No. 23-900

IN THE
Supreme Court of the United States

DEWBERRY GROUP, INC.,

Petitioner,

v.

DEWBERRY ENGINEERS INC.,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate-disclosure statement in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

The Fourth Circuit created a circuit conflict by holding that the Lanham Act authorizes district courts to disregard corporate separateness in awarding remedies based on a free-form assessment of fairness. Pet. App. 43a-45a. Applying that holding, the court of appeals upheld an award requiring petitioner to disgorge $43 million in profits earned entirely by nonparty affiliates. That decision conflicts with the Ninth and Eleventh Circuits' precedent and flouts both the statute's text permitting recovery of only the "*defendant's* profits" and "the principles of equity" that the Act expressly incorporates. 15 U.S.C. § 1117(a) (emphasis added); see Pet. 22-32; Bray & Miller Br. 3-12.

Respondent has no persuasive answer to the circuit conflict and does not try to defend the Fourth Circuit's rationale. Instead, respondent defends a fictional ruling that the Fourth Circuit never issued. Respondent contends that the courts below invoked a statutory exception purportedly authorizing whatever monetary award a court deems "just" as a substitute for a defendant's profits. 15 U.S.C. § 1117(a); see Br. in Opp. 23-25. The lower courts' opinions refute that revisionist account. Respondent's novel theory could not rescue the judgment below because it likewise contravenes the statute and controlling precedent. And respondent's resort to the argument that petitioner somehow "waived" the existence of a circuit split defies basic preservation principles and represents a last-gasp attempt to evade this Court's resolution of the conflict.

Once respondent's smokescreen is cleared away, the conflicts with other circuits' decisions, this Court's precedents, the statute, and bedrock equitable principles are undeniable. The court of appeals' "basic methodological error threatens to destabilize litigation not only under the Lanham Act, but also under a wide variety of other federal statutes." Bray & Miller Br. 12. This Court should grant review to resolve these conflicts and reaffirm federal courts' duty to respect the foundational principle of corporate separateness.

I. RESPONDENT ABANDONS THE COURT OF APPEALS' ACTUAL RULING AND IGNORES ITS FAR-REACHING IMPLICATIONS

Respondent runs away from the Fourth Circuit's holding expressly approving an order directing petitioner to disgorge its non-party affiliates' profits. It is no mystery why respondent beats that retreat: The Fourth Circuit's actual holding contravenes the statute

and settled precedent and would upend litigation of remedies under many laws. But respondent's effort to evade review by rewriting the decision below is meritless and does nothing to diminish its harmful consequences.

A. Respondent contends that the courts below did not order petitioner to disgorge affiliates' profits but merely applied a statutory exception permitting courts to award a different amount instead of a defendant's actual profits. Br. in Opp. 23-25. That exception states that "[i]f the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case." 15 U.S.C. § 1117(a). Respondent asserts that the courts below found a $43 million award "just" in place of petitioner's (nonexistent) profits. Br. in Opp. 24-25. On that basis, respondent denies that the decision below conflicts with anything. *Id.* at 2-3, 21. But the opinions below belie that misreading.

Both courts below made clear that they were ordering profit disgorgement from petitioner and were counting affiliates' profits as petitioner's—not "adjust[ing]" petitioner's profits (Br. in Opp. 3) or imposing a substitute remedy under the just-sum exception. The district court stated that it was "treat[ing]" petitioner and its affiliates "as a single corporate entity when calculating the revenues and profits" for purposes of disgorgement, expressly elevating supposed "economic reality" over "corporate formalities." Pet. App. 83a-85a. The Fourth Circuit likewise stated that the district court "disgorge[d] profits" and "treated [petitioner] and its affiliates as a single corporate entity

for the purpose of calculating revenues." *Id.* at 39a. The majority upheld the district court's decision to "conside[r] the revenues of entities under common ownership with [petitioner]" in calculating the amount of "profit disgorgement" for petitioner as a permissible exercise of "the court's discretion" applying "'the principles of equity.'" *Id.* at 43a, 45a (citation omitted). Judge Quattlebaum's dissent echoed that understanding—but disagreed that equitable principles allow courts to "simply add the revenues from non-parties to a defendant's revenues for purposes of evaluating the defendant's profits." *Id.* at 59a.

