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Case Number 378,2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BENCHMARK INVESTMENTS LLC (d/b/a KELLY BENCHMARK INDEXES),	)	No. 378,2025
Plaintiff Below/Appellant,	)	Appeal from the Superior Court of the State of Delaware:
v.	)	C.A. No. N23C-03-171 MAA [CCLD]
PACER ADVISORS, INC.,	)	
Defendant Below/Appellee.	)	

APPELLEE'S ANSWERING BRIEF

Dated: November 26, 2025

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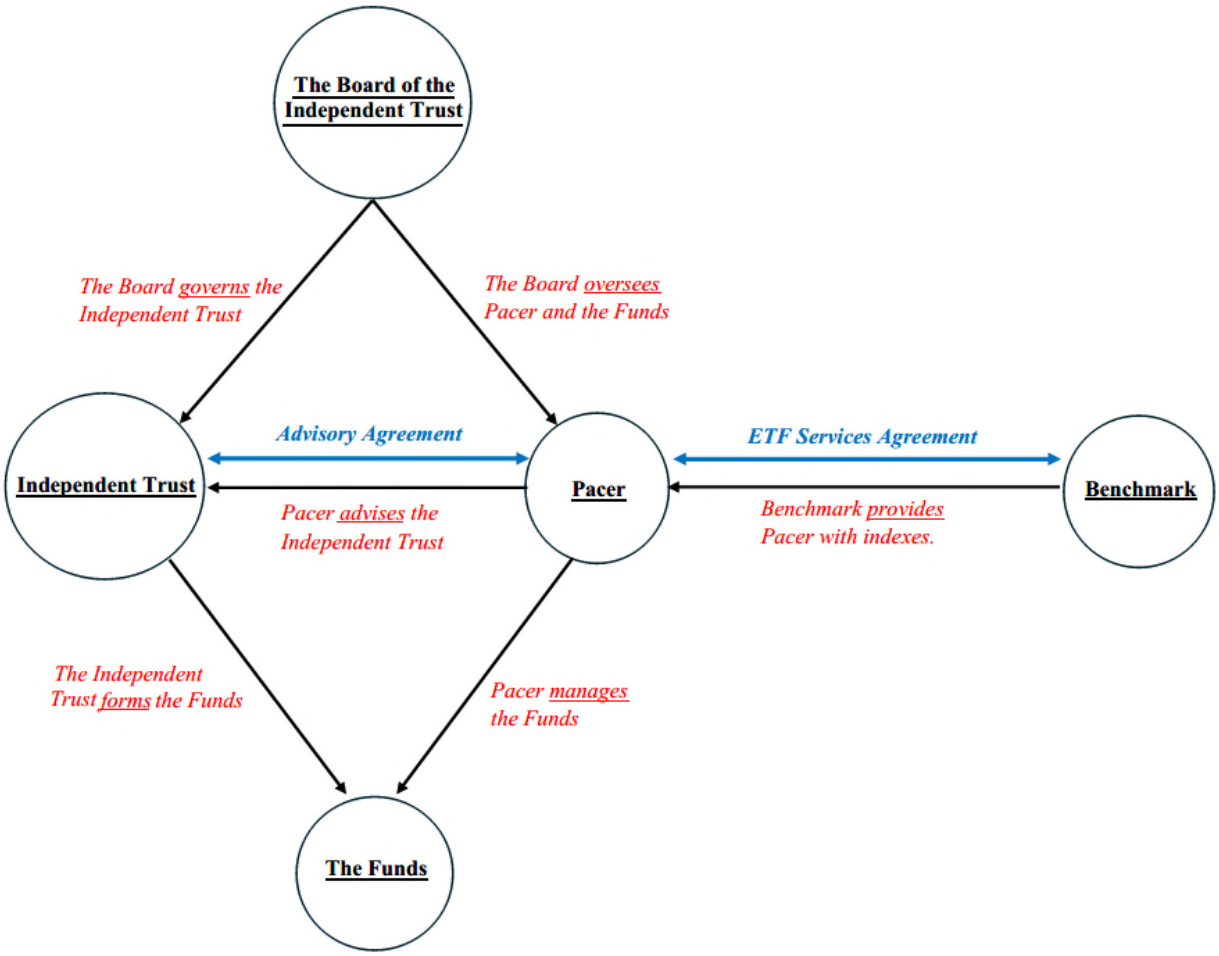
NATURE OF THE PROCEEDINGS

This appeal concerns the interpretation, construction, and application of specifically negotiated termination provisions contained in a financial services agreement involving highly-regulated securities known as exchange traded funds ("ETFs"). Plaintiff/Appellant Benchmark Investments, LLC ("Benchmark") is a third-party ETF index service provider. Defendant/Appellee Pacer Advisors, Inc. ("Pacer") is an SEC-regulated investment adviser. They are parties to an ETF Services Agreement (the "Agreement") dated November 21, 2017.

