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Case No. 2020-0385-SG

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

FORESCOUT TECHNOLOGIES, INC. Plaintiff Counterclaim-Defendant, v. FERRARI GROUP HOLDINGS, L.P., and FERRARI MERGER SUB, INC., Defendants and Counterclaim-Plaintiffs.	C.A. No. 2020-0385-SG **PUBLIC VERSION EFILED JUNE 5, 2020**

DEFENDANTS' ANSWER TO THE VERIFIED COMPLAINT

Defendants Ferrari Group Holdings, L.P. ("Parent") and Ferrari Merger Sub, Inc. ("Merger Sub") respond to the Verified Complaint (the "Complaint") of Forescout Technologies, Inc. ("Forescout") as follows:

Except as otherwise expressly admitted herein, Defendants deny each and every allegation contained in the Complaint. The headings and subheadings used in the Complaint are not well-pled allegations of fact and therefore require no response. To the extent a response is required, the allegations of the headings and subheadings in the Complaint are denied. The Defendants expressly reserve the right to seek to amend and/or supplement their Answer.

NATURE OF THE ACTION

1. Forescout brings this action for specific performance of Defendants'—affiliates of Advent International Corporation—obligation to

close the acquisition of Forescout, in a transaction valued at approximately $1.9 billion. This busted deal is unlike most others. Rather than containing a standard material adverse effect provision, the merger agreement here—executed after COVID-19 was declared a global public health emergency—specifically allocated the risk of any impact from a pandemic to Advent. Lest the Court have any doubt about Advent's motivations in trying to walk away from the deal, just days before the merger was set to close, Advent's representative admitted to Forescout's CEO that its new distaste for the merger was all "COVID-related." Advent's breach of its merger agreement with a public company, whose stockholders voted heavily in favor of the transaction, requires prompt judicial intervention. The Court should not allow a private equity buyer to walk away from the binding deal it struck because it will no longer make a profit as quickly as it had hoped.

ANSWER:

Defendants admit the allegation that the transaction described in Paragraph 1 is valued at approximately $1.9 billion. Defendants deny the remainder of the allegations in Paragraph 1.

2. Rather than proceed with the scheduled May 18, 2020 closing of the merger of Merger Sub with and into Forescout, as required under the February 6, 2020 Agreement and Plan of Merger (the "Merger Agreement")[1] (together with the other transactions contemplated by the Merger Agreement and transaction documents, the "Merger"), Advent told Forescout on the afternoon of Friday, May 15, that it would not consummate the deal on Monday, May 18, 2020. Advent falsely claimed that Forescout was in breach of various covenants in the Merger Agreement and that a material adverse effect had occurred and was continuing due to COVID- 19—despite a carveout for pandemics in the Merger Agreement.

[1] The Merger Agreement is attached as Exhibit A

ANSWER:

Defendants admit that Parent notified Forescout on May 15, 2020 that conditions to closing the Merger had not been satisfied, and that Parent therefore would not be proceeding to Closing on May 18, 2020. Defendants deny the remainder of the allegations in Paragraph 2.

3. Forescout remains a willing deal partner and has satisfied all conditions precedent to closing. Forescout has delivered all required financial deliverables and other information required for Advent to secure its financing and the lenders are fully committed and contractually obligated to fund the transaction. Defendants cannot avoid closing the Merger because—as Advent conceded—the COVID-19 outbreak caused a change of heart, particularly given that they expressly agreed to bear the risk of adverse impacts on the Company from a "pandemic."

ANSWER:

Defendants deny the allegations in Paragraph 3.

4. From the time of signing of the Merger Agreement throughout the spring of 2020, Forescout worked diligently toward closing. As the COVID-19 pandemic spread and its global impact increased, Forescout repeatedly assured Advent that it had satisfied or would be able to satisfy at closing the various conditions in the Merger Agreement. Forescout, working in collaboration with Advent, confirmed that it had taken multiple steps to protect against the impacts of COVID-19, including with regard to cash flow management and the implementation of expense reduction measures, and that it stood ready to proceed with the Merger as soon as possible. Forescout has been responsive to every request for additional information from Advent, has sought Advent's approval where appropriate, and has taken all steps necessary under the Merger Agreement to close the Merger as planned.

ANSWER:

Defendants deny the allegations in Paragraph 4.

5. Only two things changed between the execution of the Merger Agreement and now. First, the COVID-19 pandemic—already declared a global health emergency at the time of signing—spread and worsened, causing market- wide volatility. Second, the pending Merger created uncertainty for Forescout's customer base, which was skeptical of Forescout becoming a privately held company owned by a private equity firm following the Merger. Knowing that neither situation gave it a contractual basis to back out of the deal, Advent began to take a series of contradictory and unreasonable positions in April 2020 as the Merger began to appear less economically attractive to Advent.

ANSWER:

Defendants admit that the World Health Organization had declared COVID-19 a public health emergency prior to February 6, 2020. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegation in Paragraph 5 as to customers' purported uncertainty, and on that basis deny those allegations. Defendants deny the remainder of the allegations in Paragraph 5.

6. Advent first pressured Forescout to create a new set of projections for the Company accounting for COVID-19, different from the financial plan its Board of Directors (the "Board") had approved in February 2020—though nothing in the Merger Agreement required Forescout to do so. When Forescout declined, on April 14, 2020, Advent provided Forescout with a top-line "revised base case" financial analysis. Forescout later learned that Advent concocted that analysis based on questionable assumptions to create an unrealistically negative outlook for Forescout for fiscal 2020 and 2021. Advent's overly pessimistic modeling assumed an unrealistic decline in revenue while excluding expense reductions, including those that would be inherent in decreased revenue such as lower sales commissions. As became clear later, Advent's scenarios were prepared to create an imagined insolvency of Forescout post-closing of the Merger.

ANSWER:

Defendants admit that Parent asked Forescout to prepare revised financial projections, and that Forescout declined to do so. Defendants also admit that Parent delivered a "revised base case" to Forescout on April 14, 2020. Defendants deny the remainder of the allegations in Paragraph 6. Defendants further state that, as agreed and acknowledged by the Parties in the Merger Agreement, all issues arising out of or related to the Debt Financing, the Debt Commitment Letters, or the performance of services thereunder are subject to the exclusive jurisdiction of courts sitting in the State of New York, City of New York, Borough of Manhattan.

7. Advent followed up with a series of letters to Forescout expressing concern about the effects of COVID-19 on the Company and requesting a slew of additional financial information—including information that Forescout was not obligated to provide under the Merger Agreement. Nonetheless, Forescout made every effort to respond to those requests and provided Advent with all of the information that Advent desired. Forescout expended substantial time and resources to work cooperatively with Advent toward the planned consummation of the Merger, while paying heightened attention to its business because of COVID-19 and the announcement of the Merger.

ANSWER:

Defendants admit that Parent sent a series of letters to Forescout. Defendants state that the letters referenced in Paragraph 7 are in writing and respectfully refer the Court to the referenced documents for their full, complete and accurate contents, and deny any allegations or characterizations inconsistent therewith. Defendants deny the remaining allegations in Paragraph 7.

8. On May 8, 2020, a representative of Advent contacted Forescout's Chief Executive Officer and said that Advent was considering not closing. Advent's representative said that they could not "make the numbers work" and that their position was "100% COVID related." But the potential effects of COVID-19 on the global economy—including on Forescout—were well known prior to signing and were expressly accounted for in the Merger Agreement. Advent, like the rest of the world, was aware of the threat of COVID-19 before the parties signed the Merger Agreement on February 6, 2020. In fact, Advent International Corporation ("Advent International") has a well-established presence throughout Asia—particularly in China, the region initially affected by COVID-19 in early January 2020.

ANSWER:

Defendants admit that Advent International Corporation invests in Greater China, and that on May 8, 2020, a representative of Parent spoke with Forescout's Chief Executive Officer regarding Parent's concerns regarding whether the conditions to Closing would be met. Defendants deny the remaining allegations in Paragraph 8.

9. At first, it seemed that Advent was testing Forescout's appetite to reprice the deal because COVID-19 had made it less profitable to Advent International—a private equity firm. On May 14, 2020, Advent sent Forescout a set of "Financial Analysis" slides it had concocted to support a lower price. The "Financial Analysis" summarized two, speculative scenarios Advent created—a "revised base case" scenario and a "downside case" scenario—which contained unreasonably pessimistic and baseless projections for Forescout that would never play out as modeled. Tellingly, however, the slides showed Advent expected the effects of COVID-19 on Forescout's business would end with a return to business as usual in fiscal 2021.[2]

ANSWER:

[2] Those slides, called Project Ferrari, Financial Analysis (May 14, 2020), are attached as Exhibit B.

Defendants admit that Advent International is a private equity firm. Defendants also admit that Parent sent Forescout the slides referenced in the footnote to Paragraph 9. Defendants state that the slides referenced in Paragraph 9 are in writing and respectfully refer the Court to the referenced slides for their full, complete and accurate contents, and deny any allegations or characterizations inconsistent therewith. Defendants deny the remaining allegations in Paragraph 9.

10. One day later, on May 15, 2020, Ferrari Group's President and General Counsel, an officer of Advent International, delivered a letter to Forescout that revealed Advent's true intentions for sharing its "Financial Analysis" the day before.[3] Advent's letter asserted that—based on its own ginned-up scenarios— Forescout "will be insolvent at the time of Closing," such that a closing condition to the debt financing for the Merger could not be satisfied, even though no such condition to closing the Merger exists. But a buyer cannot imagine its way into a debt financing failure. The Merger Agreement obligated Advent to use its reasonable best efforts to "consummate the Debt Financing" and to find alternative financing if "any portion of the Debt Financing [became] unavailable."[4] Advent made no such efforts. Advent also falsely asserted that a material adverse effect had occurred and that Forescout was in breach of various covenants in the Merger Agreement. Advent stated that Parent would "not be proceeding to consummate the [Merger] on May 18, 2020 as scheduled."[5]

ANSWER:

Defendants admit that Parent sent Forescout the letter referenced in the footnote to Paragraph 10. Defendants state that the documents referenced in Paragraph 10 are in writing and respectfully refer the Court to the referenced

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3 The May 15, 2020 letter to Forescout is attached as Exhibit C.

4 Ex. A, Merger Agreement §§ 6.5(b)(ii)(v)-(vi), 6.5(d).

5 Ex. C, May 15, 2020 Letter.

documents for their full, complete and accurate contents, and deny any allegations or characterizations inconsistent therewith. Defendants deny the remaining allegations in Paragraph 10.

11. Contrary to that letter, all closing conditions have been satisfied and the parties are required to close the Merger as scheduled. Advent's purported bases for avoiding the May 18, 2020 planned closing are a pretext to get out of a deal it no longer finds attractive. Because Forescout has fully complied with its obligations under the Merger Agreement and stands ready to close, Advent's refusal to close is a breach of Section 2.3 of the Merger Agreement and its obligations under Section 6.1(a) to use reasonable best efforts to take all steps necessary to effect a prompt closing. Advent's actions also trigger Forescout's right to terminate under Section 81(i).

ANSWER:

Defendants deny the allegations in Paragraph 11.

12. None of Advent's purported reasons for refusing to consummate the Merger is credible. To start, Advent's claim that a material adverse effect has occurred finds no support in the Merger Agreement. The definition of "Company Material Adverse Effect" in the Merger Agreement expressly excludes any effects on the Company resulting from "epidemics" and "pandemics," barring a materially disproportionate impact on the Company, and—even then—only to the extent the Company experiences an incremental disproportionate impact. The Merger Agreement only permits Defendants to claim a Company Material Adverse Effect if it occurs *after* the date of signing of the Merger Agreement, but COVID-19 clearly existed prior to signing.

ANSWER:

Defendants state that the document referenced in Paragraph 12 is in writing and respectfully refer the Court to the referenced document for its full, complete

and accurate content, and deny any allegations or characterizations inconsistent therewith. Defendants deny the remaining allegations in Paragraph 12.

13. Advent's assertions that Forescout has "materially] breach[ed]" the operating covenants in the Merger Agreement and that the post-Merger entity will somehow not be "solvent" are equally baseless. Forescout sought Advent's approval (even where not required) before taking any actions regarding its operations following the signing of the Merger Agreement. Advent approved Forescout's actions every step of the way, with the exception of a personnel hire and planned annual executive equity grants—neither of which were subsequently pursued by Forescout. From signing until Advent said they were unwilling to close, Advent International personnel were in multiple meetings with Forescout to discuss Forescout's business and guidance. Under the terms of the Merger Agreement, Advent's knowledge and approval forecloses any claim that Forescout breached interim operating covenants. Separately, despite the circumstances created by COVID-19, Forescout's operations fully complied with the Merger Agreement's "ordinary course" covenants. Finally, the alleged insolvency of the post-closing entity is not only completely manufactured, but there is no such condition to the Merger.

ANSWER:

Defendants admit that Parent personnel met multiple times with Forescout to discuss Forescout's business and guidance. Defendants state that the document referenced in Paragraph 13 is a writing and respectfully refer the Court to the referenced document for its full, complete and accurate content, and deny and allegations or characterizations inconsistent therewith. Defendants deny the remaining allegations in Paragraph 13. Defendants further state that, as agreed and acknowledged by the Parties in the Merger Agreement, all issues arising out of or related to the Debt Financing, the Debt Commitment Letters, or the performance of

services thereunder are subject to the exclusive jurisdiction of courts sitting in the State of New York, City of New York, Borough of Manhattan.

14. The COVID-19 pandemic has created a challenging time for all businesses—including Forescout. Advent may regret that it did not negotiate the allocation of risk in the event of a pandemic such as COVID-19 differently in the Merger Agreement. But Advent is bound to abide by the contract it signed: a Merger Agreement that expressly allocated the risk of negative events such as a pandemic on Defendants and that contains a customary material adverse effect clause with no application here.

ANSWER:

Defendants state that the document referenced in Paragraph 14 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate contents, and deny any allegations or characterizations inconsistent therewith. Defendants deny the remaining allegations in Paragraph 14.

15. Forescout therefore seeks specific performance of Defendants' contractual obligations to close the Merger, including by taking *all necessary steps* to effect the closing promptly, but in no event later than the June 6 Termination Date. Forescout also seeks specific performance of Defendants' obligations under the Merger Agreement and related "Transaction Documents" (as defined in the Merger Agreement) to take all necessary steps to obtain the required financing for the Merger, including by enforcing Defendants' rights under (a) an equity commitment letter (the "Equity Commitment Letter")[6] that requires affiliates and investors of Advent International (the "Advent Funds") to fund $1.341 billion of the aggregate value of the Merger, (b) an amended and restated commitment letter (the "Debt Commitment Letter")[7] that requires certain financial institutions (the "Lenders") to provide senior secured term loans in an aggregate principal amount of $400 million and, following closing, a revolving credit facility in an

[6] The Equity Commitment Letter is attached as Exhibit D.

[7] The Debt Commitment Letter is attached as Exhibit E.

aggregate principal amount of $40 million, and (c) a limited guarantee (the "Guarantee")[8] in favor of Forescout, in which the Advent Funds guaranteed certain obligations of Defendants in connection with the Merger Agreement, including payment of the "Parent Termination Fee" of more than $111 million. Forescout has told Advent it is willing to accept a note (a so-called "seller note") in lieu of the cash that would come from the Debt Commitment Letter financing, which would immediately resolve any purported issues with Advent's ability to secure debt financing.

ANSWER:

The allegations in Paragraph 15 relate to Plaintiff's characterization of its own claims, to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 15.

16. The Merger Agreement is not subject to a financing condition and Advent is obligated to use its reasonable best efforts to take all steps necessary to close the Merger expeditiously. In addition, under the terms of the Merger Agreement, the closing should have occurred yesterday, but Advent refused to close. Advent should be compelled to comply with its contractual obligations.

ANSWER:

As to the first sentence of Paragraph 16, Defendants state that the document referenced in Paragraph 16 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate content, and deny any allegations or characterizations inconsistent therewith. Defendants deny the remaining allegations in Paragraph 16.

