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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CHRISTOPHER L. SAYCE, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. FORESCOUT TECHNOLOGIES, INC., *et. al.* Defendants.	CASE NO.: 20-CV-00076-SI **CLASS ACTION** Hon. SUSAN ILLSTON **SECOND CONSOLIDATED AMENDED COMPLAINT FOR VIOLATIONS OF THE SECURITIES LAWS** **JURY TRIAL DEMANDED**

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Lead Plaintiffs Glazer Capital Management, L.P., Glazer Enhanced Fund L.P., Glazer Enhanced Offshore Fund, Ltd., Glazer Offshore Fund, Ltd. and Highmark Limited, in respect of its Segregated Account Highmark Multi-Strategy 2 (hereinafter collectively referred to as the "Glazer Funds") and Meitav Tachlit Mutual Funds Ltd. ("Meitav" and together with the Glazer Funds referred to herein as "Lead Plaintiffs" or "Plaintiffs"), individually and on behalf of all other persons similarly situated, by their undersigned attorneys, for their Second Consolidated Amended Complaint (the "Complaint") against Defendants (defined below), allege the following based upon personal knowledge as to those allegations concerning Lead Plaintiffs and, as to all other matters, the investigation conducted by and through their attorneys, including, among other things, a review of Defendants' public statements and filings made with the U.S. Securities and Exchange Commission (the "SEC"), filings made in *Forescout Technologies, Inc. v. Ferrari Holdings, L.P.*, C.A. No. 2020-0385-SG (Del. Ch.) (the "Delaware Litigation"), wire and press releases either issued by or regarding Forescout Technologies Inc. ("Forescout" or the "Company"), analysts' reports, information obtained from interviews with knowledgeable former employees of the Company and an expert on the cybersecurity industry and cloud computing, and other information obtainable on the Internet. Lead Plaintiffs believe that substantial evidentiary support exists for the allegations set forth herein after a reasonable opportunity for discovery.

INTRODUCTION

1. Forescout specializes in providing network security from malware and potential infiltrators for large computer networks. The Company became publicly traded through an initial public offering ("IPO" or the "Offering") in October 2017 reporting growth averaging more than 30% a year in revenues for the fiscal years prior to the Offering. This steady growth continued in fiscal year ("FY") 2018 with a reported 32% increase in reported revenues.

2. However, as the Company entered 2019, it was encountering increased competition from other industry players especially because Forescout's products were not as well suited to providing security for the increasing trends towards cloud delivered cybersecurity solutions and remote working. Nonetheless, Defendants provided revenue guidance to investors of 24% annual growth in revenue for FY 2019.

3. This was the first public guidance issued by Forescout since its IPO but was untethered to the Company's prospects as demonstrated by input received in 2018 from Force Management LLC ("Force Management"), a consulting firm Forescout retained to add structure and discipline to Forescout's sales process. The related analysis of that information in early 2019 by a highly placed employee at Forescout who is serving as a confidential witness ("CW"),[1] states that a majority of Forescout's deals in the sales pipeline had only a 50% chance of closing yet Forescout identified the deals as "committed" in its sales pipeline. Forescout considered implementing the model proposed by Force Management in early 2019, but quickly abandoned that model before revenue guidance for FY 2019 was given.

4. On May 9, 2019, Defendants then preannounced a lowered guidance range for the second quarter ("Q2") of FY 2019 with revenues of $75.3 million and $78.3 million, representing year-over-year growth of 14% at the midpoint, but conditioned investors for a soft landing about the impending deterioration in Forescout's business. Defendants claimed that the Company would still meet its revenue guidance for FY 2019 because the Company had already been awarded business despite some deals simply having "slipped" to close later in the year. Analysts, as surrogates for the market, repeatedly questioned Defendants about the basis for increasing the guidance despite the "slipped" deals, and Defendants repeatedly made concrete and material misrepresentations in response to analysts' inquiries by stating that Forescout had "tech wins" with firm commitments from customers and a "ramped up" sales force with two or more years of experience that generated far more deals and revenue than inexperienced employees, both of which provided early "visibility" into the sales pipeline for the rest of the year.

5. The reality was far grimmer as, in truth and in fact, the Company did *not* have "tech wins," something which was recognized internally by Forescout soon after beginning the first in a series of exoduses and layoffs of sales representatives in the beginning of 2019, who were critical to driving the Company's growth in revenues. Ultimately, the Company admitted in an Annual

[1] CWs are identified with unique numbers taking the form "CW#" herein.

Report filed on Form 10-K for FY 2019 that sales productivity declined from 50% to 38% in 2019, wiping out all the gains from 2018.

6. In an effort to avoid disclosing these adverse facts, beginning in February 2019, senior executives, including DeCesare and Forescout Chief Revenue Officer Steve Redman ("Redman") pressured sales representative to categorize deals as "committed" even though buyers had, in fact, not yet made any such commitment to make a purchase. Multiple CWs with personal knowledge about the deals confirm the existence of this widespread pressure campaign to miscategorize seven figure deals that even spread to a new company acquired by Forescout formerly known as SecurityMatters. Towards the end of the Class Period (defined below in ¶158), CW19 states that he heard the Vice President of Americas at Forescout instruct sales representatives to report deals as "committed" based only on a single, preliminary conversation with a senior executive of the customer, again showing the pressure campaign was not restricted to immaterial one-offs but was, in fact, a companywide policy.

7. DeCesare, according to CW20, was provided with updates on a granular level about the status of all deals over $500,000 on a weekly basis as the quarter progressed, including the status of negotiations with customers and the remaining steps required to close deals. In addition, multiple CWs also confirm that DeCesare, Redman and other senior executives used Clari, a software that provides information about the status of sales representatives, the sales pipeline, and forecasts with real-time accuracy to monitor deals and sales representatives during the Class Period. CW18 further confirms that DeCesare himself acted as the chief sales representative for large transactions, and thus DeCesare knew that Forescout had not been awarded the business for numerous seven figure deals.

