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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* ERIK MAGNER

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Appeal 2019-005575  
Application 15/130,797  
Technology Center 1700

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Before LINDA M. GAUDETTE, DEBRA L. DENNETT, and LILAN REN,  
*Administrative Patent Judges.*

DENNETT, *Administrative Patent Judge.*

DECISION ON APPEAL<sup>1</sup>

Pursuant to 35 U.S.C. § 134(a), Appellant<sup>2</sup> appeals from the Examiner’s decision to reject claims 1–22. *See* Final Act. 1. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM IN PART.

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<sup>1</sup> In our Decision, we refer to the Specification (“Spec.”) of Application No. 15/130,797 filed April 15, 2016 (“the ’797 App.”); the Final Office Action dated September 18, 2018 (“Final Act.”); the Appeal Brief filed February 12, 2019 (“Appeal Br.”); the Examiner’s Answer dated May 15, 2019 (“Ans.”); and the Reply Brief filed July 15, 2019 (“Reply Br.”).

<sup>2</sup> We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as MEISTER COOK, LLC. Appeal Br. 1.

### STATEMENT OF THE CASE

The '797 Application describes apparatuses for preparing a liquid beverage with a liquid immersible bag with a desired steep time. Spec. ¶ 1.

FIG. 16, reproduced below from the '797 Application, illustrates the claimed invention.

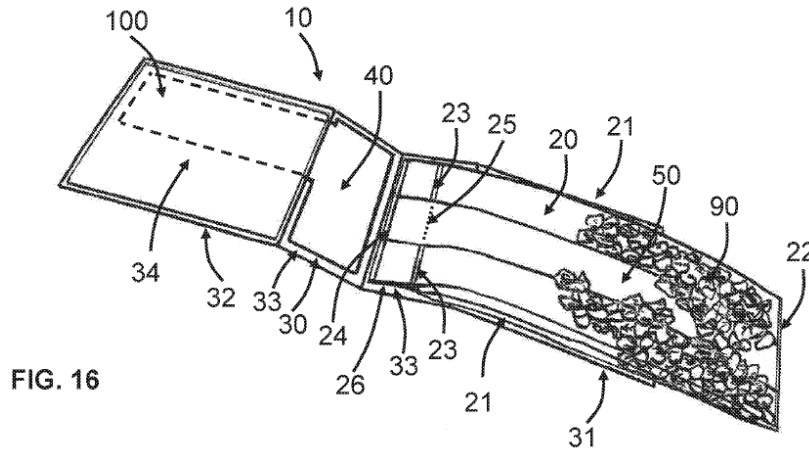


FIG. 16

FIG. 16 shows teabag with steep timer apparatus (10) in an unfolded stage. Spec. ¶ 79. Teabag (20) is attached to the inside of label handle (33) of label (30), which is connected to front label flap (31). *Id.* Teabag (20) contains tea leaves (90) and transport fluid device (50). Steep timer (40) is attached to the back of label handle (33) on steep timer label flap (32) side of label (30). *Id.* Steep timer flap cover (34) is attached on top of the steep timer segment, such as steep timer segment (100).

Claim 1 is representative of the '797 Application's claims and is reproduced below from the Claims Appendix of the Appeal Brief.

1. An apparatus for preparing a beverage, the apparatus configured and arranged to accommodate beverage ingredients having a desired steep time, the apparatus comprising:

a liquid immersible bag, said bag structured and arranged to have a portion to hold the beverage ingredients, the bag structured and arranged to be immersed in liquid such that the

ingredients of the beverage may steep in the liquid when immersed, the bag being made of a non-capillary material;

a capillary action fluid transport device associated with the liquid immersible bag apart from the portion structured and arranged to hold the beverage ingredients; and

at least one flap carrying a steep timer device with at least one visual indicator of the expiration of a predetermined steeping time, said steep timer device being constructed with a wicking media, said wicking media being in contact with said capillary action fluid transport device.

