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

BRIEF OF APPELLANT

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

Case No. 99-11242; *Burkhart Grob Luft und Raumfahrt GmbH & Co. KG v. E-Systems, Inc.*

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

Schwarz Kurtze Schniewind Kelwing Wicke
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

RECOMMENDATION ON ORAL ARGUMENT

Appellant Burkhart GROB Luft und Raumfahrt GmbH & Co. KG ("GROB") requests extended oral argument of thirty minutes per side.

The record in this case is more than fourteen volumes, and the trial transcript approaches 2,000 pages. This is a Class IV case, and the defense filed notice of cross-appeal.

An Amarillo jury found that Texas-based E-Systems defrauded GROB during their joint-venture pursuit of a multi-million dollar contract to build an unmanned, high-altitude spy plane for "Tier II Plus," a project initiated by the Advanced Research Projects Agency ["ARPA"] of the United States. After promising GROB that it would be its exclusive teammate, E-Systems teamed with Teledyne-Ryan to submit a competing bid, which won the contract, and proceeded to build the planes. The jury awarded GROB $45,000,000 in punitive damages. Despite evidence that GROB's lost profits exceeded $100 million, the trial judge refused to submit GROB's lost profits issue to the jury, failed to impose a constructive trust on E-Systems' profits, and wrongly reversed the jury's award of punitive damages.

The case raises issues of fraud, lost profits, constructive trust, and punitive damages. Oral argument will assist the Court in deciding this important case.

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STATEMENT OF JURISDICTION

This is an appeal from a final judgment in a civil case. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1332(a)(2), 1367(a) and 1391(a)(2) and (c). This Court has jurisdiction pursuant to 28 U.S.C. § 1291. GROB timely appealed, and E-Systems cross-appealed (R. 8: 1840, 1842; RE 5, 6).

STATEMENT OF THE ISSUES

1. Whether the court erred in refusing to allow the jury to consider GROB's lost profits as its actual damages for fraud?

2. Whether the court erred in failing to impose a constructive trust over E-Systems' profits?

3. Whether E-Systems' fraud requires reimbursement of GROB's bid preparation costs?

4. Whether the court erred in overturning the jury's $45,000,000 punitive damage verdict?

STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition Below.

GROB sued E-Systems in Dallas federal court for, *inter alia*, breach of contract, breach of fiduciary duty, and fraud (R. 1: 1; 2: 280). E-Systems countersued (R. 1: 77; 2: 379). The jury returned a verdict finding E-Systems guilty of fraud and

awarding GROB $45,000,000 in punitive damages (R. 8: 1781-98; RE 2). Two years later, the district court reversed the award of punitive damages and entered a judgment of $1 for GROB, based on the jury's finding of E-Systems' fraud (R. 8: 1831-39; RE 3-4).

B. Statement Of Facts.

GROB is a family owned, international business begun years ago by Dr. Burkhart Grob, who pioneered the manufacturing of a lightweight, but strong composite, carbon-fiber material for design and construction of sophisticated aircraft. GROB's Egrett and Strato 2C aircraft hold five world records for high-altitude flight (R. 12: 800, 803-4, 838-9; 14: 1653-4). Headquartered in Germany, GROB builds planes and gliders for customers such as the British Royal Air Force and the German military (R. 11: 127-33, 329; Exs. 1-4, 6). GROB's composite material and design provide the benefits of lower cost, greater strength for the weight, and easy maintenance without corrosion (R. 12: 518-19, 803).

Defendant E-Systems, now owned by Raytheon, is a defense contractor specializing in aerial surveillance software, imaging and communications equipment, systems integration, and ground stations on such projects as the U-2 spy plane and Air Force One (R. 13: 1077; 14: 1633). E-Systems was organized in several divisions, two of which — Garland and Melpar — were instrumental in the parties' prior joint

venture, GAFECS, and were critical to the success of their Tier II Plus bid (R. 12: 509-12; 914-18, 927-28; 13: 1007-8, 1058). E-Systems does not build aircraft (R. 11: 136; 12: 514; 13: 1077; 14: 1667; Ex. 71).

1. In An Eight-Year Relationship, Grob & E-Systems Built A High-Altitude Plane That Holds Three World Records.

In 1985, on a handshake between Dr. Grob and Klaus "Dutch" Meyer, an E-Systems Vice-President,[1] the parties began an eight-year relationship in which GROB designed and constructed the Egrett high-altitude manned aircraft for the German Air Force program "GAFECS" (R. 11: 136-39, 12: 496, 518-24, 810-12). GROB designed and built the new plane in only 11 months (R. 11: 142-43, 518-19, 522-23; 14: 1731-32). The Egrett flew three world records for its class (R. 11: 139-40).

2. ARPA Requests Bids For A New High-Altitude Unmanned Aerial Vehicle In A Project Named Tier II Plus.

[1]Klaus Dieter ("Dutch") Meyer was born in Offenburg, Germany. He came to the United States in 1952 and is a United States citizen (R. 12: 501-2). He worked for E-Systems for 26 years and was Vice-President for Surveillance Systems at the time of Tier II Plus. E-Systems chose Dutch Meyer to lead the proposal effort with GROB. He is fluent in German, and he had worked closely with GROB on GAFECS (R. 12: 495-97, 504-9, 515-19).

In Spring 1994, the defense industry learned that ARPA would be soliciting bids for an unmanned, Tier II Plus aircraft capable of "loitering" at 65,000 feet for 30 hours while transmitting real-time communications and imagery to a ground station for immediate field use (R. 11: 150-52; 12: 841-2). GROB learned of Tier II Plus from its consultant, A. C. Williams, a former E-Systems employee (R. 11: 149-52, 399, 12: 701-8, 711).

Herr Fischer of GROB contacted E-Systems executives Ernest Pennington and Meyer, who had worked closely with GROB in Germany when the companies teamed on GAFECS. Fischer encouraged E-Systems to team with GROB on Tier II Plus (R. 11: 150, 153, 399-400, 12: 522-24, 709-10, 813-14; 13: 1126). E-Systems told Fischer it was not interested in Tier II Plus[2] (R. 11: 153; 13: 1126). GROB began exploring other possibilities (R. 11: 154, 178-79). Fischer met in Washington with General Berman, ARPA's head of Tier II Plus, and invited Berman to Germany to see GROB's technology (R. 11: 155, 156).

3. Grob Wows ARPA With Its Facilities And Technology.

[2] Actually, E-Systems was pursuing other teammates, and by mid-April 1994, a few key people at E-Systems knew that the Melpar division would be working with Teledyne-Ryan (R. 13: 1035-36, 1302-7, 1420; 14: 1579, 1599-1601, 1662).

In April 1994, high-ranking representatives of ARPA, including Berman, toured GROB'S facilities at Mattsies, Germany and saw a demonstration of the Egrett and of the special engines on GROB's unique Strato 2C aircraft, which it had built alone (R. 11: 156, 157, 176, 484; 12: 565, 712; 13: 913-14, 993). The performance of the plane and GROB's innovative manufacturing process so impressed Berman that he encouraged GROB to participate in the Tier II Plus project. After seeing the flight demonstration of the Egrett, Berman said: "This is the airplane we need now." (R. 12: 556, 567-8, 643; 14: 1760-61). E-Systems' own representative, Pennington, who was also present, reported: GROB "blew them away." Before leaving Germany, Berman considered awarding a non-competitive contract to GROB alone (R. 11: 171, 484; 12: 550-53, 565-67, 643, 712, 729, 815, 803-4; Ex. 105).

Upon leaving GROB's demonstration, Pennington promptly wrote a memo urging E-Systems to change its strategy immediately to team with GROB as long as possible: "Modify our teaming strategy. Keep GROB in our camp as long as possible." (R. 11: 484-5; 12: 540-41, 550-53, 569; 13: 990-92, 1126; Ex. 139; RE 7).

Meyer gave a copy of Pennington's memo to E-Systems Vice-President Brian Cullen[3] (R. 12: 552; 14: 1760-62). E-Systems CEO Lawson also knew that ARPA was interested in GROB's airframe (R. 13: 1064-65; 14: 1791). Meyer recognized that a government representative's statement that GROB was going to get a non-competitive contract was "a shock." E-Systems had been trying to enter the UAV market for years. It became imperative to sign GROB immediately (R. 12: 567-7, 569; 13: 1305-7; 14: 1672, 1786-68; Ex. 140; RE 10). E-Systems knew that GROB could and would build the plane that ARPA wanted (R. 12: 554-5, 643-4; 13: 1065; 14: 1539-41, 1547).

[3] Cullen headed the Greenville Division of E-Systems (R. 14: 1630-31).

4. E-Systems Enlists GROB On Tier II Plus And Promises GROB An Exclusive Deal.

Within hours of receiving Pennington's memo, E-Systems Vice-President, Brian Cullen, wrote a letter to Dr. Grob expressing E-Systems' new-found desire to team with GROB in a "New Start" of their business relationship (R. 11: 158-59, 484, 12: 540-42, 569-71, 656-7, 816; 14: 1670, 1760-62; Ex. 18; RE 8). Cullen's letter to Grob, expressing E-Systems' sudden interest in teaming with GROB, proposed a working group meeting at GROB's "earliest convenience," either before or after the bidders' briefing scheduled for May in Washington (R. 11: 168).

Meyer admitted that by April it was clear that GROB was "the only show in town" that E-Systems could possibly hope to participate with as a prime contractor (R. 12: 531, 533, 556-63; Ex. 140; RE 10). Meyer conceded that E-Systems was well aware of ARPA's opinion that GROB was the only company that could build an entirely composite aircraft within ARPA's price range and altitude requirements (R. 12: 560-63). Finally, E-Systems knew that "GROB blew [ARPA] away with more than a snappy air show" in Mattsies (R. 12: 565).

Dr. Grob promptly responded to Cullen that GROB was interested, having just received ARPA's favorable response to its demonstration the prior Friday, and that he

thought its Egrett D-500 aircraft provided an excellent starting point for the new Unmanned Aerial Vehicle ("UAV") (R. 11: 171, 175, 366; 12: 817; Ex. 19; RE 9).

Prior to this, Meyer and Pennington understood that GROB was "committed to working with E-Systems and wants us to team with them and even will consider being a subcontractor to us, but will not sign an exclusive agreement with us, as they want to be free . . . to team with someone else if we aren't serious and sincere. They don't want to be ditched at the last minute, I am sure." (R. 12: 566). Meyer assured Fischer and Dr. Grob that E-Systems would deal exclusively with GROB (R. 12: 573-76).