8. On October 10, 2019, Forescout yet again announced poor financial results for the third fiscal quarter ("Q3") of 2019 that missed even the low end of the revenue guidance by over $7 million. Still, Defendants again failed to come clean with investors, and falsely claimed that the sales pipeline "continued to grow," and deals had merely slipped again because of extended approval cycles due to poor economic conditions outside the United States. However, in making those misrepresentations, Defendants again failed to disclose the rapid deterioration in sales productivity

at the time caused by terminations and voluntary departures of sales representatives or the failure to secure "tech wins" given CW18's statement that one out of every three seven figure deals in Forescout's global sales pipeline was illusory.

9. In October 2019, the Company decided to put itself up for sale by hiring Morgan Stanley & Co. LLC ("Morgan Stanley") to shop it to both strategic and financial purchasers. The storyline put forward by the Company for deciding to put itself up for sale was that the shift from the sale of product licenses to subscription-based services was causing some disruption in reported revenues, making it more suitable for the Company to be privately held as it had been for more than 15 years prior to the IPO.

10. However, there were certain revenue goals the Company needed to meet to make it an attractive acquisition candidate including a relatively soft landing in terms of revenue growth before Forescout's new subscription-based revenue model started generating a new period of steady growth. The Company produced these by showing moderately lower growth in revenue from prior year results for the fourth fiscal quarter ("Q4") of FY 2019 and providing projections to potential acquirers reflecting 14% growth in revenue for FY 2020 with steady annual revenue growth of approximately 15% after that time.

11. Once again, the reality was far worse as Forescout had, in fact, front-loaded millions of dollars of sales into Q4 2019 results through millions of dollars of sales to Merlin International, Inc. ("Merlin"), one of its key third-party partners, to cover up even worse results. In addition, the FY 2020 revenue projections Forescout provided to potential acquirers lacked any reasonable basis and were materially higher than internal guidance prepared as part of illustrative guidance (the "Illustrative Guidance") it was planning to provide to public investors if an acquisition had not materialized.

12. On February 6, 2020, the same day that Forescout released its Q4 2019 results, it also announced that Advent International, Inc. ("Advent"), a private equity firm, had entered into a merger agreement (the "Original Merger Agreement") to acquire Forescout for $33.00 per share (the "Planned Acquisition").

13. However, Advent soon learned through the Company's SEC proxy disclosures that the FY 2020 revenue projections it had been provided with were inconsistent and materially higher than the Illustrative Guidance and that the Company had been laying off and otherwise losing experienced sales representatives necessary to drive Forescout's revenue growth. The Company, after stonewalling Advent's request for additional information, failed to meet even the lower revenue projection of $62 million in revenue for Q1 2020, instead reporting $57.2 million in revenue representing a 24% ***decline*** from Q1 2019 revenue, an amount which it only received through selling millions of dollars of hardware below cost, *i.e.*, ***at a loss***, in a desperate effort to even come close to the Q1 2020 Illustrative Guidance. Advent then learned from a corporate whistleblower that the Company had front-loaded millions of dollars of sales in Q4 2019 through Merlin, with the whistleblower's version of events confirmed by other unusual facts reported by the Company, including an implosion in Q1 2020 revenue and Forescout's auditor openly questioning the Company's revenue recognition practices during 2019.

14. Defendants persisted in deceiving Plaintiffs and other investors concerning key facts relating to the Company's operations and whether Advent would close on the Original Merger Agreement in May 2020, despite internally acknowledging that Advent would not voluntarily do so especially after direct communication from Advent both on April 20, 2020 and May 8, 2020 reflecting that it was unlikely that Advent would voluntarily proceed with the Planned Acquisition. This was part of what Advent characterized as Defendants' litigation strategy to act as if everything was perfectly normal in order to prevent Advent from being able to back out of the Original Merger Agreement and to enforce the Original Merger Agreement through litigation. At the very same time, however, a strategic committee (the "Strategic Committee") of the Company's Board of Directors (the "Board") met regularly to discuss, among other things, Forescout's options should Advent not proceed with consummating the Planned Acquisition as correspondence between Defendants and Advent became increasingly contentious.

15. On May 15, 2020, Advent put Defendants' strategy of forcing through the Original Merger Agreement to a test when Advent sent a letter (the "Termination Letter") elaborating on and reiterating a prior oral conversation occurring no later than May 8, 2020 and explaining why it was

refusing to proceed with the Planned Acquisition. On Monday, May 18, 2020, Forescout's stock price imploded, declining to under $20.00 per share over the next three trading days, when it was forced to disclose these facts.

16. Defendants, consistent with their prior strategy, filed a sixty page Verified Complaint (the "Delaware Complaint") on May 19, 2020 in the Delaware Court of Chancery seeking, among other things, injunctive relief requiring Advent to proceed with the Planned Acquisition. This was followed by Advent answering the Delaware Complaint and asserting a counterclaim (the "Answer and Counterclaim") which was followed by Forescout answering Advent's counterclaim (the "Counterclaim Answer"), and then two months of expedited litigation.

17. The Delaware Litigation was ultimately resolved by Forescout and Advent, on July 15, 2020, entering into an Amended and Restated Agreement and Plan of Merger (the "Amended Merger Agreement") providing for Advent saving $300 million by acquiring Forescout for $29.00 per share through a tender offer made on July 20, 2020 on Schedule TO and a concurrent Solicitation/Recommendation Statement made on Schedule 14D-9 (the "Tender Offer Recommendation").

JURISDICTION AND VENUE

18. The claims asserted herein arise under Sections 10(b) and 20(a) of the Exchange Act (15 U.S.C. §§ 78j(b) and 78t(a)) and SEC Rule 10b-5 promulgated thereunder (17 C.F.R. § 240.10b-5).

19. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1337 and Section 27 of the Exchange Act (15 U.S.C. § 78aa).

20. Venue is proper in this District pursuant to Section 27 of the Exchange Act (15 U.S.C. § 78aa) and 28 U.S.C. § 1391(b) given that a significant portion of the Defendants' misconduct took place within this District. Forescout is a corporation with its principal place of business in San Jose, California, and the Individual Defendants reside in or around the San Francisco Bay Area.

21. In connection with the acts, conduct and other wrongs alleged in this Complaint, Defendants, directly or indirectly, used the means and instrumentalities of interstate commerce,

including but not limited to, the United States mail, interstate telephone communications and the facilities of a national securities exchange.

PARTIES

22. Lead Plaintiffs purchased Forescout common stock during the Class Period and suffered damages as a result of the federal securities laws violations alleged herein.

23. Defendant Forescout is a Delaware corporation with its principal executive offices located at 190 West Tasman Drive, San Jose, CA 95134. Forescout's shares traded on the NASDAQ Global Select Market under the ticker symbol "FSCT" until the Acquisition was completed.

24. Defendant Michael DeCesare ("DeCesare") was, at all relevant times, Forescout's President, CEO and a member of the Company's Board of Directors. In connection with the Planned Acquisition, DeCesare stood to receive $33.5 million for restricted stock units ("RSUs") and performance-based restricted stock units ("PSUs"), and a golden parachute worth $10.8 million. The $44.3 million DeCesare stood to gain from the Planned Acquisition was over six times his 2019 total compensation of $7,361,857. *See* 2019 Form 10K/A at p. 25. In addition, DeCesare received over $8.2 million from selling 228,382 shares of Forescout common stock during the Class Period compared to only $1.836 million from 60,621 shares disposed in the fifteen months prior to the Class Period, excluding shares sold to cover taxes and 200,000 shares sold at $29.00 in Forescout's March 2018 secondary public offering (the "SPO").

25. Defendant Christopher Harms ("Harms") was, at all relevant times, Forescout's CFO with responsibilities to lead the Company's finances, administration and supply chain management. In connection with the Planned Acquisition, Harms stood to receive $8.95 million for RSUs and PSUs and a golden parachute worth $5.185 million. The $14.135 million Harms stood to gain from the Planned Acquisition was over four times his 2019 total compensation of $3,378,044 for 2019. *See id*. Further, Harms received nearly $3.8 million from selling 109,865 shares during the Class Period compared to only $1.557 million from 64,808 shares disposed in the fifteen months prior to the Class Period, excluding shares sold to cover taxes and 46,169 shares sold for $29.00 per share in the SPO.

26. Defendants DeCesare and Harms are sometimes referred to in this Complaint as the "Individual Defendants" and together with Forescout as "Defendants."

SUBSTANTIVE ALLEGATIONS

A. The Company and its Product Offerings

27. Forescout developed proprietary agentless technology that discovers and classifies IP-based devices in real time as they connect to a customer's physical network and then continuously monitors and assesses the security posture of such IP-based devices. The Company historically generated revenue from sales of its products and associated maintenance and professional services including: ForeScout CounterACT, ForeScout Enterprise Manager, and ForeScout Extended Modules. Forescout's CounterACT and Enterprise Manager products were generally sold as physical hardware appliances with its software pre-installed.

28. In 2017, the Company also started offering, in limited quantities to a small number of large enterprises, CounterACT and Enterprise Manager together as a software-only license. The Company's Extended Modules were sold as software add-ons to the CounterACT and Enterprise Manager products. All of Forescout's products were sold with a perpetual license. End-customers typically purchased maintenance and professional services contracts with a one-year or three-year term when they purchased Forescout's products.

29. Although the Company's software solutions had been available for many years, sales began to rapidly accelerate in 2017 because an increasing number and variety of IP-based devices, which are not manageable by IT departments, began entering and connecting to enterprise networks every day. Specifically, corporate-managed devices became a smaller percentage of the total device population as bring your own device to work ("BYOD") and the Internet of Things ("IoT") became a larger percentage of the total device population connecting to networks. As a result, the agent-based approach to device discovery no longer provided adequate security for many companies as IT departments were unable to force users to install agents on BYOD devices and many IoT devices did not have the ability to install agents.

30. The lack of security from BYOD and IoT devices created vulnerabilities and caused more cyberattacks to enter organizations by leveraging gaps in network visibility and vendor silos

as the significant increase in undetected and unmanaged devices on a network increased the surface area of attack for enterprises with cybercriminals targeting less secure devices with the same access levels as enterprise-managed devices (*i.e.*, desktops and corporate laptops).

31. The security innovation of Forescout's product offerings led to rapid revenue growth with sales growing from a reported $71,113,000 in FY 2014, to $125,959,000, or by more than 77% in FY 2015 and to $166,841,000, or by more than 32% in FY 2016. The Company became publicly traded in an October 2017 IPO. For FY 2017, the Company reported that revenue had grown by more than another 32% to $220,871,000. The Company continued its strong growth in FY 2018 reporting that revenue once again had increased by more than 32% to $297,651,000.

B. Defendants Knew That the Market Was Shifting with Forescout Being Left Behind

32. Plaintiffs consulted with David Linthicum, an internationally recognized expert on cloud computing, edge computing, application integration, enterprise architecture, service-oriented architecture, electronic commerce, and business-to-business systems. Mr. Linthicum was named one of the top nine Cloud Pioneers in Information Week, the #1 cloud influencer by Apollo Research, and is typically listed as a top ten cloud influencer, podcaster and blogger by various publications. He has previously served as the Chief Technology Officer of numerous public and private companies, published more than 7,000 articles and has been quoted in major publications, including *Forbes*, *Business Week*, *The Wall Street Journal* and the *LA Times*.

