



Department of Justice

STATEMENT

OF

**STUART F. DELERY
ACTING ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
DEPARTMENT OF JUSTICE**

BEFORE THE

**SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES**

CONCERNING

**CIVIL DIVISION OF THE
UNITED STATES DEPARTMENT OF JUSTICE**

PRESENTED ON

MAY 31, 2012

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Chairman Coble, Congressman Cohen, and Members of the Subcommittee:

Thank you so much for inviting me here to testify on the work of the Civil Division of the Department of Justice. I appreciate the opportunity to discuss our work and our budget and resource needs for Fiscal Year 2013.

The Civil Division represents the United States, its agencies, Members of Congress, Cabinet officers and other Federal employees. Its litigation reflects the diversity of government activities, involving, for example, the defense of challenges to Presidential actions; national security issues; benefit programs; energy policies; commercial issues such as contract disputes, banking, insurance, patents, fraud, and debt collection; all manner of accident and liability claims; enforcement of immigration laws; and civil and criminal violations of consumer protection laws. The Division is made up of approximately 1,400 permanent employees, over 1,000 of whom are attorneys. Each year, Division attorneys handle thousands of cases that collectively involve billions of dollars in claims and recoveries. The Division confronts

significant policy issues, which often rise to constitutional dimensions, in defending and enforcing various Federal programs and actions. The priorities of the Division include protecting the nation, protecting taxpayers, and protecting consumers.

NATIONAL SECURITY

Defending the nation remains the Department's highest priority. The Civil Division currently is defending approximately 140 habeas corpus petitions brought by detainees held at the detention facility at Guantanamo Bay, Cuba. In these cases, we vigorously defend our national security interests in a manner consistent with the rule of law, and we have had significant success in obtaining resolution of many of the most important legal questions governing these cases in the government's favor. The Civil Division also has successfully defended against extending habeas corpus rights to detainees held in Afghanistan, a theatre of war where detainees are provided robust Department of Defense review.

The Division has scored a number of victories in cases involving national security:

- In 2010, the Civil Division secured the dismissal of a lawsuit contending that the United States had violated the Constitution and Alien Tort Statute by allegedly targeting a dual U.S./Yemini citizen – whom the Department of Treasury had designated a global terrorist – for the application of lethal force;
- In 2011, the Civil Division organized, instructed, and supervised a team of Pakistani lawyers in defending a member of the diplomatic staff of the U.S. Embassy in Pakistan who had been arrested and charged with murder following the killing of two individuals who attempted to rob him at gunpoint;

- The Division has handled important cases involving federal employees' obligations under agreements with the United States that prohibit them from making unauthorized disclosures of classified information; and
- The Division's attorneys have litigated *Bivens* suits against high-level government officials.

The Division defends in the federal courts every removal order involving terrorist and other national-security-risk aliens and litigates detention, benefits denial, and naturalization and denaturalization cases involving these individuals. Since 1997, the Division has successfully defended the State Department's and Treasury Department's designations of terrorist organizations and criminal prohibitions on providing "material support" to designated foreign terrorist organizations. For instance, on June 21, 2010, the Supreme Court, in *Holder v. Humanitarian Law Project*, voted 6-3 to reject a free-speech challenge from humanitarian aid groups to the law that bars "material support" – everything from money to technical know-how – to foreign terrorist organizations.

We also obtained dismissal of over 40 nationwide class action suits against numerous telecommunications companies that allegedly assisted the National Security Agency (NSA) in post-September 11th surveillance activities. That dismissal was affirmed on appeal in December 2011. The Division's national security successes continued in the federal appellate courts around the country. In recent years, the Division prevailed in cases involving records regarding the NSA's "Terrorist Surveillance Program" and a challenge to the Foreign Intelligence Surveillance Act, and individuals held as part of the investigation into the terrorist attacks of September 11th.

And, on May 11, 2012, the Division prevailed in a case involving an attempt to force the NSA to disclose whether it had records involving contacts with Google regarding cybersecurity.

