No. 23-900

IN THE

Supreme Court of the United States

DEWBERRY GROUP, INC.,

Petitioner,

v.

DEWBERRY ENGINEERS INC.,

Respondent.

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

REPLY BRIEF FOR PETITIONER

PATRICK J. FUSTER
MATT AIDAN GETZ
GIBSON, DUNN &
CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071

HELGI C. WALKER
Counsel of Record
THOMAS G. HUNGAR
JONATHAN C. BOND
M. CHRISTIAN TALLEY
GIBSON, DUNN & CRUTCHER LLP
1700 M Street, N.W.
Washington, D.C. 20036
(202) 955-8500
HWalker@gibsondunn.com

Counsel for Petitioner

RULE 29.6 STATEMENT

The corporate-disclosure statement in the brief for petitioner remains accurate.

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REPLY BRIEF FOR PETITIONER

Respondent does not defend the lower courts' conclusion that the Lanham Act empowers courts to award as the "*defendant's* profits" income received only by *other*, legally distinct entities that were never parties to the litigation. 15 U.S.C. § 1117(a) (emphasis added). Respondent does not dispute that, under this Court's precedent, federal statutes respect corporate separateness absent a direct statement in the statutory text allowing disregard of the corporate form. And respondent does not argue that the Lanham Act's language subjecting disgorgement awards to "the principles of equity," *ibid.*, or any other statutory provision supplies such a direct statement.

Those uncontested points require reversal on the question presented and should end the case.

Respondent nonetheless tries to dodge the question on which this Court granted review by reprising (Br. 39) its petition-stage assertion that the lower courts here actually respected corporate separateness and merely treated "affiliates' profits as evidence of petitioner's true financial gain." But respondent itself implored both courts below to ignore the corporate form by considering petitioner and its affiliates to be one "collective economic enterprise." J.A. 322, 325. Those courts obliged, treating petitioner and its affiliates "as a single corporate entity" for purposes of calculating revenues and profits. Pet. App. 39a, 85a. Corporate separateness should not be honored in the breach. And respondent's refusal to defend the ruling it invited calls for reversal—not dismissing the writ or remanding for a do-over.

Respondent's revisionist view fails on the merits in any event. Respondent stakes its case on an ancillary provision permitting courts to award a "just" "sum" if the defendant's profits prove "inadequate or excessive." 15 U.S.C. § 1117(a). It construes that just-sum proviso to mean that, even if the only defendant received zero profits (as here), a court may nevertheless treat the defendant's non-party affiliates' profits as the defendant's "true financial gain." Resp. Br. 33-35. The problem with respondent's semantic shell game is glaring: A court cannot transform the profits of those separate corporations into petitioner's own "gain" (*ibid.*) without disregarding the corporate veil and treating petitioner and its affiliates as one and the same.

Respondent dismisses as coincidence the fact that its reading of the just-sum provision "yields the same result that a court would (or could) reach by disregarding corporate separateness." Br. 37. But it is hardly happenstance. Respondent's position produces precisely the same *effect* as ignoring corporate boundaries because that is what it *is*: impermissible veil-piercing by another name. Treating one corporate entity's gains as those of another, separate entity without meeting the demanding standard for piercing the corporate veil is paradigmatic disregard of the corporate form. Because the Lanham Act does not displace the well-settled presumption of corporate separateness, this Court should reverse the disgorgement award.

ARGUMENT

I. THE LANHAM ACT DOES NOT PERMIT COURTS TO ORDER A DEFENDANT TO DISGORGE THE PROFITS OF NON-PARTY CORPORATE AFFILIATES ABSENT VEIL-PIERCING

Respondent does not dispute that, under *United States* v. *Bestfoods*, 524 U.S. 51 (1998), the Lanham Act cannot be read to override corporate separateness unless the statute's text "speak[s] directly" to that question. *Id.* at 63 (citation omitted). Nor does respondent contend that anything in the Lanham Act's language clears that high bar. That is the ballgame: The courts below ordered petitioner to disgorge profits received solely by its affiliates because those courts (at respondent's urging) treated petitioner and its affiliates as "a single corporate entity"—while disclaiming reliance on veil-piercing. Pet. App. 39a, 43a, 85a. That remedy runs roughshod over corporate boundaries and cannot be squared with *Bestfoods*. This Court should therefore reject respondent's attempt (Br. 1) to

distort both the statute and the judgment below so as to shoehorn that same impermissible remedy into Section 1117(a)'s just-sum provision.

