Group,  
23 instead of Dewberry Capital, and, therefore,  
24 the -- the court treated 80 percent of the  
25 revenue -- the rental revenues received by the

1 affiliates as attributable to the infringement.

2 JUSTICE JACKSON: Presumably, the  
3 affiliates were also using the mark in their  
4 materials as they --

5 MR. HUNGAR: Well --

6 JUSTICE JACKSON: -- rented the  
7 properties.

8 MR. HUNGAR: -- Petitioner was the --  
9 was -- was authorizing leasing agents to use it,  
10 if I recall the record correctly, and was itself  
11 using the mark.

12 So Petitioner serves, under contract,  
13 as the property management company for the  
14 affiliates, as a -- as a service provider.

15 JUSTICE JACKSON: Mm-hmm.

16 MR. HUNGAR: So, as a -- as a property  
17 management company, in dealing with the tenants,  
18 it would be using its new name, which the court  
19 found to be infringing.

20 And so those are the -- those are the  
21 types of uses that the court found to be  
22 infringing. And then it said: And because of  
23 those uses, we're going to attribute 80 percent  
24 of the rental profits received by the  
25 corporations during the infringement period to

1 Petitioner.

2 JUSTICE JACKSON: I guess I'm just  
3 test -- I'm just testing your -- your -- your  
4 theory that other remedies were available if the  
5 plaintiffs in this case had pled this  
6 differently.

7 So, if they -- could they have sued  
8 the affiliates for infringement and gotten the  
9 disgorgement that the affiliates received?

10 MR. HUNGAR: Well, they certainly  
11 could have sued them, and they could have  
12 alleged alter ego theories or whatever -- you  
13 know, all the theories that we've talked about.  
14 Whether those would have --

15 JUSTICE JACKSON: But the defendant  
16 and the -- the -- the Petitioner is the  
17 infringer from the perspective of this record.

18 MR. HUNGAR: Well, again, because they  
19 didn't sue any of the other defendants -- any of  
20 the other affiliates, rather, they only sued  
21 Petitioner, none of this was tested.

22 I mean, presumably, the -- if they had  
23 sued them under alter ego or as direct  
24 infringers or as secondary infringers or as  
25 vicarious infringers, that would have been

1 litigated.

2 And we don't know how that would have  
3 resolved. I assume that my client would have  
4 resisted those claims. But how it would have  
5 come out, we don't know, because Petitioner --  
6 because Respondent never brought those claims.

7 And, again, it's not this Court's  
8 role, I submit, to -- to try and reinject into  
9 the case new theories that have been forfeited  
10 and waived at the --

11 JUSTICE JACKSON: Thank you.

12 MR. HUNGAR: -- at the petition stage.  
13 Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16 Mr. Crown?

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

19 MR. CROWN: Mr. Chief Justice, and may  
20 it please the Court:

21 I'd like to pick up on some of the  
22 questions from the bench, which I think gets to  
23 the intuition that there are core, longstanding  
24 principles here. We see two of them.

25 The first is that courts typically

1 treat corporations as distinct entities, and the  
2 second is that a court, when ordering a  
3 defendant to relinquish its ill-gotten gains, is  
4 not bound by the defendant's self-serving  
5 ledgers.

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

14 But we think the second principle has  
15 important things to say about how a court could  
16 calculate a defendant's profits while still  
17 maintaining corporate separateness without  
18 crossing corporate lines.

19 Our brief identified equitable  
20 background principles that we think the very  
21 purpose of those principles is to address a  
22 situation like we may have here, where a  
23 defendant is disguising economic reality.

24 In trademark cases, courts routinely  
25 reject deductions where a defendant is

1 attempting to artificially inflate its costs to  
2 lower its profits liability. We think the  
3 outcome should be no different when a defendant  
4 tries to deflate its receipts and income, again,  
5 to reduce its profits liability.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: You say that -- you  
8 suggest that the defendant is disguising its  
9 profits. Is there anything in the record to  
10 support that?

11 MR. CROWN: There is. And I think the  
12 problem here is we have closely held affiliates.  
13 They're all under common ownership. We look at  
14 the rates here. There are 30 years according to  
15 the Petitioner's books. They are claiming that  
16 for the last three decades they have been  
17 operating at a loss.

18 If we just look at the economic  
19 realities, we don't think the owner of these  
20 entities would allow that to happen unless, in  
21 reality, the Petitioner was generating  
22 substantial value.

23 So, Justice Thomas, here's how I would  
24 address the issue with this type of case. I  
25 don't have a position on whether the arguments

1 have been preserved. We do think it's important  
2 to save this type of argument for the next case.

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

11           And we think there are two important  
12 insights that you might get from that type of  
13 analysis. And this gets to why we think that  
14 the Court should vacate or at least shouldn't  
15 affirm the award as it stands right now.

16           The first insight is we think, if you  
17 do that type of analysis, we would see that the  
18 Petitioner would have gained more money than the  
19 losses that they claim to have incurred over the  
20 last 30 years.

21           But the second insight is we think, if  
22 you have an entity that owns land, like the  
23 affiliates here, but doesn't have management  
24 expertise in how to rent out its property, and  
25 then you have a management company like

1     Petitioner that doesn't own land but does have  
2     the expertise, they would come to the  
3     negotiating table. Both bring something  
4     indispensable that the other one doesn't have,  
5     that is, land if you're the landowner, expertise  
6     if you're the management company, and then they  
7     would negotiate the rates.

