

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

13-CR-6061 G

MARY BRAINARD,

Defendant.

PLEA AGREEMENT

The defendant, MARY BRAINARD, and the United States Attorney for the Western District of New York (hereinafter "the government") hereby enter into a plea agreement with the terms and conditions as set out below.

I. THE PLEA AND POSSIBLE SENTENCE

1. The defendant agrees to waive indictment and to plead guilty to a one-count Information charging a violation of Title 18, United States Code, Section 1343 (wire fraud affecting a financial institution), for which the maximum possible sentence is a term of imprisonment of 30 years, a fine of \$1,000,000, a mandatory \$100 special assessment and a term of supervised release of 5 years. The defendant understands that the penalties set forth in this paragraph are the maximum penalties that can be imposed by the Court at sentencing.

2. The defendant understands that, if it is determined that the defendant has violated any of the terms or conditions of supervised release, the defendant may be required to serve in prison all or part of the term of supervised release, up to 3 years without credit for time previously served on supervised release. As a consequence, in the event the defendant is sentenced to the maximum term of incarceration, a prison term imposed for a violation of supervised release may result in the defendant serving a sentence of imprisonment longer than the statutory maximum set forth in Paragraph 1 of this agreement.

II. ELEMENTS AND FACTUAL BASIS

3. The defendant understands the nature of the offense set forth in paragraph 1 of this agreement and understands that if this case proceeded to trial, the government would be required to prove beyond a reasonable doubt the following elements of the crime:

- a. The defendant, having devised a scheme or artifice to defraud or to obtain money by means of false and fraudulent pretenses or representations;
- b. transmitted or caused to be transmitted by means of wire communication in interstate commerce any writing, sign or picture for the purpose of executing such scheme or artifice; and
- c. which conduct affected a financial institution.

FACTUAL BASIS

IV. The defendant and the government agree to the following facts, which form the basis for the entry of the plea of guilty including relevant conduct:

Background Facts

- a. Defendant is married to Calvin Brainard, an attorney and mortgage broker licensed in the State of New York. Together defendant and Calvin Brainard operated a mortgage brokerage business known as BMC Capital.
- b. Defendant, through BMC Capital, brokered mortgage refinancing loans for various clients. The mortgage loans were funded by federally-insured banks. A material condition for each such refinancing mortgage loan was that the refinanced loan proceeds first would be applied to pay off the existing mortgage and lien on the property.
- c. Calvin Brainard acted as the settlement agent for the lending banks, and received the refinancing loan proceeds into his attorney trust account at Community Bank N.A. in Seneca Falls, New York. Defendant had access to Calvin Brainard's attorney trust account, and routinely engaged in transactions in his attorney trust account. Defendant also handled the financial affairs of BMC Capital, as well as her and Calvin Brainard's personal finances.

Offense Conduct

- d. In 2009, R.I. and V.I. hired defendant and BMC Capital to refinance an existing mortgage held by Bank of America. Defendant arranged to obtain the refinancing from SunTrust Mortgage, Inc., a financial institution in Portsmouth, New Hampshire.
- e. The refinancing transaction closed on December 21, 2009, and Suntrust Mortgage wire transferred

- approximately \$102,469.28 from New Hampshire into Brainard's attorney trust account in New York.
- f. Also on December 21, 2009, in order to pay off R.I.'s and V.I.'s existing mortgage, Calvin Brainard wrote check no. 3274 from his attorney trust account in the approximate amount of \$95,208.85, payable to BAC Home Loans Servicing LP, and sent the check to BAC Home Loans Servicing in Greensboro, North Carolina.
 - g. On December 22, 2009, a stop order was placed on check no. 3274. Defendant thereafter used online banking to transfer \$95,208.85 from Calvin Brainard's attorney trust account into a BMC Capital account. Defendant used the stolen loan proceeds for personal living expenses and to pay debts that defendant had incurred.
 - h. When R.I., V.I. and SunTrust Mortgage discovered that the first mortgage had not been paid off, defendant engaged in a series of ruses and deceptions to avoid detection of her theft, including by creating false checks, false wire transfer instructions, and false account statements for Brainard's attorney trust account. Eventually, on or about August 19, 2011, defendant arranged to pay off the R.I.'s and V.I.'s existing first mortgage using proceeds obtained from a different client of BMC Capital.
 - i. By way of relevant conduct, defendant further agrees that she engaged in similar schemes in 2009 and 2010 to misappropriate at least \$400,000 from at least 10 different individuals.

III. SENTENCING GUIDELINES

V. The defendant understands that the Court must consider but is not bound by the Sentencing Guidelines (Sentencing Reform Act of 1984).

BASE OFFENSE LEVEL

VI. The government and the defendant agree that Guideline § 2B1.1(a)(1) applies to the offense of conviction and provides for a base offense level of 7.