Neither court below attempted to justify that award based on the just-sum exception. Although they recited that language when block-quoting the statute, Br. in Opp. 8, 11 (citing Pet. App. 37a, 76a), they never *applied* it to depart from a profits-disgorgement award. Respondent repeatedly cites one passage in the district court's opinion noting its authority to "adjust an award up or down." Br. in Opp. 3 (quoting Pet. App. 87a); see *id.* at 8, 10, 24, 29. But respondent ignores that the court had *already* decided to disgorge from petitioner its affiliates' profits earlier in its opinion. Pet. App. 82a-86a. The passage respondent cites addressed adjustments *to* those profits. *Id.* at 86a-91a. In any event, the Fourth Circuit relied solely and repeatedly on its "profit disgorgement" rationale. *Id.* at 38a, 41a, 44a-46a. The disagreement between the majority and dissent over the permissibility of imputing affiliates' profits to petitioner would be inexplicable if the disgorgement order rested on the just-sum exception.

Respondent's assertion (Br. in Opp. 3) that the courts below nevertheless silently relied on the just-sum exception as authority to "adjust" the award from

$0 to $43 million is still more implausible because the Fourth Circuit has rejected such a broad reading of the exception (in a decision the majority cited, Pet. App. 47a). The court of appeals has read the exception to confer "limited discretion to increase the award only when and to the extent it deems the award to be inadequate to compensate the plaintiff for the defendant's profits" and invalidated massive monetary awards that dwarf a defendant's actual profits. *Georgia-Pacific Consumer Products LP* v. *von Drehle Corp.*, 781 F.3d 710, 718-719 (4th Cir. 2015).

B. Litigants and lower courts will read the Fourth Circuit's decision here to mean what it says: that "the principles of equity" allow courts "to dispense with corporate formalities based on a case-specific weighing of the equities." Bray & Miller Br. 8. That "basic methodological error" has profound consequences for the many laws that, like the Lanham Act, "authorize equitable relief" subject to equitable limitations. *Id.* at 12. In the intellectual-property context, the Lanham Act, Copyright Act, and Patent Act authorize various remedies subject or according to "the principles of equity." 15 U.S.C. §§ 1116(a), 1125(c)(1) (trademarks); 17 U.S.C. §§ 1322(a), 1401(f)(4) (copyrights); 35 U.S.C. § 283 (patents). Other similar provisions dot the U.S. Code in many areas, such as employee benefits, age and disability discrimination, and data privacy. Bray & Miller Br. 14-15 & n.3.

If the decision below stands, it will become the go-to citation for plaintiffs (whether private parties or federal agencies) litigating under such statutes who sue only one corporate defendant—and either are unable to satisfy or prefer to bypass veil-piercing principles—but seek affiliates' profits.

II. THE DECISION BELOW CREATES A CONFLICT

When respondent's disguise of the decision below is stripped away, the circuit conflict remains clear. The Fourth Circuit's actual holding "unsurprisingly conflicts with the precedent of two other circuits that have properly applied traditional veil-piercing doctrine to claims under the Lanham Act." Bray & Miller Br. 8. The Fourth Circuit reads the Lanham Act to authorize freewheeling departures from the presumption of corporate separateness. Pet. App. 43a-45a. The Ninth and Eleventh Circuits reject that view. *Edmondson* v. *Velvet Lifestyles, LLC*, 43 F.4th 1153, 1162 (11th Cir. 2022); *U-Haul International, Inc.* v. *Jartran, Inc.*, 793 F.2d 1034, 1043 (9th Cir. 1986). Respondent never denies that those courts hold that the traditional presumption of corporate separateness limits courts' authority under the Lanham Act and have reversed awards that disregarded that presumption absent veil-piercing.

Trying to distract from that circuit split on the legal standard based on the cases' facts, respondent asserts that *U-Haul* and *Edmondson* concerned imposition of liability for affiliates' acts, not enhancement of liability based on affiliates' profits. Br. in Opp. 13-18. The orders in those cases, respondent argues, required only "non-violators to pay for [the] conduct of the violator" and did not require a violator to pay out profits accruing to non-violators. *Id.* at 13. But that purported distinction is empty because whether a court may do *either* of those things turns on the same principle of corporate separateness.

In *Edmondson*, *U-Haul*, and this case alike, the fundamental question is whether courts may set aside

corporate separateness "based on a case-specific weighing of the equities" absent veil-piercing. Bray & Miller Br. 8. If the answer is "no," neither imposing liability on non-violators for an affiliate's acts nor enhancing a violator's liability based on an affiliate's profits is permissible. Holding a defendant liable for either an affiliate's acts or an affiliate's profits violates the same core principle that "the corporate veil" protects those who "do business in the corporate form." *Edmondson*, 43 F.4th at 1162 (citation omitted); accord *U-Haul International*, 793 F.2d at 1043.

