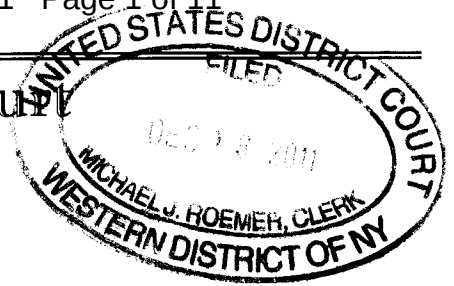


# United States District Court

for the  
Western District of New York



United States of America )

v. )

CALVIN BRAINARD & MARY BRAINARD )

Defendant )

Case No. 11-MJ- 4133

### CRIMINAL COMPLAINT

I, the complainant in this case, state that the following is true to the best of my knowledge and belief.

On or about the date of December 21, 2009 in the county of Seneca in the Western District of New York, the defendant violated 18 U.S.C. § 1341 & 1349, an offense described as follows:

Defendants devised a scheme to defraud, which scheme involved using the mails, and did conspire to commit bank fraud.

This criminal complaint is based on these facts:

X Continued on the attached sheet.

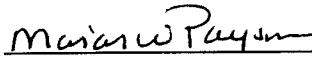
Please see attached affidavit

  
Complainant's signature

Christopher S. Mayfield, SA, FBI  
Printed name and title

Sworn to before me and signed in my presence.

Date: 12/16/11

  
Judge's signature

City and State: Rochester, New York

Hon. Marian W. Payson, U.S. Magistrate Judge  
Printed name and title

11-mj-4133

Affidavit In Support of Criminal Complaint

STATE OF NEW YORK )  
COUNTY OF MONROE ) ss:  
CITY OF ROCHESTER )

I, Christopher S. Mayfield, being duly sworn, depose and state as follows:

PRELIMINARY INFORMATION

1. From May 1998 to the present, I have been a Special Agent with the Federal Bureau of Investigation. I am presently assigned to the Elmira, New York, Resident Agency of the FBI. My duties involve investigating federal crimes, including mail fraud, wire fraud, bank fraud and conspiracy.

2. I make this affidavit in support of a criminal complaint charging CALVIN BRAINARD and MARY BRAINARD with violating Title 18, United States Code, Sections 1341 [mail fraud] and 1349 [conspiracy to commit bank fraud].

3. The statements contained in this affidavit are based on my involvement in this investigation, as well as information provided to me by other agents and individuals involved in this investigation, and upon my training and experience as a Special Agent. Because this affidavit is being submitted for the limited purpose of securing a criminal complaint, I have not included each and every fact known to me concerning this investigation. I have set forth only the facts that I believe are necessary to establish probable cause to believe that the defendant did knowingly violate Title 18, United States Code, Sections 1341 and 1349.

THE DEFENDANTS

4. CALVIN BRAINARD is an attorney registered in New York State and a licensed mortgage broker in the New York State.

5. MARY BRAINARD is the wife of CALVIN BRAINARD.

6. CALVIN and MARY BRAINARD own and operate a mortgage brokerage business known as BMC CAPITAL.

7. The BRAINARDS live and work in Seneca County, New York, within the Western District of New York.

THE INVESTIGATION

8. In or about April 2009, the owner of a residence located on Butler Drive in Pittsford, New York (hereinafter, "V1"), asked MARY BRAINARD, d/b/a BMC CAPITAL, to assist with refinancing an existing mortgage. The principal purpose of the refinancing was to permit V1 to replace his pre-existing mortgage loan with Bank of America, a financial institution within the meaning of Title 18, United States Code, Section 20, with a new loan at more favorable interest rates.

9. The closing for the refinancing occurred in or about mid-December 2009. The lender was SunTrust, a financial institution within the meaning of Title 18, United States Code, Section 20. At the closing, CALVIN BRAINARD acted as a closing agent for SunTrust, as well as V1's attorney.

10. On or about December 21, 2009, SunTrust wired approximately \$102,469 into CALVIN BRAINARD'S IOLA trust

account at Community Bank NA, a financial institution within the meaning of Title 18, United States Code, Section 20. CALVIN BRAINARD, as closing agent, was required to pay off the V1's pre-existing mortgage loan with Bank of America in the approximate amount of \$95,208.

11. BMC CAPITAL and the BRAINARDS were struggling financially at the time. Instead of using the SunTrust loan proceeds entrusted to them to pay off V1's pre-existing mortgage, the BRAINARDS devised a scheme to defraud and to divert the money to themselves.

12. On December 21, 2009, CALVIN BRAINARD wrote Check No. 3274, drawn on his IOLA trust account, in the approximate amount \$95,208, to pay off V1's pre-existing mortgage loan with Bank of America, and sent it via FedEx to Bank of America. CALVIN BRAINARD's covering letter to the loan servicing department of Bank of America asked that "this mortgage be discharged of record, and for that purpose please forward to the Monroe County Clerk the satisfaction of mortgage." The next day, however, a telephonic stop payment request was placed on Check No. 3274. The stated reason for the stop payment was that the payee was incorrect.

