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IN THE SUPREME COURT OF THE STATE OF DELAWARE

BENCHMARK INVESTMENTS LLC (D/B/A KELLY BENCHMARK INDEXES),

Plaintiff Below, Appellant,

v.

PACER ADVISORS, INC.,

Defendant Below, Appellee.

PUBLIC VERSION FILED - NOVEMBER 12, 2025

No. 378, 2025

Appeal from the Superior Court for the State of Delaware, C.A. No.: N23C-03-171 MAA-CCLD

[CORRECTED] APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

This case relates to Appellee Pacer Advisors, Inc.'s ("Pacer") improper termination of the parties' ETF Service Agreement (the "Agreement"), as a result of which Pacer appropriated Appellant Benchmark Investments LLC's ("Benchmark") proprietary business model, Exchange Traded Funds ("ETFs"), and real estate indexes for Pacer's financial gain.

Benchmark is the sponsor and index provider for ETFs. As such, Benchmark provides the capital to launch and operate, and the intellectual property for, ETFs. Benchmark entered into an ETF Services Agreement with Pacer, whereby Pacer agreed to serve as investment adviser to ETFs based on Benchmark's custom indexes (the "Funds"). A037–A054.

As is common in the industry, Benchmark and Pacer entered into a "white label" arrangement, under which Pacer served as the ETF issuer with the necessary regulatory approvals and, in essence, "hosted" Benchmark's Funds. Benchmark paid Pacer for its services. The ETFs generate fees as a percentage of assets under management ("AUM"). Benchmark only received payment if the Benchmark Funds generate a profit. A039–A040, § 2(a), (b), & (d).

The Agreement provides Benchmark, but not Pacer, with the right to terminate without cause. It provides two paths. Under Section 6(c)(i), Benchmark can simply

terminate *via* written notice. A041, § 6(c)(i). Benchmark would exercise this option if the AUM were insufficient and did not generate a profit.

Under Section (c)(ii), Benchmark can provide "***notice of its intent to terminate*** this Agreement in accordance with sub-section 6(c)(i)" and propose a "reorganization" of the Funds. A041–A042, § 6(c)(ii) (emphasis added). Because of the regulated nature of industry, such a proposal is subject to the approval of the Pacer Funds Trust's ("Pacer Trust") Board and, ultimately, the shareholders. A041–A042, § 6(c)(i), (ii); 15 U.S.C. § 80a–15(a). This option potentially allows Benchmark to replace Pacer as its service provider in a scenario (such as this) when the AUM does generate a profit but Benchmark is unhappy with Pacer.

The Funds were successful, generating over $2 billion in AUM. A095 ¶ 71. After disputes between the parties, Benchmark sought to exercise the second termination without cause option *via* two notices (the "Notices"). On November 17, 2020, Benchmark sent Pacer a "notice of Benchmark's ***intent to terminate*** the ETF Services Agreement without cause effective ***no earlier than May 6, 2021***" and informed Pacer that "Benchmark ***intends to present*** to PACER Advisors and the Board of the ETF Trust a proposal to reorganize the Funds into another investment company." A121 (emphasis added). On April 22, 2021, Benchmark wrote that "Benchmark ***intends to present*** to PACER Advisors and the Board of the ETF Trust

a proposal to reorganize the Funds into another investment company." A124 (emphasis added).

On October 14, 2022, almost two years after the initial Notice and after Pacer improperly presented a competing reorganization plan, the Pacer Trust rejected Benchmark's reorganization proposal. A126; A141. On the same day, Pacer purportedly "accept[ed]" Benchmark's termination of the Agreement. A128. If allowed to stand, Pacer retains the benefit of the AUM and pays Benchmark no compensation.

Benchmark filed suit against Pacer, asserting, among other things, that Pacer improperly terminated and repudiated the Agreement. A101–A104. After protracted motions practice on Benchmark's pleadings and discovery had barely initiated, Pacer filed a Motion for Summary Judgment on the core issue in the case: whether the Agreement was properly terminated. Benchmark opposed Pacer's motion and cross-moved for summary judgment that Pacer improperly terminated the Agreement.

The Superior Court held that Benchmark terminated the Agreement *via* the Notices. This Court should reverse the Superior Court's ruling and either hold that the Agreement was not properly terminated or, at a minimum, material factual issues remain.

The plain language of the Notices is susceptible to only one interpretation, an understanding that is confirmed by the text and structure of the Agreement. The Notices communicate a notice of intent to terminate and submit a proposal for reorganization, subject to the Trust Board's approval — not a notice of actual termination under Section 6(c)(i). Section 6(c)(ii) is distinct from Section 6(c)(i) and concerns the replacement of Pacer, not Benchmark. By providing notice of its intent to replace Pacer under Section 6(c)(ii), Benchmark did not terminate the Agreement, thus risking its investment and losing the benefit of substantial AUM generated by its Funds.

SUMMARY OF ARGUMENT

1. The Superior Court erred when it held, in the early stages of discovery, that the Benchmark Notices of its intent to replace Pacer as a service provider for the Benchmark Funds terminated the Agreement. The Notices only indicated Benchmark's intention to terminate at a future, unspecified date, subject to approval of its reorganization plan. The Superior Court reached this erroneous conclusion by improperly conflating a "written notice" of termination under Section 6(c)(i) and "notice of intent to terminate" at a future, unspecified date under Section 6(c)(ii). The Superior Court erred when it held that, under the structure and text of the Agreement, Benchmark's only path to seek reorganization under Section 6(c)(ii) was to terminate the Agreement, risking the loss of the benefit of the AUM generated by Benchmark's capital and intellectual property based on the decision of a third party affiliated with Pacer. The Superior Court reached this erroneous conclusion by holding that Section (6)(ii) only modified Section 6(c)(i) and did not provide an alternative path to termination.

