IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

DYNAPASS IP HOLDINGS LLC,	§	
	§	
Plaintiff,	§	CIVIL ACTION NO. 2:22-cv-00212-JRG-RSP
	§	(Lead Case)
v.	§	
	§	
JPMORGAN CHASE & CO., et al,	§	
	§	
Defendants.	§	

CLAIM CONSTRUCTION ORDER

In these consolidated patent cases, Dynapass IP Holdings LLC alleges infringement by Defendants of various claims of U.S. Patent No. 6,993,658. The patent "relates to a system through which user tokens required for user authentication [for a secure computer system] are supplied through personal communication devices such as mobile phones and pagers." '658 Patent at 1:8–11.

The parties dispute the scope of five terms. For each term, Dynapass alleges a "plain and ordinary meaning" construction, whereas Defendants propose specific language. Having considered the parties' briefing and arguments of counsel during the October 5, 2023 hearing, the Court resolves the disputes as follows.

I. BACKGROUND

The patent addresses a problem with the traditional use of a user ID and password for user authentication to a computer system. According to the patent:

> Guessing passwords is a frequent technique used by "hackers" to break into systems. Therefore, many systems impose regulations on password formats that require mixtures of letters of different cases and symbols and that no part of a password be a word in the dictionary. A user's inability to remember complex combi-

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> nations of letters, numbers, and symbols often results in the password being written down, sometimes on a note stuck to the side of a workstation.
>
> Present systems face several problems: users dread frequent password changes, [and] frequent password changes with hard-to-remember passwords inevitably result in users surreptitiously writing down passwords, [which compromises security].

'658 Patent at 1:30–43.

The patent describes one prior-art product to make authentication easier. That product requires the user to possess a card that generates and displays an unpredictable, one-time access code that changes every minute. When logging in to the system, the user provides the code which can be verified by the system. *See id.* at 1:44–53.

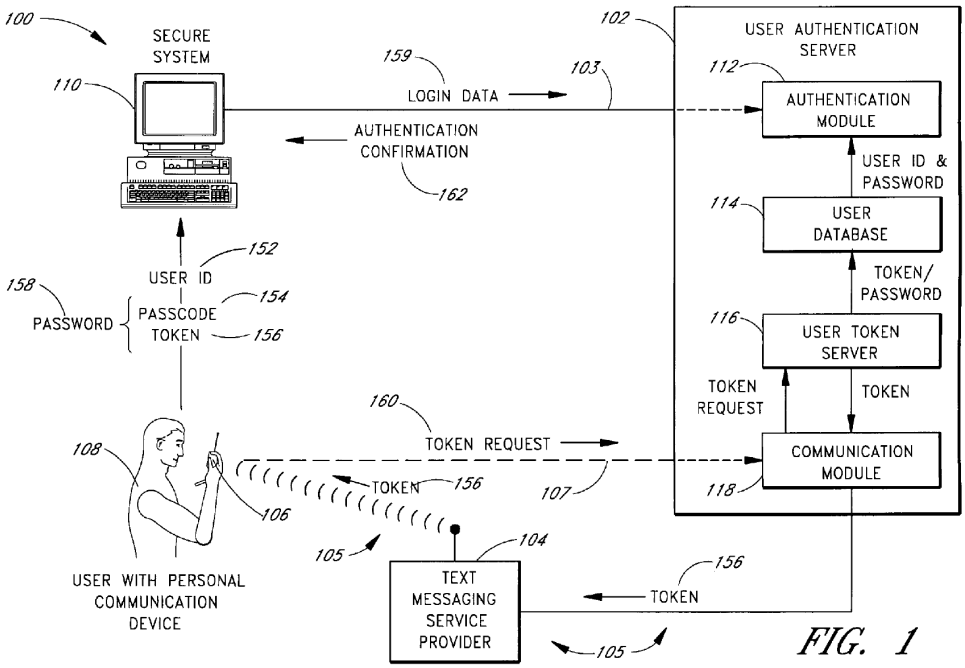

FIG. 1

The patent teaches a system with similar benefits without requiring the user to carry such a card. As shown in FIG. 1 (above), a token server (116) running on a user authentication server (102) generates a random token in response to a user request (160) for a new password. The server (102) creates the new password based on a secret passcode known to the user and the to-

ken, and then sets the user's password as the new password in a user database (114). A communication module (118) transmits the token (156) to the user's personal communication device (106), such as a mobile phone. The user forms the password from the secret passcode and received token and submits the password to access the secure system (100). *See generally* '658 Patent at [57], 4:2–51.