The ETFs at issue here, for which Benchmark provided its custom indexes under the Agreement (the "Funds"), are part of a shareholder trust overseen by an independent board of fiduciaries (the "Independent Fiduciary Trust") with investor disclosure obligations governed by the Investment Company Act of 1940. The chart below reflects the relationship among Benchmark, Pacer, the Funds, and the Independent Fiduciary Trust:



See generally Agreement (A038–54); *see also* B244.

Benchmark provided written notice to Pacer—in November 2020 and again in April 2021—that it was terminating the Agreement without cause in accordance with Section 6(c)(i) (the "Termination Notice"). A121; A124. Pacer acknowledged receipt of the Termination Notice. B001. Between April 2021 and August 2022, Benchmark sent *more than a dozen* separate communications to Pacer and the Independent Fiduciary Trust referencing and confirming its intention to terminate the Agreement in accordance with Section 6(c)(i). B008–12, B020–50.

Benchmark confirmed at the outset of this matter that Section 6(c) contained the "specific termination rights negotiated by the Parties." A017. Indeed, Section 6(c) was specifically negotiated such that—as between Pacer and Benchmark—*only* Benchmark could terminate the Agreement without cause. Benchmark construes Section 6(c)(i) as such:

> Benchmark, but not Pacer, can terminate without cause (without a proposed reorganization), in which case Benchmark would no longer provide its Benchmark Custom Indexes for the Funds.

B251. According to Benchmark, it "can simply terminate under Section 6(c)(i) and walk away" with its custom indexes for use in another fund. Appellant's Opening Brief ("OB") at 27; *see also id.* at 22. In this respect, Benchmark's interpretation and construction of Section 6(c)(i) is plainly correct.

Section 6(c) was also specifically negotiated to provide Benchmark with a potentially lucrative right—*i.e.*, the chance to successfully reorganize the Funds using Benchmark's custom indexes. Benchmark could only trigger this right after confirming its intent to terminate the Agreement without cause *via* a Section 6(c)(i) written notice:

> *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.

A041–42 (emphasis added).

Section 6(c)(ii) makes clear that *if* Benchmark elects to terminate the Agreement and propose a reorganization of the Funds, the Independent Fiduciary Trust has "sole discretion" to accept or reject the reorganization proposal. OB 22.

That is, if the Independent Fiduciary Trust discerns Benchmark's proposal to serve the best interests of the Funds' shareholders, it may accept it. If the proposal does not serve the best interests of the Funds' shareholders, it may be rejected.

In either event—acceptance *or* not—the Agreement terminates without cause in accordance with Section 6(c)(i). The Independent Fiduciary Trust effectuates the termination of the Agreement by making changes to the Funds and authorizing the filing of securities disclosures directed to the Funds' shareholders. Op. 19, 21-23.

The trial court correctly determined that Pacer's proffered construction of the Agreement is the only reasonable construction of Section 6(c)'s specifically negotiated termination provisions and granted summary judgment thereupon. Op. 18–19, 22.

The trial court also correctly rejected Benchmark's alternate construction (and primary argument in this appeal): *i.e.*, that a written notice given in accordance with Section 6(c)(i) is only effective "subject to" and "contingent upon" approval of the reorganization proposed under Section 6(c)(ii). *See* OB 26 ("If…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).")(emphasis added).

Benchmark thus insists that written notice given under Section 6(c)(i) is rendered *ineffective* when the Independent Fiduciary Trust declines to approve a reorganization proposed *via* Section 6(c)(ii). This Court, like the trial court, cannot reasonably ascribe that meaning, construction, or application to Sections 6(c) for at least three reasons.

First, it is entirely untethered to any language in the Agreement's "specifically negotiated" termination provisions. There is no 'contingent' termination language in Section 6(c), and no language by which the 6(c)(i) condition precedent termination becomes ineffective under Section 6(c)(ii).

Second, Benchmark's tortured interpretation of "intent" as used in Section 6(c)(ii) would impermissibly render that section's reference to Section 6(c)(i) illusory and meaningless. OB 28 ("Under Section 6(c)(ii),…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)…" (emphasis added)). If Benchmark had an option/right to propose a reorganization of the Funds *at any time* or *however often* it saw fit, Section 6(c)(ii) would not require Section 6(c)(i) as a condition precedent to trigger the option/right.

