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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 - DECEMBER 23, 2025

No. 378, 2025

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

APPELLANT'S REPLY BRIEF

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I. Preliminary Statement

Under the plain language of the Notices and the Agreement,[1] Benchmark did not terminate. Pacer's position otherwise rests entirely on the assertion that a notice of "***intent*** to terminate" and ***intent*** to submit a reorganization plan to replace its service provider under Section 6(c)(ii) is the same as a notice of actual termination under Section 6(c)(i). The assertion is contrary to the plain language of the Notices and the Agreement, the structure of the Agreement, and the relationship of the parties.

Pacer's position turns Section 6(c)(ii) upside down. Section 6(c)(ii) addresses the replacement of Pacer, not Benchmark. The provision speaks in terms of a notice of a future intent to terminate, not of actual termination (in contrast to the other provisions that do address termination). It does so because Benchmark did not have the right to replace Pacer unilaterally. The Trust and shareholders had to approve such a reorganization. There is nothing in the Section 6(c)(ii) that states or supports the conclusion that by seeking to replace Pacer, Benchmark would have to subject itself to the risk that it would be ousted from the Benchmark Funds without compensation.

[1] All capitalized terms not defined shall have the same meaning as in Benchmark's Opening Brief.

The absurdity of that contention is underscored by the fact pattern here. Prior to its concocted "acceptance," Pacer clearly did not believe that Benchmark had terminated the Agreement. After the first Notice, Pacer sought to negotiate a new, long-term Agreement with Benchmark. *See* A093 ¶ 60. In fact, Pacer's principal confirmed to Benchmark's founder that if the Trust rejected the reorganization proposal, the "game plan is just continue, continue the way we are." A061.

Further, Pacer not only failed to support Benchmark's reorganization, it also submitted a counterproposal under which Pacer lowered its own fees to match those proposed by Benchmark. *See* A076–A077 ¶ 10, A091–A092 ¶ 57, A100, ¶ 83. Thus, under Pacer's own interpretation, by providing a notice of intent to terminate and propose a reorganization, Benchmark risked ouster without compensation from the Funds that had garnered over $2 billion in assets under management, while Pacer was permitted to undermine, and ensure the rejection of, Benchmark's proposal. Pacer's interpretation is not plausible, even less so because Benchmark is an undeniably sophisticated party that would never agree to such a gamble after carefully crafting protections for itself throughout the rest of the Agreement.

II. Argument

A. Benchmark's Notices did not Terminate the Agreement

The plain language of the Notices indicates that Benchmark did not terminate the Agreement. Appellant's Br. 18–21. Pacer essentially does not respond to Section C.i., of Benchmark's opening brief and, as such, waives any argument. "It is settled Delaware law that a party waives an argument by not including it in its brief." *Emerald Partners v. Berlin*, No. Civ. A. 9700, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003), *aff'd*, 840 A.2d 641 (Del. 2003); *see also Jung v. El Tinieblo Int'l, Inc.*, No. 2021-0798, 2022 WL 16557663, at *9 (Del. Ch. Oct. 31, 2022) ("Generally, the failure to raise an argument in one's opening brief constitutes a waiver of that argument.").

First, Pacer ignores Benchmark's deliberate use of the phrase "***intent*** to terminate" in Benchmark's Notices, which explicitly mirrors the use of "***intent*** to terminate" in Section 6(c)(ii), as a distinct act from providing a "notice of termination." A121, A124 (emphasis added). Later in its opposition, Pacer quotes a long string of Benchmark's communications, Appellee's Br. 26–28, in which Benchmark consistently and repeatedly indicated only an ***intent*** to terminate. *Id*; B008–B012, B020–B050.

Second, Pacer does not respond to the fact that the basic dictionary definition of the word "intent" means a plan or desire to undertake ***future*** action. Appellee's

Br. 30–31. And Pacer does not respond to the fact that, by contrast, "terminate" means "to bring to an end" — *i.e.*, a completed act. Appellant's Br. 18. Instead, without citation to the Agreement, a dictionary, the Notices, precedent, or anything else, Pacer just pronounces that "intent to terminate" and "terminate" mean the exact same thing. *See* Appellee's Br. 31 ("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.").

Pacer also does not acknowledge the fact that Benchmark's November 2020 Notice uses parallel language, (i) providing "written notice of Benchmark's ***intent*** to terminate the ETF Services Agreement" and (ii) signaling that "Benchmark ***intends*** to present to PACER Advisors and the Board of the ETF Trust a proposal to reorganize the Funds into another investment . . . ." A121 (emphasis added). It is undisputed that Benchmark did not submit its reorganization plan until February 2022, over a year after the November 2020 Notice. Thus, it is undisputed that, in the November 2020 Notice, Benchmark uses the word "intend" to indicate a plan to perform an act in the future (submit a reorganization plan). Pacer's construction violates a fundamental rule of interpretation by construing the same word (intend) in the same document in fundamentally different ways.

