SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
PRESENT: Hon. Eileen Bransten, Justice PART 3

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SEA TRADE MARITIME CORPORATION,

Plaintiff,

- *against* -

MARSH USA INC.
as successor of JOHNSON & HIGGINS,

Defendant.

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Index No.: 602648/2002
Motion Date: 04/30/2013
Motion Seq. No.: 009

The following papers, numbered 1 to 3, were read on this motion to dismiss.

Notice of Motion/Order to Show Cause - Affidavits - Exhibits No(s). 1

Answering Affidavits - Exhibits No(s). 2

Replying Affidavits No(s). 3

Cross-Motion: ☐ Yes X No

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Dated: October 21, 2013

Hon. Eileen Bransten, J.S.C.

1. CHECK ONE: .....X CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: Motion Is: X GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: .....☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

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SEA TRADE MARITIME CORPORATION,

Plaintiff,

Index No. 602648/2002
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- *against* -

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as successor of JOHNSON & HIGGINS,

Defendant.

----------X

BRANSTEN, J.

INTRODUCTION

Plaintiff Sea Trade Maritime Corporation ("Sea Trade") brings this action for negligent procurement of insurance and negligent misrepresentation against Marsh USA Inc. ("Marsh") as the successor of its former insurance broker, Johnson & Higgins. In motion sequence 009, Defendant Marsh moves for dismissal of the Second Amended Complaint pursuant to CPLR 3211(a)(1), (a)(5) and (a)(7), based on documentary evidence, collateral estoppel and failure to state a cause of action. Sea Trade opposes. For the reasons stated below, the Complaint is dismissed in its entirety.

Background[1]

This case arises out of a terrorist attack by the Tamil Tigers against a maritime vessel anchored off the Sri Lankan coast in 1997, and the subsequent insurance dispute. (Cmpl. ¶

[1] All facts in this section are undisputed, unless otherwise noted.

39). According to the Complaint, Plaintiff Sea Trade owned a single maritime vessel, the M/V Athena. (Cmpl. ¶ 22). Sea Trade hired a management company, Trans-Ocean Steamship Agency, Inc. ("Trans-Ocean"), to manage the M/V Athena, including the M/V Athena's insurance requirements. (Cmpl. ¶ 9).

A. *Trans-Ocean Obtains Insurance for the M/V Athena*

Since the 1980s, Trans-Ocean had been working with an insurance broker named Veit Metzroth. (Cmpl. ¶ 14). As of 1992, when Sea Trade began its relationship with Trans-Ocean, Metzroth was employed by Alexander and Alexander, Inc. ("A&A"). (Cmpl. ¶ 14). The Complaint alleges that in December 1992, Trans-Ocean asked A&A and Metzroth to procure "held-covered" insurance for the M/V Athena.[2] (Cmpl. ¶¶ 22, 23). The Complaint further alleges that A&A and Metzroth did not acquire "held-covered" insurance, but rather obtained insurance that required advance notice of travel to a war zone. (Cmpl. ¶ 43)

A&A provided to Trans-Ocean two summaries, or cover notes, describing the insurance coverage it obtained, one for the 1993 policy and one of the renewed 1994 policy. (Cmpl. ¶¶ 25, 26). The 1993 Cover Note was issued by A&A on January 6, 1993 and was

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[2] Some maritime insurance policies require that the vessel's owner notify the insurer before the insured vessel travels to a designated war zone, also known as an Advance Premium Area or APA. "Held-covered" insurance policies provide coverage in the event that the owner inadvertently fails to give advance notice of a vessel's travel to a war zone. (Cmpl. ¶ 21).

signed by "William K. Carson, senior vice president." (Affirmation of Steven G. Storch ("Storch Affirm.") Ex. A at 1). The 1993 Cover Note provided to Trans-Ocean regarding the M/V Athena inaccurately stated that "[i]nformation of [a] voyage [into a war zone] shall be given . . . as soon as practicable, and the absence of prior advice shall not affect the cover hereon." (Cmpl. ¶ 25; Storch Affirm. Ex. A at 1, 4). In fact, the insurance policy was not "held-covered" and required advance notice of the M/V Athena's entry into a war zone in order to secure insurance coverage. (Cmpl. ¶ 43). The 1994 Cover Note from A&A was issued on January 5, 1994, was signed by "Stephen A. Gandilora, vice president," and contained identical language to the 1993 Cover Note. (Cmpl. ¶ 26; Storch Affirm. Ex. A at 5, 8).