Finally, Benchmark's proffered application of Section 6(c)(ii) would create an absurdity of circular termination notices and reorganization proposals. Benchmark writes: "Once [reorganization] approval is obtained, Benchmark would issue an *actual* termination notice under Section 6(c)(i)…" OB 23 (emphasis added). That application of Section 6(c) does away with the condition precedent of written notice under Section 6(c)(i). That application creates a non-existent contingency (*i.e.*, 'once approval is obtained'). And that application erroneously grants a perpetual option/right for Benchmark to submit a reorganization proposal under Section 6(c)(ii) "over and over and over" (A185), "the quarter after that, and then the quarter after that." *See* A061 (Benchmark's principal confirming "that is my plan."). Benchmark's application of Section 6(c)(ii) impermissibly decouples it altogether from the expressly required condition precedent—a without cause termination 'in accordance with' Section 6(c)(i).

When pressed by the trial court during oral argument to harmonize Sections 6(c)(i) and (ii), Benchmark's counsel could not explain away the 'absurd result' of its proffered application: "Even if that were an absurd result in terms of you shouldn't be allowed to do that…[,] it doesn't change something into a termination that wasn't a termination." A185.

The trial court correctly rejected that argument.

~

In this case, Benchmark indisputably provided written notice that it was terminating the Agreement without cause in accordance with Section 6(c)(i). Benchmark thereafter indisputably exercised its option/right under Section 6(c)(ii) and proposed a reorganization of the Funds (the "Reorganization Proposal"). The Independent Fiduciary Trust indisputably rejected the Reorganization Proposal. The Independent Fiduciary Trust indisputably properly authorized changes to the Funds and notified the Funds' shareholders *via* securities filings that: (i) Benchmark terminated its services as index provider, and (ii) the Funds' names, index provider, and investment strategy changed. A130–133.

Thus, the trial court correctly ruled that there was no material fact in dispute and that *Benchmark's* without cause termination of the Agreement was effective in all respects. The trial court rulings must be affirmed.

SUMMARY OF ARGUMENT

1. Denied. As set forth more fully herein, the Court's analysis may begin and end with the plain language and simple effect of Section 6(c)(i): Benchmark intended to terminate the Agreement without cause so it gave written notice to Pacer. Benchmark specifically negotiated for the *exclusive* ability to terminate the Agreement without cause under Section 6(c)(i), along with an *exclusive* option/right *via* Section 6(c)(ii) that could *only* be exercised *after* Benchmark terminated the Agreement "in accordance with" Section 6(c)(i). Benchmark's Section 6(c)(i) written notice was effective when given to Pacer—*whether or not* Benchmark exercised the right to submit a Reorganization Proposal under Section 6(c)(ii) and *whether or not* Benchmark's Reorganization Proposal was accepted by the Independent Fiduciary Trust. Only the Independent Fiduciary Trust had the authority and ability to effectuate the termination/cessation of services under the Agreement through board-authorized changes to the Funds and accompanying securities disclosures. OB 10,11; Op. 19, 21-23. Here, the Independent Fiduciary Trust did so at the time it rejected Benchmark's Reorganization Proposal. The trial court's ruling is correct and must be affirmed.

STATEMENT OF UNDISPUTED FACTS

The Agreement is a "valid, binding contract, which sets forth the Parties' obligations." Ans. ¶ 111 (B169).

The Agreement is unambiguous. B224 (citing B204). Section 6 of the Agreement was "specifically structured" by the parties (Am. Compl. ¶ 5 (A074)) and contains "the specific termination rights negotiated by the parties" (*Id.* at ¶ 43 (A088)). Section 6 states:

> **6. Term of Agreement.**
>
> (a) Initial Term; Renewal.
>
> This Agreement will remain in effect for a period of two years from the commencement of operations of the first Fund to be organized and operated under this Agreement ("Initial Term") and will automatically renew for successive periods of one year (each a "Renewal Term" and together with the Initial Term, the "Term") unless and until terminated hereunder.
>
> (b) Termination for a Material Breach.
>
> Either party may terminate this Agreement for a material breach by the other party of this Agreement that is not cured within thirty (30) days' notice thereof. Termination of this Agreement will not affect the rights and obligations of the parties arising prior to such termination, and such rights and obligations will survive to the extent necessary to effectuate this Agreement for periods prior to such termination.
>
> (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 interest 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.

A041–42.

Benchmark gave written notice to Pacer on November 17, 2020 and April 22, 2021, both in accordance with Section 6(c)(i), confirming its intent to terminate the Agreement without cause "effective no earlier than May 6, 2021." A121; A124; A144–45.

Pacer acknowledged receipt of the written notice on April 28, 2021. B001.

Benchmark's written notice to Pacer under Section 6(c)(i) did not immediately terminate any services being performed by Benchmark or Pacer under the Agreement. B226 (citing B204); OB 12. Benchmark contemporaneously confirmed its exercise of the option/right under Section 6(c)(ii) to propose a reorganization. B226; A121; A124.

Benchmark also confirmed directly to the Independent Fiduciary Trust that it had given Pacer written notice in accordance with Section 6(c)(i), and that a reorganization proposal was forthcoming under Section 6(c)(ii). A135–36; A145.