Third, as Pacer concedes, the Notices did not immediately terminate the Agreement. Appellee's Br. 11 ("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." (emphasis added)). The Parties continued to operate under the Agreement for two years. Yet, the Notices also did not include a future termination date.

That is why Pacer purported to "accept" Benchmark's termination and supplied a manufactured termination date: "Pacer Advisors hereby accepts the Benchmark Notices of Termination and, accordingly, Benchmark's termination of the Agreement, ***effective as of October 31, 2022***." Appellant's Br. 14; A128 (emphasis added). At this point, Pacer has run away from its "acceptance." But the reason Pacer purportedly accepted in the first instance was because it was aware the lack of a date in the Notices means the Notices did not effect termination.

Pacer now asserts that if the parties required a specific termination date, they had to include that requirement in the Agreement. Appellee's Br. 25. As an initial matter, that is not what Pacer argued below. There, Pacer contended that no termination date was required either (i) because of the "nature of the services" at issue, or (ii) because the court should "imply a reasonable time for performance." B231–B232; B255–B256. Those arguments are both wrong and, even if credited, highly factual preventing summary judgment at the outset of discovery.

Moreover, Pacer's current argument is meritless. Contracts do not include specific language requiring a termination date in a termination notice. Benchmark

and its counsel are not aware of any agreements including such language.[2] Language and logic impose the termination date requirement. A party either terminates immediately or sets a date for termination. Benchmark did neither.

[2] Moreover, if Pacer were correct, the parties would have provided in the Agreement that termination under Section 6(c)(ii) becomes effective once either the Trust rejects the reorganization plan or the Trust and then the shareholders accepted the plan. Of course, the Agreement contains no such language.

B. The Language and Structure of the Agreement Confirm that Benchmark did not Terminate

The Agreement is clear that providing notice of intent to terminate under Section 6(c)(ii) is not a written notice of termination under Section(c)(i). Pacer's argument fails because it ignores the plain meaning of the word "intent." Appellant's Br. 18, 25. If Pacer were correct, Section 6(c)(ii) would read: "In the event that Benchmark gives notice of termination of this Agreement under sub-section 6(c)(i), …." It does not. That settles the matter.

However, Pacer's construction is also inconsistent with the relationship of the parties and the other provisions of the Agreement. Appellant's Br. 7, 10–11. Pacer responds to none of these points, merely asserting over and over that intent to terminate means the same thing as terminate.

i. The Agreement Does Not Require Benchmark to Play Russian Roulette

Under the Agreement, Pacer is a service provider. It has no claim to the Funds or Benchmark's Custom Indexes. Given the regulated nature of the industry and the "white label" model, if Benchmark terminates the Agreement in the absence of a reorganization replacing Pacer, it loses the benefit of the AUM and receives no compensation. Appellant's Br. 6–8.

Pacer concedes that, under its construction of Section 6(c)(ii), Benchmark must play Russian Roulette. Specifically, Pacer asserts that "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)." Appellee's Br. 21 (emphases omitted). In other words, Pacer asks this Court not only to ignore the insertion of the word intent into Section 6(c)(ii), but to do so under circumstances that would require Benchmark to risk its entire investment and right to future profits if it seeks to replace its service provider. Pacer does not explain why the parties would agree to such an arrangement or how such an arrangement is consistent with reading the Agreement as a whole, which (as Pacer concedes) is required. *Id*. at 14.

ii. The Structure of the Agreement Confirms that Notice under Section 6(c)(ii) Does Not Terminate the Agreement

Beyond the plain language of Section(c)(ii), Benchmark identifies several structural features of the Agreement that confirm its interpretation.

First, Section(c)(ii) speaks in terms of a notice of intent to terminate. All the other provisions speak in terms of actual termination. Appellant's Br. 8–9, 11, 29. It is a fundamental tenet of contractual interpretation that differences in language indicate differences in substance. Pacer's response — silence.

Second, the Agreement provides a closed universe of termination options with associated payment options, which excludes the result here (Benchmark's ouster without liquidation of the Funds and without compensation to Benchmark). Specifically, as explained, Pacer has no right to replace Benchmark. The Trust can

do so without cause; but if it does, the Funds cannot continue to use the Benchmark Indexes. Further, if Pacer supports the removal of Benchmark, which Pacer did here by submitting a competing reorganization proposal, it must compensate Benchmark under Exhibit D. Under no scenario can Benchmark be ousted without compensation, which is exactly what happened here. Appellant's Br. 28, 33. Pacer's response — silence.

Third, Pacer's interpretation is fundamentally at odds with the change of control provisions. That is, under Pacer's construction, if Pacer changes its ownership in a manner that permits Benchmark to terminate the Agreement, Benchmark must either (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. Appellant's Br. 29–30. Pacer's response — silence.