5. ARPA Outlines The Tier II Plus Project.

At the bidders' briefing in Washington on May 5, 1994, ARPA outlined a four-phase project to design and build a plane that would fly unmanned, at high-altitudes, "loitering" for approximately 30 hours while transmitting real-time information to the ground. Each plane, exclusive of the ground station, was to be constructed for a unit fly-away price of $10,000,000 (R. 11: 161-65). Phase I was the paperwork – design and calculations; Phase II was to build and test fly the plane; Phase III would require building 8 planes in 24 months and demonstrating mission capabilities; and, Phase IV would be mass production (R. 11: 162). The initial contract for Phase I design would be awarded to 5 teams that would receive $4,000,000 each (R. 11: 163). Only two contractors would proceed to Phase II, with each building two planes that would fly

against each other. The winner would build eight demonstration planes in Phase III (R. 11: 163-64).

In conjunction with the bidders' briefing, GROB met with Boeing Aircraft, Lockheed Martin, Martin Marietta and Grumman, and had not ruled out teaming with another company (R. 11: 178, 180, 12: 819, 998). E-Systems knew that GROB also had been approached by Hughes and the Israelis (R. 12: 998).

6. E-Systems Secures GROB's Promise To Work Exclusively With E-Systems.

On Monday after the ARPA briefing, Fischer and GROB consultants A.C. and Robert Williams met with E-Systems' team in Greenville, Texas[4] (R. 11: 173, 177, 180-81, 12: 713-15, 719-23, 818-19; 14: 1762). Pennington had lived in Germany and worked at GROB for years. Fischer respected him and thought of him as a friend (R. 11: 182). The teams agreed that E-Systems would lead on the mission side and GROB would lead on the design and construction of the aircraft (R. 11: 182-83; 12: 854-85; Ex. 131; RE 14). They also agreed that E-Systems would draft the proposal because

[4]E-Systems' team included Jack Cooke, Neal Cooper, Pennington and Alan Doshier. Cooke was E-Systems' Program Manager for Tier II Plus; Cooper was the chief engineer; and, Pennington had worked with GROB on GAFECS (R.11: 181; 13: 1208, 1222-3, 1416, 1491).

E-Systems had an entire department that specialized in proposal preparation for government contracts (R. 11: 186-87).

E-Systems' primary request was that GROB work exclusively with E-Systems (R. 11: 182; 12: 793). Exclusivity was the first point Fischer wrote in his notes from the meeting (R. 11: 450, 452, 484-85; 12: 718-9, 819; Ex. 70). No one told Fischer or anyone else from GROB that the exclusivity would not be reciprocal[5] (R. 11: 183, 488-9, 714, 718, 793). Indeed, the only question at the end of the meeting was whether GROB would agree to work exclusively with E-Systems (R. 11: 187, 382-3, 485; 12: 793). Herr Fischer explained that he would discuss it with Dr. GROB (R. 11: 184, 187-88, 389-90; 12: 793).

[5]E-Systems' Vice-President Alan Doshier testified that he went to the meeting in Greenville specifically to inform Fischer that E-Systems' Melpar division would be working with Teledyne-Ryan on the ground station, but Doshier admitted that he did not know all the facts when he claims he made his limited disclosure to Fischer (R. 13: 1102-3, 1116, 1130-31, 1183-85, 1353; 14: 1676). For example, he did not know, and therefore did not disclose, that Garland was helping Melpar and Teledyne-Ryan. Nor did he tell Fisher that Melpar would not assist GROB as it had done in GAFECS (R. 13: 1113, 1116, 1130, 1139-42, 1185, 1353; 14: 1678-79).

Dr.Herr Grob agreed to work exclusively with E-Systems because the two companies had such a good working relationship during the eight years of the GAFECS project (R. 11: 188; 12: 572-76, 819; Ex. 25; RE 12). After talking with Dr. Grob, Fischer wrote: "On behalf of Dr. Grob, I would like to let you know that the GROB Company is very happy to work exclusively with E-Systems based on our existing teaming agreement." (R. 11: 190, 389-90; Ex. 25; RE 12). Fischer understood that the two companies had agreed to work exclusively in the Tier II Plus bidding (R. 11: 191, 215; 12: 714-15, 719). He invited E-Systems' representatives to Germany in June to "document the official start of the Tier II Plus program." (R. 11: 192; 13: 1328-9; Ex. 25).

Meanwhile, on May 11, Dr. Grob had spoken rwith Meyer, and they agreed that E-Systems and GROB would proceed exclusively on the Tier II Plus project (R. 11: 193, 206-7, 12: 571-76, 655, 659-60, 820; Ex. 61). Dr. Grob said that Fischer had briefed him, and he agreed with pursuing Tier II Plus on an exclusive basis with E-Systems (R. 12: 578-80; 14: 1685, 1763-64). Meyer promised GROB exclusivity only after consulting with E-Systems' highest executives, including Cullen. Meyer also told Dr. Grob that all the Garland division would be available to assist on the proposal as it had done in GAFECS[6] (R. 12: 573-76, 584, 624-26). Meyer testified

[6]Unknown to Meyer at the time, E-Systems' highest management had earlier decided

that E-Systems had promised GROB complete exclusivity[7] (R. 12: 573-76, 584, 658; Ex. 16; RE 11).

CEO Lawson and selected senior Vice-Presidents, including Terry Heil (Melpar) and Brian Cullen (Greenville), knew at this time of E-Systems' calculated strategy to double-team (R. 12: 924-28, 930; 14: 1579-83, 1800-2; Ex. 35; RE 13).

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to bid with Teledyne-Ryan, and finalized an agreement with Teledyne-Ryan on June 29 (R. 12: 583-4). E-Systems had also decided to allow the Garland division to participate in both bids (R.12: 584-85; 14: 1615, 1618, 1621, 1623-24).

[7] Meyer testified that the strategy of using all the company's assets to support this program was discussed in various meetings at E-Systems. He also told the jury that prior to his May 11 phone call with Dr. Grob, he had specifically discussed exclusivity with Brian Cullen and that all of E-Systems would support the GROB bidding effort exclusively (R. 12: 624-26). He said that Cullen agreed and signed the letter committing to exclusivity (R. 12: 626-27, 659-60). When he spoke with Dr. Grob on May 11, Meyer believed that he had the commitment of Doshier and Cullen on the complete exclusivity of E-Systems (R. 12: 628, 655, 658, 820). Moreover, Meyer had the authority to bind the company at that time (R. 12: 674-5). Meyer admitted that his intent was to bind GROB to E-Systems prior to having to deliver a proposal and he confessed to being part of stringing GROB along (R. 12: 681-3, 685).

Meanwhile, after reaching the agreement of mutual exclusivity with E-Systems, GROB wrote its other potential teammates and advised them of its decision to team with E-Systems, then turned to working on the new project, then turned its attention to working on the new project (R. 11: 195, 268-71; Ex. 69).

7. E-Systems Reiterates Its Promises Of Exclusivity At Design Meeting In Germany.

E-Systems' team of Cooke, Cooper, Pennington, O'Conner, and Meyer traveled to Germany in June for a lengthy meeting on the design of the plane. Dr. Frank, GROB's lead engineer, presented performance tests for a new turboprop, which would be derived from the Egrett, and also for an entirely new jet aircraft (R. 11: 197; 12: 791, 840-1; 13: 1309-11, 1321-2). The GROB team understood that both aircraft would be featured equally in the proposal (R. 11: 197-200, 366-7, 377-80; 12: 786-9, 824-5, 843, 852, 856, 863-4; 13: 1309, 1435, 1476; 14: 1536, 1539, 1541; RE 14). GROB provided the requested drawings of each plane (R. 11: 202-3; 13: 1438; Ex. 12, 13). GROB also provided the technical specifications and financial data for all phases and proposals for the two aircraft designs for Tier II Plus (R. 11: 205-6, 210-11, 250, 282-3, 288-95, 446; 12: 593-8, 612, 783-9, 849; 13: 1430-33; Exs. 61, 62, 71).

During the June meeting in Germany, Meyer and Dr. Grob again discussed exclusivity and shook hands on E-Systems' assurance of exclusivity (R. 12: 824-5).

Dr. Grob wrote Brian Cullen on June 23, 1994 to confirm the mutual exclusivity[8] (R. 11: 212; 12: 602-4, 824-26; Ex. 22; RE 16). Cullen asked Meyer to "craft" the reply, in which Cullen wrote: "We concur" with GROB's confirmation of exclusivity (R. 11: 214; 12: 604-7; Ex. 452; RE 16). Cullen's reply to Dr. Grob was dated June 29 (Exs. 23-24; RE 17, 19). At the same time, Cullen was telling E-Systems Vice-President Terry Heil that E-Systems did not have an exclusive arrangement with GROB[9] (R. 12: 905).

8. E-Systems Prepares The Proposal For "The Tier II Plus Team."

[8] In response to E-Systems' request for proposal in June, Fischer again confirmed: "We refer to our letter to Brian Cullen, dated 11 May, 1994, in which GROB expressed its willingness to work on an exclusive basis with E-Systems on the Tier II Plus program. This exclusivity was accepted by E-Systems verbally through K. H. Meyer, when GROB got confirmation that E-Systems is working exclusively with GROB on the Tier II Plus program. This commitment is binding for E-Systems, Inc. and their relevant divisions or subsidiaries as well as for the GROB group of companies." (R. 12: 206-8, 672-4; Ex. 61). At the time, E-Systems did not dispute these statements (R. 12: 208-9; 13: 1330-1).

[9] Evidencing Cullen's bias and intent to defraud, after writing Dr. Grob and asking for "a New Start" to their business relationship, Cullen handwrote a note to Meyer on Dr. GROB's letter: "Dutch, perhaps you could craft a response that we could offer . . . Thanks. Brian." Then an arrow pointed to this remark: "An undertone that we are prepared to terminate and go it alone would not be bad. I have no intention of being blackmailed again. B." (R. 12: 669-70; 14: 1701-4; Exs. 22, 452; RE 16). Cullen claimed at trial that this letter changed the relationship only to mean if E-Systems and GROB won the Phase I contract, E-Systems could not switch to a Lockheed or Boeing plane (R. 14: 1704, 1722). What Cullen called "blackmail" was an easily-resolved dispute between GROB and E-Systems at the conclusion of GAFECS (R.12: 812)

E-Systems prepared the proposal, bearing the E-Systems and GROB logos, calling itself and GROB "the Tier II Plus Team." (R. 11: 226-28, 234, 236-7; 12: 437; Ex. 71; RE 21). The proposal included a letter, signed by E-Systems President Lowell Lawson and by Dr. Grob, the letterhead of which identified E-Systems and GROB as "the Tier II Plus Team." (R. 11: 236-8; RE 21).

