99-11242

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BURKHART GROB LUFT UND RAUMFAHRT GMBH & CO. KG
Plaintiff/Appellant/Cross-Appellee,

v.

E-SYSTEMS, INC.
Defendant/Appellee/Cross-Appellant.

On Appeal from the United States District Court
for the Northern District of Texas
Amarillo Division

PETITION FOR REHEARING *EN BANC*

SIDNEY POWELL
Texas Bar No. 16209700

DEBORAH PEARCE REGGIO
Louisiana Bar No. 22577

POWELL & REGGIO
1920 Abrams Parkway, #369
Dallas, TX 75214
(214) 653-3933
(214) 319-2502 (Telecopier)

ATTORNEYS FOR APPELLANT,
BURKHART GROB LUFT UND
RAUMFAHRT GMBH & CO.
KG

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

PLAINTIFF/APPELLANT:

Burkhart GROB Luft und Raumfahrt GmbH & Co. KG

Burkhart GROB Luft und Raumfahrt GmbH & Co. KG has changed its legal form. Its legal and universal successor of all rights and obligations is a sole proprietorship doing business as:

GROB-Werke Dr. h.c. mult. Dipl.-Ing. Burkhart Grob e.K.
Unternehmensbereich Luft-und Raumfahrt

ATTORNEYS FOR PLAINTIFF/APPELLANT:

Powell & Reggio
Sidney K. Powell
Deborah Pearce Reggio

GROB-Werke
Munich, Germany
Dr. Andreas Plesske

Whittenburg Whittenburg & Schachter
Dallas, Texas
Cary Ira Schachter

Thomason Hendrix Harvey Johnson & Mitchell
Memphis, Tennessee
John Thomason

DEFENDANT/APPELLEE/CROSS APPELLANT:

Raytheon Company
E-Systems, Inc.

ATTORNEYS FOR DEFENDANTS/APPELLEES:

Gardere & Wynne
Joe B. Harrison
Cynthia Hollingsworth
Stacy R. Obenhaus
William G. Whitehill

Sprouse Smith & Rowley
Mark D. White
Marty Levi Rowley

Respectfully submitted,

_____
SIDNEY K. POWELL
DEBORAH PEARCE REGGIO

STATEMENT OF COUNSEL

I express a belief, based on reasoned professional judgment, that the panel decision in this case conflicts with the following opinions of this Court and the Texas Courts, and that Full Court review is necessary to ensure uniformity of decisions:

* *DSC Communications Corp. v. Next Level Communications*, 107 F.3d 322 (5th Cir. 1997);

* *Dyll v. Adams,* 167 F.3d 945 (5th Cir. 1999);

* *Procom Energy, L.L.A. v. Roach*, 16 S.W.3d 377 (Tex.App.–Tyler 2000);

* *Aboud, M.D. v. Schlichtemeier, M.D.*, 6 S.W.3d 742 (Tex. App.–Corpus Christi 1999);

* *Lone Star Partners v. Nationsbank Corp.*, 893 S.W.2d 593 (Tex.App.–Texarkana 1994);

* *R.L. Lipsey, Inc. v. Panama-Williams, Inc.*, 611 S.W.2d 917 (Tex.App.–Houston [14th Dist.] 1981).

I further express the belief that the panel opinion conflicts with the decisions of the Third, Fourth, and Ninth Circuits, and the Texas Supreme Court, in that it misconstrues the meaning and purpose of constructive trust, which exists to redress wrongs such as fraud when damages are too difficult to estimate.

Finally, I express the belief that this case raises an issue of exceptional international importance. The panel has affirmed findings of malice, fraud, and cause by an American corporation, but has left its victim, a foreign corporation, without a remedy when a jury had awarded it $45,000,000. The outcome of this case is legally wrong and morally unjust. The panel decision will deter international business relations. Foreign corporations must be able to trust in our system of justice, and the laws of this country must provide a clear framework with remedies for the fair and just resolution of international business disputes.

Respectfully submitted,

_____

SIDNEY K. POWELL
DEBORAH PEARCE REGGIO

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE ISSUE WARRANTING *EN BANC* REVIEW

Whether constructive trust is the proper remedy for malicious fraud that harms the defrauded party and unjustly enriches the defrauder?