In November 1992, Metzroth left A&A to become a representative of Johnson & Higgins (Marsh's predecessor in interest, hereinafter "Marsh"). (Affidavit of Jay Cho ("Cho Aff.") Ex. B). On July 11, 1994, Trans-Ocean issued a letter appointing Marsh as its exclusive insurance broker. (Cmpl. ¶ 30). In January 1995, Trans-Ocean requested that Marsh renew the maritime insurance policy for the M/V Athena on identical terms. *See* Cmpl. ¶ 33. Each year that Marsh renewed coverage, Marsh provided Trans-Ocean with a Confirmation of Insurance, analogous to a cover note. However, unlike A&A's cover notes, the various Confirmations of Insurance each correctly described the policy by stating that "[t]he Rules [of the insurance company] provide that [Trans-Ocean] . . . shall give written

notice . . . before the [M/V Athena] enters an Additional Premium Area, and specifies the consequences that follow if this condition is not complied with." (Cho Aff. Ex. D).

Sea Trade avers, and Marsh disputes, that despite repeated requests, neither Sea Trade nor Trans-Ocean ever received the insurance company's "Rule Book" that fully described the policy. (Cmpl. ¶ 35). The Rule Book described the "consequences" of a failure to provide advance notice of a vessel's travel to a war zone–a denial of coverage. (Cmpl. ¶ 35). Sea Trade alleges that it would only have allowed Trans-Ocean to purchase the insurance if the insurance was "held-covered" and that it did not require arbitration in London. (Cmpl. ¶ 38).

B. *The Terrorist Attack and Aftermath*

In May 1997, the M/V Athena was chartered by a third-party, which took the vessel to Sri Lanka. (Cmpl. ¶ 41). As stated in Marsh's January 1997 Confirmation of Insurance provided to Trans-Ocean, Sri Lanka had been designated a war zone, requiring advance notice before entry. (Cmpl. ¶ 32; Affidavit of Jonathan Wolfert ("Wolfert Aff.") Ex. D at 3). Trans-Ocean failed to provide advance notice of the Sri Lankan voyage. (Cmpl. ¶ 40). On May 29, 1997, while the M/V Athena was floating in the waters near the Sri Lankan port town of Trincomalee, the Tamil Tigers terrorist group detonated an explosive device that ripped through the M/V Athena's hull, causing $6.8 million in damage. (Cmpl. ¶¶ 39, 44).

Trans-Ocean notified the insurance company of the incident, but the insurance company asserted that it had no obligation to remit due to Trans-Ocean's failure to provide advance notice. (Cmpl. ¶ 43). Nevertheless, the insurance company paid half, or $3.4 million, of the claim. (Cmpl. ¶ 45).

On July 18, 2002, Sea Trade filed the instant action against the insurance company, Marsh and others seeking to recover the remainder of the claim. (Cmpl. ¶ 61). This Court granted a stay pending the outcome of contractually-mandated arbitration in London, which was affirmed by the First Department. *Sea Trade Maritime Corp. v. Hellenic Mut. WarRisks Ass'n (Bermuda) Ltd.*, 7 A.D.3d 289 (1st Dep't 2004), *lv. dismissed* 3 N.Y.3d 766 (2004). Sea Trade lost its arbitration bid against the insurance company after an extensive evidentiary hearing. *See* Wolfert Aff. Ex. F. The arbitration award was affirmed by this Court, the First Department and the New York Court of Appeals. (Wolfert Aff. Exs. P, Q, R).