Since September 2009, the Department has used new policies and procedures regarding the invocation of the state secrets privilege that provide greater accountability and reliability. The Department's policy is that the privilege should be invoked only to the extent necessary to protect against the risk of significant harm to national security. The Department attempts to allow cases or claims to proceed whenever possible, and will never defend an assertion of the privilege to cover up official wrongdoing or to prevent embarrassment to government officials or departments. Under the new procedures there is a State Secrets Review Committee, consisting of senior Department officials, which evaluates the recommendation to invoke the privilege.

COMBATTING WASTE, FRAUD, AND ABUSE

The Attorney General and the Civil Division have made fighting waste, fraud, and abuse a top priority, and this focus has paid off. Since January 2009, the Civil Division's efforts to combat fraud in its many forms (such as health care fraud, financial fraud, and procurement fraud) have yielded record civil and criminal recoveries of over \$14.9 billion. Since January 2009, the Civil Division has used the False Claims Act to recover more taxpayer dollars lost to fraud – more than \$11 billion – than in any other comparable period. During this time, the Civil Division's Consumer Protection Branch, which pursues criminal and civil violations of the Food, Drug, and Cosmetic Act, recovered nearly \$3.9 billion in fines, forfeitures, and penalties.

1. Health Care Fraud

Fighting health care fraud is a priority for the Division. On May 20, 2009, the Attorney General and the Secretary of the Department of Health and Human Services (HHS) announced the creation of a new interagency task force, the Health Care Fraud Prevention and Enforcement Action Team (HEAT), to increase coordination and optimize criminal and civil enforcement. Through enforcement actions under the False Claims Act, and aided by the efforts of HEAT, the Department has recovered over \$7.4 billion in health care funds lost to fraud since January 2009.

A significant component of the Department's health care fraud caseload consists of cases alleging misconduct by manufacturers of pharmaceuticals and medical devices. For example, during fiscal year 2011, we recovered \$900 million in settlements with eight pharmaceutical manufacturers that allegedly reported inflated drug prices, knowing that federal health care programs relied on those prices to set payment rates. Additionally, during the last fiscal year, the Division pursued allegations that a subsidiary of GlaxoSmithKline was manufacturing and distributing certain adulterated drugs from its now closed Cidra, Puerto Rico plant. The subsidiary ultimately pled guilty to criminal charges and paid \$150 million in criminal fines and forfeitures, and GlaxoSmithKline agreed to pay an additional \$600 million to the federal government and the states to resolve related civil claims.

Recently, on May 7, 2012, the Department announced the second largest settlement with a drug company in a case involving Abbott Laboratories Inc., which paid \$1.5 billion to resolve criminal and civil liability arising from the company's unlawful promotion of the prescription drug Depakote for uses not approved as safe and effective by the Food and Drug Administration.

The settlement includes a criminal fine and forfeiture totaling \$700 million, and civil settlements with the federal government and the states totaling \$800 million. Abbott also will be subject to court-supervised probation and reporting obligations for Abbott's CEO and Board of Directors.

2. Responding To The Financial Crisis

The Civil Division has taken a prominent role in the President's Financial Fraud Enforcement Task Force. I serve as a co-chair of three of the Task Force's working groups, all of which bring together the government's civil and criminal capabilities to enhance our enforcement, prevention, and outreach efforts.

The Mortgage Fraud Working Group's work has led to unprecedented levels of cooperation between the federal government and state and local partners to address the housing crisis that has affected so many American families. Since FY2009, the Department has seen a 92 percent increase in mortgage fraud cases, and, in FY2010 and FY2011, there were 2,100 defendants charged with mortgage-fraud related crimes.

In March 2012, a \$25 billion settlement was jointly concluded by the federal government and the States with the five leading mortgage servicers. The historic settlement provides nearly \$1 billion to the federal Treasury and \$20 billion in consumer relief. The settlement also requires new servicing standards that will protect consumers from future abuses.

Just recently, for example, the Department announced a settlement with Deutsche Bank and its subsidiary, MortgageIT, that will return \$202.3 million to the FHA's Mortgage Insurance

Fund. The settlement resolved allegations that these entities failed to maintain a quality control program to prevent and correct underwriting deficiencies in connection with FHA loans, including failing to review early payment defaults. The Department has also filed a complaint against Allied Home Mortgage and two of its executives, which alleges misconduct that caused substantial losses to the FHA.

