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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 (OAKLAND DIVISION)
11

12 MELISSA PANICO, individually, and as
13 mother and next friend of, SIGNE
WHELAN and OSCAR WHELAN,

14 Plaintiffs,

15 vs.

16 BDR THERMEA, BAXI GROUP and MILES
17 INDUSTRIES LTD.,

18 Defendants.
19

No.

**COMPLAINT FOR DAMAGES;
DEMAND FOR JURY TRIAL**

20
21 Plaintiff MELISSA PANICO, individually and as guardian ad litem for SIGNE WHELAN and
22 OSCAR WHELAN, allege against Defendants BDR THERMEA, BAXI GROUP and MILES INDUSTRIES
23 LTD., as follows:

24 **JURISDICTION AND VENUE**

25 1. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C.
26 §1332 (a)(2) because this action is between citizens of the State of California and citizens or
27 subjects of foreign states, namely the United Kingdom, Canada, and The Netherlands, and the
28 amount in controversy is in excess of \$75,000.00 exclusive of interest and costs. None of the

1 causes of action stated herein have been assigned or otherwise given to any other court of
2 tribunal.

3 2. Venue is proper in this Judicial District pursuant to 28 U.S.C. §1332 (d) because the
4 three Defendants are aliens. In addition, venue is proper in this Judicial District pursuant to 28
5 U.S.C. §1332 (a)(2) because the HAZARDOUS FIREPLACE to which this litigation relates was
6 installed in Plaintiffs' home located within this District at 158 Funston Avenue, San Francisco, CA
7 94118, where Plaintiff SIGNE WHELAN suffered physical injuries, namely 3rd degree burns, and
8 her injuries were contemporaneously witnessed by Plaintiffs MELISSA PANICO and OSCAR
9 WHELAN.¹ Therefore, a substantial part of the events or omissions that gave rise to the injuries
10 to Plaintiffs occurred within this District.

11 **PLAINTIFFS**

12 3. At all times herein relevant, Plaintiffs were individuals residing in the County of San
13 Francisco, State of California. Plaintiff, MELISSA PANICO is the mother of SIGNE WHELAN, who
14 was only ten months old at the time of the incident which occurred on July 27, 2010.

15 **DEFECTIVE PRODUCT**

16 4. Defendants MILES INDUSTRIES and BAXI GROUP are the designers, manufacturers,
17 distributors and sellers of a Valor brand direct vent, room-sealed, glass front gas fireplace listed
18 as Model No. Ventana 1200EAN (hereafter "HAZARDOUS FIREPLACE") that was designed and
19 manufactured so as to reach unreasonably high temperatures capable of causing third degree
20 burns after only momentary contact with the glass front while, and for a substantial period of time
21 after, the fireplace was in operation. The HAZARDOUS FIREPLACE was installed in Plaintiffs' home
22 located in San Francisco, California, where it caused severe burns and irreparable injury to Plaintiff
23 SIGNE WHELAN.

24 **DEFENDANTS**

25 5. Defendants MILES INDUSTRIES, BAXI GROUP, and BDR THERMEA and their owners,
26 employees, parent companies, subsidiaries, affiliates, and agents, designed, manufactured,

27
28 ¹See Paragraph 4, *infra*, for the definition of "HAZARDOUS FIREPLACE."

1 assembled, distributed, supplied, tested, marketed, advertised, sold and/or provided warnings and
2 instructions for the HAZARDOUS FIREPLACES. At all times relevant herein, Defendant BAXI
3 GROUP provided Defendant MILES INDUSTRIES LTD. with the exclusive license to distribute and
4 sell Valor brand fireplaces, including the HAZARDOUS FIREPLACE, in North America. At all times
5 relevant herein, Defendant BAXI GROUP also provided Defendant MILES INDUSTRIES LTD. with
6 the right to design, manufacture, assemble and package for distribution Valor-branded fireplaces
7 for the consumer market in the United States and Canada.