33. Mr. Linthicum agrees that the cybersecurity market began to shift dramatically towards the cloud between 2018 and 2020, but, based on his research and examination of Forescout's suite of product offerings during the Class Period, concludes that Forescout focused on enterprise security based on devices connected to local networks that did not provide value for the emerging cloud computing marketplace, which is dependent on processes and management of data outside the corporate firewall on public clouds.

34. Mr. Linthicum notes further that Forescout's products were not positioned for private clouds. Given the dramatic shift from enterprise-based information technology to public clouds hosted by Amazon, Google and Microsoft between 2018 and 2020, Mr. Linthicum states that the market increasingly sought cloud-based cybersecurity products that Forescout could not provide.

While most technology platforms began to dramatically shift from the enterprise to the public clouds and Forescout's competitors quickly adjusted to cloud-based cybersecurity solutions, Mr. Linthicum observes that Forescout continued to offer legacy technology between 2018 and 2020 that was not competitive with the offerings of its peers.

35. This is evidenced by DeCesare telling investors on November 6, 2019, that the Company did not expect to launch its core cloud-based product until late 2020. Instead, Forescout only launched a secondary cloud offering with cloud enabled features known as eyeSegment on November 6, 2019, but revenue from this product was immaterial in its financial statements with cloud-based sales of only $22,000 in 2019, $122,000 in the first quarter of 2020, and $167,000 in the second quarter of 2020.

36. Mr. Linthicum's analysis of the state of the Company's business as it entered 2019 is confirmed by CW8, a Named Account Manager ("NAM") in Forescout's Commercial division between February 2016 and October 2019, who states that sales began to substantially decrease in 2019, and the rate of closed deals dramatically shrunk because customers believed that Forescout's competitors offered a better product than Forescout at a lower price. Due to the decreased sales, CW8 was able to hit only 25% of CW8's $3 million quota for the year before CW8 left the Company in October 2019. The Company's product offerings are ideally suited for situations when the employees are all in one location and connecting to a physical network in that fashion but Forescout's products were substantially less effective for use in cloud computing or remote working situations. Several former Forescout employees identified this specific problem, including:

A. CW1, a former Senior Sales Development Representative ("SDR") who worked at Forescout from June 2018 to May 2019, who was responsible for reaching out to new or existing customers to inquire about the customers' interest in purchasing Forescout's products, and also set up meetings between the customers and a Forescout NAM, stated that in the beginning of 2019, SDRs had serious difficulty in meeting their quotas for potential pipeline opportunities because of intense competition and a lack of customer interest in Forescout's products. CW1 recalled that most SDRs were able to only meet 50% of their targets in the beginning of 2019.

B. CW2, a former SDR at Forescout from June 2016 to June 2019, corroborates CW1's account. According to CW2, Forescout's products had become difficult to sell, causing experienced sales employees to resign from Forescout.

C. CW3, Forescout's former Director of Americas – Business Values & Strategic Sales between July 2018 and February 2020, confirms that the Company struggled to sell its products in 2019 because customers encountered difficulties with understanding their value. CW3 also corroborated CW1's statement that Forescout was outcompeted by larger cybersecurity firms, which offered similar products at a lower price.

D. CW4, a Forescout SDR from January 2018 to January 2019 and a Forescout Inside Sales Representative from January 2019 to March 2019, corroborated both CW1's and CW3's statements that customers preferred larger and well-established vendors like Cisco Systems, Inc., over Forescout.

E. CW17, a Strategic Account Manager ("SAM") at Forescout from April 2019 to February 2021, who sold Forescout's products to large enterprises in Houston, Austin and San Antonio, confirms the accounts of numerous other CWs and states that some sales employees voluntarily left the Company because Forescout's products were outdated, making sales to new customers he encountered extremely difficult with the close rate for new logos being no more than 10%.

37. These operating problems did not immediately manifest themselves in the Company's reported operating results because of Forescout's relatively lengthy sales cycle and because existing customers were largely committed to Forescout's product platform. According to the Company's public filings made with the SEC, Forescout had a sales cycle of between nine and twenty-four months for sales to new customers and between three and twelve months for sales to existing customers. Thus, even though the Company started reporting sales shortfalls in May 2019, the underlying problems in the sales process manifested themselves months earlier.

38. Thus, according to CW12, a former Senior Business Operations Manager at Forescout from the beginning of 2018 through the beginning of 2020, deals previously identified as "committed" in the sales pipeline began evaporating in 2019. This caused many experienced sales

personnel to leave the Company voluntarily. Several former Forescout employees identified this specific problem, including:

A. CW1 recalled that, as a result of competition in early 2019, more than a dozen SDRs left the Company in the beginning of 2019. CW1 confirms that the entire inside sales team was, in fact, dissolved in the spring of 2019, and a steady stream of sales employees from the division began to resign as a result. CW1 stated that at least twenty-five sales employees located in San Jose left the Company within the first few months of 2019.

B. CW2 confirms that the Company was unable to close deals in 2019 and, as a result, a significant number of sales employees began to depart the Company in the first half of 2019. CW2 asserts that employees at all levels from SDRs to NAMs to Regional Managers began to depart in the first half of 2019.

39. In addition, the Company began eliminating sales representatives, which was particularly important because the Company informed investors that its sales representatives' productivity is directly tied to the duration of their tenure, with a 100% increase in productivity after the second year at Forescout, and 50% higher than second-year productivity in the third year at Forescout. Indeed, the Company reported that, as of December 31, 2018, 50% of its sales representatives had been with the Company for more than two years, compared to 35% as of December 31, 2017. *See, e.g.*, 2018 Form 10-K at p. 11.

40. These voluntary and involuntary departures throughout 2019 caused a precipitous decline in the number of productive employees through the end of 2019 demonstrating and exacerbating the Company's inability to successfully sell its relatively outdated product offerings to larger government entities and financial companies. Several former Forescout employees identified this specific problem:

A. CW6, the Company's former Director of Accounting from February 2019 to September 2019, stated that Forescout instituted a hiring freeze in the third quarter of 2019 in an attempt to increase its cash flow and blunt the impact of poor financial results.