8             But we don't think in that  
9     circumstance -- and -- and this is the error  
10    that we perceive in the decisions below -- we  
11    don't think the economically realistic  
12    transaction would mean that the landowner would  
13    say the management company should keep all \$43  
14    million worth of profit that's generated through  
15    that enterprise.

16            CHIEF JUSTICE ROBERTS: Counsel, you  
17    say that the United States takes no position on  
18    whether some of these arguments, which it seems  
19    you regard as important, were preserved.

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

25            MR. CROWN: In this case, it seemed



1 like this is something that the lower courts  
2 would be particularly well suited to sort out.  
3 We think, on top of the fact it's not entirely  
4 clear which arguments the courts were grappling  
5 with below, we take the -- the Petitioner and  
6 the Respondent to be arguing over what the  
7 courts actually did below.

8           So, when you have that type of  
9 confusion, I think it would be fair to say this  
10 Court can follow its usual practice. Rather  
11 than reaching out and addressing whether  
12 arguments had been preserved, you can send the  
13 case back and let the courts below try --

14           CHIEF JUSTICE ROBERTS: Well, no,  
15 that -- that's the argument why you may not take  
16 that position or a position. But you tell us  
17 that you're not taking any position on that  
18 question.

19           MR. CROWN: Well, I do want to  
20 emphasize I don't mean to speak for Respondent  
21 in terms of the arguments that they have made.  
22 Again, we don't think it's necessary for this  
23 Court to decide whether the arguments have been  
24 preserved in terms of the outcome of this case.

25           We do think there was an independent

1 error in the profits award that was granted in  
2 this case. We think that there are other  
3 potential avenues that could have been pursued,  
4 may have been pursued, to get at the same number  
5 or a similar number on remand.

6 Again, for purposes of the question  
7 presented before this Court, we don't think you  
8 have to get into that.

9 I actually take the arguments from  
10 both sides to vehemently agree on the answer to  
11 the QP itself, that is, whether you can order a  
12 defendant to disgorge the profits of a nonparty  
13 separate entity.

14 I think everyone says the answer to  
15 that question is no. Then the question becomes:  
16 How do we calculate what the proper amount of  
17 profits should be when we are respecting  
18 corporate separateness?

19 And we've identified background  
20 equitable principles that target that exact  
21 problem when it looks like what's shown on the  
22 defendant's books, which Petitioner conceded  
23 today and in their reply brief at page 5 aren't  
24 controlling.

25 There are various tools available to

1 the Court to sort out that type of problem both  
2 in equity generally and in the trademark  
3 context.

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

14 MR. CROWN: Just --

15 JUSTICE ALITO: Why should we do that?

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

22 So, again, we would leave it to the  
23 courts below to determine what has been properly  
24 preserved because I -- I take it that the  
25 parties do have a dispute over what's actually

1 still live in the case.

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

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

17 Our modest submission here is:  
18 Whatever the Court decides in the opinion, it  
19 should not reach out and foreclose the other  
20 background equitable principles and arguments  
21 that we've identified in our brief. I -- I  
22 think that would be the -- the part that we  
23 would care about.

24 JUSTICE BARRETT: But, when you  
25 say "not foreclose," just to follow up on

1 Justice Alito's question, it seems to me I  
2 read -- and -- and Respondent can say if -- if  
3 he sees it differently -- I -- I read there to  
4 be vehement agreement on the -- the QP, the --  
5 the narrow QP too as well.

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

15 I -- I guess I don't understand why --  
16 as long as we don't go further and say this is  
17 foreclosed, doesn't silence on that point  
18 suggest that it's not?

19 MR. CROWN: I think that would be  
20 fair. I -- I also think that courts might --  
21 courts below might appreciate clarity in -- in  
22 the Court just saying: We are not deciding the  
23 issue. But I wouldn't deign to tell you,  
24 Justice Barrett, how to write the opinion.

25 I think the same outcome would --

1 would come out the same way. It would cash out  
2 the same either way.

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

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

19 MR. CROWN: Justice Jackson, I have  
20 four answers. If I may --

21 JUSTICE JACKSON: Yes.

22 MR. CROWN: -- I would like to lump  
23 into that the question why couldn't they have  
24 just sued the entities under the Lanham Act  
25 directly. And I think --

1 JUSTICE JACKSON: Please.

2 MR. CROWN: -- all four will get to  
3 that.

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

16 The second problem, the affiliates, if  
17 we're looking at substantive liability under the  
18 Lanham Act -- this is my addition to the  
19 question -- they might not be liable if you were  
20 to sue them, and there are a couple reasons why.  
21 If we're looking at direct infringement, there  
22 might be a problem under the facts of this case  
23 or a similar one. If one entity is doing all  
24 the infringing, that is, using the mark in  
25 commerce as the one that created the consumer

1 confusion, and the other entities, all they're  
2 doing is holding the money, just holding the  
3 proceeds or the profits of infringement is  
4 usually, I don't think, going to get you to  
5 substantive liability. And I think that might  
6 also be true if we're talking about secondary  
7 liability.

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

18                   CHIEF JUSTICE ROBERTS: Counsel,  
19 just --

20                   MR. CROWN: The third thing --

21                   CHIEF JUSTICE ROBERTS: -- before you  
22 go on, how many of your four things did you just  
23 get out?

