

This Opinion is Not a  
Precedent of the TTAB

Mailed: May 13, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Ayres Group*

Serial No. 97246717  
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Kit M. Stetina of Stetina Brunda Garred & Brucker for Ayres Group.

Leah Barrett, Trademark Examining Attorney, Law Office 126,  
Andrew Lawrence, Managing Attorney.

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Before Adlin, English and Thurmon,  
Administrative Trademark Judges.

Opinion by English, Administrative Trademark Judge:

Ayres Group (“Applicant”) seeks registration on the Principal Register of the mark set forth below for “wine; red wine; rose wine; white wine all of the foregoing being marketed and sold at an associated hotel and related website” in International Class 33.<sup>1</sup>

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<sup>1</sup> Application Serial No. 97246717; filed on January 31, 2022 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), claiming September 5, 2013 as the date of first use of the mark anywhere and March 1, 2017 as the date of first use of the mark in commerce. The word “wines” has been disclaimed apart from the mark as a whole. The application includes the following description of the mark: “The mark consists of capital ‘A’ written in stylized script with a red geometric shape with a gold stripe as the background. The ‘A’ is beige. The



The Examining Attorney refused registration of the mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on a likelihood of confusion with the

stylized mark  registered on the Principal Register for “wines” (the “Cited Mark or Cited Registration”).<sup>2</sup>

When the refusal was made final, Applicant appealed.<sup>3</sup> Both Applicant and the Examining Attorney filed briefs. For the reasons explained, we affirm the refusal to register.

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word ‘ALLEGRETTO’ in stylized script below the ‘A’ with ‘WINES’ in stylized letter below the word ‘Allegretto.’” The colors red, gold and beige are claimed as features of the mark.

<sup>2</sup> Registration No. 5425584, issued on March 20, 2018. The registration includes the following translation statement: “The English translation of ‘ALLEGRETTO’ in the mark is ‘FAIRLY QUICKLY.’” On March 20, 2024, Registrant filed a combined Declaration under Sections 71 & 15 of the Trademark Act seeking to maintain its registration for “wines” but requesting deletion of the other goods identified in the registration, namely, “sparkling wines, liquors, spirits, grappa, alcoholic beverages except beers, alcoholic beverages containing fruit.”

<sup>3</sup> In the initial Office action refusing registration, the Examining Attorney cited an additional registration (Reg. No. 1871501 for the typeset mark ALLEGRO) as a bar to registration under Section 2(d) of the Trademark Act, but the analysis supporting the refusal was based only on the Cited Mark. *See* November 15, 2022 Office Action, TSDR 3-4 (comparing Applicant’s Mark and goods with only the Cited Mark and goods). In its Office action response, Applicant identified Reg. No. 1871501 as a basis for refusal, but argued against a likelihood of confusion only as to the Cited Mark. *See* May 10, 2023 Office Action Response, TSDR 19-23. The Final Office action makes no reference to Reg. No. 1871501 and includes as an attachment only a copy of the Cited Registration. In its appeal brief, Applicant acknowledges that the Cited Mark was the only basis for the Section 2(d) refusal in the initial Office action. TTABVue 5-6. We consider only whether there is a likelihood of confusion between Applicant’s Mark and the Cited Mark.

## **I. Analysis**

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019); *M2 Software, Inc. v. M2 Commc’ns., Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Monster Energy Co. v. Lo*, 2023 USPQ2d 87, at \*14 (TTAB 2023) (citing *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1973)). We address these two factors and other relevant *DuPont* factors below.

### **A. Similarity or Dissimilarity of the Goods**

Under the second *DuPont* factor we consider “[t]he similarity or dissimilarity and nature of the goods or services” as they are identified in the Cited Registration and involved application. *DuPont*, 177 USPQ at 567; *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018); *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014).

Both the involved application and Cited Registration identify “wine.” The goods are identical; the second *DuPont* factor weighs heavily in favor of finding confusion likely.

**B. Trade Channels, Classes of Consumers and Purchaser Care**

The third *DuPont* factor concerns the “similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 177 USPQ at 567. Under the fourth *DuPont* factor, we consider “[t]he conditions under which and buyers to whom sales are made[.]” *Id.* As with the relatedness of the goods, the similarity or dissimilarity of the channels of trade and classes of consumers must be determined based on the identifications in the involved application and Cited Registration. *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at \*20 (TTAB 2021).

With respect to trade channels, the involved application specifies that Applicant’s wine is “marketed and sold at an associated hotel and related website.” Applicant argues these “narrowed” trade channels “effectively avoid any overlap with the cited goods.”<sup>4</sup> We disagree.

Although Applicant has limited its trade channels, there are no trade channel restrictions in the Cited Registration. Thus, we must presume that Registrant’s wines are sold through all normal channels of trade for wine, which include establishments

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<sup>4</sup> Appeal Brief, 4 TTABVUE 9.