Early drafts of the proposal included substantial material on the jet propulsion system GROB wanted (R. 12: 759, 773-5, 783-89, 791, 794). Indeed, GROB proposed two planes — the more readily-available Egrett derivative turboprop and a new high-tech jet that would meet ARPA's specs (R. 12: 843-6, 857). GROB provided drawings and performance data for its new jet (R. 11: 418-21, 12: 757, 759, 777-9; Exs. 38, 198). GROB believed the jet would be featured prominently (R. 12: 736, 756-60, 773-6, 829, 832, 849-52, 871-4; 13: 1487; 14: 1536, 1541; Ex. 4). GROB *did not know* in sufficient time to make a difference that it was relegated to a turboprop — only proposal (R. 12: 829, 832-4; 13: 1487). More importantly, GROB did not know that E-Systems' consulting expert, General Mitchell, had advised E-Systems that neither the Egrett platform nor the turboprop was acceptable to the military,[10] and GROB did not know that E-Systems had dual and conflicting interests in the bidding process (R.

[10] From early on, General Mitchell told E-Systems executives Lawson and Cullen that the Egrett was not the correct platform from the military perspective. It was too much like the existing U-2 and met few of ARPA's specs (R. 12: 876-7, 880).

11: 424-5, 472; 12: 658, 871-4; Ex. 38). Without rational explanation, E-Systems' final proposal focused on a turboprop plane, derived from the Egrett and, by comparison, rejected a jet (R. 11: 258-268, 436-7, 440, 482-3; 12: 794, 849-50; Ex. 71).

9. Simultaneously, Pursuant To The Secret Strategy Of E-Systems' Highest Executives, E-Systems Teams With Teledyne-Ryan And Prepares The Competing Winning Bid.

On June 29, 1994, the same day Cullen signed the letter promising GROB exclusivity, E-Systems also signed an agreement with Teledyne-Ryan to prepare a bid based on a new, high-tech jet design (R. 12: 603-5, 607-8; 14: 1798-1802; Exs. 23, 35; RE 17-18). In Cullen's words: E-Systems proposed a "Volkswagen" with GROB and a "Cadillac" with Teledyne-Ryan (R. 13: 1094-5).

The proposal E-Systems prepared with Teledyne-Ryan is open, inclusive and detailed. It touts Garland's success with the JSIPS imaging program, Melpar's Deployable Ground Intercept Facility and Melpar's success with the U-2 spy plane (R. 13: 1105-15; *Cf.* Exs. 61, 71, 361). The proposal E-Systems prepared for GROB, perfunctory in comparison, did not mention E-Systems' experience with the U-2 spy plane or its Deployable Ground Intercept Facility, because those accomplishments belonged to the Melpar Division (R. 13: 1113-5; Exs. 36, 71A).

10. E-Systems Perpetuates Fraud — Concealing Its Dual And Conflicting Efforts Even When Its Wrongs Are Challenged By Its Own Vice-President.

When Meyer learned that E-Systems' Melpar division was preparing a proposal with Teledyne-Ryan, he deemed it a breach of E-Systems' agreement of exclusivity (R. 12: 576-78; RE 20). Meyer wrote Cullen and Doshier about his May 11 phone call with Dr. Grob (R. 13: 1134-5; 12: 576-78, 589; 14: 1744; Ex. 16; RE 11). Meyer knew from his conversation with Dr. Grob, and so informed E-Systems' executives, that Dr. Grob believed E-Systems was working exclusively with GROB and "did not fully understand what the E-Systems' arrangement with Teledyne-Ryan was" (R. 12: 580, 589-593). Moreover, E-Systems Vice-President Terry Heil warned fellow executives that exclusivity with GROB was "impossible" (R. 14: 1591-92). Heil admitted knowing that exclusivity with GROB meant bidding only with GROB, and that this was impossible given of E-Systems' prior decision to team with Teledyne-Ryan (R. 14: 1591-92, 1594). Even Cullen admitted that Meyer told him that if they were going to proceed with GROB, E-Systems needed to drop Teledyne-Ryan (R. 14: 1699).

It was obvious to Meyer that having E-Systems divide its "front" affected GROB's chance of winning, and Meyer encouraged his superiors to make certain Dr. GROB understood that E-Systems was making competing bids (R. 12: 580-82). Meyer said that he "made a total nuisance" of himself on this issue, speaking up at staff

meetings and going from office to office to talk to people about this problem (R. 12: 592-93; Ex. 58; RE 20). He testified that he "could not get anybody's attention." (R. 12: 592-3). Despite Meyer's efforts, nothing was done to communicate the truth to Dr. Grob, and E-Systems proceeded with its duplicity (R. 12: 593-4; 13: 1134-7).

The absence of Melpar on the E-Systems/GROB ground station and the sole focus on the turboprop sabotaged GROB's chance of winning (R. 12: 580-82; 13: 1115-7). Melpar and Garland had worked with GROB on GAFECS, and Meyer believed that having Melpar and Teledyne-Ryan appear as competitors defeated the previously agreed strategy to present a "united front" (R. 12: 582-85, 594, 659). It was even later that Meyer learned that the resources of Garland were divided between the two proposals, and that a "Chinese wall" existed in the Garland division to preserve competitive advantage (R. 12: 585-86; 13: 1207; Ex. 223; RE 15). No one at E-Systems disclosed these material facts to Dr. Grob (R. 12: 610, 659-60; 13: 1115-16; 14: 1765-66).

Meyer described E-Systems' strategy as one of expediency and duplicity. E-Systems now claims that its promise of exclusivity was intended to apply only to the Greenville Division,[11] yet if the GROB proposal had won the ARPA Phase I

[11] E-Systems' claim is belied by its own documents. E-Systems knew how to draft an agreement that obligated only a specified division. Its agreement with Teledyne-Ryan says: "It is understood by the parties with respect to the obligation of E-Systems, that this

contract, it was still a false promise. E-Systems could not have dealt exclusively with GROB and Teledyne-Ryan (R. 12: 699-704; 13: 1084-5). Moreover, E-Systems highest executives knew that Dr. Grob believed they had an exclusive working relationship, and that is what they wanted him to believe. E-Systems knew GROB would not participate with them on any other terms (R. 12: 701-4, 822; RE 20).

11. E-Systems Deliberately Concealed Numerous Material Facts From GROB.

Unknown to GROB, E-Systems maximized its own chance of winning a Tier II Plus contract by double-teaming with Teledyne-Ryan on the most high-tech, high risk solution for ARPA ("the Cadillac"), and by limiting GROB to an Egrett-derivative, turboprop solution ("the Volkswagen"), which its own, high-ranking military consultant knew would not satisfy the military and did not meet ARPA specifications (R. 11: 471-72; 12: 610-12, 617-9; 13: 1094-95; 14: 1773-1801-3; Ex. 2). E-Systems'

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exclusive arrangement applies only to the Melpar Division of E-Systems, Inc . . ." (R. 13: 1117-8; Ex. 60). E-Systems never limited its role to GROB, and instead perpetuated the false promise of exclusivity (R. 13: 1132-6). By admission of E-Systems' highest executives, E-Systems never told GROB that Melpar was unavailable to GROB or that it and Garland were divided and double-teaming (R. 13: 1115-6).

Vice-Presidents and consultants described a series of meetings on double-teaming illustrating that E-Systems' decision to defraud GROB was calculated and deliberate. Ultimately, E-Systems Vice-Presidents Heil and Cullen decided that E-Systems best chance of winning was to be on more than one team, and E-Systems CEO Lawson approved this strategy and ordered a "Chinese wall" in Garland (R. 12: 892, 905-6, 925-7; 13: 1167-8; 14: 1800-02; 14: 1579-83, 1773-74). Cullen knew Teledyne-Ryan would come forth with "breakthrough technology," and he wanted E-Systems to compete at both ends of the market (R. 14: 1686).

By admission of E-Systems highest management, E-Systems disclosed to GROB nothing more than that Melpar would be helping Teledyne-Ryan with a ground station (R. 13: 1101-3, 1183-7).[12]

E-Systems concealed numerous material facts:

[12] E-Systems CEO Lawson claimed that he directed subordinates to let GROB know that E-Systems was bidding with Teledyne-Ryan, but Doshier, who made the instructed disclosure, did not say that much (R. 12: 1069-71, 1115-6). John Nannen, E-Systems/Melpar executive responsible for the Tier II Plus project, did not even know that Melpar was prevented from building a ground station with GROB (R. 13: 1373).

1. E-Systems did *not* tell GROB that it was teaming with Teledyne-Ryan and submitting a competing bid[13] (R. 11: 217, 488-89; 12: 610-12, 618, 622; 13: 1128-31, 1456; 14: 1695).

[13] Even viewing E-Systems' testimony in the best possible light, at most, Doshier told Fischer at the meeting in Greenville that the Melpar Division would be assisting Teledyne-Ryan with its ground station (R. 13: 1101-3, 1183-7; 14: 1555, 1684). Doshier attended only ½ hour of the day-long meetings, and Doshier said nothing about Melpar doing any work on the aircraft systems (R. 13: 1103-4, 1185-7). Likewise, Doshier admitted that he did not disclose to Fischer that Melpar would *not* design the ground station for GROB as it had done in GAFECS; that Garland was also helping Teledyne-Ryan; or, that Mitchell had said neither the Egrett nor a turboprop would satisfy the military (R. 13: 1112-7). DOSHIER ADMITTED THAT HE DID NOT EVEN KNOW ALL OF THE FACTS WHEN HE TALKED WITH FISCHER (R. 13: 1130, 1132, 1135, 1186).

E-SYSTEMS NEVER SHOWED GROB A TELEDYNE-RYAN AERONAUTICAL DIAGRAM EVEN THOUGH IT KNEW ITS APPROACH WOULD HAVE BEEN IMPORTANT TO GROB, AND MITCHELL E-SYSTEMS

2. E-Systems, which had long wanted to enter the UAV market, did not disclose that Melpar was building a 10-year relationship with Teledyne-Ryan (R. 12: 926; 13: 1396).

3. E-Systems did not tell GROB that Melpar — the only bidder with U-2 experience and a critical part of the GROB team on GAFECS — would *not* be available to build the GROB ground station[14] (R. 12: 915-7; 13: 1115-6, 1132, 1361, 1373; 14: 1746, 1764).