24                   MR. CROWN: Two.

25                   (Laughter.)



1 CHIEF JUSTICE ROBERTS: Two. All  
2 right.

3 MR. CROWN: I've got to -- I have two  
4 more, Mr. Chief Justice.

5 CHIEF JUSTICE ROBERTS: I will -- I  
6 will allow a historically unprecedented  
7 exception to allow you to give us --

8 (Laughter.)

9 CHIEF JUSTICE ROBERTS: -- the other  
10 two promptly.

11 MR. CROWN: I appreciate it.

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

20 The fourth thing is we think the risk  
21 of disguising profits or manipulating your books  
22 is especially acute when you have all these  
23 entities that are closely held under common  
24 control. It's really tough to sort out what's  
25 actually happening on the ground, and

1 veil-piercing or substantive liability might not  
2 get at that problem.

3 CHIEF JUSTICE ROBERTS: Thank you.  
4 Justice Thomas?

5 MR. CROWN: Thank you, Mr. Chief  
6 Justice.

7 CHIEF JUSTICE ROBERTS: Justice Alito?

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

15 MR. CROWN: I would tweak it a little  
16 bit and then I hope provide a palliative,  
17 Justice Alito.

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

23 In terms of whether this is -- is  
24 freewheeling or open-ended, I don't think so.  
25 This is something courts have dealt with in the

1 equitable context dealing with profits awards.  
2 This Court explained in cases like City of  
3 Elizabeth -- that was one of the principal  
4 citations that the Petitioner relied on -- and  
5 in Goodyear, when a defendant is trying to lower  
6 its profits liability by asserting certain costs  
7 that it had incurred, the court can peek under  
8 the hood and say, in terms of economic  
9 realities, that's not what actually happened  
10 here.

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

19 Those were patent cases, but courts of  
20 appeals have taken this Court's lead in applying  
21 the same principles in the trademark context.  
22 That's the Aladdin decision, pre-Lanham Act;  
23 American Rice, Fifth Circuit, post-Lanham Act.

24 JUSTICE ALITO: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

2 Justice Kagan?

3 JUSTICE KAGAN: You heard the colloquy  
4 between me and Mr. Hungar about the just-sums  
5 provision. What do you make of that? What do  
6 you think it's there for? What do you think it  
7 allows?

8 MR. CROWN: The first thing I will say  
9 is I think I heard Petitioner agree that that  
10 provision allows the full measure of  
11 compensation to the plaintiff. We agree with  
12 that. Now --

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

20 MR. CROWN: Right. And I would say  
21 two things. I think, to the extent the  
22 Petitioner is arguing that, this is really just  
23 a proxy for the compensation that the plaintiff  
24 lost. We think the better proxy here would --  
25 would be our theory, that is, what would the

1 defendant have charged at arm's length in  
2 providing services to unaffiliated entities.

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

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

21           I take the point here that the  
22 Petitioner, at least on these facts as I  
23 understand them, appears to have collapsed those  
24 two steps. Instead of contracting for an amount  
25 and then forgiving it, it has just said, on the

1 front end in this contractual negotiation, we're  
2 going to leave -- we're going to take  
3 below-market rates and leave the rest with the  
4 affiliates.

5 Economically, we think that is the  
6 same outcome, and we think those two cases  
7 should be treated similarly.

8 JUSTICE KAGAN: Thank you.

9 MR. CROWN: And we think the just-sum  
10 provision provides the courts a tool to do that.

11 CHIEF JUSTICE ROBERTS: Justice  
12 Gorsuch?

13 Justice Kavanaugh?

14 Justice Barrett?

15 Justice Jackson?

16 Okay. Thank you, counsel.

17 Mr. Lin.

18 ORAL ARGUMENT OF ELBERT LIN

19 ON BEHALF OF THE RESPONDENT

20 MR. LIN: Mr. Chief -- Mr. Chief  
21 Justice, and may it please the Court:

22 The legal question governing this case  
23 is really an evidentiary one: May a court  
24 awarding a profits-type remedy under Section  
25 1117(a) ever take into account the finances of

1 an affiliate of the defendant infringer without  
2 piercing the veil? The answer is yes, the plain  
3 text authorizes it, and, also, just relying on  
4 the financials of another party does not  
5 automatically disregard corporate separateness  
6 and require piercing the veil.

7 Start with separateness. Disregarding  
8 corporate separateness is not an end in itself  
9 but a path or a means to an end. So, if a court  
10 relied on an affiliate's financials based on the  
11 conclusion that the affiliate is one and the  
12 same with the defendant, that would disregard  
13 corporate separateness.

14 But it would not disregard  
15 separateness to rely on such evidence based on  
16 some other justification. Doing that simply  
17 recognizes, as has long been held, that legally  
18 separate entities, whether affiliates or not,  
19 can still interact in ways that bear on each  
20 other.

21 Indeed, that is what the Fourth  
22 Circuit concluded happened here. It understood  
23 the district court not to have set aside  
24 separateness but rather to have relied on the  
25 affiliates' revenues as evidence of Petitioner's

1 own, and I quote, "true financial gain."