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

An Amarillo jury, a trial judge, and a panel of this Court all agree that E-Systems committed fraud, with malice, and caused GROB damages. The jury tried to do something about it–awarding GROB $45,000,000 in punitive damages. Two years after the verdict, the trial judge, who would not allow the jury to consider GROB's lost profits, overturned the punitive damage award because the jury had awarded only $1 in actual damages.[1] Misunderstanding the purpose of the constructive trust remedy, the court wrongly refused to impose a constructive trust on E-Systems' fraudulently gained profits–contrary to Fifth Circuit precedent and numerous decisions of Texas courts and other circuits. In its brief comments on that issue, the panel likewise misunderstood that constructive trust does not turn on proof of actual damages, but exists to remedy cases such as this where an egregious wrong would otherwise go unpunished.

[1] The current Texas statute always allows punitive damages for fraud with malice, even when the damages are nominal. TEX.CIV. PRAC.&REM.CODE § 41.004(b).

The panel opinion leaves GROB and future defrauded bidders with no legal remedy (Op., A-1). Its reasoning and result conflict with existing law. Malicious fraud as egregious as E-Systems' does not lie without a remedy. E-Systems intended to and did profit from its fraud. The panel opinion wrongly allows E-Systems to keep every penny of the millions (or billions) it fraudulently procured while depriving GROB of the $45,000,000 the jury intended it to have. This Court should grant rehearing *en banc* to review the law of constructive trust, resolve the conflict of decisions in this Circuit, and bring this Circuit in line with others that have considered this issue in this context.

STATEMENT OF THE FACTS NECESSARY FOR *EN BANC* REVIEW

A. The Jury And Two Courts Found That E-Systems Committed Fraud, With Malice, And Caused GROB's Damages.

This case involves team bidding for the design and construction of new technology–high altitude unmanned aerial vehicles [UAVs] for the Advanced Research Projects Agency [ARPA] of the United States Department of Defense. ARPA was looking for breakthrough technology and the design and creation of planes never before built. The jury found that E-Systems fraudulently misrepresented and failed to disclose material facts to GROB, the teammate to whom it had promised bidding exclusivity. It specifically found that E-Systems' fraud proximately caused GROB's damages (GROB-RE2:1791-92). The jury then found that E-Systems had acted with malice, and it awarded GROB $45,000,000 in punitive damages as a

reflection of the seriousness of E-Systems' deliberate fraud (GROB-RE2:1794; E-Systems-RE1:1684).

B. E-Systems Seduced GROB Into An Exclusive Bidding Contract, While Double-Teaming and Sharing Confidential Information.

E-Systems learned of the Tier II Plus Project before it was publicly announced, through its own expert, former General Lawrence Mitchell. General Mitchell's opinions about the necessary requirements for the UAV had been solicited by DARO head, Major General Ken Israel (R12:874, 883). From the first, General Mitchell told E-Systems that advanced jet technology would be required to win the bid, but E-Systems did not share this information with its exclusive bidding partner, GROB (R12:874, 876-880). Indeed, E-Systems had no interest in working with GROB–at least until GROB won the attention of ARPA officials attending a demonstration of GROB's German facilities and capabilities (R11:150, 153-54, 399-400; 13:1126). Berman, the highest ranking ARPA official in attendance, left the meeting stating that GROB's Egrett was "the plane ARPA needed now," and he even considered awarding GROB its own noncompetitive contract to work on Tier II Plus (R11:171, 484; 12:550-5-58, 565-67, 643, 712, 729, 803-04, 815; 14:1760-61; Ex105). DARO head, General Israel, also informed General Mitchell that GROB had "wowed" ARPA (R12:883).