Benchmark submitted a Reorganization Proposal in February 2022 and the Independent Fiduciary Trust thereafter requested information and conducted diligence concerning the proposal. OB 13.

The Independent Fiduciary Trust rejected Benchmark's Reorganization Proposal on October 14, 2022. A126. Contemporaneously with its rejection of Benchmark's Reorganization Proposal, the Independent Fiduciary Trust authorized changes to the Funds names, indexes, and investment strategies that would become

"effective as of November 1, 2022," and made a series of securities filings through which it notified the Funds' shareholders of the same. A130–33.

Benchmark did not sue the Independent Fiduciary Trust. OB 15. Benchmark does not otherwise challenge the propriety of the Independent Fiduciary Trust's (i) rejection of the Reorganization Proposal, (ii) recognition that Benchmark terminated its services as index provider to the Funds, or (iii) authorizations, directions, and disclosures of changes to the Funds. OB 14.

ARGUMENT

I. BENCHMARK TERMINATED THE AGREEMENT.

A. Question Presented: Did not Benchmark terminate the Agreement without cause by and through written notice given in accordance with Sections 6(c)(i) and 6(c)(ii)? B185–87 (¶¶ 21–30); *see also* OB 8 ("This case hinges on whether the [Termination] Notices effectuated a termination of the Agreement without cause pursuant to Section 6(c).").

B. Scope of Review

This Court "review[s] questions of contract interpretation *de novo.*" *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)).

C. Merits of Argument

i. Applicable Law

The apex goal of contract interpretation is to give "sensible life to a real-world contract." *Chicago Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 913–14 (Del. 2017), *as revised* (June 28, 2017). Breathing sensible life into real-world contracts requires that Delaware courts interpret their plain meaning to avoid absurd results. *See Manti Holdings, LLC v. Authentix Acquisition Co., Inc.*, 261 A.3d 1199, 1211 (Del. 2021). "Delaware law adheres to the objective theory of contracts, *i.e.*, a contract's construction should be that which would be understood

by an objective, reasonable third party." *Salamone v. Gorman*, 106 A.3d 354, 367–68 (Del. 2014).

Delaware courts "will read the contract as a whole and enforce the plain meaning of clear and unambiguous language." *Waters v. Delaware Moving & Storage, Inc.*, 300 A.3d 1, 21 (Del. Super. Ct. 2023). Delaware's courts do not rewrite contracts to add or read-in language that could have been, but was not, agreed to at the negotiating table. *Outbox Sys., Inc. v. Trimble Inc.*, 2022 WL 3696773, at *10 (Del. Super. Ct. Aug. 24, 2022); *GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2012 WL 2356489, at *7 (Del. Ch. June 21, 2012). And Delaware courts "endeavor to interpret a contract's meaning so that each provision and term is given effect without rendering any terms 'meaningless or illusory.'" *Waters*, 300 A.3d at 21 (quoting *Weinberg v. Waystar, Inc.*, 294 A.3d 1039, 1044 (Del. 2023)); *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010).

A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction. Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings. *Rhone-Poulenc Basic Chemicals Co. v. American Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992). Ambiguity does not exist where the court can determine the meaning of a contract "without any other guide than a knowledge of the simple facts on which, from the

nature of language in general, its meaning depends." *Id.* Courts will not torture contractual terms to impart ambiguity where ordinary meaning leaves no room for uncertainty. *Id.* The true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant. *Rhone-Poulenc*, 616 A.2d at 1196.

ii. Written Notice Given Under Section 6(c)(i) Has A Plain Meaning, A Lone Reasonable Construction, And A Single Effect: It Confirms Benchmark's Intent To Terminate Without Cause.

There is *only* one path for a party to the Agreement to terminate it without cause. And *only* Benchmark can go down that path.

Benchmark confirms this in its complaint: "However, only Benchmark could terminate the Agreement without cause, and only after the end of the Initial Term. Under Section 6(c)(i), *in order to terminate the Agreement*, Benchmark would have to send Pacer a 'written notice' of termination." (Am. Compl. ¶ 44 (A088)) (underlined in original; emphasis added). Benchmark construes Section 6(c)(i) as follows:

> Benchmark, but not Pacer, can terminate without cause (without a proposed reorganization), in which case Benchmark would no longer provide its Benchmark Custom Indexes for the Funds.

B251.

> 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).

B198.

In its Opening Brief, Benchmark twice proffers the 'simple' effect of a written notice given in accordance with Section 6(c)(i): "…Benchmark can simply terminate

under Section 6(c)(i) and walk away" (OB 27), and "…Section 6(c)(i), which allows Benchmark to terminate and simply walk away." OB 22.

Pacer plainly reads and construes Section 6(c)(i) the same way as Benchmark does above.

iii. Written Notice Terminating the Agreement In Accordance With Section 6(c)(i) Is A Condition Precedent To Section 6(c)(ii)'s Applicability.

