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Court: No retrial for ex-Symbol execs

NEW YORK

A federal appeals court said Monday that two former Symbol Technologies Inc. executives can't be retried on criminal charges related to an alleged accounting fraud at the company.

In an opinion issued Monday, a three-judge panel of the 2nd Circuit Court of Appeals found that retrying Michael DeGennaro, Symbol's former senior vice president of finance, and Frank Borghese, the Holtsville, N.Y., company's former senior vice president and general manager of worldwide sales and services, would violate their constitutional protections against double jeopardy.

"The decision by a district court to declare a mistrial is of great consequence," U.S. Circuit Judge Robert A. Katzmann wrote in a 19-page opinion. "The case at hand calls on us to review such a ruling to determine whether it was an abuse of discretion for a trial court to decide that a single jury note indicating deadlock created a 'manifest necessity' to declare a mistrial. On the record before us, we conclude that it was."

DeGennaro and Borghese were among a group of former Symbol executives charged criminally in 2004 in connection with an alleged scheme to improperly inflate the company's revenue and earnings in order to create the false appearance it had met or exceeded its financial projections. At least seven former executives have pleaded guilty in the matter.

A mistrial was declared in the case against DeGennaro, Borghese and Kenneth Jaeggi, Symbol's former vice president of finance and chief financial officer, in February 2006 after the jurors said in a note to the judge that they were "at a dead lock" during deliberations following a six-week trial.

The district judge, at the time, denied a request by DeGennaro and Borghese's lawyers to poll the jurors prior to dismissing them, according to the circuit's order. Jaeggi's counsel had moved for a mistrial after the jury's note at the end of its third day of deliberations and opposed polling the jury.

"We are thrilled that the 2nd Circuit's decision bars a retrial and thereby honors the jury's unanimous decision that Michael DeGennaro was innocent," said Michael S. Sommer, DeGennaro's lawyer.

Jaeggi is expected to be retried on conspiracy, fraud and other charges. No date has been set for his retrial.

"We're very grateful that the 2nd Circuit in its decision today recognized the jury's acquittal of Mr. Borghese on all counts and barred the government from retrying him on double jeopardy grounds," said Bradley Simon,

Borghese's lawyer. "They rectified what we considered a huge miscarriage of justice."

Tomo Razmilovic, Symbol's onetime chief executive, is a fugitive and is believed to be in Sweden, prosecutors said.

"We're going to review the 2nd Circuit's decision and decide how we're going to proceed," said Robert Nardoza, a spokesman for the U.S. Attorney's office in Brooklyn, which brought the case.

The company itself agreed in 2004 to pay \$139 million, including a \$37 million Securities and Exchange Commission civil penalty, and cooperate with the government's probe.

Symbol, a maker of bar-code scanners and hand-held devices, was acquired by Motorola Inc. for \$3.9 billion earlier this year.

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