The patent includes two independent claims that collectively include four of the five disputed terms. Claim 1 is directed to:

> 1. A method of authenticating a user on a first secure computer network, the user having a user account on said first secure computer network, the method comprising:
>
> associating the user with a personal communication device possessed by the user, said personal communication device in communication over a second network, wherein said second network is a cell phone network different from the first secure computer network;
>
> **receiving a request from the user for a token via the personal communication device, over the second network;**
>
> generating a new password for said first secure computer network based at least upon the token and a passcode, wherein the token is not known to the user and wherein the passcode is known to the user;
>
> setting a **password** associated with the user to be the new password;
>
> **activating access the user account on the first secure computer network;**
>
> transmitting the token to the personal communication device;
>
> receiving the **password** from the user via the first secure computer network; and
>
> deactivating access to the user account on the first secure computer network within a predetermined amount of time after said activating, such that said user account is not accessible

through any password, via said first secure computer network.

'658 Patent at 11:43–57 (disputed terms bolded). Claim 5 is directed to a system that implements the method:

> 5. A user authentication system comprising:
>
> a computer processor;
>
> a user database configured to associate a user with a personal communication device possessed by the user, said personal communication device configured to communicate over a cell phone network with the user authentication system;
>
> a control module executed on the computer processor configured to create a new password based at least upon a token and a passcode, wherein the token is not known to the user and wherein the passcode is known to the user, the control module further configured to set a **password** associated with the user to be the new password;
>
> a communication module configured to transmit the token to the personal communication device through the cell phone network; and
>
> an authentication module configured to receive the **password** from the user through a secure computer network, said secure computer network being different from the cell phone network, wherein the user has an account on the secure computer network, wherein the authentication module **activates access to the account in response to the password** and deactivates the account within a predetermined amount of time after activating the account, such that said account is not accessible through any password via the secure computer network.

Id. at 12:20–47 (disputed terms bolded). For each of the disputed terms, Dynapass asks for a "plain and ordinary meaning" construction. Defendants, on the other hand, propose specific language.

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II. GENERAL LEGAL STANDARDS

"[T]he claims of a patent define the invention to which the patentee is entitled the right to exclude." *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (en banc). As such, if the parties dispute the scope of the claims, the court must determine their meaning. *See, e.g.*, *Verizon Servs. Corp. v. Vonage Holdings Corp.*, 503 F.3d 1295, 1317 (Fed. Cir. 2007) (Gajarsa, J., concurring in part); *see also Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 390 (1996), *aff'g*, 52 F.3d 967, 976 (Fed. Cir. 1995) (en banc).

Claim construction, however, "is not an obligatory exercise in redundancy." *U.S. Surgical Corp. v. Ethicon, Inc.*, 103 F.3d 1554, 1568 (Fed. Cir. 1997). Rather, "[c]laim construction is a matter of [resolving] disputed meanings and technical scope, to clarify and when necessary to explain what the patentee covered by the claims . . . ." *Id.* A court need not "repeat or restate every claim term in order to comply with the ruling that claim construction is for the court." *Id.*

When construing claims, "[t]here is a heavy presumption that claim terms are to be given their ordinary and customary meaning." *Aventis Pharm. Inc. v. Amino Chems. Ltd.*, 715 F.3d 1363, 1373 (Fed. Cir. 2013) (citing *Phillips*, 415 F.3d at 1312–13). Courts must therefore "look to the words of the claims themselves . . . to define the scope of the patented invention." *Id.* (citations omitted). The "ordinary and customary meaning of a claim term is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention, i.e., as of the effective filing date of the patent application." *Phillips*, 415 F.3d at 1313. This "person of ordinary skill in the art is deemed to read the claim term not only in the context of the particular claim in which the disputed term appears, but in the context of the entire patent, including the specification." *Id.*

Intrinsic evidence is the primary resource for claim construction. *See Power-One, Inc. v.*

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Artesyn Techs., Inc., 599 F.3d 1343, 1348 (Fed. Cir. 2010) (citing *Phillips*, 415 F.3d at 1312). For certain claim terms, "the ordinary meaning of claim language as understood by a person of skill in the art may be readily apparent even to lay judges, and claim construction in such cases involves little more than the application of the widely accepted meaning of commonly understood words." *Phillips*, 415 F.3d at 1314; *see also Medrad, Inc. v. MRI Devices Corp.*, 401 F.3d 1313, 1319 (Fed. Cir. 2005) ("We cannot look at the ordinary meaning of the term . . . in a vacuum. Rather, we must look at the ordinary meaning in the context of the written description and the prosecution history."). But for claim terms with less-apparent meanings, courts consider "those sources available to the public that show what a person of skill in the art would have understood disputed claim language to mean . . . [including] the words of the claims themselves, the remainder of the specification, the prosecution history, and extrinsic evidence concerning relevant scientific principles, the meaning of technical terms, and the state of the art." *Phillips*, 415 F.3d at 1314.