On January 27, 2012, the Attorney General also announced the formation of the Financial Fraud Enforcement Task Force's new Residential Mortgage-Backed Securities Working Group. This Working Group brings together the Department of Justice, several state Attorneys General, and other federal agencies to investigate those responsible for misconduct contributing to the financial crisis through the pooling and sale of residential mortgage-backed securities, with the goal of holding those who violated the law accountable and providing relief to homeowners.

The Civil Division is also a leader of the new Consumer Protection Working Group, which is charged with working with federal law enforcement and regulatory agencies and state and local partners to strengthen and expand existing efforts to combat consumer-related fraud schemes. In March 2012, the Consumer Protection Working Group held a summit where federal and state law enforcement officers and regulatory agencies were first joined privately by the Attorney General and local consumer protection groups to discuss issues of importance to American consumers and where later they held panel presentations that were open to the public in an effort to educate consumers about how to protect themselves from scams.

The Department's Commercial Litigation Branch is defending against claims relating to the Government's 2008-2009 rescue of our nation's financial system and economy from the most severe crisis since the Great Depression. These cases allege that, when the Federal Reserve and the Treasury made emergency loans and financial investments, they did so on terms that violated the Constitution by purportedly taking the plaintiffs' property without just compensation or by unlawfully exacting financial consideration. For example, the Department is defending against a class action brought by Starr International Co. upon behalf of shareholders of American International Group (AIG), and derivatively upon behalf of AIG. Starr complains that it was an uncompensated taking or an unlawful exaction for the Government to acquire equity in AIG as consideration for the Federal Reserve's \$85 billion loan rescuing AIG from a liquidity crisis that presented systemic risk. In *Colonial Chevrolet Co., Inc., et al., v. United States*, and *Alley's of Kingsport, Inc., et al., v. United States*, former General Motors (GM) and Chrysler dealers whose dealership agreements were terminated during GM and Chrysler's restructurings and bankruptcies allege that the Government's assistance to the automakers resulted in a taking of their dealerships, rights under their dealership agreements, and rights under state dealer laws.

3. Procurement Fraud

Using the False Claims Act, the Department is aggressively pursuing fraud in connection with the wars in Southwest Asia. On September 13, 2011, the Department of Justice announced that Saudi-based Tamimi Global Company Ltd. agreed to pay the United States a combined \$13 million to resolve criminal and civil allegations that the company paid kickbacks to a Kellogg Brown & Root Inc. (KBR) employee and illegal gratuities to a former U.S. Army sergeant in

connection with KBR's prime contract with the U.S. Army to provide logistical support to the military in conflicts abroad, including Iraq and Afghanistan. Earlier this year, the Department of Justice announced that Maersk Line Limited agreed to pay \$31.9 million to resolve qui tam allegations that it had inflated invoices for transporting thousands of shipping containers to the U.S. military operating in Iraq and Afghanistan. Since January 2009, we have reached settlements in cases involving goods and services provided in connection with the war effort amounting to \$222 million.

The Civil Division's focus on Southwest Asia is only part of our broader commitment to protecting the Government's military and procurement systems against fraud. Since January 2009, procurement fraud cases have accounted for approximately \$1.6 billion in recoveries – which exceeds the amount recovered in any comparable period. The Government's recent efforts to combat procurement fraud include the filing of a False Claims Act complaint against Bollinger Shipyards for making material false statements to the Coast Guard about the longitudinal strength of its design to extend the length of Coast Guard cutters. The first converted cutter suffered hull failure when put into service, and efforts to repair it and other converted cutters were unsuccessful. The unseaworthy vessels have since been decommissioned.

The Government is also continuing to litigate various matters alleging that companies, as well as individual executives, manufactured and sold defective bulletproof vests containing Zylon fabric as the key ballistic material to the United States for use by federal, state, local, and tribal law enforcement agencies. The United States has alleged that these defendants were aware

that the Zylon fabric degraded quickly, but took no action to inform the government. Thus far, the Department has obtained more than \$61 million in this effort.