SPECIFIC OFFENSE CHARACTERISTICS
U.S.S.G. CHAPTER 2 ADJUSTMENTS

VII. (a) The government maintains that the 16 level increase pursuant to Guidelines § 2B1.1(b)(1)(I) (loss more than \$1,000,000) applies. The defendant specifically reserves the right at the time of sentencing to argue to the Court that this increase does not apply, but instead, that the 14 level increase pursuant to Guidelines § 2B1.1(b)(1)(H) (loss more than \$400,000) applies.

VIII. The government and the defendant agree that the following specific offense characteristic does apply:

- a. the 2 level increase pursuant to Guidelines § 2B1.1(b)(2)(A)(i) (offense involved more than 10 victims).

U.S.S.G. CHAPTER 3 ADJUSTMENTS

IX. The government and the defendant agree that the following adjustment to the base offense level does apply:

- a. The 2 level increase pursuant to Guidelines § 3B1.3 (abuse of trust).

ADJUSTED OFFENSE LEVEL

X. Based on the foregoing, it is the understanding of the government and the defendant that the adjusted offense level for the offense of conviction is 27 if Guidelines § 2B1.1(b)(1)(I) applies, and 25 if Guidelines § 2B1.1(b)(1)(H) applies.

ACCEPTANCE OF RESPONSIBILITY

XI. At sentencing, the government agrees not to oppose the recommendation that the Court apply the two (2) level downward adjustment of Guidelines § 3E1.1(a) (acceptance of responsibility) and further agrees to move the Court to apply the additional one (1) level downward adjustment of Guidelines § 3E1.1(b), which would result in a total offense level of 24 if Guidelines § 2B1.1(b)(1)(I) applies, and 22 if Guidelines § 2B1.1(b)(1)(H) applies.

CRIMINAL HISTORY CATEGORY

XII. It is the understanding of the government and the defendant that the defendant's criminal history category is I. The defendant understands that if the defendant is sentenced for, or convicted of, any other charges prior to sentencing in this action the defendant's criminal history category may

increase. The defendant understands that the defendant has no right to withdraw the plea of guilty based on the Court's determination of the defendant's criminal history category.

GUIDELINES' APPLICATION, CALCULATIONS AND IMPACT

XIII. (a) It is the understanding of the government and the defendant that, if the Court determines that Guidelines § 2B1.1(b)(1)(I) does apply, with a total offense level of 24 and criminal history category of I, the defendant's sentencing range would be a term of imprisonment of 51 to 63 months, a fine of \$10,000 to \$100,000 and a period of supervised release of 2 to 5 years.

(b) It is the understanding of the government and the defendant that, if the Court determines that Guidelines § 2B1.1(b)(1)(H) does apply, with a total offense level of 22 and criminal history category of I, the defendant's sentencing range would be a term of imprisonment of 41 to 51 months, a fine of \$7,500 to \$75,000 and a period of supervised release of 2 to 5 years.

(c) Notwithstanding the above, the defendant understands that at sentencing the defendant is subject to the minimum and maximum penalties set forth in paragraph 1 of this agreement.

XIV. The government and the defendant agree to the correctness of the calculations of the Sentencing Guidelines range set forth above. The government and the defendant, however, reserve the right to recommend a sentence outside the Sentencing Guidelines range. This paragraph reserves the right to the government and the defendant to bring to the attention of the Court all information deemed relevant to a determination of the proper sentence in this action.

XV. The defendant understands that the Court is not bound to accept any Sentencing Guidelines calculations recommended by either party and the defendant will not be entitled to withdraw the plea of guilty based on the sentence imposed by the Court.

IV. STATUTE OF LIMITATIONS

XVI. In the event the defendant's plea of guilty is withdrawn, or conviction vacated, either pre- or post-sentence, by way of appeal, motion, post-conviction proceeding, collateral attack or otherwise, the defendant agrees that any charges dismissed pursuant to this agreement shall be automatically reinstated upon motion of the government and further agrees not to assert the statute of limitations as a defense to any other

criminal offense involving or related to fraud which is not time barred as of the date of this agreement. This waiver shall be effective for a period of six months following the date upon which the withdrawal of the guilty plea or vacating of the conviction becomes final.

V. GOVERNMENT RIGHTS AND RESERVATIONS

XVII. The defendant understands that the government has reserved the right to:

- a. provide to the Probation Office and the Court all the information and evidence in its possession that the government deems relevant concerning the defendant's background, character and involvement in the offense charged, the circumstances surrounding the charge and the defendant's criminal history;
- b. respond at sentencing to any statements made by the defendant or on the defendant's behalf that are inconsistent with the information and evidence available to the government;
- c. advocate for a specific sentence, including the amount of restitution and/or fine and the method of payment;
- d. modify its position with respect to any sentencing recommendation or sentencing factor under the Guidelines including criminal history category, in the event that subsequent to this agreement the government receives previously unknown information regarding the recommendation or factor; and
- e. oppose any application for a downward departure or sentence outside the Guidelines range made by the defendant.

