No. 23-900

In the Supreme Court of the United States

DEWBERRY GROUP, INC.,
FKA DEWBERRY CAPITAL CORPORATION,
Petitioner,

v.

DEWBERRY ENGINEERS INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

In allowing disgorgement of profits as a remedy for trademark infringement, the Lanham Act provides 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.A. § 1117(a).

The question presented is:

Whether a district court's discretion under the Lanham Act permits using the financial statements of "non-arms' length" affiliates to adjust a disgorgement award against a trademark infringer, and only that infringer, when the infringer has claimed $0 in profits.

RULE 29.6 DISCLOSURE STATEMENT

Respondent Dewberry Engineers Inc. is wholly owned by The Dewberry Companies Inc. Neither company is publicly traded, and no publicly held company owns 10% or more of Dewberry Engineers Inc.'s stock.

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RELEVANT STATUTORY PROVISION

The Lanham Act provides, in relevant part:

> When a violation of any right of the registrant of a mark . . . shall have been established in any civil action arising under this chapter, the plaintiff shall be entitled, . . . subject to the principles of equity, to recover (1) defendant's profits . . . . *If 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.* Such sum in either of the above circumstances shall constitute compensation and not a penalty. . . .

15 U.S.C.A. § 1117(a) (italicized language omitted by Petitioner).

INTRODUCTION

The picture painted by Petitioner Dewberry Group (DG) of a purportedly cert-worthy case is entirely illusory. Among other things, the alleged circuit split is premised on two cases that no party or judge mentioned until now, and that, unsurprisingly, are readily distinguishable when examined in any depth. Worse still, DG entirely ignores the language in the Lanham Act that expressly authorizes the disgorgement award at issue. For these reasons and more, the Petition should be denied.

Begin with the purported circuit split. DG points to two cases (*U-Haul* and *Edmondson*) that nobody—including DG itself—raised in the courts below.

That's because they concerned an issue not present in this case. In both *U-Haul* and *Edmondson*, affiliates that had *not* violated the Lanham Act were themselves held liable, and ordered to pay damages, for the violating conduct of another. The courts of appeals held that those orders against the non-violators were improper, as a matter of state law, because they lacked a valid basis for ignoring corporate separateness. Here, DG's non-violating affiliates weren't held liable or required to pay damages for anything. The Fourth Circuit affirmed an order against DG, and DG alone, for infringing conduct committed by DG itself. There is nothing inconsistent between the decision below and the cases cited by DG. Instead, the only issue here is how to calculate damages owed by DG; and, as explained below, the Lanham Act, by its express terms, accords the district court substantial discretion on that very issue.

DG also claims the decision below "conflicts" with this Court's decisions, excavating still *more* cases that never came up below. But these cases—like *U-Haul* and *Edmondson*—concern issues not present here. And moreover, only one of these cases even involves the Lanham Act, and that case addressed the question of *when* disgorgement is appropriate, not *how much*, which is the question here. There simply is no plausible argument that the Fourth Circuit's holding contradicts the holdings of any of DG's cited cases.

At most, DG asserts that the Fourth Circuit's interpretation of the Act was *wrong* on a splitless issue. But that, too, is incorrect, as DG ignores the express language in the Lanham Act that provides the very basis for the decisions of both the district court and Fourth Circuit below:

> If the court shall find the amount of the recovery based on profits is . . . inadequate . . . *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) (emphasis added). Indeed, the foregoing language is found nowhere in the Petition, but is instead conspicuously excised via ellipsis from its "Statutory Provisions Involved." Pet. 2.

This language expressly authorizes what the district court did and the Fourth Circuit affirmed. As the district court itself explained, "profits disgorgement under the Lanham Act . . . allow[s] courts to adjust an award up or down as circumstances demand." Pet. App. 87a (citing 15 U.S.C. § 1117). And here, the extraordinary facts demanded much more than the $0 in profits reflected on DG's tax returns. The district court found—after a bench trial—not only that DG was a willful and repeated bad faith trademark infringer, but also that DG's tax returns didn't reflect "economic reality" due to the "non-arms' length" relationship with its affiliates. Pet. App. 85a. So the district court adjusted the award, acknowledging that in doing so it was "not provid[ing] a precise mathematical calculation of the profits earned by Dewberry Group, but rather weigh[ing] the equities in determining the appropriate disgorgement remedy." Pet. App. 87a. As the Fourth Circuit agreed, the adjustment merely approximated "Dewberry Group's true financial gain." Pet. App. 43a. This was not some sweeping assault on "corporate separateness." It was simply an application of the broad discretion granted expressly by the Lanham Act to account for the wide variety of creative infringers a court might face. DG's claims that the decision below did something entirely different cannot be squared with the opinions and the record below.

Finally, even were the question DG identifies otherwise worthy of this Court's attention, this case would be an extremely poor vehicle in which to examine it. Beyond having to recharacterize the opinions below to fit DG's theory, this Court also would have to ignore that DG never raised before the authorities it now says demonstrate a purported split and error. Neither to the district court nor to the court of appeals did DG raise *U-Haul*, *Edmondson*, *Bestfoods*, or any other decision that it now says creates a supposed "conflict" and "error." If this Court were to grant review, it would find itself embroiled in threshold questions of waiver and, were it to reach the merits of DG's arguments about the cases, would have no reasoning from the courts below to guide the way.

The Petition should be denied.

STATEMENT OF THE CASE

A. Factual background

DG and Respondent Dewberry Engineers (Dewberry) provide similar real-estate development services in overlapping geographic areas. Pet. App. 3a–4a. Dewberry was founded decades earlier, and owns two federally registered trademarks for the name "Dewberry." Pet. App. 3a.