STATEMENT OF FACTS

I. FACTUAL BACKGROUND

Benchmark is a real estate index provider and ETF sponsor. A072–A073 ¶ 2. An index is a list of assets — like stocks or bonds — that provides a benchmark for a specific market or segment of the economy (such as the S&P 500 or, here, bespoke real estate assets). An index is central to determining whether investors in an ETF make a profit. Further, as the ETF sponsor, Benchmark supplies the capital to launch and support the ETFs. A072, A080 ¶¶ 2, 22–23.

Pacer is a registered investment adviser that serves as an adviser to the Pacer Trust and serves as a "white label" platform for firms like Benchmark. A078 ¶ 15. Pacer also serves as a third-party fund services provider that issues, holds, manages, and markets funds on behalf of index providers and ETF sponsors like Benchmark. A078, A083 ¶¶ 15, 31. A white label issuer is a third-party ETF service provider that offers the infrastructure and services to ETF sponsors that do not want to build such infrastructure from the ground up. A083 ¶ 31. The white label arrangement is common in the ETF industry. *See Nasdaq, Inc. v. Exch. Traded Managers Grp., LLC*, 431 F. Supp. 3d 176, 188–89 (S.D.N.Y. 2019).

Under this arrangement, Pacer, in essence, "hosts" Benchmark's Funds. While Pacer's role is an important one, it is only one of several providers that can supply such services. A073, A078, A080–A082 ¶¶ 3, 15, 23, 27. By contrast,

Benchmark's Custom Indexes are central to the Funds' success and are proprietary and unique.

On November 21, 2017, Benchmark and Pacer entered into the ETF Services Agreement. A084 ¶ 33; A038–A052. In April 2019, the parties executed an Amendment to extend the two-year Initial Term of the Agreement to May 5, 2021. A041, A053–A054 § 6(a), Amendment.

Reflecting the above arrangement, under the Agreement, Pacer provides services to the Benchmark Funds, and Benchmark pays for those services. A038–A041 §§ 1(b), 2. Benchmark is responsible for covering [redacted] expenses of the Funds, including Pacer's fee. Benchmark only receives payment if the Benchmark Funds generate a profit. A039–A040 § 2(a), (b), & (d). Thus, Benchmark covers losses (in the initial period as the Funds were established and increased AUM) and then enjoys [redacted] of the profits once generated, as they ultimately were. *See* A091, A095 ¶¶ 55, 71.

Benchmark retains control under the Agreement. For example, Benchmark has the right to review and approve any prospectus or statement of additional information for a Benchmark Fund and any supplement or amendment thereto. A038 § 1(c). Similarly, Pacer is not permitted to recommend to the Board any changes with respect to a Fund, which includes changing the index provider for the Funds or change the fee structure, without Benchmark's written approval. A041 §

2(f). Furthermore, Pacer is required to launch any additional Benchmark Funds requested by Benchmark unless legal or regulatory reasons prevent Pacer from doing so. A039 § 1(f)(ii). The Agreement also includes a unilateral non-compete provision, preventing Pacer from distributing shares of ETFs that invest in real estate not in existence prior to the Agreement. A045 § 15. Consistent with the parties' arrangement and relationship, the Agreement provides Benchmark the right to terminate without cause and the right to propose to replace Pacer. It does not grant Pacer such rights.

A. The Agreement's Termination Provisions

This case hinges on whether the Notices effectuated a termination of the Agreement without cause pursuant to Section 6(c).

Section 6(c) provides three paths for termination without cause — the first two by Benchmark and the third by the Pacer Funds Trust (not Pacer). The provision states in full:

> (c) Termination Without Cause.
>
> (i) This Agreement may be terminated without Cause by Benchmark upon written notice to PACER Advisors, provided that Benchmark shall not have the termination date of the License occur before the end of the Initial Term of the Agreement unless a change of control of PACER Advisors which terminates the investment advisory agreement between the Trust and PACER Advisors is contemplated.
>
> (ii) In the event that Benchmark gives notice of its ***intent to terminate*** this Agreement in accordance with sub-section 6(c)(i), Benchmark shall have the right but not the obligation to propose a

reorganization of the Fund or Funds formed and operating hereunder with and into another registered investment company or series thereof. Any such proposal shall be subject to acceptance by the Trust in the sole discretion of the Trust's Board. PACER Advisors agrees that, solely for purposes of this sub-section (c)(ii), it will support any such reorganization proposal that appears to PACER Advisors to be in the best interests of the Fund's (or Funds') shareholders, **provided, however**, that in the event that the Fund or Funds are reorganized into another registered investment company or series thereof, Benchmark shall pay for all reasonable costs associated with obtaining Board and shareholder approval (if any), associated with such reorganization, and shall pay to PACER Advisors an amount determined according to the formula outlined in Exhibit "C".

(iii) This Agreement shall terminate as to a Fund if the Trust's Board approves the termination of a Fund's use of a Benchmark Custom Index without Cause **and** the Fund is liquidated.