Within hours of learning this, E-Systems charted a deliberate course of deception to "keep GROB in its camp as long as possible" to insure E-Systems' prospects of winning and to prevent GROB's submission of a competing bid

(R11:484-5; 12:540-41, 550-53, 569, 884; 13:990-92, 1126; GROB-RE7). E-Systems' highest executives devised the plan to ensure their success: Bid both ends of the Tier II Plus spectrum– proposing a limited "workhorse" with GROB and a high-tech "racehorse" with Teledyne-Ryan–while falsely promising GROB exclusivity and demanding GROB's exclusivity to prevent it from competing (R11:158-59, 182-3, 450-52, 484-89; 12:540-42, 569-76, 630, 656-57, 714-18, 793, 816, 892, 900; 14:1670, 1760-62; GROB-RE8). E-Systems' fraud caused GROB to lose its opportunity to bid effectively in Tier II Plus (R13:1113-17, 1130-34). After promising GROB exclusivity–which GROB honored, E-Systems submitted a competing bid with Teledyne-Ryan and won the contract with ARPA to build the advanced jet aircraft that General Mitchell had all along said was required for success (R12:867, 871, 874-77, 880-84, 887-89, 892).

C. E-Systems Own Executives Admitted E-Systems' Deliberate Fraud.

E-Systems' executives admitted deceiving and manipulating GROB to keep it in its camp and out of competition (R11:212; 12:580, 589-93, 602-04, 824-26; 14:1591-92, 1594; Ex22; 61). When confronted with E-System's duplicitous dealings, E-Systems' CEO chose to continue the fraud, knowing that E-Systems would substantially benefit (R12:573-81, 589-93, GROB-RE11; Ex17). E-Systems knew that its "divided front" undermined GROB's chance of winning, but rejected pleas from some executives to deal honestly with GROB (R12:580-2; 592-4, 624; 13:1134-7; 14:1699). E-Systems' strategy was one of expediency and duplicity, and

designed to win (R12:658, 699-704; 13:1084-85). E-Systems knew that GROB would not devote itself exclusively to E-Systems absent a promise of *mutual* exclusivity (R12:699-704, 822). E-Systems' CEO participated in a series of double-teaming meetings to ensure that E-Systems' fraudulent plan was effective but secret, and he approved this double- teaming strategy (R12:892, 905-06, 925-27; 13:1167-8; 14:1579-83, 1773-74).

D. E-Systems Benefitted From GROB's Specialized Expertise And Confidential Data To The Detriment Of GROB.

E-Systems not only sabotaged GROB, it also withheld inside information about the Tier II Plus Project and wrongly shared confidential information gathered from GROB's specialized knowledge, expertise, and data. E-Systems had worked with GROB on the GAFECS project to develop the Egrett, and had the advantage of knowing confidential and proprietary information about the Egrett, from which the GROB-E-Systems' bid was derived. Melpar, especially, had been intimately involved in developing the ground station for the Egrett (R12:523, 584-94, 636-40, 915-16; 13:1373), but in this case, Melpar worked exclusively with Teledyne-Ryan. During the Tier II Plus Project, E-Systems held several meetings at which the executives overseeing the Teledyne-Ryan bid became privy to details of the GROB-E-Systems' bid, its technical information, and its confidential data (RE20). Even though General Mitchell had been assigned to work at Greenville, which worked on the GROB bid, his inside information on what the military wanted was shared only with Teledyne-Ryan.

E. E-Systems' Fraud Benefitted E-Systems, While Significantly Damaging GROB.

E-Systems knew that its duplicitous dealings would and did damage GROB (R12:581-86, 658-60; 699-702; GROB-RE20). E-Systems promised GROB complete exclusivity but, in reality, divided its resources and talents–unevenly–and double-teamed to undermine GROB. E-Systems executives admitted that GROB was harmed: (1) E-Systems touted its unique and special talents–such as its U-2 experience–in its Teledyne-Ryan bid only (R13:1105-15; 1132-34; Ex61; 71; 361); (2) E-Systems set up a "Chinese wall" dividing its Garland division between the two bids, but slanting the talent heavily in favor of Teledyne-Ryan (R14:1624); (3) E-Systems fractured its company's expertise and resources, giving GROB only "workhorse" support and undermining GROB (R12:594; 14:1531-33); (4) E-Systems deprived GROB of any help whatsoever from its Melpar division–the division that had worked so closely with GROB on the Egrett, knew everything there was to know about the Egrett, and specialized in building ground stations (R12:582). One executive unequivocally stated that the absence of Melpar "absolutely" sealed GROB's fate of submitting a losing bid *Id.* Finally, (5) E-Systems executives admitted they knew that GROB could build the jet that ARPA wanted and General Mitchell recommended, but E-Systems forbade GROB from submitting a jet (R12:554-55, 643-44;13:1065; 14:1539-41, 1547).

