

Supreme Court to Consider Corporate Separateness in Calculating Trademark Infringement Damages

Corporate News: A Legal Update

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The United States Supreme Court is set to take on a trademark infringement case that may have a lasting impact on the concept of corporate separateness. In *Dewberry Group, Inc. v. Dewberry Engineers Inc.*, the Supreme Court will decide whether the disgorgement of profits of non-party corporate affiliates is appropriate in calculating damages under federal trademark law (i.e., the Lanham Act).

In the case, Dewberry Engineers brought suit against Dewberry Group, which had previously gone by the name Dewberry Capital, after it underwent a substantial rebranding. This rebranding consisted of the creation of various affiliate entities, including Dewberry Living and Studio Dewberry. Dewberry Engineers alleged trademark infringement as well as breach of a prior settlement agreement reached between the parties regarding their use of the term "Dewberry."

Dewberry Group was found to be infringing on the trademarks owned by Dewberry Engineers and was ordered to pay over \$40 million in damages based on disgorgement of profits, along with attorney's fees. In calculating these damages, the court not only looked to Dewberry Group's profits but the profits of its corporate affiliates under common ownership, despite the fact that they were not named as parties in the dispute.

The court found the disgorgement of the affiliates' profits permissible because Dewberry Group had provided infringing services to its affiliates, causing the profits from Dewberry Group's infringement to appear on the books of its affiliates. In essence, the court treated Dewberry Group and its affiliates as a single corporate entity for the purpose of calculating damages.

The Fourth Circuit appellate court affirmed, relying on testimony from an expert witness who found that Dewberry Group was structured in a way that allowed it and its employees to promote, manage and operate the properties owned by the affiliate companies through the use of the infringing marks. The appellate court also expressly rejected Dewberry Group's assertion that the lower court failed to give proper weight to the concept of corporate separateness in piercing the

corporate veil to consider the profits of its affiliates. In particular, the court emphasized the principle that disgorgement of profits under the Lanham Act is subject to the principles of equity, allowing the district court to hold Dewberry Group accountable for the profits generated by infringing materials used by its affiliates.

Business and legal professionals alike should remain on the lookout for the Supreme Court's decision, which could impact how they assess liability and potential recovery in developing and maintaining brands. If this type of disgorgement is found to be permissible in calculating damages, principal entities will want to increase scrutiny of any intellectual property they pass along to any related entities for use.

In addition, the assessment of potential brands for noninfringement becomes all the more important given a potential drastic increase in the body of potential damages. Last, but certainly not least, businesses should continue to scrutinize the level of involvement they have with the affiliated entities to ensure that they, without a doubt, operate as distinct businesses to sustain corporate separateness.

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