(iv) In the event that this Agreement is terminated without Cause pursuant to sub-section (c)(iii) above and PACER Advisors proposes, recommends or supports such termination to the Board, PACER Advisors shall pay to Benchmark an amount determined according to the formula outlined in Exhibit "D".

For the purpose of this provision, "Cause" exists when the Benchmark Custom Index provider ceases calculation of the Index or the Benchmark Custom Index provider causes a material adverse impact on the Fund that is not cured within thirty days of PACER Advisors providing notice to Benchmark of such material adverse impact.

A041 § 6(c) (emphasis added).

Section 6(c)(i) requires, in all cases of termination without cause by Benchmark, that Benchmark provide written notice to Pacer before any termination and that any termination shall not occur before the end of the Initial Term (subject

to an exception not at issue here). A041 § 6(c)(i). Under the first path, Benchmark can terminate the Agreement at a definite date after the end of the Initial Term.

Section 6(c)(ii) provides that after Benchmark gives "notice of its intent to terminate" the Agreement pursuant to Section 6(c)(i) and propose a reorganization of the Funds into another investment adviser. A041–A042 § 6(c)(ii). Such reorganization involves changing the investment adviser (Pacer) — not the index provider and sponsor (Benchmark). If reorganization is approved by the Pacer Trust Board, Benchmark must pay Pacer half of the fair value of the Funds' assets as established by a methodology set forth in Exhibit C. A041–A042 § 6(c)(ii); A051. If the Trust Board rejects the reorganization proposal, the Agreement continues until one of the terminating actions of Section 6 occurs.

The requirement for the Pacer Trust Board approval in Section 6(c)(ii) stems from the regulated nature of the industry. Under the 1940 Investments Adviser Act, Benchmark cannot unilaterally replace Pacer as the investment adviser of the Funds. Rather, the Trust must approve such a change, and the shareholders must approve it. A041–A042 § 6(c)(ii); 15 U.S.C. § 80a–15(a). That is the reason that Section 6(c)(ii) is structured such that (i) Benchmark provides a "notice of intent to terminate" the Agreement, not a "notice to terminate"; and (ii) the Trust (and, ultimately, shareholder) approval is required to replace Pacer as the investment adviser.

Finally, Section 6(c)(iii) provides that the Agreement terminates if the Trust Board (not Pacer) "approves the termination of a Fund's use of a Benchmark Custom Index without Cause **and** the Fund is liquidated." A042 § 6(c)(iii). If Pacer "proposes, recommends, or supports such termination to the Board," Pacer must pay Benchmark half of the fair value of the Funds' assets. A042 § 6(c)(iv); A052. Thus, under the third path, the Trust Board can terminate the Agreement by approving the termination of the Funds' use of a Benchmark Custom Index without cause and then liquidating the Funds, *i.e.*, there are no longer Funds using the Benchmark Custom Indexes with Pacer as the investment advisor.

In other words, the Agreement provides a closed universe of termination possibilities with associated payment options. The Agreement does not provide that Pacer (in contrast to the Trust) can terminate Benchmark as index provider and sponsor, as Pacer effectively did here. Further, the Agreement provides that, if Pacer supports the termination of Benchmark by the Trust Board (which it did here), the Funds must be liquidated (which they were not) and Pacer must pay Benchmark (which Pacer did not).

B. Benchmark's Notices

On November 17, 2020, Benchmark sent Pacer a notice of "intent to terminate" the Agreement at an unspecified date in the future, which states in relevant part:

> Please accept this email as written notice of Benchmark's ***intent to terminate the ETF Services Agreement*** without cause effective ***no earlier than May 6, 2021, the end of the Initial Term***, pursuant to Section 6(c)(i) of the ETF Services Agreement. Consistent with Section 6(c)(ii) of the ETF Services Agreement, Benchmark ***intends to present*** to PACER Advisors and the Board of the ETF Trust a proposal to reorganize the Funds into another investment company that Benchmark believes is in the best interests of the Funds and their shareholders.

A121 (emphasis added). Thus, in both operative sentences, Benchmark indicated an intent to perform an act in the future.

On April 22, 2021, Benchmark sent Pacer a second notice, reaffirming that it would propose a reorganization under Section 6(c)(ii):

> Please accept this email as advance written notice that, no earlier than May 6, 2021 and pursuant to Section 6(c)(ii) of the ETF Services Agreement, Benchmark intends to present to PACER Advisors and the Board of the ETF Trust a proposal to reorganize the Funds into another investment company. Benchmark believes that such proposal is in the best interests of the Funds and their shareholders.

A124. This notice does not even mention termination.

C. The Parties' Conduct Leading Up to the Reorganization Proposal

After the Notices, the parties continued to operate under the Agreement for almost two years. During that time, Pacer never once indicated its understanding that the Notices provided by Benchmark terminated the Agreement. A093 ¶ 60. Instead, Pacer continued to collect fees pursuant to the Agreement and tried negotiating an extension to prevent the Funds from leaving the Pacer Funds Trust. *Id*.

Frustrated by these delays, on August 24, 2021, Benchmark's counsel sent Pacer's counsel a letter demanding that Pacer stop stalling and schedule a meeting of the Pacer Trust at which Benchmark could present its reorganization proposal. A138–A139. Benchmark indicated its desire "move expeditiously to implement the procedures set forth in sub-section 6(c)(ii) of the Agreement." A139.