Section 6(c)(ii) is not a "second path" for Benchmark to terminate the Agreement without cause. Section 6(c)(ii) involves the *same, only path* (plainly construed above) that *only* Benchmark can go down: written notice given under Section 6(c)(i).

Section 6(c)(ii) provides, in pertinent part:

> 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.

A041 (emphasis added). Section 6(c)(ii) is a bespoke provision "specifically structured" (Am. Compl. ¶ 5 (A074)) by the parties to create an exclusive option for Benchmark (*i.e.*, a "right but not the obligation") to propose a reorganization of the Funds. But Benchmark's exclusive option/right arises *only* "[i]n the event" that Benchmark first acts "in accordance with Section 6(c)(i)." A041.

Here, Sections 6(c)(i) and (ii) must be read and construed together. Section 6(c)(ii) does not ascribe a different meaning or effect to Section 6(c)(i). Section 6(c)(ii) begins with conditional language (*i.e.*, "In the event that"). The phrase "in the event that" is synonymous with "if." *See Earthgrains Baking Companies Inc. v.*

Sycamore Fam. Bakery, Inc., 573 Fed. Appx. 676, 680 (10th Cir. 2014) (citing Webster's Third New International Dictionary 1124 (1993) ("if" defined as "in the event that"); VII Oxford English Dictionary 633–34 (2d ed.1989)). The "event" (*i.e.*, "in the event") that must first take place is that Benchmark "gives notice of its intent to terminate this Agreement *in accordance with sub-section 6(c)(i)*." A041–42. The phrase "in accordance with" links the sections together. *See Delta & Pine Land Co. v. Monsanto Co.*, 2006 WL 1510417, at *3 n.15 (Del. Ch. May 24, 2006). Here, that link is crucial because the consequence of Benchmark giving Pacer written notice under Section 6(c)(i) is that a termination of the Agreement without cause is set in motion—*whether or not* Benchmark elects to exercise the option/right arising under Section 6(c)(ii) and *whether or not* a reorganizational proposal is accepted.

There is no contingency language anywhere in Section 6(c) indicating that Benchmark's Section 6(c)(i) written notice 'is not effective until' or 'is only effective if' a reorganization proposal is approved under Section 6(c)(ii). Similarly, there is no language anywhere indicating that a Section 6(c)(i) written notice becomes ineffective upon rejection of a reorganization proposal made under Section 6(c)(ii).

Benchmark's appeal eschews a plain construction. Benchmark proffers various alternate constructions—but none honor the plain language of the Agreement and each seek to rewrite Sections 6(c)(i) and 6(c)(ii).

First, Benchmark proclaims that it "merely sent a reorganization notice, *not* a termination notice." OB 20 (emphasis added). This position defies the indisputable reality of the *actual* written termination notice given by Benchmark in accordance with Section 6(c)(i). *See* A121 ("Please accept this email as written notice of Benchmark's intent to terminate the ETF Services Agreement, . . ."). Moreover, the term or concept of a 'reorganization notice' cannot be found anywhere in the Agreement.

Second, the Opening Brief argues that: "…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." OB 23 (emphasis in original). This interpretation ignores the express condition precedent that triggers Section 6(c)(ii): "[i]n the event that Benchmark gives notice…in accordance with Section 6(c)(i), Benchmark shall have the right but not the obligation…" A041.

Third, the Opening Brief maintains that: "Under Section 6(c)(ii),… 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)..." OB 28 (emphasis added). *See also* OB 26 ("If,…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).”). Simply put, Benchmark can only propose a reorganization under Section 6(c)(ii) if it first provides written notice confirming its intent to terminate the Agreement in accordance with Section 6(c)(i).

This flawed construction impermissibly (i) reorders the triggering ‘event that’ Benchmark gives Pacer written notice ‘in accordance with’ Section 6(c)(i) to some later time, *i.e.*, ‘*then, if* its reorganization plan is approved,’ and (ii) rewrites Section 6(c)(ii) to add a “subject to approval” contingency that does not exist.

Finally, Benchmark argued to the trial court that there was “…simply no textual basis for concluding that Benchmark is required to terminate under Section 6(c)(ii) and await its fate, a fate that rests beyond its control.” But that is precisely the simple ‘textual basis’ construction of Section 6(c)(ii). Benchmark is plainly required to *first* give written notice in accordance with Section 6(c)(i) *before* the “fate” of a Benchmark-proposed reorganization can even be considered under Section 6(c)(ii).

Benchmark’s alternate constructions are not reasonable and should be rejected in this appeal. Pacer proffered the only reasonable construction of Section 6(c)(i)-(ii). The trial court correctly ruled the same. Op. 19.

iv. No Language In The Agreement Makes Section 6(c)(i) Termination "Subject To" Or "Contingent Upon" Acceptance Of A Reorganization Proposal.