2 And that tracks the record, which  
3 reflects that, despite some imprecise language,  
4 the district court did not view the affiliates  
5 and the Petitioner as interchangeable. To the  
6 contrary -- and these facts are important -- the  
7 district court relied on the affiliates' profits  
8 because it found that Petitioner alone had  
9 generated all those revenues through its  
10 infringing activities. And so the revenues were  
11 thus gain created by the Petitioner even though  
12 Petitioner assigned them elsewhere.

13 The other question is what part of  
14 1117(a) authorized the district court to rely on  
15 this evidence. We believe the discretion to  
16 look beyond the defendant's net profits is found  
17 in the unique just-sum provision. The U.S.  
18 reads the statute differently, but, under either  
19 approach, you get to the same place.

20 I welcome the Court's questions.

21 JUSTICE THOMAS: Mr. Lin, wouldn't --  
22 we would not be here on this if you -- if  
23 your -- if Petitioner or Respondent had sued all  
24 of the entities.

25 Why wasn't that the approach?



1                   MR. LIN: Your Honor, I understand  
2                   that there were a number of practical and  
3                   strategic reasons, but I think maybe the -- the  
4                   easiest answer to you is, Your Honor, if you  
5                   look at JA 109, which is in the expert report,  
6                   it -- it notes that the Petitioner's website  
7                   represented that it owned 1.5 billion in -- in  
8                   properties. We didn't know, in short, that  
9                   there were other ownership entities, and so we  
10                  made the decision to sue who we thought was the  
11                  defendant, and we think that the just-sum  
12                  provision allows us to get at the defendant's  
13                  true financial gain.

14                  JUSTICE THOMAS: So, I guess, to some  
15                  extent, you have to argue that the just-sum  
16                  provision allows you to pierce the corporate  
17                  veil. This would be a different case if it were  
18                  a partnership or a sole proprietorship. Your  
19                  argument would be much easier.

20                  So how do you get past the separate  
21                  corporate entities? Even to calculate income,  
22                  it's not the income, technically, of the -- of  
23                  Petitioner here.

24                  MR. LIN: Your Honor, so my answer to  
25                  you is: I would take issue with the premise

1 that we have to argue that the just-sum  
2 provision requires piercing the veil, and it  
3 gets to what I think is an important  
4 understanding of what disregarding the corporate  
5 separateness really means. I think it's a means  
6 to a certain outcome.

7 And so, really, the justification for  
8 looking at the affiliates' financials matters,  
9 this Court has said -- and -- and if I could,  
10 the Arthur Andersen case, Arthur Andersen versus  
11 Carlisle, the 2009 case, it's talking about, you  
12 know, when you can hold nonparties to a contract  
13 to be responsible.

14 And -- and it lists a number of ways  
15 to do that: assumption, piercing the corporate  
16 veil, alter ego, incorporation by reference,  
17 third-party beneficiary theories, waiver, and  
18 estoppel.

19 And, Your Honor, my point is piercing  
20 the corporate veil and disregarding corporate  
21 separateness is one way to look at the  
22 affiliates' finances, but there are other ways.  
23 And if -- if the reason is not simply that  
24 you're concluding that the two are  
25 indistinguishable, then you're not disregarding

1 the corporate veil at all, and there's no reason  
2 to -- to say that the just-sum provision allows  
3 piercing the veil.

4 We're simply saying, if you look at  
5 the findings of fact here, which are  
6 unchallenged in this Court, what the court  
7 concluded -- it's somewhat of an unusual factual  
8 finding because there are unusual facts. But  
9 what the court concluded is that the Petitioner  
10 alone drove and created all of these revenues  
11 and then put them on the books of the affiliate.

12 That is not disregarding corporate  
13 separateness.

14 JUSTICE GORSUCH: Mr. Lin, I would --

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

16 JUSTICE GORSUCH: -- I'd agree with  
17 you that there are many ways to skin the cat.  
18 You can sue these people. You can pierce the  
19 veil. You've got all kinds of equitable  
20 theories. You just had a great list of them a  
21 second ago.

22 But, as I understand it, the Fourth  
23 Circuit below did none of those things. And you  
24 all actually agree with that. And you agree  
25 that on the question presented, the Fourth

1 Circuit erred, is that right?

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

3 JUSTICE GORSUCH: So the Solicitor  
4 General is wrong, there isn't total agreement  
5 here today?

6 MR. LIN: There is total -- so if I  
7 could answer that in two ways. There is  
8 total --

9 JUSTICE GORSUCH: No, pick one.

10 (Laughter.)

11 MR. LIN: Maybe I can combine them  
12 into one answer.

13 (Laughter.)

14 JUSTICE GORSUCH: Give me your best.

15 MR. LIN: There is total agreement  
16 that you cannot include in the judgment the  
17 affiliates' profits as the affiliates' profits.

18 JUSTICE GORSUCH: As such, yes.

19 MR. LIN: Right? Because that would  
20 be saying that --

21 JUSTICE GORSUCH: Right. We need some  
22 other theory to get there.

23 MR. LIN: You need some -- you need  
24 some other reason, unless you're going to pierce  
25 the veil.

1 JUSTICE GORSUCH: Right.

2 MR. LIN: And we would say that --  
3 that that other reason exists here.

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

7 And so perhaps maybe you preserved the  
8 arguments, maybe you didn't. The Solicitor  
9 General doesn't know. And maybe the best thing  
10 in those circumstances is for us to -- to vacate  
11 and remand, allow you to try again.