### REFERENCES

The Examiner relies upon the following prior art:

Name	Reference	Date
Howerin	US 3,126,284	Mar. 24, 1964
Christie	US 4,726,956	Feb. 23, 1988
Bowe	US 2004/0255788 A1	Dec. 23, 2004
Aregger et al. ("Aregger")	EP 148153A	Jan. 2, 1985
Müller <sup>3</sup>	DE 10151356A1	Apr. 30, 2004

Clout, *Nylon teabags set to let the flavor flood out*, The Telegraph, Nov. 7, 2007

### REJECTIONS

The Examiner maintains the following rejections under AIA 35 U.S.C. § 103;

A. Claims 1, 5–9, 11, 12, 16–19, 21, and 22 as unpatentable over Müller in view of Clout;

B. Claims 2, 3, 13, and 14 as unpatentable over Müller in view of Clout and Christie;

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<sup>3</sup> The Examiner relies on a machine translation of Müller, to which Appellant does not object. See Appeal Br. 7.

C. Claims 4 and 15 as unpatentable over Müller in view of Clout, Christie, and Aregger; and

D. Claims 10 and 20 as unpatentable over Müller in view of Clout, Bowe, and Howerin. Ans. 4–7.

#### OPINION

We review the appealed rejections for error based upon the issues identified by Appellant and in light of the arguments and evidence produced thereon. *Ex parte Frye*, 94 USPQ2d 1072, 1075 (BPAI 2010) (precedential), (cited with approval in *In re Jung*, 637 F.3d 1356, 1365 (Fed. Cir. 2011)) (“[I]t has long been the Board’s practice to require an applicant to identify the alleged error in the [E]xaminer’s rejections.”).

##### *A. Rejection over Müller in view of Clout*

In response to this rejection, Appellant argues claims 1, 5–7, 9, 12, 16, 17, 19, and 21 as a group. Appeal Br. 6–9. We select claim 1 as representative of the group. Claims 5–7, 9, 12, 16, 17, 19, and 21 stand or fall with claim 1. 37 C.F.R. § 42.37(c)(1)(iv). We separately address below the Examiner’s rejection of claims 8 and 18, and 11 and 22 over Müller in view of Clout.

With respect to claim 1, the Examiner finds that Müller discloses the claim limitations except for the tea bag being made of a non-capillary material. Final Act. 3. The Examiner relies on Clout for disclosure of a nylon (non-capillary) tea bag. *Id.* The Examiner determines that it would have been obvious to one of ordinary skill in the art at the time of the invention to use Clout’s nylon tea bag with Müller’s device based on taste preference. *Id.*

Müller Fig. 1 is reproduced below:

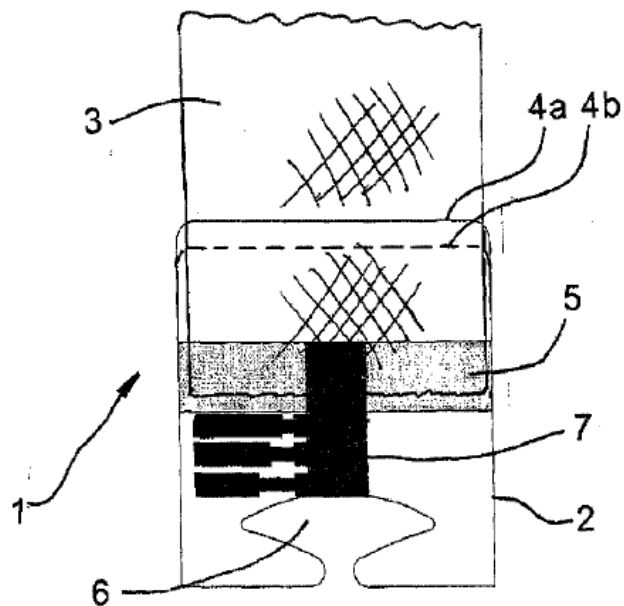


Fig. 1 shows Müller's invention (1) comprising tea bag (3) for receiving a quantity of a tea mixture. Müller ¶ 13. Tea bag (3) is fastened to handling flap (2) at an upper area, wherein surfaces of tea bag (3) and handling flap (2) are connected to each other via heat seal panel (5). *Id.* Handling flap (2) comprises two layers indicated by lower edges 4a and 4b. *Id.* Flap (2) has a recess (6) which can be clamped to the handle of a teapot. *Id.* In use, moisture from tea bag (3) wets the first part of L-shaped blotter paper strip (7), which sucks moisture slowly along by capillary action. *Id.* ¶ 15. The markings to the left each become visible after a given time as moisture reaches them at progressively longer times. *Id.*

Appellant argues that the Examiner misconstrues Müller. Appeal Br. 6. Appellant acknowledges that tea bags having a string attached were known and conventional. *Id.* Appellant contends that Müller relies on the material of the tea bag to have a capillary action effect to transport liquid from the tea bag to the transport and signaling elements in the handling flap,

attached directly to the tea bag. *Id.* at 7. Appellant argues that Müller’s disclosure of a tea bag string providing liquid between the tea bag and the flap with signaling means “does not contemplate any situation where the single service tea bag string would be associated with the steeping liquid rather than conventionally attached to the tea bag.” *Id.* at 8.

As the Examiner explains in the Answer, Müller teaches that liquid may be transported by a “capillary-strong thread” (string) from the liquid to the steep indicator. *See* Ans. 7, Müller ¶ 25. “An essential idea of [Müller’s] invention is to use the distance a liquid travels in a capillary-strong material as a measure of the elapsed time.” Müller ¶ 26. In such case, much like a conventional tea bag, the string holding the tea bag and steep indicator together would be the capillary-strong material.

Appellant’s argument that Müller does not contemplate the tea bag string being associated with the steeping liquid is not persuasive. *See* Appeal Br. 8. As the Examiner explains, when a tea bag with a capillary-strong thread attached is immersed in the liquid, the capillary-strong thread would become wet and move liquid to the tea bag flap containing the steep timer device. *See* Ans. 8.

Appellant argues, “there is no evidence to support the proposition that the teabag string would ever be able to transport a sufficient amount of fluid in an appropriate amount of time to make a steep timer work.” Reply Br. 2. However, Appellant’s argument directly contradicts the record. Specifically, Müller discloses a “time measuring device according to the invention consists of a liquid-conveying means of transport, which in particular utilizes the capillary action and a moisture-activatable signal means which is located at the end of a certain distance to be covered by the liquid in the

means of transport.” Müller ¶ 4. Müller also discloses that the invention is transferable to 1-cup tea bags “wherein the supply of liquid can be done via a capillary-strong thread.” *Id.* at ¶ 25. We agree with the Examiner that Müller teaches a capillary-strong thread is capable of transporting sufficient fluid to allow the invention to work as intended.

Given Müller’s teachings, we are unpersuaded of reversible error in the rejection of claim 1. For the same reasons, we are equally unpersuaded of reversible error in the rejection of claims 5–7, 9, 12, 16, 17, 19, and 21.

*Claims 8, 9, 18, and 19*

Claims 8 and 18 depend from claims 1 and 12, respectively, and each recites “wherein said capillary fluid transport device is attached to the outside of the liquid immersible bag.” Appeal Br. 15, 16 (Claims App.). Claims 9 and 19 depend from claims 1 and 12, respectively, and each recites, “wherein said capillary fluid transport device includes material with capillary action that is integrated into the material of the liquid immersible bag.” *Id.*

The Examiner finds that Müller’s Fig. 1 teaches both that the capillary fluid transport device “is attached to the outside of the liquid immersible bag” and “includes material with capillary action that is integrated into the material of the liquid immersible bag” via heat seal panel (5). Final Act. 4.

Appellant argues that the Examiner’s findings regarding “attached to” and “integrated into” contradict each other, and the Examiner therefore “fail[s] to provide a cogent argument” supporting obviousness. Appeal Br. 9.