Dewberry and DG have now clashed for nearly two decades in two separate lawsuits, both alleging trademark infringement under the Lanham Act. The first began in 2006 with a cease-and-desist letter from DG. Pet. App. 4a. This letter expressly conceded that DG's "Dewberry Capital" mark was confusingly similar to Dewberry's. *Ibid.* But it claimed this confusion injured DG, not Dewberry, because DG's common-law rights trumped Dewberry's federally registered marks. *Ibid.* Dewberry disagreed, and sued DG for trademark infringement. *Ibid.*

Around the same time, DG had applied unsuccessfully to register its "Dewberry Capital" mark with the United States Patent and Trademark Office (USPTO). Pet. App. 5a. That mark was rejected as confusingly similar to those Dewberry had already registered. *Ibid.*

The first lawsuit ended in 2007 with a confidential settlement agreement that memorialized Dewberry's superior trademark rights (the "CSA"). Pet. App. 5a–6a, 12a–14a, 30a–31a. The CSA broadly permitted Dewberry to use any "Dewberry" mark it wished, anywhere it pleased. *Ibid.* By contrast, it allowed DG to use only one "Dewberry" mark ("Dewberry Capital"). *Ibid.* And DG could use that mark only for certain services, only in certain geographic areas, and only with a distinguishing column/capital logo. *Ibid.*

This truce was only temporary, because DG decided to ignore the CSA. DG first used "Dewberry Capital" for prohibited services, in prohibited areas, and without the required logo. Pet. App. 13a–14a. Then, in 2017, it rebranded to four different "Dewberry" marks (including "Dewberry Group"), all of which were prohibited by the CSA. *See* Pet. App. 7a, 30a–31a.

When DG's founder, John Dewberry, first initiated this rebranding, he "did not inform [his] then-general counsel, David Groce, of the prior litigation or the CSA." Pet. App. 7a. "Instead, he asked Groce to 'do a search' for related trademarks." *Ibid.* Unsurprisingly, Groce's search "revealed Dewberry Engineers' 'Dewberry' mark." *Ibid.* But "[e]ven after this . . . Groce still was unaware of the CSA between the parties." *Ibid.* And despite the search result, Groce applied to register DG's new "Dewberry Group" mark with the USPTO. *Ibid.*

DG's efforts quickly encountered trouble. The USPTO rejected the application due to a likelihood of confusion with Dewberry's previously registered marks. Pet. App. 7a. And after learning of DG's application, Dewberry sent its first cease-and-desist letter. *Ibid.* Upon receipt, Groce promptly apologized on behalf of DG, "claiming he had not been aware of the prior litigation or the CSA," and that DG "had no intent to infringe [Dewberry's] valid trademark rights." Pet. App. 7a–8a. He promised that DG would immediately cease rebranding. Pet. App. 8a.

But DG didn't stop. It applied to register four additional "Dewberry" marks, all of which were rejected as confusingly similar to Dewberry's. Pet. App. 8a. This prompted two more cease-and-desist letters from Dewberry. Pet. App. 8a–9a. And still, DG forged ahead—continuing to use prohibited marks on promotional materials. Pet. App. 71a.

DG used these new, prohibited marks while rendering services to its affiliates. These affiliates were "single-purpose entities," also owned by John

Dewberry, whose sole function was to own commercial properties serviced by DG. Pet. App. 82a. Although the affiliates paid DG "a fee for this internal service," Pet. App. 44a, that fee did not cover DG's operating costs, resulting in negative profits on DG's tax returns, Pet. App. 83a–84a. DG remained in business only because John Dewberry covered these losses with tens of millions of dollars of his own money. Pet. App. 84a. The affiliates, on the other hand, recorded massive profits—$53 million from 2018–2020 alone. Pet. App. 86a–88a. But these affiliates "do not and cannot perform the work and services necessary to generate [these] revenues." Pet. App. 83a. Instead, DG "promoted, managed, and operated all of the properties," and "did so using the Infringing Marks." *Ibid.*

Predictably, DG's conduct caused confusion in the marketplace. One survey found "that at least twenty percent of respondents confused 'Dewberry Group' for 'Dewberry Engineers.'" Pet. App. 31a. Dewberry also learned of instances of actual confusion, including by multiple representatives at one of Dewberry's largest clients. Pet. App. 31a.

This confusion caused "irreparable injury" to Dewberry due to DG's "negative publicity." Pet. App. 16a. For example, news articles described one of DG's projects as "an 'eyesore' and 'blight,' a 'long-languishing' 'skeletal building,' 'violating building codes,' and containing 'so many rats' that 'it looked like the ground was moving.'" *Ibid.*

B. Procedural history

After DG refused to stop rebranding, Dewberry brought this suit for trademark infringement and breach of the CSA—and won at every stage. Pet. App. 9a–12a.

The district court granted summary judgment for Dewberry on both claims. Pet. App. 9a. It held that DG repeatedly violated four different provisions of the CSA and, in the process, infringed Dewberry's trademarks as a matter of law. Pet. App. 10a–11a. It also granted a permanent injunction prohibiting any further infringement. Pet. App. 12a.

The district court then held a three-day bench trial on the issue of damages. Pet. App. 11a. At the conclusion, it held that disgorgement of profits was appropriate in light of DG's "willful, bad faith infringement." Pet. App. 86a. It also found that John Dewberry engaged in a "pattern of claiming ignorance," Pet. App. 68a, and his "testimony throughout trial was not credible," Pet. App. 70a. It similarly found that "Groce's testimony throughout the trial was not credible," "troubling," and "strain[ed] credulity." Pet. App. 70a, 73a, 76a.

The district court next turned to calculating the amount of the disgorgement award. It began by quoting Section 1117(a), including the language that "[i]f the court shall find that the amount of the recovery based on profits is . . . inadequate . . . 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." Pet. App. 76a.

The district court then exercised this discretion. As it said, "disgorgement under the Lanham Act is a remedy sounding in equity, allowing courts to adjust an award up or down as circumstances demand." Pet. App. 87a (citing 15 U.S.C. § 1117(a)).

It first rejected DG's argument that because its tax returns showed negative profits, the disgorgement award should be $0. Pet. App. 82a–84a. The court found these tax returns inconsistent with "economic reality." Pet. App. 84a. In support, it found that John Dewberry covered DG's purported losses with at least $23 million of his own money. *Ibid*. And it further found that "[b]ecause no real estate . . . business could continue as a going concern after decades of losses like these, . . . Dewberry Group, Inc.'s tax returns, standing alone, do not tell the whole economic story." Pet. App. 84a. The district court therefore found that an award of $0 would "undermine the equitable purposes of the Lanham Act[]" by allowing DG to "evade the financial consequences of its willful, bad faith infringement." Pet. App. 85a–86a.