17. Finally, in the alternative (only if specific performance is not available), Forescout seeks damages arising from Defendants' breach of the

[8] The Guarantee is attached as Exhibit F.

Merger Agreement in the form of payment of the Parent Termination Fee, backed by the Guarantee.

ANSWER:

The allegations in Paragraph 17 relate to Plaintiff's characterization of its own claims, to which no response is required. To the extent a response is required, the Defendants deny the allegations in Paragraph 17.

THE PARTIES

18. Plaintiff Forescout Technologies, Inc. is a Delaware corporation headquartered in San Jose, California. Forescout provides "security at first sight" by delivering software that enables device visibility and control that enables enterprises and government agencies to gain complete situational awareness of their environment (devices on their networks) and orchestrate actions to reduce cyber and operational risk. As of December 31, 2019, more than 3,700 customers in over 90 countries relied on Forescout's solutions to reduce the risk of business disruption from security incidents or breaches, ensure and demonstrate security compliance, and increase security operations productivity. Forescout's common stock is listed on NASDAQ under the symbol "FSCT."

ANSWER:

Defendants admit the allegations in the first and last sentences of Paragraph 18. Defendants admit that the remaining allegations of Paragraph 18 reflect Forescout's description of its business. To the extent further response is required, Defendants deny the allegations in Paragraph 18.

19. Defendant Ferrari Group Holdings, L.P. is a Delaware limited partnership that was formed on January 31, 2020 solely for the purpose of engaging in the transactions contemplated by the Merger Agreement. It is affiliated with funds managed or advised by Advent International.

ANSWER:

Defendants admit the allegations in Paragraph 19.

20. Defendant Ferrari Merger Sub, Inc. is a Delaware corporation and a wholly-owned subsidiary of Ferrari Group. It was formed on January 31, 2020 solely for the purpose of engaging in the transactions contemplated by the Merger Agreement. It is affiliated with funds managed or advised by Advent International.

ANSWER:

Defendants admit the allegations in Paragraph 20.

21. Non-party Advent International is a Delaware corporation headquartered in Boston. It describes itself as one of the largest and most experienced global private equity firms, with 15 offices in 12 countries and hundreds of investment professionals across North America, Europe, Latin America, and Asia. It has invested $48 billion in over 350 private equity investments across 41 countries since 1989 and, as of December 31, 2019, managed $57 billion in assets. Pursuant to the Equity Commitment Letter referenced in the Merger Agreement, Advent International, through the Advent Funds, committed to capitalize Ferrari Group with $1.341 billion to effect the Merger, representing a significant portion of the aggregate purchase price to be paid to Forescout's stockholders. In addition, pursuant to the Guarantee referenced in the Merger Agreement, the Advent Funds committed to guarantee certain obligations of Ferrari Group under the Merger Agreement, including the obligation to pay the Parent Termination Fee capped at more than $111 million.

ANSWER:

Defendants admit the allegations in the first three sentences of Paragraph 21. As to the final two sentences of Paragraph 21, Defendants state that the documents referenced in Paragraph 21 are in writing and respectfully refer the Court to the

referenced documents for their full, complete and accurate contents, and deny any allegations or characterizations inconsistent therewith.

JURISDICTION AND VENUE

22. The Court has subject matter jurisdiction over this action pursuant to 10 *Del. C.* § 6501 to declare the rights, status, and legal obligations of the parties to the Merger Agreement, as well as under 10 *Del. C.* § 341, which gives the Court jurisdiction "to hear and determine all matters and causes in equity" where, as here, Plaintiff lacks an adequate remedy at law.

ANSWER:

Paragraph 22 states a legal conclusion to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 22.

23. The Court has personal jurisdiction over Ferrari Group, a Delaware limited partnership, pursuant to 6 *Del. C.* § 17-105 and Sections 9.12(a)(ii) and (iii) of the Merger Agreement.

ANSWER:

Defendants state that the document referenced in Paragraph 23 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate content, and deny any allegations or characterizations inconsistent therewith. Further, Paragraph 23 states a legal conclusion to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 23.

24. This Court has jurisdiction over Merger Sub, a Delaware corporation, pursuant to 8 *Del. C.* § 111 and Section 9.12(a)(ii) and (iii) of the Agreement.

ANSWER:

Defendants state that the document referenced in Paragraph 24 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate content, and deny any allegations or characterizations inconsistent therewith. Further, Paragraph 24 states a legal conclusion to which no response is required.

25. Venue before this Court is proper pursuant to Section 9.12(a)(iv) of the Merger Agreement, which provides that: "any Legal Proceeding arising in connection with this Agreement, the Guarantee or the Merger will be brought, tried and determined in the [Delaware Court of Chancery]."

ANSWER:

Defendants state that the document referenced in Paragraph 25 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate content, and deny any allegations or characterizations inconsistent therewith. Further, Paragraph 25 states a legal conclusion to which no response is required.

FACTUAL ALLEGATIONS

I. BACKGROUND OF THE MERGER AGREEMENT

A. Forescout's Sale Process

26. Before choosing Advent as its merger partner, Forescout conducted a careful sale process assisted by financial advisor Morgan Stanley

& Co. LLC ("Morgan Stanley") and overseen by a committee (the "Strategic Committee") of the Forescout Board.

ANSWER:

Defendants admit that Morgan Stanley assisted Forescout with its sales process. Defendants lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 26, and on that basis deny those allegations.

27. Forescout began the process of exploring strategic and financial alternatives, including a potential sale of the Company, in the second half of 2019. On October 10, 2019, the Company announced that it did not expect to meet prior guidance on total revenue and non-GAAP operating loss for the third quarter of 2019 ("Q3 2019"). Subsequently, on October 28, 2019, the Board determined—for a variety of reasons—to retain Morgan Stanley and establish the Strategic Committee to oversee a review of strategic alternatives.

ANSWER:

Defendants admit that on October 10, 2019, Forescout issued a public announcement that Forescout did not expect to meet prior guidance on total revenue and non-GAAP operating loss for the third quarter of 2019. Defendants lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 27, and on that basis deny those allegations.

28. On November 6, 2019, Forescout publicly announced its final results for Q3 2019—disclosing both total revenue and non-GAAP operating loss below Forescout's prior public guidance. At the same time, Forescout provided its guidance for the fourth quarter of 2019 ("Q4 2019"). After that announcement, Morgan Stanley began contacting potential acquirers.

Forescout received various indications of interest from multiple parties during the following three months.

ANSWER:

Defendants admit that on November 6, 2019, Forescout issued a public announcement of Q3 2019 losses and Q4 2019 guidance. Defendants lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 28, and on that basis deny those allegations.

29. Potential acquirers, including Advent International, were given access to extensive due diligence on Forescout's financial condition and Board-approved operating plans for 2020. On November 19 and 20, 2019, the Board (after discussion with Forescout management) reviewed preliminary drafts of two operating plans prepared by Company management on a top-down basis (the "Target Plan" and the "Preliminary Alternate Plan"). The Board's consideration of a preliminary, top- down analysis at its November meeting followed the same procedure the Board had undertaken in the previous five years. The Target Plan and the Preliminary Alternate Plan were developed to highlight the range of possible business outcomes resulting from factors such as bottoms-up analyses of Forescout's sales pipeline and expenses (which were in process in November 2019 and expected to be completed in January 2020) and Forescout's results for Q4 2019.

ANSWER:

Defendants admit that Advent International conducted due diligence into Forescout, but deny the remaining allegations in the first sentence of Paragraph 29. Defendants lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 29, and on that basis deny those allegations.

30. By December 18, 2019, Forescout had received preliminary, non-binding written indications of interest from four different potential financial acquirers concerning their respective interest in pursuing an acquisition of Forescout. Advent International proposed an acquisition of Forescout for $38.00 to $41.00 in cash per share of Forescout common stock.

ANSWER:

Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in the first sentence of Paragraph 30, and on that basis deny those allegations. Defendants admit the allegations in the second sentence of Paragraph 30.

31. Forescout's results for Q4 2019 reflected revenue below Forescout's public guidance caused by, among other things, a greater-than-expected shift away from perpetual licenses and towards term-based licenses (where customers commit to shorter license periods up front but are expected to renew their licenses in future periods) and, to a lesser degree, continued sales weakness. The Strategic Committee directed Morgan Stanley to provide a summary of the Q4 2019 preliminary results to Advent International and other potential acquirers. Morgan Stanley subsequently provided this information.

ANSWER:

Defendants admit that Forescout's results for Q4 2019 reflected revenue below public guidance and that Morgan Stanley provided Advent International with Q4 2019 preliminary results. Defendants lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in the first sentence of Paragraph 31 and the second sentence of Paragraph 31.

32. Forescout recognized that the trends affecting its results for Q4 2019 would likely lower its expected results for fiscal 2020. Forescout's sales pipeline for 2020 also appeared weaker than originally projected. Forescout anticipated releasing public guidance for the first quarter of 2020 and fiscal 2020 that would be less optimistic than Forescout had hoped.

ANSWER:

Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 32, and on that basis deny those allegations.

33. On January 27, 2020, after consulting with Company management and Morgan Stanley, the Strategic Committee approved an "Alternate Plan" for Forescout on January 27, 2020 that—unlike the Target Plan and Preliminary Alternate Plan—was prepared on a bottoms-up basis and also reflected the disappointing results for Q4 2019 as well as recently lowered expectations for 2020. The Alternate Plan was provided to Advent International and the only other remaining interested potential acquirer at that point. The Alternate Plan was subsequently adopted by the Board on February 5, 2020.

ANSWER:

Defendants admit that Advent International received the Alternate Plan but otherwise lack knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 33, and on that basis deny those allegations.

34. Meanwhile, the world began to experience the effects of COVID-19. In early January 2020, while the parties were negotiating the Merger Agreement, news reports emerged of a novel coronavirus (COVID-19)

spreading in Wuhan, China.[9] By January 21, 2020, Japan, South Korea, Thailand, and the United States all had reported cases. With the virus quickly spreading throughout the world, on January 30, 2020, the World Health Organization declared COVID-19 a global public health emergency.[10] On January 31, 2020, the United States began restricting travel into the country by any foreign nationals who had recently been in China.[11]

ANSWER:

Defendants admit that there were reported cases of COVID-19 in Japan, South, Korea, China, and the United States in late January 2020, that the World Health Organization declared a public health emergency on January 30, 2020, and that the United States began restricting travel into the country by foreign nationals who had recently traveled to China on January 31, 2020. Defendants deny the remaining allegations in Paragraph 34.

35. On February 3, 2020, Advent International provided a revised proposal to acquire Forescout for $32.00 per share. This was down from the proposal of $38.00 to $41.00 per share that Advent International had made around December 18, 2019.

ANSWER:

Defendants admit the allegations in Paragraph 35.

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9 *See* WHO Timeline – COVID-19, World Health Organization, April 27, 2020, https://www.who.int/news-room/detail/27-04-2020-who-timeline – covid-19.

10 *Id.*

11 *See* Derrick Bryson Taylor, A Timeline of the Coronavirus Pandemic, N.Y. Times, Apr. 7, 2020, https://www.nytimes.com/article/coronavirus-timeline.html.

36. On February 4, 2020, Forescout made a counterproposal to Advent International for $34.00 per share. The parties negotiated throughout that day and Advent International increased its acquisition proposal to $33.00 per share.

ANSWER:

Defendants admit the allegations in Paragraph 36.

37. Throughout this entire period, Forescout and Advent International, through outside counsel, engaged in arms' -length negotiations of the terms of the Merger Agreement and the related disclosure letter, Guarantee, Equity Commitment Letter, and Debt Commitment Letter.

ANSWER:

Defendants admit the allegations in Paragraph 37.

38. On February 5, 2020, Forescout accepted Advent International's acquisition proposal at a price of $33.00 per share in cash. The parties went on to finalize the terms of the Merger Agreement and related transaction documents following extensive negotiations during which all parties were represented by sophisticated and experienced legal counsel and financial advisors.

ANSWER:

Defendants admit the allegations in Paragraph 38.

B. The Parties Execute the Merger Agreement, the Go-Shop Period Expires, and the Stockholders Approve the Merger.

39. On February 6, 2020, Advent and Forescout signed the Merger Agreement after Advent delivered to Forescout the Equity Commitment Letter and the initial Debt Commitment Letter (later amended and restated), along with the Guarantee to "induce" the Company's "willingness" to enter into the Merger Agreement.[12] Pursuant to the Merger Agreement, Merger

[12] Ex. A, Merger Agreement, Recital C; Ex. D, Equity Commitment Letter; Ex. E, Debt Commitment Letter.

Sub will be merged with and into Forescout, with Forescout continuing as the surviving entity and a wholly- owned subsidiary of Ferrari Group. Advent will purchase all of the outstanding shares of Forescout's common stock for $33.00 in cash per share, for a total transaction value of approximately $1.9 billion.

ANSWER:

Defendants admit that the parties signed the Merger Agreement on February 6, 2002, and that Advent provided Forescout the Equity Commitment Letter, Debt Commitment Letter, and Limited Guarantee. Defendants state that the agreements referenced in Paragraph 39 are in writing and respectfully refer the Court to the referenced documents for their full, complete and accurate content, and deny any allegations or characterizations inconsistent therewith.

40. The purchase price represents a premium of approximately 30% over the Company's closing stock price of $25.45 on October 18, 2019, the last full trading day before the release of two Schedule 13-D filings by activist investors on October 21, 2019, disclosing they had formed a partnership to approach Forescout and had accumulated a combined 14.5% ownership in the Company. Under the Merger Agreement and the Equity Commitment Letter, the Advent Funds will contribute $1.341 billion to Ferrari Group to fund a significant portion of the aggregate purchase price to be paid to the Forescout stockholders at closing.

ANSWER:

Defendants admit the allegations in Paragraph 40.

41. The Merger Agreement provided for a "go-shop" period of approximately a month after signing, during which Forescout could consider alternative acquisition proposals.[13] The go-shop period expired on March 8,

[13] Ex. A, Merger Agreement § 5.3(a).

2020 and Forescout received no other offers. Forescout subsequently filed its Definitive Proxy Statement with the Securities and Exchange Commission on March 24, 2020 and noticed a Special Meeting of Stockholders to vote on the Merger. Stockholders were told in that proxy statement that the Merger consideration was $33 in cash per share of Forescout common stock. On April 23, 2020, the proposed Merger was approved by Forescout stockholders, with the holders of more than 99% of the shares of Forescout common stock present at the meeting voting in favor of the Merger.

ANSWER:

Defendants state that the documents referenced in Paragraph 41 are in writing and respectfully refer the Court to the referenced document for their full, complete and accurate content, and deny any allegations or characterizations inconsistent therewith.

42. On February 25, 2020, Advent delivered an Amended and Restated Commitment Letter (defined above as the Debt Commitment Letter) to Forescout. The Debt Commitment Letter provides that the Lenders would provide $400 million in term loans to close the Merger and $40 million in revolving loans for operations post-closing.

ANSWER:

Defendants admit that Parent delivered to Forescout the Amended and Restated Commitment Letter. Defendants state that the letter referenced in Paragraph 42 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate content, and deny any allegations or characterizations inconsistent therewith.

II. THE MERGER AGREEMENT

A. The Transaction Documents

43. During the negotiation process, Advent provided Forescout with multiple assurances that it had the financing necessary to close the Merger. In the Equity Commitment Letter executed by Advent on February 6, 2020 to induce Forescout to enter into the Merger Agreement,[14] the Advent Funds committed to capitalize Ferrari Group on the date of closing of the Merger with an aggregate equity contribution of up to $1.341 billion.

ANSWER:

Defendants deny the allegations in the first sentence of Paragraph 43. Defendants additionally state that the letter referenced in the second sentence of Paragraph 43 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate content, and deny any allegations or characterizations inconsistent therewith.

44. In addition, in the Debt Commitment Letter, which was first delivered along with the executed Merger Agreement and subsequently amended and restated as of February 25, 2020, a number of financial institutions committed to provide Advent with senior secured term loans in the aggregate principal amount of $400 million on the date of closing of the Merger as well as with secured revolving loans in the aggregate principal amount of $40 million to be made available to the surviving entity in the Merger after closing.[15]

ANSWER:

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[14] Ex. D, Equity Commitment Letter, at 1. The Equity Commitment Letter has a closing condition linked to the closing of the debt financing. Compl. Ex. D § 2(v).