4. Consumer Protection

The Civil Division is at the forefront of efforts to protect consumers through vigorous civil and criminal enforcement of federal consumer protection laws. In 2010, the Attorney General and Congress approved a reorganization of the Civil Division to create the Consumer Protection Branch, which would report to its own Deputy Assistant Attorney General. In 2011, the Division implemented that reorganization, empowering the Branch to more effectively and comprehensively protect consumers from myriad forms of fraud and abuse. It sharpened its focus in areas such as health care fraud, business opportunity fraud, and food and drug safety, and it expanded its footprint to include areas like mortgage fraud, counterfeit pharmaceuticals, and immigration service fraud. These renewed efforts have led to great success — in 2011 alone, the Branch recovered almost \$1 billion in fines, penalties, and restitution. Between January 2009 and May 1, 2012, the Consumer Protection Branch, working together with our partners in the U.S. Attorneys' Offices, has obtained convictions of 123 defendants and courts have imposed fines, restitution, forfeitures, and penalties, exceeding \$ 3.9 billion for illegal activities in connection with defrauding consumers. During this same time period, 84 defendants were sentenced to some form of confinement, receiving a total of more than 312 years.

The Department also promotes critical consumer protection initiatives. The Civil Division is litigating several cases that challenge efforts to place critical, public-health-based limitations on the sale and marketing of tobacco. The Division also regularly defends the Food

and Drug Administration (FDA) in cases meant to ensure that the public has access to safe and effective generic drugs. Currently, the Division is defending the legality of an important, Congressionally-mandated database, maintained by the Consumer Product Safety Commission (CSPC), which provides consumers with vital information about the safety of products they buy. The Division is actively litigating against any number of companies around the country that persist in robo-calling consumers, flouting the Do-Not-Call statutes and regulations.

OTHER SIGNIFICANT LITIGATION MATTERS

The Civil Division has led the Department's response to a number of events of national significance and, in the process, has been engaged in significant litigation. The Civil Division has defended against more than 20 lawsuits challenging the constitutionality of the Affordable Care Act in district courts and courts of appeal. The Civil Division and the Environment and Natural Resources Division are co-leading the government's civil efforts to hold accountable those responsible for the explosion and fire on the Deepwater Horizon and the resulting oil spill in the Gulf of Mexico by filing a civil suit against BP and others under the Oil Pollution Act and Clean Water Act.

The Department is challenging, on federal preemption grounds, a series of state statutes designed to implement state-specific immigration policies. To date, we have filed suit against laws passed by Alabama, Arizona, South Carolina, and Utah. In each of these cases, the district court enjoined part of the relevant law. The Ninth Circuit upheld the entirety of the injunction against Arizona's law, and while the Eleventh Circuit has not yet issued a decision in Alabama's appeal, it has enjoined additional portions of the law pending appeal that were not enjoined by

the district court. The Supreme Court recently heard oral arguments in the Arizona case, and a decision in that matter is expected before the end of the Court's current term.

KATRINA LITIGATION

The Civil Division's Torts Branch is defending against approximately 400 tort suits for flood damage in New Orleans as a result of Hurricane Katrina. The suits are consolidated in the Eastern District of Louisiana under the caption *In re Katrina Canal Breaches Consolidated Litigation*. The suits, which include putative class actions, allege that the Army Corps of Engineers negligently designed, constructed, and maintained the levees and floodwalls that failed along the Outfall Canals, the Mississippi River Gulf Outlet (MRGO), and the Inner Harbor Navigation Canal (IHNC) during the hurricane.

The district court dismissed a lawsuit arising from the flooding caused by the failure of the floodwalls along the Outfall Canals holding that the United States was immune from liability based on the Flood Control Act and the Federal Tort Claim Act's discretionary function exception. The district court imposed liability in a lawsuit filed in connection with flooding arising from levees that failed along the MRGO, after rejecting the immunity defenses in that case. The Fifth Circuit Court of Appeals affirmed both rulings of the district court. The United States has requested rehearing *en banc* in the Fifth Circuit Court of Appeals regarding the affirmance of the judgment related to the MRGO. A third suit regarding the flooding from floodwall failures along the IHNC affecting the Lower Ninth Ward is set for trial on September 10, 2012.