8 6. At all times relevant herein, the corporate headquarters of Defendant BDR THERMEA
9 was and is at Marchantstraat 55, 7332 AZ Apeldoorn, the Netherlands. BDR THERMEA is the
10 owner, parent company, joint venturer, partner and/or affiliate of Defendant BAXI GROUP and on
11 information and belief controlled and controls the operations of BAXI GROUP's manufacture and
12 production of Valor brand direct vent, room-sealed, glass front gas fireplaces.

13 7. Defendant BAXI GROUP is a registered company in the United Kingdom with a
14 registered office address at 16 Stanier Way, The Wyvern Business Park, Derby, DE21 6BF, United
15 Kingdom. The corporate headquarters of Defendant MILES INDUSTRIES LTD. is at 190-2255
16 Dollarton Highway, North Vancouver, BC, Canada V7H 3B1. Defendants BAXI GROUP and MILES
17 INDUSTRIES LTD. are and were the designers, manufacturers, assemblers, packagers,
18 distributors, testers, marketers and sellers of Valor brand direct vent, room-sealed, glass front gas
19 fireplaces, like the one that injured Plaintiff SIGNE WHELAN.

20 8. Plaintiffs are informed and believe and thereon allege that Defendants, individually
21 and collectively each of them, were at all times herein mentioned the agents, joint venturers, third
22 party administrators, controlling and actively participating parent companies, subsidiaries,
23 affiliates, predecessors, successors, servants, relations or employees of each of the other
24 Defendants, and were at all times herein mentioned acting within the course and scope of said
25 agency, service, employment, joint venture, ownership, agreement for administrative services,
26 and/or affiliate, predecessor or successor relationship, and with the consent and knowledge of,
27 or in consort with, each other Defendant.

28 9. Plaintiffs further contend that Defendant BDR THERMEA failed initially and on an

1 ongoing basis to adequately capitalize Defendant BAXI GROUP, failed to observe corporate
2 formalities with respect to BAXI GROUP, and otherwise controlled, directed and oversaw the
3 activities of subsidiary BAXI GROUP, and refused to allow BAXI GROUP to operate independently
4 as a separate going concern, to the point where BDR THERMEA on the one hand and BAXI GROUP
5 on the other were in fact a single venture and going concern.

6 10. In engaging in the conduct alleged herein, each Defendant acted as the agent for
7 each of the other Defendants, or as the agent of those Defendants' predecessors in interest, and
8 as a single, unified going concern.

9 **GENERAL ALLEGATIONS**

10 11. Defendants and each of them offered for distribution and sale the HAZARDOUS
11 FIREPLACE with the specific intention and purpose that said FIREPLACE be installed by
12 homeowners and builders in residential homes and other dwellings throughout the State of
13 California, including the home occupied by Plaintiffs on July 27, 2010. In so conducting
14 themselves, Defendants represented to consumers that said FIREPLACE was safe, of merchantable
15 quality, fit for its intended and reasonably foreseeable uses, and affixed with warnings and
16 information regarding potential dangers and hazards which reasonable consumers would expect
17 and assume to be provided.

18 12. Defendants and each of them produced, distributed and sold a defective product,
19 unreasonably dangerous and containing severe hazards not expected by reasonable consumers,
20 and then failed to disclose or warn of the true facts, *to wit*, that the HAZARDOUS FIREPLACE is
21 a dangerous and patently unsafe hazard to be used in a residence given the ability of the
22 unguarded glass sealed front to heat up to temperatures in excess of 350 degrees Fahrenheit —
23 well in excess of a temperature necessary to cause third degree burns to skin contacting the glass
24 for only a few seconds. This hazard, previously known to Defendants, creates an unreasonable
25 potential for harm to owners of residential homes, dwellings and structures throughout California.
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1 and/or to design the product in such a way as to prevent direct contact with the super-heated
2 glass by barrier or guard because Defendants were concerned and believed that: 1) a reasonable
3 warning of the gravity of the hazard would dissuade families, particularly those with young
4 children, from purchasing a HAZARDOUS FIREPLACE; and 2) a protective barrier would negatively
5 affect the ambiance of their HAZARDOUS FIREPLACES to the point where their product would
6 become unmarketable or uncompetitive in the gas fireplace market. To ignore basic safety at the
7 expense of perceived consumer aesthetic expectations, Plaintiffs allege, shocks the public
8 conscience and amounts to conscious disregard.

