

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

**SECURITIES AND EXCHANGE COMMISSION,**

**Plaintiff,**

**- against -**

**SYMBOL TECHNOLOGIES, INC., et al.,**

**Defendants.**

**Civ. A. No. 04-2276 (SJF)**

**FINAL CONSENT JUDGMENT AS TO DEFENDANT FRANK BORGHESE**

Plaintiff Securities and Exchange Commission ("Commission") having filed a complaint ("Complaint") charging defendant Frank Borghese ("Frank Borghese") with violating Sections 10(b) and 13(b)(5) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. §§ 78j(b) and 78m(b)(5)] and Rules 10b-5 and 13b2-1 [17 C.F.R. §§ 240.10b-5 and 240.13b2-1], and aiding and abetting violations by Symbol Technologies, Inc. of Sections 13(a) and 13(b)(2) of the Exchange Act [15 U.S.C. §§ 78m(a) and 78m(b)(2)] and Rules 12b-20, 13a-1 and 13a-13 [17 C.F.R. §§ 240.12b-20, 240.13a-1 and 240.13a-13], and Borghese having executed the consent annexed hereto and incorporated herein, having acknowledged service of the Summons and Complaint, having waived the entry of findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure, admitted to the jurisdiction of this Court over him and over the subject matter of this action and, without admitting or denying the allegations contained in the Complaint (except as to jurisdiction), having consented to the entry of this Final Consent Judgment As To Defendant Frank Borghese ("Final Judgment"), without further notice:

**I.**

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Borghese is permanently restrained and enjoined from, directly or indirectly, in connection with the purchase or sale of any security, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange:

- (A) employing any device, scheme, or artifice to defraud;
- (B) making any untrue statement of a material fact or omitting to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or
- (C) engaging in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in violation of Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].

**II.**

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that Borghese is permanently restrained and enjoined from, directly or indirectly, singly or in concert:

- (A) knowingly circumventing or knowingly failing to implement a system of internal accounting controls or knowingly falsifying any book, record or account described in Section 13(b)(2) of the Exchange Act [15 U.S.C. § 78m(b)(2)], in violation of Section 13(b)(5) of the Exchange Act [15 U.S.C. § 78m(b)(5)]; or
- (B) falsifying, or causing to be falsified, any book, record or account subject to Section 13(b)(2)(A) of the Exchange Act [15 U.S.C. § 78m(b)(2)(A)], in violation of Rule 13b2-1 [17 C.F.R. § 240.13b2-1].

**III.**

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that Borghese is permanently restrained and enjoined from aiding and abetting violations of Section 13(a) of the Exchange Act [15 U.S.C. § 78m(a)] or Rules 12b-20, 13a-1 or 13a-13 [17 C.F.R. §§ 240.12b-20, 240.13a-1 or 240.13a-13] by knowingly providing substantial assistance to an issuer that:

- (A) fails to file with the Commission any report required to be filed with the Commission pursuant to Section 13(a) of the Exchange Act [15 U.S.C. §78m(a)] and the rules and regulations promulgated thereunder; or
- (B) files with the Commission a report required to be filed with the Commission pursuant to Section 13(a) of the Exchange Act [15 U.S.C. §78m(a)] and the rules and regulations promulgated thereunder that (1) contains an untrue statement of material fact; (2) fails to include, in addition to the information required to be stated in such report, such further material information as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading; or (3) fails to disclose any information required to be disclosed therein.

**IV.**

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that Borghese is permanently restrained and enjoined from aiding and abetting violations of Section 13(b)(2) of the Exchange Act [15 U.S.C. § 78m(b)(2)] by knowingly providing substantial assistance to an issuer that:

- (A) fails to make and keep books, records and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of an issuer; or
- (B) fails to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that
  - (1) transactions are executed in accordance with management's general or specific authorization;
  - (2) transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles, or any other criteria applicable to such statements, and to maintain accountability for assets;
  - (3) access to assets is permitted only in accordance with management's general or specific authorization; and
  - (4) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

**V.**

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that Borghese, pursuant to Section 21(d)(2) of the Exchange Act [15 U.S.C. § 78u(d)(2)], is prohibited from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. § 78l] or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78o(d)].