A. The Judgment Awarding Affiliates' Profits Cannot Be Sustained As An Award Of "Defendant's Profits"

1. Respondent makes no effort to square the award of affiliates' profits here with the Lanham Act's provision authorizing a plaintiff to recover the "defendant's profits." 15 U.S.C. § 1117(a). It does not dispute that the plain meaning of "defendant's profits," buttressed by the *expressio unius* canon, excludes the profits of the defendant's affiliates. Pet. Br. 21-22; see International Trademark Ass'n Br. 8-9. Nor does respondent deny that petitioner was the only defendant or that its affiliates were never parties and were never found liable. So the only "defendan[t]" whose "profits" (15 U.S.C. § 1117(a)) were relevant was petitioner—and it had none to disgorge. Pet. Br. 24.

Under *Bestfoods*, respondent could not recover petitioner's *affiliates'* profits without piercing the corporate veil. But respondent admits that it never did so, and instead "disclaim[ed] the need" for veil piercing in this case. Br. 52 n.8 (emphasis omitted); see J.A. 67. Respondent accordingly has never asserted (much less substantiated) any claim that the affiliates were petitioner "under another name." *Rubber Co.* v. *Goodyear*, 76 U.S. (9 Wall.) 788, 802 (1870); see Pet. Br. 10. It therefore could not seek (and the courts below could not order) disgorgement of non-party affiliates' profits as an award of "defendant's profits." 15 U.S.C. § 1117(a).

Respondent also does not defend the Fourth Circuit's workaround: that the Act's reference to "'the principles of equity'" permitted the district court "to hold [petitioner] to account for the revenues" of its affiliates. Pet. App. 45a (quoting 15 U.S.C. § 1117(a)). Indeed, respondent accepts multiple equitable principles that foreclose the award here. It implicitly acknowledges (Br. 36-37) that equity follows the law—and so does not displace the background common-law rule of corporate separateness. Respondent agrees (Br. 31) that disgorgement of profits generally is limited to a defendant's *own* "net profits" from infringement. And it concedes (Br. 5) that "equity forbade" the imposition of penalties that exceed the defendant's actual gains. The decision below thus violated undisputed principles of equity three times over by upholding an award that ignores the corporate form, requires petitioner to disgorge $43 million in affiliates' profits despite its own net losses, and impermissibly penalizes petitioner. Pet. Br. 31-36.

2. Falling back, respondent (Br. 29) and the government (Br. 23-24) retort that the Lanham Act does not deem a defendant's own records of its profits dispositive. But that is a red herring. Regardless of whether or how a defendant records on its books or tax returns the revenues it actually received, the Lanham Act authorizes disgorgement of such revenues. Cf. *American Rice, Inc.* v. *Producers Rice Mill, Inc.*, 518 F.3d 321, 339-340 (5th Cir. 2008). But respondent never argued, let alone proved, that petitioner received its affiliates' revenues yet failed to record them. See Pet. App. 60a (Quattlebaum, J., dissenting). To the contrary, respondent does not dispute that tenants paid rents only to petitioner's affiliates—the

property owners legally entitled to those rents—not to petitioner, which merely supported the owners with accounting and other services. Pet. Br. 8, 24; see J.A. 71-74, 84-87.

By the same token, the government's speculation (Br. 18-19) that petitioner's affiliates "might" have funneled some portion of their profits to petitioner "indirect[ly]" through the companies' common owner is just that: speculation. Respondent never alleged or established that petitioner ultimately received a share of the profits under the table through triangle-trade transactions, let alone that any such hypothetical amount bore even the slightest relationship to the $43 million award. Rank conjecture cannot sustain the judgment.

The government (but not respondent) advances a still more attenuated theory that "profits" should be read loosely as "any 'advantage or benefit.'" Br. 22 (citation omitted). But the Lanham Act does not use the term "profits" in the abstract. Instead, it authorizes *disgorgement* of profits "subject to the principles of equity." 15 U.S.C. § 1117(a). The measure of disgorgement at equity was the defendant's own net profits from the infringement—as distinct from affiliates' profits. See *Liu* v. *SEC*, 591 U.S. 71, 82-83 (2020); Washington Legal Foundation Br. 11-16. Congress also specified precisely *how* courts calculate net profits: first, by calculating the "*defendant's* sales"; and second, by subtracting "elements of cost or deduction." 15 U.S.C. § 1117(a) (emphasis added). The profits that the Lanham Act aims to disgorge are thus the net financial gains *the defendant* obtained from *its* sales of infringing items—not a more nebulous array of "advantages" the defendant derives. The government

itself ultimately agrees, acknowledging that the award of "'defendant's profits'" in this case wrongly swept in "nonparty affiliates' gain." Br. 29 (citation omitted).