Unwilling to award $0, the district court next looked for a principled basis for an adjustment. DG didn't provide one—it "did not do a profits analysis" to assess the benefits it received from its infringement. Pet. App. 92a. Indeed, DG did "no actual calculations" at all. *Ibid.* As noted, it simply insisted that because its tax returns showed a net loss, it received no benefits whatsoever. *Ibid.* And the district court had rejected this implausible assertion, observing that DG's strategic decision to forego its own profits analysis "puts both the Defendant and the Court at a disadvantage," requiring the court to "rely on general notions of equity . . . and determine its disgorgement award accordingly." *Ibid*.

So the district court instead agreed with Dewberry's expert, who had "consider[ed] . . . the revenues and profits" of DG's affiliates. Pet. App. 82a. The court concurred with this examination of "the economic reality of how Defendant's business actually operates." Pet. App. 83a. It thus found that the affiliates "do not and cannot perform the work necessary to generate revenues," and that it was DG, not the affiliates, that "promoted, managed, and operated all of the properties . . . using the Infringing Marks." *Ibid.* And because of the "non-arms' length" relationship between all of these entities, "all revenues generated through Dewberry Group, Inc.'s services show up exclusively on the [affiliates'] books." *Ibid.*

The district court considered this "economic reality" when fashioning a "disgorgement remedy" that, in its view, would prevent DG from "evad[ing] the financial consequences of its willful, bad faith infringement." Pet. App. 85a–86a. In doing so, the district court "acknowledge[d] that it [was] not provid[ing] a precise mathematical calculation of the profits earned by Dewberry Group, but rather weigh[ing] the equities in determining the appropriate disgorgement remedy." Pet. App. 87a. To that end, the district court relied on the affiliates' financial statements "when calculating the revenues and profits generated by Defendant's use of the Infringing Marks." Pet. App. 85a. But it did so "conservatively," by underestimating the infringement period. Pet. App. 87a. And then it further reduced the affiliates' revenue figures by 20%, giving DG the benefit of the doubt that some of these revenues might not have directly resulted from DG's infringement. Pet. App. 91a. This all came to a total award of $43 million. Pet. App. 94a.

The court then entered judgment against DG, and DG alone. Supp. App. 1SA. The court didn't purport to hold DG's affiliates liable for infringement, order

DG's affiliates to pay, or direct DG to retrieve any money from them. *Ibid.* It simply ordered DG to pay $43 million. *Ibid.*

DG appealed, and the Fourth Circuit affirmed the district court in every respect in a partially split decision. Nearly all of the Fourth Circuit's decision—including its rulings on liability and the appropriateness of ordering disgorgement in light of DG's bad faith—remains unchallenged here. The only issue is the amount of the disgorgement award.

As relevant to that question, the majority affirmed the district court's decision to consider the finances of DG's affiliates "for the purpose of calculating revenues generated by Dewberry Group's use of the infringing marks." Pet. App. 11a. Like the district court, the majority began by quoting Section 1117(a), including the provision that "[i]f the court shall find that the amount of the recovery based on profits is . . . inadequate . . . 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." Pet. 36a–37a.

The majority then rejected DG's argument that the district court had impermissibly "pierce[d] the corporate veil." Pet. 43a. It "view[ed] the district court's decision differently." *Ibid.* "Rather than pierce the corporate veil," the district court merely "considered the revenues of [the affiliates] in calculating Dewberry Group's true financial gain from its infringing activities." *Ibid.* The Fourth Circuit explained that disgorgement of profits is "subject to the principles of equity" and "ultimately a matter of the court's discretion." Pet. App. 45a. And here, the district court properly "weighed the equities of the dispute and exercised its discretion." *Ibid*. The Fourth Circuit further found that "[a]ny arbitrariness" in the district court's award "can be traced back to [DG's] litigation strategy to deny *any* connection between its affiliates' revenues and its infringing marks." Pet. App. 46a (emphasis in original).

Judge Quattlebaum dissented. In his view, the district court should not have "use[d] revenues from [the affiliates] to assess the profits of the Dewberry Group" without either suing those affiliates directly or "pierc[ing] the Dewberry Group's corporate veil." Pet. App. 58a–59a.

DG petitioned for rehearing en banc. No judge requested a poll, and the petition was denied. Pet. App. 121a.

REASONS FOR DENYING THE PETITION

Certiorari is not warranted. For starters, none of the reasons that ordinarily justify this Court's intervention are present. There is no split among the courts of appeals, and there is no conflict with any holding of this Court. The reality is that DG merely seeks splitless error correction, but there wasn't any error either. The decisions below rest on the broad discretion expressly granted by the plain text of the Lanham Act that DG entirely ignores. And on top of all that, the Petition is riddled with problems—including waiver and a case of extraordinary facts—that make it an extremely poor vehicle to consider DG's issue, even were it otherwise worthy of review. The Petition should be denied.

I. The Courts of Appeals are not divided.

Though DG now claims that the Fourth Circuit has split from two other courts of appeals, neither DG nor any of the opinions below even acknowledged the two cases cited in the Petition, much less any division in authority. DG itself never once cited or discussed *U-Haul* or *Edmondson*—either in the district court or the three briefs it filed in the Fourth Circuit, including its request for rehearing en banc. Nor did the district court or either opinion in the Fourth Circuit. Even Judge Quattlebaum, who had every reason to flag an inter-circuit conflict in his partial dissent, did not identify one or ask for a poll on rehearing en banc.

The reason for that deafening silence is simple: there is no circuit split. Both *U-Haul* and *Edmondson* are readily distinguishable. In those false-advertising cases, the lower courts were reversed for imposing damages liability on entities *other than the violator*, and ordering those non-violators to pay for conduct of the violator. Here, however, even DG cannot dispute that the district court didn't impose liability on anyone other than the trademark infringer (DG), and didn't order DG's non-infringing affiliates to pay anything. Instead, the only issue here is whether the district court properly calculated the damages owed by DG, and DG alone—an issue over which the Act expressly gives the court broad discretion. *Infra* Section III. Accordingly, there is no split to resolve.