[15] Ex. E, Debt Commitment Letter, Schedule 1. The Debt Commitment Letter expires five business days after the Termination Date in the Merger Agreement.

Defendants state that the letter referenced in Paragraph 44 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate content, and deny any allegations or characterizations inconsistent therewith.

45. To further induce Forescout to enter the Merger Agreement, Advent also agreed to use its "reasonable best efforts" to consummate both the equity and debt financing for the Merger.[16]

ANSWER:

Defendants state that the document referenced in Paragraph 45 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate content, and deny any allegations or characterizations inconsistent therewith.

46. Under Section 6.5(b)(ii)(v) of the Merger Agreement, Advent agreed to use its reasonable best efforts to "consummate the Debt Financing at the Closing, including causing the Financing Sources to fund the Debt Financing at the Closing" so long as all of the conditions to closing (other than those conditions to be satisfied at closing) the Merger are satisfied. In Section 6.5(b)(ii)(vi), Advent agreed to use its reasonable best efforts to "enforce its rights pursuant to the Debt Commitment Letters." In Section 6.5(d), Advent agreed to use its reasonable best efforts to arrange and obtain alternative financing "if any portion of the Debt Financing becomes unavailable."[17]

ANSWER:

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16 Ex. A, Merger Agreement § 6.5(b).

17 Ex. A, Merger Agreement §§ 6.5(b)(ii), 6.5(d). The Company is not a party to the DCL or ECL.

Defendants state that the document referenced in Paragraph 46 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate contents, and deny any allegations or characterizations inconsistent therewith.

47. The Merger is not subject to a financing condition. Advent is obligated to consummate the Merger even if the requisite equity or debt financing is not obtained prior to closing, subject to the satisfaction or waiver of the conditions in Article VII of the Merger Agreement. Section 6.6(h) of the Merger Agreement provides:

> Parent and Merger Sub each acknowledge and agree that obtaining the ***Financing is not a condition to the Closing***. Subject to Section 9.10(b)(ii), ***if the Financing has not been obtained, Parent and Merger Sub will each continue to be obligated***, subject to the satisfaction or waiver of the conditions set forth in Article VII, ***to consummate the Merger***.[18]

ANSWER

Defendants state that the document referenced in Paragraph 47 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate content, and deny any allegations or characterizations inconsistent therewith.

48. Finally, the Advent Funds executed the Guarantee on February 6, 2020, "as a condition and inducement to the Company's willingness to enter

[18] Ex. A, Merger Agreement § 6.6(h) (emphasis added). "Financing" is defined as the equity financing for the Merger together with the debt financing. *Id*. § 4.10(a). Advent International is not a party to any of the relevant agreements.

into th[e] [Merger] Agreement."[19] Pursuant to the Guarantee, the Advent Funds guaranteed certain obligations of Ferrari Group in connection with the Merger Agreement, including payment of the "Parent Termination Fee" (defined in the Merger Agreement), capped at $111,664,539.00.[20]

ANSWER:

Defendants state that the document referenced in Paragraph 48 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate content, and deny any allegations or characterizations inconsistent therewith.

B. The Operating Covenants

49. The parties also agreed to various provisions regarding the operation of Forescout's business between the time of signing of the Merger Agreement and closing of the Merger.

ANSWER:

Defendants state that the document referenced in Paragraph 49 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate content, and deny any allegations or characterizations inconsistent therewith.

50. Section 5.1 of the Merger Agreement provides that, unless Parent approves otherwise, Forescout will use "reasonable best efforts" to preserve the business and operate in the ordinary course. Section 5.1 of the Merger Agreement states in relevant part that:

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19 Ex. A, Merger Agreement Recital C; *see id*. § 4.9.

20 *Id*. § 1.1(kkk); Ex. F, Guarantee § 1(a).

> Except (a) as expressly contemplated by this Agreement; (b) as set forth in Section 5.1 or Section 5.2 of the Company Disclosure Letter [delivered by Forescout to Ferrari on the date of signing of the Agreement]; (c) as contemplated by Section 5.2; or (d) as approved by [Ferrari Group] (which approval will not be unreasonably withheld, conditioned or delayed), during the Pre-Closing Period, the Company will . . . (i) use its respective reasonable best efforts to maintain its existence in good standing pursuant to applicable Law; (ii) subject to the restrictions and exceptions set forth in Section 5.2 or elsewhere in this Agreement, conduct its business and operations in the ordinary course of business; and (iii) use its respective reasonable best efforts to (a) preserve intact its material assets, properties, Contracts and business organizations; (b) keep available the services of its current officers and key employees; and (c) preserve the current relationships with material customers, suppliers, distributors, [etc.], in each case solely to the extent that (A) the Company has not, as of the date of this Agreement, already notified such third Person of its intent to terminate those relations and (B) provided notice thereof to Parent prior to the date of this Agreement.[21]

ANSWER:

Defendants state that the document referenced in Paragraph 50 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate content, and deny any allegations or characterizations inconsistent therewith. Defendants state further that Forescout's obligation to conduct its business and operations in the ordinary course is not qualified by a "reasonable best efforts" standard. Defendants deny the remaining allegations in Paragraph 50.

51. Section 5.2 of the Merger Agreement contains forbearance covenants that preclude Forescout from taking certain actions between the time of signing of the Merger Agreement and closing unless "approved by

[21] Ex. A, Merger Agreement § 5.1.

[Ferrari Group] (which approval will not be unreasonably withheld, conditioned or delayed)," as "expressly contemplated in the terms of the [Merger] Agreement," or "as set forth in Section 5.2 of the Company Disclosure Letter."[22] The Merger Agreement does not require such approval to be in writing. Relevant actions requiring Advent's approval under Section 5.2 include communications to Forescout's employees "with respect to the compensation, benefits or other treatment they will receive [post-closing]."[23]

ANSWER:

Defendants state that the document referenced in Paragraph 51 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate content, and deny any allegations or characterizations inconsistent therewith.

52. The parties further agreed that, before the Merger becomes effective, the Merger Agreement's restrictions "are not intended to give [Advent], on the one hand, or [Forescout] on the other hand, directly or indirectly, the right to control or direct the business or operations of the other," and that Forescout and Ferrari Group "will exercise, consistent with the terms, conditions and restrictions of this Agreement, complete control and supervision over their respective businesses and operations."[24]

ANSWER:

Defendants state that the document referenced in Paragraph 52 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate content, and deny any allegations or characterizations inconsistent therewith.

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22 *Id*. § 5.2.

23 *Id*. § 5.2(i)(F).

24 *Id*. § 5.4.

C. Closing Conditions

53. Section 6.1(a) of the Merger Agreement provides that the parties will use "their respective reasonable best efforts" to cause the conditions to the Merger to be satisfied and for closing to occur. Section 6.1(a) states, in relevant part, that:

> [Advent], on the one hand, and the [Forescout], on the other hand, will use their respective best efforts to (A) take (or cause to be taken) all actions; (B) do (or cause to be done) all things; and (C) assist and cooperate with the other Parties in doing (or causing to be done) all things, in each case as are necessary, proper or advisable pursuant to applicable Law or otherwise to consummate and make effective, in the most expeditious manner practicable, the Merger, including by using ***reasonable best efforts*** to[, among other things,] ***cause the conditions to the Merger set forth in Article VII to be satisfied*** . . . [25]

ANSWER:

Defendants state that the document referenced in Paragraph 53 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate content, and deny any allegations or characterizations inconsistent therewith.

54. The Merger Agreement expressly sets forth the conditions to Advent's obligations to close the Merger. One closing condition is that, unless waived by Ferrari Group, Forescout "will have performed and complied in all material respects with all covenants and obligations in this Agreement required to be performed and complied with by it at or prior to the Closing."[26]

ANSWER:

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[25] *Id.* § 6.1(a).

[26] *Id.* § 6.1(a).

Defendants state that the document referenced in Paragraph 54 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate content, and deny any allegations or characterizations inconsistent therewith.

55. Another condition for Advent's obligation to close is that Forescout's representations and warranties in specific parts of Article III of the Merger Agreement, including Section 3.12(b), which "are not qualified by Company Material Adverse Effect or other materiality qualifications," must be "true and correct in all material respects as of the Closing Date."[27] Section 3.12(b) provides that "[s]ince the date of the Audited Company Balance Sheet [for the fiscal year ended December 31, 2018], through the date of this Agreement, there has not occurred a Company Material Adverse Effect."[28]

ANSWER:

Defendants state that the document referenced in Paragraph 55 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate content, and deny any allegations or characterizations inconsistent therewith.

56. Section 7.2(b) of the Merger Agreement provides that Advent's obligation to close is conditioned upon Forescout having satisfied "in all material respects" the "covenants and obligations in th[e] [Merger] Agreement required to be performed and complied with by it at or prior to the Closing."[29] Section 7.2(d) provides that another condition to Advent's obligation to close is the satisfaction (or waiver by Ferrari Group) of the

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27 *Id*. § 7.2(a)(ii).

28 *Id*. §§1.1(f), 3.12(b).

29 *Id*. § 7.2(b).

condition that "[n]o Company Material Adverse Effect will have occurred after the date of th[e] [Merger] Agreement that is continuing."[30]

ANSWER:

Defendants state that the document referenced in Paragraph 56 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate content, and deny any allegations or characterizations inconsistent therewith.

57. Company Material Adverse Effect (or "MAE") is defined in Section 1.1 of the Merger Agreement as follows:

> "Company Material Adverse Effect" means any change, event, violation, inaccuracy, effect or circumstance (each, an "Effect") that, individually or taken together with all other Effects that exist or have occurred prior to the date of determination of the occurrence of the Company Material Adverse Effect, (A) has had or would reasonably be expected to have a material adverse effect on the business, financial condition or results of operations of the Company and its Subsidiaries, taken as a whole; or (B) would reasonably be expected to prevent or materially impair or delay the consummation of the Merger, it being understood that, in the case of clause (A) or clause (B), none of the following (by itself or when aggregated) will be deemed to be or constitute a Company Material Adverse Effect or will be taken into account when determining whether a Company Material Adverse Effect has occurred or may, would or could occur (subject to the limitations set forth below):
>
> (i) ***changes in general economic conditions*** in the United States or any other country or region in the world, or changes in conditions in the global economy generally (***except to the extent that such Effect has had a materially disproportionate adverse effect on the Company relative to other companies of a similar size operating in***

30 *Id.* § 7.2(d).

the industries in which the Company and its Subsidiaries conduct business, in which case only the incremental disproportionate adverse impact may be taken into account in determining whether there has occurred a Company Material Adverse Effect); . . .

(vi) earthquakes, hurricanes, tsunamis, tornadoes, floods, mudslides, wild fires or other natural disasters, weather conditions, ***epidemics***, ***pandemics and other force majeure events*** in the United States or any other country or region in the world (***except to the extent that such Effect has had a materially disproportionate adverse effect on the Company relative to other companies of similar size operating in the industries in which the Company and its Subsidiaries conduct business, in which case only the incremental disproportionate adverse impact may be taken into account*** in determining whether there has occurred a Company Material Adverse Effect);

(vii) any ***Effect resulting from the announcement of this Agreement or the pendency of the Merger***, including the impact thereof on the relationships, contractual or otherwise, of the Company and its Subsidiaries with employees, suppliers, customers, partners, vendors, Governmental Authorities or any other third Person . . . . [31]

ANSWER

Defendants state that the document referenced in Paragraph 57 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate content, and deny any allegations or characterizations inconsistent therewith.

58. At the time the parties were negotiating the terms of the Merger Agreement, COVID-19 had already begun to spread beyond China and throughout the world. The World Health Organization declared COVID-19 a

[31] *Id*. § 1.1(t) (emphasis added).

global public health emergency the week before the Merger Agreement was signed.[32]

ANSWER:

Defendants admit that, prior to the signing of the Merger Agreement, cases of COVID-19 had been reported outside of China, and that the World Health Organization declared COVID-19 a public health emergency prior to February 6, 2020. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegation in Paragraph 58 as to the extent of COVID-19's spread worldwide.

59. Accordingly, the parties expressly allocated to Advent the risks of an epidemic or pandemic such as COVID-19 or changes in general economic conditions affecting the financial performance of Forescout. Under the Merger Agreement, Advent would bear all of the risk unless an epidemic or pandemic occurred *after* the date of signing of the Merger Agreement, only if it had a "materially disproportionate adverse effect" on Forescout compared to peer companies and—even then—only the incrementally disproportionate impact on Forescout can be considered.

ANSWER:

Defendants state that the document referenced in Paragraph 59 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate content, and deny any allegations or characterizations inconsistent therewith. Defendants deny the remaining allegations in Paragraph 59.

D. Required Time of Closing

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[32] *See supra* ¶ 34.

60. Pursuant to Section 2.3 of the Merger Agreement, closing of the Merger is to occur no later than the second business day after the Marketing Period ends if all specific conditions to closing are satisfied or waived. Section 2.3 provides that:

> [t]he second Business Day after the satisfaction or waiver (to the extent permitted under this Agreement) of the last to be satisfied or waived of the conditions set forth in Article VII (other than those conditions that by their terms are to be satisfied at the Closing, but subject to the satisfaction or waiver (to the extent permitted under this Agreement) of such conditions); or (b) such other time, location and date as Parent, Merger Sub and the Company mutually agree in writing. Notwithstanding the foregoing, if the Marketing Period has not ended at the time of the satisfaction or waiver (to the extent permitted under this Agreement) of the last to be satisfied or waived of the conditions set forth in Article VII (other than those conditions that by their terms are to be satisfied at the Closing), then the Closing will occur on the earlier of . . . (ii) the second Business Day after the final day of the Marketing Period (subject . . . to the satisfaction or waiver (to the extent permitted under this Agreement) of all of the conditions set forth in Article VII, other than those conditions that by their terms are to be satisfied at the Closing, but subject to the satisfaction or waiver (to the extent permitted under this Agreement) of such conditions).[33]

ANSWER:

Defendants state that the document referenced in Paragraph 60 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate content, and deny any allegations or characterizations inconsistent therewith.

E. Termination and Remedies for Breach

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[33] Ex. A, Merger Agreement § 2.3. The Marketing Period is defined in Section 1.1(ggg).

61. The parties to the Merger Agreement agreed that specific performance is an appropriate remedy if any party does not perform its obligations under the Merger Agreement, including any actions required to consummate the Merger. Section 8.3(h) of the Merger Agreement provides that:

> Notwithstanding anything to the contrary in this Agreement, it is acknowledged and agreed that Parent, Merger Sub and the Company will each be entitled to an injunction, specific performance or other equitable relief as provided in Section 9.10(b), except that, although the Company, in its sole discretion, may determine its choice of remedies under this Agreement, including by pursuing specific performance in accordance with, but subject to the limitations of, Section 9.10(b), under no circumstances will the Company, directly or indirectly, be permitted or entitled to receive both specific performance of the type contemplated by Section 9.10(b) and any monetary damages.[34]

In the Equity Commitment Letter, the Advent Funds also agreed to Forescout's choice of remedies.[35]

ANSWER:

Defendants state that the document referenced in Paragraph 61 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate content, and deny any allegations or characterizations inconsistent therewith. Defendants deny the remaining allegations in Paragraph 61.

62. The parties broadly waived objections to the granting of specific performance and other equitable relief in the Merger Agreement. Pursuant to Section 9.10(b)(i) of the Merger Agreement:

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34 Ex. A, Merger Agreement § 8.3(h).