Sea Trade resumed the instant action by serving the Second Amended Complaint on October 23, 2012. The Second Amended Complaint asserts (i) that Marsh negligently failed to obtain appropriate "held-covered" insurance coverage, and (ii) that Marsh negligently misrepresented the details of the procured coverage.

I. Marsh's Motion to Dismiss

Defendant Marsh moves for dismissal of the Second Amended Complaint pursuant to CPLR 3211(a)(1), (a)(5) and (a)(7), based on documentary evidence, collateral estoppel and failure to state a cause of action. Plaintiff Sea Trade opposes.

A. *Motion to Dismiss Standard*

On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in a light most favorable to the plaintiffs and the plaintiffs must be given the benefit of all reasonable inferences. *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep't 2004). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez,* 84 N.Y.2d 83, 87-88 (1994). This Court must deny a motion to dismiss, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.,* 98 N.Y.2d 144, 152 (2002) (internal quotation marks and citations omitted). On a CPLR 3211(a)(1) motion, "[i]t is well settled that bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence . . . are not presumed to be true on a motion to dismiss for legal insufficiency." *O'Donnell, Fox & Gartner v. R-2000 Corp.*, 198 A.D.2d 154, 154 (1st Dep't

1993). Under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon*, 84 N.Y.2d at 88.

B. *Marsh Owed No Duty to Sea Trade*

As an initial matter, Marsh owed a duty only to Trans-Ocean, not Sea Trade. "[A]bsent privity of contract or a relationship approaching privity," a claim against an insurance broker by the insured cannot survive. *See, e.g., Levi v. Utica First Ins. Co.*, 12 A.D.3d 256, 257 (1st Dep't 2004) (citations omitted); *Glynn v. United House of Prayer*, 292 A.D.2d 319, 323 (1st Dep't 2002) (broker had no duty to insured because there was neither contractual privity nor any other type of privity between broker and insured). In *Levi,* the court dismissed a negligent misrepresentation claim against a wholesale insurance broker because the insured dealt strictly with a retail broker. *Levi*, 12 A.D.3d at 257. The First Department found that the cause of action was properly dismissed because the complaint did not allege any contact between the insured and the broker, or that the broker made any representation to the insured. *Levi*, 12 A.D.3d at 257.

Here, the Complaint asserts that all interactions were between Marsh and Trans-Ocean. *See* Cmpl. ¶ 9 ("At all relevant times, Sea Trade's management functions, including insurance related matters, were conducted by Trans-Ocean"); Cmpl. ¶ 10 ("Metzroth was

responsible for procuring, maintaining and counseling Trans-Ocean"); Cmpl. ¶ 14 ("Trans-Ocean consistently followed Metzroth's advice"); Cmpl. ¶ 16 ("Trans-Ocean specifically requested the widest available coverage"). Further, the cover notes, confirmations of insurance, and the letter appointing Marsh as Trans-Ocean's exclusive broker were all sent either by or to Trans-Ocean. (Storch Affim. Exs. A, B; Wolfert. Aff. Ex. D; Cho Aff. Ex. D). Akin to *Levi*, without any direct interactions pleaded between Sea Trade and Marsh, Marsh as broker did not owe any duties to Sea Trade as insured.

C. *Negligent Failure to Procure Insurance*

Nevertheless, assuming *arguendo* that a duty was owed from Marsh to Sea Trade, the Complaint still fails to state a cause of action for negligent failure to procure. Sea Trade asserts that Marsh negligently failed to procure the proper "held-covered" insurance that it allegedly requested. Sea Trade argues that Marsh negligently violated two distinct duties to Sea Trade. First, Sea Trade argues that Marsh owed a duty to renew coverage on the terms as Sea Trade erroneously believed them to be. Second, Sea Trade argues that Marsh owed a duty to review all past insurance documents, including the A&A Cover Notes, to discover Sea Trade's misconception regarding the policy and to correct the misunderstanding.