13. Also on December 22, 2009, CALVIN BRAINARD transferred V1's mortgage payoff funds (approximately \$95,208) from his IOLA trust account to a general business account that he and MARY BRAINARD controlled. This money was used by the BRAINARDS to pay for various business and personal expenses.

14. As a result of the BRAINARDS' scheme, V1 was deprived of approximately \$95,208, and SunTrust's loan to V1 was not secured to the extent that SunTrust expected.

15. Sometime in February 2010, V1 began receiving notices from Bank of America advising that V1 had failed to make required mortgage payments. V1 was surprised because V1 had received paperwork indicating that the Bank of America mortgage had been discharged, and that a Satisfaction of Mortgage had been filed with the Monroe County Clerk.

16. V1 called MARY BRAINARD to inquire about this situation and get it remedied. Rather than telling the truth, the BRAINARDS launched an extended effort to cover-up and conceal their wrongdoing. The cover-up included a

letter faxed from CALVIN BRAINARD to Bank of America, dated April 27, 2010, attaching a fake Outgoing Wire Transfer Authorization in the amount of \$95,208.85, dated December 23, 2009, and stating: "My client's position on this loan is now and always has been that it was paid in full last December by virtue of my wire to you. If you have in the interim lost track of the funds, that is not [V1's] concern."

17. MARY BRAINARD falsely stated to V1 that Bank of America did not accept the original pay-off check because it was short "a couple hundred dollars." MARY BRAINARD also falsely claimed that the mortgage loan pay-off money had thereafter been wired to Bank of America, but that Bank of America had somehow lost it. Despite V1s requests, the BRAINARDS did not supply V1 with confirmation of the purported wire transfer to Bank of America.

18. In or about August 2010, V1 hired an attorney to help resolve this matter. To try to convince V1's attorney that the BRAINARDS had properly remitted V1's mortgage payoff to Bank of America, on September 30, 2010 MARY BRAINARD emailed to V1's attorney a copy of a fake Outgoing FED Message. V1's attorney thereafter faxed this forged

Outgoing FED Message to Bank of America. When the matter could not be resolved, V1 eventually filed a civil lawsuit against the BRAINARDS and others in February 2011.

19. After the lawsuit was filed, CALVIN BRAINARD met with a representative of Community Bank NA, where he maintained his IOLA trust account and general business account, and falsely claimed that he had wired approximately \$95,208 to Bank of America, but that this money was never received by Bank of America. He asked the representative of Community Bank NA to explain the discrepancy and account for this (purportedly) missing money.

20. In support of his false claim, CALVIN BRAINARD presented to Community Bank NA representatives various forged banking records, including among other things, (i) the bogus Outgoing FED Message, which purported to show a \$95,208.85 wire transfer from BRAINARD's IOLA trust account to Bank of America on September 24, 2010; (ii) an altered copy of a statement from CALVIN BRAINARD's IOLA trust account for September 2010; and (iii) the forged Wire Transfer Authorization Form, dated December 23, 2009.



21. According to bank personnel, the bogus Outgoing FED Message contained two unique identifier numbers - IMAD and OMAD numbers assigned by the Federal Reserve - that matched a different, but genuine, wire transfer in the amount of \$211,121.35 that had in fact been sent from CALVIN BRAINARD's IOLA trust account on June 4, 2010. Also according to bank personnel, on September 30, 2010, MARY BRAINARD had requested and obtained a copy of the genuine Outgoing FED Message document.


22. I interviewed CALVIN BRAINARD about these and other matters on November 2, 2011. CALVIN BRAINARD stated that Check No. 3274 had been received and rejected by Bank of America because Bank of America allegedly did not accept IOLA trust account checks for mortgage payoffs. This statement is inconsistent with the purported basis for the stop payment order that BRAINARD put on Check No. 3274, namely, that the payee was incorrect. BRAINARD further claimed that he then wired the mortgage payoff amount to Bank of America. There is no credible evidence that any such wire transfer was ordered or occurred.

23. According to CALVIN BRAINARD, his wife MARY BRAINARD handled the matter going forward after problems

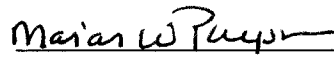
surfaced with the mortgage payoff. BRAINARD blamed Community Bank NA for providing conflicting sets of documentation, including the altered IOLA trust account statement for September 2010. He admitted that the account statement had been altered, and observed that something "very bizarre" was going on.

24. FBI agents also interviewed MARY BRAINARD on November 2, 2011. She acknowledged that Bank of America was "having issue with" a wire transfer to pay off V1's mortgage. She claimed to have received conflicting documentation from her bank concerning this matter, and stated that her husband, CALVIN BRAINARD, went to the bank to discuss the discrepancy.

25. Based upon the foregoing, I respectfully submit that there is probable cause to believe that CALVIN BRAINARD and MARY BRAINARD did devise a scheme to defraud, which scheme involved using the mails, in violation of Title 18, United States Code, Section 1341, and did conspire to commit bank fraud in violation of Title 18, United States Code, Section 1349.

  
\_\_\_\_\_  
Christopher S. Mayfield  
Special Agent, FBI

Sworn before me this 16<sup>th</sup> day of December, 2011

  
\_\_\_\_\_  
MARIAN W. PAYSON  
United States Magistrate Judge