B. CW7, a NAM at Forescout between June 2018 and September 2019 who worked in the State, Local and Educational ("SLED") section of the Public Sector division with

responsibility for the upper Midwest region, asserts that the Company laid off a significant number of sales representatives in its Commercial division in February 2019. CW7 further states that the entire SLED section was eliminated in the third quarter of 2019, including high level executives like the Regional Director of SLED.

C. CW19, a former Strategic Enterprise Account Executive ("SEAE") at Forescout from September 2019 to June 2020, confirms that the entire SLED section of the Public Sector division was eliminated in September 2019. CW19 further confirms that Forescout conducted layoffs in waves with cuts made in September 2019 and further cuts made in 2020, including in June 2020.

D. CW8 states that Forescout laid off a significant number of sales representatives dedicated to the healthcare and financial services industry in August 2019. CW8 also stated that Forescout eliminated several employees who assisted with sales and marketing at that time.

E. CW16, a Channel Account Manager ("CAM") at Forescout from December 2015 to February 2020, who provided support for sales efforts in New England, New York City and Canada, recalls that there were numerous hiring freezes at the Company during CW16's tenure, and a significant hiring freeze in 2019. According to CW16, Forescout initiated major layoffs in the summer of 2019 in an attempt to "get leaner" in anticipation of a planned sale of the Company, demonstrating that Forescout formed the intent to seek buyers and go private long before it hired financial advisors in anticipation of the Merger in October 2019.

F. CW17 confirms that Forescout conducted five rounds of layoffs between April 2019 and February 2021 and that major cuts in the sales force took place in the summer of 2019. CW17 further states that another significant round of layoffs took place in January 2020, and the layoffs occurred at a quicker pace in anticipation of a planned acquisition of the Company.

G. CW18, a former senior executive at Forescout who served as the Global Talent and Enablement Manager ("GTEM") at the Company from June 2018 to December 2020 and trained and supervised NAMs and other sales representatives, stated that, in June 2018, Forescout had 400 employees in its sales organization, including 200 sales representatives. By the end of 2019

and the beginning of 2020, CW18 stated that the total sales force had shrunk to 300 employees. According to CW18, Forescout's long sales cycle required sales representatives to spend years working at the Company to be able to close deals. However, between 2019 and 2020, CW18 recalls that Forescout replaced 100 experienced sales representatives with inexperienced ones who were unable to close deals given the lengthy sales cycle. In 2019 alone, CW18 states that Forescout fired or otherwise lost through voluntary departures between twenty-five and thirty "ramped up" NAMs. According to CW18, the NAMs were let go or left on their own as soon as they had been "ramped up," and replaced with NAMs who did not have two years of experience. CW18 asserts further that in late 2019 or early 2020, Forescout laid off another 30% of its sales force or about one hundred sales representatives, including the entire team of sixty SDRs and Business Development Representatives ("BDRs"). At a sales kick off meeting held a week or so after these additional cuts, CW18 heard DeCesare state that Forescout reduced its sales force in 2019 and additional cuts needed to be made in early 2020 because the Company had failed to grow revenues in 2019.

H. CW17 also identified similar layoffs having taken place during the summer in 2019, a fact which is confirmed by CW16, a former CAM at Forescout. CW8, a NAM in Forescout's Commercial Division, fixes that date as being in August 2019. This appears to include, according to CW19, a former SEAE, the Company's elimination of the entire SLED sales team in or about September 2019. The elimination of the entire SLED team is confirmed by CW7, who worked for the SLED team.

41. These reductions in experienced sales staff were material and demonstrated the Company's lack of success in attracting new customers because, as Forescout recognized in its public filings, experienced sales representatives were a key driver of growth at the Company. 2018 Form 10-K at pp. 7 and 11. Similarly, DeCesare, on a May 2019 earnings conference call, publicly tied the amount of time a NAM had been at Forescout to the visibility of the Company's pipeline (*i.e.*, the longer a sales representative was at Forescout, the greater the likelihood that the sales representative would generate more deals and greater revenue).

42. The existence of these 2019 sales representative layoffs was not separately disclosed by the Company. However, a careful reading of the Company's Form 10-K for FY 2019, filed with

the SEC on February 28, 2020, reflects an otherwise unexplained decline in the Company's experienced salesforce with only 38% of sales representatives having been with the Company for more than two years, down from 50% the prior year. *See* Form 2019 Form 10-K at p. 11.

43. DeCesare, Redman and other C-suite executives used a Salesforce revenue operations platform add-on called Clari, which utilized artificial intelligence and machine learning algorithms to find patterns, identify risks and make forward-looking predictions. These tools provided DeCesare, Redman and other C-suite executives with "surface predictive insights so [the Company] ***always knows what's going on with [its] reps, deals, pipeline and forecast in purpose-built applications.***" *See* https://www.clari.com/why-change/ (emphasis added). These machine learning tools further provided DeCesare, Redman and other C-suite executives with: "a company-wide forecasting workflow that continuously rolls up across teams, product lines, geographies and market segments. ***Your forecast is always up-to the-minute and accurate—whether you have five sales reps or 5,000.***" *Id.* (emphasis added). DeCesare, Redman and other C-suite executives further used Clari to "know when [they] were short on pipeline, see which deals are at risk, predict outcome early in the quarter, spot churn risk before its too late, track sales and buyer activities, and manage forecast calls, 1:1 and QBRs." *Id.*

44. Defendants admitted that they had made use of all the available internal reporting tools at Forescout regarding the sales pipeline and the status of potential deals. Thus, on Forescout's May 9, 2019, earnings conference call, Defendant DeCesare told an analyst from Berenberg that "sales execution is certainly – or sales ramping and productivity is always one of those areas that both [Harms] and I spend a lot of time on." Similarly, on Forescout's August 7, 2019 earnings conference call, Defendant Harms told a UBS analyst that he and DeCesare analyzed and "probe[d]" the sales pipeline, spent time in the field "asking the additional question as it relates to customers[']buying preferences," and "all of that is baked into how we are guiding for the full year."