Benchmark insists that its Termination Notice was "*contingent upon the Trust's approval* of Benchmark's reorganization plan . . ." Am. Compl. ¶ 45 (A088–89) (emphasis added); A144–45 ("I intended to give notice of intent to terminate, *contingent on* the Trust's approval of the plan of reorganization . . .") (emphasis added); B212–13 (Benchmark only "intended to provide notice of intent to terminate the Agreement, which was *contingent upon approval* of the plan to reorganize.") (emphasis added).

Benchmark's reading and construction of Section 6(c)(i) and (ii) to be 'contingent upon approval' is not reasonable because no such language exists in the Agreement and cannot be read-in by a Delaware court. *Dover Glass-Works Co. v. Am. Fire Ins. Co.*, 29 A. 1039, 1041 (Del. 1894) ("It is the province of courts to interpret, and not to make, contracts,—to ascertain the legal import of the language employed by the parties themselves to express their agreements, and not to add to or take from, in order to make ideal contracts.").

Benchmark explains that if its proposed reorganization is rejected, "the Agreement continues until one of the terminating actions of Section 6 occurs." B199. Benchmark self-servingly described how the "contingency" would operate:

> Benchmark noticed an intent to terminate the Agreement by proposing a reorganization, subject to the Trust Board's approval of the plan, and subsequently a shareholders' vote. When the Trust rejected Benchmark's proposal for reorganization, Pacer continued to serve as the Funds' investment adviser until one of the terminating actions specified in Section 6 of the Agreement occurred. That never happened.

B209 (emphasis added).

But "one of the terminating actions specified in Section 6" *did* actually occur—it had already happened: Benchmark indisputably gave written notice "in accordance with" Section 6(c)(i) that it intended to terminate the Agreement without cause, *i.e.*, 'walk away' and no longer provide its custom indexes for use by the Funds. Benchmark's written notice did not vanish or otherwise become ineffective when the Independent Fiduciary Trust rejected the proposed reorganization. B209. There is no language in Section 6 or anywhere else in the Agreement supporting Benchmark's proffered construction. Op. 19.

Crediting Benchmark's reading and construction would also render illusory and meaningless the condition precedent of "written notice" given in accordance with Section 6(c)(i). That violates basic tenets of Delaware contract principles. *Waters*, 300 A.3d at 21 ("Courts should endeavor to interpret a contract's meaning so that each provision and term is given effect without rendering any terms 'meaningless or illusory.'") (quoting *Weinberg*, 294 A.3d at 1044).

The trial court correctly rejected Benchmark's construction on that basis. Op. 19, 22. Benchmark's appeal must be denied on that same basis.

v. Effective Written Notice Under Section 6(c)(i) Does Not Require A Specific Termination Date.

In this appeal, Benchmark seeks to add a new 'specific date' requirement that exists nowhere in the "specifically structured" (A074), "specific termination rights negotiated by the parties." A088. The Opening Brief insists that: "…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." OB 20 (emphasis added). Benchmark maintains that written notice under Section 6(c)(i) is not 'proper' or effective where it fails to include a "definite date," "specific date," or "date certain." OB 10, 18; B193–94, B198, B204–05, B208, B210, B213.

But a plain reading and simple construction of Section 6(c)(i) shows Benchmark is not required to specify a termination date. The only applicable requirements specified in Section 6(c)(i) is that notice be "written" and given "to Pacer" A041.

The trial court easily dispensed with this argument, ruling: "Benchmark cannot now read in a date requirement that is not there." Op. 17. The trial court also correctly observed that if specifying a "definite date" was necessary for a written notice to be effective under Section 6(c)(i), the parties would have so provided in the specifically negotiated termination provisions contained in the Agreement. *Id*.

Benchmark's appeal must be denied on that same basis.

vi. Benchmark's Affidavit Submission Does Not Raise A Genuine Issue Of Triable Fact.

Benchmark insists that "there exists a question of fact as to Benchmark's intent in sending the Notices." AB at 21; AB at 13. Benchmark cites to an affidavit submitted by its principal, Kevin Kelly, to support the proposition that "the only evidence as to Benchmark's intent indicates that it did not intend to terminate." B213 (emphasis added).

First, Benchmark's position cannot be reconciled with *Benchmark's own* express language in *Benchmark's own* written notice under Section 6(c)(i) attached as Exhibit B to *Benchmark's own* complaint: "Please accept this email as written notice of Benchmark's intent to terminate the ETF Services Agreement, . . ." A121 (emphasis added). In addition, Benchmark directed more than a dozen separate writings to Pacer or the Independent Fiduciary Trust between April 2021 and August 2022 confirming its intent to terminate the Agreement under Section 6(c)(i). B008–12, B020–50. These included:

- August 24, 2021 letter from Benchmark:
"[. . .] Benchmark had provided [Pacer] with written notice on April 22, 2021 of Benchmark's intent to terminate the Agreement in accordance with sub-section 6(c)(i)."