10 17. The gravity of Defendants' conscious disregard is amplified by its inaction in the face
11 of remediation by other manufacturers in the fireplace market. Defendants' main competitor in
12 the residential direct vent gas fireplace market, Home and Hearth Technology ("HHT"), began
13 selling its fireplaces with a standard glass guard several years before SIGNE WHELAN was injured.
14 HHT's continued viability in the direct vent gas fireplace market, despite HHT having risked
15 ambiance to address elementary safety concerns, provided Defendants with a compelling
16 indication that the consumer market would have tolerated well a responsible decision regarding
17 consumer safety by Defendants. Therefore, their alleged justification for continuing to provide
18 fireplaces which offered children the opportunity to make direct contact with the super-heated
19 glass was frivolous and contrived to obtain some recklessly dangerous competitive advantage in
20 the market.

22 18. Based on information and belief, for years Defendants have tested all of their direct
23 vent fireplaces, including the HAZARDOUS FIREPLACE, for compliance with international safety
24 standards, including but not limited to, American National Standards Institute ("ANSI") standard
25 Z21.88 and similar standards of the Canadian Standards Association. In order to obtain
26 certification of the HAZARDOUS FIREPLACE under these standards, Defendants had to have
27 known the extreme temperatures the decorative glass of their fireplaces, including the
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1 HAZARDOUS FIREPLACE, were reaching. This is because ANSI standard Z21.88 requires that the
2 exposed room-sided glass surface be tested and recorded, and preserved. As a result, Defendants
3 cannot claim that they were unaware of the high temperatures that the HAZARDOUS FIREPLACE
4 could reach.

5
6 19. On information and belief, Defendants disregarded several inquiries and complaints
7 by customers specifically identifying the heat of the decorative glass and its burn potential, all of
8 which gave knowledge of the problem and its probable consequences for infants and children prior
9 to the development of the HAZARDOUS FIREPLACE which burned Plaintiff SIGNE WHELAN. These
10 complaints were received and directed to directors and officers of Defendants, imparting clear
11 knowledge of the problem to those at the highest levels of management.

12 20. At the same time, Defendants callously disregarded and ignored important sources
13 for information pertinent to the dangers posed by the HAZARDOUS FIREPLACE including, *inter*
14 *alia*, The American Burn Association and burn physicians. Defendants did so in the face of a
15 growing body of published evidence that clearly identified a dramatic and increasing risk of severe
16 burns to infants and children directly correlated to direct vent fireplaces like the HAZARDOUS
17 FIREPLACE. By way of example, a January/February 2004 article in the American Burn Association
18 – Journal of Burn Care and Rehabilitation entitled “Contact Palmar Burns in Toddlers from Glass
19 Enclosed Fireplaces” reached the following conclusions:
20

- 21 • “We have seen an alarming increase in the incidence of pediatric palm burns
22 associated with gas fireplaces. The increasing popularity of these units places more
23 children at risk.”
- 24 • During the period of review, “A 15-fold increase in incidence was observed.”
- 25 • “Pediatric burns resulting from palmar contact with the glass enclosures of gas
26 fireplaces have emerged as an avoidable new danger within the home. Although
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1 most of these injuries heal with conservative treatment alone, many require surgery
2 or other intensive management to regain acceptable function.”

3 21. On information and belief, Defendants attempt to justify their conduct and their
4 distribution of the HAZARDOUS FIREPLACE based upon their alleged compliance with and
5 certification of the HAZARDOUS FIREPLACE under ANSI standard Z21-88. This assertion itself
6 reinforces the depths of Defendants’ conscious disregard of the rights of California consumers and
7 vulnerable children — for the simple reason that this standard does not in any way regulate the
8 temperature of the glass. Glass temperature is tested *but solely for purposes of calculating the*
9 *estimated interior glass temperature to assess the heat resistant properties of the chosen glass*
10 *material*. In other words, the ANSI standard results in Defendants knowing what the room-sided
11 glass temperature is, but provides no regulatory consideration or oversight of that temperature
12 — no matter how hot.

