

D/E

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 JAMES HEUSCHNEIDER**

Plaintiff Securities and Exchange Commission ("Commission") having filed a complaint ("Complaint") charging defendant James Heuschneider 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 defendant Heuschneider 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, which are admitted), having consented to the entry of this Final Consent Judgment As To Defendant James Heuschneider ("Final Judgment"), without further notice:

I.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendant Heuschneider 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 defendant Heuschneider 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 defendant Heuschneider 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 defendant Heuschneider 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 Defendant Heuschneider shall disgorge a total of \$3587, representing \$2280 in gains that Heuschneider received allegedly as a result of the conduct alleged in the Complaint and prejudgment interest thereon of \$1307, and shall pay a civil penalty in the amount of \$35,000 pursuant to Section

21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)]. Defendant Heuschneider shall satisfy these obligations by making payments to the Clerk of this Court in the following manner:

- (A) Defendant Heuschneider shall pay \$19,294 within fifteen business days after entry of this Final Judgment.
- (B) Beginning ninety days from the entry of this Final Judgment, defendant Heuschneider shall pay the remaining \$19,293, plus post-judgment interest of \$55 pursuant to 28 U.S.C. § 1961, in four equal quarterly installments of \$4837. The first quarterly installment payment shall be paid ninety days from the entry of this Final Judgment and each succeeding payment shall be paid ninety days from the date on which the immediately preceding payment was due.
- (C) In the event that defendant Heuschneider 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 ten days. On the date of such declaration, defendant Heuschneider 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) Defendant Heuschneider 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 James Heuschneider 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. Defendant Heuschneider shall simultaneously transmit photocopies of such payments and letters to the Commission's counsel in this action, Joseph Boryshansky, Esq., U.S. Securities and Exchange Commission, New York Regional Office, Three World Financial Center, New York, NY 10281. By making such payments, defendant Heuschneider relinquishes all legal and equitable right, title, and interest in such funds, and no part of the funds shall be returned to defendant Heuschneider.

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. Such a plan may provide that the Fund shall be distributed pursuant to the Fair Fund provisions of Section 308(a) of the Sarbanes-Oxley Act of 2002. Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil penalties pursuant to this Judgment shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, defendant Heuschneider shall not, after offset or reduction of any award of compensatory damages in any Related Investor Action (as defined below) based on defendant Heuschneider's payment of disgorgement in this

action, argue that he is entitled to, nor shall he further benefit by, offset or reduction of such compensatory damages award by the amount of any part of defendant Heuschneider's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, defendant Heuschneider shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this Final Judgment. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against defendant Heuschneider by or on behalf of one or more investors based on substantially the same facts as alleged in the Complaint in this action.

VI.

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 defendant Heuschneider, 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.

VII.

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 defendant Heuschneider shall comply with all of the undertakings and agreements set forth therein.

VIII.

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.

IX.

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 JAMES HEUSCHNEIDER

1. Defendant James Heuschneider, 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 James Heuschneider ("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. Defendant Heuschneider 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. Defendant Heuschneider waives the right, if any, to a jury trial and to appeal from the Final Judgment.
4. Defendant Heuschneider 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. Defendant Heuschneider 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. Defendant Heuschneider 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. Defendant Heuschneider 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. Defendant Heuschneider 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, Defendant Heuschneider 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. Defendant Heuschneider 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. Defendant Heuschneider 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, defendant Heuschneider 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, defendant Heuschneider hereby withdraws any papers filed in this action to the extent that they deny any allegation in the Complaint. If defendant Heuschneider 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 defendant Heuschneider'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. Defendant Heuschneider 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. Defendant Heuschneider 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.

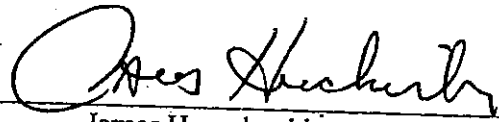
12. Defendant Heuschneider will not oppose the enforcement of the Final Judgment on the ground, if any exists, that it fails to comply with Rule 65(d) of the Federal Rules of Civil Procedure, and hereby waives any objection based thereon.

13. Defendant Heuschneider 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 defendant Heuschneider of its terms and conditions. Defendant Heuschneider 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 (10) business days after a copy of the Final Judgment has been forwarded to defendant Heuschneider's counsel, Ronald C. Minkoff, Esq., Frankfurt, Kurnit, Klein & Selz, P.C., 488 Madison Avenue, New York, NY 10022.

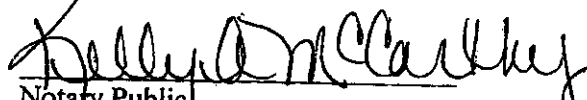
14. Defendant Heuschneider hereby waives any rights under the Equal Access to Justice Act, the Small Business Regulatory Enforcement Fairness Act of 1996, or any other provision of law to seek from the United States, or any agency, or any official of the United States acting in his or her official capacity, directly or indirectly, reimbursement of attorney's fees or other fees, expenses, or costs expended by defendant Heuschneider to defend against this action. For these purposes, defendant Heuschneider agrees that he is not the prevailing party in this action since the parties have reached a good faith settlement.

15. Defendant Heuschneider agrees that he shall not seek or accept, directly or indirectly, reimbursement or indemnification from any source, including but not limited to payment made pursuant to any insurance policy, with regard to any civil penalty amounts that defendant Heuschneider pays pursuant to the Final Judgment, regardless of whether such penalty amounts or any part thereof are added to a distribution fund or otherwise used for the benefit of investors. Defendant Heuschneider further agrees that he shall not claim, assert, or apply for a tax deduction or tax credit with regard to any federal, state, or local tax for any penalty amounts that he pays pursuant to the Final Judgment, regardless of whether such penalty amounts or any part thereof are added to a distribution fund or otherwise used for the benefit of investors.

Dated: 9/11, 2009


James Heuschneider

On Sept. 11, 2009, a person known to me, personally appeared before me and acknowledged executing the foregoing Consent.


Notary Public

Commission expires:

KELLY ANN MCCARTHY
Notary Public, State of New York
No. 01MC5083497
Qualified in Suffolk County
Commission Expires August 11, 2013

SO ORDERED:

10/28/09

UNITED STATES DISTRICT JUDGE