3. Rather than defend the court of appeals' reasoning, respondent resurfaces a vehicle objection that it raised unsuccessfully at the petition stage. Respondent contends (Br. 40-41) that the courts below bypassed an award of "defendant's profits" because they found the "amount of the recovery based on profits" to be "inadequate." 15 U.S.C. § 1117(a). But that is not what either court did. Cert. Reply Br. 3-5.

Both courts below candidly acknowledged that they were eliding corporate boundaries by treating petitioner and its affiliates as interchangeable when measuring profits. The district court left no doubt that it was discarding "corporate formalities" in favor of a supposed "economic reality" of "combined" profits under which petitioner and its affiliates would "be treated as a single corporate entity." Pet. App. 82a-83a, 85a. The Fourth Circuit then approved that approach, holding that the district court properly treated petitioner and its affiliates as "a single corporate entity for the purpose of calculating revenues." *Id.* at 39a; see *id.* at 43a. The court of appeals asserted that Section 1117(a)'s "principles of equity" language permitted that result. *Id.* at 45a. The government agrees that the courts below misinterpreted the provision allowing awards of "defendant's profits." See U.S. Br. 29-31. As it explains, both courts "award[ed], as 'defendant's profits,' all of the revenues that petitioner's affiliates received"—and erred in doing so. *Id.* at 29 (citation and emphasis omitted).

Respondent thus stands alone in its unfounded belief that the decision below did not address the question presented concerning the proper scope of an award of "defendant's profits." Respondent's renewed suggestion (Br. 39) that this Court forgo review on that basis is unserious.

* * *

Respondent fails to show that the decision below is even consistent with the Lanham Act's relevant text—let alone directly authorized, as *Bestfoods* requires. Reversal is warranted for that reason alone.

B. The Judgment Cannot Be Sustained As A "Just" Sum Equal To Affiliates' Profits

Respondent fares no better in arguing (Br. 40-50) that Section 1117(a)'s just-sum language supplies an alternative basis to affirm. Respondent's principal submission now is that the just-sum provision empowered the courts here to order petitioner to disgorge its affiliates' profits because those profits represented petitioner's "true financial gain." *E.g.*, Br. 40. As applied here, that catchphrase—which respondent incants more than 50 times even though it appears nowhere in the statute—is merely disregard of corporate separateness by another name. Nothing in the just-sum provision's text, structure, or history supports such a departure from the background corporate-separateness principle. Adopting respondent's position would put the just-sum provision at odds with this Court's cases, centuries of equity practice, and Section 1117 itself. And it would invite standardless awards that defendants could not reasonably anticipate—despite a statutory scheme that already addresses every policy concern respondent identifies.

1. Respondent's merits brief confirms that its novel true-financial-gain theory requires disregarding the corporate form. Whatever other circumstances may support an award of a "just" sum, respondent advances only one theory: that an award of only petitioner's own "profits" would have been "inadequate," 15 U.S.C. § 1117(a), because it would not reflect petitioner's "true financial gain" absent inclusion of affiliates' profits. Br. 24 & n.4. Yet respondent insists (Br. 2) that ordering petitioner to disgorge its affiliates' profits as a "just sum" does not entail "abandon[ing] corporate separateness."

That is doublespeak. The $43 million in profits the courts below ordered disgorged were received solely by petitioner's legally distinct affiliates. Pet. Br. 24. As even the court of appeals "recognize[d]," petitioner "never held any direct profits from its affiliates' uses of the infringing materials." Pet. App. 44a. Petitioner also was never due to receive the revenues under the tenants' leases with the affiliates. See pp. 5-6, *supra*. As a result, petitioner "d[id] not own or have legal title to" those profits, *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 475 (2003), and it thus "cannot be called upon to respond for" them, *Elizabeth* v. *Pavement Co.*, 97 U.S. 126, 138 (1878).

That is why respondent's just-sum theory amounts to "junior-varsity" veil piercing. Pet. Br. 45. As even respondent admits, its theory produces precisely the same result as "disregard of corporate separateness." Resp. Br. 36. But it does so without requiring respondent to carry its heavy burden of proving that corporate distinctions can be ignored under alter-ego or other legitimate veil-piercing doctrines. That is veil-piercing without supporting evidence, circumventing the

"bedrock principle" of corporate separateness. *Bestfoods*, 524 U.S. at 62.

Respondent's refrain (*e.g.*, Br. 3, 18, 38) that profits of a defendant's affiliates can be "relevant evidence" of the defendant's own gains fails for similar reasons. The affiliates' earnings could be relevant only to the extent they reveal what "ha[d] been actually received *by the defendant*," since "'the infringer is liable for actual, not for possible gains.'" *Coupe* v. *Royer*, 155 U.S. 565, 583 (1895) (emphasis added; citation omitted). But not once during the three-day damages trial did respondent introduce any evidence that petitioner pocketed (or even had a legal right to) a penny of the affiliates' revenues or profits.