Unwilling to tolerate further delay, on February 19, 2022, Benchmark presented its preliminary reorganization proposal to the Trust, proposing to move the Funds' assets to a new trust to be managed by a different investment adviser. A135–A136. Immediately after, in violation of its obligations to support Benchmark's reorganization proposal (§ 6(c)(ii)), not to compete (§ 2(f)), and not to recommend any change to a Fund (§ 2(f)), Pacer began to work with another index provider to "build a replacement index[es]" for the two Benchmark Funds. A055. Pacer sought indexes "as close as possible to the existing [Benchmark] indexes." A068.

Following Pacer's February 2022 proposal, Pacer's Board initially requested information from Benchmark related to the proposed reorganization, and Benchmark responded with additional information supporting the proposal and outlining the benefits to shareholders. Only then did Pacer start to request information for reorganization. A099 ¶ 81. On October 3, 2022, almost two years after Benchmark's initial notice, Pacer informed Benchmark that it would not support the

proposed reorganization and breached its express obligation under Section 6(c)(ii) to support Benchmark's proposal by submitting a competing plan to the Pacer Trust Board. A141.

The Trust rejected Benchmark's proposal for reorganization on October 14, 2022. A126. Pacer's counsel sent Benchmark's counsel an email, purportedly "accept[ing]" Benchmark's Notices of termination:

> I write on behalf of my client, Pacer Advisors, Inc. ("Pacer Advisors"). Per the Benchmark Investments LLC (d/b/a Kelly Benchmark Indexes) ("Benchmark") notices of termination pursuant to Sections 6(c)(i) and 6(c)(ii) of the ETF Services Agreement between Benchmark and Pacer Advisors (the "Agreement") to Pacer Advisors dated November 17, 2020 and April 22, 2021, respectively (together, the "Benchmark Notices of Termination"), ***Pacer Advisors hereby accepts the Benchmark Notices of Termination*** and, accordingly, Benchmark's termination of the Agreement, effective as of October 31, 2022.

A128 (emphasis added).

The Pacer Trust filed prospectus supplements for the Funds stating: "Effective as of October 31, 2022, Pacer Advisors, Inc. (the 'Adviser') has accepted the termination by Kelly Benchmark Indexes (the 'Index Provider') of its services as the Index Provider" for the Funds. A130, A132. The supplements indicated that the Funds would change names and seek to track a new index. *Id*.

II. PROCEDURAL HISTORY

A. Benchmark's Complaint

Benchmark filed suit against Pacer in the Court of Chancery for the State of Delaware on October 10, 2022 and seeking a Temporary Restraining Order ("TRO") preventing Pacer from "accepting" Benchmark's termination and taking further action to remove Benchmark as the index provider for the Funds. Benchmark's TRO was denied on October 27, 2022. Pacer then filed a Motion to Dismiss on December 2, 2022. Following dismissal of Count III of Benchmark's complaint seeking equitable relief, Benchmark moved to transfer the case to Superior Court, which was granted on March 10, 2023. Benchmark then filed an Amended Complaint in Superior Court on June 14, 2023.

B. The Parties' Cross Motions for Summary Judgment

On February 29, 2024, before Pacer had produced virtually any documents, Pacer filed a Motion for Partial Summary Judgement as to Count I, which is Benchmark's request for a "judicial declaration that the Agreement has not been terminated" and that "Pacer is not authorized to serve as an investment advisor or sponsor to the Funds now that the Funds are changed to track a competing index." A112–A113 ¶¶ 113–14. Benchmark then cross-moved for Summary Judgment on Count I. The Superior Court held oral argument on the Parties' cross-motions on April 9, 2024.

The Superior Court granted Summary Judgment in favor of Pacer as to Count I, and denied Benchmark's Cross-Motion for Partial Summary Judgment ("Op.") *See* Exhibit A. The Court held that Benchmark effectively terminated the Agreement through the two Notices. Op. at 20, 23. The Court concluded held that Benchmark's termination of the Agreement became effective on October 14, 2022 when the Pacer Trust rejected Benchmark's reorganization proposal. Op. at 19, 21–23.

The Parties filed a stipulation of voluntary dismissal and final judgment, which the Court entered on August 22, 2025 ("Stip."). *See* Exhibit B. Final judgement was entered as to Count I and Count III. Final Judgment was entered as to Count II (Breach of Contract), ¶¶ 118 (i) and (k) of Benchmark's Amended Complaint — addressing Pacer's improper termination of the Agreement and breach of the non-compete provision, respectively. Stip. at 1–2. The remainder of Count II was voluntarily dismissed with prejudice. *Id*. at 2.

On September 10, 2025, Benchmark filed a timely notice of appeal of the Superior Court's Summary Judgment Opinion.

III. ARGUMENT

A. Question Presented

Whether the Superior Court erred in holding, prior to discovery, that the Benchmark Notices under Section 6(c)(ii) of its intent to replace Pacer as a service provider for the Benchmark's Funds terminated the Agreement, potentially depriving Benchmark of the benefits of over $2 billion in AUM with no compensation. Op. at 15-19.

B. Scope of Review

This Court "review[s] the Superior Court's grant of summary judgment *de novo* 'to determine whether, viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law.'" *GMG Cap. Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012) (quoting *State Farm Mut. Auto. Ins. Co. v. Patterson*, 7 A.3d 454, 456 (Del. 2010)). This Court "review[s] questions of contract interpretation *de novo." Id.*

C. Merits of Argument

The Superior Court erred in holding that Benchmark's Notices terminated the Agreement. *First*, the plain language of the Notices demonstrates that Benchmark did not terminate the Agreement, but rather communicated an intent to terminate in

the future (subject to approval of its reorganization plan). *Second*, the language and structure of the termination provisions, and the Agreement as a whole, confirm this conclusion.