14 22. At the same time, the ANSI standard upon which Defendants purport to rely to
15 justify their conduct provides a maximum surface temperature for everything but the decorative
16 glass. Specifically, in order to obtain ANSI certification, the exposed surfaces, *excluding the glass*,
17 must be tested to a temperature not in excess of 117 degrees Fahrenheit plus ambient room
18 temperature. The purpose of this test is to “mitigate potential burning of flesh.” Despite realizing
19 that the maximum temperature standard for the decorative glass of the HAZARDOUS FIREPLACE
20 would be far in excess of the maximum permitted temperature of 117 degrees Fahrenheit,
21 Defendants engaged in the above-described manufacture and sale of the HAZARDOUS
22 FIREPLACE. The apparent dissonance between the maximum temperature test for the exposed
23 surface of everything but the glass and the extreme temperatures the decorative glass will achieve
24 at the same time has been a topic of discussion at the vast majority of ANSI meetings in the past
25 several years.

1 manufacturing, testing, assembly, marketing, advertising, inspection, maintenance, sale and/or
2 distribution.

3 28. Defendants designed, engineered, manufactured, tested, assembled, marketed,
4 advertised, inspected, maintained, sold, distributed, and placed on the market and in the stream
5 of commerce a defective product, the HAZARDOUS FIREPLACE, which was unreasonably
6 dangerous to the consumer, knowing that the product would reach and did reach the ultimate
7 consumer without substantial change in the defective condition it was in from the date when it
8 left each Defendant's control.
9

10 29. Defendants knew or should have known that the ultimate users or consumers of this
11 product would not, and could not, inspect the HAZARDOUS FIREPLACE so as to discover the latent
12 defects described above. The HAZARDOUS FIREPLACE was defective when it left the control of
13 each of these Defendants.

14 30. Defendants knew or should have known of the substantial dangers involved in the
15 reasonably foreseeable use of the HAZARDOUS FIREPLACE, whose defective design,
16 manufacturing and lack of warnings caused it to have an unreasonably dangerous propensity to
17 heat up to dangerous and injury—producing temperatures under normal and reasonable use, and
18 thus to inflict injury, including severe burns, to those, particularly infants and toddlers, who
19 touched the super-heated glass even momentarily.
20

21 31. The HAZARDOUS FIREPLACE was, at the time of Plaintiff SIGNE WHELAN's injury,
22 being used in the manner intended by Defendants, and in a manner that was reasonably
23 foreseeable by Defendants as involving a substantial danger not readily apparent if adequate
24 warnings of the danger were not given.

25 32. Plaintiff SIGNE WHELAN was a foreseeable user of the HAZARDOUS FIREPLACE.

26 33. Defendants, despite clear knowledge of the extreme and hidden danger posed by
27 the defect in the HAZARDOUS FIREPLACE, failed to provide adequate warnings of the defect to
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1 operators so that operators could protect themselves and their children from the danger posed
2 by the HAZARDOUS FIREPLACE.

3 34. Plaintiff SIGNE WHELAN's damages and injuries were the legal and proximate result
4 of Defendants' failure in design and in failing to provide adequate warnings of the risks of
5 substantial harm associated with the foreseeable use of the HAZARDOUS FIREPLACE. Plaintiff
6 SIGNE WHELAN has suffered compensatory and general damages in excess of the jurisdictional
7 minimum of this Court as a result. Based upon Defendants' malice and conscious disregard as set
8 forth in greater particularity in Paragraphs 14-23, *supra*, Plaintiff SIGNE WHELAN is entitled to an
9 award of punitive damages.
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11 35. Prejudgment interest on the damages set forth herein should be awarded in the
12 event that judgment for Plaintiff SIGNE WHELAN be rendered; said sum should be calculated from
13 the time that this action arose or as provided under the California Civil Code.
14

15 **SECOND CAUSE OF ACTION**

16 (Negligence)

17 (Against All Defendants)

18 36. Plaintiff SIGNE WHELAN incorporates by reference all preceding paragraphs and
19 allegations as if fully set forth herein.