Respondent's relevant-evidence narrative also bears no relationship to the decision below. The district court did not consider the affiliates' gains as "evidence" of petitioner's profits (Resp. Br. 38) and then find that, by pure chance, petitioner's own financial gain (*mirabile dictu*) equaled its affiliates' earnings. Any such ruling would have been nonsensical, because the affiliates' earnings arose from rents paid by tenants occupying *properties owned by and leased from the affiliates*, not petitioner. J.A. 71-74, 84-87. Rather, the court ordered petitioner to pay its affiliates' profits to respondent because the court believed it could treat the companies "as a single corporate entity." Pet. App. 85a. As the government recognizes, respondent's theory that petitioner's true financial gain was $43 million cannot be explained unless one abandons "respec[t] [for] corporate separateness" and follows the lower courts' lead of treating petitioner and the affiliates "'as a single corporate entity.'" U.S. Br. 29-30 (citation omitted).

Although respondent disclaims "reading [the just-sum] provision to require or authorize 'courts to abandon corporate separateness,'" Br. 39 (citation omitted), in reality that is exactly what respondent asks this Court to do. The *Bestfoods* presumption "would be a craven watchdog indeed if it retreated to its kennel" whenever a court wished to treat profits of a company and its affiliates as interchangeable. *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247, 266 (2010).

2. Because applying respondent's true-financial-gain theory to reach the profits of petitioner's affiliates disregards corporate separateness, respondent must show that the just-sum provision overcomes the *Bestfoods* presumption. Pet. Br. 37. Respondent cannot do so—and never even tries. The text, structure, and history of the just-sum provision show that it does not authorize courts to ignore the corporate form.

a. Section 1117(a)'s text supplies no hook for respondent's theory, let alone a clear statement. As this Court recently explained, a statute's reference to "just" relief reinforces rather than replaces "traditional equitable principles" limiting available remedies. *Starbucks Corp.* v. *McKinney*, 602 U.S. 339, 347 (2024). An award of a "just" sum is therefore subject to all the same equitable limitations that generally confine awards of defendant's profits. Pet. Br. 31-35, 37. Respondent never addresses *Starbucks* or the limiting effect of Congress's use of the word "just."

Respondent also never grapples with limits on the court's "discretion" to award a "just" sum. 15 U.S.C. § 1117(a). Respondent conceives of discretion as carte blanche to award whatever "fact-specific" amount courts deem appropriate. Br. 32-33. But "through

[the] centuries," "the channel of discretion" to award just relief "has narrowed," *Halo Electronics, Inc.* v. *Pulse Electronics, Inc.*, 579 U.S. 93, 104 (2016) (brackets and citation omitted), as *Starbucks* underscores, see 602 U.S. at 347-348. And allowing courts to discard corporate separateness and disgorge profits the defendant never received would endorse a rule "not of flexibility but of omnipotence." *Grupo Mexicano de Desarrollo S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 322 (1999). Because courts never have discretion to ignore the law, Section 1117(a)'s reference to "discretion" cannot override the *Bestfoods* presumption.

Respondent curiously seeks refuge (Br. 30-31) in the Lanham Act's statement that any award "shall constitute compensation and not a penalty." 15 U.S.C. § 1117(a). That statement confirms that the statute does *not* authorize ignoring corporate boundaries, because it forbids awards that would constitute a penalty. Pet. Br. 17, 40, 46-47. As the Fourth Circuit and now the government agree, the not-a-penalty phrase does not empower courts to impose awards that amount to penalties; rather, it bars such awards. See *Georgia-Pacific Consumer Products LP* v. *von Drehle Corp.*, 781 F.3d 710, 718 (4th Cir. 2015); U.S. Br. 34. Respondent ultimately admits (Br. 32) that other courts of appeals have rejected its inverted reading and cites none that has accepted it.

The old soil of the "not a penalty" language does not support respondent's position either. As respondent acknowledges (Br. 31), Congress borrowed and adapted the just-sum provision and not-a-penalty clause from the copyright laws. This Court had held that allowance for a just sum of statutory damages "provides for the recovery of neither a penalty nor a

forfeiture," but instead approximates compensation given "the inherent difficulty of always proving by satisfactory evidence" the exact "amount" of actual damages a defendant "sustained." *Brady* v. *Daly*, 175 U.S. 148, 155, 157 (1899). Ten years later, Congress reauthorized a "just" sum within specified monetary ranges in place of an award of actual damages or profits, this time with the proviso that the award "shall not be regarded as a penalty." Act of Mar. 4, 1909, ch. 320, § 25(b), 35 Stat. 1081. That language codified *Brady*'s holding that copyright's just-sum provision avoids limitations on penal laws because its "chief purpose" is compensation rather than "punishment." 175 U.S. at 157.