NATIVE AMERICAN ISSUES

During the past few years, the Department has continued to make some significant strides in improving the relationship between the United States government and tribal nations. The Division continued working to finalize the \$3.4 billion settlement in *Cobell v. Salazar*, one of the largest class action cases ever filed against the government. The settlement provides \$1.5 billion as compensation to over 495,000 individual Indians for alleged accounting and asset mismanagement claims, and \$1.9 billion to fund a land buy-back program to address the continuing “fractionation” problem caused by land interests being repeatedly divided over the years. Following the passage of legislation that ratified the settlement, which the President signed into law in 2010, the Division, along with class counsel, argued for and obtained district court final approval of the settlement in July 2011. On May 22, 2012, the D. C. Circuit affirmed the district court’s judgment approving the settlement. The appellants have 45 days within which to seek rehearing and 90 days within which to file a petition for certiorari with the Supreme Court.

The Department administers the Radiation Exposure Compensation Act Program, which provides payments to those who contracted certain cancers and other serious diseases after being exposed to radiation through nuclear weapons tests or in the uranium mining industry during the 1940s, 1950s, and 1960s. During 2010, the Civil Division implemented a new outreach internship program in order to address the special concerns and difficulties faced by Native American populations in the claims process. Through the new internship program, 27 Native American college and graduate students from the Four Corners region attended a two-week training session in Washington, D.C., on the Program’s claim adjudication process. Upon

returning to their communities, the students were provided with employment opportunities to conduct intensive outreach efforts. During the period of their fieldwork from July 2010 through March 2012, the students reviewed over 150 potential new claims of which 30 have been filed with the Program, published eight articles in local papers, spoke at 58 community engagements, and hosted over 40 outreach meetings. In May 2012, the Program is participating in a health fair with the Spokane Tribe in Wellpinit, Washington, to educate the community on the availability of compensation under the Act.

FARMERS' ALLEGED DISCRIMINATION LITIGATION

For more than a decade, the Civil Division has been defending the Department of Agriculture (USDA) in lawsuits brought by African American farmers (*Pigford v. Vilsack*), Native American farmers (*Keepseagle v. Vilsack*), Hispanic farmers (*Garcia v. Vilsack*), and female farmers (*Love v. Vilsack*), respectively, alleging that USDA discriminated against these groups in its farm loan programs. The Civil Division has made it a priority to put these cases on a path to resolution, so that USDA can turn the page on this chapter in its history and renew its efforts to be a model service provider.

In February 2010, the Department and USDA announced the settlement of the *Pigford II* case, which was brought by African American farmers who tried unsuccessfully to have their claims against USDA for credit and non-credit discrimination resolved under the *Pigford I* Consent Decree. Congress appropriated a total of \$1.25 billion to fund the settlement, and the court approved the settlement in October 2011. The settlement certified a non-opt out class and established two mutually exclusive alternative dispute resolution processes under which class

members' claims will be decided. Successful class members will be eligible for a liquidated damages award, debt forgiveness, and tax payments.

The Division is also handling *Keepseagle v. Vilsack*, a class action settlement brought on behalf of Native American farmers who claim that they suffered discrimination in connection with their attempts to obtain farm loans. The court approved the parties' settlement agreement on April 28, 2011. That agreement provided a settlement class with a claims process and payments of up to \$680 million in compensation, up to \$80 million in debt relief from USDA, and various forms of programmatic relief.

Finally, the Division is defending lawsuits brought by Hispanic farmers, *Guadalupe L. Garcia Jr. v. Vilsack*, and by female farmers, *Rosemary Love v. Thomas Vilsack*, who allege that USDA discriminated against them in the awarding of government loans and other assistance. In February 2011, in the *Garcia* and *Love* cases, the Department and USDA announced a voluntary administrative claims process, which USDA is developing, to provide up to a total of \$1.33 billion to participating Hispanic and female farmers in lieu of further court proceedings.

IMMIGRATION MATTERS

The Civil Division defends and prosecutes the Nation's most complex civil immigration matters in federal court. In 2011, the Civil Division's Office of Immigration Litigation (OIL) prevailed in more than 90 percent of its cases in the trial and appellate courts. One example of the Civil Division's immigration litigation is a case in which a computer error led to flawed results in the diversity visa lottery for Fiscal Year 2012. When the State Department realized the