35 Ex. B, Equity Commitment Letter § 4.5.

> The Parties ***agree that irreparable damage for which monetary damages, even if available, would not be an adequate remedy would occur in the event that the Parties do not perform the provisions of this Agreement*** (including any Party failing to take such actions that are required of it by this Agreement in order to consummate the Merger) in accordance with its specified terms or otherwise breach such provisions. Subject to Section 9.10(b)(ii), the Parties acknowledge and agree that, subject to the penultimate sentence of Section 8.2(b), (A) the Parties will be entitled, in addition to any other remedy to which they are entitled at law or in equity, to an injunction, specific performance and other equitable relief to prevent breaches (or threatened breaches) of this Agreement and to enforce specifically the terms of this Agreement (including, subject to Section 9.10(b)(ii), specific performance or other equitable relief to cause Parent to perform any obligations required of it to enforce its rights under the Equity Commitment Letter); (B) the provisions of Section 8.3 are not intended to and do not adequately compensate the Company, on the one hand, or Parent and Merger Sub, on the other hand, for the harm that would result from a breach of this Agreement, and will not be construed to diminish or otherwise impair in any respect any Party's right to an injunction, specific performance and other equitable relief; and (C) the right of specific enforcement is an integral part of the Merger and without that right, neither the Company nor Parent would have entered into this Agreement.[36]

In addition, Section 9.10(b)(iii) of the Merger Agreement provides that the parties will not:

> raise any objections to (A) the granting of an injunction, specific performance or other equitable relief to prevent or restrain breaches or threatened breaches of this Agreement by the Company, on the one hand, or Parent and Merger Sub, on the other hand; and (B) the specific performance of the terms and provisions of this Agreement to prevent breaches or threatened breaches of, or to enforce compliance with, the covenants, obligations and agreements of the Parties pursuant to this Agreement. Any Party seeking an injunction or

[36] Ex. A, Merger Agreement § 9.10(b)(i) (emphasis added).

> injunctions to prevent breaches (or threatened breaches) of this Agreement and to enforce specifically the terms and provisions of this Agreement will not be required to provide any bond or other security in connection with such injunction or enforcement, and each Party irrevocably waives any right that it may have to require the obtaining, furnishing or posting of any such bond or other security.[37]

ANSWER:

Defendants state that the document referenced in Paragraph 62 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate content, and deny any allegations or characterizations inconsistent therewith. Defendants deny the remaining allegations in Paragraph 62.

63. Section 8.1(c) of the Merger Agreement sets an outside closing date of June 6, 2020 (the "Termination Date"), which will be automatically extended to August 6, 2020 in certain circumstances.[38] Under the terms of Section 8.1(c), however, Parent is not permitted to terminate the Merger Agreement as a result of the occurrence of the Termination Date "if the Company has the right to terminate this Agreement pursuant to . . . Section 8.1(i)," or if Parent's "action or failure to act (which action or failure to act constitutes a breach by [Parent]) has been the primary cause of, or primarily resulted in, either (A) the failure to satisfy the conditions to the obligations of the terminating Party to consummate the Merger as set forth in Article VII prior to the Termination Date; or (B) the failure of the Effective Time to have occurred prior to the Termination Date . . . ." [39]

ANSWER:

Defendants state that the document referenced in Paragraph 63 is in writing and respectfully refer the Court to the referenced documents for its full, complete

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37 *Id*. § 9.10(b)(iii).

38 *Id.* § 8.1(c).

39 *Id.*

and accurate content, and deny any allegations or characterizations inconsistent therewith.

64. Section 8.1(i) of the Merger Agreement provides that Forescout is entitled to terminate the Merger Agreement if the Merger does not close two days after the Marketing Period ends if all of the specified conditions to closing are satisfied or waived (or can be satisfied or waived at closing) and the Company gives the required notice stating that it is ready, willing, and able to close and that all necessary conditions have been satisfied or waived. Specifically, it provides:

> if (i) the Marketing Period has ended and all of the conditions set forth in Section 7.1 and Section 7.2 have been and continue to be satisfied or waived (other than those conditions that by their terms are to be satisfied at the Closing, each of which is capable of being satisfied at the Closing); (ii) Parent and Merger Sub fail to consummate the Merger on the date required pursuant to Section 2.3; (iii) the Company has notified Parent in writing that (A) it is ready, willing and able to consummate the Closing; and (B) all conditions set forth in Section 7.3 have been satisfied (other than those conditions that by their terms are to be satisfied at the Closing, each of which is capable of being satisfied at the Closing) or that it is willing to waive any unsatisfied conditions set forth in Section 7.3; and (iv) Parent and Merger Sub fail to consummate the Merger by the second Business Day after the delivery of the notice described in clause (iii).

Forescout sent Parent the notice contemplated by clause (iii) of Section 8.1(i) of the Merger Agreement on May 17, 2020.[40]

ANSWER:

Defendants admit that Forescout sent Parent what purported to be a Section 8.1(i)(iii) notice on May 17, 2020. Defendants state that the documents

[40] The May 17, 2020 letter notice to Parent is attached as Exhibit G.

referenced in Paragraph 64 are in writing and respectfully refer the Court to the referenced documents for their full, complete and accurate contents, and deny any allegations or characterizations inconsistent therewith.

III. FORESCOUT OPERATES IN THE ORDINARY COURSE AFTER SIGNING THE MERGER AGREEMENT.

A. Forescout, with Advent's Approval, Undertakes Measures to Address the Effects of COVID-19 and Complies with Advent's Repeated Information Requests.

65. COVID-19 is not a valid basis for Advent to refuse to close the Merger. The effects of COVID-19 on Forescout did not create an MAE that "occurred after the date of th[e] [Merger] Agreement that is continuing."[41] The pandemic was known to the world before Defendants executed the Merger Agreement—which expressly allocated the risk of a pandemic to Defendants.

ANSWER:

Defendants deny the allegations in Paragraph 65.

66. While the pandemic deepened after the parties signed the Merger Agreement, Forescout management continued to actively analyze and manage the pandemic's effects on Forescout's business and customer pipeline. Forescout had numerous discussions with Advent about its actions in this regard, explaining Forescout's cost structure and other remedial actions taken to respond to the current environment.

ANSWER:

Defendants admit that Forescout and Advent had numerous discussions with Advent regarding Forescout's financial performance and actions. Defendants deny the remaining allegations in Paragraph 66.

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41 *Id*. § 7.2(d).

67. Despite the fact that Forescout was ready to close the transaction shortly after the April 23, 2020 stockholder vote on the Merger, Forescout also agreed to Advent's request to implement a marketing period. The Merger Agreement provides for a 15-day "Marketing Period" following stockholder approval of the Merger and Ferrari Group's receipt of "Required Financing Information," as defined in the Merger Agreement.[42] The parties negotiated for the Marketing Period in the Merger Agreement because Advent had initially anticipated needing time before closing for debt syndication. Forescout understood, however, that the debt had been syndicated shortly after the Merger was announced in February 2020. Advent nonetheless insisted on a Marketing Period to cause further delay.

ANSWER:

Defendants state that the document referenced in Paragraph 67 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate contents, and deny any allegations or characterizations inconsistent therewith. Defendants deny the remaining allegations in Paragraph 67.

68. Although Forescout—like many businesses in the era of COVID-19— faced challenges, it continued to operate in accordance with the Alternate Plan that the Board had approved and Forescout had disclosed to stockholders throughout the Marketing Period. Forescout repeatedly walked Advent through all of the data underlying the Alternate Plan, giving it full visibility into Forescout's assumptions. In April 2020, however, Advent began to demand that Forescout abandon the Alternate Plan and create a revised forecast addressing the effects of COVID-19. Forescout, in response, created three detailed illustrative alternative scenarios for planning purposes, considering various effects of the pandemic, with Forescout recommending appropriate expense reduction measures. Forescout emphasized that these scenarios were highly speculative given the uncertainty in the global economy, which had caused more than 400 public companies to abandon giving guidance entirely. Advent was made aware of, and did not object to, the cost-reduction measures Forescout proposed, which included a hiring freeze except

[42] *Id*. §§ 6.6(a)(v), 1.1(ggg).

for certain strategic positions. At one point, Forescout asked Advent whether it could proceed with hiring a new employee in Thailand. Advent questioned whether the decision was consistent with the hiring freeze, and so Forescout did not proceed with the hiring. Advent also objected to Forescout making certain executive equity payments (which would normally be done in the first quarter of the year) and accordingly Forescout did not make the payments.

ANSWER:

Defendants deny the allegations in Paragraph 68.

69. Forescout had no obligation—contractual or otherwise—to create revised forecasts that would deviate from its multi-year standard procedure of having the Board approve a plan once per fiscal year. Nonetheless, Forescout engaged with Advent on scenario planning, taking into account potential expense reductions due to the shortfall of the first quarter of 2020 ("Q1 2020")—including a hiring freeze and delaying planned raises to employees until later in the year. Forescout told Advent that it continued to believe the Alternate Plan was operative, and consistently cooperated with Advent's information requests to ensure that Advent remained fully apprised about Forescout's business and understood that Forescout was well- positioned to close as planned. In each instance where approval was required under Section 5.2 of the Merger Agreement, Forescout kept Advent informed, sought approval, and abided by Advent's guidance.

ANSWER:

Defendants deny the allegations in Paragraph 69.

70. On April 14, 2020, Advent delivered a "revised base case" analysis it concocted based on Advent's own premature assumptions and modeling for Forescout revenue and bookings for fiscal 2020 to 2021 (the "Advent Illustrative Case"). The Advent Illustrative Case presented an overly conservative outlook for bookings and revenue estimates due to COVID-19. The Advent Illustrative Case estimated revenues that were approximately half of the Alternate Plan estimates. Advent never explained the factual basis for those assumed values. Nor could it, since Advent fabricated the projections without the input of Forescout management. Forescout consistently told Advent the cases would never happen as modeled.

ANSWER:

Defendants admit that Advent delivered a "revised base case" analysis to Forescout on April 14, 2020. Defendants state that the documents referenced in Paragraph 67 are in writing and respectfully refer the Court to the referenced documents for their full, complete and accurate contents, and deny any allegations or characterizations inconsistent therewith. Defendants deny the remaining allegations in Paragraph 70.

71. At midnight on April 19, 2020, Forescout's management received a request from Ferrari Group for sales information specific to Q1 2020, which had just ended March 31, 2020. On April 20, 2020, while the parties were in the midst of working through various items on the closing checklist, Ferrari Group delivered a letter to Forescout expressing concern about the impact of COVID-19 on the Company and requesting a variety of additional financial information.[43] The majority of the information Ferrari Group was requesting fell outside of the Agreement's definition of "Required Financing Information."[44]

ANSWER:

Defendants admit that on April 19, 2020 they requested from Plaintiff sales information specific to Q1 2020. Additionally, Defendants state that the letter referenced in Paragraph 71 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate contents, and deny any allegations or characterizations inconsistent therewith.

72. Within a day of receiving the information requests, Forescout began replying on a response-by-response basis. Forescout provided detailed Q1 2020 renewals information, as well as pipeline data, and provided the rest of the Q1 2020 financial information requested the next day. On April 23, 2020, Forescout sent a letter to Ferrari Group responding in full to the

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43 The April 20, 2020 letter to Forescout is attached as Exhibit H.

44 Ex. A, Merger Agreement § 6.6(a)(v).

information requests where it could and advising of the status of when further responses would be made or asking for further clarifications from Ferrari Group.[45] In addition to the written correspondence, members of Forescout's senior management continued to have multiple, lengthy conversations with representatives of Advent to respond to and address Advent's questions and requests. Forescout, at Advent's request, created four operating committees comprised of members of Forescout management and Advent International management to prepare for the company's operations post-closing. Forescout's April 23, 2020 letter states that Advent "now has in its possession all of the historical Forescout financial information required by the initial lenders as a condition precedent to the funding of the Debt Financing," triggering the beginning of the Marketing Period that Advent had insisted upon. Forescout further explained that it "remain[ed] eager to close the Merger and move forward with the next phase of the partnership between Forescout and Parent."[46] Although Forescout explained that the Marketing Period would end on May 13, 2020 under the Merger Agreement, Forescout adopted—at Advent's insistence—a May 14, 2020 end of the Marketing Period, meaning that pursuant to Section 2.3 of the Merger Agreement the Merger was required to close no later than May 18, 2020 if all conditions to closing were satisfied (or ready to be satisfied at closing).

ANSWER:

Defendants state that the documents referenced in Paragraph 72 are in writing and respectfully refer the Court to the referenced documents for their full,

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45 A copy of Forescout's letter of April 23, 2020 is attached hereto as Exhibit I, along with Forescout's written notice that it had provided the "Required Financing Information" as of April 23, 2020 and that the Marketing Period had commenced as Exhibit J.

46 Ex. I, April 23, 2020 Letter.

complete and accurate contents, and deny any allegations or characterizations inconsistent therewith. Defendants deny the remaining allegations in Paragraph 72.

73. Forescout proceeded diligently toward the closing date, expending hundreds of hours engaging in transition planning and information sharing with Advent. At the same time, Forescout continued to operate under the Alternate Plan and expects to have a strong second quarter of 2020 ("Q2 2020")—despite challenges created not only by COVID-19 but also by the looming Merger with Advent. For example, during the week of May 11, 2020, Forescout's head of sales raised his internal best estimate for the quarter as it appeared increasingly likely that Forescout would close in Q2 2020 a very large eight-figure transaction, which it has been working on for some time.

ANSWER:

Defendants deny the allegations in Paragraph 73.

74. At Advent's insistence, Forescout began to work on anticipated personnel reductions that would be implemented immediately after closing. Advent demanded that personnel changes be rolled out by June 1, 2020. Forescout also agreed that it would hire an employee of an Advent International affiliate as its new Chief Operating Officer post-Closing. Advent's selected Chief Operating Officer scheduled multiple discussions with members of the Forescout team who would be reporting to him after the Merger.

ANSWER:

Defendants deny the allegations in Paragraph 74.

B. Advent Signals Its Intention to Renege on the Merger Agreement.

75. Forescout's satisfaction of all conditions to closing, compliance with Advent's hiring and information requests, and encouraging Q2 2020 forecasts were of no matter to Advent. Advent International was singularly focused on the reality that its portfolio was being pummeled by a declining global market. On May 8, 2020, the extent of Advent's buyer's remorse became apparent. During a phone call between Forescout's Chief Executive Officer and Advent's head of technology investment Bryan Taylor, Mr.

Taylor told Forescout's CEO that Advent was considering not closing the Merger because of the COVID-19 pandemic. Mr. Taylor emphasized that Advent's decision was entirely "COVID-related."

ANSWER:

Defendants deny the allegations in Paragraph 75.

76. On May 11, 2020, Mr. Taylor told a representative of Morgan Stanley that "we want[ed] to close the deal" but that Advent International had concerns that needed to be addressed during an internal meeting of Advent International principals scheduled for May 13, 2020. Mr. Taylor had previously expressed Advent International's concerns before the signing of the Merger Agreement in view of Forescout's "missed quarters" in 2019. Those concerns were reflected in the negotiated per share price of $33.00 per share.

ANSWER:

Defendants admit the allegations in Paragraph 76, except for the last sentence, which Defendants deny.

77. On May 13, 2020 Advent cancelled a previously-scheduled planning meeting of the Forescout and Advent communications teams to coordinate the public announcements of the closing of the Merger, still planned for May 18, 2020. Despite this cancellation, other planning meetings between Advent and Forescout continued. Forescout continued to work in good faith toward a May 18, 2020 closing.

ANSWER:

Defendants admit the allegations in the first two sentences of Paragraph 77. Defendants deny the allegations in the third sentence of Paragraph 77.

78. On May 14, 2020, Mr. Taylor sent Forescout's CEO a presentation called "Project Ferrari Financial Analysis."[47] That presentation

[47] Ex. B, May 14, 2020 "Financial Analysis."

contained a "revised base case" and a new "downside case" that Advent had prepared for Forescout. Advent explained that the scenarios had been created because the Company had declined to create new projections. Forescout had, instead, chosen to rely on its Board-approved 2020 Alternate Plan and told Advent that revising that plan in the current economic climate (where many public companies are pulling guidance) would be inherently speculative.

ANSWER:

Defendants admit that on May 14, 2020, Mr. Taylor sent the referenced document and that Advent provided the "revised base case" and a new "downside case. Defendants deny the remaining allegations in Paragraph 78.