Respondent turns that history on its head. It points (Br. 31) to this Court's later statement that the not-a-penalty "phraseology" entered the Copyright Act of 1909 "to avoid the strictness of construction incident to a law imposing penalties." *Douglas* v. *Cunningham*, 294 U.S. 207, 209 (1935). True, but not because Congress aimed to authorize penalties while jettisoning limitations on their imposition. *Douglas* itself fills the blank in respondent's brief: Copyright's just-sum provision allowed "some recompense for injury" when "the rules of law render[ed] difficult or impossible proof of damages or discovery of profits." *Ibid.*; see Pet. Br. 38-39. In other words, the copyright statute avoided restrictions on penal laws not by overriding the prohibition against penalties but by authorizing relief that "compensat[es] a victim for his loss" in the face of proof problems. *Kokesh* v. *SEC*, 581 U.S. 455, 462 (2017).

Respondent points to no evidence that Congress, in adopting similar not-a-penalty language in the

Lanham Act, intended to reorient trademark remedies from compensation toward punishment. In fact, the legislative record reflects what this Court had said in *Brady* and *Douglas*: that the just-sum provision was "simply a recognition of the problems of proof facing plaintiffs." *Getty Petroleum Corp.* v. *Bartco Petroleum Corp.*, 858 F.2d 103, 111 (2d Cir. 1988). And although respondent invokes the Lanham Act's "principal drafter, Edward Rogers," Br. 8, it neglects to mention that Rogers explained that the not-a-penalty clause *constrains* the just-sum provision: If a sum awarded in the court's discretion "exceed[ed] the total amount of the defendant's sales," the result would be "a penalty there, and you do not want to do [that]," *Trade-Marks: Hearings on H.R. 102, H.R. 5461, and S. 895 Before the Subcomm. on Trade-Marks of the H. Comm. on Patents*, 77th Cong., 1st Sess. 205 (1941).

At a minimum, the not-a-penalty clause does not overcome the *Bestfoods* presumption that statutes respect corporate separateness. The statutory text contains no "direc[t]" instruction to that effect. 524 U.S. at 63 (citation omitted). Nor is there any "clear command" to abandon equity's limits on profits-based awards. *Starbucks*, 602 U.S. at 346. Here, those limits include a wall of precedent recognizing that courts may disgorge profits only as a "measure of compensation," *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 259 (1916), and that ordering a defendant to disgorge profits that its affiliates received would constitute "a penalty," *Liu*, 591 U.S. at 82-83. Even if respondent were correct (Br. 31) that Congress adopted the not-a-penalty clause to mollify judicial reluctance to award treble damages, nothing in its

language authorizes collective calculation of profits across corporate affiliates. Pet. Br. 40.

The not-a-penalty clause thus operates as a "limiting instruction," not a license to punish. James M. Koelemay, Jr., *Monetary Relief for Trade-Mark Infringement Under the Lanham Act*, 72 Trademark Reporter 458, 460 (1983). It does not authorize punitive awards, much less ones that discard corporate separateness.

b. Respondent's true-financial-gain gloss on the just-sum provision is also irreconcilable with the statutory structure. The Lanham Act's reticulated framework specifies the remedies courts can award. Pet. Br. 40-41. Courts first consider the "*defendant's* profits" and then move through a formalized burden-shifting framework involving proof of "*defendant's* sales." 15 U.S.C. § 1117(a) (emphases added). That detailed framework comports with centuries of equity practice. Pet. Br. 32-34. In the rare instances in which Congress wanted to enable courts to depart from such background principles, it said so expressly—as when it amended the Act to allow courts to award attorneys' fees in "exceptional" cases. Act of Jan. 2, 1975, Pub. L. No. 93-600, § 3, 88 Stat. 1955.

As respondent would have it, that detailed framework is merely an optional "step-one assessment" before a court can proceed to award whatever sum it deems "supported by the record." Br. 32, 41. But construing the just-sum provision as an all-powerful override that empowers district courts to disregard traditional equitable and legal constraints on their remedial authority is simply not a permissible reading of the statutory text. Such a "fundamental" change is too

weighty to ascribe to "vague terms or ancillary provisions." *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001); see, *e.g.*, *Helsinn Healthcare S.A.* v. *Teva Pharmaceuticals USA, Inc.*, 586 U.S. 123, 131 (2019). It would set the Lanham Act at odds with itself if the very "principles of equity" that the statute incorporates were the thing that made an amount of profits "inadequate." 15 U.S.C. § 1117(a); see Pet. Br. 44.