45. Several former employees of the Company confirm that DeCesare and Harms had real-time access to, and knowledge of, the deteriorating sales pipeline and the rapid decline in sales productivity:

A. CW10, a NAM at Forescout from January 2017 to July 2019, stated that sales pipeline reports generated on the Salesforce platform were compiled regularly and delivered to Redman, who DeCesare identified as the key high-level executive with responsibility over global sales and revenues during the Class Period. CW10 further explained that Brian Gumbel ("Gumbel"), Forescout's head of worldwide sales, received automatic alerts regarding the details of any potential deal worth $1 million or more that was entered as a potential opportunity in the Salesforce platform.

B. CW7 was told by CW14, the Regional Director of the SLED section until December 2019, and other senior managers that the purpose of updating the status of major opportunities in the pipeline on the Salesforce platform was because Gumbel ***and*** DeCesare both reviewed the data on the Salesforce platform, and then asked CW7 specific questions about specific deals.

C. CW8 states that CW8 participated in monthly conference calls with Niels Jensen ("Jensen"), Forescout's Senior Vice President of Sales for the Americas, and Redman to discuss the details of the Company's sales pipeline, including forecasts and the status of specific deals. CW8's immediate supervisor, the Regional Sales Director of the Commercial Division, relayed questions from Defendant DeCesare regarding large deals in CW8's sales pipeline. CW8 stated that DeCesare specifically inquired about the technology fit, budget, timeline, and competitive pressure regarding all deals that were over a $1 million. CW8 said that this was par for the course as DeCesare was an extreme micromanager.

D. CW16 states that Defendant DeCesare held quarterly internal business review calls where he provided updates on the sales pipeline, including "tech wins." During these quarterly review calls, which were attended by the Company's sales employees, including CW16, DeCesare discussed "tech wins" as cases that could be utilized to pitch other deals to customers.

E. According to CW17, Forescout's most senior executives, including DeCesare and Redman, used Clari to monitor sales deals and the Company's forecasts. CW17 states that Clari provided a more visual and easy-to-read view of sales data. This testimony is confirmed by the

reference to a sales pipeline predictor tool in the Delaware Litigation. *See* Counterclaim Answer ¶26.

F. CW18 states that DeCesare was heavily involved in managing larger clients and acted as the sales representative himself for any multi-million-dollar deal. According to CW18, it was common knowledge at the Company that DeCesare would get together with clients in face-to-face meetings, pitch Forescout's products to them and participate in all calls in an effort to micromanage the process. According to CW18, "the rep would still be there, but Mike would lead the show because Mike started his career as a salesperson, and he liked being part of deals."

G. CW18 corroborates the account of CW17 that DeCesare, Redman and other senior executives viewed sales pipeline data on Clari, which provided them with knowledge of where a particular deal stood in the process towards a commitment or closing.

H. CW20 was a Senior Deal Desk Manager at Forescout from August 2018 to April 2020, who worked directly with sales representatives on the East Coast to structure deals and make proposals to customers. CW20 reported directly to the Director of the Global Deal Desk, Mick Roberts ("Roberts"), who reported to the Senior Vice President of Revenue Operations, Aaron Martin ("Martin"), who in turn reported directly to DeCesare. CW20 reports that DeCesare held weekly forecasting calls with Martin, who provided DeCesare with updates on all deals valued at or above $500,000. CW20 states that, during these weekly calls, DeCesare and Martin extensively discussed the sales pipeline, including deals that were expected to close or not expected to close, and whether any other steps were required to help facilitate closing such as legal review of customer contracts. CW20 knows this because, in preparation for these weekly calls between DeCesare and Martin, CW20 prepared updates that Martin provided to DeCesare regarding deals valued at $500,000 or more by utilizing Smartsheet, a software program that gathered all pertinent information from Salesforce data concerning the specific status of deals. CW20 was told by Roberts that updates on Smartsheet were required to be prepared because Martin presented the information contained in them to DeCesare in weekly meetings.

I. CW20 also inputted granular data in Smartsheet about the status of deals worth $500,000 or more, including the status of negotiations with the customer, the steps needed to

be taken to close the deal, and the expected dollar amount for each customer contract. According to CW20, Martin also had access to Smartsheet and supervised CW20's and other employees' work in connection with updates he would regularly provide to DeCesare.

J. During the beginning of each quarter, Martin asked CW20 and other members of the Deal Desk team to provide updates every two weeks about the status of all deals valued at or above $500,000. CW20 recalled that information was updated on Smartsheet on, at least, a weekly basis after a month into any quarter of the year. In an effort to incorporate accurate and timely information about the status of deals, CW20 regularly communicated with NAMs and other sales employees.

K. CW20 also attended quarterly "all-hands" conference calls where DeCesare discussed the Company's performance in any given quarter, including its revenue forecasts, bookings and the status of potential "tech wins." CW20 heard DeCesare discuss the Company's lack of progress in meeting sales goals for acquiring "net new logos." According to CW20, the Company failed to meet its target for "net new logos" in 2019.

L. Corroborating the accounts of numerous other CWs, CW20 states that DeCesare and other senior executives utilized Clari to regularly monitor deals, and by using Clari, Forescout's C-suite executives, including DeCesare and Redman, saw all the deals included in the Company's forecasts, including notes from the sales team on the status of negotiations and the steps remaining to close a deal. CW20 confirms that deals at Forescout were regularly forecasted improperly because all the steps required to close the deal had not even taken place. CW20 further confirms that deals without a proof of concept or a "tech win," which CW20 explained was a deal that was actually awarded to Forescout, were forecasted to close three weeks before the end of the quarter even though Forescout's sales cycle was significantly longer than that short amount of time, and deals would then naturally and eventually "slip" into the next quarter as a result.