E-Systems' knew that "GROB did not want to be ditched at the last minute" (R12:566), but E-Systems deliberately strung GROB along. The critical factors in the government's decision to award the contract to the E-Systems-Teledyne-Ryan team were Melpar's ground station (which should have been the ground station of the E-Systems-GROB bid since they called for the exact same requirements), and the new jet design (which E-Systems foreclosed GROB from submitting) (R13:1113-14, 1262, 1328, 1334-40, 1353, 1360). E-Systems' CEO was so intent on boxing GROB in that he threatened to no-bid GROB's proposal if it did not drop the jet (R12:622).

If E-Systems had exclusively supported the GROB bid, as it had done historically and represented would be done here, the GROB bid alone would have had the winning ground station (R13:1337-40, 1353, 1360; Ex P10). If E-Systems had given GROB the benefit of General Mitchell's inside information, experience and expertise, GROB would have designed the winning jet, which, as General Mitchell noted, was exactly along the lines of the one instead submitted by Teledyne-Ryan (R12:566). Finally, if E-Systems had not shared confidential GROB information with Teledyne-Ryan, Teledyne-Ryan might not have won (R12:523, 584-94, 636-40, 915-16; 13:1373; RE20). E-Systems admitted that GROB had the expertise to build the winning jet (R12:554-55, 643-44) and E-Systems provided the winning station. E-Systems' fraud placed Teledyne-Ryan in the position that rightfully belonged to GROB. E-Systems-Teledyne-Ryan have proceeded to Phase IV of Tier II Plus–production of Global Hawk aircraft at a price-tag of over $50,000,000 each. E-

Systems' profits will be in the millions (R11:252-56, 274-77, 282, 286-93, 295-304; 12:865-70, 884-87; ExP7; 61-62; GROB-RE22).

ARGUMENTS AND AUTHORITIES WARRANTING *EN BANC* REVIEW

The panel opinion rewards and encourages fraud, and creates a conflict within this Circuit, with three other federal circuits, and with Texas courts. After affirming the jury's fraud finding, the panel held that GROB's lost profits were too speculative to prove, and then denied constructive trust for the same reason, under the nomenclature of "no unjust enrichment." *En banc* review is necessary to resolve the conflict. The remedy of constructive trust is designed to redress wrongs such as fraud precisely when lost profits are speculative.

The panel found that "E-Systems' fraud may have prevented GROB from teaming with another contractor, or submitting a bid on its own, or being the only company to have teamed with E-Systems," yet said that E-Systems was not unjustly enriched at GROB's expense. The panel has created a conflict in the law by requiring absolute evidence that GROB would have succeeded in Phase 1, and concrete proof of GROB's resulting lost profits, in the context of considering the remedy of constructive trust. This record evidences the likelihood of GROB's success and lost profits–at least sufficient evidence to have let the jury decide. However, by rejecting constructive trust on the same grounds used to reject lost profits, the panel has rewritten the law on constructive trust, wrongly merging it with the lost profits inquiry.

Fraud justifies the imposition of a constructive trust over the wrongdoers' profits. *Meadows v. Bierschwale*, 516 S.W.2d 125, 128 (Tex. 1974); *Dyll*, 167 F.3d at 948. "A constructive trust is a legal fiction–a creation of equity to prevent a wrongdoer from profiting from his wrongful acts." *McAlpin v. Sanchez*, 858 S.W.2d 501, 507 (Tex.App.–Corpus Christi 1993) (citing *Ginther v. Taub,* 675 S.W.2d 724, 728 (Tex. 1984)). It is remedial in nature and has "the very broad function of redressing wrong or unjust enrichment in keeping with basic principles of equity and justice." *Meadows,* 516 S.W.2d at 131; *Dyll,* 167 F.3d at 948.