20 37. Defendants, and each of them, owed a duty to Plaintiff SIGNE WHELAN to use
21 reasonable care in the design, engineering, manufacturing, testing, assembly, marketing,
22 advertisement, inspection, maintenance, sale, warning and distribution of the HAZARDOUS
23 FIREPLACE to be used by the public and ultimate users, like Plaintiff, for the purpose for which
24 they were intended, and to provide Plaintiffs a safe residence to occupy and use.

25 38 Defendants breached said duty and are guilty of one or more of the following
26 negligent acts and/or omissions:
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1 a. Failing to use due care in the design, engineering, manufacturing, testing,
2 assembly, marketing, advertising, inspection, maintenance, sale and/or distribution of the
3 HAZARDOUS FIREPLACE, and/or to utilize and/or implement reasonably safe designs and/or
4 warnings in its manufacture;

5 b. Failing to provide adequate and proper warnings to the public and to Plaintiffs
6 of the HAZARDOUS FIREPLACE'S danger when used in the manner for which it was intended;

7 c. Failing to design, manufacture, incorporate or to retrofit the HAZARDOUS
8 FIREPLACE with reasonable safeguards and protections against burns and injuries reasonably
9 foreseeable when used in the manner for which it was intended;

10 d. Failing to adequately identify and mitigate hazards in accordance with good
11 engineering practices and to give reasonable warnings;

12 f. Failing to make timely and adequate corrections to the manufacture and
13 design of the HAZARDOUS FIREPLACE;

14 g. Failing to use due care in the testing, inspection, maintenance and servicing
15 of the HAZARDOUS FIREPLACE at all times prior to the incident; and

16 h. Otherwise being careless and negligent.

17
18 39. Defendants knew or should have known from their testing of the production models
19 of the HAZARDOUS FIREPLACE, and/or its predecessors, and/or from other fireplaces they
20 manufactured, distributed, inspected and maintained that said FIREPLACE was defective.

21 40. Defendants knew or should have known that the HAZARDOUS FIREPLACE had a
22 propensity to become unreasonably and dangerously hot. Defendants knew safer alternatives and
23 adequate corrections were available which would have avoided the incident, and Plaintiff's
24 damages and injury.

25 41. Defendants designed, engineered, manufactured, tested, assembled, marketed,
26 advertised, inspected, maintained, sold, distributed, placed on the market and in the stream of
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1 commerce, and/or maintained and serviced the HAZARDOUS FIREPLACE in a manner and in a
2 condition unreasonably dangerous to the consumer.

3 42. Plaintiff SIGNE WHELAN's damages and injuries were the legal and proximate result
4 of the negligent actions of Defendants. As a result, Defendants are liable to Plaintiff for
5 compensatory and general damages including any and all future special and general damages
6 associated with the disability suffered by Plaintiff SIGNE WHELAN.
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8 43. Prejudgment interest on the damages set forth herein should be awarded in the
9 event that judgment for Plaintiff SIGNE WHELAN be rendered; said sum should be calculated from
10 the time that this action arose or as provided under the California Civil Code.
11

12 **THIRD CAUSE OF ACTION**

13 *(Dillon v. Legg)*

14 (Against All Defendants)

15 44. Plaintiffs incorporate by reference all preceding paragraphs and allegations as set
16 forth herein.

17 45. Plaintiff MELISSA PANICO is and at all relevant times was the natural mother of
18 SIGNE WHELAN. Plaintiff OSCAR WHELAN is and at all relevant times was the natural brother of
19 SIGNE WHELAN.
20

21 46. Plaintiffs MELISSA PANICO and OSCAR WHELAN were physically present and
22 contemporaneously witnessed the incident and SIGNE WHELAN'S resulting injuries as they
23 occurred.

24 47. Plaintiffs MELISSA PANICO and OSCAR WHELAN experienced a direct emotional
25 impact upon them as a result of the sensory and contemporaneous observance of the incident and
26 of their loved one's injuries.