In answer, the Examiner further explains that Müller discloses (1) “wherein said capillary fluid transport device (i.e. blotting paper 7) is



attached to the outside of the liquid immersible bag as seen in Fig. 1 where blotting paper 7 sticks out from the end of the liquid immersible bag” (claims 8 and 18), and (2) “the blotting paper is also ‘integrated’ to the tea bag via a heat seal 5” (claims 9 and 19). Ans. 8.

During prosecution, an application’s claims are given their broadest reasonable scope consistent with the specification. *In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004). The words used in a claim must be read in light of the specification, as it would have been interpreted by one of ordinary skill in the art at the time of the invention. *Id.* In general, words used in a claim are accorded their ordinary and customary meaning. *Honeywell Int’l Inc. v. Universal Avionics Sys. Corp.*, 488 F.3d 982, 992 (Fed. Cir. 2007). The “broadest reasonable interpretation” standard does not prejudice the applicant, who has the ability to correct errors in claim language and to adjust the scope of claim protection as needed during prosecution by amending the claims. *In re Yamamoto*, 740 F.2d 1569, 1571–72 (Fed. Cir. 1984). “[W]ords in a claim are generally given their ordinary and customary meaning, [but] a patentee may choose to be his own lexicographer and use terms in a manner other than their ordinary meaning, as long as the special definition of the term is clearly stated in the patent specification or file history.” *Vitronics Corp. v. Conceptoronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996)

The Specification provides no special definitions for a capillary fluid transport device “attached to the outside of the liquid immersible bag” or “includ[ing] material with capillary action that is integrated into the material of the liquid immersible bag.” The ordinary and customary meanings of “attach” and “integrate” are as follows: “attach” means “to fasten or affix;

join; connect; to join in action or function; make part of.”

(<https://www.dictionary.com/browse/attach?s=t>), and “integrate” means “to bring together or incorporate (parts) into a whole, to unite or combine” (<https://www.dictionary.com/browse/integrate?s=t>). Applying these definitions, we agree with the Examiner that Müller discloses a capillary fluid transport device that may be attached to the outside of the liquid immersible bag, and that may be integrated into the material of the liquid immersible bag, both by, e.g., heat seal panel (5).

We sustain the rejection of claims 8, 9, 18, and 19 over Müller in view of Clout.

*Claims 11 and 22*

Claims 11 and 22 depend from claims 1 and 12, respectively, and each recites, “wherein said wicking media of said flap is comprised of two or more integrated materials with different capillary action characteristics.” Appeal Br. 15, 16 (Claims App.).

The Examiner finds claims 11 and 22 obvious over Müller in view of Clout. Final Act. 4. More specifically, the Examiner finds that Müller discloses “several suitable materials for the wicking media (i.e. felt blotting paper, cell paper and capillaries)” and “recognizes that time is measured by the distance the liquid travels on a capillary strong material.” *Id.* (citing Müller ¶¶ 19 and 25). The Examiner acknowledges that Müller does not state that the wicking media may comprise two materials, each having different capillary action characteristics. But the Examiner explains that “it would have been within the technical grasp of one having ordinary skill in the art to understand that utilizing different materials with different capillary action characteristics would alter the time it takes a liquid to travel a certain

distance,” making it obvious to use additional materials as a wicking media to alter the time it takes a liquid to travel. *Id.* The Examiner finds that Müller teaches the concept of using two or more integrated materials with different moisture transport speeds in disclosing the use of a fast liquid transporting device (a tea bag) and a slow liquid transporting device (blotting paper). Ans. 8–9.

Appellant argues that the Examiner has not made a cogent argument of why the ordinarily skilled artisan would have been motivated to use two or more integrated materials with different capillary action characteristics but does not address the Examiner’s rationale. Appeal Br. 10.