The panel decision conflicts with precedent in three critical ways: (i) GROB did not have to prove lost profits to justify a constructive trust. Texas courts impose constructive trusts in cases of wrongdoing when the existence of actual damages can not be proved. *See Procom*, 16 S.W.3d at 381-82*; Thomas v. Barton Lodge II, Ltd.,* 174 F.3d 636, 650 (5th Cir. 1999); *Dyll*, 167 F.3d at 947-48; (ii) imposition of a constructive trust does not require a direct connection to an identifiable *res*. *Harris v. Sentry Title Co., Inc.*, 715 F.2d 941, 948 (5th Cir. 1983), and *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 261-65 (Tex. 1951), do not even list connection to a *res* as an element of constructive trust; and, (iii) E-Systems was *ipso facto* unjustly enriched by its fraud. The panel recognized the many ways in which E-Systems' harmed GROB, but failed to recognize the logical corollary: E-Systems' fraud was designed to and did benefit E-Systems. Indeed, that fact should be presumed from the enormous effort E-Systems invested in its scheme.

A. The Panel Decision Conflicts With This Court's Precedent.

In *Dyll*, 167 F.3d at 948, this Court recognized that a constructive trust was warranted because by defrauding a competitor, the defrauder necessarily acquired a benefit, and thus was unjustly enriched. This Court upheld imposition of a constructive trust even though the property on which the trust was imposed had been legally acquired by the defendant through its own efforts. *Id.* The constructive trust remedy is extremely flexible. To satisfy the demands of justice, courts of equity can and should "indulge in presumptions and even pure fiction" when considering whether to impose a constructive trust. *Meadows*, 516 S.W.2d at 131.

In finding no unjust enrichment, the panel improperly ignored the benefit E-Systems gained by defrauding GROB. E-Systems sacrificed GROB's opportunity to win solely to insure its own success. Moreover, while recognizing the harm to GROB, the panel improperly required absolute proof that GROB would have won. This contradicts all prior cases in similar contexts. Even were that a requirement, GROB had record-holding experience in high-altitude aircraft; E-Systems admitted that GROB was capable of building a successful jet; and, E-Systems adamantly refused to let GROB submit a jet. These facts alone establish that E-Systems' fraud prevented GROB from succeeding. *DSC,* 107 F.3d at 329.

More importantly, proof that GROB would have won is not an element of constructive trust. Neither the district court nor the panel had discretion to ignore the elements of constructive trust. E-Systems, as the wrongdoer, was unjustly enriched,

and did benefit from defrauding its competitor. E-Systems' own executives admitted GROB was harmed. GROB also produced evidence of the profit margin to which E-Systems agreed (R11:252-56), and it would be simple to impose a constructive trust in that amount ($562,000 per plane based on a $10,000,000 unit fly-away price).

B. The Panel Decision Conflicts With Controlling Texas Precedent.

Defeating the very purpose of constructive trust, the panel refused to impose it because GROB could not prove lost profits. This circular reasoning begs the question. A constructive trust is to provide a remedy when others fail. The Texas Supreme Court and lower courts have confirmed that the "*res* element" cannot be read as stringently as it was here. In *Meadows*, 516 S.W.2d at 131-32, the Court held that a constructive trust could be imposed in favor of a plaintiff who was damaged by fraud, even though he had no legal or proprietary interest in the underlying property or contract which yielded the trust proceeds. *Id.* In *Ginther*, 675 S.W.2d at 728, the Court extended constructive trust to property held by a third party, noting that the flexible and equitable nature of the remedy allows this. This Court should grant *en banc* review to follow the Texas Supreme Court's pronouncements in *Ginther* and *Meadows.*

This Court must follow Texas law. E-Systems' fraud was blatant, malicious, and damaged GROB while benefitting E-Systems. GROB's losses and E-Systems' profits are intertwined, and trace to E-Systems' fraud in the team bids. This case is precisely the type in which constructive trust should be imposed. Texas courts readily

impose constructive trusts in situations of fraud *or* breach of confidence or trust in the context of joint ventures. *See Procom*, 16 S.W.3d 377; *see also Carr v. Weiss*, 984 S.W.2d 753, 766-78 (Tex.App.–Amarillo 1999).