Start with *U-Haul*. The plaintiff there sued both a corporation (Jartran, Inc.) and its owner (Ryder). Jartran was found to have violated the Lanham Act by falsely comparing itself to the plaintiff in an advertising campaign. *U-Haul Int'l, Inc. v. Jartran, Inc.*, 601 F. Supp. 1140, 1143–44 (D. Ariz. 1984). But the district court also held that Ryder was Jartran's alter ego, and found both Jartran *and* Ryder "jointly and severally" liable for $40 million. *Id.* at 1150–51. In short, the district court ordered damages from a non-violating party (Ryder) for the violating conduct of another (Jartran).

The Ninth Circuit reversed, among other things, the order against Ryder. Under Florida state law, the Ninth Circuit explained, "individual stockholders can be liable for the debts of corporations only after" an alter-ego finding. *U-Haul Int'l, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1043 (9th Cir. 1986) (discussing *Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So.2d 1114 (Fla. 1984)). But, the appeals court held, the district court had erred in reaching its alter-ego finding because Ryder hadn't used the corporate separateness of Jartran for a fraudulent purpose. *Ibid.* Without that finding, as DG itself puts it, "Mr. Ryder could not be liable for Jartran's infringing conduct and resulting profits." Pet. 17.

Edmondson is similar. The plaintiffs there sued a company (Velvet Lifestyles, LLC) for false advertising under the Lanham Act. *Edmondson v. Velvet Lifestyles, LLC*, 43 F.4th 1153, 1157 (11th Cir. 2022). But they also sued one of the company's individual managers (Dorfman) and its corporate affiliate (My Three Yorkies, LLC). *Ibid.* The district court held all three defendants liable on summary judgment, though it made no specific "findings regarding Mrs. Dorfman's or Yorkies' direct involvement with the relevant advertisements." *Id.* at 1158. After a trial on damages, the jury awarded damages against all three defendants too. *Id.* at 1159.

The Eleventh Circuit reversed as to Dorfman and Yorkies. It explained that the plaintiffs and the district court had "operat[ed] on the mistaken assumption that if Velvet Lifestyles was liable for violating the Act, so were Yorkies and Mrs. Dorfman." *Id.* at 1161. Instead, "it was the plaintiffs' burden to show factually and legally that Yorkies and Mrs. Dorfman were liable under the Lanham Act, and they failed to do so." *Ibid.* (citation omitted). In particular, the plaintiffs had not shown any basis for direct liability or to "disregard" the limitations on liability that "Florida law" recognizes for separate corporate entities. *Id.* at 1160. Accordingly, just as in *U-Haul*, the district court had erred in holding non-violators liable for a violator's conduct and damages.

This case does not involve that issue. Unlike in *U-Haul* and *Edmondson*, the district court here did not attempt to hold non-violators liable for a violator's conduct and damages without a proper legal basis. In fact, as even DG must admit, the district court did not order anything at all against the non-violators. Rather, the district court's judgment of liability and award of damages were against the violator (DG) only. Supp. App. 1SA. The court merely "considered the revenues" of the non-infringing affiliates in deciding the appropriate sum to order from *DG* for *DG's* "use of the infringing marks." Pet. App. 11a. As explained further below, that approach to calculating the award from DG for its own conduct was entirely within the district court's statutorily-granted discretion. *See infra* Section III. But regardless, it does not conflict with *U-Haul* or *Edmondson*. The holdings in those cases concerned whether orders of damages liability against non-violators for the violations of others had a proper basis; there simply are no such orders here. And that's precisely why nobody—not DG, the district court, or any member of the Fourth Circuit—cited *U-Haul* or *Edmondson* below.

DG's newfound efforts to concoct a split of authority are not convincing. It first attempts to elide the clear difference between these cases by abstractly describing *U-Haul* and *Edmondson* as addressing "whether the presumption of corporate separateness" applies under the Lanham Act. Pet. 15. Likewise, it argues that the "Ninth and Eleventh Circuits respect the corporate form" while the Fourth Circuit "disregard[s] it." Pet. 12–13. *See also id.* at 15 ("The circuits are now divided on the scope of Lanham Act remedies against corporate affiliates.").

But neither the holdings of nor any of the reasoning in *U-Haul* or *Edmondson* concerned the abstract question whether corporate separateness should be "respected." The actual issue in those cases was whether state-law principles of corporate separateness prevented the district courts from doing what they did—namely, imposing liability on and ordering damages from non-violating entities for the conduct of violating entities. In *U-Haul*, the Ninth Circuit was enforcing the Florida state law principle that "individual stockholders can be liable for the debts of corporations only after" an alter-ego finding. 793 F.2d at 1043 (citing *Dania Jai-Alai Palace*). And in *Edmondson*, the Eleventh Circuit was enforcing a similar rule from the same Florida Supreme Court case: that "[t]hose who utilize the laws of this state in order to do business in the corporate form have every right to rely on the rules of law which protect them against . . . liability unless" there is justification for "piercing of the corporate veil." 43 F.4th at 1162 (quoting *Dania Jai-Alai Palace*). Those are state-law principles about *actually imposing liability* on separate corporate entities for the acts of another, not generic vibes about "respect[ing] the corporate form." Pet. 15. Indeed, even DG is ultimately forced to admit to this more precise, and more accurate, understanding of the scope of those cases. *See* Pet. 16 ("Both the Ninth and Eleventh Circuits have rejected attempts . . . to hold defendants *liable* for related entities' infringing conduct unless the plaintiff can properly pierce the corporate veil.") (emphasis added).[1]

As discussed, nothing in this case conflicts with any of *that*. The Fourth Circuit had no occasion even to consider the issues in *U-Haul* and *Edmondson* because, unlike in those cases, the district court here did not order *anything* against entities protected from liability by corporate separateness. It found liability and ordered damages against DG, and DG alone. Of course, the fact that the affiliates weren't ordered to pay could be an issue for collection. As Dewberry acknowledged at oral argument before the Fourth Circuit, if it chooses to attempt to seek funds from the non-infringing affiliates because DG claims an inability to pay, Dewberry would *then* need to pierce the corporate veil or otherwise overcome corporate separateness. Oral Argument Recording at 36:45, available at *https://tinyurl.com/yn9ns9us*. That just confirms, however, that this case simply does not

[1] *See also id.* at 17 ("[T]he *U-Haul* court held that [the affiliate] *could not be held liable* . . . .") (emphasis added); *id.* at 19 ("[T]he Eleventh Circuit held . . . that a manager generally is *not liable* for the corporation's actions.") (emphasis added).

present the same non-violator liability issues as *U-Haul* and *Edmondson*.