VI.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that Borghese is liable for disgorgement of \$1,226,430, representing ill-gotten gains he received as a result of the conduct alleged in the Complaint, together with prejudgment interest thereon in the amount of \$503,374, for a total of \$1,729,804. Based on Borghese's sworn representations in his Statement of Financial Condition dated December 21, 2009, and other documents and information submitted to the Commission, however, the Court is not ordering Borghese to pay a civil penalty and is waiving payment of all but \$450,000 of the disgorgement and pre-judgment interest thereon. Borghese shall satisfy this obligation by making payments to the Clerk of this Court in the following manner:

- (A) Borghese shall pay \$370,000 within fourteen days after entry of this Final Judgment.
- (B) Beginning one year from the entry of this Final Judgment, Borghese shall pay the remaining \$80,000, plus post-judgment interest of \$640 pursuant to 28 U.S.C. § 1961, in four equal annual installments of \$20,160. The first annual installment payment of \$20,160 shall be paid one year from the entry of this Final Judgment and each succeeding payment of \$20,160 shall be paid one year from the date on which the immediately preceding payment was due.
- (C) In the event that Borghese defaults on any of the payments required by this paragraph, at any time thereafter the Commission, in its sole discretion, may declare the outstanding balance due and payable within fourteen days. On the date of such declaration, Borghese shall consent to the entry of a Default Judgment noting his default and ordering the payment of the then outstanding

balance and post-judgment interest thereon, plus costs and reasonable attorney's fees incurred in entering and collecting the Default Judgment.

- (D) Borghese may prepay the outstanding balance at any time without penalty, and if such prepayment is made, post-judgment interest owed will be calculated accordingly.

Each of the foregoing payments shall be accompanied by a cover letter addressed to the Clerk of the Court identifying Frank Borghese as a defendant in this action, setting forth the title and civil action number of this action and the name of this Court, and specifying that payment is made pursuant to this Final Judgment. Borghese shall simultaneously transmit photocopies of such payments and letters to the Commission's counsel in this action, Todd Brody, Esq., U.S. Securities and Exchange Commission, New York Regional Office, Three World Financial Center, New York, NY 10281. By making such payments, Borghese relinquishes all legal and equitable right, title, and interest in such funds, and no part of the funds shall be returned to Borghese. The Clerk shall deposit the funds into an interest bearing account with the Court Registry Investment System ("CRIS") or any other type of interest bearing account that is utilized by the Court. These funds, together with any interest and income earned thereon (collectively, the "Fund"), shall be held in the interest bearing account until further order of the Court. In accordance with 28 U.S.C. § 1914 and the guidelines set by the Director of the Administrative Office of the United States Courts, the Clerk is directed, without further order of this Court, to deduct from the income earned on the money in the Fund a fee equal to ten percent of the income earned on the Fund. Such fee shall not exceed that authorized by the Judicial Conference of the United States. The Commission may by motion propose a plan to distribute

the Fund subject to the Court's approval. Borghese shall pay post-judgment interest on any delinquent amounts pursuant to 28 USC § 1961.

The determination not to impose a civil penalty and to waive payment of all but \$450,000 of the disgorgement and pre-judgment interest is contingent upon the accuracy and completeness of Borghese's Statement of Financial Condition. If at any time following the entry of this Final Judgment the Commission obtains information indicating that Borghese's representations to the Commission concerning his assets, income, liabilities, or net worth were fraudulent, misleading, inaccurate, or incomplete in any material respect as of the time such representations were made, the Commission may, at its sole discretion and without prior notice to Borghese, petition the Court for an order requiring Borghese to pay the full amount of his disgorgement liability (\$1,226,430), as well as pre-judgment and post-judgment interest thereon, and the maximum civil penalty allowable under the law. In connection with any such petition, the only issue shall be whether the financial information provided by Borghese was fraudulent, misleading, inaccurate, or incomplete in any material respect as of the time such representations were made. In its petition, the Commission may move this Court to consider all available remedies, including, but not limited to, ordering Borghese to pay funds or assets, or directing the forfeiture of any assets, or imposing sanctions for contempt of this Final Judgment. The Commission may also request additional discovery. Borghese may not, by way of defense to such petition: (1) challenge the validity of the Consent or this Final Judgment; (2) contest the allegations in the Complaint filed by the Commission; (3) assert that payment of disgorgement, pre-judgment and post-judgment interest or a civil penalty should not be ordered; (4) contest the amount of disgorgement and pre-judgment and post-judgment interest; (5) contest the imposition of the

maximum civil penalty allowable under the law; or (6) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

**VII.**

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that, pursuant to Rule 65(d) of the Federal Rules of Civil Procedure, this Final Judgment shall be binding upon Borghese, his agents, servants, employees and attorneys, and upon those persons in active concert or participation with him, who receive actual notice of this Final Judgment by personal service or otherwise.