Fourth, Pacer's construction is not viable. Pacer would require Benchmark to terminate and then, after having terminated, propose reorganization. Benchmark asked a series of questions such a construction raises, demonstrating Pacer's construction is unworkable. Appellant's Br. 23–24 ("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?"); *id*. at 24 ("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?"). Pacer's response — silence.[3]

In short, Pacer does not even attempt to explain how its interpretation is consistent with the nature, structure, and specific provisions of the Agreement. It does not because it cannot.

To the extent that Pacer offers any additional argument, it asserts that "No Language In The Agreement Makes Section 6(c)(i) Termination 'Subject To' Or 'Contingent Upon' Acceptance Of A Reorganization Proposal." Appellee's Br. 22. Pacer's argument fails twice over. *First*, Benchmark provided notice under Section 6(c)(ii), not under Section 6(c)(i). Section 6(c)(ii) is the relevant provision. *Second*,

[3] Pacer attempts to avoid these questions by asserting that they improperly raise new factual issues. That is not the case. They are contractual interpretation issues. The topic sentence of the paragraph raising the issues reads: "[Pacer's] 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." Appellant's Br. 23.

the process set forth in Section 6(c)(ii) is a contingent process. By only requiring a notice of intent to terminate (rather than a notice of termination), the Agreement defers termination notice until after the reorganization process plays out. If the reorganization plan is approved, then Benchmark provides an actual termination notice under Section 6(c)(i).

To the extent that Pacer suggests its breaches are immunized by actions of the Trust, an argument Pacer made explicitly below, the assertion is baseless. It is undisputed that the Trust did not terminate the use of Benchmark's Custom Indexes for the Funds under Section 6(c)(iii). That is the only route that the Trust could act to terminate the Agreement (indirectly). Rather, the Trust made filings reflecting that Pacer had "accepted" the termination by Benchmark. *See* A129–A133. In other words, the Trust's filings simply reflected Pacer's misconduct and breach of the Agreement.

Finally, Pacer suggests Benchmark's construction is impermissible because it would be "absurd" to permit Benchmark to submit another reorganization proposal if the Trust rejected its first such proposal. Appellee's Br. 6. There is nothing in the language or structure of the Agreement that prohibits Benchmark from submitting more than one re-organization proposal and there is nothing "absurd" about such a course of events. *Id.* For example, if the Trust rejected Benchmark's proposals

because it concluded the proposed fees were too high, what would be absurd about making a new proposal with lower fees?

C. Open Factual Issues are Not a New Argument

Pacer's contention that Benchmark conceded that there are no factual issues is baseless.

Benchmark maintains that the contractual language is plain and unambiguous and it is entitled to partial summary judgment. But if this Court determines the contract is ambiguous, then there are factual issues to resolve. That is inherent in a contract dispute, whether or not Benchmark made the assertion below. In fact, Benchmark recognized this state of affairs in its submissions. B212–B213. Cross-moving for summary judgment on the contractual language does not constitute a stipulation that there are no disputed issues of material fact.

Further, Benchmark was explicit that even if the court determined that Pacer's contractual interpretation is correct, there remain factual questions in dispute. Benchmark's Cross-Motion for Partial Summary Judgment explicitly stated: "when construing the facts and reasonable inference in favor of Benchmark, there exists a question of fact as to Benchmark's intent in sending the Notices. Pacer is thus not entitled to partial summary judgment." B196.

Section IV.C. of Benchmark's Motion laid out several remaining factual issues that go to the issue of Benchmark's intent in sending the Notices:

> Mr. Kelly's Affidavit states that he did not intend to terminate the Agreement via the Notices. Rather, as described above, he intended to provide notice of intent to terminate the Agreement, which was contingent upon approval of the plan to reorganize. Kelly Affidavit ¶

> 5. And 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 Benchmark's two Notices to effectuate a termination of the Agreement as of any specific date. Am. Compl. ¶ 60.
>
> Pacer has yet to produce a single document in these proceedings. Therefore, the only evidence as to Benchmark's intent indicates that it did not intend to terminate. Thus, at a minimum, there exists a question of fact as to Benchmark's intent in sending the Notices. For this reason as well, the Court should deny Pacer's motion for partial summary judgment.

B212–B213.

In short, Benchmark has been consistent. It believes that its interpretation of the Agreement and the Notices is correct and it is entitled to partial summary judgment that Pacer impermissibly terminated the Agreement. However, if the Court determines that the Agreement is ambiguous, factual issues regarding the contractual interpretation remain. Moreover, even if the Court were to agree with Pacer's contractual interpretation, other factual issues remain. Pacer's assertion that by cross-moving for summary judgment, Benchmark stipulated that there are no material issues of fact even if Benchmark's contractual interpretation is not accepted, is meritless.

CONCLUSION

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

Dated: December 11, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 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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