79. Advent created that "Financial Analysis" entirely on its own, without input from Forescout management or Morgan Stanley. Both the "revised base case" and "downside case" scenarios contained a variety of assumptions without basis in fact. It soon became clear that these contrived scenarios were ginned up by Advent in bad faith to create an unreasonably pessimistic view of Forescout's business and frustrate the debt financing for the Merger. Even under their unduly negative assumptions, both scenarios predicted that Forescout's business would return to business as usual in fiscal 2021.

ANSWER:

Defendants deny the allegations in Paragraph 79.

IV. DEFENDANTS' REFUSAL TO CLOSE IS INVALID.

80. On May 15, 2020, Ferrari Group, through Advent, sent a letter to Forescout (the "May 15 Letter") stating that Defendants would "not be proceeding to consummate the transaction on May 18, 2020 as scheduled."[48] In the May 15 Letter, Ferrari Group asserted that the Company was "in material breach of various covenants set forth in the Merger Agreement." Ferrari Group claimed that it could not attest to the Lenders that the post-closing entity would be solvent, revealing that it had concocted the May 14,

[48] Ex. C, May 15, 2020 Letter.

2020 "Financial Analysis" in a self-serving attempt to foreclose the debt financing for the Merger. Remarkably—despite predicting the prior day that Forescout would return to "business-as-usual"—Ferrari Group now claimed that "a Company Material Adverse Effect has occurred and is continuing."[49] None of the purported grounds Ferrari Group cited in its May 15 Letter provides Defendants with a valid basis to avoid their obligations to consummate the Merger.

ANSWER:

Defendants state that the documents referenced in Paragraph 80 are in writing and respectfully refer the Court to the referenced documents for their full, complete and accurate contents, and deny any allegations or characterizations inconsistent therewith.

A. The Company Has Not Suffered a Material Adverse Effect.

81. The May 15 Letter asserts that Forescout "has suffered a material adverse effect on its business, financial conditions, and results of operations" and that "it is clear that the Company's decline in earnings potential and financial performance will last for a durationally significant period of time."[50] Ferrari Group goes on to claim that:

> To the extent the Company has attributed its downturn in financial prospects to the COVID-19 outbreak or any other general economic condition, there has been a materially disproportionate effect on the Company's business relative to other companies of similar size operating in the industries in which the Company and its subsidiaries conduct business. See Merger Agreement, Section 1.1(t)(i), (vi). In fact, the financial performance and earnings of the Company's peers have actually improved in this economic environment, while the Company's financial performance and earnings have dramatically declined.

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49 *Id.*

50 *Id.*

ANSWER:

Defendants state that the document referenced in Paragraph 81 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate contents, and deny any allegations or characterizations inconsistent therewith.

82. The fact that Advent is even claiming an MAE reveals that it is fabricating reasons to avoid closing the Merger. That is clear for several reasons. First, the Merger Agreement expressly provides that COVID-19 and the resulting economic climate cannot create an MAE. The definition of Company Material Adverse Effect *excludes* pandemics, epidemics, and changes from general economic conditions.[51] The effects of the announcement of the Merger on Forescout's business are also expressly carved out.[52] Ferrari agreed in the Merger Agreement to bear the risk of any financial impact on the Company resulting from a pandemic or Merger announcement. It must now live with that agreement.

ANSWER:

Defendants state that the document referenced in Paragraph 82 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate contents, and deny any allegations or characterizations inconsistent therewith. Defendants deny the remaining allegations in Paragraph 82.

83. Ferrari Group's contention that the "Company's decline" will "last for a durationally significant period of time" is belied by Advent's own presentation from *one day* earlier. The May 14, 2020 "Financial Analysis" presentation predicted that Forescout would return to business as usual in

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51 *See supra* ¶ 57; Ex. A, Merger Agreement §§ 1.1(t)(i), (vi).

52 Ex. A, Merger Agreement §§ 1.1(t)(vii).

fiscal 2021—in both a "base" and "downside" case. That fact alone shows that Advent cannot credibly believe an MAE has occurred.

ANSWER:

Defendants deny the allegations in Paragraph 83.

84. There has been no disproportionate impact of COVID-19 on Forescout that could support Advent's invocation of an MAE. The definition of Company Material Adverse Effect in the Merger Agreement has a specific disproportionality concept: the effect on Forescout must be disproportionate relative to peer companies, and then only "the incremental disproportionate adverse impact may be taken into account in determining whether" an MAE has occurred.[53] Although many companies, including customers of Forescout, have told employees to shelter in place, Forescout has continued to pursue business opportunities, including the large eight-figure deal it expects to close in the second quarter of 2020. In addition, despite the challenges created by COVID-19 and the announcement of the Merger, Forescout's subscription business was up 11 percent in Q1 2020. Q1 2020 can hardly be seen as indicative of Forescout's (or any company's) long-term financial performance, given the recent COVID-19 outbreak in the United States. There is no evidence of any sustained long-term impact on Forescout's prospects. Advent does not have a crystal ball, and results to date have shown only minor impacts. Forescout's revenues for the first quarter were approximately $57 million—only $5 million lower than the $62 million "Illustrative Guidance" that was communicated to Advent and disclosed to shareholders in the company's proxy issued to shareholders in connection with its stockholder vote. A $5 million revenue shortfall does not constitute an MAE on a $1.9 billion transaction.

ANSWER:

Defendants state that the document referenced in Paragraph 84 is in writing and respectfully refer the Court to the referenced document for its full, complete

[53] Ex. A, Merger Agreement § 1.1(t).

and accurate contents, and deny any allegations or characterizations inconsistent therewith. Defendants deny the remaining allegations in Paragraph 84.

85. Finally, Ferrari Group's claim that—as a result of an MAE—a closing condition in Section 7.2(d) of the Merger Agreement cannot be satisfied is not credible.[54] By the time the Merger Agreement was signed on February 6, 2020, COVID-19 had already spread throughout the world and been declared a global public health emergency by the World Health Organization. As a result, even if COVID-19 could create an MAE (and it cannot), it did not "occur after the date of [the Merger] Agreement," as required by Section 7.2(d).[55] Forescout also represented in Section 3.12(b) of the Merger Agreement that no MAE had occurred before the Merger Agreement was signed.

ANSWER:

Defendants state that the document referenced in Paragraph 85 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate contents, and deny any allegations or characterizations inconsistent therewith. Defendants deny the remaining allegations in Paragraph 85.

B. Forescout Has Complied with Its Operating Covenants in All Material Respects.

86. Ferrari Group's second basis for claiming that a condition to closing has not been satisfied is that Forescout supposedly failed to operate its business in the ordinary course or failed to obtain Advent's consent to any deviations from ordinary course operations.[56] Each of the four "examples" Ferrari Group gives of Forescout's purported failure to comply with its operating covenants in Section 5.1 or its forbearance covenants in Section 5.2

54 Ex. C, May 15, 2020 Letter.
55 Ex. A, Merger Agreement § 7.2.
56 *Id*. § 3.12(b).

of the Merger Agreement is pretextual. And none of those "examples" gives it a basis not to consummate the Merger. The only circumstance that will prevent, materially impede, or materially delay Forescout's performance of its obligations under the Agreement and related documents is Advent's improper refusal to close.[57]

ANSWER:

Defendants state that the document referenced in Paragraph 86 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate contents, and deny any allegations or characterizations inconsistent therewith. Defendants deny the remaining allegations in Paragraph 86.

87. *First*, Ferrari Group's primary claim is that Forescout "abdicated its ordinary course business planning, budgeting, and financial forecasting responsibilities" by "refus[ing] to produce updated financial forecasts for 2020 or beyond."[58] **Ferrari Group reiterated that Forescout "declined to update its business plan or forecasts since January of 2020."**[59] **That is false. Forescout created—and shared—multiple different scenarios with Advent throughout March 2020 showing projected Q1 2020 performance. Forescout has been diligently iterating with Advent on an ongoing assessment of Forescout's business so that Forescout can provide an updated income statement, cash flow, and liquidity statements. The culmination of those efforts occurred on May 15, 2020, and a summary of that information was provided to Advent on May 18, 2020.**

ANSWER:

Defendants state that the document referenced in Paragraph 87 is in writing and respectfully refer the Court to the referenced document for its full, complete

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57 Ex. C, May 15, 2020 Letter.

58 *Id.*

59 *Id.*

and accurate contents, and deny any allegations or characterizations inconsistent therewith. Defendants deny the remaining allegations in Paragraph 87.

88. As explained above, nothing in the Merger Agreement obligated Forescout to create a new set of forecasts. In fact, creating an entirely new operating plan would be a *departure* from the way Forescout has run its business. Forescout followed its normal process where preliminary forecasts were prepared by management and presented to the Board in November, followed by Board approval of a final plan in February.[60] The Alternate Plan approved by the Board on February 5, 2020 accounted for lower anticipated revenues after the Company received its Q4 2019 results. Although Forescout has continually engaged with Advent on scenario planning for 2020 (and beyond), the Alternate Plan remains the operative forecast for the Company—and the plan provided to Advent in advance of signing the Merger Agreement. Advent's self-serving creation of the Advent Illustrative Scenario and the May 14, 2020 "Financial Analysis" does not change that reality.

ANSWER:

Defendants deny the allegations in Paragraph 88.

89. Notably, the morning of May 15, 2020, Mr. Taylor told Forescout's CEO that—despite Forescout continuing to rely on the Board-approved Alternate Plan and explaining that creating new forecasts would be inherently speculative— Advent had decided to create its own plan using an unreasonably low number for anticipated revenues. But, as Advent knows well, for 2020 alone, Forescout has approximately $100 million worth of maintenance and renewal contracts that show no signs of eroding, a major deal worth tens of millions of dollars expected to close in 2020, and multiple civilian government renewal contracts planned for Q2 2020. Forescout's predicted revenues well surpass what Advent purports to expect. In any event, Forescout's refusal to concoct new financial forecasts in the midst of the ongoing uncertainty created by COVID-19—while hundreds of publicly-traded companies have suspended guidance—neither violates Forescout's

[60] *See supra* ¶¶ 29, 33, 68.

operating covenants in Sections 5.1(ii), 5.1(iii)(a) or 5.1(iii)(c) of the Merger Agreement (as Advent claims) nor creates a failed condition to closing.

ANSWER:

Defendants deny the allegations in Paragraph 89.

90. *Second*, Ferrari Group states that Forescout's "sales function has dramatically decreased meaningful interactions with customers" due to the Company's remote work environment. Unspecified "competitors," Ferrari Group asserts, have been better able to "effectively sell [their] product[s] remotely" or by some "other means."[61] Advent's argument that Forescout's sales pipeline suffered due to a shift to a remote working environment comes nowhere close to constituting a failure to "conduct [Forescout's] business and operations in the ordinary course" as the Merger Agreement requires.[62]

ANSWER:

Defendants state that the document referenced in Paragraph 90 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate contents, and deny any allegations or characterizations inconsistent therewith. Defendants deny the remaining allegations in Paragraph 90.

91. Despite Ferrari Group's claim to the contrary in the May 15, 2020 Letter, Forescout's switch to a remote working environment came *after* making Advent aware, with Advent International itself having ordered employees to work remotely. This was not a choice. Forescout's headquarters are in Santa Clara County, California. On March 16, 2020, Santa Clara County (plus six other counties in the San Francisco Bay Area) issued a shelter-in-place order requiring residents to stay in their homes except for

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61 Ex. C, May 15, 2020 Letter.

62 Ex. A, Merger Agreement § 5.1(ii).

attending to a discrete set of necessities specified in the order.[63] Three days later, the Governor of California ordered all California residents to shelter in place in their homes, except for limited exemptions for essential services, not including Forescout.[64] Many of Forescout's employees, including salespeople, already worked from home before the pandemic. Forescout's shift of all other employees to a remote working environment, in compliance with state and local law, therefore cannot reasonably be construed as a failure to operate in the ordinary course. In any event, that is what companies operating in the ordinary course of business under current trying circumstances have done across industries.[65] Forescout is a software service business and does not have brick and mortar retail stores that rely on customers physically walking in the door or have factories churning out physical goods. Its business easily transitioned to remote work and its employees, including sales personnel, were able to conduct business as usual remotely and engage with Forescout's customers.

ANSWER:

Defendants admit that Forescout's headquarters are in Santa Clara County, California. Defendants further admit that on March 16, 2020, Santa Clara County issued a shelter-in-place order and three days later, the Governor of California ordered all California residents to shelter in place in their homes. Defendants deny the remaining allegations in Paragraph 91.

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63 Order of the Health Officer of the County of Santa Clara, March 16, 2020, https://www.sccgov.org/sites/covid19/Pages/order-health-officer-031620.aspx.

64 CalMatters, Timeline: California Reacts to Coronavirus, https://calmatters.org/health/coronavirus/2020/04/gavin-newsom-coronavirus-updates-timeline/.

65 *See* Ex. A, Merger Agreement §§ 5.1(ii)-(iii). It bears mention that the Merger Agreement required Forescout to represent and warrant that, as of the Closing Date, "the Company and each of its Subsidiaries is in compliance with all Laws that are applicable to the Company and its Subsidiaries or to the conduct of the business or operations of the Company and its Subsidiaries." *Id.* §§ 3.21, 7.2(a)(i). "Law" is defined broadly to include the ordinances or orders of "any federal, national, state, provincial or local, whether domestic or foreign, government." *Id.* § 1.1(yy), 1.1(eee) (definitions of "Government Authority" and "Law").

92. Forescout's solutions for customers remain as compelling today as before the COVID-19 crisis, or before announcement of the Merger. Forescout's software helps businesses and governments monitor and manage devices that come on to their networks. These devices include mobile phones, laptops, PCs, servers, routers, security cameras, and a multitude of "internet of things" devices that include connected hospital beds, wireless thermostats, webcams, connected watches and other devices. With the global change in work and social habits, there is undoubtedly going to be an increase in remote computing, an increase in personal and business mobile device usage, and increasing activity of these devices across networks. The need for Forescout's security solutions has never been greater. The pipeline of customer opportunities remains strong, Q2 2020 sales activity looks promising, and Forescout's competitive position as the category leader is clear.

ANSWER:

Defendants deny the allegations in Paragraph 92.

93. Any loss in contracts can—in large part—also be attributed to the announcement of the deal with Advent. For example, two multinational professional service companies that were substantial business partners of Forescout terminated their relationships with the Company due to the conflicts created by auditing relationships with Advent's portfolio companies, and a third major partner has also said it could no longer be a go-to market partner for Forescout for similar reasons. That alone has caused tens of millions of dollars of Forescout's pipeline to be deregistered. Other customers have simply expressed their unwillingness to work with a private equity buyer post-closing. Nonetheless, as even Advent's May 14, 2020 Financial Analysis recognized, Forescout has managed to secure large deals and see renewals in 2020.[66]

ANSWER:

Defendants deny the allegations in Paragraph 93.

94. *Third*, Ferrari Group claims that Forescout having "provided and . . .continuing to provide non-standard discounts" to a "significant number of customers" caused a "material" adverse effect of its "near- and long-term

[66] Ex. B, May 14, 2020 "Financial Analysis."

business prospects for the Company."[67] But Forescout maintained each of its "forbearance covenants" in Section 5.2 of the Merger Agreement, including not giving material discounts, in consultation with Advent. Any discounts Forescout gave were consistent with the way Forescout has operated in the past. In addition, Advent International was a party to many forecast calls where deal specifics were often discussed and reviewed—including discounts.

ANSWER:

Defendants state that the document referenced in Paragraph 94 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate contents, and deny any allegations or characterizations inconsistent therewith. Defendants deny the remaining allegations in Paragraph 94.

95. *Fourth*, Parent says that Company management "erroneously" telling "certain employees that they will likely be terminated post-closing" or that "adverse compensation decisions" having been made were "outside the ordinary course" and harmed "employee morale and retention."[68] That is false. Advent, through Mr. Taylor, pressured Forescout to put in place a transition plan for employees by June 1, 2020. That plan required an extensive effort by Forescout. It became obvious to some Forescout executives that Advent would not be retaining them after the Merger closed. Advent also pushed Forescout to announce that a current employee of an Advent International affiliate would become Forescout's COO post-closing. Setting aside that employee morale issues caused by the Merger cannot constitute a failure to comply with Sections 5.1(ii), 5.1(iii)(b), or 5.2(i)(F) of the Merger Agreement— as Ferrari Group claims—any such issues were caused (and necessarily approved) by Advent.