**VIII.**

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the provisions of the annexed Consent be, and the same hereby are, incorporated in this Final Judgment with the same force and effect as if fully set forth herein, and that Borghese shall comply with all of the undertakings and agreements set forth therein.

**IX.**

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that this Court shall retain jurisdiction of this matter for all purposes, including, but not limited to, implementing and enforcing the terms and conditions of this Final Judgment.

**X.**

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that, there being no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk is ordered to enter this Final Judgment forthwith and without further notice.



**CONSENT OF DEFENDANT FRANK BORGHESE**

1. Defendant Frank Borghese ("Borghese"), being fully apprised of his rights, having had the opportunity to confer with legal counsel, having read and understood the terms of the annexed Final Consent Judgment As To Defendant Frank Borghese ("Final Judgment"), acknowledges proper service of the Summons and Complaint, appears and admits to the jurisdiction of this Court over him and over the subject matter of this action, waives the entry of findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure and, without further notice, trial or argument, and without admitting or denying the allegations of the Complaint filed by plaintiff Securities and Exchange Commission ("Commission"), except as to jurisdiction, which allegations are admitted, hereby consents to the entry of the Final Judgment annexed hereto and incorporated by reference herein.
2. Borghese agrees that this Consent shall be incorporated by reference in, and be made part of, the Final Judgment to be presented to the Court for signature, filing and entry contemporaneously herewith.
3. Borghese waives the right, if any, to a jury trial and to appeal from the Final Judgment.
4. Borghese acknowledges that the violation of any of the terms of the Final Judgment may place him in contempt of this Court and subject him to civil or criminal sanctions.
5. Borghese acknowledges that he enters into this Consent voluntarily and that this Consent and the Final Judgment embody the entire understanding of himself and the Commission. Borghese acknowledges and agrees that this proceeding and his consent to the

entry of the Final Judgment are for the purposes of resolving this civil action only and that no tender, offer, promise, threat, or representation of any kind has been made by the Commission or any member, officer, attorney, agent, or representative thereof to induce him to enter into this Consent or with regard to (a) any criminal liability arising from the facts underlying this action; or (b) immunity from any such criminal liability.

6. Borghese acknowledges that he has been informed and understands that the Commission, at its sole and exclusive discretion, may refer, or grant access to, this matter or any information or evidence gathered in connection therewith or derived therefrom, to any person or entity having appropriate administrative, civil, or criminal jurisdiction, if the Commission has not already done so.

7. Borghese acknowledges that, consistent with 17 C.F.R. § 202.5(f), his Consent and the entry of the annexed Final Judgment do not resolve, affect or preclude any other proceeding that has been or may be brought against him or anyone else. Among other things, Borghese waives any right he may have to assert that, under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, the relief sought or consented to in this civil action, including the seeking or imposition of any remedy, disgorgement or civil penalty herein, bars any criminal action, or that any criminal action bars the relief consented to in this action.

8. Borghese acknowledges that the Court's entry of a permanent injunction may have collateral consequences under federal or state law and the rules and regulations of self-regulatory organizations, licensing boards, and other regulatory organizations. Such collateral consequences include, but are not limited to, a statutory disqualification with respect to

membership or participation in, or association with a member of, a self-regulatory organization. This statutory disqualification has consequences that are separate from any sanction imposed in an administrative proceeding.

9. Borghese understands and agrees to comply with the Commission's policy "not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegation in the complaint or order for proceedings," 17 C.F.R. § 202.5(e). In compliance with this policy, Borghese agrees: (i) not to take any action or to make or permit to be made any public statement denying, directly or indirectly, any allegation in the Complaint or creating the impression that the Complaint is without factual basis; and (ii) that upon the filing of this Consent, Borghese hereby withdraws any papers filed in this action to the extent that they deny any allegation in the Complaint. If Borghese breaches this agreement, the Commission may petition the Court to vacate the Final Judgment and restore this action to its active docket. Nothing in this provision affects Borghese's: (a) testimonial obligations; or (b) right to take legal or factual positions in defense of litigation or other legal proceedings in which the Commission is not a party.