12 MR. LIN: And so what I would quarrel  
13 with, Your Honor, is that that is -- that --  
14 that the -- that there was no other reason on  
15 which the judgment below was based.

16 I think, if you -- if you look at  
17 Petitioner's Appendix 43a, what the Fourth  
18 Circuit says is: We view the district court's  
19 decision differently. Rather than pierce the  
20 corporate veil, rather than disregard corporate  
21 separateness, the court considered "the revenues  
22 of entities under common ownership with Dewberry  
23 Group in calculating Dewberry Group's true  
24 financial gain." And that's a quote that  
25 Petitioner assiduously leaves out of any of

1 their pleadings.

2           What the Fourth Circuit's basis was,  
3 was that it did not understand the district  
4 court to have just viewed the two, the  
5 affiliates and the defendant, at a -- as a  
6 single entity.

7           JUSTICE GORSUCH: I -- I -- I think  
8 what Mr. Hungar would say to you is: That's a  
9 nice little snippet, but there's no work there,  
10 that it -- it appears that the court just  
11 treated the affiliates' profits as the  
12 defendant's profits, pretty much full stop, and  
13 that that's a mistake.

14           And I think you'd agree with that,  
15 that something more needs to be done to  
16 attribute those profits to the defendants. Some  
17 work has to be done under some equitable theory.

18           And we don't have any evidence that  
19 the Fourth Circuit did that in this case. Maybe  
20 they can. Maybe you have the facts. You had  
21 lots of theories to work with. But we don't  
22 know.

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

24           JUSTICE GORSUCH: One.

25           (Laughter.)

1                   MR. LIN: Well, I -- I -- I have to  
2 take issue with the fact that there has to be an  
3 equitable theory. We think the just-sum  
4 provision provides a statutory basis.

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

7                   MR. LIN: Of course, Your Honor.

8                   JUSTICE GORSUCH: -- that might or  
9 might not be available.

10                  MR. LIN: And, yes, I agree that there  
11 has to be more work as a general matter, but I  
12 think that work was done -- so, yes, the Fourth  
13 Circuit's -- the Fourth Circuit's analysis is  
14 very short, but I think what the Fourth  
15 Circuit's analysis tracks is its understanding  
16 of the full record.

17                  And I think, if you go to the  
18 record -- and -- and that's what I was alluding  
19 to earlier -- and you look at the unchallenged  
20 findings of fact in this case, the unchallenged  
21 finding of fact in this case is that the  
22 defendant -- petitioner created all of the  
23 revenues that the affiliates -- and this gets to  
24 Justice Jackson's questions -- question -- the  
25 affiliates were passive receivers. They had no

1 employees. They did not do a single thing.

2 Now they -- they suggest in their  
3 briefs that that is wrong, but that is the  
4 unchallenged finding of fact of the district  
5 court, which you are -- which you are stuck with  
6 here.

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

12 MR. LIN: I think we can agree on  
13 that.

14 JUSTICE BARRETT: Okay. So, if we  
15 want to beyond just the strict QP in the way  
16 that we've talked about, the point on which  
17 there's vehement agreement, we have to  
18 articulate some theory, correct, to justify the  
19 Fourth Circuit's opinion?

20 You're -- you're giving us some --  
21 some mechanism for doing that, but the Fourth  
22 Circuit didn't spell that reasoning out. It  
23 sounds like you're pretty confident in your  
24 position. And Justice Gorsuch said you have a  
25 bunch of theories.



1           If the Fourth Circuit believed that,  
2           it can presumably make pretty quick work of this  
3           on remand, and then maybe you walk away and you  
4           win quickly. But we would be kind of wading  
5           into uncertainty if we spell out all of those  
6           theories that the Fourth Circuit never  
7           addressed.

8           MR. LIN: I understand the question,  
9           Your Honor, and here's how I would respond to  
10          that.

11          I think, if you conclude, a majority  
12          of this Court concludes, that you're uncertain  
13          about what the Fourth Circuit did, whether the  
14          record supports the idea that there was no  
15          disregard of corporate separateness, that  
16          then -- then I do think that you should vacate  
17          and remand and allow the lower courts to spell  
18          out what they did and whether that was  
19          permissible.

20          But I think, Your Honor, if you agree  
21          with us that the record is clear on its face --  
22          and -- and we think that the -- I think, if you  
23          look at the unchallenged factual findings, I  
24          don't think there's another way to read the  
25          record, and I think, if that's true, then you do

1 have to go on and address the other questions.

2 JUSTICE BARRETT: So you would say,  
3 like, this is kind of a quibble between a  
4 vacate -- if we have uncertainty about the  
5 Fourth Circuit opinion, you're just trying to  
6 make sure we vacate and remand and not -- not  
7 reverse? Is that kind of the way I --

8 MR. LIN: Well, yes, Your Honor. I  
9 mean, I -- I don't think that this Court should  
10 reach out and decide what the amount of the  
11 judgment should be, which I think is what you  
12 would have to decide if you were to just  
13 straight-up reverse and not allow any further  
14 proceedings below.