- August 25, 2021 email from Kelly to Pacer:
"[. . .] I informed you in April of Benchmark's intent to terminate the agreement and reorganize the funds."

- October 26, 2021 email from Kelly:

". . . Benchmark had provided [Pacer] with written notice on April 22, 2021 of Benchmark's intent to terminate the Agreement in accordance with sub-section 6(c)(i) . . ."

- November 18, 2021 email from Benchmark:

". . . Pacer was notified on April 22, 2021 of Benchmark's intent to terminate the Agreement in accordance with sub-section 6(c)(i) (termination without cause) . . . This termination did not require the approval of the [Independent Trust]."

- February 22, 2022 letter to the Independent Trust:

"Kelly provided Pacer Advisors with written notice on April 22, 2021 of its intent to terminate the ETF Services Agreement, dated November 21, 2017, in accordance with subsection 6(c)(i) . . ."

- February 24, 2022 Reorganization Proposal:

"[Benchmark] provided written notice on April 22, 2021 of its intent to terminate the Agreement in accordance with sub-section 6(c)(i), and proposed at that time a reorganization . . ."

- March 24, 2022 email from Kelly:

"I informed Pacer in April 2021 of Benchmark's intent to terminate the agreement and reorganize the funds."

- March 31, 2022 email from Benchmark:

"As you are aware, Pacer was notified on April 22, 2021 of Benchmark's intent to terminate the Agreement in accordance with sub-section 6(c)(i) (termination without cause), and intent to propose a reorganization of the ETFs with and into another registered investment company."

- April 1, 2022 letter from Benchmark:

". . . Benchmark's prior notice that it was terminating the Agreement without cause and its proposed plan of reorganization."

- April 4, 2022 email from Kelly:
"... we have previously provided our intent to terminate the Agreement and to reorganize the SRVR & INDS ETFs into a new series trust."

- June 3, 2022 letter from Benchmark to the Independent Trust: "Benchmark has given notice of its intention to terminate its Services Agreement with PACER and is proposing the Reorganizations to the Board."

- July 1, 2022 letter from Benchmark:
"Pacer also has not conducted joint marketing efforts with [Benchmark] since [Benchmark] has given the notice to terminate the ETF Services Agreement."

- August 30, 2022 letter to the Independent Trust:
"By its terms, the ETF Services Agreement clearly gives [Benchmark] the right to terminate the Agreement and propose the reorganization of the Funds."

See B008–12. Benchmark's *own* express, repeated, objective manifestations confirming its intent to terminate the Agreement ought prevail here.

Second, the affidavit does not raise an issue of disputed fact that is *material*. Kelly's subjective state of mind concerning his personal intent simply does not matter. *See Black Horse Cap., LP v. Xstelos Holdings, Inc.*, 2014 WL 5025926, at *16 (Del. Ch. Sept. 30, 2014) ("The relevant inquiry, however, is not what the parties' subjective intent was then or is currently. This Court, and all Delaware courts, look to the parties' outward manifestations of intent and construe them according to the meaning they would have in the eyes of a reasonable person in like

circumstances—*i.e.*, their objective meaning."). A contract's construction as understood by an objective, reasonable third party does matter. *Salamone v. Gorman*, 106 A.3d 354, 367–68 (Del. 2014).

The essence of Kelly's affidavit merely confirms (i) his subjective belief about the legal effect of Benchmark giving written notice to Pacer under Section 6(c)(i); and (ii) Kelly's subjective misunderstanding of how Section 6(c)(i) and 6(c)(ii) would operate as a matter of law. Here, the trial court correctly held that "[t]he subjective intent of any party or a party's interpretation of the terms does not override the contractually-agreed-to terms of the Agreement." Op. 15.

Thus, Kelly's affidavit does little more than masquerade subjective issues of contract misinterpretation as disputed material facts concerning the Agreement. The trial court correctly discerned that no triable fact issues were implicated by Kelly's affidavit and then correctly adjudicated the cross-motions in favor of Pacer's Section 6(c) construction. This same result favors in this appeal.

vii. Benchmark's Proffered Construction Involves A Tortured Reading Of The Specifically Negotiated Termination Provisions In The Agreement.

Throughout this appeal, as in its cross-motion below, Benchmark tortures the language of Section 6(c) in a way that renders it unrecognizable.

Benchmark contends that its written notice "did not express a present intent to terminate, as required by Section 6(c)(i)." OB 18. It then says of Section 6 (c)(ii): "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." OB 20.