XVIII. At sentencing, the government will move to dismiss the Criminal Complaint pending against the defendant under Magistrate's No. 11-MJ-4133.

VI. RESTITUTION AND FINANCIAL PENALTY PROVISIONS

XIX. The defendant understands that the Court must require restitution to be paid to the victims in the amounts to be determined by the Court, as part of the sentence pursuant to Sentencing Guidelines § 5E1.1 and Title 18, United States Code, Section 3663A.

XX. The defendant agrees to disclose fully and completely all assets in which the defendant either has any property interest or over which the defendant exercises control, directly or indirectly, including those held by a spouse, nominee or other third party. The defendant agrees to make complete financial disclosure to the United States by truthfully executing a sworn financial statement by the deadline set by the United States, or if no deadline is set, no later than two weeks prior to the date of sentencing. The defendant agrees to authorize the release of all financial information requested by the United States, including, but not limited to, executing authorization forms for the United States to obtain tax

information, bank account records, credit history, and social security information. The defendant agrees to discuss or answer any questions by the United States relating to the defendant's complete financial disclosure. The defendant will submit to an examination under oath and/or a polygraph examination conducted by an examiner selected by the U.S. Attorney's Office on the issue of the defendant's financial disclosures and assets, if deemed necessary by the U.S. Attorney's Office. The defendant certifies that the defendant has made no transfer of assets in contemplation of this prosecution for the purpose of evading or defeating financial obligations that are created by the agreement and/or that may be imposed upon the defendant by the Court. In addition, the defendant promises that the defendant will make no such transfers in the future.

XXI. The defendant agrees that any financial records and information provided by the defendant to the Probation Office, before or after sentencing, may be disclosed to the United States Attorney's Office for use in the collection of any unpaid financial obligation.

XXII. The defendant understands and agrees that the Court, at the time of sentencing, may order that all monetary penalties imposed at that time (including any fine, restitution,

or special assessment imposed in accordance with the terms and conditions of this plea agreement) are to be due and payable in full immediately and subject to immediate enforcement by the United States. The defendant understands and acknowledges that any schedule of payments imposed by the Court at the time of sentencing is merely a minimum schedule of payments and does not, in any way, limit those methods available to the United States to enforce the judgment.

VII. APPEAL RIGHTS

XXIII. The defendant understands that Title 18, United States Code, Section 3742 affords a defendant a limited right to appeal the sentence imposed. The defendant, however, knowingly waives the right to appeal and collaterally attack any component of a sentence imposed by the Court which falls within or is less than the sentencing range for imprisonment, a fine and supervised release set forth in Section III, ¶ 13(a), above, notwithstanding the manner in which the Court determines the sentence. In the event of an appeal of the defendant's sentence by the government, the defendant reserves the right to argue the correctness of the defendant's sentence.

XXIV. The defendant understands that by agreeing to not collaterally attack the sentence, the defendant is waiving the right to challenge the sentence in the event that in the future the defendant becomes aware of previously unknown facts or a change in the law which the defendant believes would justify a decrease in the defendant's sentence.

XXV. The government waives its right to appeal any component of a sentence imposed by the Court which falls within or is greater than the sentencing range for imprisonment, a fine and supervised release set forth in Section III, ¶ 13(b), above, notwithstanding the manner in which the Court determines the sentence. However, in the event of an appeal from the defendant's sentence by the defendant, the government reserves its right to argue the correctness of the defendant's sentence.

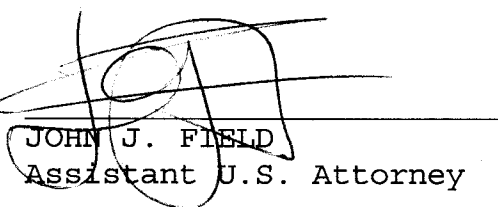
VIII. TOTAL AGREEMENT AND AFFIRMATIONS

XXVI. This plea agreement represents the total agreement between the defendant, MARY BRAINARD, and the government. There are no promises made by anyone other than those contained in this agreement. This agreement supersedes

any other prior agreements, written or oral, entered into
between the government and the defendant.

WILLIAM J. HOCHUL, JR.
United States Attorney
Western District of New York

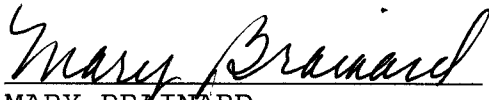
BY:



JOHN J. FIELD
Assistant U.S. Attorney


Dated: May 16, 2013

I have read this agreement, which consists of 15 pages. I have had a full opportunity to discuss this agreement with my attorney, David Rothenberg, Esq. I agree that it represents the total agreement reached between myself and the government. No promises or representations have been made to me other than what is contained in this agreement. I understand all of the consequences of my plea of guilty. I fully agree with the contents of this agreement. I am signing this agreement voluntarily and of my own free will.



MARY BRAINARD
Defendant

DATED: May 16, 2013



DAVID ROTHENBERG, ESQ.
Attorney for Defendant

DATED: May 16, 2013