15 I think the -- if -- if you have  
16 uncertainty as to what the courts below did,  
17 then I think the answer is to -- you could  
18 decide the QP. I think you could provide some  
19 further guidance -- to Justice Jackson's  
20 question, I think I would say it's not  
21 categorically impermissible to look at the  
22 financial evidence of affiliates -- and then  
23 allow this to go back down and for the -- the  
24 courts to further explain what they did and why  
25 that was on --

1 JUSTICE SOTOMAYOR: When I read --

2 JUSTICE BARRETT: So it's like a scope  
3 of the remand question, kind of what we say  
4 about all that?

5 MR. LIN: Yes, Your Honor.

6 JUSTICE SOTOMAYOR: When I read the  
7 Petitioner's brief, and not until the reply, he  
8 seemed to be saying -- and I think that he's  
9 disavowed that now. If you disagree, let me  
10 know -- that you looked only at the defendant's  
11 tax returns basically.

12 And I think he's now disavowed that  
13 theory and admitted that you can look at the  
14 revenues of an affiliate in some circumstances,  
15 correct?

16 MR. LIN: Yes, Your Honor. I -- I  
17 read the briefs the same way. We -- and we  
18 understood them to be arguing below as well that  
19 the tax returns are what provide the measure of  
20 their profits.

21 I do think that in the reply and today  
22 my friend is -- is saying that there are  
23 circumstances where you could not only look  
24 beyond the tax returns to receipts maybe that  
25 are not -- not recorded, but also potentially to

1 the --

2 JUSTICE SOTOMAYOR: You said something  
3 earlier, was that Dewberry Group had basically  
4 taken the revenues of the affiliate. But,  
5 actually, this is a horizontal situation.  
6 Dewberry Group had no power to order the  
7 affiliates to do anything, correct?

8 MR. LIN: Yes, Your Honor. And if  
9 that's what I said, let me -- let me  
10 clarify what I meant.

11 JUSTICE SOTOMAYOR: I thought that's  
12 what you said. And that's the complication in  
13 this case, which is what Mr. Crown pointed to,  
14 that this is a horizontal situation, where it's  
15 really the owner, John Dewberry, that could  
16 order anybody to do anything, correct? And he's  
17 not a defendant here.

18 MR. LIN: I -- I don't -- I don't  
19 think that's what -- again, I don't think that's  
20 what the factual findings reflect. And if I  
21 could, Your Honor --

22 JUSTICE SOTOMAYOR: Mm-hmm.

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

1           The first is that the district court  
2 held -- and so it's not that the Dewberry Group  
3 took the revenues. What the district court held  
4 is that the district court generated all of the  
5 revenues, that the affiliates added no value,  
6 did no work, that the revenues and the gain was  
7 created by the Petitioner. And that's at  
8 Petitioner Appendix 83a, where it not only held  
9 that but rejected -- and my friend said today  
10 that there was no testing of whether the  
11 affiliates had contributed any value.

12           At Petitioner Appendix 83a, the  
13 district court rejects Petitioner's argument,  
14 and I quote, it is -- that "it is not the  
15 economic engine that creates the revenue." They  
16 had argued that that Petitioner -- that the  
17 affiliates through their ownership of the  
18 property had somehow added some value. And the  
19 district court specifically rejected that. So  
20 finding of fact number one, unchallenged, the  
21 Petitioner generated all the revenue.

22           The second is that the Petitioner  
23 controlled the allocation of the revenues.  
24 That's at 83a, where the district court says  
25 that the Petitioner was responsible for the

1 accounting and cash management, and it adopted  
2 Dewberry's expert, what -- who said in the  
3 testimony at JA 68 that Petitioner's, quote,  
4 "management determines whether, on paper,  
5 Petitioner or the affiliates show the losses or  
6 the profits."

7           So we have the finding that they drove  
8 the revenues, created the revenues. We have the  
9 finding that they controlled where the revenues  
10 are recorded.

11           And then, third, the third finding is  
12 also at 83a, that Petitioner's tax returns don't  
13 tell the whole story and that all revenues  
14 generated through Dewberry Group show up on the  
15 ownership entity's books.

16           So I think if you look at those three,  
17 what you have is, again, admittedly some unusual  
18 factual findings, but they're supported by the  
19 record and they're not challenged. Dewberry  
20 Group, the defendant, created all the revenues;  
21 Dewberry Group, the defendant, decided where  
22 they were recorded; and Dewberry Group, the  
23 defendant, had them recorded on the ownership  
24 entity's books.

25           So what you have is not the idea that

1 they are indistinguishable, the Petitioner and  
2 the affiliates. It's to the contrary. It's a  
3 recognition that they are separate entities and  
4 that only one of them drove and created the  
5 gain.

6 And the just-sum provision allows for  
7 a district court to look and say: Look, I think  
8 the net profits are inadequate. I'm going to  
9 look for the true gain. I have to do it in a  
10 way that doesn't disregard corporate  
11 separateness, and I've done that here.

12 JUSTICE JACKSON: Wouldn't the way to  
13 do that, though, is to recognize the two steps  
14 in the statute? So to the extent we're looking  
15 only at Dewberry Group, shouldn't the court have  
16 said zero, which is what they said, and then we  
17 move to the second step using the "just"  
18 provision and adjust it in the way that you're  
19 talking about?

20 MR. LIN: I -- I think it did do that.  
21 Again, I think if you look at -- if I can  
22 remember where. I think if you look at -- I  
23 think it's 83a as well. What the district court  
24 says is -- 84a -- Dewberry Group's tax returns  
25 standing alone do not tell the whole economic

1 story. I think that's step one. I think they  
2 were presented -- the district court -- I'm  
3 sorry -- the district court was presented with  
4 the -- the notion that the profits are zero  
5 based on the tax returns, and the district court  
6 said that doesn't tell the whole economic story.