Finally, at a minimum, there is a fact issue as to the parties' intent and summary judgment is improper. The Agreement does not state explicitly that if Benchmark notices its intent to terminate its service provider and reorganize, Benchmark is ousted from its own Funds and deprived of the over $2 billion AUM unless a third party, affiliated with Pacer, accepts the reorganization plan; and the Notices did not express a present intent to terminate, as required by Section 6(c)(i).

i. The plain language of Benchmark's Notices did not terminate the Agreement

Even when viewed independently of the contractual language, the Notices, on their face, indicate that Benchmark ***intended to terminate*** the Agreement at an unspecified, future date — not that Benchmark terminated on a definite date under Section 6(c)(i). A121–A123. The Notices did not terminate the Agreement.

Terminate means "to bring to an end." *Terminate*, Dictionary.com, https://www.dictionary.com/browse/terminate (last visited Oct. 27, 2025). It is a completed act. Intend, by contrast, means "to have in mind as something to be done or brought about; plan." *Intend*, Dictionary.com, https://www.dictionary.com/browse/intend (last visited Oct. 27, 2025). Synonyms for intend include purpose, aim, expect, and contemplate. *Id*.

Benchmark's November 17, 2020 email states that it is a "written notice of Benchmark's ***intent to terminate*** the ETF Services Agreement without cause effective no earlier than May 6, 2021." A121 (emphasis added). The November 17, 2020 notice is not susceptible to the interpretation that Benchmark terminated the Agreement. It is explicitly couched in terms of an intent to do something in the future. It does not state that Benchmark "terminates" the Agreement. It does not state that Benchmark "is terminating this Agreement as of [a specific date]." It provides no date, but rather only that Benchmark plans, hopes, expects to terminate as of some future date no earlier than the expiration of the Initial Term of the Agreement.

The April 22, 2021 notice does not even mention termination or Section (c)(i) and confirms that, "***no earlier than May 6, 2021*** and pursuant to Section 6(c)(ii) of the ETF Services Agreement, Benchmark ***intends to present*** to PACER Advisors and the Board of the ETF Trust a proposal to reorganize the Funds into another investment company." A124 (emphasis added). It is not reasonable to interpret such language as meaning that Benchmark terminated the Agreement.

As noted, in both Notices, Benchmark stated that it "intended" to present a reorganization proposal. Pacer does not, and cannot, argue that such language means that Benchmark had actually submitted such a proposal. Rather, it acknowledges that, in the Notices, Benchmark indicated its intention to submit a proposal in the

future. It is illogical and impermissible to interpret the parallel phrases in the same documents of "intention to terminate" and "intend to present" a proposal inconsistently such that one means the action has already undertaken, while the other refers to future conduct.

The Superior Court largely did not address the language of the Notices. The Court simply notes that because of its reading of the contractual language, the acknowledged "distinction" between a "written notice" of termination, on the one hand, and a notice of "intent to terminate," at some unspecified date, on the other, was "a distinction without a difference." Op. at 17.

As explained below, the Superior Court's interpretation of the Agreement — improperly conflating Sections 6(c)(i) and (c)(ii) — rests on an incorrect construction of the plain language of the Agreement. But even if the Agreement, properly interpreted, provides for, *first*, current termination under Sections 6(c)(i) and, *second*, a contingent proposal for reorganization, Benchmark is required to provide proper notice under Section 6(c)(i), *i.e.*, Benchmark has to state that it is terminating now or at some specific date. Benchmark provided no such notice. Thus, even if Benchmark's contractual interpretation were incorrect, Benchmark still did not, and did not intend to, effectively terminate under the express language of the Notices. Benchmark merely sent a reorganization notice, not a termination notice.

Similarly, the Superior Court's conclusion that no termination date was required in the Notices is untenable. The Court reasons that: "If the parties wanted specifics in the written notice, they should have bargained to have such requirements in the Agreement." *Id.* But that logic is not persuasive. The requirement for a specific date stems from the nature of the act of termination and the plain meaning of language, not specific contractual wording. A party seeking to terminate does not do so by saying "I intend to terminate" at some point. A person that states "I intend to climb a mountain" has not actually climbed a mountain. It does not take contractual language to establish the requirement of a specific date.

ii. The text and structure of the Agreement confirm that Benchmark did not terminate.

1. Under Section 6(c)(ii), Benchmark did not terminate by providing the Notices.

The plain language of Section 6(c)(ii), standing alone, makes clear that Benchmark did not terminate by providing the Notices.

First, Section 6(c)(ii) concerns the replacement of Pacer as a service provider for the Funds, not the replacement of Benchmark. Pacer has no right under the Agreement to replace Benchmark without cause, although it sought such a right during contractual negotiations. A211, A027–A036

Under the white label arrangement, as the ETF sponsor and index provider, Benchmark provides the capital and actual proprietary strategy (custom indexes)

vital to generate the AUM for the Funds. A080–A083 ¶¶ 23–29; *Nasdaq*, 431 F. Supp. 3d at 184–89. This is why when Pacer impermissibly sought to replace the Benchmark indexes, it asked to make them "as close as possible to the existing [Benchmark] indexes." A068. Benchmark never proposed changing the indexes in the reorganization proposal, further evidencing it was not a termination.