III. THE LEVEL OF ORDINARY SKILL IN THE ART

The level of ordinary skill in the art is the skill level of a hypothetical person who is presumed to have known the relevant art at the time of the invention. *In re GPAC*, 57 F.3d 1573, 1579 (Fed. Cir. 1995). In resolving the appropriate level of ordinary skill, courts consider the types of and solutions to problems encountered in the art, the speed of innovation, the sophistication of the technology, and the education of workers active in the field. *Id.* Importantly, "[a] person of ordinary skill in the art is also a person of ordinary creativity, not an automaton." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 421 (2007).

Here, only Defendants propose an ordinary level of skill in the art. Specifically, Defendants assert a skilled artisan "would have at least an undergraduate degree in electrical engineer-

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ing, computer science, computer engineering, or a closely related field, and two or more years of experience in online security, such as user authentication technologies." Dkt. No. 107 at 6. Because Dynapass does not challenge this proposed level of ordinary skill, the Court adopts it for purposes of analyzing the disputed terms, except the Court limits the amount of experience in "online security" to two years.

IV. THE DISPUTED TERMS

A. "concatenating" (Claim 2)

Plaintiff's Proposal	Defendants' Proposal
Plain and ordinary meaning. *See* Dkt. No. 106 at 6 ("concatenating means 'joining' or combining")	"joining sequentially"

Claim 1 recites "generating a new password for said first secure computer network based at least upon the token and a passcode." '658 Patent at 11:54–55. Claim 2, which depends from Claim 1, then recites generating the new password "by concatenating the token and the passcode." *Id.* at 12:15. The parties dispute the scope of "concatenating."

According to Dynapass, "concatenating means 'joining' or combining." Dkt. No. 106 at 6. For support, Dynapass points to the disclosure of "combin[ing] a valid, memorized passcode of 'abcd' with a valid token of '1234' to form a valid password of 'abcd1234.'" *Id.* at 7 (citing '658 Patent at 4:54–56). Dynapass accuses Defendants' construction of "run[ning] afoul of the intrinsic record because it requires that the 'joining' is sequential." *Id.*

Defendants rely only on extrinsic evidence for their definition of "join sequentially." Dkt. No. 107 at 24 (citing Microsoft Comput. Dict., Dkt. No. 107-5 at 122). They also cite three decisions from the Court they contend support their position. *Id.*

The Court agrees with Defendants. Dynapass provides no evidence of the ordinary mean-

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ing of "concatenating" to a skilled artisan. And contrary to Dynapass's assertion, nothing about Defendants' construction runs "afoul of the intrinsic record." Dynapass contends Defendants' construction would exclude the example in the specification where the "passcode" occurs before the token, but nothing about Claim 2 limits the order in which the passcode and token are concatenated. And even if it did, "concatenating" only appears in a dependent claim, and Claim 1 would still include the embodiment to which Dynapass refers.

In its reply, Dynapass argues Defendants' statements show the term does not need construction because Defendants agree "concatenating" is a common term with an ordinary meaning. Dkt. No. 109 at 6 (citing Dkt. No. 107 at 23). That argument, however, ignores the parties' disagreement over what the "ordinary meaning" is, the resolution of which is a primary purpose of claim construction. *See Eon Corp. IP Holdings LLC v. Silver Spring Networks, Inc.*, 815 F.3d 1314, 1319 (Fed. Cir. 2016) ("[A] district court's duty at the claim construction stage is, simply . . . to resolve a dispute about claim scope that has been raised by the parties."). Here, based on the only evidence of the term's ordinary meaning submitted by the parties, the Court resolves that disagreement by construing "concatenating" in Claim 2 as "joining sequentially."[1]

[1] At the hearing, Dynapass asked for "clarification as to whether sequentially means that the password and token need to be abutted next to each other without any intervening data." Hr'g Tr., Dkt. No. 119 at 6:15–20 (noting that as "the only dispute remaining between the parties"). Arguing "sequentially" does *not* have that meaning, Dynapass pointed to the Microsoft Computer Dictionary, which shows the result of concatenating "hello" and "there" as "hello there," with a space between the words. *Id.* at 6:23–7:4. Defendants agreed the result of "concatenating" two words could include an intervening space, but nothing more. *Id.* at 8:21–24. The Court notes that agreement, but otherwise rejects that "concatenating" could include intervening data, which would not be joining terms "sequentially."