7 I think that's enough of a -- of a --  
8 of a finding to support a finding of inadequacy  
9 under step one, right? You then go to the  
10 just-sum provision, and the district court says  
11 what are the true gains? And, again, I can't,  
12 right, you can't disregard corporate  
13 separateness. You can't simply say they are  
14 indistinguishable entities. But if there's  
15 evidence that the true gains are a certain  
16 amount, I can look at the financial records and  
17 determine that. And here, again, the  
18 unchallenged factual finding is that the  
19 Petitioner created all of the revenues.

20 This case might seem a little bit less  
21 unusual, to be honest, if the finding were that  
22 the Petitioner created half the revenues, right,  
23 25 percent of the revenues. Then we would have  
24 a much smaller just-sum judgment. And I don't  
25 think anybody would be saying, wow, this number



1 looks a lot like the full amount of the profits.  
2 But the reason that we have what kind of appears  
3 like an unusual is because we have unusual facts  
4 and an unusual factual finding.

5 On the just-sum provision, Justice  
6 Kagan, you had asked, you know, what does that  
7 encompass? And -- and we had understood our  
8 friends to have argued that you can't go beyond  
9 net profits, that the just-sum provision is only  
10 about, you know, a situation where we can't  
11 figure out the net profits.

12 I think I heard my friend say today  
13 that you can, that there could be a delta  
14 between net profits and gains, and that the  
15 just-sum provision could allow a court to get at  
16 that. And I think that makes -- that's the only  
17 way that the just-sum provision can be squared  
18 with its text, because the text specifically  
19 says that, if a district court finds inadequate  
20 or excessive the amount of an award of profits,  
21 it can award a sum that is just.

22 And I think, textually, what that  
23 means is the just-sum provision is about  
24 providing for an award that goes beyond profits.

25 JUSTICE GORSUCH: Mr. -- Mr. Lin --

1 JUSTICE KAGAN: I think Mr. Hungar --

2 JUSTICE GORSUCH: Sorry. Go ahead,  
3 please.

4 JUSTICE KAGAN: I think Mr. Hungar  
5 might say, well, there was an important  
6 qualification in what I said, which is that you  
7 can't do this in a way that treats the defendant  
8 just the same as these other corporate entities  
9 and that that is an important limit in this case  
10 at any rate.

11 MR. LIN: Understood. And -- and we  
12 would agree with that. We don't think that you  
13 can use the just-sum provision in a way that  
14 simply treats the entities as indistinguishable.  
15 And that is why, to answer Justice Thomas's  
16 question, we don't have to show that the  
17 just-sum provision would permit disregarding  
18 corporate separateness.

19 But, again, I think our -- our point  
20 here is that we don't think the district court,  
21 when you look at the record, in fact ignored  
22 corporate separateness in using the just-sum  
23 provision.

24 JUSTICE ALITO: All right. Could you  
25 take just a moment to address the SG's argument

1 that the -- the courts below offered no  
2 persuasive justification for awarding all of the  
3 revenues that Petitioner's affiliates received?

4 MR. LIN: Of course, Your Honor.  
5 There's two answers to that, and the first one  
6 comes back to the factual finding. The factual  
7 finding is that the Petitioner and the  
8 Petitioner alone created all of the revenues and  
9 then put those revenues on the books of the  
10 affiliates.

11 So, number one, I think the factual  
12 finding says that all of those revenues and  
13 therefore all of the profits are the true gain  
14 of the defendant.

15 The second answer is, to the extent  
16 that there is any uncertainty or a quarrel about  
17 whether some portion of that number is not  
18 attributable to the infringement or should have  
19 been reduced by costs, the burden for that,  
20 whether statutorily at what I would call step  
21 one, or equitably under the just-sum provision  
22 because of the word "just," the burden for that  
23 disentanglement falls on the defendant. That  
24 goes all the way back to the Westinghouse case,  
25 and the doctrine of trustee ex maleficio, where

1 once we have shown -- basically made a prima  
2 facie showing of what the -- what the -- the  
3 gain from the infringement is, which I think is  
4 supported by the factual finding, then the  
5 burden of disentangling, you know, anything that  
6 might -- we might not be entitled to, that falls  
7 on the trustee, right? That's the doctrine of  
8 -- of -- of accounting of profits.

9 And so -- and they -- again, as the  
10 district court and the Fourth Circuit  
11 recognized, they refused to engage with that,  
12 because they simply said we don't think any of  
13 these affiliate profits have any relevance  
14 whatsoever to what our true gain is. And so  
15 that risk falls on the defendant.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.

18 Justice Thomas, anything further?

19 JUSTICE THOMAS: Would it matter, in  
20 our consideration of whether or not the  
21 affiliate income should be counted, that the  
22 affiliate -- that this practice is typical or  
23 atypical in the real estate industry or whether  
24 the tax assessed by the -- say, the IRS reflects  
25 your thinking or that of Mr. Hungar?

1                   In other words, that the affiliates  
2                   pay separate tax or that this is a typical  
3                   practice in the real estate industry to keep the  
4                   businesses separate?