The test for obviousness is not whether the claimed invention is expressly suggested in any one or all of the references, but whether the claimed subject matter would have been obvious to those of ordinary skill in the art in light of the combined teachings of those references. *See In re Keller*, 642 F.2d 413, 425 (CCPA 1981). One of ordinary skill can use his or her ordinary skill, creativity, and common sense to make the necessary adjustments and further modifications to result in a properly functioning device. *See KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007) (“a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ”). “A reference must be considered for everything it *teaches* by way of technology and is not limited to the particular *invention* it is describing and attempting to protect.” *EWP Corp. v. Reliance Universal Inc.*, 755 F.2d 898, 907 (Fed. Cir. 1985); *see also Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1076 (Fed. Cir. 2015).

We sustain the rejection of claims 11 and 22 over Müller in view of Clout.

*B. Rejection over Müller in view of Clout and Christie*

The Examiner rejects claims 2, 3, 13, and 14 over Müller in view of Clout and Christie.<sup>4</sup> Claims 2 and 13 depend respectively from claims 1 and 12. Appeal Br. 14, 16. Claim 2 recites “wherein said liquid immersible bag has at least one side fold, wherein said side fold acts as a stiffener to facilitate insertion through an opening of a lid of a cup,” and claim 13 is almost identical. *See id.* Claims 3 and 13 depend respectively from claims 1 and 12. *Id.* Claim 3 recites “wherein said liquid immersible bag has rigid sides, wherein said rigid sides act as stiffeners to facilitate insertion through the opening of a lid of a cup,” and claim 14 is almost identical. *See id.*

The Examiner finds that Christie teaches “providing side fold or rigid sides on tea bags that ha[ve] been heat sealed to contain the beverage ingredients therein.” Final Act. 5 (citing Christie Fig. 1 and 3:63–67). The Examiner finds that “heat sealing would have necessarily resulted in a ‘stiffened’ area relative to the center of the tea bag.” Ans. 9.

Appellant argues that none of the cited references contain any disclosure, teaching, or suggestion of a liquid immersible bag having at least one side fold which much less one that “acts as a stiffener to facilitate insertion through an opening of a lid of a cup” as recited. Appeal Br. 11. Appellant’s argument is persuasive of reversible error.

The Examiner’s citations to Christie fail to identify a side fold (claims 2 and 13) or rigid sides (claim 3 and 14). The Examiner also fails to

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<sup>4</sup> The Final Action indicates incorrectly that the claims are rejected over the combination of only Müller and Christie. *See* Final Act. 4–5. The Examiner corrected the error in the Answer. *See* Ans. 5–6. In addition, Appellant argued patentability of the claims over the combination of Müller, Clout, and Christie, making the error harmless. *See* Appeal Br. 10–11.

substantiate that heat sealing would necessarily result in stiffened areas. *See* Christie Fig. 1 and 3:63–67. “Inherency . . . may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient.” *In re Olerich*, 666 F.2d 578, 581 (CCPA 1981) (quoting *Hansgirk v. Kemmer*, 102 F.2d 212, 214 (CCPA 1939)). Heat sealing of the sides of a tea bag does not necessarily mean that the tea bag center is less stiff, as the stiffness of the center may depend, *inter alia*, on the amount of filling in the bag.

We reverse the rejection of claims 2, 3, 13, and 14 over Muller in view of Clout and Christie.

*C. Rejection over Müller in view of Clout, Christie, and Aregger*

Claims 4 and 15 depend respectively from claims 3 and 14, and further recite that “wherein said rigid sides comprise one of cardboard and plastic.” Appeal Br. 14, 16.

The Examiner finds that claims 4 and 15 are obvious over Müller in view of Clout, Christie, and Aregger.<sup>5</sup> Ans. 6. The Examiner finds that Aregger teaches a thermoplastic adhesive to seal edges of infusion packages, and this would have necessarily stiffened the edges relative to the rest of the tea bag. *Id.* at 9.