4. E-Systems did not disclose that Melpar would be providing surveillance hardware and software on Teledyne-Ryan's plane, or that it will provide the Threat Warning System on their plane (R. 11: 378-80; 13: 1383, 1389-90; 14: 1765).

5. E-Systems did not disclose that E-Systems would no-bid the program if they did not use only the turboprop (R. 12: 622; 13: 1458).

CONSULTANT ALL ALONG THOUGHT THE CONTRACT WOULD BE AWARDED ALONG THE LINES OF TELEDYNE-RYANS AIRCRAFT (R. 11: 309; 12: 610, 928). E-Systems' Melpar and Garland divisions had the advantage of knowing the details of GROB's Egrett because they had supported GROB in the GAFECS project in which Grob had provided E-Systems' confidential and proprietary information (R. 12: 523, 584-594, 636-40). The competing team also was privy to details disclosed at joint executive meetings during Tier II Plus (RE 20).

[14] Doshier conceded that it would have helped for the GROB proposal to state it was the only team with U-2 experience (R. 13: 1132-4).

6. E-Systems did not disclose that E-Systems consultant General Mitchell had advised E-Systems from early on that a derivative of the Egrett was not what the military wanted or needed, and that it met few of ARPA's specs (R. 11: 309-10; 12: 872, 874-7, 880, 909; 13: 1173; Ex. 2).[15]

7. E-Systems did not disclose that General Mitchell advised that a turboprop would not satisfy the military (R. 11: 309-10; 12: 610-12; 13: 1112-7).

8. E-Systems did not disclose that, by comparison, it was rejecting a jet in the proposal, even though it knew ARPA was looking for "breakthrough technology" in aircraft (R. 11: 268; 13: 1435, 1452, 1466, 1476, 1487-8; 14: 1541-4, 1665-6, 1686).

9. E-Systems did not disclose that Melpar had an exclusive agreement with Teledyne-Ryan (R. 13: 1131-32; 14: 1692-93, 1695, 1764-65).

[15] Indeed, from early on, General Mitchell told E-Systems executives Lawson and Cullen that the successful platform would be along the lines of what Teledyne-Ryan proposed. Even though Mitchell was the consultant to the Greenville Division this information was not shared with Garo (R. 12: 887).

10. E-Systems did not disclose that it built a "Chinese wall" in its Garland Division,[16] and that Garland's unique imaging resources were being divided between GROB and Teledyne-Ryan[17] (R. 11: 241, 307-11, 488-9; 12: 586, 594, 629, 820, 824, 827-30, 927-8, 930-3; 13: 1113; 14: 1624-25, 1691-93).

11. E-Systems did not disclose that it had deliberately relegated GROB to propose a "Volkswagen" to compete against Teledyne-Ryan's high-tech, new "Cadillac" (R. 13: 1466).

12. E-Systems And Teledyne-Ryan Win The Contract with ARPA.

In October 1994, GROB received a letter from E-Systems advising that GROB was not on the winning team (R. 11: 307-9; 14: 1712; Ex. 89). E-Systems had teamed with Teledyne-Ryan to win the contract and, as of the time of trial, had proceeded into Phase III (R. 11: 308-9; 14: 1584).

The critical factors in the government's decision to award the contract to the E-Systems/Teledyne-Ryan team were Melpar's ground station and the new jet design (13: 1113-14). E-Systems had withheld from GROB the critical information about the need for a new jet and thwarted GROB's proposal for a jet. ARPA also found Melpar's ground station far superior to that proposed by the E-Systems' Greenville/GROB team,

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[16] E-Systems Vice-President Terry Gause conceded that the "Chinese wall" in Garland was not the best possible way to get the job done (R. 14: 1624). Cullen claims he did not know Garland was going to work with Melpar (R. 14: 1691-92).

[17] E-Systems Vice-President Meyer admitted that the support Grob received from Garland on this proposal was *not* equal to the support received from Garland on DAFECS (R. 12: 594; 14: 1531-33).

though the payload for both planes was the same (R. 13: 1262, 1328, 1334-40, 1353, 1360; Ex. P10). If E-Systems' Melpar had worked with GROB, instead of pursuant to its secret, exclusive contract with Teledyne-Ryan, the GROB team would have had the winning ground station (R. 13: 1337-40, 1353, 1360; Ex. P10).

SUMMARY OF THE ARGUMENTS

An Amarillo jury found Texas-based E-Systems guilty of fraud and awarded $45,000,000 in punitive damages to the German GROB corporation based on substantial evidence of E-Systems' calculated duplicity in dealing with GROB, and E-Systems' admitted concealment of many material facts. Known only to E-Systems, it master-minded the game plan for competing teams, making decisions which insured that E-Systems would win a contract, while deliberately stringing GROB along with false promises to insure E-Systems' success in the bidding process.

After E-Systems learned that ARPA was considering awarding GROB its own contract, E-Systems solicited GROB's agreement to be its exclusive partner, thereby insuring a contract award and profits for E-Systems in the event ARPA acted on Berman's desire to award a contract to GROB. E-Systems promised GROB an exclusive teaming agreement but then foreclosed meaningful competition by GROB by submitting a limited proposal based on the Egrett and a turboprop, all along knowing that neither the Egrett nor a turboprop would meet the technical requirements

established by ARPA or satisfy the military. Meanwhile, E-Systems through its Melpar division, teamed also with Teledyne-Ryan and submitted a high-tech proposal for a high-altitude jet and won the contract. E-Systems and Teledyne-Ryan have progressed into Phase III.

At bottom, E-Systems deliberately foreclosed GROB from teaming with anyone else, from obtaining its own airframe contract with ARPA, and from presenting a winning jet design. It sabotaged the GROB bid by barring Melpar from developing the winning ground station for GROB and shorting GROB on assistance from the Garland division.

The jury found that E-Systems' fraud caused GROB's damages, but was not allowed to take the next logical step to award GROB the millions in actual damages it suffered as a result of E-Systems' unconscionable conduct. The trial judge refused to submit the issue of lost profits to jury, deeming Grob's evidence insufficient after having wrongly excluded further evidence of GROB's damages. The judge should not have taken GROB's damages from the jury, but should have allowed the jury to determine the profits lost by GROB as a result of E-Systems' fraud.

The trial judge also erred in not imposing a constructive trust on E-Systems' profits for its fraud. A constructive trust is a proper remedy for E-Systems' actual fraud, its calculated scheme to benefit itself at the expense of GROB, and GROB's

reliance on E-Systems' actions and representations – not knowing them to be false, inaccurate, and part of a duplicitous scheme. The trial judge refused even to hold a hearing on this issue. Its decision must reversed, a constructive trust ordered, and the case remanded for a hearing to impose a constructive trust over E-Systems' profits.

As a matter of law, Grob is also entitled to its out-of-pocket expenses for bid preparation because E-Systems nullified GROB's bid, sabotaging its chance to compete. In any event, actual damages must be awarded, and the punitive damages must be reinstated.

ARGUMENT AND AUTHORITIES

E-Systems defrauded GROB and sabotaged its bid to the United States. The Amarillo jury found E-Systems committed fraud, that E-Systems' fraud caused GROB's damages, and awarded GROB $45,000,000 in punitive damages. It awarded GROB only $1 in actual damages because the district court wrongly excluded evidence of GROB's lost profits, failed to submit the issue of GROB's lost profits to the jury, and failed to impose a constructive trust on E-Systems' profits.

The record reflects substantial evidence of the fact and amount of GROB's damages – enough to have required the issue of the amount of GROB's lost profits to go to the jury. The jury heard evidence that would have supported an award of $14,500,000 in actual damages to GROB for Phases II and III. It also heard that

GROB's profits would have been between $562,000 and $580,000 per plane in Phase IV. Further, there was additional evidence – wrongly excluded by the trial court – that would have showed that Grob could have built the winning jet and that E-Systems' own military consultant expected at least 200 planes to be built (Exs. 275, 510).

This case should be remanded with instructions for the fact-finder to decide the amount of profits GROB lost in Phases II - IV because of E-Systems' fraud, and/or for the court to impose a constructive trust on E-Systems' profits on all phases, including its future profits for Phase IV.

This Court should also render judgment for GROB for its $284,000 in bid preparation costs lost because of E-Systems' fraud. In any event, the $45,000,000 in punitive damages must be reinstated.

I. GROB'S EVIDENCE OF LOST PROFITS WAS SUBSTANTIAL, AND THUS THE TRIAL JUDGE ERRED BY REFUSING TO SUBMIT THE ISSUE OF LOST PROFITS TO THE JURY.

A. Standard of Review.

This Court reviews *de novo* the trial judge's decision to withhold the issue of GROB's lost profits from the jury. The trial judge's decision can be upheld only if "there [was] no legally sufficient evidentiary basis" for the jury to have found in GROB's favor. *Casarez v. Burlington Northern/Sante Fe Co.*, 193 F.3d 334, 336 (5th Cir. 1999). In making this determination, the Court "view[s] the entire trial record in the light most favorable to [GROB], drawing reasonable inferences in its favor." *Id.* Decisions to withhold lost profits issues from a jury are rare. *Necaise v. Chrysler Corp.*, 335 F.2d 562, 567 (5th Cir. 1964). The decision to withhold GROB's lost profits here must be reversed because there was ample evidence — hard facts and inferences — from which a reasonable jury could have determined GROB'S lost profits. *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (*en banc*).

B. Pursuant To Texas Law, GROB Presented Sufficient Evidence To Allow The Issue Of Lost Profits To Go To The Jury.

Under Texas law, E-Systems is liable for the natural and probable consequences of its fraudulent acts. *Texas Instruments, Inc. v. Teletron Energy Management, Inc.*, 877 S.W.2d 276 (Tex. 1994). GROB presented ample evidence from which a

reasonable jury could have calculated the amount of damages caused by E-Systems' fraud. The issue of cause was submitted to the jury, and the jury specifically found that GROB's damages were a consequence of E-Systems' fraud (R. 8: 1793).