The government correctly rejects respondent's view. As it explains, given Section 1117(a)'s detailed language, it would be "anomalous" to read the just-sum provision "as authorizing a court to dispense entirely with the estimation of a defendant's gain; to invent an award the court deems appropriate; or to issue an award based on different criteria entirely." U.S. Br. 33. Giving courts that sort of "unbounded discretion" would "render superfluous the statutory language that governs the calculation of profits." *Id.* at 33-34.

This Court has rejected that unbounded view, too. In *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714 (1967), the Lanham Act's "meticulously detailed" remedies, including the provision allowing "compensatory recovery measured by the profits that accrued to the defendant by virtue of his infringement," foreclosed reading the Act to "implicit[ly]" authorize courts to award traditionally unavailable remedies (there, attorneys' fees). *Id.* at 717-720. The Court rejected an argument, like respondent's here, that the just-sum provision permitted attorneys' fees to be awarded whenever the court deemed them appropriate under "the 'circumstances of the case.'" *Id.* at 722-723 (Stewart, J., dissenting).

Respondent downplays *Fleischmann* as addressing whether courts may craft remedies not "listed in the statute," whereas "[a] just sum *is* among" the remedies enumerated. Br. 38-39. But the same argument was made in *Fleischmann* that the just-sum provision authorized courts to award relief that they traditionally could not under settled principles. 386 U.S. at 722-723 (Stewart, J., dissenting). The only difference is the particular background rule a plaintiff seeks to override: in *Fleischmann*, the American rule that parties bear their own attorneys' fees; and here, the *Bestfoods* presumption that federal statutes respect corporate separateness. *Fleischmann*'s logic remains unrebutted.

3. Respondent's view of the just-sum provision would give courts unbridled authority to disrupt the finely tuned statutory scheme. Pet. Br. 41-44. At the petition stage, respondent endorsed the view that the just-sum provision authorizes "[u]nlimited enhancement" of profits-based awards. Br. in Opp. 23 (citation omitted); see *id.* at 24-25, 27, 29. Respondent now disavows that description, insisting that a court's authority under the just-sum provision is "not 'unlimited'" after all. Resp. Br. 32 (quoting Pet. Br. 39, in turn quoting Br. in Opp. 23). But respondent's effort to show that its reading places "real limits" on just-sum awards (*ibid.*) confirms that the power its approach gives courts is essentially unbounded.

Respondent posits three limitations: (1) a court must first find a profits-based award "inadequate (or excessive)"; (2) the substitute sum the court awards must be "'just, according to the circumstances of the case'"; and (3) an award is subject to appellate review for "abuse of discretion." Resp. Br. 32-33 (citation

omitted). Those supposedly separate limitations boil down to the same rule: If a court thinks a profits-based award too low (or too high) in a particular case, it can award any different sum it deems "just" within the wide outer bounds of what abuse-of-discretion review allows. That is the same invitation to freeform, case-by-case reasoning that this Court rejected in *Starbucks*. See *McKinney ex rel. NLRB* v. *Starbucks Corp.*, 77 F.4th 391, 397-398 (6th Cir. 2023), vacated and remanded, 602 U.S. 339. Respondent also elsewhere stresses (Br. 47-48) that the statute imposes no "numerical cap." In short, once the authority conferred by the just-sum provision is decoupled from traditional equitable limitations, the sky is the limit.

The prospect of massive potential liability across corporate boundaries would be profoundly harmful. Corporate separateness is the foundation for much of the modern economy; organizations routinely structure themselves so that one entity provides services to corporate affiliates for fees. Pet. Br. 49-51. Yet respondent's view would unsettle the reasonable expectations of such businesses, both in the trademark context and across a broader array of statutes. And respondent's assurance (Br. 32-33) that its approach requires judges to consider each case's facts and bring their own gestalt sense of fairness to bear is cold comfort.

Respondent presses (Br. 2) this limitless interpretation to "remov[e] any incentive from infringement." But Congress addressed those policy concerns through express remedies that generously compensate plaintiffs and deter future wrongdoing. Pet. Br. 48. Plaintiffs also have many tools in their toolkit when it comes to profits received by affiliated entities. *Id.* at

48-49. But one policy approach that Congress clearly has not taken is displacing the presumption of corporate separateness under *Bestfoods*.