Benchmark tries to explain this cramped view by noting that: "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." OB 21. Benchmark then posits that the term or notion 'elects to terminate,' 'stands in contrast with' the term or notion 'intent to terminate.' *See* OB 27.

All of this, Benchmark says, raises material fact issues "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)." OB 34 ("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.").

But this tortured reading/analysis of the term or notion of "intent" *viz* a termination notice does not create an ambiguity in Section 6(c). It does not raise a fact issue at all concerning Benchmark's written notice given in accordance with Section 6(c)(i). This Court may, like the trial court did, ascribe to Section 6(c)(i) an ordinary, reasonable meaning—the *only* reading for this unambiguous provision—which leaves no room for the uncertainty that Benchmark's tortured reading invokes.

That is, when a party to an agreement provides written notice confirming that it has elected to terminate the agreement, surely it reflects that party's 'intent to terminate' the agreement. Surely written notice confirming a party's 'intent to terminate' an agreement concomitantly confirms that party's intent that such termination is effective and will be effectuated. And surely under Delaware law a counter-party, as well as *here* a non-party Independent Fiduciary Trust, in receipt of such written notice may rely upon the same.

Benchmark's construction does not give 'sensible life' to a real world application of the Agreement. It makes a real world application of Section 6(c)'s specifically negotiated termination provisions impossible. Benchmark contends that it can give effective written notice of its intent to terminate the Agreement without cause under Section 6(c)(i) such that it triggers Benchmark's Section 6(c)(ii)

option/right. But Benchmark also contends that Pacer (and the Independent Fiduciary Trust) cannot rely upon the effectiveness of that written notice because it is subject to Benchmark subjective intent as to whether the Agreement can actually be terminated.

"Courts will not torture contractual terms to impart ambiguity where ordinary meaning leaves no room for uncertainty." *Rhone-Poulenc*, 616 A.2d at 1196. And they will not relieve sophisticated parties of contracts they willingly accepted. *See, e.g.*, *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010) (The Court "must assess the parties' reasonable expectations at the time of contracting and not rewrite the contract to appease a party who later wishes to rewrite a contract he now believes to have been a bad deal. Parties have a right to enter into good and bad contracts, the law enforces both.") (citation omitted); *see also DeLucca v. KKAT Mgmt., L.L.C.*, 2006 WL 224058, at *2 (Del. Ch. Jan. 23, 2006) ("[I]t is not the job of a court to relieve sophisticated parties of the burdens of contracts they wish they had drafted differently but in fact did not.").

The trial court correctly rejected Benchmark's efforts to retrade the specifically negotiated termination provisions, and to rewrite the plain meaning of 'intent' in the termination provisions of Section 6(c). The appeal must be denied.

II. BENCHMARK'S OPENING BRIEF PRESENTS ISSUES NOT FAIRLY RAISED BELOW.

Benchmark's Opening Brief raises a series of arguments posed as "questions" that were plainly not raised below. *See* OB 23–24 (*e.g.*, "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?" "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," says Benchmark in its Opening Brief, "there are factual issues raised by these questions." OB 24.

But Benchmark *cross-moved* for summary judgment, thereby stipulating that there were no disputed issues of material fact. *See* Del. Super. Ct. Civ. R. 56(h). Benchmark raises these hypothetical issues for the first time on appeal in an effort to manufacture one or more fact disputes. Consideration of these issues should be rejected for the following reasons.

First, "these questions" were not posed as fact or legal questions (nor were answers proffered) during the proceedings before the trial court. This Court may

decline to consider them as such. *Ravindran v. GLAS Trust Company LLC*, 327 A.3d 1061, 1078 (Del. 2024). ("Under Supreme Court Rule 8 and general appellate practice, this Court may not consider questions on appeal unless they were first fairly presented to the trial court for consideration.").

Second, to the extent "these questions" are now claimed to raise "factual issues," they are plainly barred by the record Benchmark made below. Benchmark cross-moved for summary judgment, but also proffered an affidavit to suggest a lone potential fact dispute concerning the "intent" of the Section 6(c)(i) written notice given to Pacer. The trial court correctly rejected Benchmark's proffered subjective intent as a triable fact issue, *supra* section I.vi, and correctly observed that "neither party alleges <u>any other</u> material fact dispute…" Op. 16. Benchmark has waived consideration of these and other additional "factual issues" raised for the first time in the Opening Brief at pages 11, 23–24.

CONCLUSION

The specifically negotiated termination provisions contained in the Agreement are unambiguous. The trial court correctly, plainly, construed those provisions to confirm that Benchmark's Section 6(c)(i) written termination notice was effective to terminate the Agreement without cause after the Independent Trust rejected the Reorganization proposal made under Section 6(c)(ii). Accordingly, the Superior Court's Order granting Pacer's motion for partial summary judgment and denying Benchmark's cross-motion for partial summary judgment should be Affirmed.

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Dated: November 26, 2025

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