Citations in this opinion to the briefs refer to TTABVUE, the Board’s online docket system. Citations to documents contained in the Trademark Status & Document Retrieval (TSDR) database are to the downloadable .pdf versions of the documents.

that sell and serve wine, including hotels like Applicant's.<sup>5</sup> See, e.g., *In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1449 (Fed. Cir. 2017) (“Likelihood of confusion ‘must be resolved on the basis of the goods named in the registration and, in the absence of specific limitations in the registration, on the basis of all normal and usual channels of trade and methods of distribution.’”) (quoting *SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ2d 937 (Fed. Cir. 1983)); *Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 56 USPQ2d 1351, 1361 (Fed. Cir. 2000) (“When the registration does not contain limitations describing a particular channel of trade or class of customer, the goods or services are assumed to travel in all normal channels of trade.”).

Accordingly, despite Applicant's limitation on trade channels, there is still an overlap with Registrant's unlimited trade channels and this weighs strongly in favor of finding a likelihood of confusion.

There also are no limitations on the classes of consumers in the Cited Registration so we must presume that “the buyers to whom [Registrant's] sales are made” overlap with those consumers who purchase Applicant's wine through Applicant's associated hotel and website. *Citigroup Inc. v. Cap. City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); see also *In re I-Coat Co.*, 126 USPQ2d 1730, 1737 (TTAB 2018) (where identification does not include any limitation on consumers, Board must presume that the identified goods “are available to all

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<sup>5</sup> Presumably Applicant's hotel sells third-party wines as well as its own wine. There is nothing in Applicant's identification of goods or the record to support that Applicant sells only its own wine at its hotel.

potential classes of ordinary consumers of such goods.”). Accordingly, even if there were no overlap in trade channels, which there is, those consumers familiar with Registrant’s wine, upon encountering Applicant’s wine at its hotel and website, might mistakenly believe that Applicant’s goods are sponsored by or otherwise associated with Registrant. *See In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1188 (TTAB 2018) (“the issue is ... whether there is a likelihood of confusion as to the source of the goods”). The classes of consumers therefore also strongly supports that confusion is likely.

As to the degree of care exercised by purchasers of “wines,” Applicant argues:<sup>6</sup>

Consumers of wine tend to place a very high interest in the wine prior to consumption. Indeed, consumers will often times look into the year and varietal of the grape used in making the wine. Furthermore, grapes sourced from certain regions, or more specifically, particular vineyards, tend to have certain characteristics that may be desirable to some consumers and undesirable to others. Thus, a good amount of research and scrutiny is common for a wine consumer prior to purchasing and consuming the wine.

Applicant has not introduced any evidence to support these factual assertions. “Attorney argument is no substitute for evidence.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)).

In any event, even if some wine purchasers may be highly knowledgeable and discerning, others are not necessarily sophisticated or careful in making their purchasing decisions. We must base our determination regarding a likelihood of

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<sup>6</sup> Appeal Brief, 4 TTABVUE 9.

confusion on the least sophisticated potential purchasers. *Stone Lion*, 110 USPQ2d at 1163. Moreover, because there are no price limitations in either the involved application or registration “we must presume that Applicant’s and Registrant’s wine encompasses inexpensive or moderately-priced wine” that may be subject to casual purchase. *In re Aquitaine Wine*, 126 USPQ2d at 1195.

We find the degree of purchaser care under the fourth *DuPont* factor neutral. *See, e.g., id.* (wine purchaser sophistication neutral); *Syndicat Des Proprietaires Viticulteurs De Chateauneuf-Du-Pape v. Pasquier DesVignes*, 107 USPQ2d 1930, 1942-43 (TTAB 2013) (“We do not hold the class of consumers, which includes the average American wine consumer, to be sophisticated despite the fact that the market for Chateauneuf-du-Pape wines appears to be the higher-end wine market. Wine is offered and sold to the general public, and there is no [evidence] that customers for opposer’s wines (or applicant’s) are particularly sophisticated or that special education or study is necessary to purchase it.”).

### **C. Similarities Between the Marks**

The first *DuPont* factor focuses on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *Stone Lion*, 110 USPQ2d at 1160; *DuPont*, 177 USPQ at 567. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019).

The issue is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression such that confusion as to the source of the goods offered under the respective marks is likely to result. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012). We do not predicate our analysis on a dissection of the involved marks; we consider the marks in their entireties. *Stone Lion*, 110 USPQ2d at 1160; *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). But one feature of a mark may be more significant than another, and it is not improper, for rational reasons, to give more weight to a dominant feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re Charger Ventures LLC*, 64 F.4th 1375, 2023 USPQ2d 451, at \*5 (Fed. Cir. 2023) (permissible for the Board “to focus on dominant portions of a mark”); *In re Chatam Int’l*, 71 USPQ2d at 1946; *Packard Press, v. Hewlett-Packard*, 56 USPQ2d at 1354.