C. Defendants Know that the Revenue Guidance Provided to Investors Is Based on Faulty Assumptions

46. The Company's reported quarterly results during 2019 fell below FY 2018's reported growth in revenues and were consistently and materially below the full year revenue guidance,

which the Company started providing on February 7, 2019. Thus, in Q1 2019, Forescout reported that total revenue growth had slowed from the 42% year over year growth reported in Q1 2018 to 27% year over year growth in Q1 2019. *See* Q1 2019 Form 10-Q at p. 19. The reported decline in growth rates worsened in Q2 2019 with the Company reporting year over year revenue growth of 16% compared to 35% for Q2 2018. *See* Q2 2019 Form 10-Q at p. 20. By Q3 2019, the decline had accelerated with the Company reporting year over year revenue growth of 7% compared to reported revenue growth of 23% for Q3 2018. *See* Q3 2019 Form 10-Q at p. 21. In addition, the disclosure in the Q3 2019 Form 10-Q was notable because, unlike the prior periods' Form 10-Qs, it failed to break out revenue growth and the related decline in the rate of revenue growth by the specific categories of license revenues, subscription revenues and professional services revenue. *Compare* Q1 and Q2 2019 Form 10-Qs *with* Q3 2019 Form 10-Q.

47. Defendants publicly attributed this decline in sales growth to a series of non-recurring delays, *i.e.*, one-offs, such as bureaucratic delays in customers finalizing orders, a shift to a subscription revenue model and finally, in Q3 2019, deteriorating macroeconomic conditions in the EMEA region, which region accounted for 16.1% of the Company's revenues in 2019, 17.5% of the Company's revenues in 2018, and 16.3% of the Company's revenues in 2017. *See* 2019 Form 10-K at p. 110. In other words, sales were delayed but would materialize because the Company still had the "technology win" based upon its product offerings.

48. However, in truth and in fact, Defendants knew that the culprit for missed revenue guidance was basically two-fold: the shift in customer demand to products which were better suited to the increasing trend towards cloud computing and remote work (*see* ¶¶33-34, *supra*); and an inadequate internal system for projecting future revenue.

49. The Company included sales designated as "committed" in creating projections according to CW18 and CW19. Defendants, however, knew that the resulting revenue projections were inflated and, because of that, according to CW18, beginning in June 2018 with the help of Force Management, a consulting firm that helps companies build sales teams and improve revenues, instituted a new system, designed to provide greater structure and more certainty to the method for projecting future revenue known as the "Customer Engagement Process" ("CEP").

50. CEP was developed in the middle of 2018 in consultation with Force Management. CW18 states that Force Management told senior executives at Forescout in 2018, including CW18, that implementation of the CEP model would result in a majority of deals categorized as "committed" by the Company as not actually locked down as "committed" deals. CW18 stated that the CEP model had seven rigorous steps, each linked to a percentage of likelihood that a given deal would close: Prospect (0%), Qualify (10%), Present (30%), Prove (50%), Purpose (70%), Negotiate (90%) and Closed-Won (100%). CW18 explained that each one of these steps was associated with specific tasks that needed to be completed before a deal could move on to the next step. CW18 estimates that a majority of Forescout's forecasts for "committed" deals were, in fact, generated based on the "Prove" category where deals had only a 50% chance of closing and hence could not constitute "tech wins."

51. CEP was scheduled to be fully implemented in the beginning of 2019 and reflected that a very large number of sales recorded as "committed" by sales representatives were, in fact, highly unlikely to be made. However, rather than acknowledge reality, Defendants simply refused to implement CEP and continued to project revenues based upon the prior faulty system that categorized deals as "committed" when they had only a 50% chance of success.

52. Compounding this failure was that starting at least by the beginning of 2019, Defendants engaged in a pressure campaign by forcing NAMs and other sales representatives to miscategorize deals as "committed" in order for the Company to be able to project continued rapid increases in sales even though, in fact, there were no actual commitments from buyers:

A. CW9 was a NAM at Forescout from 2014 to February 2019. CW9 stated that CW9's immediate boss instructed CW9 to move a $1 million deal from the upside category to the committed category, so that the Salesforce platform would show a $1 million increase in revenue for the quarter even though a customer had not committed to the deal.

B. CW10 described $1 million worth of deals that CW10 inherited as "mostly BS." Forescout expected these deals to close, but when CW10 directly spoke to the customers, they told CW10 that they were not interested in acquiring any of Forescout's products.

C. In July 2019, CW7, another NAM in the public sector division worked on a deal for the University of Wisconsin – Madison ("UWM"). CW7 participated in a conference call with Jensen and a procurement officer for UWM. According to CW7, UWM's procurement officer flatly informed Jensen that UWM would not place a purchase order before September 2019 as Jensen requested. Right after this conference call with UWM, CW14 called CW7 and told CW7 that Jensen wanted CW7 to list the close date for the UWM project on or before the end of September 2019. CW7 states that the UWM project never materialized.

D. CW11 was a NAM at Forescout's Enterprise division between December 2018 and September 2019. CW11 was forced to report closing dates that were sooner than CW11 had forecast for deals worth $1.2 million. CW11 learned from other colleagues after leaving the Company that at least one of these deals did not close before the end of the third quarter of 2019.

E. According to CW12, in the middle of 2019, NAMs at Forescout became concerned that deals listed as "committed" in the sales pipeline would not materialize as they did not just fall through, but "evaporated."