That follows from first principles. "The properties of two corporations are distinct," and one corporation "does not own or have legal title" to an affiliate's assets. *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 475 (2003) (citation omitted). As a result, "related corporations * * * ordinarily are not subject to corporate liabilities" imposed on a distinct corporation. *Laborers' Pension Fund* v. *Lay-Com, Inc.*, 580 F.3d 602, 610 (7th Cir. 2009). The presumption of corporate separateness thus erects a wall. Unless a recognized exception to corporate separateness applies, any attempt to breach that barrier in *either* direction—by holding one entity responsible for acts or profits of another—is improper.

Tellingly, even respondent concedes that it would need "to pierce the corporate veil or otherwise overcome corporate separateness" to *enforce* the judgment below against the profits received by petitioner's nonparty affiliates. Br. in Opp. 17. That concession demolishes respondent's effort to distinguish the other circuits' decisions. If petitioner's affiliates are not interchangeable with petitioner for purposes of enforcing the judgment, the same must be true for purposes of *imposing* the judgment in the first place. The same

corporate-separateness principle applies at both stages of the proceeding. Compare, *e.g.*, *Edmondson*, 43 F.4th at 1162, with *Maiz* v. *Virani*, 311 F.3d 334, 345 (5th Cir. 2002) (turnover of assets impermissible where "appellants had never been found to be the alter egos of [defendant] through a 'piercing the veil' judicial process"), and *Skidmore, Owings & Merrill* v. *Canada Life Assurance Co.*, 907 F.2d 1026, 1028 (10th Cir. 1990) (per curiam) (rejecting judgment-enforcement action where plaintiff failed to "pierc[e] the corporate veil"). Respondent is left with no coherent basis to reconcile the circuit conflict.

III. THE DECISION BELOW IS WRONG

A. Respondent never defends the Fourth Circuit's rationale. It admits that "the decision below ordered disgorgement of more than just 'defendant's profits'" (here, $0). Br. in Opp. 27 (quoting 15 U.S.C. § 1117(a)). Nor does it deny that "the principles of equity" the Lanham Act incorporates, 15 U.S.C. § 1117(a), generally forbid disgorgement that sweeps across "multiple wrongdoers under a joint-and-several liability theory." *Liu* v. *SEC*, 591 U.S. 71, 82-83 (2020); see Br. in Opp. 20-21.

Instead, respondent argues that corporate separateness limits courts only at the *liability* stage—not the *remedial* stage. Br. in Opp. 19. But that distinction finds no support in this Court's decisions. For example, veil-piercing principles govern courts' discretion to shape injunctive relief. *NLRB* v. *Deena Artware, Inc.*, 361 U.S. 398, 402-403 (1960). This Court also has distinguished a defendant's profits "from salaries of officers in a corporation" in calculating disgorgement awards. *Liu*, 591 U.S. at 84. And *United*

States v. *Bestfoods*, 524 U.S. 51 (1998), would have been a Pyrrhic victory for corporate separateness if a court—barred from holding a corporation liable for affiliates' cleanup costs—could wave a magic wand at the remedial stage and order the corporation to pay damages equal to those same costs.

B. Respondent's alternative argument based on Section 1117(a)'s just-sum exception was not the basis of the decision below and cannot support that judgment in any event.

1. The Lanham Act's reference to "just" relief reaffirms rather than displaces the traditional "principles of equity" (15 U.S.C. § 1117(a)) that govern the entire provision. Under those traditional principles, courts may award an amount other than actual profits if needed to compensate a plaintiff for its harms or if the defendant has made determining profits difficult. See, *e.g.*, *Eastman Kodak Co. of New York* v. *Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927). But as courts (including the Fourth Circuit) recognize, the exception is not carte blanche to replace a profits award with any sum disconnected from profits that a court happens to pick. *E.g.*, *Georgia-Pacific*, 781 F.3d at 718-719 (collecting cases). It certainly does not cut Lanham Act remedies loose from equitable principles and empower courts to fashion a novel remedy from whole cloth that overrides well-settled limitations (like corporate separateness).

This Court previously rejected an attempt to invent new remedies under Section 1117(a)'s just-sum exception. In *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714 (1967), the Court held that courts could not award attorney's fees under that

exception because "Congress meticulously detailed the remedies" for Lanham Act plaintiffs. *Id.* at 719. Justice Stewart, in language respondent echoes, dissented on the theory that the just-sum provision granted district courts broad discretion to "consider the 'circumstances of the case' to arrive at the amount of the judgment for the plaintiff." *Id.* at 722. The lesson of *Fleischmann* is that Section 1117(a)'s just-sum exception does not authorize novel remedies that measure neither the defendant's profits nor the plaintiff's actual damages.