5                   MR. LIN: Your Honor, I think it --  
6                   the short answer to the question is I don't  
7                   think it should particularly matter. I think  
8                   the question here is whether -- you know, who  
9                   drove the revenues. And, I mean, you can have  
10                  separate entities where maybe the affiliates are  
11                  doing more work in a different case than in this  
12                  case.

13                  And, again, that gets back to my  
14                  explanation before about why this judgment might  
15                  look a little bit unusual, but that's because  
16                  the facts here were that this Petitioner drove  
17                  and created all of the revenues and then put  
18                  those revenues on the books of the affiliate.

19                  CHIEF JUSTICE ROBERTS: Justice Alito?  
20                  Justice Sotomayor?  
21                  Justice Kagan?  
22                  Justice Kavanaugh?  
23                  Justice Barrett?  
24                  Justice Jackson, anything further?

25                  JUSTICE JACKSON: Would -- would

1 piercing have been an option here for the court  
2 from your perspective? The SG said -- came up  
3 with a number of reasons why piercing wouldn't  
4 have resolved this issue.

5 MR. LIN: Your Honor, I think you may  
6 appreciate that I'm hesitant to commit one way  
7 or the other. I don't want to prejudge whether  
8 piercing could be shown or not. Our -- our  
9 position was that we didn't have to -- have to  
10 do it --

11 JUSTICE JACKSON: Yes. Right.

12 MR. LIN: -- and that the just-sum  
13 provision would amount for it. I think, if this  
14 were to go back and there was a contention -- if  
15 the Fourth Circuit concluded, or the district  
16 court, that the just-sum provision couldn't be  
17 used in this way, we would then address that  
18 question.

19 JUSTICE JACKSON: Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel.

22 MR. LIN: Thank you, Your Honor.

23 CHIEF JUSTICE ROBERTS: Rebuttal,  
24 Mr. Hungar?

25

1 REBUTTAL ARGUMENT OF THOMAS G. HUNGAR  
2 ON BEHALF OF THE PETITIONER

3 MR. HUNGAR: Thank you, Your Honor.

4 So, with respect to the argument that  
5 Petitioner generated the profits, as a matter of  
6 law, the fact that a corporation, through its  
7 employees, agents, or independent contractors,  
8 as here, uses other people to generate its  
9 profits does not mean that those service  
10 providers own the profits so generated.

11 This Court held precisely that even in  
12 the tax -- tax context in Commissioner against  
13 Banks at the government's urging. The argument  
14 there was that the lawyer who generated the  
15 proceeds of the lawsuit, who did all the work to  
16 make that lawsuit profitable, was -- was the  
17 owner of the income that was shared that had  
18 been assigned to him. And the Court said no,  
19 the owner of the property, the cause of action,  
20 owns the proceeds of that property, the  
21 settlement award, and the fact that the lawyer  
22 did all the work doesn't mean that he gets --  
23 that he's the owner or the recipient of the  
24 income. That's why the taxpayer, the owner of  
25 the claim, had to pay taxes on the full amount.

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

15           The problem is they didn't do that  
16 here. So that arguing about who generated the  
17 profits proves nothing, and this Court's  
18 decision in Banks and Bollinger establish  
19 precisely that.

20           So, with respect to the -- the  
21 question whether there's vehement agreement, I  
22 think you heard Respondent vehemently disagree  
23 with our position. They say that courts can do  
24 what the court of appeals did here. And, again,  
25 there is no doubt -- there is no doubt that what



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

18 That is disregard of corporate  
19 separateness, plain and simple. That is the  
20 only theory that is argued -- was argued below.  
21 It's the only theory that was accepted by the  
22 courts below. And Respondent is trying to run  
23 away from it and pretend that they don't want to  
24 treat the affiliates and Petitioner as  
25 interchangeable. That was -- those were his

1 words today. But that's precisely what they  
2 argued below and persuaded the courts below to  
3 accept, and that's precisely what this Court  
4 should reject.

5           And it should reject it not only as to  
6 the principles of equity and based on the  
7 language of the defendant's profits in the  
8 statute, but it should also reject the just-sum  
9 argument for precisely the same reasons, because  
10 "just sum" is subject to the same equitable  
11 constraints and can't impose a penalty and for  
12 precisely the same reasons therefor, and it's  
13 also subject to the Bestfoods presumption, which  
14 requires Congress to speak clearly to override  
15 corporate separateness, which it didn't do.

16           So, for all those reasons, the Court  
17 should reverse as to the rationale adopted by  
18 the court of appeals and reject the "just sum"  
19 argument that Respondent is offering in an  
20 attempt to -- to defend that illicit rationale.

21           And there's no need for a remand,  
22 again, because this is not a question of whether  
23 it was -- of not -- it's not only a question of  
24 whether it was failed -- they failed to raise  
25 any of these arguments below. They failed to

1 raise them in the brief in opposition and they  
2 failed to dispute the assertion that Petitioner  
3 had zero profits from the infringement.

4 So, as a matter of Rule 15, which this  
5 Court has a responsibility and the authority to  
6 enforce, not the court of appeals, as a matter  
7 of Rule 15, those issues are not in the case, so  
8 there's nothing to remand.

9 For all these reasons, we ask that the  
10 judgment of the court of appeals be reversed,  
11 full stop.

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel.

14 The case is submitted.

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

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