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<sup>5</sup> The Final Action indicates incorrectly that the claims are rejected over the combination of only Müller, Christie, and Aregger. *See* Final Act. 5. As with claims 3, 4, 13, and 14, the Examiner corrected the error in the Answer, and Appellant argued patentability of the claims over the combination of Müller, Clout, Christie, and Aregger making the error harmless. *See* Ans. 9 and Appeal Br. 11.

Appellant argues that none of the cited references discloses, teaches, or suggests a bag with rigid sides made of cardboard or plastic, thus the rejection should be reversed.

The Examiner fails to identify a teaching that the rigid sides are made of cardboard or plastic. *See generally* Final Act., Ans. Therefore, the Examiner fails to make a prima facie case of obviousness. When the references cited by the examiner fail to establish a prima facie case of obviousness, the rejection is improper and will be overturned. *In re Fine*, 837 F.2d 1071, 1074 (Fed. Cir. 1988)

We do not sustain the rejection of claims 4 and 15 over Müller in view of Clout, Christie, and Aregger.

*D. Rejection over Müller in view of Clout, Bowe, and Howerin*

Claims 10 and 20 depend respectively from claims 1 and 12, and require that the capillary fluid transport device includes at least one cavity for carrying additional beverage ingredients or supplements. Appeal Br. 15, 16 (Claims App.).

The Examiner finds that Müller is silent regarding the additional limitation, but Bowe shows that it is known to provide additional cavities to store additional beverage ingredients, and Howerin shows that it is known to integrate additional flavorings to other features of a conventional tea bag. Final Act. 5–6. The Examiner finds that having the additional ingredients within the capillary transport device is not seen to produce an unexpected result. Ans. 10.

Appellant argues that Bowe discloses having a first and a second infusible bag for tea and flavoring material, and Howerin involves a carrier with impregnated areas for flavoring. Appeal Br. 12. Appellant contends

that neither Bowe nor Howerin discloses, teaches, or suggests a cavity in a capillary fluid transport device. *Id.* Thus, contrary to the Examiner's finding, Appellant does not argue unexpected results overcome obviousness, but rather, that no prima facie case of obviousness was made. *See generally* Appeal Br.

Bowe shows an additional cavity in the tea bag, but does not disclose a capillary fluid transport device comprising a cavity. Howerin teaches impregnating flavors into the tea bag tag, but also fails to disclose a capillary fluid transport device comprising a cavity. Although the Examiner is correct that providing additional ingredients anywhere in a tea bag device would have similarly infused additional flavors into the liquid, it is the structure, not the end result, with which we are concerned in addressing patentability of the claims. Structural claims, such as claims directed to an article or apparatus, must be distinguished from the prior art in terms of structure. *See In re Schreiber*, 128 F.3d 1473, 1478 (Fed. Cir. 1997) and cases cited therein; *see also In re Danly*, 263 F.2d 844, 848 (CCPA 1959) (“Claims drawn to an apparatus must distinguish from the prior art in terms of structure rather than function”); *In re Gardiner*, 171 F.2d 313, 315–16 (CCPA 1948) (“It is trite to state that the patentability of apparatus claims must be shown in the structure claimed and not merely upon a use, function, or result thereof.”). The Examiner identifies no structure in the cited art that satisfies the requirement that a capillary fluid transport device includes at least one cavity.

We do not sustain the rejection of claims 10 and 20 over Müller in view of Clout, Bowe, and Howerin.

DECISION SUMMARY

<b>Claim(s) Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
1, 5–9, 11, 12, 16–19, 21, 22	103	Müller, Clout	1, 5–9, 11, 12, 16–19, 21, 22	
2, 3, 13, 14	103	Müller, Clout, Christie	2, 3, 13, 14	
4, 15	103	Müller, Clout, Christie, Aregger		4, 15
10, 20	103	Müller, Clout, Bowe, Howerin		10, 20
<b>Overall Outcome</b>			1–3, 5–9, 11–14, 16– 19, 21, 22	4, 10, 15, 20

TIME PERIOD FOR RESPONSE

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED IN PART