Even though the jury found E-Systems' fraud caused GROB's damages, the trial judge improperly withheld the issue of GROB's lost profits from it. The court deemed GROB's evidence of lost profits speculative, despite the weight of evidence offered by GROB and despite having wrongly excluded additional evidence of lost profits.[18]

In Texas, "where it is shown that a loss of profits is the natural and probable consequence[] of the act or omission complained of, and their amount is shown with sufficient certainty, there may be recovery." *Texas Instruments,* 877 S.W.2d at 279. While the evidence establishing lost profits may not be uncertain or speculative, "[i]t is not necessary that profits should be susceptible of exact calculation, it is sufficient that there be data from which they may be ascertained with a reasonable degree of certainty and exactness." *Id.* "An award of damages for lost profits may be based on

[18] The trial judge wrongly refused to admit: (1) the testimony of General Mitchell about the number of planes the government planned to purchase, despite General Mitchell's long experience in the area of government defense contracting (R.12: 865-70, 885-87); and (2) the testimony of Dr. Frank, an engineer, who was to testify that GROB's jet would have satisfied Tier II Plus criteria to win the bid (R. 12: 853).

estimates," *Interceramic, Inc. v. South Orient R. Co., Ltd.*, 999 S.W.2d 920, 929 (Tex. App. -- Texarkana 1999), and may rest on the testimony of a lay person with knowledge of the facts, data, and situation. *Bradford v. Vento*, 997 S.W.2d 713, 739 (Tex. App. -- Corpus Christi 1999). The inquiry is a flexible one, highly dependent upon the circumstances of each case. It is "fact intensive" to fit "the myriad of circumstances in which claims for lost profits arise." *Id.; DSC Communications Corp. v. Next Level Communications*, 107 F.3d 322, 329 (5th Cir. 1997).

1. The Evidence Shows That GROB Lost Substantial Profits As A Result Of E-Systems' Fraud.

At trial, GROB presented a plethora of evidence to support an award of lost profits. GROB showed — through the admissions of E-Systems' own executives — that despite E-Systems' stated agreement to dedicate the full force of E-Systems to the development and submission of an exclusive team bid with GROB,[19] E-Systems defrauded GROB at every turn. It sabotaged GROB's bid by withholding critical information and expertise, and foreclosed GROB's chance of winning the bid by rejecting a jet and by presenting the winning ground station with Teledyne-Ryan instead of Grob. *See supra* pp. 18-21 (detailing the fraudulent acts of E-Systems), *and*

[19] In a teaming agreement, the parties pool financial and technical resources with the intent to bid together on a government contract. *ATACS Corp. v. Trans World Communications, Inc.*, 155 F.3d 659 (3d Cir. 1998).

supra pp. 15-18 (demonstrating that E-Systems was fully aware of its fraud). That GROB, like Teledyne-Ryan, would have proceeded to win a contract in Phases I-III is not just probable, but highly likely given that E-Systems should have provided teammate GROB with the information its expert, General Mitchell, gave it about the jet design required to win, that GROB was fully capable of designing a high-tech jet which met ARPA's specs, and that GROB was entitled to the high quality ground station developed by E-Systems for the winning bid.[20]

[20] The payload for the planes was exactly the same, and thus the ground station given by Melpar to Teledyne-Ryan would have equally benefitted Grob. Notably, all of E-Systems, especially Melpar, had played a large role in developing the ground station for the Egrett for GAFECS, and GROB expected nothing less for Tier II Plus (R. 12: 915-16; 13: 1373).

GROB's vast experience in the area of air design shows that GROB was capable of producing the winning jet — an opportunity which E-Systems unilaterally rejected.[21] An established, record-holding company, GROB pioneered the manufacturing process using composite material in sophisticated aircraft, allowing light-weight planes to fly at high altitudes, and has set world records for high-altitude flight. GROB has produced sophisticated planes for other governments, including Great Britain and Germany, *supra* pp. 2-7, and worked diligently on a jet to submit in the Tier II Plus bid.[22] *Supra* pp. 11-14.

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[21] At the time, GROB did not know that E-Systems' motives were ill-conceived and that E-Systems had also signed an exclusive contract to devote Melpar's ground station expertise to Teledyne-Ryan (Ex. 35; RE 18). Grob also did not know in time to change things that E-Systems was discounting the jet.

[22] GROB began the jet with the parties' consensus and according to their bid plan. *Supra* pp. 11-14. GROB was not told that General Mitchell, E-Systems' high-ranking miliary expert assigned to consult on the GROB/E-Systems' bid, told E-Systems that the Government was not interested in a turboprop or an Egrett-based platform. *Supra* pp. 14, 18-22. More importantly, E-Systems did not share with GROB that General Mitchell recommended a jet

ARPA's keen interest in GROB's designs and technology further enhances evidence from which the jury could have awarded lost profits. Tier II Plus Project head, Berman, viewed GROB's Egrett and Strato2C presentations favorably: "This is the airplane we need now," he said, and even discussed the possibility of awarding GROB a non-competitive contract apart from the bids. *Supra* pp. 4-5.

Ironically, the very air show that placed GROB is such high esteem with the U.S. Government also prompted E-Systems to change its bid strategy and embark on fraud. Realizing GROB's unique chance for success, Pennington immediately reported "[we must] [m]odify our teaming agreement. Keep GROB in our camp as long as possible." *Supra* p. 5; (RE 7). Meyer agreed, *supra* pp. 5-6, but also realized that E-Systems' plan was self-serving and duplicitous. *Supra* pp. 15-17. E-Systems knew that GROB could build the plane ARPA wanted. E-Systems also knew GROB had "wowed"ARPA almost to the point of being granted a contract on the spot.

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more along the lines of Teledyne-Ryan's, and advised that the Egrett did not meet the project's technical specifications or the military's needs. *Supra* nn. 10, 13. Meanwhile, Teledyne-Ryan had unlimited knowledge of GROB's designs from Melpar and Garland's work on GAFECS and joint meetings on this project.

E-Systems wanted to be part of any Tier II Plus contract. Thus, E-Systems set out to secure GROB, exclusively, in its camp, to profit from any advantages afforded to GROB and to prevent GROB from presenting stiff competition, either on its own or with a competitor.[23] E-Systems' blatant willingness to do anything to secure a Tier II Plus slot is underscored by the timing of its agreement with Teledyne-Ryan and reaffirmation of exclusivity to GROB. The same day, June 29, E-Systems signed both

[23] That E-System' motive was to advantage itself while disadvantaging GROB is evidenced by Pennington's memorandum and Meyer's testimony at trial. After advising E-Systems to "keep GROB in its camp as long as possible," Pennington stated that, if necessary, he was both willing and able to "peel[] [GROB's] hide off," as he had done in the past (Ex. 139; RE 7). At trial, Meyer also admitted that E-Systems had no problem with duplicity, stating that it was his intent to bind GROB to E-Systems and to string it along,

an exclusive contract with Teledyne-Ryan and a letter confirming exclusivity to GROB.[24] *Supra* pp. 14-15.

But for E-Systems' fraud, GROB would not have agreed to team with E-Systems, *supra* p. 17, and would have submitted a bid far-superior to the one actually submitted — one which included both a turboprop aircraft and a new jet, and the

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without binding E-Systems to GROB, if at all possible. *Supra* n. 7.

[24] E-Systems even kept the truth about its bid with Teledyne-Ryan from some of its own executives. Only CEO Lawson and selected vice-presidents knew that E-Systems planned all along to double-team. *Supra* nn. 6, 7, 12; pp. 15-17. When others did learn of the double-bidding, they protested that E-Systems was breaching its agreement with GROB. *Id.*; (Ex. 58; RE 20)

All this helped E-Systems to hide from GROB the extent of its involvement in the Teledyne-Ryan bid and the division of its expertise and resources. *Id*. The information that was disclosed to GROB was incomplete and misleading. At most, E-Systems told GROB that Melpar would be helping Teledyne-Ryan with a ground station. It failed to reveal numerous material facts, as outlined *supra* pp. 18-21. E-System admitted at trial that it knew GROB was in the dark about E-Systems involvement with Teledyne-Ryan and that GROB did not understand the full scope. *Supra* nn. 5, 7, 9, 13. E-Systems executives admitted they knew this would affect GROB's decision to bid with E-Systems. *See supra* pp. 15-18.

superior ground station. *Supra* pp. 11-14. Instead, the final bid omitted many of the parties' accomplishments and areas of expertise, though they were prominently outlined in the Teledyne-Ryan/E-Systems bid. It rejected the high-tech jet the military wanted, and it lacked the sophisticated, winning ground station that E-Systems provided instead to Teledyne-Ryan. *Supra* pp. 14-18. The Government confirmed that absence of a jet and the deficient ground station prevented an award to GROB (R. 13: 1262, 1328, 1334-40, 1360). Meanwhile, the E-Systems/Teledyne-Ryan bid won and has now successfully progressed well into Phase III. *Supra* pp. 21-22. But for E-Systems' duplicity and double-dealing, the E-Systems/GROB team would have had the winning components.

2. There Is Substantial Evidence Of The Amount Of Profits GROB Lost As A Result Of E-Systems' Fraud.

GROB also submitted sufficient evidence from which the jury could have calculated the amount of GROB's lost profits. Though the parties agreed that Phase I would not yield profits because it would encompass the developmental costs, GROB pegged Phase II-IV profits to be about 13-15% net of the contract amounts paid by the Government, and E-Systems set the profit at approximately 12%. For Phase II, alone, had E-Systems not sabotaged its bid, GROB would have profited $6,900,000. For Phase III, with the delivery of multiple planes, the profit to GROB would have been $7,600,000 million. Finally, Phase IV, the production phase, was worth millions to GROB, with an undisputed profit of $562,000 *per plane*, and the projected production of more than 200 planes (R. 11: 252-56, 274-79, 282, 286-93, 295-304; 12: 865-70, 884-87; Exs. P7, 61, 62; RE 22). Thus, there is ample evidence from which a jury could find that GROB's lost profits exceed $100 million.

3. GROB's Lost Profit Evidence Rests On Firm Grounds.

GROB's lost profits are not speculative because of an alleged newness of its jet or uniqueness of the government contract. In *Texas Instruments*, the Supreme Court held that the mere fact a business or enterprise[25] is new or unique is not fatal under the

[25] "Enterprise" refers not to the business entity itself, but to the activity alleged to have been damaged. 877 S.W.2d at 280. A well-established industry does not have the same

"reasonable certainty" test. Instead, the court must focus on: (1) the experience of the persons involved in the enterprise; (2) the nature of the business activity; and (3) the relevant market. *Texas Instruments,* 877 S.W.2d at 280.