DG's next tactic is to try to mischaracterize what happened in this case to create a purported conflict with the actual holdings in *U-Haul* and *Edmondson*. It argues that the district court held DG "liable for its affiliates' infringing acts," and that the Fourth Circuit affirmed this "choice to disregard corporate form." Pet. 20.

But that is belied by the record. Nowhere did the district court find DG liable for its affiliates' infringing acts. To the contrary, all the district court's findings and conclusions concerned DG's liability for *its own* conduct. The district court found as fact that the affiliates "do not and cannot perform the work and services necessary to generate revenues." Pet. App. 83a. They were "single-purpose entities" whose sole function was to "own[] properties managed and serviced by Dewberry Group." Pet. App. 82a. Instead, it was *DG* that "promoted, managed, and operated all of [the] properties." Pet. App. 83a. Thus, the district court calculated for disgorgement purposes what it deemed the true value of "*Dewberry Group's* use of infringing marks." Pet. App. 11a (emphasis added). To be sure, DG claimed in the district court that "[DG] produces infringing branding for its affiliates, who in turn generate profits using that branding on their lease, loan, and other promotional materials." Pet. App. 39a. *See also ibid.* (DG arguing that "it is not the 'economic engine that creates the revenue that flows to these [affiliates]'"). But the district court rejected those arguments in finding, as noted, that the affiliates "do not and cannot perform the work and services necessary to generate revenues." Pet. App. 83a.

II. The Fourth Circuit's decision does not conflict with this Court's precedent.

Beyond trying to manufacture a circuit split, DG also claims the Fourth Circuit's decision "conflicts with this Court's decisions." Pet. 22–32. For this, DG and its amici rely primarily on *Bestfoods*. They argue that *Bestfoods* established a "presumption" that "corporate veil-piercing principles apply to federal-law remedies unless Congress displaces them in the statute," and claim the Lanham Act does not overcome that presumption for three reasons, and therefore the decision below "conflicts" with *Bestfoods*. Pet. 22 (citing *United States v. Bestfoods*, 524 U.S. 51 (1998)). *See also* Am. Br. 2, 11.

Once again, this is an argument raised for the first time in DG's petition. Like *U-Haul* and *Edmondson*, DG never cited *Bestfoods* below. Nor did the district court or any judge of the Fourth Circuit.

And yet again, the reason for that omission is straightforward: there is no "conflict." This is true for two reasons. First, as in *U-Haul* and *Edmondson*, the award at issue in *Bestfoods* actually imposed *liability* on a non-violating affiliate for the violating conduct of another. The question in *Bestfoods* was "whether a parent corporation . . . may . . . be *held liable* as an operator of a polluting facility owned and operated by the subsidiary." 524 U.S. at 55 (emphasis added). The Court held that it wasn't, because a "parent corporation" is generally "not *liable* for the acts of its subsidiaries." *Id.* at 61 (emphasis added). *See also id.* at 58 (noting that "only the first [liability] phase ha[d] been completed" in the case, not the remedy phase). Again, that's not what happened here—the decisions below didn't hold DG's affiliates liable for anything.

So for the same reasons there is no conflict with *U-Haul* and *Edmondson*, there is no conflict with any holding in *Bestfoods*.

Second, *Bestfoods* couldn't meaningfully "conflict" with this case anyway, because it addressed an entirely different statute. It applied the "presumption" of corporate separateness to liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), not the Lanham Act. 524 U.S. at 55. And it concluded that the presumption was not overcome with respect to that specific statute. *Ibid.* It did not involve the Lanham Act, nor did it say anything about whether or how that presumption applies to the Lanham Act.

At most, DG has identified a possible reason the Fourth Circuit was *wrong*—namely, that it should have construed the Lanham Act differently in light of *Bestfoods*. That isn't true, for the reasons stated both above and below, including because *Bestfoods* addressed liability rather than remedies, and because the Lanham Act includes unique discretionary language that DG ignores. 15 U.S.C.A. § 1117(a) ("[T]he 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."), *see infra* Section III. But in all events, DG hasn't identified any "conflict" with *Bestfoods*.

Nor can DG establish a "conflict" with any other decisions of this Court. Pet. 27–29. By DG's own admission, these other decisions all addressed defendants who were "ordered to disgorge someone else's profits." Pet. 27. As explained below, that's not what happened here, either. *See infra* Section III. But regardless, as with *Bestfoods*, nearly all of these other cases did *not* involve the Lanham Act. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 591 U.S. 430 (2020) (First Amendment); *Daimler AG v. Bauman*, 571 U.S. 117 (2014) (personal jurisdiction); *Ambler v. Whipple*, 87 U.S. 546 (1874) (partnership dispute); *City of Elizabeth v. Am. Nicholson Pavement Co.*, 97 U.S. 126, 127 (1877) (pre-Lanham Act patent infringement); *Jennings v. Carson*, 8 U.S. 2, 6, 2 L. Ed. 531 (1807) (condemnation of ship); *Liu v. Sec. & Exch. Comm'n*, 591 U.S. 71 (2020) (SEC enforcement action); *Honeycutt v. United States*, 581 U.S. 443 (2017) (criminal forfeiture).