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B. "receiving a request from the user for a token via the personal communication device, over the second network" (Claim 1)

Plaintiff's Proposal	Defendants' Proposal
Plain and ordinary meaning	"receiving a request from the user for a token where the request is transmitted over the second network from the user's personal communication device"

The parties' briefing suggests this phrase could be interpreted two ways with respect to "over the second network." First, the user's *request* could be received "over the second network." Second, the request could be for the token to be sent "over the second network." In other words, does "over the second network" modify "receiving a request," receiving a "token," or both? *See* Dkt. No. 107 at 22 (arguing "the user is not requesting (over any network) that a token be sent to it over the second network, but instead, the system receives a token request from a user that is transmitted over the second network"); *id.* ("[T]he specification does not disclose that a user can send a request including an instruction to send the token over a particular network (e.g., the second network)."); Dkt. No. 109 at 6 (arguing "Defendants' construction seeks to imply a direct connection between the personal communication device and the second network").

Defendants proffer three reasons why it is the user's request—not the token—received "over the second network." First, the first limitation of Claim 1 requires the personal communication device to be connected to the system over the second network by reciting "said personal communication device in communication over a second network." Dkt. No. 107 at 21. Second, the structure of the language supports its position, particularly the placement of the comma after "device." *Id.* at 21–22. Third, nothing in the specification suggests how the token is transmitted to the user. *Id.* at 22.

The Court agrees. FIG. 1 shows the request from the personal communication device

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(106) to the user authentication server (102), and nothing in the specification suggests the request concerns how a token should be returned to the user. Moreover, the placement of the comma before "over the second network" suggests those four words modify the entirety of the preceding language. The Court therefore construes this phrase as "receiving, over the second network via the personal communication device, a request from the user for a token."[2]

C. "activates access to the account in response to the password" (Claim 5)

Plaintiff's Proposal	Defendants' Proposal
Plain and ordinary meaning	"activates an account in response to the creation of the password"

Claim 5 recites "an authentication module [that] activates access to the account in response to the password and deactivates the account within a predetermined amount of time after activating the account, such that said account is not accessible through any password via the secure computer network." '658 Patent at 12:37–47. The parties present two disputes about this limitation: (1) whether "activates access to the account" means "activates an account," and (2) whether "in response to the password" means "in response *to the creation* of the password."

Defendants give three reasons for their position. First, the specification never refers to "activating access" to a user's account—only "activating" the account. Dkt. No. 107 at 13. Second, when responding to a petition for IPR by Unified Patents, Dynapass read out "access" from the claims and admitted "activating" is "not in response to receiving the password from the user." *Id.* at 14–16 (citing Prelim. Resp., Dkt. No. 107-2 at 1–2, 10, 30–32). Finally, Dynapass disclaimed any interpretation where "activating" is not in response to the creation of the password. *Id.* at 16–18 (citing Prelim. Resp., Dkt. No. 107-2 at 31, 40–41).

[2] At the hearing, the parties accepted this construction. *See* Hr'g Tr., Dkt. No. 119 at 10:1–11.

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According to Dynapass, the IPR arguments on which Defendants rely "do nothing more than identify requirements that are already in the recited claims." Dkt. No. 106 at 12. Moreover, says Dynapass, Defendants' construction "is inconsistent with the claim language and the statements made in the [IPR] proceeding." *Id.* at 14.

1. Whether "activates access to the account" is interchangeable with "activates the account"

In Dynapass's preliminary response to Unified's petition for IPR, Dynapass summarized the claims as requiring "activation of the user's account in response to creation of a new 'password' for the user." Prelim. Resp., Dkt. No. 107-2 at 1; *see also id.* at 2 ("The asserted references do not discuss activation of a user account."). For example, Dynapass characterized Claim 1 and Claim 5, which both recite activating *access*, as "requir[ing] that the user's account is deactivated 'within a predetermined amount of time' after the account is activated." *Id.* at 10. Thus, Dynapass appears to have used "activating access to the account" and "activating the account" interchangeably, and also used "deactivating access to the account" and "deactivating the account" interchangeably, in its arguments to the PTAB.