Defendant Marsh argues that it did not violate any duty to Sea Trade. Marsh contends that a request to renew the insurance policy cannot be understood as a request to obtain a

new, different policy. Further, Marsh argues that no duty was owed to Sea Trade because Trans-Ocean, not Sea Trade, was Marsh's client, and any duty was owed solely to Trans-Ocean.

Under New York law, an insurance broker must exercise due care in a brokerage transaction. *See Bruckmann, Rosser, Sherrill & Co., L.P. v. Marsh USA, Inc.*, 65 A.D.3d 865, 866 (1st Dep't 2009). This means that a broker has a common-law duty to either obtain specifically requested coverage or to inform the insured of an inability to obtain the coverage. *See, e.g., Hoffend & Sons, Inc. v. Rose & Kiernan, Inc.*, 7 N.Y.3d 152, 157 (2006) (citing *Murphy v. Kuhn*, 90 N.Y.2d 266, 270 (1997)). Further, New York courts regularly hold that "[t]here is no continuing duty to advise, guide or direct a client to obtain additional coverage," absent a special relationship. *See Murphy*, 90 N.Y.2d at 270-71. "The burden is on the customer to initiate, seek and obtain appropriate coverage." *Thompson & Bailey, LLC v. Whitmore Group, Ltd.*, 34 A.D.3d 1001, 1002 (3d Dep't 2006).

1. *Duty Running from Renewal Request*

Sea Trade first argues that Marsh owed a duty to renew coverage on the terms as Sea Trade erroneously believed them to be at the time of the renewal request. Sea Trade contends that Marsh is chargeable with Metzroth's knowledge of Trans-Ocean's request to A&A for "held-covered" insurance. Based on that knowledge, Sea Trade asserts that Marsh

was required to interpret the request for renewal of the existing policy as a request to obtain "held-covered" insurance. Holding otherwise, according to Sea Trade, would encourage an insured to stay with its original brokerage firm when a representative leaves, even though the new account representative would have no knowledge of the insured's needs. Sea Trade contends that when Metzroth went from A&A to Marsh, so did his knowledge and duty to obtain "held-covered" insurance.

Plaintiff Sea Trade relies on *Ruddy v. Lexington Ins. Co.*, 40 A.D.3d 733, 735 (2d Dep't 2007), where the court denied summary judgment because it found that the broker may have been negligent in renewing the requested insurance. The Second Department found that a request to renew insurance could have "implicitly included a request that the policy be renewed upon the same terms as it contained previously." *Ruddy*, 40 A.D.3d at 735. Relevant to the court's holding was that the renewed policy differed from the original policy because the renewal had a lower coverage limit than the original. *Ruddy*, 40 A.D.3d at 735.

There is a glaring difference between *Ruddy*, where the broker used a renewal request to obtain a policy different from the original, and the facts as alleged here. *Ruddy*, 40 A.D.3d at 735. Sea Trade acknowledges that "the terms of the underlying coverage . . . had not changed," and that "each subsequent War Risk Policy issued to Sea Trade was a renewal of the previous policy." (Plaintiff's Memorandum of Law in Opposition ("Pl.'s Br.") 15; Cmpl. ¶ 108). While the Complaint does make a conclusory averment that "each renewal

constituted a new request for specific coverage," conspicuously absent is an allegation that either Sea Trade or Trans-Ocean asked Marsh to do anything other than renew the existing policy.

Sea Trade points to no New York case, and the Court has found no case, imposing a duty to obtain a policy different from the one requested, absent some special duty. The duty proposed by Sea Trade would require insurance brokers to investigate the prior statements made by and to other brokers, and then to divine whether or not the other broker had misled its customer. This would require a decree of telepathy on the part of insurance brokers not required by New York law under the circumstances as plead in the Complaint.