Only one of DG's cases actually did address the Lanham Act, but it too concerned a completely different issue. Pet. 25–26 (citing *Romag Fasteners, Inc v. Fossil, Inc.*, 140 S.Ct. 1492 (2020)). *Romag* held that a plaintiff need not "prove a willful Lanham Act violation in order to seek the defendant's profits." Pet. 26 (citing *Romag*). That is not in question here, as DG does not contest at all its willful, bad faith infringement or Dewberry's entitlement to disgorgement. DG challenges only the amount of that award—an issue governed by specific language in the Lanham Act that was not at issue in *Romag*.

DG argues that *Romag* is nevertheless relevant because it "treated Section 1117(a)'s text with care," while the decision below did not. Pet. 25. That's wrong, too, as the district court faithfully adhered to the statutory language that DG completely ignores. *See infra* Section III. But in any event, DG's argument isn't premised on a legal principle; at most, it's just another vague feeling about a case. If a lower court's alleged failure to treat statutory text "with care" constitutes a conflict worthy of certiorari, this Court will need to greatly expand its docket.

III. The decision below was correct.

In the end, DG's petition is little more than a plea for splitless error correction, and should be denied for that reason alone. As shown, DG lacks any serious argument that circuits are actually split. Nor has it shown any conflict with a prior holding of this Court. And while this Court sometimes grants review of cases in that posture, not even DG contends that this case has the characteristics that justify certiorari in those circumstances. *See, e.g.*, *Rudisill v. McDonough*, 144 S.Ct. 945 (2024) (resolving splitless veterans issue arising out of exclusive jurisdiction of the Federal Circuit); *Trump v. Anderson*, 601 U.S. 100 (2024) (resolving splitless question of a State's authority to remove former President Trump from a presidential primary ballot).

What is more, the Fourth Circuit's decision was correct. The Lanham Act "provides a broad menu of remedies to a plaintiff claiming infringement." *Hard Candy, LLC v. Anastasia Beverly Hills, Inc.*, 921 F.3d 1343, 1353 (11th Cir. 2019). Among other things, it authorizes damages, disgorgement of profits, or some combination of the two. 15 U.S.C.A. § 1117(a). It also confers "broad discretion" to set the *amount* of a monetary award, as courts of appeals (including the Ninth and Eleventh Circuits) unanimously agree. *See, e.g., Lindy Pen Co. v. Bic Pen Corp.,* 982 F.2d 1400, 1411 (9th Cir. 1993); *Burger King Corp. v. Mason,* 855 F.2d 779, 781 (11th Cir. 1988) ("wide scope of discretion").[2]

[2] *See also Banjo Buddies, Inc. v. Renosky*, 399 F.3d 168, 177 (3d Cir. 2005) ("The District Court has broad discretion in shaping remedies under [§ 1117(a)]."); *Shell Oil Co. v. Com.*

With respect to disgorgement in particular, the statute expressly grants an even wider berth. The Act, for example, "shifts the burden of proving economic injury off the innocent party, and places the hardship of disproving economic gain onto the infringer." *George Basch Co. v. Blue Coral, Inc.*, 968 F.2d 1532, 1539 (2d Cir. 1992). And while damages awards are expressly capped, disgorgement of profits is not. *Ibid.* (limiting awards to "three times" actual damages). *See also Getty Petrol. Corp. v. Bartco Petrol. Corp.,* 858 F.2d 103, 109 (2d Cir. 1988) ("Unlimited enhancement . . . of an award based on defendant's profits is permitted in order to correct inadequacy . . . .").

Most significantly, the Act expressly provides that if a court finds that "the amount of the recovery based on profits is . . . inadequate[,] . . . 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). This discretion allows courts to capture the infringer's "true profits" when the "infringer gained more . . . than the [infringer's]

Petrol., Inc., 928 F.2d 104, 108 (4th Cir. 1991) ("[T]he court has broad discretion to award any monetary relief necessary to serve the interests of justice.") (citing § 1117(a)); *La Quinta Corp. v. Heartland Prop. LLC*, 603 F.3d 327, 342 (6th Cir. 2010) ("Section 1117(a) grants a district court a great deal of discretion in fashioning an appropriate remedy in cases of trademark infringement.") (citation omitted); *TE-TA-MA Truth Found.-Fam. of URI, Inc. v. World Church of the Creator*, 392 F.3d 248, 263 (7th Cir. 2004) ("[A] district court has broad discretion under § 1117(a) to fashion an appropriate remedy according to equitable considerations."); *Metric & Multistandard Components Corp. v. Metric's, Inc.*, 635 F.2d 710, 715 (8th Cir. 1980) ("The language of [§ 1117(a)] is clear: the district court is given broad discretion to award the monetary relief necessary to serve the interests of justice . . . .").

profits reflect." *Kars 4 Kids Inc. v. Am. Can!*, 8 F.4th 209, 223 (3d Cir. 2021) (citation omitted). *See also Max Rack, Inc. v. Core Health & Fitness, LLC,* 40 F.4th 454, 473 (6th Cir. 2022) ("[T]he court may increase a profits award for a compensatory reason, such as a concern that the award does not encompass the defendant's full profits."), *reh'g denied*, No. 20-3598, 2022 WL 3237492 (6th Cir. Aug. 10, 2022); *Badger Meter, Inc. v. Grinnell Corp.*, 13 F.3d 1145, 1157 (7th Cir. 1994) ("[T]he benchmark for making this determination is the likely benefit accruing to the defendant on account of its infringement."). No court has ever held otherwise.

The Fourth Circuit's and district court's holdings fall squarely within this statutory language. The district court determined that a disgorgement award of $0, based on DG's tax returns, would disregard "economic reality" and "undermine the equitable purposes of the Lanham Act." Pet. App. 85a–86a. So it exercised its discretion to "adjust an award up . . . as circumstances demand," expressly "acknowledg[ing]" that it was *not* "provid[ing] a precise mathematical calculation of the profits earned by Dewberry Group." Pet. App. 87a. In line with that reasoning, Dewberry consistently argued to the Fourth Circuit that the district court "merely considered [the affiliates'] finances as *evidence* when exercising its 'broad discretion' to 'enter judgment for such sum as the court shall find to be just.'" Supp. App. 55SA.[3] And the Fourth Circuit agreed, holding

[3] *See also* Supp. App. 27SA ("In exercising its broad equitable discretion to 'enter judgment for such sum as the court shall find to be just,' the district court properly considered the profits of DG's [affiliates]."); Supp. App. 25SA ("The district court did not

that the district court's discretionary adjustment approximated "Dewberry Group's true financial gain." Pet. App. 43a. As a result, DG's argument that the district court imposed a "penalty" is simply wrong. Pet. 30 (quoting 15 U.S.C. § 1117(a)).