lottery had not been conducted according to law, it cancelled the results. A putative class action was brought on behalf of the approximately 22,000 applicants who received notification of their winning status in the flawed process. The district court dismissed the complaint, and the matter is now pending on appeal. OIL's litigation success is due in part to OIL's committed support of the Department of Homeland Security's (DHS) enforcement objectives calling on DHS to focus immigration resources on matters of the highest priority, which include national security, criminal, and border integrity cases. OIL also continued its collaborative efforts across Department components and other government agencies to maximize litigation and enforcement results. A specialized unit within OIL has engaged in continued training of Justice Department, FBI, and other agencies' national security components on enforcement alternatives in investigations when national security information cannot be used publicly or where declassification and use comes at too great a cost, toward the ultimate objective of removing security risk aliens from the country. Further, OIL helped secure two victories this year in the Supreme Court: in one case, the Court reversed the Ninth Circuit and upheld the determination that an alien child cannot impute his or her parent's years of continuous residence in order to obtain cancellation of removal; in the other, in which OIL worked closely with the Tax Division, the Court found that tax evasion constitutes an aggravated felony, potentially subjecting an alien to removal.

INTERNATIONAL TRADE

The Division has been actively supporting the Administration's policies regarding trade with our largest trading partners. For example, the Department's Commercial Litigation Branch has now brought three arbitration proceedings to enforce the 2006 Softwood Lumber

Agreement between the United States and Canada, and received two Awards requiring Canadian lumber producers and exporters to abide by the Agreement's export charge requirements. A third award is pending. The Department has also vigorously defended the Administration's efforts to ensure that Chinese imports into the United States are assessed the proper duties. Finally, the Department continues to work closely with U.S. Customs and Border Protection to bring appropriate cases against importers who have committed fraud and other violations.

OTHER DEFENSIVE LITIGATION

The Division continues to protect taxpayer dollars by vigorously defending the government in civil litigation, and limiting monetary judgments entered against the United States to just pennies for each dollar sought. For example, the Department has virtually finished resolving the massive *Winstar* claims that resulted from the savings and loan crisis of the 1980s, with recoveries averaging only six cents on each dollar claimed. The Division also has defended the Treasury against multi-billion dollar claims advanced by the nuclear power industry over the government's delay in taking possession of spent nuclear fuel, while simultaneously obtaining settlements with 70 percent of the industry.

ALTERNATIVES TO LITIGATION

The Division also currently helps administer the Vaccine Injury Compensation Program (VICP). The VICP was created in 1986 by the National Childhood Vaccine Injury Act to encourage childhood vaccination by providing a streamlined system for compensation in rare instances where an injury results. The most important and controversial litigation concerns whether there is a causal connection between childhood vaccines and the development of

autism. In 2009, the Civil Division successfully proved that there was no causal connection between autism and vaccines in several important test cases in the Omnibus Autism Litigation, a litigation effort that involves nearly 5,000 claims. The opinions in those test cases were widely praised by experts in the public health community as critical to addressing growing misconceptions about vaccines and maintaining public confidence in the safety and efficacy of the nation's vaccine program. The opinions were affirmed by the U.S. Court of Appeals for the Federal Circuit. The Division continues to successfully advance this position in resolving the remaining cases alleging autism as a vaccine injury.

The Civil Division has led the Department's efforts to implement the James Zadroga 9/11 Health and Compensation Act of 2010, which reopens the September 11th Victim Compensation Fund of 2001 (the Fund) and expands the pool of eligible applicants to include rescue workers and others who experienced latent physical injuries as a result of the September 11, 2001 terrorist attacks and subsequent debris removal. Civil Division attorneys have assisted the Fund's Special Master on a wide array of complex legal and policy issues, while Division administrative staff lead a team of contractors managing the Fund's operations, including the development of a web-based claim form designed to save administrative costs and make it easier for claimants and their families to apply for compensation.

PRESIDENT'S BUDGET REQUEST

The President's FY 2013 request seeks 1,476 positions (1,063 attorneys), 1,419 FTE and \$298,040,000. Included in this request are the base resources required to maintain the superior legal representation services that have yielded such tremendous success and additional funds to

support additional financial fraud investigations. Unfortunately, the House bill approved on May 11th did not include the requested increase for financial fraud, or the adjustments-to-base to cover increases in rent, contracts, health benefits coverage, and other uncontrollable costs. We hope that the House will reconsider the President's request at Conference.

At this time, Mr. Chairman, I would be happy to address any questions you or Members of the Subcommittee may have.