The duty that New York law imposes on insurance brokers is only to either obtain specifically requested coverage within a reasonable time or to inform the insured of an inability to obtain the coverage. *See Cuomo v. Liberty Mut. Ins. Co.*, 52 A.D.3d 378, 380 (1st Dep't 2008) ("an insurance agent or broker owes no common-law duty to its customer other than to obtain the policy requested within a reasonable period of time, or to inform the customer that it could not do so"). Further, while *knowledge* may be imputed from an employee's previous position to his employer, *duty* cannot be so imputed. *See Phelan v. Middle States Oil Corp.*, 210 F.2d 360, 365-66 (1954) ("A principal is not charged with his agent's knowledge obtained before he became an agent . . . unless the information was in the agent's mind when he acted for the principal on the occasion under scrutiny").

Taking the allegations of the Complaint as true, A&A may have violated its duty to obtain "held-covered" insurance. However, even assuming that Marsh knew of A&A's mistake through Metzroth, that knowledge did not create a duty for Marsh to correct the mistake. Marsh's duty was to obtain the requested renewal of insurance or notify that it was unable to do so. *See Hoffend & Sons, Inc. v. Rose & Kiernan, Inc.*, 7 N.Y.3d 152, 157 (2006). Marsh was not under a duty to investigate whether Sea Trade was mislead by the incorrect A&A Cover Notes or whether Sea Trade was satisfied with the insurance as obtained by A&A. Therefore, allowing every favorable inference to the non-movant and taking the Complaint's allegations as true, Marsh did not violate any duty owed to Sea Trade regarding requests to renew insurance.

2. *New Broker's Review of Insurance Needs*

The second duty that Marsh allegedly breached was to review Sea Trade's insurance needs and advise Sea Trade to obtain "held-covered" insurance, regardless of Metzroth's imputed knowledge. As stated above, there is no duty imposed on an insurance broker to investigate the prior statements made by and to other brokers, and then to divine whether or not the other broker had misled its customer. A broker's only duty is to either obtain specifically requested coverage or to inform of an inability to obtain the coverage. *See, e.g., Hoffend & Sons, Inc. v. Rose & Kiernan, Inc.*, 7 N.Y.3d 152, 157 (2006).

D. *No Special Relationship Between Sea Trade and Marsh*

New York courts may impose a heightened duty to procure or advise when there is a special relationship between the broker and the customer. *See Hoffend & Sons, Inc. v. Rose & Kiernan, Inc.*, 7 N.Y.3d 152, 157-58 (2006). A special relationship may exist where (i) the agent is compensated for consultation beyond premium payments, (ii) there is an interaction regarding a question of coverage with expertise of the agent being relied upon, or (iii) a course of dealings over a long period of time so as to put a broker on notice that its advice was being specially relied upon. *See Murphy v. Kuhn*, 90 N.Y.2d 266, 272 (1997).

As stated above, the Complaint fails to allege that Sea Trade ever interacted with Marsh. *See* Cmpl. ¶¶ 9, 10, 14, 16 (alleging only that Trans-Ocean directly interacted with A&A, Marsh or Metzroth). Trans-Ocean may have developed a special relationship with certain brokers in its role as manager of a large fleet of ships, but Sea Trade itself has failed to allege any relationship at all with any broker. *See* Cmpl. ¶ 23. Therefore, Marsh did not breach any duty owed to Sea Trade to procure insurance, and the Complaint fails to state a cause of action for negligent failure to procure.

E. *Negligent Misrepresentation of Insurance Coverage*

Again assuming there was a sufficient relationship between Marsh and Sea Trade either specially as a broker or generally as a commercial party, Sea Trade's second cause of

action seeks recovery for Marsh's alleged negligent misrepresentations. Sea Trade alleges that Marsh (i) failed to correct its allegedly ambiguous Confirmations of Insurance and (ii) failed to inform Sea Trade that its insurance was not "held-covered" insurance and required London arbitration.