However, Pacer serves as the ETF issuer with the necessary regulatory approvals and hosts Benchmark's Funds. A082–A083 ¶¶ 29–31; *Nasdaq*, 431 F. Supp. 3d at 184–89. As a result, if the Agreement is terminated and Pacer is not replaced, Pacer remains the ETF issuer and Benchmark loses the benefit of the AUM generated by its capital and intellectual property.

It makes no sense that a notice under Section 6(c)(ii) would result in the ouster of Benchmark from its own Funds.

Second, Section 6(c)(ii) contemplates Benchmark giving "notice of its intent to terminate" the Agreement. A041 § 6(c)(ii). As noted above, a notice of intent to take some action in the future does not equate to taking that action.

Third, Section 6(c)(ii) is distinct from Section 6(c)(i), which allows Benchmark to terminate and simply walk away. Otherwise, Section 6(c)(ii) is superfluous. The distinction involves a proposal to reorganize, *i.e.*, to replace Pacer. Section 6(c)(ii) makes clear that any reorganization proposal is "subject to acceptance by the Trust in the sole discretion of the Trust's Board." *Id*. Section

6(c)(ii) is so framed because termination pursuant to a reorganization proposal is subject to approval by the Trust Board and shareholders, as required by the 1940 Investment Advisers Act.

That is why Section 6(c)(ii) uses the term "intent to terminate." Termination pursuant to a reorganization proposal is contingent on Board and shareholder approval. Once that approval is obtained, Benchmark would issue an actual termination notice under Section 6(c)(i), taking into account the timing required to transition to a new service provider.

Fourth, Section 6(c)(ii) does not state expressly that if the reorganization plan is rejected, the Agreement is terminated; neither does it spell out the related consequences and processes of such a termination (*e.g.*, how long of a transition period exists, the requirement that the Funds be liquidated, or the implications for the non-compete provision of the Agreement). Given the complexities of such a transition and the dire consequences to Benchmark, those details would have to be included for Pacer's construction to be correct.

Finally, an interpretation of Section 6(c)(ii) such that Benchmark must, *first*, terminate under Sections 6(c)(i) and, *second*, make a proposal for reorganization, is unworkable. How would Benchmark have standing to propose reorganization if it has terminated and ended its rights in the Funds? What if Benchmark provides Notice under Section (c)(ii) and never presents a reorganization proposal? Does the

Agreement remain in place indefinitely? If there is a period in which Benchmark still has rights after terminating (and concomitantly still has the payment and other obligations as sponsor and index provider), how long does that last? Here, two years elapsed between the initial Notice and purported termination *via* acceptance, during which both parties continued to perform under the Agreement.

What if, as here, Pacer fails to cooperate with Benchmark's reorganization plan, as Pacer was expressly required to do under Section 6(c)(ii), and instead seeks to build replacement indexes and proposes its own competing reorganization plan? Does Benchmark have to continue to cover costs and perform its obligations even though it has (under Pacer's construction) already terminated? At a minimum, there are factual issues raised by these questions.

The Superior Court's contrary reasoning that notice under 6(c)(ii) terminates the Agreement is unpersuasive. The Superior Court states that Section 6(c)(i) provides that Benchmark can terminate *via* "written notice." Op. at 16. The Superior Court then notes that under Section 6(c)(ii), Benchmark provides its notice of intent to terminate "in accordance with" Section 6(c)(i). *Id.* at 16–17. The Superior Court thus concludes:

> The Court notes this "in accordance with" language necessarily links the termination discussed in 6(c)(ii) with the method of termination defined in Section 6(c)(i), *i.e.*, "upon written notice." The Court acknowledges the difference between the phrases "written notice" of termination, and "intent to terminate," but finds this is a distinction without a difference given the context of the two phrases here. Section

> (c)(ii) plainly modifies Section (c)(i) and is thus limited by the terms of (c)(i), which broadly states "written notice," not "intent to terminate."

Id. at 17.

The Superior Court's conclusion does not follow the premise. Neither as a matter of grammar nor logic does the "in accordance" language convert a "notice of intent to terminate" into a "termination notice."

The "in accordance" language of Section 6(c)(ii) certainly links the two sections, but Section (c)(ii) does not "modify" Section (c)(i). That is not a reasonable interpretation. The two sections are distinct. Rather, the "in accordance" language only indicates only that ***when*** Benchmark terminates, it will do so under Section 6(c)(i). That is why Section 6(c)(ii) includes the word "intent." Otherwise, Section 6(c)(ii) would state: "In the event that Benchmark gives ***notice of termination*** of this Agreement under sub-section 6(c)(i)…."

In short, construing "intent to terminate" and "written notice of termination" as identical ignores the words selected by the parties and violates the cannon of construction under which Delaware courts "endeavor 'to give each provision and term effect' and not render any terms 'meaningless or illusory.'" *Weinberg v. Waystar, Inc.*, 294 A.3d 1039, 1045 (Del. 2023) (quoting *Manti Hldgs, LLC v. Authentix Acquisition Co., Inc.*, 261 A.3d 1199, 1208 (Del. 2021)).

The Superior Court also notes the "right but not obligation" language of Section 6(c)(ii). But that language only makes clear that Benchmark is not required

to propose a reorganization. When there are multiple options in an agreement, such as those under Section 6(c)(i) and Section 6(c)(ii), parties regularly include such clarifying language.