ANSWER:

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67 Ex. C, May 15, 2020 Letter.

68 *Id.*

Defendants state that the documents referenced in Paragraph 95 are in writing and respectfully refer the Court to the referenced documents for their full, complete and accurate contents, and deny any allegations or characterizations inconsistent therewith. Defendants deny the remaining allegations in Paragraph 95.

C. Advent's Assertions About Insolvency Are Imagined and Based on the False Projections It Created.

96. Finally, Parent claims that it will be "unable to represent as to, or deliver to" the Lenders a certificate "attesting to[] the solvency of the post-closing entity involving Merger Sub and the Company," as required by the Debt Commitment Letter.[69] As a result, it argues, one of the conditions under the Debt Commitment Letter to the funding of the debt financing cannot be satisfied. Neither the solvency of the post-closing entity, nor the funding of the debt financing, is a condition to the Merger.

ANSWER:

Defendants state that the document referenced in Paragraph 96 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate contents, and deny any allegations or characterizations inconsistent therewith. Defendants further state that the Debt Commitment Letter is governed by New York Law and includes an exclusive New York forum provision, as acknowledged and agreed in Section 9.12(b) of the Merger Agreement.

97. Rather, Advent is attempting to create an imagined insolvency based upon its own baseless "Financial Analysis" that does not even show Forescout is insolvent. Advent is plainly relying on those scenarios to cast

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69 *Id*.

Forescout's financial outlook in an unreasonably negative light for one reason: to fabricate a reason to back out of the Merger. Furthermore, these fictional insolvency conditions for Forescout are solely related to the lending that Advent intends to place on the Company following the consummation of the Merger. As of March 31, 2020, Forescout had $100 million in cash and $22 million in notes payable and a revolving credit facility.

ANSWER:

Defendants deny the allegations in Paragraph 97. Defendants further state that the Debt Commitment Letter is governed by New York Law and includes an exclusive New York forum provision, as acknowledged and agreed in Section 9.12(b) of the Merger Agreement.

98. In any event, it is the Company, not Advent, that must provide "a customary certificate executed by the chief financial officer of the [post-closing] Company with respect to solvency matters) as may be reasonably requested by Parent or the Financing Sources."[70] The requirement has nothing to do with Forescout's current or future performance but rather is a customary lender requirement designed to remove one of the elements of fraudulent conveyance and ward off suits by existing creditors to the Company that might be subordinated in the Merger. If Advent felt that it could no longer obtain financing through the Debt Commitment Letter, it was obligated under the Merger Agreement to use its reasonable best efforts to arrange alternative financing.[71] To the extent that debt financing became an

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70 Ex. A § 6.6(a)(iv); *see also* Ex. E, Annex I to Exhibit C thereof (requiring a certificate of "the Borrower," referring to the Company, that applies "after giving effect to the Transactions and the incurrence of the indebtedness and obligations being incurred in connection with the Credit Agreement and the Transactions").

71 *See supra* ¶ 46.

issue, Forescout indicated that it was prepared to accept a note in lieu of the funding committed under the Debt Commitment Letter.[72]

ANSWER:

Defendants deny the allegations in Paragraph 98. Defendants state that the document referenced in Paragraph 98 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate content, and deny any allegations or characterizations inconsistent therewith.

99. Advent's argument is nothing more than a ploy on its part to disrupt the debt commitment, putting at risk the ability of Parent and Merger Sub to finance the Merger at the $33 per share purchase price Forescout stockholders were promised.

ANSWER:

Defendants deny the allegations in Paragraph 99.

V. DEFENDANTS HAVE BREACHED THEIR OBLIGATIONS UNDER THE MERGER AGREEMENT.

100. Forescout has fully complied with, and stands ready to comply with, all of its obligations under the Merger Agreement, including satisfying all required conditions to closing. Advent is in breach of its obligations under the Merger Agreement, has repudiated the Merger Agreement, and has threatened further breaches. Advent is in material breach of the Merger Agreement through its conduct over the past month, culminating in the May 15 Letter refusing to close the Merger as required on May 18, 2020. None of Advent's purported reasons for refusing to close are credible or valid.

ANSWER:

Defendants deny the allegations in Paragraph 100.

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[72] A May 19, 2020 letter to Parent discussing that potential financing option is attached as Exhibit K.

101. In addition to violating the express requirements of Section 2.3, Advent has failed to use reasonable best efforts to consummate the Merger. Under Section 6.1(a)(i) of the Merger Agreement, Defendants are obligated to take or cause to be taken all actions necessary to consummate "in the most expeditious manner practicable, the Merger, including by using reasonable best efforts to: (i) cause the conditions to the Merger set forth in Article VII [the closing conditions] to be satisfied."[73]

ANSWER:

Defendants state that the document referenced in Paragraph 101 is in writing and respectfully refer the Court to the referenced document for its full, complete and accurate content, and deny any allegations or characterizations inconsistent therewith. Defendants deny the remaining allegations in Paragraph 101.

102. Despite those obligations, Advent engaged in a course of conduct to try to avoid closing, culminating in the delivery of the May 15 Letter in which Ferrari Group asserted that it "will not be proceeding to consummate the transaction on May 18, 2020 as scheduled" and that "the proposed transaction cannot close."[74] Advent cannot use the effects of COVID-19—or its view that the Merger is no longer in Advent's interest—to avoid its obligations under the Merger Agreement. Rather, Advent should be required to fulfill its contractual obligations to Forescout to close the Merger immediately, but in no event later than the June 6, 2020 Termination Date, and to use is reasonable best efforts to consummate the Merger as "expeditious[ly]" as possible.[75]

ANSWER:

Defendants state that the document referenced in Paragraph 102 is in writing and respectfully refer the Court to the referenced document for its full, complete

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73 Ex. A, Merger Agreement § 6.1(a)(i).

74 Ex. C, May 15, 2020 Letter.

75 Ex. A, Merger Agreement § 6.1(a)(i).

and accurate content, and deny any allegations or characterizations inconsistent therewith. Defendants deny the remaining allegations in Paragraph 102.

103. Further, in refusing to close the Merger under the pretense that certain conditions to the Debt Commitment Letter cannot be satisfied, Defendants have repudiated their obligations to use their "reasonable best efforts" to consummate both the equity and debt financing for the Merger and enforce all of their rights under the Equity Commitment Letter and Debt Commitment Letters.[76] All necessary financing has been secured and was available for the planned closing of the Merger on May 18, 2020.

ANSWER:

Defendants deny the allegations in Paragraph 103.

104. Forescout stood ready, willing, and able to close the Merger as scheduled. It remains ready, willing, and able to close as promptly as possible. Defendants, however, are in material breach of the Merger Agreement.

ANSWER:

Defendants deny the allegations in Paragraph 104.

COUNT I
(DECLARATORY JUDGMENT PURSUANT TO 10 *DEL.* C. § 6501)

105. Forescout incorporates herein by reference paragraphs 1 through 104 hereof as if fully set forth herein.

ANSWER:

Defendants repeat their responses to the allegations of the foregoing paragraphs as if fully set forth therein.

106. The Merger Agreement is a valid and enforceable contract.

[76] *Id*. § 6.5(b).

ANSWER:

Paragraph 106 states a legal conclusion to which no response is required.

107. Forescout has substantially performed its obligations to date, has not breached the Merger Agreement, and remains ready, willing, and able to consummate the Merger.

ANSWER:

Defendants deny the allegations in Paragraph 107.

108. Forescout has satisfied all conditions precedent in the Merger Agreement and any other relevant contractual agreements or will be capable of satisfying any remaining closing conditions at or prior to closing of the Merger.

ANSWER:

Defendants deny the allegations in Paragraph 108.

109. Advent has refused to comply with its obligations under and in connection with the Merger Agreement and has unilaterally breached the Agreement by failing to close the Merger as required under Section 2.3 and also by failing to use reasonable best efforts to consummate the Merger as contemplated by Section 6.1(a) of the Merger Agreement.

ANSWER:

Defendants deny the allegations in Paragraph 109.

110. A real and adverse controversy exists between the parties that is ripe for adjudication, including whether Advent is in breach of the Merger Agreement by failing to use reasonable best efforts to consummate the Merger and by improperly refusing to consummate the Merger.

ANSWER:

Paragraph 110 states a legal conclusion to which no response is required.

111. Forescout is entitled to a declaration that Advent's refusal to close the Merger is a violation of the Merger Agreement and that Advent has knowingly and willfully breached the Agreement.

ANSWER:

Defendants deny the allegations in Paragraph 111.

112. Plaintiff also is entitled to a declaration that any attempt by Advent to terminate the Merger due to the failure of any conditions to closing set forth in its May 15, 2020 letter, the occurrence of a Company Material Adverse Effect, the passing of the Termination Date, the expiration of the debt commitments or otherwise is invalid.

ANSWER:

Defendants deny the allegations in Paragraph 112.

COUNT II
(BREACH OF CONTRACT AND SPECIFIC PERFORMANCE AGAINST FERRARI GROUP AND MERGER SUB)

113. Forescout incorporates herein by reference paragraphs 1 through 112 hereof as if fully set forth herein.

ANSWER:

Defendants repeat their responses to the allegations of the foregoing paragraphs as if fully set forth therein.

114. The Merger Agreement is a valid and binding contract.

ANSWER:

Paragraph 114 states a legal conclusion to which no response is required.

115. Forescout has substantially performed its obligations under the Merger Agreement and remains ready, willing, and able to perform any obligations necessary to close the Merger.

ANSWER:

Defendants deny the allegations in Paragraph 115.

116. Forescout has satisfied all conditions precedent to closing under and in connection with the Merger Agreement or will be capable of satisfying those conditions precedent at or prior to the closing of the Merger.

ANSWER:

Defendants deny the allegations in Paragraph 116.

117. Advent has breached, and intends to breach, the Merger Agreement, without contractual excuse or justification, by, among other things, failing to close the Merger on May 18, 2020, as required under Section 2.3, failing to use reasonable best efforts to consummate the Merger as contemplated by Section 6.1(a) of the Merger Agreement, and refusing to otherwise comply with its contractual obligations to close without any basis for taking such action under the Merger Agreement or applicable law.

ANSWER:

Defendants deny the allegations in Paragraph 117.

118. Forescout will be irreparably harmed if Advent refuses to comply with its contractual obligations under the Merger Agreement, including to close the Merger Agreement promptly, but no later than June 6, 2020, and to use reasonable best efforts to consummate the Merger, as contemplated by Section 9.10(b)(i) of the Merger Agreement, in which the parties "agree[d] that irreparable damage for which monetary damages, even if available, would not be an adequate remedy would occur in the event that the Parties do not perform the provisions of this Agreement (including any Party failing to take such actions that are required of it by this Agreement in order to consummate the Merger) in accordance with its specified terms or otherwise breach such provisions."

ANSWER:

Defendants state that the document referenced in Paragraph 118 is in writing and respectfully refer the Court to the referenced document for its full, complete

and accurate content, and deny any allegations or characterizations inconsistent therewith. Defendants deny the remaining allegations in Paragraph 118.

119. Advent must abide by its clear contractual obligations under the Merger Agreement and will not be harmed if it is prevented from violating Forescout's clear contractual rights under the Merger Agreement.

ANSWER:

Defendants deny the allegations in Paragraph 119.

120. In contrast, Forescout will be immediately and irreparably harmed if the Merger is not consummated.

ANSWER:

Defendants deny the allegations in Paragraph 120.

121. The balance of the equities weighs in Forescout's favor.

ANSWER:

Defendants deny the allegations in Paragraph 121

122. Forescout has no adequate remedy at law.

ANSWER:

Defendants deny the allegations in Paragraph 122.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a claim against Defendants upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the Merger Agreement, in whole or in part, because Defendants have complied in all material respects with its representations and warranties, covenants, and agreements under the Merger Agreement.

THIRD AFFIRMATIVE DEFENSE

For the reasons set forth in Defendants' Verified Counterclaims, Plaintiff's claims are barred, in whole or in part, by the doctrines of waiver, estoppel, ratification, and acquiescence. Plaintiff has acted inconsistently with its contractual obligations to Defendants, including but not limited to Plaintiff's obligations to fulfill its representations, warranties, and covenants.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff itself is in breach of the Merger Agreement for the reasons set forth in Defendants' Counterclaims.

FIFTH AFFIRMATIVE DEFENSE

All issues arising out of or related to the Debt Financing, the Debt Commitment Letters, or the performance of services thereunder are subject to the exclusive jurisdiction of courts sitting in the State of New York, City of New York, Borough of Manhattan.

Defendants reserve the right to assert additional defenses as discovery proceeds in this case.

WHEREFORE, Defendants respectfully request that this Court grant the following relief:

A. Dismissing the Complaint with prejudice;

B. Awarding Defendants their attorneys' fees and expenses; and

C. Granting such other and further relief as the Court may deem appropriate and just.

DEFENDANTS' VERIFIED COUNTERCLAIMS

Counterclaimants Ferrari Group Holdings, L.P. and Ferrari Merger Sub, Inc. by and through their undersigned counsel, upon knowledge as to themselves and upon information and belief as to all other matters, hereby assert the following counterclaims against Forescout Technologies, Inc., and state as follows:

PRELIMINARY STATEMENT

1. When Ferrari Group Holdings, L.P. ("Parent") and Ferrari Merger Sub, Inc. ("Merger Sub" and, together with Parent, "Buyers") signed an Agreement and Plan of Merger (the "Merger Agreement") with Forescout Technologies, Inc. ("Forescout" or "Company") on February 6, 2020, they believed they were acquiring a promising provider of cybersecurity solutions for enterprise information technology networks. Although the Company had not, in Buyers' view, lived up to its full potential, Buyers were optimistic that with time, capital investment, and strategic guidance, they could take the Company to the next level.

2. By the time the parties were approaching the expected Closing date in mid-May, however, Forescout's financial and operational performance had fallen off a cliff. Its reported first quarter earnings had fallen ***76%***, and its revenue had fallen more than ***24%***, compared to the first quarter of 2019. Its management reported an approximately [redacted] Its Vice President of Business Enablement [redacted]

[redacted] Parent's projections, which are based significantly on information that Forescout provided to Parent, and which were disclosed to and discussed extensively with Forescout's management—estimate that, for FY 2020, ***Forescout will experience a*** [redacted] [redacted] Remarkably, while Forescout's performance was falling, its peers were almost uniformly reporting significant first quarter earnings and revenue gains.

3. In light of these disastrous results, Buyers concluded that Forescout had suffered a material adverse event, and that it would be rendered insolvent if the parties were to close the planned transaction, which involved $400 million in term loan financing and a $40 million revolver commitment. Buyers came to this conclusion after careful consideration and evaluation of Forescout's business and financial circumstances. As part of this process, Buyers repeatedly tried to engage Forescout and its management to understand and address the causes of the Company's troubles. Yet rather than work collaboratively with Buyers, Forescout and its management stuck their heads in the sand, repeatedly refusing to revisit their prior business plans or financial projections. Indeed, Forescout maintained, with less and less plausibility, that expectations set in January 2020—before its abysmal first quarter results and before COVID-19 shut down large parts of the

United States—remained accurate and true, and that [redacted].

4. Stymied by a management team unwilling to confront the realities faced by the Company, Buyers performed their own rigorous analysis of Forescout's operations and financial condition, obtaining detailed information directly from the Company and discussing the data and their analysis with management throughout. That analysis revealed financial and operational troubles, and material changes in the operation of the business.

5. Financially, the analysis revealed that [redacted] if the parties closed the proposed transactions as contemplated. Given [redacted], the assumption of $400 million in new debt—a key aspect of the merger financing—would leave Forescout unable to meet its operational costs and unable to satisfy its (ever growing) liabilities. In the second quarter alone, [redacted] which is unsustainable for any business.