* * * * *

At the end of the day, the lower courts' interpretation of the "defendant's profits" provision and respondent's alternative theory under the just-sum provision yield the same result—and should be rejected for the same reasons. Petitioner neither made profits nor realized "true financial gain" from the infringement. And respondent disclaimed any duty—and made no effort—to pierce the corporate veil. The award here treating the affiliates' pockets as petitioner's by requiring petitioner to disgorge profits that only the affiliates received is unlawful because the Lanham Act respects, rather than overrides, the corporate form.

II. RESPONDENT'S LATE-BREAKING THEORIES ARE UNPRESERVED AND UNPERSUASIVE

Turning away from the question presented, respondent and the government offer a grab-bag of unpreserved and unsupported alternative arguments in an effort to save some measure of disgorgement in this case. Although their new theories overlap, respondent and the government do not agree on which of those arguments apply and how much of the award here each could support. But their infighting is academic. These thirteenth-hour theories are forfeited and meritless, and none can shield the award from reversal.

A. Respondent now argues that the disgorgement award can be affirmed on the theory that the affiliates' revenues were effectively "assign[ed]" from petitioner (Br. 42-43) and that it could seek more limited

disgorgement of *different* sums on remand (Br. 51-52). The government alone invokes (Br. 21-22) the "nominee" doctrine. Because those arguments make their first appearances in a merits brief (and, for one, only an amicus brief), they are forfeited twice over.

Respondent's failure to "presen[t]" its alternative theories to the "lower court[s]" renders them "forfeited." *OBB Personenverkehr AG* v. *Sachs*, 577 U.S. 27, 37 (2015). Despite a full-blown trial on the disgorgement issue, respondent never asserted or attempted to prove below that the affiliates' revenues represent an "assignment" from petitioner or that it could disgorge *other* sums aside from those revenues. The finding it specifically requested from the district court was that petitioner and its affiliates should be treated as a "collective economic enterprise" through which the affiliates' revenues were imputed to petitioner, J.A. 322, 325, even though respondent did not "allege," let alone prove, "alter-ego liability," J.A. 331. Respondent presumably declined to develop alternative theories below because they could not come close to matching the $43 million in profits received by petitioner's affiliates in the three years at issue (2018-2020) that the lower courts awarded. Pet. App. 88a-90a. For example, even the $23 million in contributions Mr. Dewberry made to petitioner were spread over *30 years*; the contributions made in the relevant three-year window would pale in comparison. *Id.* at 40a.

Respondent's post-grant attempt to inject alternative theories also "falls squarely within the rule" that, when an "argument first ma[kes] its appearance in this Court in [the respondent's] brief on the merits," it is "'deemed waived.'" *Baldwin* v. *Reese*, 541 U.S. 27, 34 (2004) (citation omitted); see Sup. Ct. R. 15.2.

Respondent focused at the petition stage exclusively on the just-sum provision, never used any variant of "assign," and never suggested that respondent could recover a different sum even if corporate separateness were respected. Br. in Opp. i, 23-30. Because those alternative theories are "[n]onjurisdictional," respondent had to put its cards on the table "*no later* than in [its] brief in opposition." *Oklahoma City* v. *Tuttle*, 471 U.S. 808, 816 (1985); see, *e.g.*, *Stop the Beach Renourishment, Inc.* v. *Florida Department of Environmental Protection*, 560 U.S. 702, 729 (2010).

Rewarding respondent's request for a do-over to pursue unpreserved theories that require brand-new evidence would create perverse incentives for future cases. Any time it seemed that this Court might reverse based on the arguments and evidence presented below, future respondents could similarly abandon their arguments and the lower courts' reasoning, casually interject unpreserved, unsubstantiated theories, and claim they must be examined on remand. Legitimating that tactic would impair the orderly presentation of issues before this Court—precisely why such "postcertiorari maneuvers" should be rejected. *Knox* v. *Service Employees*, 567 U.S. 298, 307 (2012).

B. Respondent's unpreserved theories also lack any foundation in the Lanham Act or, unsurprisingly, the record below.

Respondent belatedly asserts (Br. 11, 45-46) that, because petitioner performed services necessary for the affiliates to generate revenues, it functionally "assign[ed]" those revenues to the affiliates. But even the government rejects (Br. 30-31) respondent's view that such a pseudo-assignment theory could justify the

entire $43 million award. And in reality, no aspect of that theory accords with the Lanham Act or the record.

Neither the government nor respondent justifies importing the assignment-of-income doctrine into the Lanham Act. As the government admits (Br. 19), it borrowed this concept from the "tax context." But taxation involves "unique interests" like the "Government's 'exceedingly strong interest in financial stability.'" *United States Trustee* v. *John Q. Hammons Fall 2006, LLC*, 144 S. Ct. 1588, 1599-1600 (2024) (citation omitted). And although the government asserts here that tax law is a source of "established equitable principle[s]," Br. 19, it argues the opposite when seeking to line its coffers, as when it persuaded this Court that "arguments of equity have little force in construing [income's] boundaries," *Commissioner* v. *Kowalski*, 434 U.S. 77, 95-96 (1977).