Here, the evidence shows that GROB is more than qualified to satisfy the Tier II Plus requirements. GROB has a long and successful history in aircraft development, has designed sophisticated planes for other governments, and holds numerous world records. Its expertise and ability to finalize the jet for Tier II Plus is beyond dispute — based on the evidence relating to GROB's experience, its accomplishments and actual work on the jet, ARPA's high opinion of GROB and its ability, and even E-Systems' own admissions that GROB was fully capable of building the ARPA plane. The business enterprise and market here are also long-standing and profitable. Indeed, as government weapons systems have grown more complex, the involvement of private contractors has become more widespread, especially by way of teaming or joint ventures. The prize for success is high: the lifespan of government contracts are often generational, thus securing large profits over long periods of time. *See* KOVACIC, WILLIAM E., *Antitrust Analysis of Joint Ventures and Teaming Agreements*

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speculative nature that an untried and novel industry suffers. Citing *Southwest Battery v. Owen*, 115 S.W.2d 1097 (Tex. 1938), as an example, *id.*, the Court explained that established and thriving industries, such as the automobile industry, are not uncertain or speculative.

Involving Government Contractors, 58 ANTITRUST L.J. 1059, 1059-63 (1990); CHIERICHELLA, JOHN W., *Antitrust Considerations Affecting Teaming Agreements*, 57 ANTITRUST L.J. 555, 555-57 (1988); HIBNER, DON T., *Antitrust Consideration Of Joint Ventures, Teaming Agreements, Co-Production and Leader-Follower Agreements*, 51 ANTITRUST L.J. 705, 705-06 (1983).

That GROB's jet would be a "new" plane does not undermine its lost profits claim. First, and as stated, GROB is an experienced builder of reconnaissance aircraft fully capable of producing the plane ARPA wanted. That is what GROB does — it develops and builds new and cutting-edge aircraft. Second, the other Tier II Plus bidders were able to propose a new jet. E-Systems submitted no evidence to suggest that GROB, an experienced aircraft innovator, could not do the same. Finally, that GROB's jet was not fully developed is attributable to the fraud and deceit of E-Systems, not to any inability on GROB's part. E-Systems' wrongdoing should not insulate it from liability.

In *DSC Communications Corp.,* 107 F.3d at 329, this Court 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, and the evidence shows the eventual completion and success of that product is probable." There, a designer and manufacturer of telecommunications equipment sued two former employees after they

began their own company and competed directly by developing and marketing a product similar to one they had begun while working for DSC. On appeal, the defendant company, Next Level, claimed DSC's lost profits were speculative because: (1) DSC had never sold its version of the product, which was a new telecommunications product; (2) no established market existed for the novel consumer product; (3) DSC's damage expert rendered conjectural conclusions because he had no basis to assume a large number of households would gain access to the product or to assign market shares to DSC and Next Level, respectively;[26] and, (4) DSC's expert could not tie DSC's damages to any specific acts of Next Level.[27]

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[26] DSC's expert surmised that DSC would have captured 40% of the market "but for" Next Level's interference. Because Next Level was competing, he estimated that DSC could gain only 20% of the market, and then recapture another 8% later. These figures were enough to support an award of lost profits to DSC. 107 F.3d at 329-30. Here, because the trial court refused to hold the hearing on GROB'S damages (R. 7: 184; 11: 339-40; RE 3), GROB'S damages expert, Sam Rhodes, did not testify. However, even E-Systems' expert calculated GROB'S damages to be in the millions for Phases II and III, and $11,266,000 in Phase IV based on a minimal contract for 32 planes (Ex. 275).

[27] Punitive damages were also awarded and upheld on appeal. *Id.* at 330.

This Court rejected Next Level's arguments that DSC's profits were not established with reasonable certainty. This Court found that the defendant's actions hindered DSC's completion of its product. This, coupled with the known history of the telecommunications industry and DSC's history as a leader of that industry, were sufficient to establish DSC's lost profits. Indeed, that "DSC ha[d] traditionally been a leader in producing technology used in telecommunications[,] [with a] history of strong performance[,] [was deemed] indicative of the likely success of [its] revolutionary new product." *Id.*

GROB's circumstances are like DSC's. Its history as an industry leader with strong, record-setting performance evidences its likely success. E-Systems has admitted GROB's capabilities and has not proven that GROB was incapable of producing the jet for Tier II Plus. *Compare Fiberlok, Inc. v. LMS Enterprises, Inc.*, 976 F.2d 958, 964 (5th Cir. 1993) (upholding award of lost profits because, *inter alia*, defendant failed to prove plaintiff was incapable of fulfilling contract). ARPA was predisposed to grant GROB a contract. But for E-Systems' fraud and misrepresentations, GROB would have further developed and submitted a jet, along with the winning ground station. *See DSC, supra; Trenholm v. Ratcliff*, 646 S.W.2d 927, 933 (Tex. 1983) (lost profits resulting from fraudulent misrepresentations recoverable, along with exemplary damages); *Howell Crude Oil Co. v. Donna*

Refinery Partners, Ltd., 928 S.W.2d 100, 109-11 (Tex.App. – Houston [14th Dist.] 1996) (where defendant's misrepresentations or omissions caused plaintiff to enter into contract with defendant rather than with another party, defendant's conduct was the cause of the plaintiff's damages, including lost profits).

As for any alleged speculation about the amount of GROB's lost profits, GROB need only have introduced predictions or estimations of its lost profits based on objective data, facts, and figures. *See DSC, supra*. GROB submitted evidence which amply satisfied this burden: (1) Fischer testified at length and provided calculations establishing Grob's profit on Phase II at $6,900,000 and on Phase III at $7,600,000 (R. 11: 252-6, 274-9, 282, 286-93, 295-304; Exs. 61, 62; RE 22); and, (2) E-Systems Vice-President Doshier admitted that GROB would have made a similar 12% profit on Phases II & III (R 13: 1315; Ex. 71). E-Systems' own expert calculated that GROB would have made $11,266,000 in Phase IV based on $562,797 profit per plane for 32 planes (Ex. 275). Additionally, the court wrongly excluded General Mitchell's testimony that at least 200 planes would be required by ARPA. (*Supra* n. 18; R. 12: 865-87; Ex. P7).

There is enough in this record for the jury to have awarded GROB $14,500,000 in lost profits for Phase II and III, and additional millions for Phase IV. Nonetheless, on remand, the fact-finder should also consider the testimony of Sam Rhodes, GROB's

expert, who will provide additional evidence of Grob's lost profits, and of E-Systems' expert, General Mitchell, who attests that more than 200 planes will be built. As for GROB's damages in Phase IV, the undisputed base amount is approximately $562,797 per plane (R. 11: 301; 13: 1272; Ex. 275). Grob's lost profits easily exceed $100,000,000.

This Court explained in *DSC*:

> It is true [that] predictions are not guaranteed. No one can definitely say what the future holds for [the] technology, or [the parties] in particular. However, uncertainty surrounding precisely how the industry will evolve does not reduce all analysis about future developments to mere speculation. [Here, DSC] based [its] predictions on data obtained from respected sources in the telecommunications market.

This Court deemed that sufficient evidence. So, too, should GROB's evidence be sufficient. The fact-finder has discretion to determine the amount of lost profits because future damages cannot be determined with mathematical exactitude. The jury must weigh the evidence and determine the amount of lost profits GROB suffered as a result of E-Systems' scheme of fraud and deception. *See also Aboud, M.D. v. Schlichtemeier, M.D.*, 6 S.W.3d 742, 745-49 (Tex. App. -- Corpus Christi 1999) (where experienced doctor's agreement with defendant doctor to develop cancer treatment center never materialized because it was sabotaged by fraud, misrepresentation and deceit, court allowed lost profits, noting "[i]t is impossible to

say with certainty what would have happened in any scenario where a wrongdoing interrupts the course of events. . . . [A] jury could reasonably . . . . believe[] that, but for [the wrongdoing], . . . the plaintiff [might have succeeded]); *Bradford*, 997 S.W.2d at 739 (rejecting defendant's claim plaintiff would not have gotten lease contract, court said it was up to the jury to decide whether the defendant's fraud prevented plaintiff's success); *Ishen Speed Sport, Inc. v. Rutherford*, 933 S.W.2d 343, 350-52 (Tex. App. -- Ft. Worth 1996) (totality of circumstances, including plaintiff's ample expertise and probable success with the enterprise, supported award of lost profits, despite fact enterprise never came into being).

Finally, any suggestion by E-Systems that Tier II Plus will not progress or produce profits are belied by the progress of the program. Tier II Plus has progressed into Phase III and is expected to progress through Phase IV (R 12: 978-9, 982-4). Indeed, for three years, Congress has repeatedly allocated more money for UAV's then the Department of Defense has even requested (R 12: 954). GROB needed only to progress to Phase II to make millions in net profits. It would have — if not for E-Systems' fraud and deceit, which caused it to reject a jet and to deny GROB the winning ground station. The jury should have been allowed to assess the totality of the evidence to determine that GROB would have proceeded to Phase II and beyond,

and the amount of lost profits it suffered as a result of E-Systems' fraud. *See DSC, Aboud, and Bradford, supra.*

4. Lost Profits Are Available To A Team Member In The Government Bid Context.

Finally, several courts have approved submission of the issue of a team member's lost profits in the government bid context. In each case, the trier of fact was allowed to value the plaintiff's damages by considering the potential for profit lost by the plaintiff in light of the contingencies on which the profit and its amount depended.

In *Air Technology Corp. v. General Elec. Co.*, 199 N.E.2d 538 (Mass. 1964), the plaintiff and defendant agreed to team bid on an Air Force nuclear detection system. The defendant led the plaintiff to believe that the plaintiff would be its sole, or exclusive, subcontract source. After securing the government contract, the defendant then requested bids from the plaintiff's competitors, and ultimately gave the subcontract to one of them. In response to the plaintiff's suit, the defendant argued that the plaintiff's damages were too speculative and uncertain to be recoverable because: (1) the terms of the plaintiff and defendant's agreement were never solidified; and (2) the plaintiff's subcontract was contingent on Air Force approval. The Court held that the plaintiff was entitled to have the trier of fact decide its damages by "taking into account the relevant factors, including what . . . would have

been (1) the approximate net amount realized by plaintiff from a subcontract . . ., and (2) the probability of successful negotiations and Air Force approval.[28] *Id.* at 545-50. *See also Curtis-Wright Corp. v. Edel-Brown Tool & Die Co.*, 407 N.E.2d 319, 327 (Mass. 1980) (court in this sole source case remanded to allow the jury to assess lost profits).

[28] The Court remanded to allow the jury to assess the evidence presented, and to be presented, to determine a fair award to the plaintiff, one which could be "a fair and equitable share of the [defendant's] net profits." *Id.* at 548-49.

