

PUBLISH

April 26, 2022

**Christopher M. Wolpert
Clerk of Court**

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff - Appellee,

v.

No. 19-1454

GENAUDIO INC.,

Defendant - Appellant,

and

TAJ JERRY MAHABUB,

Defendant.

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff - Appellee,

v.

No. 19-1455

TAJ JERRY MAHABUB,

Defendant - Appellant,

and

GENAUDIO INC.,

Defendant.

**Appeals from the United States District Court
for the District of Colorado
(D.C. No. 1:15-CV-02118-WJM-SKC)**

David J. Aveni, Wilson Elser Moskowitz Edelman & Dicker LLP, San Diego, California, for Defendant-Appellant GenAudio, Inc.

Andrew Bryan Holmes, Holmes, Taylor, Cowan & Jones, Los Angeles, California (David J. Aveni, Wilson Elser Moskowitz Edelman & Dicker LLP, San Diego, California, on the briefs), for Defendant-Appellant Taj Jerry Mahabub.

Emily True Parise, Senior Counsel (Robert B. Stebbins, General Counsel and John W. Avery, Deputy Solicitor, with her on the brief), Securities and Exchange Commission, Washington, D.C., for Plaintiff-Appellee.

Before **HOLMES, KELLY, and CARSON**, Circuit Judges.

HOLMES, Circuit Judge.

Taj Jerry Mahabub, founder and Chief Executive Officer (“CEO”) of GenAudio, Inc. (“GenAudio”)—whom we collectively refer to as “Appellants”—attempted to secure a software licensing deal with a well-known technology company, Apple, Inc. (“Apple”). It was Mr. Mahabub’s goal to integrate GenAudio’s three-dimensional audio software—AstoundSound—into Apple’s products. While Appellants were pursuing that collaboration, the Securities and Exchange Commission (“SEC”) commenced an investigation into Mr. Mahabub’s conduct. Mr. Mahabub was suspected of defrauding investors by

fabricating statements about Apple’s interest in GenAudio’s software and violating registration provisions of the securities laws in connection with sales of GenAudio securities.

Granting summary judgment for the SEC, the district court found that Mr. Mahabub defrauded investors and violated the securities laws. The court determined that Appellants were liable for knowingly or recklessly making six fraudulent misstatements in connection with two offerings of GenAudio’s securities in violation of the antifraud provisions of the securities laws—that is, SEC Rule 10b-5 and § 10(b) of the Exchange Act.¹ As to one of those statements, the court also determined that Appellants violated § 17(a)(2) of the Securities Act, which also proscribes the making of certain misstatements. In addition, the district court granted summary judgment in favor of the SEC on its claims that GenAudio and Mr. Mahabub violated §§ 5(a) and 5(c) of the Securities Act, which prohibit the offer or sale of unregistered securities. As a remedy for these violations, the court ordered disgorgement of Appellants’ proceeds and imposed civil penalties.

Appellants now appeal from the district court’s decision, raising three overarching issues before us. First, Appellants assert that the district court erred in finding them liable for the six fraudulent misstatements under the securities

¹ Rule 10b-5 is coextensive in its substantive coverage with that of § 10(b). *See, e.g., SEC v. Smart*, 678 F.3d 850, 856 n.7 (10th Cir. 2012).

laws. Generally, Appellants explain that Mr. Mahabub’s statements to actual and potential shareholders were informed by a reasonable belief regarding Apple’s interest in acquiring GenAudio’s proprietary technology. Second, Appellants contend that the district court erred in concluding GenAudio did not qualify for two exemptions allowing its sale of unregistered securities—specifically, the private-offering exemption under § 4(a)(2) of the Securities Act, and the Rule 506 safe-harbor exemption of the SEC’s Regulation D. Third, Appellants challenge the district court’s legal authority to impose a disgorgement order and the court’s computation of the disgorgement amounts, as well as the civil penalties that the court imposed on them. Exercising jurisdiction under 28 U.S.C. § 1291, we reject all of Appellants’ arguments and **affirm** the district court’s judgment.

I

A

Mr. Mahabub founded GenAudio in 2003 and served as its CEO and Chairman of the Board from 2009 to 2012. GenAudio is a Colorado corporation headquartered in Centennial, Colorado, that develops and markets software. GenAudio created a “three-dimensional audio” technology, which it calls AstoundSound. AstoundSound is a software-based system for processing normal stereo audio to give it a “three-dimensional” effect—as if the sound is coming from some other place, such as behind the listener or from far away.

GenAudio primarily financed itself through selling debt and equity securities in private offerings, but it consistently had funding issues. To bolster funding, GenAudio asked Jim Wei-Kung Mattos, a GenAudio employee, to raise money, which he did, devoting much of his time to the task.

In late 2006, GenAudio commenced discussions with Apple regarding AstoundSound. GenAudio's goal throughout "was to reach a licensing agreement or [arrange for the] acquisition of GenAudio's technology" so Apple could integrate AstoundSound into its consumer products. *Aplts.' App.*, Vol. VI, at 1493, ¶ 126 (Def. GenAudio's Resp. to SEC's Revised Mot. for Summ. J., filed Mar. 30, 2018). With this end in mind, GenAudio had talks with two separate product divisions within Apple: (1) the handheld-devices division which encompassed iPhones, iPods, and iPads, and (2) the Macintosh or "Mac" division.

On July 1, 2009, Mr. Mahabub signed Apple's standard non-disclosure agreement ("NDA") on behalf of GenAudio. Mr. Mahabub's primary point of contact in Apple's handheld-devices division was Victor Tiscareno, a senior audio and acoustics engineer. Mr. Mahabub also met and communicated with Michael Hailey, a product-market manager for the iPod, iPhone, and iPad product lines, as well as Ronald Issac, a signal-processing engineer and acoustician technologist. Mr. Issac was Mr. Mahabub's point of contact in the Mac division.

As talks between GenAudio and Apple continued between August 2009 and February 2010, Mr. Mahabub periodically would forward to the GenAudio

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