6. Operationally, Buyers determined that Forescout's sales function had retracted significantly between February and April, with the Company [redacted]

[redacted] In fact, a senior member of Forescout's sales team candidly admitted in mid-April, a month after much of the United States adopted social distancing regulations, [redacted]

7. When Buyers shared their analysis with Forescout in mid-April, however, the Company's management ***still*** failed to respond meaningfully to the challenges that the Company faced. Instead, the Company continued to resist reality, insisting that its pie-in-the-sky forecasts were sufficient—[redacted] in a transparent attempt to bolster its pre-closing sales figures at the expense of longer-term revenue. It appeared that Forescout's management's strategy for the challenges faced by the business was to attempt to ignore them until the expected Closing made this Buyers' problem.

8. Forescout's financial decline, [redacted] has been material both in absolute terms and relative to the performance of its peers, who have performed well in an environment where secure remote access to IT networks has become a priority. Forescout's failure to revise its business plans and financial projections in order to steer a course through

a period of volatility and opportunity, and its decision instead to offer extraordinary and short-sighted discounts to customers in a desperate attempt to prop the Company up until Closing, represent a departure from the manner in which the Company operated in the ordinary course. And because Forescout's precarious finances would leave it insolvent upon Closing of the proposed transactions, Buyers cannot in good faith certify the solvency of the post-closing entity—which is a condition to close the $400 million term loan financing.

9. For these reasons, and as set forth in greater detail herein, Buyers informed Forescout on May 15, 2020, that the contractual conditions to Closing have not been and cannot be met. Buyers now bring this action seeking a declaration that Forescout has suffered a "Company Material Adverse Effect," that it has failed to conduct its business in the ordinary course, and that the likelihood of the Company's insolvency upon consummation of the proposed transactions would in any event prevent enforcement of a specific performance remedy.

PARTIES

10. Plaintiff/Defendant-in-Counterclaim Forescout is a Delaware corporation with a principal place of business at 90 West Tasman Drive, San Jose, California 95134. Forescout is cybersecurity software company that was founded

in April of 2000 in Tel Aviv, Israel. It was a private company until November 2017, when it had its initial public offering.

11. Defendant/Plaintiff-in-Counterclaim Parent is a Delaware limited partnership with a principal place of business at 800 Boylston Street, Boston, MA 02119.

12. Defendant/Plaintiff-in-Counterclaim Merger Sub is a Delaware corporation with a principal place of business at 12 E. 49th St., 45th Floor, New York, NY 10017.

13. Both Parent and Merger Sub are affiliates of non-party Advent International Corporation ("Advent"), a Delaware corporation headquartered in Boston, MA.

JURISDICTION AND VENUE

14. This Court has subject matter jurisdiction under 10 *Del. C.* § 6501 to declare the rights, status and other legal relations of the parties to the Merger Agreement.

15. This Court has personal jurisdiction over Forescout, and venue is proper before this Court, because the parties consented to the jurisdiction and venue of this Court. Section 9.12(a) of the Merger Agreement, states that each party "irrevocably and unconditionally consents and submits itself and its

properties and assets in any Legal Proceeding to the exclusive general jurisdiction of the Chosen Courts in the event that any dispute or controversy arises out of" the proposed transaction or Merger Agreement. The Merger Agreement defines "Chosen Courts" as the "Courts of Chancery of the State of Delaware and any state appellate court therefrom within the State of Delaware" if available. *See* Ex. A (Merger Agreement) § 1.1(l).

FACTS

The Merger Agreement and the Conditions to Close

16. Forescout and Parent signed the Merger Agreement governing the proposed transaction on February 6, 2020. Under and subject to the conditions of the Merger Agreement, each outstanding share of Forescout's common stock would be cancelled and automatically converted into the right to receive $33.00 in cash per share. All currently outstanding debt of Forescout would also be repaid, resulting in a total transaction cost, after taking into account transaction expenses and the assumption of the liabilities relating to Forescout's unvested incentive equity, of almost $2 billion. The deal included $400 million in term loan financing and a $40 million revolver commitment from third-party lenders (both subject to the terms of a debt commitment letter).

17. Article VII of the Merger Agreement sets forth the conditions to the closing of the proposed transaction, and Sections 7.1 and 7.2 provide the conditions precedent to Parent's and Merger Sub's obligation to close the proposed transaction. One of the conditions precedent to Buyers' obligation to Close is that "No Company Material Adverse Effect will have occurred after the date of this [Merger] Agreement that is continuing." Ex. A (Merger Agreement) § 7.2(d). Section 1.1(t) of the Merger Agreement defines Company Material Adverse Effect as:

> any change, event, violation, inaccuracy, effect or circumstance (each, an "**Effect**") that, individually or taken together with all other Effects that exist or have occurred prior to the date of determination of the occurrence of the Company Material Adverse Effect, (A) has had or would reasonably be expected to have a material adverse effect on the business, financial condition or results of operations of the Company and its Subsidiaries, taken as a whole; or (B) would reasonably be expected to prevent or materially impair or delay the consummation of the Merger, it being understood that, in the case of clause (A) or clause (B), none of the following (by itself or when aggregated) will be deemed to be or constitute a Company Material Adverse Effect or will be taken into account when determining whether a Company Material Adverse Effect has occurred or may, would or could occur . . . .

Id. § 1.1(t).

18. While Effects such as "general economic conditions," "changes in the conditions of the financial markets," "natural disasters," and "epidemics,

pandemics and other force majeure events" are carved out, there is a savings clause providing such Effects remain a Company Material Adverse Effect if:

> such Effect ***has had a materially disproportionate adverse effect on the Company relative to other companies of similar size operating in the industries in which the Company and its Subsidiaries conduct business***, in which case only the incremental disproportionate adverse impact may be taken into account in determining whether there has occurred a Company Material Adverse Effect.

Id. § 1.1(t)(i), (ii), (vi) (emphasis added).

19. Section 7.2(b) of the Merger Agreement provides that a condition to Parent's and Merger Sub's obligation to close the proposed transaction is that Forescout "will have performed and complied in all material respects with all covenants and obligations in this [Merger] Agreement required to be performed and complied with by it at or prior to the Closing." *Id.* § 7.2(b). One such covenant requires Forescout to conduct its business and operations in the ordinary course between the signing and Closing of the Merger Agreement. Specifically, Forescout agreed that:

> Except (a) as expressly contemplated by this [Merger Agreement or incorporated Forescout disclosures]; . . . (c) as contemplated by Section 5.2; or (d) as approved by Parent (which approval will not be unreasonably withheld, conditioned or delayed), during the Pre-Closing Period, the Company will, and will cause each of its Subsidiaries to, . . . (ii) subject to the restrictions and exceptions set forth in Section 5.2 or elsewhere in this [Merger] Agreement, ***conduct its business and operations in the ordinary course of business***; and

> (iii) use its respective reasonable best efforts to (a) preserve intact its material assets, properties, Contracts and business organizations . . .”

Id. § 5.1 (emphasis added).

20. The Merger Agreement provides Forescout with a right to specific performance of Parent’s obligations under the Merger Agreement under certain circumstances, with particular limitations on the ability to obtain specific performance of the obligation to close. In particular, Section 9.10(b)(ii) of the Merger Agreement provides that the right of Forescout to specific performance in enforcing Parent’s obligations to “effect the Closing and consummate the” proposed transaction is that “(B) the Debt Financing [whether original or alternate] has been funded or will be funded in accordance with the terms thereof at Closing.” *Id.* § 9.10(b)(ii). The Merger Agreement further states: “***In no event*** will [Forescout] be ***entitled to enforce or seek to enforce specifically Parent’s obligation . . . to complete the Merger if the Debt Financing has not been funded in full*** (or is not reasonably expected to be funded in full at the Closing[]). . . .” *Id.* (emphasis added).

21. The Merger Agreement also provides, under certain circumstances, for Forescout to pay to Buyers a Company Termination Fee, in particular if Forescout enters into certain alternative transactions. *Id.* § 8.3(b).

The Debt Commitment Letter and the Conditions to Close

22. Contemporaneous with signing the Merger Agreement, Merger Sub and certain lending parties executed a debt commitment letter, which was amended by an Amended and Restated Commitment Letter (the "Debt Commitment Letter" or "DCL"), dated February 25, 2020 attached to Forescout's Complaint as Exhibit E, in which several third-party lenders committed to provide (i) approximately $400 million in term loan financing at the Closing of the proposed transaction, subject to the terms and conditions of the DCL, and (ii) a $40 million revolver commitment, a portion of which could be drawn at Closing. As agreed and acknowledged by the Parties in the Merger Agreement, the Debt Commitment letter is subject to New York law and a New York exclusive forum provision. *Id.* § 9.12(b).

23. The lenders' obligations to fund under the DCL are subject to certain conditions precedent, including [redacted] *Id.* at Conditions §§ 2, 5. [redacted]

[redacted] *Id.* § 6. As Merger Sub has no assets or liabilities on its own, that effectively means [redacted] *See id.*

24. Another condition precedent to the Initial Funding under the Debt Commitment Letter is that [redacted] *See id.* at Conditions § 1(b).

25. Importantly, "Borrower" is at all times a subsidiary of Parent and under control of its selected Board of Directors, which must authorize the debt. Pre-Merger, "Borrower" is Merger Sub, and post-Merger, it is Forescout as the surviving company of the Merger. Absent delivery of the certification by Merger Sub pre-Closing, the Initial Funding for $400 million of the merger consideration at Closing does not, and will not, occur.

The Period Between Signing and Closing: Forescout's Business Collapses and Parent Pursues More Accurate Data Regarding Forescout's Financial Condition

26. A few short weeks after the parties signed the Merger Agreement, Forescout's business cratered. Initially, during the last week of February 2020, [redacted]

27. However, only three weeks later, on March 20, when Forescout gave Buyers a preview to its first quarter results, management reported to Buyers that Forescout [redacted] During a subsequent call on the same day, Forescout's Chief Financial Officer, Christopher Harms, [redacted]. Harms seemed to be suggesting that Forescout [redacted]

28. Alarmed by this sudden and sharp decline in performance, Parent immediately engaged directly with Company management in an effort to better understand Forescout's changed financial condition. In response, on or around March 24, Parent received even more alarming news: although only a few days had passed since the last preview of Q1, management changed its tune and

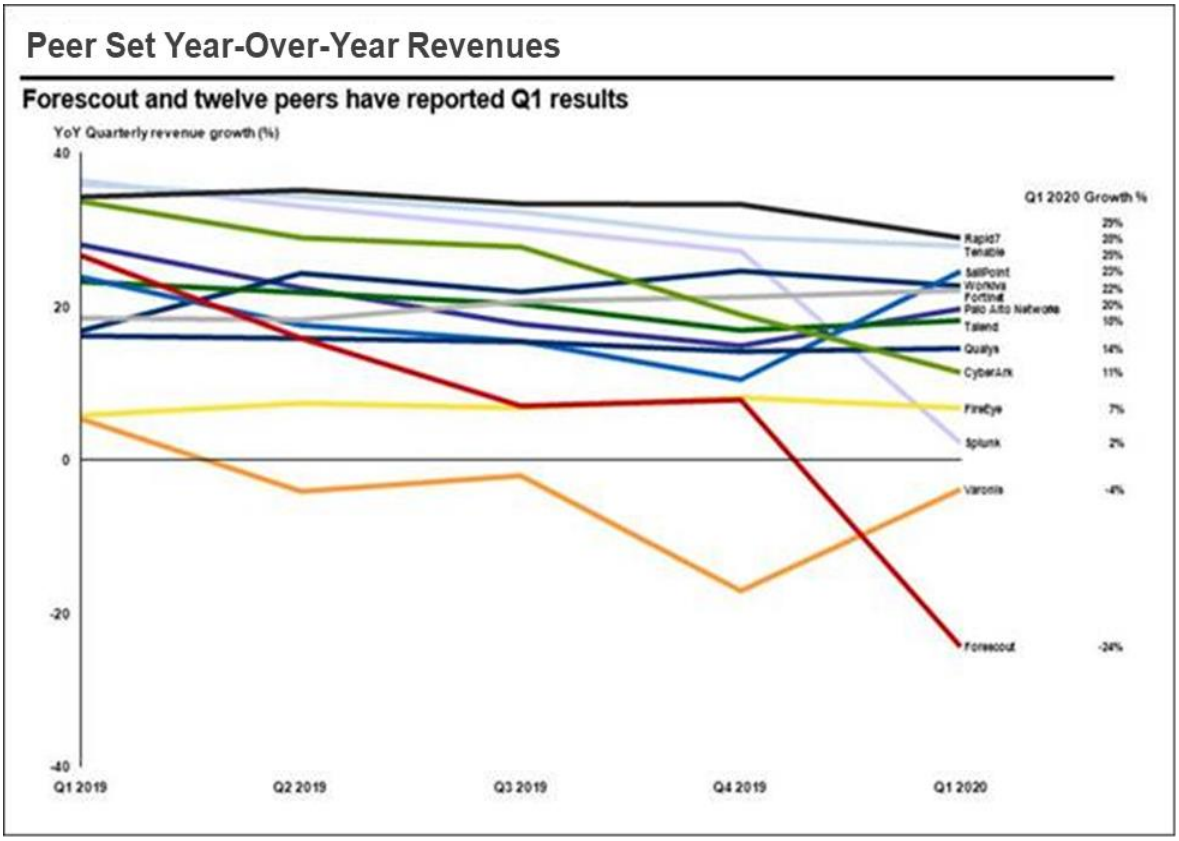
reported that Forescout [redacted]

29. As part of its effort to understand Forescout's worsening financial condition, Advent asked Forescout to provide updated forecasts, in order to assess and respond to changing circumstances. Forescout's initial draft was of such low quality that Parent did not share it with Advent's Investment Committee.

30. The next version prepared by Forescout, sent on or around March 27, and updated again on April 6, still reflected an inability of Company management to take the changed circumstances seriously. Instead of conducting an independent [redacted]

31. The conclusions from the analysis were just as troubling. This included [redacted]

32. Even with the aid of several highly unnatural (and detrimental) actions taken by Forescout to pull additional bookings into the quarter, discussed *infra*, Forescout ultimately [redacted] In short, Forescout's Q1 2020 actual performance dropped off a cliff, compared to its actual Q1 2019 performance, and, importantly, compared to its peers,[77] as the following chart demonstrates:



[77] The peer comparison uses the companies in the fairness opinion of Forescout's financial advisor. Parent does not necessarily believe that this peer set is the best comparison to Forescout. Nevertheless, the analysis shows that Forescout is dramatically underperforming the peer set of its own choosing.

33. On April 3, Forescout's Vice President of Business Enablement [redacted] On April 5, Parent asked Forescout whether it expected any meaningful change from [redacted] to account for Forescout's fundamentally changed circumstances. Despite its disastrous Q1 performance and the ongoing economic crisis, Forescout responded that [redacted]

34. By this point it had become increasingly clear to Parent that the weakness in the business was not well understood by Forescout's management team, nor was management making a serious effort to understand the weakness, let alone right the ship. A more rigorous, analytical review by Parent of Forescout's actual financial condition and projected performance was critical.

35. One day later, on April 7, Forescout's Chief Executive Officer ("CEO") Michael DeCesare shifted course, telling Parent that [redacted]

[redacted] In other words, Forescout finally recognized that things were not "business as usual" at Forescout. [redacted] Finally, Forescout and Parent determined that Parent would focus on completing a top-down, analytical revenue re-forecast, and would share this analysis with Forescout within a week or so.

36. At Parent's request, Forescout provided Parent with comprehensive historical data and other quantitative and qualitative inputs to use as the basis for Parent's updated forecast. To ensure its understanding was accurate and complete, Parent discussed this data extensively with Forescout. Parent also communicated with Forescout's management and business functions at length to fully understand the potential impact of changed circumstances on Forescout's business.

37. Parent shared its top-down forecast—called the "revised base case" model (the "Revised Base Case")—with Forescout on April 14, seeking Forescout's focused engagement and input. Instead, Forescout provided *no* substantive feedback on Parent's model, let alone any data or other factual information to support any alternative view of Parent's projections.