But that does not mean there is a disclaimer of *scope*. Disclaimer narrows the meaning of the claim "congruent *with the scope* of the surrender." *Omega Eng'g, Inc. v. Raytek Corp.*, 334 F.3d 1314, 1324 (Fed. Cir. 2003) (emphasis added); *see also Mass. Inst. of Tech. v. Shire Pharms., Inc.*, 839 F.3d 1111, 1123 (Fed. Cir. 2016) (concluding the defendant did not show that "a clear and unmistakable disclaimer attaches to limit the claim scope"). Here, Defendants point to nothing from Dynapass's IPR arguments that turns on the difference in meaning, if any, between "activating access to the account" and "activating the account." In fact, Defendants suggest there isn't any difference in meaning. *See* Hr'g Tr., Dkt. No. 119 at 22:19–24 ("we're not

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advocating that . . . there's necessarily a different meaning between activates an account and activates access"). And Dynapass's IPR arguments were focused on the meaning of "in response to the password" rather than any distinction between "activating access to the account" and "activating the account." Given that, Defendants have not persuaded the Court that Dynapass has disclaimed any scope with respect to this part of the disputed phrase.

2. Whether Dynapass disclaimed any embodiment in which "activating" is not "in response to the creation of the password"

In its petition for IPR, Unified asserted Kew teaches "wherein the authentication module activates access to the account in response to the password and deactivates the account within a predetermined amount of time after activating the account." In response, Dynapass argued "[t]he Petition fails to show that *Kew* discloses activating account access *in response to generation of* the new 'password,' . . . . Instead, Petitioner incorrectly relies on steps in the prior art that occur well after the claimed 'password' is created." *See* Prelim. Resp., Dkt. No. 107-2 at 40. Dynapass also wrote Claim 5 "requires that the 'authentication module' activates access to the account *in response to creation of the new 'password,'* not in response to receiving the 'password' from the user." *Id.* at 41 (emphasis added). These statements clearly and unmistakably tie the disputed phrase to the *creation* of the new password. *See also id.* at 1 ("[T]he independent claims require activation of the user's account *in response to creation* of a new 'password' for the user." (emphasis added)); *id.* at 2 ("Petitioner disregards the requirement that activation occurs *in response to creation of* a new 'password' for the user." (emphasis added)); *id.* at 29 ("the *creation* of 'the password' by the 'control module' . . . is what causes the 'authentication module' to activate access to the account" (emphasis added)).

Dynapass's arguments to the contrary are not persuasive. In its opening brief, Dynapass

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points to the "control module" limitation, which is "configured to create a new password." It then argues "that creation of that password is a prerequisite to . . . activat[ing] access to the account in response to the password," which is all the claims require. Dkt. No. 106 at 12; *see also* Dkt. No. 109 at 4–5 (arguing "activation of the access is not based solely on the creation of the password" and "[t]he creation of the password is only one portion of the process, and the claim language is not limited to that portion of the process"). The issue, however, is not whether creation of a password is required by the claim, but *when* does the authentication module "activate[] access to the account"? If anything, the recitation of "to create a new password" earlier in the claim bolsters Defendants' position, as "in response to the password" refers back to the earlier *creation* of the password. The Court therefore adopts that part of Defendants' proposed construction.

For the foregoing reasons, the Court construes "activates access to the account in response to the password" as "activates access to the account in response to the creation of the password."

D. "activating access the user account on the first secure computer network" (Claim 1)

Plaintiff's Proposal	Defendants' Proposal
Plain and ordinary meaning	"activating access to the user account on the first secure computer network in response to the creation of the password"

This dispute is similar to the dispute over the "activates access . . ." phrase from Claim 5. In its response to Unified's IPR challenge to Claim 1, Dynapass wrote:

> Petitioner argues that "[m]ost limitations of claim 1 are substantively similar to claim 5. Therefore, these limitations are obvious for the same reasons as the corresponding limitations in claim 5." Pet., pp. 72-73. As discussed above, the combination of *Kew* and *Sormunen* fails to teach or suggest claim elements [5.3] and [5.6]. Accordingly, the combination also fails to teach or suggest the correspond-

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ing limitations in independent claim 1.