27 48. Plaintiffs MELISSA PANICO and OSCAR WHELAN are direct and foreseeable victims
28 of Defendants' conduct in placing a defective product in the stream of commerce (as alleged in

1 the First Cause of Action, *supra*) and their negligence (as alleged in the Second Cause of Action,
2 *supra*), and have suffered severe and debilitating emotional distress and physical upset as a result
3 of Defendants' wrongdoing.

4 49. As a result of witnessing the incident and their loved one's injuries, Plaintiffs
5 MELISSA PANICO and OSCAR WHELAN have been hurt and injured in their health, strength, and
6 activity, sustaining injury to body and shock and injury to nervous system and person, all of which
7 have caused and continue to cause great mental and physical pain, suffering and nervousness.
8 Plaintiff MELISSA PANICO is informed and believes and thereon alleges, that the injuries will result
9 in some permanent disability to herself, all to her general damage in an amount in excess of the
10 jurisdictional limits of this Court, which will be shown according to proof at the time of trial.
11 Plaintiff MELISSA PANICO is also informed and believes and thereon alleges that the injuries
12 sustained by her minor son, OSCAR WHELAN, will result in some permanent injury and disability
13 to OSCAR WHELAN, all to his general damage in an amount in excess of the jurisdictional limits
14 of this Court, which will be shown according to proof at the time of trial.

15 50. As a further proximate result of the said acts of the Defendants, and each of them,
16 Plaintiffs MELISSA PANICO and OSCAR WHELAN have and will continue to be required to employ
17 physicians and surgeons, therapists and counselors to examine, treat and care for them, incurring
18 past and future expenses and damages in an amount to be proven at the trial of this action.
19 Based upon Defendants' malice, recklessness and conscious disregard as set forth in Paragraphs
20 14-23, *supra*, Plaintiffs MELISSA PANICO and OSCAR WHELAN are entitled to an award of punitive
21 damages.

22 51. Prejudgment interest on the damages set forth herein should be awarded in the
23 event that judgment for Plaintiffs MELISSA PANICO and OSCAR WHELAN be rendered; said sum
24 should be calculated from the time that this action arose or as provided under the California Civil
25 Code.
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28 WHEREFORE, Plaintiffs pray for damages and relief as follows:

1 **On SIGNE WHELAN'S First Cause of Action:**

- 2 1. For medical and incidental expenses according to proof;
- 3 2. For other special damages according to proof;
- 4 3. For general and emotional distress damages;
- 5 4. For punitive damages;
- 6 5. Costs; and
- 7 6. For prejudgment interest on the award for damages rendered in favor of Plaintiffs,
- 8 calculated from the time the cause of action arose, or as provided in the California Civil Code.

9 **On SIGNE WHELAN'S Second Cause of Action:**

- 10 1. For medical and incidental expenses according to proof;
- 11 2. For other special damages according to proof;
- 12 3. For general and emotional distress damages;
- 13 4. For punitive damages;
- 14 5. Costs; and
- 15 5. For prejudgment interest on the award for damages rendered in favor of Plaintiffs,
- 16 calculated from the time the cause of action arose, or as provided under the California Civil Code.

17 **On MELISSA PANICO'S And OSCAR WHELAN'S Third Cause of Action:**

- 18 1. For medical and incidental expenses according to proof;
- 19 2. For other special damages according to proof;
- 20 3. For general and emotional distress damages;
- 21 4. For punitive damages;
- 22 5. Costs; and
- 23 6. For prejudgment interest on the award for damages rendered in favor of Plaintiffs,
- 24 calculated from the time the cause of action arose, or as provided under the California Civil Code.

25 **On All Causes of Action:**

- 26 1. For such other and further relief as the Court deems proper.
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Dated: April 19, 2011

CLAYEO C. ARNOLD
A Professional Law Corporation

By: _____
KIRK J. WOLDEN
Attorneys for Plaintiffs

DEMAND FOR JURY TRIAL

Plaintiffs demand trial by jury of each cause of action set forth in this complaint
and the issues in this matter.

Dated: April 19, 2011

CLAYEO C. ARNOLD
A Professional Law Corporation

By: _____
KIRK J. WOLDEN
Attorney for Plaintiffs