The Superior Court's related suggestion that Benchmark's interpretation renders Section 6(c)(i) superfluous is inaccurate. If Benchmark merely serves a notice of termination under Section (c)(i) — as opposed to a notice of intent to terminate under Section (c)(ii) — the Agreement is terminated. Reorganization is irrelevant under such a scenario. If, by contrast, Benchmark chooses to proceed under Section 6(c)(ii), it first provides a notice of intent to terminate under Section 6(c)(ii) and then, if its reorganization plan is approved, it provides its termination notice under Section 6(c)(i). It is Pacer's interpretation that negates portions of the Agreement, not Benchmark's.

Finally, the Superior Court concludes that the language in Exhibit C that "[i]n the event that Benchmark ***elects to terminate*** this Agreement any time after the initial two-year term" supports the conclusion that there is no distinction between terminate and intend to terminate. Op. at 21 (emphasis added). That is not the case. As an initial matter, Exhibit C provides the formula for Benchmark's payment to Pacer if Benchmark's reorganization plan is approved. It does not provide the mechanism for reaching that point; Section 6(c)(ii) provides that mechanism.

Relatedly, Exhibit C addresses a scenario in which Benchmark has terminated and its proposal has been approved. Only then do the compensation provisions of Exhibit C become relevant. Exhibit C does not expressly or impliedly address whether a notice of intention to terminate equates to actual termination. It would stand contractual interpretation on its head to use an exhibit, only relevant under certain conditions, to interpret and rewrite the specific, governing language of Section 6(c)(ii).

In any event, the language of Exhibit C supports Benchmark's interpretation. "Elects to terminate" indicates that actual termination has occurred. It stands in contrast with "intend to terminate," which indicates only a plan of action. Benchmark's construction of the Agreement requires actual termination, consistent with Exhibit C.

2. The Termination Provisions Confirm that Pacer Cannot Continue to Host the Funds without Compensating Benchmark.

The termination provisions of the Agreement, read together, lead to the same conclusion.

Section 6 provides a finite framework of actions that can terminate the Agreement. A041 § 6(a) ("This Agreement will remain in effect…unless and until terminated hereunder."). In the event that AUM are disappointing, Benchmark can simply terminate under Section 6(c)(i) and walk away. *Id.* § 6(c)(i).

Under Section 6(c)(ii), in the event that there substantial AUM, but Benchmark seeks to replace Pacer as its service provider, Benchmark can indicate its intent to terminate subject to approval of its plan to reorganize. If approved, Benchmark then provides its termination under Section 6(c)(i) and is required to pay Pacer half of the fair value of the Funds' assets as established by a methodology set forth in Exhibit C. A041–042 § 6(c)(ii); A051.

Finally, Section 6(c)(iii) provides that the Agreement terminates if the Trust Board (not Pacer) "approves the termination of a Fund's use of a Benchmark Custom Index without Cause ***and*** the Fund is liquidated." A042 § 6(c)(iii) (emphasis in original). If Pacer supports such termination, Pacer must pay Benchmark half of the fair value of the Funds' assets. A042 § 6(c)(iv); A052. The Pacer Trust Board (again, not Pacer) can terminate the Agreement by approving the termination of the Funds' use of a Benchmark Custom Index without cause ***and liquidating the Funds***.

In other words, the Agreement does not provide that Pacer can terminate Benchmark and certainly does not authorize Pacer to do so without liquidating the Funds and without paying Benchmark. Yet, that is exactly what Pacer did.

Moreover, the language of Section 6(c)(ii) stands in stark contrast to that of every other section addressing termination. Section 6(c)(ii) speaks in terms of an "intent to terminate." Every other provision addressing termination speaks in terms of actual termination, not an intent to do something later. *See* A041 § 6(a) ("unless

and until terminated"), *id.* § 6(b) ("Each party may terminate"); *id.* § 6(c)(i) ("This Agreement may be terminated"); A042 § 6(c)(iii) ("This Agreement shall terminate"); *id.* § 6(c)(iv) ("In the event that this Agreement is terminated"). This distinction is vital.

Finally, the intersection of the "change of control" and termination provisions further corroborates that Benchmark's interpretation is correct. As noted, Section (c)(i) provides that Benchmark cannot terminate prior to the expiration of the Initial Term unless there is a change of control at Pacer, which terminates the Agreement. A041 § 6(c)(i); *see also* A039 § 1(e) (Pacer change of control terminates the Agreement); A044 § 9(b)(ii).

Under the Pacer's and the Superior Court's construction, a notice under Section (c)(ii) is the equivalent of a notice under Section (c)(i) and Benchmark is deprived of the benefit of the AUM unless its plan to reorganize is approved. Put together, that means that if Pacer is correct, in the event of a Pacer change of control, Benchmark is required either to (i) terminate under Section (c)(i) and definitively be deprived of the benefit of the AUM, or (ii) terminate under Section (c)(ii) and risk being deprived of the benefit of the AUM unless the Pacer Trust approves Benchmark's proposal. That result eviscerates not only the termination provisions but also the change of control provisions (which protect Benchmark) and the overall nature of the relationship documented in the Agreement.

There is a simple solution that harmonizes these provisions — interpreting the "intent to terminate" language in accordance with its plain meaning as an indication of intent to take action in the future.

3. Pacer was a Service Provider

The broader structure of the Agreement solidifies this conclusion. *Weinberg*, 294 A.3d at 1044 ("We will read the contract as a whole and enforce the plain meaning of clear and unambiguous language.").