Prelim. Resp., Dkt. No. 107-2 at 43 (brackets in original). Dynapass identified element [5.6] as "wherein the authentication module activates access to the account in response to the password and deactivates the account within a predetermined amount of time after activating the account." *See id.* at i. Notably, unlike element [5.6], the disputed phrase does *not* include "in response to." Nonetheless, Defendants assert this phrase should be given an analogous construction to its proposal for the "activates access" phrase of Claim 5, including the requirement that activating access to the account occur "in response to the creation of the password."

The Court disagrees. In the cited portion of the Preliminary Response, Dynapass made a general response to an equally general argument by Unified. In fact, Dynapass's prior argument concerning element [5.6] of Claim 5 isn't completely applicable given Claim 1's lack of the phrase "in response to." Thus, given the lack of specificity in both Unified's argument (as characterized by Dynapass) and Dynapass's response, this does not amount to clear disclaimer.[3] The Court will give this phrase a "plain and ordinary meaning" construction.

E. "password" (Claim 1, 2, 5, 6)

Plaintiff's Proposal	Defendants' Proposal
Plain and ordinary meaning	"string of characters"

This dispute concerns whether the password must be "distinct" from the passcode and token. Dynapass, say Defendants, suggests "the passcode and token could instead be used separately in some abstract or conceptual way as a new password." Dkt. No. 107 at 7. In its reply, Dyna-

[3] In contrast, Dynapass made other, very specific arguments concerning Claim 5's limitation of "receiving a request from the user for a token via the personal communication device, over the second network." *See* Prelim. Resp., Dkt. No. 107-2 at 43–47.

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pass calls that statement "a regrettable misrepresentation," but does not expressly deny it will not take that or a similar position under the guise of "plain and ordinary meaning." Dkt. No. 109 at 1. In fact, Dynapass elsewhere asserts "there can be no reasonable dispute that the specification expressly states that the 'passcode' and 'token' can be sent as separate components," *id.* at 3 (citing '658 Patent at 4:59–61), suggesting the claims cover such an embodiment. The underlying question is therefore whether the separate receipt of the "passcode" and "token" can literally meet the "receiving the password" limitations of Claims 1 and 5.

It cannot. As explained by Dynapass during another IPR proceeding, "password" refers "to the combination of at least the 'passcode' and a 'token.'" Prelim. Resp., Dkt. No. 107-3 at 7. Thus, sending or receiving the "password" is different from sending or receiving the uncombined passcode and token and then later combining them into the password. Put differently, until the passcode and token are combined, there is no password. And while there "might be no reasonable dispute that the specification expressly states that the 'passcode' and 'token' can be sent as separate components" in an alternative embodiment, Dkt. No. 109 at 3, that does not mean the claims are directed to that embodiment. *See Pacing Techs., LLC v. Garmin Int'l, Inc.*, 778 F.3d 1021, 1026 (Fed. Cir. 2015) ("[W]here the patent describes multiple embodiments, every claim does not need to cover every embodiment. . . . This is particularly true where the plain language of a limitation of the claim does not appear to cover that embodiment."). In fact, the context of the surrounding language underscores that sending the password is not the same as sending the passcode and token separately. *See* '658 Patent at 4:52–60 (noting that "in the preferred embodiment the user combines the token with the passcode to form a password" for use at a login screen, but "[i]n an alternative embodiment, the passcode and the token are submitted separately" (reference numbers omitted)). Thus, the plain language of the claim does not appear to cover

an embodiment that submits the passcode and token separately.

Having resolved the underlying dispute, the Court need not address whether the password is a "string of characters" as urged by Defendants. Subject to the foregoing guidance, the Court will give this term a "plain and ordinary meaning" construction.

Disputed Term	The Court's Construction
"concatenating"	"joining sequentially"
"receiving a request from the user for a token via the personal communication device, over the second network"	"receiving, over the second network via the personal communication device, a request from the user for a token"
"activates access to the account in response to the password"	"activates access to the account in response to the creation of the password"
"activating access the user account on the first secure computer network"	Plain and ordinary meaning
"password"	Plain and ordinary meaning

The Court **ORDERS** each party not to refer, directly or indirectly, to its own or any other party's claim-construction positions in the presence of the jury. Likewise, the Court **ORDERS** the parties to refrain from mentioning any part of this opinion, other than the actual positions adopted by the Court, in the presence of the jury. Neither party may take a position before the jury that contradicts the Court's reasoning in this opinion. Any reference to claim construction proceedings is limited to informing the jury of the positions adopted by the Court.

SIGNED this 31st day of October, 2023.

ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE

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