10. Borghese agrees that this Court shall retain jurisdiction of this matter for purposes of implementing and enforcing the terms and conditions of the Final Judgment and for all other purposes.

11. Borghese hereby consents and agrees that the Final Judgment may be presented by the Commission to the Court for signature and entry without further notice or delay.

12. Borghese will not oppose the enforcement of the Final Judgment on the ground, if any exists, that it fails to comply with Rule 65(d) of the Federal Rules of Civil Procedure, and hereby waives any objection based thereon.

13. Borghese acknowledges that the Court is not imposing a civil penalty and is waiving payment of all but \$450,000 of his disgorgement liability and prejudgment interest based on Borghese's sworn representations in Borghese's Statement of Financial Condition dated December 21, 2009, and other documents and information submitted to the Commission. Borghese further consents that if at any time following the entry of the Final Judgment the Commission obtains information indicating that Borghese's representations to the Commission concerning Borghese's assets, income, liabilities, or net worth were fraudulent, misleading, inaccurate, or incomplete in any material respect as of the time such representations were made, the Commission may, at its sole discretion and without prior notice to Borghese, petition the Court for an order requiring Borghese to pay the full amount of his disgorgement liability (\$1,226,430), as well as pre-judgment and post-judgment interest thereon, and the maximum civil penalty allowable under the law. In connection with any such petition, the only issue shall be whether the financial information provided by Borghese was fraudulent, misleading, inaccurate, or incomplete in any material respect as of the time such representations were made. In any such petition, the Commission may move the Court to consider all available remedies, including but not limited to ordering Borghese to pay funds or assets, or directing the forfeiture of any assets, or imposing sanctions for contempt of the Court's Final Judgment. The Commission may also request additional discovery. Borghese may not, by way of defense to such petition: (1) challenge the validity of this Consent or the Final Judgment; (2) contest the allegations in the complaint; (3) assert that payment of disgorgement, pre-judgment or post-

judgment interest, or a civil penalty should not be ordered; (4) contest the amount of disgorgement or pre-judgment or post-judgment interest; (5) contest the imposition of the maximum civil penalty allowable under the law; or (6) assert any defense to liability or remedy, including but not limited to any statute of limitations defense.

14. Borghese waives service of the Final Judgment and agrees that entry of the Final Judgment by the Court and filing with the Clerk of the Court will constitute notice to Borghese of its terms and conditions. Borghese agrees to execute and provide to the Commission a written declaration pursuant to 28 U.S.C. § 1746 acknowledging his receipt of the Final Judgment no later than ten business days after a copy of the Final Judgment has been forwarded to Borghese's counsel, Bradley Simon, Esq., Simon & Partners LLP, 551 Fifth Avenue, New York, New York 10176.

15. Borghese hereby waives any rights under the Equal Access to Justice Act, the Small Business Regulatory Enforcement Fairness Act of 1996, or any other provision of law to seek from the United States, or any agency, or any official of the United States acting in his or her official capacity, directly or indirectly, reimbursement of attorney's fees or other fees, expenses, or costs expended by Borghese to defend against this action. For these purposes,

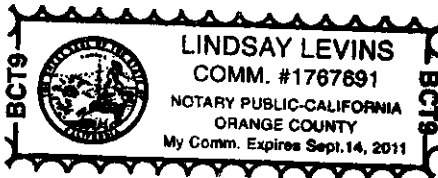
Borghese agrees that he is not the prevailing party in this action since the parties have reached a good faith settlement.

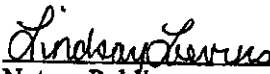
Dated:

Feb. 6<sup>th</sup>, 2010

  
Frank Borghese

On Feb. 6<sup>th</sup>, 2010, 2010, a person known to me, personally appeared before me and acknowledged executing the foregoing Consent.



  
Notary Public  
Commission expires: Sept. 14, 2011

2/19/10 SO ORDERED: 

UNITED STATES DISTRICT JUDGE