It makes no difference that this adjustment was calibrated to the financial statements of DG's affiliates. The Lanham Act doesn't restrict the evidence a court can use to increase an award. And here, using the affiliates' financial statements made sense given the district court's finding that the affiliates "do not and cannot perform the work necessary to generate revenues" and "all revenues generated through Dewberry Group, Inc.'s services show up exclusively on [these affiliates'] books." Pet. App. 82a. For purposes of adjusting the award, it was entirely appropriate to look past DG's "non-arms' length" relationship with these affiliates to the "economic reality of how Defendant's business actually operates." Pet. App. 83a. Doing so allowed

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order disgorgement from these entities, but rather used the profits distributed to them (earned from DG's services using the Infringing Marks) to calculate the disgorgement award against DG."); Supp. App. 52SA ("Here, the district court acted well within that 'broad discretion' when it calculated profits based not only on DG's financial statements, but those of the [affiliates]."); Supp. App. 54SA ("[T]he district court properly considered other financial evidence to 'tell the whole economic story.'"); Supp. App. 55SA ("Again, even if the [affiliates] are separate corporate entities, that doesn't prevent the court from considering the profits DG generated for them through its services using the Infringing marks when calculating an award against DG."); Oral Argument Recording at 36:25, *available at https://tinyurl.com/yn9ns9us* ("The district court . . . used the revenues and the profits of [the affiliates] as a benchmark, a measuring stick . . . for the exercise of his discretion under § 1117(a) . . . .").

the court to capture DG's "true financial gain." Pet. App. 43a. And in all events, DG cannot argue that the district court's findings in this regard were clearly erroneous.

In fact, the financial statements of these affiliates were the *only* benchmark available to the district court. DG chose to do "no actual calculations" and rest solely on the (implausible) assertion that there were simply no profits to disgorge. Pet. App. 92a. So not only did it make sense to use the financial statements of the affiliates in determining an appropriate disgorgement award, but DG also left the district court little other choice. Indeed, that is why the Fourth Circuit noted that any imprecision in those calculations "can be traced back to Dewberry Group's litigation strategy to deny *any* connection between its affiliates' revenues and its infringing marks." Pet. App. 46a (emphasis in original).

Moreover, as the Fourth Circuit explained, to hold that affiliates' finances are never an appropriate measuring stick would undermine Congress's intent that the Lanham Act "take all the economic incentive out of trademark infringement," particularly under the unique facts and circumstances of this case. Pet. App. 45a. That is what the court found "illuminating" about *American Rice*. Pet. App. 44a–45a (citing *Am. Rice, Inc. v. Producers Rice Mill, Inc.*, 518 F.3d 321 (5th Cir. 2008)). There, the Fifth Circuit affirmed a disgorgement award that included not just the profits formally recognized by the infringing defendant, but also profits the infringer had passed along to affiliates. Pet. App. 44a. The decision below acknowledged that unlike in *American Rice,* DG never formally possessed the affiliates' profits before they appeared on its affiliates' books. Pet. App. 44a. But "while Dewberry Group did not receive the revenues from its infringing behavior directly, it still *benefited* from its infringing relationship with its affiliates," just like the infringer in *American Rice*. Pet. App. 45a. As in *American Rice*, the Fourth Circuit was concerned about "handing potential trademark infringers the blueprint for using corporate formalities to insulate their infringement from financial consequences." Pet. App. 45a.

In challenging the Fourth Circuit's decision, DG entirely ignores the district court's discretion to increase a disgorgement award to "such sum as the court shall find to be just" when "the amount of recovery based on profits is . . . inadequate." 15 U.S.C. § 1117(a). While DG claims "careful attention to Section 1117(a)'s text is warranted," Pet. 26, it nowhere even acknowledges this crucial statutory language. In fact, when reciting the "Statutory Provisions Involved," DG literally omits the language with an ellipsis. Pet. 2. So while DG accuses the Fourth Circuit of "rewrit[ing] the Lanham Act," Pet. 22, DG is the one actually doing so.

In short, DG's attack on the Fourth Circuit's decision rests entirely on a flawed premise. DG focuses exclusively on *other* statutory language, repeatedly complaining that the decision below ordered disgorgement of more than just "defendant's profits." *See, e.g.,* Pet. 5, 13, 22, 25 (quoting 15 U.S.C. § 1117(a)). But again, the statute allows precisely that in the event the court "find[s] that the amount of the recovery based on profits is . . . inadequate." *Ibid.* And at a minimum, the adjustment isn't a "penalty" if used to approximate the defendant's "true profits." *Kars 4 Kids*, 8 F.4th at 223. *See also Max Rack*, 40 F.4th at 473 ("full profits"). That's exactly what happened here—the district court increased the award to approximate "Dewberry Group's true financial gain" because the profits reflected on DG's tax return were wholly inadequate. Pet. App. 43a. DG's analysis—including its lengthy discussion of *Bestfoods*—thus completely misses the point. Indeed, because DG never even acknowledges the district court's discretion to increase a disgorgement award, it also never argues that the district court *abused* that discretion. Accordingly, that argument is waived.

DG claims the Fourth Circuit and district court did something different, although it has trouble telling a consistent story. DG sometimes complains that it was held liable for "an affiliate's *acts*," Pet. 24 (emphasis added), and other times says it was held "jointly liable for [its affiliates'] *profits*," Pet. 28 (emphasis added). This waffling is itself confirmation that both characterizations are wrong.