The record also is missing the key ingredient for any assignment-of-income case: an actual *assignment*. See *Commissioner* v. *Banks*, 543 U.S. 426, 433-434 (2005). The affiliates' revenues comprise rents collected on properties *they* own, and which petitioner merely serviced. (Respondent suggests this structure is nefarious, Br. 26, but its expert called it "common" in the real-estate context, J.A. 46.) There is no evidence that petitioner had a right to receive the rents and then assigned that right to its affiliates. See pp. 5-6, *supra*. And "[f]or federal income tax purposes, gain or loss from the sale or use of property is attributable to the *owner* of the property," not a service provider. *Commissioner* v. *Bollinger*, 485 U.S. 340, 344 (1988) (emphasis added). If tax law is relevant at all, it shows that the revenues should be attributed to the

affiliates, not petitioner. No one would say the rental income on a landlord's books was "assigned" from the groundskeepers.

The government stretches (Br. 21) "assignment" to refer not to actual assignments of income but instead to a loose consideration of how revenues might be allocated across affiliated businesses in a counterfactual "arm's-length" universe. But even tax law does not allow such freewheeling disregard of corporate separateness. *Moline Properties, Inc.* v. *Commissioner*, 319 U.S. 436, 438-439 (1943). Instead, courts rely on special provisions that *expressly* authorize reallocation of income through limited disregard of corporate separateness. See, *e.g.*, 26 U.S.C. § 482; *United States* v. *Vogel Fertilizer Co.*, 455 U.S. 16, 27-28 & n.9 (1982); *Rubin* v. *Commissioner*, 429 F.2d 650, 652-653 (2d Cir. 1970) (Friendly, J.). The Lanham Act contains no such express instruction here. And in any event, respondent never advanced this theory below, nor did it introduce evidence showing what petitioner supposedly would have earned from "arm's-length" service fees.

The government's nominee theory (Br. 21) is even further afield. Because respondent never advanced (and declines to adopt) that theory, it should be ignored under the "principle of party presentation." *United States* v. *Sineneng-Smith*, 590 U.S. 371, 375 (2020); see *FTC* v. *Phoebe Putney Health System, Inc.*, 568 U.S. 216, 226 n.4 (2013). Nor does it have any application here. Respondent never attempted to prove that petitioner relinquished legal title to any profits while continuing to possess them or retaining a state-law right to repossess them. *United States* v. *National Bank of Commerce*, 472 U.S. 713,

724-725 (1985); *National Bank* v. *Case*, 99 U.S. 628, 632 (1879).

For its part, respondent posits a handful of still more theories it never advanced below. None holds water. Respondent suggests (Br. 52) that some disgorgement award targeting petitioner's own "profits" could be justified by ignoring petitioner's losses. But that approach lacks any foundation in the record, which contains extensive evidence of petitioner's expenditures. J.A. 254-282. Both lower courts accepted that petitioner has "zero profits," Pet. App. 39a, 83a, due to its "extensive losses over the past thirty years," *id.* at 40a. Respondent never argued otherwise below and repeatedly assured this Court that an award of "defendant's profits" would be $0. Br. in Opp. 3, 9.

Respondent also suggests (Br. 52) a remand for it to pursue a new theory that petitioner and its affiliates were "partner[s] engaged in concerted wrongdoing." That approach is no more viable. Petitioner and its affiliates are separate corporations, not partners, and it is a "deeply 'ingrained'" "general principle" that one corporation "is not liable for the acts" of another when the "corporate veil" remains intact. *Bestfoods*, 524 U.S. at 61-62 (citation omitted).

Finally, and without any apparent sense of irony, respondent requests (Br. 52) a remand so that it can try to "overcome corporate separateness" by piercing the corporate veil. That is the very showing respondent—in litigation spanning years and across all three levels of the federal judiciary—expressly and repeatedly declined to make. Enough is enough.

CONCLUSION

The judgment of the court of appeals affirming the disgorgement order should be reversed.

Respectfully submitted.

HELGI C. WALKER
Counsel of Record
THOMAS G. HUNGAR
JONATHAN C. BOND
M. CHRISTIAN TALLEY
GIBSON, DUNN & CRUTCHER LLP
1700 M Street, N.W.
Washington, D.C. 20036
(202) 955-8500
HWalker@gibsondunn.com

PATRICK J. FUSTER
MATT AIDAN GETZ
GIBSON, DUNN &
CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071

Counsel for Petitioner

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