Other courts have reached similar conclusions, holding that the issue of lost profits should have gone to the jury, or even approving a jury's award of lost profits to the mistreated bidder. In *Iconco v. Jensen Constr. Co.*, 622 F.2d 1291, 1300 (8th Cir. 1980), the Court rejected the defendant's argument against awarding lost profits due to uncertainty surrounding the plaintiff's ability to win the contract and the government's decision to continue the project. The Court held that if an unsuccessful bidder "proves by a preponderance of the evidence that it would have received the contract award absent the successful bidder's wrongdoing," then it may recover lost profits.[29] *See also City of Durant v. Laws Const. Co., Inc.*, 721 So.2d 598, 604-07

[29] The Eight Circuit refused to follow the blanket rule announced in some older decisions that the uncertainty of a government contract or failure to procure it renders lost profits too speculative to be recoverable. *Id.* Indeed, that rule fails to reflect the prevailing law of contractual good faith and the now-sanctioned ability to recover lost profits despite the nonexistence of a contract. *See e.g., Texas Instruments, supra* pp. 26-28, 33-34, and progeny. When a party can show it was improperly prevented from obtaining a contract, whether government or otherwise, the court should award lost profits. This rule should apply in any case of wrongdoing, especially one based on fraud. *See generally* CLAYBROOK, FREDERICK, *A Modest Proposal: Why Not Award Lost Profits To A Disappointed Bidder*?, 33 SUM. PROCUREMENT LAW 8 (1998); *Good Faith in the Termination and Formation of*

(Miss. 1998) (upholding lost profit award to public contract bidder); *Bradford & Bigelow, Inc. v. Commonwealth*, 509 N.E.2d 30, 35, 37 (Mass.App.Ct. 1987) (same); *Marbucco Corp. v. City of Manchester*, 632 A.2d 522, 524-25 (N.H. 1993) (lost profits even recoverable against public agency if conduct tantamount to bad faith or fraud).

Federal Contracts, 56 MD.L.REV. 555, 596-98 (1997).

The trial judge here erred in refusing to allow the jury to quantify the amount of GROB's lost profits. The test is whether there is no evidence for the issue to go to the jury – not whether the trial judge believes it. *See Robinson v. Zapata Corp.*, 664 F.2d 45, 49 (5th Cir. 1981); *Necaise*, 335 F.2d at 567; *see also General Device, Inc. v. Bacon*, 888 S.W.2d 497 (Tex.App. -- Dallas 1994) (unless plaintiff presented no evidence to support lost profits, fact issue regarding lost profits should go to jury); *First So. Trust Co. v. Szczepanik*, 880 S.W.2d 10 (Tex.App. -- Dallas 1993) (if there is some evidence to support submission of lost profits issue, it is reversible error not to do so). This Court should reverse and remand to allow the trier of fact to assess the profits lost by GROB as a result of E-Systems' fraud. On remand, the jury should be allowed to hear the record evidence relating to lost profits, the lost profits evidence erroneously excluded by the trial judge,[30] as well as any additional evidence relevant to the issue of lost profits. *See Air Tech*, 199 N.E.2d at 548-49 (on remand, jury should assess evidence presented, and to be presented, to determine a fair award to the plaintiff). Highly relevant to this inquiry will be the then-current state of the Tier II Plus Project, as well as the profits actually realized by E-Systems and Teledyne-Ryan

[30] *See supra* n. 18. The Eighth Circuit in *Iconco*, 622 F.3d at 1300-01, not only approved the admission of hypothetical questioning relating to whether the plaintiff would have won the contract, but relied on it in determining that the jury should have decided this issue: "in our view, . . . the opinion was 'proof sufficient to allow the jury to conclude that the . . . contract would have been awarded to Iconco had it not been awarded to Jensen.'" *Id.*

in their successful pursuit of the government contract. *See Curtis-Wright*, 407 N.E.2d at 327 (on remand, consideration should be given to factor which was uncertain at time of trial, but which is now a reality, namely the award of the government contract).

II. THE TRIAL JUDGE ERRED BY REFUSING TO IMPOSE A CONSTRUCTIVE TRUST OVER THE PROFITS REALIZED BY E-SYSTEMS AS A RESULT OF ITS FRAUD.

Even if this Court finds GROB's lost profits to be speculative, it should impose a constructive trust over E-Systems' profits and remand to the district court for a determination of that amount. In Texas, fraud justifies the imposition of a constructive trust over the wrongdoers' profits. *Meadows v. Bierschwale*, 516 S.W.2d 125, 128 (Tex. 1974); *Dyll v. Adams*, 167 F.3d 945, 948 (5th Cir. 1999). "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.

In *Meadows*, the Texas Supreme held that a constructive trust may be imposed even when the plaintiff has no interest in or connection to the property or contract at

issue. *Id.* at 130-31; *see also Wheeler v. Blacklands Prod. Credit Ass'n*, 627 S.W.2d 846, 848-50 (Tex.App. -- Ft. Worth 1982). In *Ginther*, 675 S.W.2d at 728, the Texas Supreme Court extended imposition of a constructive trust over property held by a third party, noting that the flexible and equitable nature of the remedy allows this. Following the Texas Supreme Court's pronouncements in *Ginther* and *Meadows*, the court in *Procom Energy, L.L.A. v. Roach*, 16 S.W.3d 377, 381-82 (Tex.App. -- Tyler 2000), noted: (1) the parties need not be partners or joint venturers; (2) a true fiduciary relationship need not exist so long as there is a breach of confidence and trust; and (3) a failure to prove damages does not foreclose a constructive trust. *See also Thomas v. Barton Lodge II, Ltd.,* 174 F.3d 636, 650 (5th Cir. 1999) (constructive trust is perfect remedy in cases of fraud where plaintiff is unable to demonstrate actual loss); *Dyll*, 167 F.3d at 947-48 (imposing constructive trust despite speculative nature of actual damages). Finally, in *Dyll*, 167 F.3d at 948, this Court upheld imposition of a constructive trust over property which was legally and properly acquired by the defendant.

"[T]here is no unyielding formula to which a court of equity is bound in decreeing a constructive trust, since the equity of the transaction will shape the measure of the relief granted." *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.

A constructive trust is warranted on these facts. E-Systems' fraud was blatant; the jury saw it clearly. However, the jury was not allowed to assess lost profits, and the trial judge refused to hold a hearing or to determine the constructive trust. Because this case is precisely the type in which a constructive trust should have been imposed, the trial judge must be reversed, and a constructive trust imposed over E-Systems' profits. *See Thomas*, 174 F.3d at 650.

Several analogous cases demonstrate that a constructive trust should have been imposed based on the fraud perpetrated in this case. First, 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 (joint effort to acquire leaseholds where, in reliance on defendant's promises, plaintiff failed to acquire leaseholds on his own, constructive trust imposed and exemplary damages awarded); *Carr v. Weiss*, 984 S.W.2d 753, 766-68 (Tex.App. -- Amarillo 1999) (same in joint effort to acquire and own commercial property, with resulting constructive trust and exemplary damages); *see also Mims v. Beall,* 810 S.W.2d 876, 880-82 (Tex.App. -- Texarkana 1991) (self-dealing in oil and gas context); *Fuqua v. Taylor,* 683 S.W.2d 735, 737-38 (Tex.App. -- Dallas 1985) (constructive trust in favor of investors against managing geologist in oil

and gas joint venture); *Palmer v. Fuqua,* 641 F.2d 1146, 1159-61 (5th Cir. 1981) (constructive trust in oil and gas partnership context); *Omohundro v. Matthews*, 341 S.W.2d 401, 407-09 (Tex. 1960) (constructive trust imposed where parties agreed to use joint efforts to obtain and develop area for oil and gas).

Indeed, in *Procom*, the court held that in the joint effort situation, the burden rests with the team member who refused to act in the best interest, or for the benefit of both members, "to fully disclose the facts and circumstances that would demonstrate his good faith in his conduct." 16 S.W.3d at 382. Otherwise, unfairness is presumed and imposition of a constructive trust is warranted. *Id.* at 382-83. Furthermore, in *Huffington v. Upchurch,* 532 S.W.2d 576, 579 (Tex. 1976), the Court noted that an enhanced duty attaches to the member who is in charge to use special care to protect the interests of the other members. *See also Mims,* 810 S.W.2d at 879. "For him and for those like him the rule of undivided loyalty is relentless and supreme." *Huffington*, 532 S.W.2d at 579 (citation omitted).

Here, E-Systems controlled the GROB/E-Systems' team bid. That bid, when juxtaposed against the competing bid E-Systems submitted with Teledyne-Ryan, and the knowledge and expertise E-Systems withheld, demonstrates that the GROB/E-Systems bid was not formulated in the best interest or for the full benefit of both team members. E-Systems' self-dealing was presumptively unfair and justified the

imposition of a constructive trust. E-Systems failed to carry its burden of proving good faith. The record and jury's finding of actual fraud belie any assertion by E-Systems that it acted in good faith or in both parties' best interests.

Secondly, and specifically in the bid context, courts in Texas and elsewhere have imposed constructive trusts over profits realized by a successful bidder guilty of fraud or breach of duty. In *R.L. Lipsey, Inc. v. Panama-Williams, Inc.*, 611 S.W.2d 917, 919-20 (Tex.App. -- Houston [14th Dist.] 1981), the defendant's breach of an agreement to submit a team bid prompted the court to impose a constructive trust over the profits the defendant earned as a result of the defendant's own successful bid. In *Lone Star Partners v. Nationsbank Corp.*, 893 S.W.2d 593 (Tex.App. -- Texarkana 1994), 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. Rejecting the defendant's contention of no legally cognizable damages and no cause, the court stated:

> 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 NCBC's hands. Those are legally cognizable damages and remedies causally related to the alleged wrongs.

Id. at 601. In our case, the jury has already found fraud and cause (RE 2). Thus, the trial judge erred as a matter of law in not imposing a constructive trust over E-Systems' profits.