38. Over the next week, instead of constructively engaging with Parent on the Revised Base Case, Forescout doubled down on its initial, implausible view that re-forecasting the business was not necessary. On April 20, DeCesare told Parent that the Company's revised financial plan continued to use the revenue forecasts from its original plan for the entire second half of 2020, without any explanation as to how that could possibly make sense in light of the current circumstances and prior comments DeCesare himself had made. The next day, DeCesare added that he had a lot of "enthusiasm" for Q2 because the sales representatives were still expressing a lot of "enthusiasm." But this was not encouraging to Parent, [redacted]

39. On April 23, reportedly at the direction of counsel, Forescout [redacted] Finally, on April 23, Forescout wrote a letter to Parent, reporting:

[redacted]

40. So, by April 23—nearly a month into Q2—despite the ongoing COVID-19 outbreak, the shock to the economy and financial markets, and the

Company's nosedive in Q1, Forescout's management continued to maintain (without any supporting analysis; indeed, openly refusing to prepare any analysis) [redacted] In other words, they insisted that in the second half of 2020, [redacted]

41. While Forescout's management appeared to be in denial throughout the month of April and into May, Parent worked to complete its own rigorous and fact-based understanding of what Forescout's management was refusing to confront: the rapidly deteriorating financial and operating condition of the Company under the current circumstances. This included submitting numerous written and oral requests for information to Forescout, including written requests dated April 20, 27, and 30, 2020. Parent's requests sought information about Forescout's sales pipeline, cash flow forecasts, the details behind the Company's Q1 2020 bookings and revenue, as well as pricing and discounting data and operational and business plans. Parent also sought information concerning the

Company's operations in the sign-close period. What Parent learned from this information provided by Forescout was deeply distressing:

- [redacted] Meaningful interactions with customers and potential customers—including especially hardware and software proof-of-value assessments ("POVs")[78]—are critical to Forescout generating new business. Between February and April, [redacted]

- In the second week of April, almost a month after the transition to work-from-home for most businesses in the United States, [redacted] In response to [redacted]

- Forescout's 2020 pipeline [redacted]

[78] POVs allow Forescout to demonstrate how its products would work in a potential customers' actual deployment environment and facilitate a clear understanding of the value of its products.

- Forescout had provided non-standard payment terms [redacted] and deep discounts [redacted] Forescout specifically disclosed two such deals in its Q1 10-Q, describing them as "deeply discounted." [redacted] These actions appear to have been taken in a failed attempt to maintain at least some of its Q1 revenues, albeit at the expense of long-term value.

- [redacted] in doing so.

Parent's Liquidity Analysis

42. As discussed *supra*, by mid-April, Parent had prepared its initial version of a top-down pro forma financial analysis, including revenue, earnings before interest, taxes, depreciation, and amortization ("EBITDA"), total contract value, and cash flow forecasts for the Company for 2020 and 2021. Advent's financial analysis relied extensively on financial and operational data provided by

Forescout, together with ongoing input from Forescout's management, including frequent discussions concerning Forescout's business strategy, sales performance and pipeline. Parent also discussed extensively with Forescout whether there might be additional areas where Forescout could reduce costs in light of current circumstances.

43. Advent's work culminated in a detailed and thorough re-forecasting of Forescout's business, projecting both the Revised Base Case and "downside" scenarios. As discussed *supra*, revenue projections from the Revised Base Case were shared with Forescout on April 14, 2020, ***more than a month before this lawsuit was filed***. Importantly, ***despite having these revenue projections for over a month, Forescout only finally responded to them on May 14, 2020*** after management finally and belatedly confronted the fact that the conditions to closing the proposed transaction would not be satisfied.

44. In a made-for-litigation email to Advent, DeCesare acknowledged that Forescout [redacted] Forescout then brazenly put forward [redacted]—something Forescout has consistently claimed since April is not possible.

Forescout Would Be Insolvent After Giving Effect to the Proposed Transaction[79]

45. Forescout reported having around $100 million in cash at the end of Q1, $16 million of which came from the Company's then existing revolver, [redacted] However, [redacted]

46. The Revised Base Case, reflecting a thorough re-forecasting of the Company's business, [redacted] after giving effect to the proposed transaction, [redacted]

47. *First*, Forescout will have [redacted] Forescout's [redacted] in the same manner as it conducted them

[79] In Section 9.12(b) of the Merger Agreement, Forescout acknowledged and agreed that all matters related to the Debt Financing, the Debt Commitment Letter, and the performance of services thereunder are subject to the exclusive jurisdiction of courts in New York. *See also* Merger Agreement § 9.16(b). Buyers specifically reserve and do not wave any and all rights under these provisions.

before the proposed transaction [redacted]

48. *Second*, by entering into the credit facility, [redacted] The reforecast shows that Forescout [redacted] The entire $400 million in term loan financing under the credit facility would then be accelerated by the lenders and Forescout would be unable to pay absent an *immediate* ability to refinance, to further modify the terms of the debt, to raise equity on acceptable terms, or to raise capital through the sale of assets—all of which is simply not feasible in light of the deterioration of Forescout's business. In addition, Parent believes that Forescout would incur debts beyond its ability to pay because the Revised Base Case shows that [redacted]

49. *Third*, the cash flow forecasts suggest that Forescout [redacted]

Forescout Has Suffered a Material Adverse Effect

50. Forescout has clearly experienced a Company Material Adverse Effect ("MAE"), and that MAE is continuing. Forescout's earnings power has declined dramatically across a wide range of metrics. For example, [redacted] and revenue ***fell by more than 24%*** on a year-over-year basis from Q1 2019 to Q1 2020.

51. There is no indication that this catastrophic downturn will be short-lived. Based on Forescout's actual recent financial performance, information received from Forescout regarding Forescout's expected future financial performance (including sales and customer pipeline data), and Parent's projections of Forescout's future financial performance for the fiscal year 2020 and beyond, [redacted]

52. Buyer's projections—which, again, are based significantly on information that Forescout provided to Buyers, and which were disclosed to and discussed extensively with management—estimate that, for FY 2020, [redacted]

53. Further confirming the accuracy of Buyers' view of Forescout's condition are Forescout's own Q2 estimates, which have [redacted] as Forescout is forced to confront that reality is playing out far worse than its blindly optimistic expectations. [redacted] But Forescout has [redacted]

54. Forescout's challenges are stark when compared to the performance of its peers. The median earnings of the peer set (who have so far released their Q1 financial results) have actually improved, while Forescout's earnings—across a wide range of metrics—have grown materially worse. For example, Forescout's ***EBITDA*** [redacted] between Q1 2019 and Q1 2020, while the median peer saw an ***increase*** of 16.8%. The wide divergence between Forescout's performance and that of its peers is not a short-term phenomenon. When comparing FY 2020 to FY 2019, Parent projects that Forescout's EBITDA

[redacted] while, based on analyst estimates, the median peer's EBITDA will decline by less than 27%--[redacted]. Forescout is also vastly underperforming its peers in terms of profit margin, [redacted] while that of the median peer ***increased*** by 0.5%.

Forescout Has Failed To Conduct Its Business In The Ordinary Couse

55. The business Forescout plans to deliver at Closing is not the same business that Buyers agreed to buy at signing. Forescout's management has abdicated its legal and contractual responsibilities to maintain consistent operation of business in the face of a challenging business environment.

56. Above all, Forescout has abandoned its financial forecasting and business planning function. In order for any business to budget and plan effectively for the future and to make informed business decisions, it must maintain accurate and current financial forecasts and models. Indeed, even businesses that are not currently sinking have revised their forecasts to reflect the current economic environment. Yet Forescout refuses even to undertake the exercise, [redacted]

57. Forescout's sales function is also not operating in anything like the ordinary course of business. Given the cost (many sales are millions of dollars each) and complexity of Forescout's products, sales are largely dependent on meaningful customer interactions, through which Forescout can demonstrate the value of its products. Specifically, hardware and software POVs are critical to Forescout's generation of new business. Without them, new customer business will go to [redacted] This decline was particularly devastating to Forescout because it has [redacted]

58. Next, Forescout has also been window-dressing near-term sales at the expense of future revenue. As part of this effort, Forescout has been providing [redacted] In Q1 2020, [redacted] and, indeed, were so material that Forescout called them out specifically in its quarterly 10-Q, filed on May 11. [redacted]

[redacted] These actions all have the effect of taking Forescout's operations well outside the ordinary course of business.

The Debt Financing Is Not Available for the Proposed Transaction

59. As of May 15, Parent had concluded that certain conditions to the Debt Commitment Letter, which governed the availability of debt financing at the time of the scheduled Closing, could not be satisfied. Specifically, relying on information that Forescout had provided to Parent and on Parent's resultant financial forecasting model, Parent determined that, if the proposed transaction were consummated, [redacted]

60. Forescout's insolvency meant that Merger Sub could not make contractually required representations in the Credit Agreement concerning, or deliver to the lenders of the debt financing [redacted] Ex. E (Debt Commitment Letter), Exhibit C §§ 2 [redacted]

[redacted]

61. But that is not the only reason the debt financing will not be available—Forescout is unable to satisfy the condition that [redacted] *Id.* at Exhibit C, § 5. As a result, the debt financing is unavailable for a Closing of the proposed transaction. [redacted] *Id.* § 10.

There Is No Alternative Debt Financing

62. Because of the condition of the financial markets, to date, alternative debt financing on terms that were "not materially less favorable" than the Debt Financing is not available and will not be available given Forescout's operational and financial difficulties. *See* Compl. Ex. A § 6.5(d). [redacted]

Parent Notified Forescout that Closing Conditions Were Not Met

[80] PIK'ing, also known as "Payment-In-Kind" is a type of high-risk loan or bond that allows borrowers to pay interest with additional debt.

63. In light of the foregoing, on May 8, Parent contacted Forescout's CEO to inform him of its concern about the proposed transaction. On May 15, Parent informed Forescout that the closing conditions could not be met because: (i) Forescout had suffered an MAE and (ii) Forescout had violated the ordinary course covenant. Parent also reiterated its *bona fide* belief that consummation of the proposed transaction would render Forescout insolvent, effectively preventing Parent from closing the financing.

64. Forescout filed this instant lawsuit on May 19, 2020.

COUNT I:
DECLARATORY JUDGMENT—MATERIAL ADVERSE EFFECT

65. Defendants/Plaintiffs-in-Counterclaim repeat and reallege the allegations above as if set fully forth herein.

66. The condition precedent to Defendants'/Plaintiffs'-in-Counterclaim' obligation to close under Section 7.2(d) has not been satisfied because Forescout has suffered a Company Material Adverse Effect that is continuing

67. To the extent that the Company Material Adverse Effect could be attributed to general economic conditions, conditions of the financial markets, a natural disaster, an epidemic, pandemic, or other force majeure event, then such Effect has had a materially disproportionate adverse effect on Forescout relative to other companies of similar size operating in the industries in which Forescout and

its subsidiaries conduct business (which incremental effect itself is a Company Material Adverse Effect).

68. An actual controversy exists between the parties as to whether a Company Material Adverse Effect has occurred and is continuing.

69. Defendants/Plaintiffs-in-Counterclaim are entitled to judgment declaring that the conditions precedent to closing have not been satisfied, and cannot be satisfied, on account of the occurrence and continuation of a Company Material Adverse Effect.

COUNT II:
DECLARATORY JUDGMENT—ORDINARY COURSE

70. Defendants/Plaintiffs-in-Counterclaim repeat and reallege the allegations above as if set fully forth herein.

71. The condition precedent to Defendants'/Plaintiffs'-in-Counterclaim obligation to close under Section 7.2(b) has not been satisfied because Forescout has not complied with its covenants and obligations under the Merger Agreement in all material respects.

72. Specifically, Forescout has not adhered in all material respects to "conduct its business and operations in the ordinary course of business," pursuant to Section 5.1(ii) of the Merger Agreement, because, among other things:

a. In the ordinary course of business, when confronted with unexpected circumstances, Forescout would adjust its business plans, budgets, and financial forecasts to reflect these circumstances. Forescout has abdicated these responsibilities, including, without limitation, by refusing to reforecast its revenue or to consider certain cost reductions.

b. Forescout's sales function is not operating in the ordinary course of business. Forescout's sales function is built on a model of in-person and on-site interactions, which has been completely disrupted, and Forescout has not developed or adopted adequate alternatives to counteract the disruption to its ordinary course operations.

c. Forescout has not priced new transactions in the ordinary course, contributing to [redacted]

d. [redacted]

73. Forescout's failure to adhere in all material respects to "conduct its business and operations in the ordinary course of business," pursuant to Section 5.1(ii) of the Merger Agreement, is not reasonably susceptible to cure.

74. An actual controversy exists between the parties as to whether Forescout has complied with its covenant to operate the business in the ordinary course.

75. Defendants/Plaintiffs-in-Counterclaim are entitled to judgment declaring that the conditions precedent to closing have not been satisfied, and

cannot be satisfied, on account of the breach of Forescout's covenant to operate the business in the ordinary course, and its inability to cure such breach.

COUNT III:
DECLARATORY JUDGMENT—FORBEARANCE COVENANTS

76. Defendants/Plaintiffs-in-Counterclaim repeat and reallege the allegations above as if set fully forth herein.

77. The condition precedent to Defendants'/Plaintiffs'-in-Counterclaim obligation to close under Section 7.2(b) has not been satisfied because Forescout has not complied with its covenants and obligations under the Merger Agreement in all material respects.

78. Specifically, Forescout has not priced new transactions in the ordinary course, contributing to abnormally low [redacted] in Q1 2020, [redacted]

79. Forescout's actions in this regard violate multiple provisions of the Merger Agreement, including Sections 5.2(h)(iii)(A) (Forescout may not "make any loans, advances or capital contributions to, or investments in, any other Person, except for (A) extensions of credit to customers in the ordinary course of business") and 5.2(n)(vi) (Forescout may not "grant any material refunds, credits,

rebates or other allowances to any end user, customer, reseller or distributor, in each case other than in the ordinary course of business").

80. An actual controversy exists between the parties as to whether Forescout has breached its forbearance covenants.

81. Defendants/Plaintiffs-in-Counterclaim are entitled to judgment declaring that the conditions precedent to closing have not been satisfied, and cannot be satisfied, due to Forescout's breach of its forbearance covenants, and its inability to cure such breaches.

COUNT IV:
DECLARATORY JUDGMENT—SPECIFIC PERFORMANCE

82. Defendants/Plaintiffs-in-Counterclaim repeat and reallege the allegations above as if set fully forth herein.

83. Specific performance to enforce Parent's obligation to consummate the proposed transaction is not an available remedy to Forescout where the debt financing for the proposed transaction has not been or will not be funded at Closing.

84. The debt financing has not been funded and will not be funded at Closing because the conditions to the Debt Commitment Letter, Exhibit C, § 1(b) and (2), have not been met. Specifically, [redacted]

[redacted]

85. For that reason, Forescout may not seek to enforce Parent's obligation to consummate the proposed transaction.

86. An actual controversy exists between the parties as to whether specific performance of Parent's obligation to close is available as a remedy to Forescout.

87. Defendants/Plaintiffs-in-Counterclaim are entitled to judgment declaring that specific performance to enforce Parent's obligation to consummate the proposed transaction is not available as a remedy to Forescout.

PRAYER FOR RELIEF

WHEREFORE, the Defendants/Plaintiffs-in-Counterclaim respectfully request that the Court enter an order:

a) Declaring that the conditions precedent to Closing under Sections 7.2(b) and 7.2(d) of the Merger Agreement have not been satisfied and cannot be satisfied;

b) Declaring that, pursuant to Section 9.10(b)(ii) of the Merger Agreement, specific performance to enforce Parent's obligation to close the proposed transaction is not an available remedy to Forescout;

c) Awarding Defendants/Plaintiffs-in-Counterclaim, liquidated damages in the form of a Termination Fee per Section 8.3(d) of the Merger Agreement, costs, and reasonable attorneys' fees; and

d) Granting such other and further relief as the Court deems proper.

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Dated: May 30, 2020

CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2020 the foregoing was caused to be served upon the following counsel of record via File & Serve*Xpress*:

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