In comparing the marks, we are mindful that where, as here, the goods are identical, the degree of similarity necessary to find a likelihood of confusion need not be as great as where there is a disparity between the goods. *Coach Servs.*, 101 USPQ2d at 1721; *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enters. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007).



Applicant points to a number of visual differences between its mark




consumers to quickly and easily identify the marks as being associated with different sources of the related goods and services.”<sup>7</sup> Specifically, Applicant points out that: (1) the word “Allegretto” in its mark “includes a capital ‘A,’ presented in a style with two sides meeting at an apex. The cited mark includes a different font, which does not include a similar capital ‘A.’ Instead, the A in the cited mark is of a more rounded, circular design, that creates a clear visual distinction between the marks”; (2) Applicant’s Mark “includes the distinctive ‘A’ in a logo or crest that appears above the word ALLEGRETTO”; and (3) Applicant’s Mark “includes [a] vertical layering” that is not present in the Cited Mark with “the logo A design on top, the word ALLEGRETTO in the middle, and the word WINES on the bottom.”<sup>8</sup>


In comparing the marks, we must focus on the recollection of the average purchaser, namely consumers of wine, who normally retain a general rather than specific impression of trademarks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB

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<sup>7</sup> Appeal Brief, 4 TTABVUE 8. Applicant asserts that because “the marks at issue are both design marks, the similarity of the marks must be decided primarily on the basis of visual similarity.” *Id.* This argument is misplaced as the Cited Mark is a stylized mark, not a design mark.

<sup>8</sup> *Id.*

1975). It is highly unlikely that consumers will focus on the minute details in the appearance of the marks to which Applicant points. Rather, consumer are likely to focus on and remember the word ALLEGRETTO as the dominant element of Applicant's mark because it is prominently displayed in a much larger font than the design element  and the word "wines," which is generic for Applicant's goods and has been appropriately disclaimed. *See, e.g., In re Detroit Athletic*, 128 USPQ2d at 1050 ("[N]on-source identifying nature of the words 'Co.' and Club' and the disclaimers thereof constitute rational reasons for giving those terms less weight in the analysis."); *In re Chatam Int'l*, 71 USPQ2d at 1946 ("Board properly accorded ... less weight" to generic term ALE because it had "nominal commercial significance") (citing *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 985)); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often "less significant in creating the mark's commercial impression").

Moreover, "wine" often is ordered verbally. Consumers ordering Applicant's wine are likely to simply ask for "Allegretto" or "Allegretto Wines"; they will not pronounce the design element  in Applicant's mark. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) ("In the case of a composite mark containing both words and a design, 'the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed.'"); *see also, In re Aquitaine Wine*, 126 USPQ2d at 1188 ("[C]onsumers often have a propensity to shorten marks when ordering [goods] orally[.]"). This increases the similarity between the marks in sound. Similarity in sound alone may be sufficient to support a finding that the marks are

confusingly similarly particularly where, as here, the goods are likely to be ordered and recommended by word of mouth. *See In re 1st USA Realty Pros., Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007).

The marks also share the same commercial impression and connotation. “Allegretto” is a tempo of music and, thus, is arbitrary for wine.<sup>9</sup> The design element “” and the generic word “wines” in Applicant’s Mark does not change the commercial impression created by the dominant word ALLEGRETTO.

The fact that Applicant’s Mark incorporates the Cited Mark in its entirety further increases the likelihood of confusion because the dominant element of Applicant’s Mark, ALLEGRETTO, is arbitrary for wine and the goods are legally identical. *See Wella Corp. v. Cal. Concept Corp.*, 558 F.2d 1019, 194 USPQ 419, 422 (CCPA 1977) (consumer confusion more likely “[w]hen one incorporates the entire arbitrary mark of another into a composite mark”); *see also, e.g., Stone Lion*, 110 USPQ2d at 1161 (affirming Board’s finding that the applicant’s mark STONE LION CAPITAL incorporated the entirety of the registered marks LION CAPITAL and LION for in-part legally identical services); *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at \*6-7 (TTAB 2019) (“Tru’s junior mark, ROAD WARRIOR contains Double Coin’s entire mark WARRIOR,” both for tires); *Hunter Indus., Inc. v. Toro Co.*, 110

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<sup>9</sup> MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/allegretto> (last visited May 10, 2024). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *See, e.g., In re Omniome, Inc.*, 2020 USPQ2d 3222, at \*2 n.17 (TTAB 2020).

USPQ2d 1651, 1660 (TTAB 2014) (“Likelihood of confusion often has been found where the entirety of one mark is incorporated within another.”).