First, as noted earlier, the Fourth Circuit didn't affirm an award that "imposed liability for an affiliate's *acts* without veil piercing," in violation of *Bestfoods*. Pet. 24 (emphasis added). DG points to no language in either of the decisions below even remotely suggesting that this occurred, because there is none. To the contrary, these decisions allowed an award of "profits generated by *Dewberry Group's* use of infringing marks." Pet. App. 11a (emphasis added). *See also* Pet. App. 85a (calculating "profits generated by *Defendant's* use of the infringing marks") (emphasis added). The district court found as fact that DG's affiliates didn't actually do *anything*—it was DG that performed all "the work and services necessary to generate [their] revenues." *Supra* Statement of the Case, Section A (quoting Pet. App.

83a). Accordingly, the decisions below held DG liable only for its *own* acts, not the acts of its affiliates.

Second, DG (and its amici) alternatively claim the Fourth Circuit allowed DG to be held "jointly liable for [the] *profits*" of its affiliates. Pet. 28. *See also* Am. Br. 8–12. And because DG purportedly "never received" those profits, the award was "plainly a penalty." Pet. 30–31. In support, DG quotes language "treat[ing] Dewberry Group and its affiliates as a single corporate entity." Pet. 3–4, 9–10,

But the Fourth Circuit's decision didn't do that either. It didn't hold DG "jointly liable" for the affiliate's profits—it approved the district court's treating of these companies as a "single corporate entity *for the purpose of calculating*" the award. Pet. App. 11a (emphasis added). *See also* Pet. App. 85a ("[DG] and its [affiliates] will be treated as a single corporate entity when *calculating* the revenues and profits generated by Defendant's use of the Infringing Marks.") (emphasis added). The Fourth Circuit agreed with what Dewberry had explained in briefing and at oral argument (*supra* pp. 27–28 & n.3)—that the calculation merely used the affiliates' financials as a benchmark for DG's "true financial gain." Pet. App. 43a. In other words, the Fourth Circuit affirmed the district court's exercise of discretion to "adjust an award up . . . as circumstances demand," Pet. App. 87a—not as a "precise mathematical calculation of the profits earned by Dewberry Group," *ibid.*, but an equitable adjustment based on the "circumstances of the case," 15 U.S.C. § 1117(a).

For all these reasons, DG is wrong, too, that the Fourth Circuit's decision will impact other statutes. In DG's (and its amici's) telling, this decision misconstrued the phrase "subject to the principles of equity" as conferring "broad 'discretion' to 'weigh the equities of the dispute.'" Pet. 11 (quoting Pet. App. 45a). *See also* Pet. 26–27, 29; Am. Br. 3, 14–16. This, DG claims, could "distort other crucial statutory frameworks" that reference "equitable relief." Pet. 34. But as noted, the district court and Fourth Circuit didn't violate these equitable principles at all but, instead, faithfully adhered to the plain text of the Lanham Act. And that language, which these other statutes lack, expressly gives the district court "discretion" to "enter judgment for such sum as the court *shall find to be just*." 15 U.S.C. § 1117(a) (emphasis added). As the Fourth Circuit stressed, the Lanham Act is *uniquely* aimed at "giv[ing] trademark registrants . . . 'the greatest protection that can be given them.'" Pet. App. 45a (quoting *Park Fly*).

IV. This case is a poor vehicle in any event.

Even were the question DG identifies otherwise worthy of this Court's attention, this case would be an extremely poor vehicle in which to examine it.

First, as just explained, DG's arguments mischaracterize the decisions below. *See supra* Section III. To address DG's arguments, this Court at least would need to ignore language in both decisions confirming that the district court exercised its statutorily-conferred discretion to increase the disgorgement award to a "sum [it found] to be just, according to the circumstances of the case." 15 U.S.C. § 1117(a).

Second, accepting DG's erroneous view of the decisions below wouldn't make any practical difference. Even if that view were correct, the decisions below could still have achieved the exact same result through the statutory text that DG conspicuously ignores. This Court (or the courts below on remand) could still affirm the award as a sum deemed "just," based on DG's "true financial gain." Pet. App. 43. In fact, that is what the courts below actually did.

Third, while DG argued more generally below that the district court had improperly "pierced the corporate veil," it didn't make the specific arguments it now advances, nor did it mention any of the case law it now cites. DG didn't claim below it was being held liable for the "acts" of its affiliates. Nor did it argue that (1) the phrase "subject to principles of equity" imports restrictions from the common law; or (2) one of those restrictions prevents "joint liability" for another party's profits. Pet. 26–30. *See also* Am. Br. 3–12. As explained, DG didn't raise these arguments because they don't apply—the district court didn't hold DG "jointly liable" for anything. But were this Court to grant review anyway, it would need to address as a threshold matter whether these arguments are waived. As this Court has repeatedly stressed, it is a court "of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 719 n.7 (2005).

Finally, even setting these other problems aside, this case is a poor vehicle on the facts alone. As the district court found, DG structured its business such that "all revenues generated through Dewberry Group, Inc.'s services show up exclusively" on the books of its affiliates. Pet. App. 83a. DG then claimed that because its own tax returns showed negative profits, the district court had no choice but to award $0. Pet. App. 82a–84a. And DG offered no alternative—it "did not do a profits analysis" and performed "no actual calculations." Pet. App. 92a.

These unusual facts are almost tailor-made for the Lanham Act's unique discretionary language. Accordingly, this case could offer little guidance outside of these very specific circumstances.

What's more, reversing the decision below would effectively exonerate DG for "willful, bad faith infringement." Op. 54. DG purposefully violated a settlement agreement, disregarded multiple cease and desist letters, and ignored repeated rejections by the USPTO. *See supra* Statement of the Case, Section A. John Dewberry even hid the parties' prior litigation from his own general counsel. *Ibid.* And on top of that, he structured his companies so that none of the profits from DG's infringing conduct would appear on DG's books. *Ibid.* It is difficult to imagine more compelling circumstances for increasing a disgorgement award that the defendant insists should be $0.

CONCLUSION

The Court should deny the petition for certiorari.

Respectfully submitted,

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