In the joint or team effort, unfairness is presumed and a constructive trust is imposed if the team member who refused to act in the best interest, or for the benefit of both members, fails "to fully disclose the facts and circumstances that would demonstrate his good faith . . .." *Procom,* 16 S.W.3d at 382-83; *see also* in *Huffington v. Upchurch,* 532 S.W.2d 576, 579 (Tex. 1976). "For him and for those like him the rule of undivided loyalty is relentless and supreme." *Huffington*, 532 S.W.2d at 579. The panel opinion conflicts with cases in the bid context, in Texas and elsewhere, which have imposed constructive trusts over profits realized by a successful bidder guilty of fraud or breach of duty. In *R.L. Lipsey,* 611 S.W.2d at 919-20, the defendant's breach of an agreement to submit a team bid prompted the court to impose a constructive trust over profits the defendant earned as a result of its successful bid.

The panel decision squarely conflicts with *Lone Star*, 893 S.W.2d at 601, in which the court reversed a take-nothing judgment in favor of the successful bidder and remanded to allow the jury to determine whether the successful bidder's fraud caused the plaintiff to lose the bid and suffer damages. GROB asks for nothing more here. The *Lone Star* court rejected the defendant's contention of no legally cognizable damages:

> Lone Star alleged that the fraud and breach of fiduciary duties caused it to lose the opportunity to successfully bid for the failed bank's assets and

> that a constructive trust should be imposed on those assets in NCNB's hands. Those are legally cognizable damages and remedies causally related to the alleged wrongs. *Id.* at 601.

This case is even stronger than *Lone Star*–the jury has already found fraud and cause (GROB-RE2). The panel opinion conflicts with binding Texas precedent.

C. The Panel Decision Conflicts With Decisions Of Other Circuits.

At least three other circuits have applied constructive trust to team bid situations where fraud or breach of duty undermined the plaintiff's bid award. This case is virtually identical to *Cable & Computer Technology, Inc. v. Lockheed Sanders, Inc.*, 214 F.3d 1030 (9th Cir. 2000), where a constructive trust with disgorgement of profits was the approved remedy because one division of the defendant's corporation fraudulently concealed facts from its teammate and strung it along until it was too late for the teammate to secure another partner. There, like here, one of the defendant's purposes was to disable the teammate as a competitor so that another division of the defendant's corporation had a better chance of winning the government contract.

The panel's opinion also conflicts with *ATACS Corp. v. Trans World Communications, Inc.*, 155 F.3d 659 (3d Cir. 1998). There, the Court reversed an award of $1 for breach of an exclusive agreement to submit a team bid on a government contract, and remanded for an evidentiary hearing on restitution damages, which, the Court said, are "[r]ooted in common notions of equity" akin to unjust enrichment and call for disgorgement of the defendant's benefits.

Finally, in *Eden Hannon & Co. v. Sumitomo Trust & Banking Co.*, 914 F.2d 556 (4th Cir. 1990), *cert. denied,* 499 U.S. 947 (1991), a case which the panel wrongly distinguished, the Court imposed a constructive trust on similar facts. After the plaintiff–bidder "wowed" the contracting authorities, the defendant–bidder sought out the plaintiff and agreed not to bid without the plaintiff–all as part of its fraudulent scheme to remove the plaintiff from the competition and benefit from the plaintiff's expertise in submitting a secret separate bid. Here, too, E-Systems used exclusivity as a ruse and benefitted from full access to GROB's world-record holding technology for high altitude flight. GROB's technology and information were available to E-Systems and Teledyne-Ryan, while GROB was kept in the dark about E-Systems' inside information from ARPA. In *Eden Hannon*, the Fourth Circuit rejected the defendant's argument that the winning bid reflected its own hard work–noting that bid contamination and actual damages are hard to prove. It imposed a constructive trust over the defendant's profits, which could be easily quantified, even though the plaintiff could *not* prove it would have won the contract *or* the amount of its damages.