Beyond a special relationship, to state a cause of action for negligent misrepresentation, a party must also allege a knowing misstatement or omission, reasonable reliance on that statement or omission, and damages caused by that reliance. *See Kimmell v. Schaefer*, 224 A.D.2d 217, 218 (1st Dep't 1996) *aff'd,* 89 N.Y.2d 257 (1996). Sea Trade argues that Marsh failed to clearly correct Sea Trade's misunderstanding that it had "held-covered" insurance because Marsh omitted a clear statement regarding "held-covered" status. The lack of clarity allegedly arose from the Confirmations' third page, which stated:

> The Rules provide that the Owner of an Entered Ship shall give written notice to the [insurance company] before the Entered Ship enters an Additional Premium Area, and specifies the consequences that follow if this condition is not complied with.

(Wolfer. Aff. Ex. D at 3).

Sea Trade asserts that, given that it thought it had "held-covered" insurance, it was not clear what the "consequences" resulting from a failure to provide the notice to the insurance company would be. *See* Pl.'s Br. 14. The Complaint also alleges that Sea Trade understood

the Confirmations of Insurance to mean only that notice "should" be given to the insurance company in advance of the M/V Athena traveling to a war zone. (Cmpl. ¶ 35).

Sea Trade's claim fails because the alleged misrepresentations or omissions in Marsh's Confirmations of Insurance are conclusively refuted by the provisions of the Confirmations of Insurance. The allegedly mystifying "consequences," as Sea Trade notes in its brief, were actually very clear. Sea Trade cannot plainly state that "forfeiture [of insurance coverage] was the only relevant 'consequence'" of a failure to provide notice, and then argue that it was misled by the term "consequences." *See* Pl.'s Br. 14.

Further, although the Complaint alleges that the Confirmations of Insurance led Sea Trade to believe notice "should" be given to the insurance company in advance of the M/V Athena traveling to a war zone, the actual language states that "the Owner . . . *shall* give written notice." (Wolfert Aff. Ex. D). Sea Trade's allegations are refuted by the mandatory language of the Confirmations. *See Black's Law Dictionary* (9th ed. 2009) (defining shall as "[h]as a duty to; . . . Only [this] sense [] is acceptable under strict standards of drafting.").

Therefore, as acknowledged by Sea Trade, the Confirmations of Insurance that Marsh provided to Trans-Ocean clearly and correctly described the policy and did not misrepresent or omit any information regarding the status of "held-covered" insurance. "[B]are legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence . . . are not presumed to be true on a motion to dismiss

for legal insufficiency." *O'Donnell, Fox & Gartner v. R-2000 Corp.*, 198 A.D.2d 154, 154 (1st Dep't 1993). Therefore, Sea Trade's cause of action for negligent misrepresentation is dismissed.

Marsh's arguments regarding collateral estoppel are rendered moot and have not been considered. The Court has examined Sea Trade's remaining arguments and finds them unpersuasive.

Given the extensive litigation history and factual development already had by the parties in this case, with a stay of the case granted by this Court and confirmed by the First Department, a proceeding in the Court of First Instance in Piraeus, an extensive and detailed four-year arbitration award granted in England, and confirmation of the arbitration award by English courts, as well as confirmation of that award in this Court, the First Department, and the Court of Appeals, and given the Courts findings on this decision, the Court does not see any set of new facts on which Sea Trade can state a cause of action against Marsh. Therefore, the Complaint is dismissed with prejudice.

(Order of the Court appears on the next page.)

Conclusion

For the reasons stated above, it is hereby

ORDERED that Defendant Marsh's motion to dismiss is GRANTED, and the Complaint is dismissed with prejudice and with costs and disbursements to Defendant Marsh as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: New York, New York
October 21, 2013

ENTER:

Hon. Eileen Bransten, J.S.C.