As described, Pacer is a service provider to Benchmark. Indeed, the underlying contract is an "ETF ***Services*** Agreement." A038 (emphasis added). Benchmark pays Pacer under the Agreement. Benchmark only receives payment if the Benchmark Funds generate a profit. A039–A040 § 2(a), (b), & (d). AUM is key to generating a profit. However, under the "white label" arrangement, Pacer hosts Benchmark's Funds. A082–A083 ¶¶ 29–31; *Nasdaq*, 431 F. Supp. 3d at 184–89.

As a result, if the Agreement is terminated and Pacer is not replaced, Pacer remains the ETF issuer and Benchmark loses the benefit of the AUM, which is exactly what happened here (when Pacer purportedly "accepted" Benchmark's termination offer).

Given Pacer is a service provider to Benchmark and AUM are critical to the success of the ETFs, it makes no sense that Benchmark would agree to an absurd "Russian roulette" reorganization procedure, under which Benchmark must propose

reorganizing the Funds into another investment adviser at the risk of Benchmark's own status as index provider and sponsor and the chance of losing the benefit of the AUM achieved because of Benchmark's capital investment and intellectual property.

4. Pacer was not permitted to "accept" Benchmark's termination.

Finally, the conclusion that Benchmark's Notices under Section 6(c)(ii) did not end its rights to the Funds and AUM is reinforced by Pacer's purported "acceptance" of Benchmark's termination. There is no such thing. *See* 3 Corbin on Contracts § 11.9 (2022) ("The 'option to terminate' does, indeed, give to a party a choice between terminating and not terminating; but it creates no power of acceptance (no power to consummate a new exchange).").

Pacer's letter states that it accepts Benchmark's "notices of termination pursuant to Sections 6(c)(i) and 6(c)(ii) of the ETF Services Agreement" and arbitrarily sets the effective date of termination as "October 31, 2022." A128. No such date was included in Benchmark's Notices.

With good reason, Pacer has now conceded that its acceptance did not effect a termination. A155 at 8:3–21. But there is no doubt, that is exactly what Pacer originally asserted. It did so because it knew that the Notices themselves did not terminate the Agreement, under which the parties continued to operate for almost two years.

In effect, *via* is improper acceptance, Pacer arrogated Benchmark's right to terminate without cause.

iii. At a minimum, the meaning of Section 6(c)(ii) and intent of the parties are factual issues not susceptible to a motion for summary judgment.

In the alternative, the Superior Court erred in holding that Section 6(c)(i) and (ii) the Agreement are unambiguous and there are no material facts in dispute. *GMG*, 36 A.3d at 783–84 (reversing summary judgment on the grounds that the contract was ambiguous and remanding).

Benchmark believes that the Agreement is clear that a notice under Section 6(c)(ii) does not, alone, effect termination. However, if the Court disagrees, it is undisputed that the Agreement does not expressly state that such Notice effects termination, even if a proposal to reorganize is rejected. "Where a contract is ambiguous, 'the interpreting court must look beyond the language of the contract to ascertain the parties' intentions.'" *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc*., 702 A.2d 1228, 1232 (Del. 1997) (citation omitted). Similarly, if Benchmark is not correct that a notice under Section 6(c)(ii) can never, alone, terminate the Agreement, Benchmark's intent as expressed in the Notices is a separate and distinct factual issue.

Even though Pacer had produced virtually no documents before filings its Summary Judgment Motion, such evidence of intent abounds here. Benchmark

submitted an Affidavit from Mr. Kelly, Benchmark's Founder and Managing Partner, and the individual who negotiated the Agreement for Benchmark. In it, he explained that his reasonable interpretation of the Agreement was that providing a notice of intent as described in Section 6(c)(ii) was not providing written notice of termination and he did not intend to terminate the Agreement with the Notice alone. Rather, he was providing notice of intent to terminate the Agreement, which was contingent upon approval of the plan to reorganize. A144 ¶ 5.

Further, following Benchmark's Notices, the parties continued to operate under the Agreement from November 17, 2020 to October 14, 2022, while Pacer employed a variety of delay tactics to avoid a reorganization. During this time, Pacer continued to collect fees pursuant to the Agreement and never once indicated that it understood the Notices to effectuate termination. In fact, in a conversation, a principal of Pacer indicated to Mr. Kelly that if the Pacer Trust rejected the reorganization plan, the parties would simply continue to operate under the Agreement. A061. Similarly, the documents relating to the negotiating history of the termination provisions are clear that Benchmark refused Pacer's request for the right to terminate without cause and Pacer understood that Benchmark could not be ousted without compensation. A211; A027–A036.

By the time the motions for summary judgement were briefed, Pacer had steadfastly refused to produce virtually any documents in response to Benchmark's

discovery requests. No depositions have taken place, and no expert reports have been submitted. Thus, at a minimum, there exists a question of fact as to Benchmark's intent in sending the Notices, and the parties' meaning and intention for the processes set forth in Sections 6(c)(i)-(ii). Regardless, it is not a matter of fact that an intent to do something is not actually doing it as evidenced by the language of the Agreement.

CONCLUSION

For the foregoing reasons, this Court should reverse the dismissal of the action and remand to the Superior Court as outlined above.

Dated: October 29, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2025, I caused a true and correct copy of the foregoing document to be served upon the following counsel of record via File & Serve*Xpress*:

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