This Circuit, in *DSC,* 107 F.3d at 329, held that "[e]ven if a product is not yet fully developed, a plaintiff is not prevented from recovering lost profits if it was hindered in developing that product." DSC had never sold its revolutionary new product and had no established market. This Court rejected the defendant's argument against *lost profits* (which require more proof), finding that the defendant's actions hindered DSC's development of the product and DSC had a history as an industry

leader. *Id.* The same applies to GROB. Even E-Systems admitted GROB's capability to build a winning jet, and ARPA was predisposed to grant GROB a contract after its visit to Germany.

Additionally, although the panel missed this, E-Systems assisted Teledyne with the development of its jet (R11:378-80; 13:1103-04, 1185-87, 1383, 1389-90; 14:1765), while E-Systems insisted to GROB that a jet was not the proper aircraft. This connects E-Systems' benefits and GROB's losses as a result of E-Systems' fraud. E-Systems' fraud allowed it to have it all–Grob's experience, high-altitude record-setting performance, and technical expertise and data; Teledyne-Ryan's input; and, its own specialized knowledge about the ground station, which was the same for all types of planes. On these facts, there can be no doubt that E-Systems was unjustly enriched by its fraud. To refuse to at least impose a constructive trust, if not to allow lost profits, will encourage large corporations such as E-Systems to commit fraud.

CONCLUSION

For these reasons, this Court should grant *en banc* review. The panel decision affirms findings of egregious and malicious fraud but creates a conflict in the decisions of this Court, with Texas precedent and with at least three sister circuits. It makes bad law by leaving a defrauded victim without any legal remedy. *En banc* review is necessary to secure and maintain uniformity on these issues.

Respectfully submitted,

_____

SIDNEY POWELL
Texas Bar No. 16209700

DEBORAH REGGIO
Louisiana Bar No. 22577

POWELL & REGGIO
1920 Abrams Parkway, #369
Dallas, Texas 75214
(214) 653-3933 (Telephone)
(214) 319-2502 (Telecopier)

ATTORNEYS FOR APPELLANT, BURKHART GROB LUFT UND RAUMFAHRT GMBH & CO. KG

CERTIFICATE OF SERVICE

I hereby certify that a true and correct hard and electronic copy of the Petition for Rehearing *En Banc* was served on Appellee's attorneys listed below via First Class Mail this ____ day of August, 2001.

Joe Bill Harrison
William G. Whitehill
Stacy Obenhaus
Gardere & Wynne
Thanksgiving Tower
1601 Elm Street, Ste. 3000
Dallas, TX 75201-4761

Marty L. Rowley
Mark D. White
Sprouse Smith & Rowley
P. O. Box 15008
Amarillo, TX 79105-5008

_____

SIDNEY POWELL
DEBORAH REGGIO

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.3, undersigned counsel certifies this appellate brief complies with the page-volume limitations of 5th Cir. R. 32.3.

1. EXCLUSIVE OF THE EXEMPTED PORTIONS OF FED.R.APP.P. 32(a)(7)(B)(iii), THE BRIEF IS 15 PAGES LONG.

2. THE BRIEF HAS BEEN PREPARED IN PROPORTIONALLY SPACED TYPEFACE USING WORD PERFECT 8.0 FOR WINDOWS IN TIMES NEW ROMAN TYPEFACE AND 14 POINT FONT SIZE.

3. UNDERSIGNED COUNSEL IS ALSO PROVIDING AN ELECTRONIC VERSION OF THE BRIEF TO THE COURT AND OPPOSING COUNSEL.

4. UNDERSIGNED COUNSEL UNDERSTANDS THAT A MATERIAL MISREPRESENTATION IN COMPLETING THIS CERTIFICATE, OR CIRCUMVENTION OF THE TYPE-VOLUME LIMITS IN FED.R.APP.P. 32(a)(7)(B)(iii), MAY RESULT IN THE COURT'S STRIKING THE BRIEF AND IMPOSING SANCTIONS AGAINST THE PERSON SIGNING THE BRIEF.

_____

SIDNEY POWELL
DEBORAH PEARCE REGGIO