Consumers who do recognize the specific differences between the marks are likely to perceive Applicant’s Mark as a variation of the Cited Mark identifying a companion line of products or are otherwise likely to mistakenly believe that Applicant’s wine is associated with or sponsored by Registrant. *See, e.g., In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010) (finding ML likely to be perceived as a shortened version of ML MARK LEES when used on the same or closely related skin care products); *Double Coin*, 2019 USPQ2d 377409, at \*7 (“ROAD WARRIOR looks, sounds, and conveys the impression of being a line extension of WARRIOR”); *Schieffelin & Co. v. Molson Cos.*, 9 USPQ2d 2069, 2073 (“Those consumers who do recognize the differences in the marks may believe that applicant's mark is a variation of opposer’s mark that opposer has adopted for use on a different product.”); *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 485 (TTAB 1985) (“Even those purchasers who are fully aware of the specific differences between the marks may well believe, because of the similarities between them, that the two marks are simply variants of one another, used by a single producer to identify and distinguish companion lines of products.”).

For all of these reasons, we find that the marks in their entireties are overall quite similar in appearance, sound, connotation and commercial impression. The first *DuPont* factor also weighs in favor of finding a likelihood of confusion.

**D. Thirteenth *DuPont* Factor**

The thirteenth *DuPont* factor is a “catchall,” allowing us to consider “[a]ny other established fact probative of the effect of use.” 177 USPQ at 567. Rarely invoked, this factor “accommodates the need for flexibility in assessing each unique set of facts....” *In re Strategic Partners Inc.*, 102 USPQ2d 1397, 1399 (TTAB 2012). This includes a variety of circumstances such as an applicant’s ownership of a previously registered mark. *Id.*

Applicant asserts that it owns Registration No. 5053669 for the mark



for “hotel accommodation services”; that the involved mark and its registered mark are “substantially similar as several features are common to both marks,” namely, “the distinctive A crest that appears above the word ALLEGRETO [sic]” and the identical “font and appearance of ALLEGRETO [sic]”; that “[t]hese common features allow consumers to readily identify Appellant as the source of the associated goods and services so as to mitigate any likelihood of confusion”; and this “prior registration is a factor that shows Appellant’s use of an almost identical mark on related goods/services, which weighs against a likelihood of consumer confusion.”<sup>10</sup>


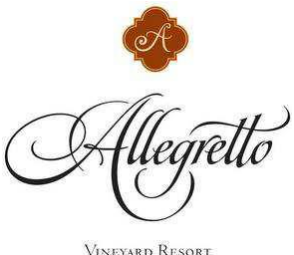
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<sup>10</sup> Appeal Brief, 4 TTABVUE 7-8.

Applicant did not introduce a copy of the registration, but we consider Applicant’s arguments because the involved application includes a claim of ownership of Registration No. 5053669 and the Examining Attorney addressed the arguments in her brief. 6 TTABVUE 7.

When determining whether the coexistence of an applicant's prior registration mitigates against a likelihood of confusion, we consider: (1) whether the applicant's prior registered mark is the same as the applicant's mark or is otherwise not meaningfully different; (2) whether the identification of goods or services in the application and the applicant's prior registration are identical or identical in relevant part; and (3) the length of time the applicant's prior registration has coexisted with the registration being considered as the basis for the Section 2(d) refusal. *Strategic Partners*, 102 USPQ2d at 1400; TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMPEP) § 1207.01 (Nov. 2023).



Here, there is a meaningful difference between the mark Applicant seeks to

register  and its registered mark . The former includes the word "wine" while the latter includes the words "vineyard resort." The goods and services also are different (wine "marketed and sold at an associated hotel and related website" as compared to hotel accommodation services). Finally, even if consumers were to "readily identify Appellant as the source" of Applicant's wine because the involved mark incorporates some of the same features as the registered mark, this would not negate the likelihood that consumers may mistakenly believe that Registrant and its wine also is associated with Applicant.

The thirteenth *DuPont* factor is neutral.

## II. Conclusion: Balancing of the *DuPont* Factors

The goods are identical and the classes of purchasers and trade channels overlap. These factors weigh strongly in favor of finding a likelihood of confusion. The similarities between the marks also support that confusion is likely. The conditions under which purchases are made under the fourth *DuPont* factor and the thirteenth *DuPont* factor are neutral. Because all of the relevant *DuPont* factors weigh in favor of finding a likelihood of confusion or are neutral, we find that Applicant's Mark

  
 for "wine; red wine; rose wine; white wine all of the foregoing being marketed and sold at an associated hotel and related website" is likely to cause

confusion with the Cited Mark  for "wines."

**Decision:** The refusal to register Applicant's Mark under Section 2(d) of the Trademark Act is affirmed.