This Court similarly interpreted a parallel provision of the patent laws to retain traditional limitations on profits-disgorgement awards for patent infringement. Even though the Patent Act of 1870 authorized courts to "increase" such awards, ch. 230, § 55, 16 Stat. 206, the Court reaffirmed the principle "'that, if an infringer of a patent has realized no profit from the use of the invention, he cannot be called upon to respond for profits,'" *Root* v. *Railway Co.*, 105 U.S. 189, 202 (1882) (quoting *Elizabeth* v. *Pavement Co.*, 97 U.S. 126, 138 (1877)). A profits-disgorgement award, *Root* held, could be "increase[d]" solely when "the profits found to have been received are insufficient to compensate" for the plaintiff's "actual damages." *Id.* at 212. Respondent has never argued that ordering petitioner to pay an amount equal to its affiliates' profits approximates respondent's actual damages.

2. Properly construed, Section 1117(a)'s just-sum exception does not remotely support the award here. It merely authorizes a modest "adjustment" to a profits award "where the recovery would be otherwise unjust." *Thompson* v. *Haynes*, 305 F.3d 1369, 1380 (Fed. Cir. 2002). It does not permit drastically inflating a

profits award far above actual profits proved—such as a treble-profits award. See *ibid.* The exception cannot plausibly be read to authorize "adjusting" a profits award (Br. in Opp. 25) from $0 to *$43 million*. Labeling that increase an "adjustment" (Br. in Opp. 3, 9, 25, 27, 29) "might be good English * * * but only because there is a figure of speech called understatement and a literary device known as sarcasm." *MCI Telecommunications Corp.* v. *AT&T Co.*, 512 U.S. 218, 228 (1994) (addressing "modify"); cf. *Biden* v. *Nebraska*, 600 U.S. 477, 496 (2023) (student-loan "plan 'modified' the cited provisions only in the same sense that 'the French Revolution "modified" the status of the French nobility'—it has abolished them and supplanted them with a new regime entirely" (citation omitted)).

The Lanham Act's next sentence further refutes respondent's misreading: A profits-disgorgement award or a just-sum award "shall constitute compensation and not a penalty." 15 U.S.C. § 1117(a). But respondent does not attempt to show—as its own authorities require—that the award of affiliates' profits here compensated respondent for its harms and avoided punishing petitioner. *E.g.*, *Max Rack, Inc.* v. *Core Health & Fitness, LLC*, 40 F.4th 454, 473 (6th Cir. 2022). It made no effort to prove actual damages below. See Pet. App. 79a. And ordering a defendant to disgorge "benefits that accrue to [the defendant's] affiliates" could—and here plainly did—"transform any equitable profits-focused remedy into a penalty." *Liu*, 591 U.S. at 90.

Respondent's rejoinder that the award is not a penalty because the affiliates' profits "approximate [petitioner's] 'true profits'" (Br. in Opp. 27) begs the question presented: *whether*, absent veil-piercing, the

affiliates' profits can fairly be treated as a defendant's. Pet. i. The answer is "no." Pet. 25-30; Bray & Miller Br. 8-12. Respondent cannot evade review by assuming its preferred answer to the question presented.

IV. THIS PETITION IS AN IDEAL VEHICLE

Respondent's last-ditch vehicle objections are makeweights. It perplexingly asserts (Br. in Opp. 12-13) that petitioner somehow "waive[d]" the *circuit conflict* by not citing other circuits' decisions below. But this Court has never required that parties preemptively preserve points concerning certworthiness; indeed, circuit splits often do not arise until the decision at issue is rendered. Parties must preserve "claim[s]," not "precise arguments" supporting them. *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995) (citation omitted). Respondent does not dispute that the question presented was "pressed or passed upon below," *United States* v. *Williams*, 504 U.S. 36, 41 (1992): The court of appeals squarely addressed that question (over a dissent). Pet. App. 43a-45a. Petitioner had no obligation to argue below reasons why an adverse ruling would warrant this Court's review.

Respondent's contention (Br. in Opp. 31-32) that petitioner's $0 in profits makes this case a *poor* vehicle to decide the question presented is backwards. Because the *only* profits were earned by petitioner's affiliates, the only possible basis for a profits-disgorgement award is the one the Fourth Circuit erroneously adopted: imputing those affiliates' profits to petitioner. That makes this case the perfect vehicle for cleanly reviewing that misguided approach.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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