Finally, courts have found the constructive trust remedy uniquely well-suited to team bid situations such as this where fraud or breach of duty foreclosed the plaintiff's bid award. In our case, the admissions of E-Systems' own executives show that E-Systems breached its agreement to bid exclusively with GROB ignored its duty to dedicate all of E-Systems' resources to the development and submission of the GROB team bid, and sabotaged GROB's bid by withholding critical information, knowledge and expertise. E-Systems enhanced Teledyne-Ryan's bid by allowing E-Systems executives in charge of that bid to share in information relating to the GROB/E-Systems bid,[31] and foreclosed GROB's chance of winning the bid by refusing to share its expert's information on the winning jet, withholding the winning ground station from GROB and

[31] Apart from sabotaging GROB's bid, E-Systems/Teledyne-Ryan benefitted from GROB's knowledge, expertise, and technical data. Melpar and Garland had worked extensively on the GAFESC project involving the Egrett, on which the GROB/E-Systems bid was based. Melpar, especially, provided the ground station for the Egrett (R. 12: 915-16; 13: 1373). Moreover, several meetings were held at which the E-Systems' executives overseeing the E-Systems/Teledyne-Ryan bid learned about the GROB/E-Systems' bid (RE 20).

submitting it instead with Teledyne-Ryan. These facts, when viewed in light of decisions of other federal circuits facing similarly egregious situations, support imposition of a constructive trust over E-Systems' ill gotten profits.

In *Cable & Computer Technology, Inc. v. Lockheed Sanders, Inc.*, 214 F.3d 1030 (9th Cir. 2000), the Ninth Circuit imposed a constructive trust based on facts like those here. Sanders, a division of Lockheed Martin, represented to CCT that it had eliminated any potential conflict of interest within Lockeed Martin arising from multiple business units competing for the same government contract.[32] A company representative admitted, however, that Sanders was actually concealing information from CCT to enhance the chances of another Lockheed Martin business unit winning the bid contest. As with E-Systems and GROB, Sanders' goal was to string CCT along until it was impossible for CCT to find a substitute teammate. Lockeed ultimately dropped the Sanders/CCT bid proposal and another of its units, Owega, won the bid award. *See id.* at 1036-37.

At trial, CCT alleged, *inter alia*, that Sanders "made promises it had no intention of keeping with the purpose of ultimately disabling CCT as a competitor for the [contract]." Noting that the evidence tended to support CCT's fraud allegation, the

[32] Notably, E-Systems did not even do this much. Instead, it hid from GROB the full extent of its involvement in the competing Teledyne-Ryan bid.

Ninth Circuit reversed a summary judgment and remanded for a jury trial. In so doing, the Court noted that if Lockheed's actions were designed to enhance the Owega bid's chance of succeeding, then disgorgement of Owega's profits would be in order. *Id.* at 1039.

In *ATACS Corp. v. Trans World Communications, Inc.*, 155 F.3d 659 (3d Cir. 1998), the Third Circuit determined that an equitable remedy was appropriate for the breach of an exclusive agreement to submit a team bid on a government contract. Defendant, Trans World, ultimately teamed with ATACS' competitor to perform the contract. Reversing the trial court award of $1 in damages to ATACS, the Third Circuit remanded for an evidentiary hearing on restitution damages. "Rooted in common notions of equity," restitution is akin to unjust enrichment or forfeiture and calls for the disgorgement of the defendant's benefits. While sympathetic to the trial court's difficulty in assessing damages, the Third Circuit deemed the "denial of restitution as a possible remedy premature without an evidentiary hearing." *Id.* at 671. Equitable considerations must predominate over damage calculation issues in such a case. *Id.*

Finally, in *Eden Hannon & Co. v. Sumitomo Trust & Banking Co.*, 914 F.2d 556 (4th Cir. 1990), *cert denied,* 499 U.S. 947 (1991), Sumitomo led EHC to believe that they would submit a team bid, but submitted the winning bid itself when the parties

could not agree on bid details. Similar to the situation between GROB and E-Systems, Sumitomo sought out EHC after EHC had proven its ability and "wowed" the contracting authorities. Similar to the GROB/E-Systems agreement to team exclusively, Sumitomo signed an agreement not to compete in the bid contest in the event the parties' bid agreement could not be finalized. Like E-Systems, and unbeknownst to its teammate, Sumitomo had much earlier hatched a scheme of fraud and all along intended to breach its promise to bid only with it as a team member. *See id.* at 558-61. Similarly, Sumitomo's separate bid may have benefitted from the expertise and information provided by the plaintiff teammate in furtherance of what it thought was an exclusive team bid.

In response to Sumitomo's argument that its winning bid reflected only its own hard work, the Court noted how difficult it is to pinpoint bid contamination and actual damages in these sorts of cases. The Fourth Circuit held that a constructive trust is the appropriate remedy is this kind of case precisely because it is difficult to prove damages.[33] While EHC might not be able to demonstrate it would have won the contract or the extent of its actual damages, Sumitomo's benefit could easily be

[33] Although the court here focused more on the possible use of confidential information, it was also swayed by the underhanded, fraudulent tactics employed by Sumitomo to win the bid contest. *See id.* at 564. This is exactly what E-Systems did in our case, and it withheld critical information from GROB while using its experience and knowledge from GROB in GAFECS to enhance its Teledyne-Ryan bid.

measured by looking to its profits. The Fourth Circuit ordered that a constructive trust be imposed over Sumitomo's profits. *Id.* at 564.

Following the decisions of the Fourth Circuit in *EHC,* Third Circuit in *ATACS,* and Ninth Circuit in *CCT*, this Court should hold that E-Systems' fraud requires a constructive trust. The jury rightly found E-Systems' conduct was reprehensible — $45,000,000 reprehensible. A constructive trust over E-Systems' profits is warranted because, in this type of case, fraudulent and deceitful conduct benefits one party to the detriment of the other. Indeed, this is to be presumed. *Procom*, 16 S.W.3d at 382-83. However, the circumstances of such complex dealings often render actual damages difficult to prove. Thus, Texas and federal courts have relied on constructive trust to right the wrongs of defendants such as E-Systems. Accordingly, to the extent, if any, that GROB's actual damages are not certain, a constructive trust must be imposed.

III. GROB WAS ENTITLED TO RECOVER ITS OUT-OF-POCKET COSTS FOR PREPARING A "TEAM" BID WITH A PARTNER WHO WAS DEFRAUDING IT.

Finally, this Court should order E-Systems to pay GROB's bid preparations costs of $284,000[34] (R. 11: 488; Ex. 275). At trial, E-Systems' argued that GROB would have expended this money anyway because GROB would have submitted a bid alone or

[34] This amount varied due to fluctuations in the exchange rate. *Id.*

with another team partner. The jury bought this argument. However, as a matter of law, E-Systems' fraud should vitiate this finding. E-Systems' fraud rendered GROB's bid effort futile. But for E-Systems' fraud, that money would not have been wasted. *Marbucco,* 632 A.2d at 525 ("No contractor would bid at all if it knows that 'the deck [is] stacked against' it." [Citation omitted]).

As a result of E-Systems' conduct, GROB's "team" bid was deficient and substandard, and E-Systems knew this. E-Systems knew it was withholding critical information, knowledge and expertise from GROB; E-Systems knew it was wrong to conceal critical information, hinder development of a jet, discourage and ultimately reject a jet, and, provide the winning ground station to a competitor.

In sum, E-Systems sabotaged GROB's bid, rendering it a "Volkswagen" in a competition of Cadillacs. E-Systems foreclosed any chance of that bid succeeding. GROB is therefore entitled to recover its bid preparations costs caused by E-Systems' fraud. *Marbucco Corp. v. Suffolk Const. Co., Inc.,* 165 F.3d 103, 104 (1st Cir. 1999), (even absent bad faith or fraud, bid costs should be awarded).

IV. THE PUNITIVE DAMAGES AWARD MUST BE REINSTATED.

After refusing to allow the jury to assess lost profits and refusing even to conduct a hearing on constructive trust, the trial judge reversed the jury's $45,000,000 punitive damage award on the ground that GROB suffered no actual damages (RE 3).

As shown above, GROB suffered significant actual damage as a result of E-Systems' scheme of fraud, and thus the $45,000,000 punitive damage award should be reinstated. On remand, the jury will be required to calculate GROB's lost profits. This award will support the $45,000,000 punitive damage award. *DSC*, 107 F.3d at 330.

Imposition of a constructive trust also requires reinstatement of the $45,000,000 punitive damage award. *Internat'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 584 (Tex. 1963); *Procom*, 16 S.W.3d at 385. In *Nabours v. Longview Sav. & Loan Ass'n*, 700 S.W.2d 901, 904 (Tex. 1985), and *Holloway*, 368 S.W.2d at 584, the Texas Supreme Court approved the rule that punitive damages may be awarded when the equitable remedy requires the return of profit.

Finally, and as a matter of law, GROB should be allowed to recover the $284,000 it uselessly expended while participating in a bid with a partner who was defrauding it. This recovery also requires reinstatement of the punitive damage award. *TXO Prod. Corp. v. Alliance Resources Corp.,* 509 U.S. 443 (1993).

In short, GROB is entitled to the $45,000,000 punitive damage award, and the trial judge erred as a matter of law in reversing it.[35] The jury found E-Systems guilty of fraud and that E-Systems' fraud caused GROB's damages. The trial judge

[35] The Texas statute has been amended to permit recovery of punitive damages, even when the actual damage award is nominal, if there is malice. Tex. CIV. PRAC. & REM. CODE Ann. §41.004(b).

incorrectly denied GROB any damages, wrongly refused to impose the constructive trust, and it incorrectly failed to respect the jury's punitive damage award. The law entitles GROB to recover its actual damages and the $45,000,000 the jury knew it deserved for having suffered E-Systems' fraud.

CONCLUSION

For these reasons, the judgment must be reversed and the $45,000,000 punitive damages award reinstated. In addition, this Court should reverse and remand with instructions for the fact-finder to calculate GROB's lost profits based on the record evidence, the evidence erroneously excluded by the trial judge, and any additional evidence relevant to the lost profits inquiry at the time of the new hearing. This Court should also order the district court to impose a constructive trust and remand for a hearing to determine E-Systems' wrongfully gained profits over which the trust should be imposed. Finally, Grob is entitled to its $284,000 in out-of-pocket expenses — on which this Court should render judgment as a matter of law and reinstate the punitive damages.

Respectfully submitted,

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SIDNEY POWELL
Texas Bar No. 16209700

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DEBORAH PEARCE 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 copy of the Brief of Appellant was served on Appellee's attorneys listed below via Federal Express this 31st day of July, 2000.

Joe Bill Harrison
William G. Whitehill
Joanne Early
Cynthia Hollingsworth
Stacy R. 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

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SIDNEY POWELL
DEBORAH PEARCE REGGIO

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.3, undersigned counsel certifies this appellate brief complies with the type-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 CONTAINS 13,912 WORDS.

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.

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SIDNEY POWELL
DEBORAH PEARCE REGGIO