F. CW13 was a Senior Administrative Assistant and Office Manager at Forescout between November 2018 and March 2020. CW13 joined Forescout in November 2018 when Forescout acquired SecurityMatters, an information technology company based in the Netherlands with its U.S. operations in New Hampshire, which specialized in providing security solutions for industrial threats and flaws. According to CW13, SecurityMatters sales employees were pressured by Forescout's senior managers to list deals as "committed" even though SecurityMatters' sales employees knew that there was no actual commitment from buyers. CW13 further stated that Jim Crowley, the head of sales at SecurityMatters, left Forescout in January 2020 because he was fed up with Forescout's pressure campaign. CW13 further stated that the pressure to fudge the sales numbers at SecurityMatters came directly from DeCesare.

G. CW14 corroborated CW7's allegations, and states that the pressure campaign to include illusory deals in the sales pipeline was instigated by both Jensen and Redman.

D. Defendants Act to Sell the Company Before Revenue Comparisons Turn Negative

53. The Company put itself up for sale in October 2019. The explanation offered was that even though the Company's product offerings were in heavy demand, short-term dislocation caused by, among other things, the transition to subscription fee arrangements, would be better managed in a non-public reporting company setting.

54. Key to Defendants' effort to obtain a premium price for the Company was to portray Forescout as still being a growth company with a steadily increasing revenue flow that had been sidelined by a series of one-offs during 2019. In order to do so, the Company would need to avoid reporting a further decline in revenue growth for Q4 2019 and project a resumption in growth more in line with Forescout's historical results.

55. The Company reported Q4 2019 revenue of $91.3 million, representing 8% year-over-year growth from Q4 2018, which was disappointing but still not a continued decline in growth from the 7% reported in Q3 2019. In addition, in connection with a sales process in which the Company hired Morgan Stanley to shop itself to potential acquirers, it prepared two alternative forecasts projecting 2020 revenue of $389 million and $386 million, reflecting anticipated 30.6% growth in reported revenue from 2019. In other words, Defendants' revenue model continued to assume that sales had simply "slipped" from 2019 into 2020.

56. As Defendants knew, the true situation at the Company was substantially more dire with internal Illustrative Guidance prepared in January 2020 reflecting projected 2020 revenue of $355 million – a full 10% below the projections provided to potential acquirers – with projected Q1 2020 revenue of $62 million, reflecting an 18% expected ***decline*** from Q1 2019 reported revenues. Defendants later acknowledged that at least by January 2020 a fundamental shift had taken place in Forescout's business operations causing the reduced revenue projections contained in the Illustrative Guidance. *See* Preliminary Proxy Statement dated March 3, 2020 (the "Preliminary Proxy Statement") at pp. 42-44; and Proxy Statement dated March 24, 2020 (the "Proxy Statement") at pp. 42-44. However, as demonstrated above, that fundamental shift had, in fact, taken place much earlier in 2019. *See* ¶¶32-36, *supra*.

57. However, even the more realistic and dire projections offered by the Illustrative Guidance were not tied to reality. CW19, a SEAE who worked at Forescout from September 2019 to June 2020 recalls an in-person meeting at the "sales kickoff" event in January 2020 where, during a breakout session, the Vice President of the Americas for Forescout, Matt Hartley ("Hartley"), who oversaw all American sales at Forescout towards the end of the Class Period, instructed sales representatives to list deals as "committed" into the Salesforce platform only on the basis of a single conversation with a potential customer's C-suite executives or employees in the procurement group.

58. Therefore, it was unsurprising to Defendants when Q1 2020 reported revenue came in at $57.2 million, more than 10% below the $62 million in the Illustrative Guidance, representing a 24% ***decline*** in revenue from Q1 2019 revenues, and that decline was only achieved through a multi-million-dollar discounted sale of hardware at a loss. As Advent explained in the Delaware Litigation, "even with several highly unnatural (and detrimental) actions taken by Forescout to pull additional bookings into the quarter," Forescout's financial performance "***dropped off a cliff***, compared to its actual Q1 2019 performance, and importantly, ***compared to its peers***." Answer and Counterclaim ¶32 (footnote omitted, emphasis added).

59. Similarly, Q2 2020 results, although not reflecting a decline in year over year review, came in at $79.9 million, representing only a 2% increase in revenue from Q2 2019. Eventually, in July 2020, Defendants provided updated projections reflecting 2020 revenue of $321 million, a 10.5% decline from even the Illustrative Guidance and a more substantial decline from the projections provided to potential acquirers with a similar decline in expected FY 2021 from $417 million in guidance provided to potential acquirers in February to $317 million.

E. Advent Agrees to Acquire Forescout for $33.00 Per Share Which Promises to Enrich DeCesare and Harms

60. Defendants' deception bore fruit when on February 6, 2020, Advent, a well-respected private equity firm, acting though Ferrari Group Holdings, L.P and Ferrari Merger Sub, Inc. (collectively "Ferrari"), entered into the Original Merger Agreement pursuant to which it agreed to purchase Forescout for $33.00 per share in the Planned Acquisition.

61. The Planned Acquisition promised to substantially enrich both DeCesare and Harms, as they were set to receive $33.5 million and $8.95 million for their Forescout RSUs and PSUs, respectively. In addition, DeCesare and Harms stood to receive golden parachutes valued at $10.8 million and $5.185 million, respectively. In contrast, had the Company not entered into the Merger Agreement, both DeCesare and Harms were threatened with the loss of their jobs by an activist investor (*see* Proxy Statement at 37-38), the stock they owned would have traded for much lower values (*see* Form 10K/A at page 31 (showing DeCesare and Harms beneficially owned 898,623 and 174,034 shares of common stock as of December 31, 2019, respectively)), and many, if not all, of their PSUs would have been underwater without the Original Merger Agreement.

F. Advent Expresses Concern About Proceeding With, and Then Refuses to Close on, the Original Merger Agreement

62. The Company's required disclosures in connection with soliciting shareholder approval through the Preliminary Proxy Statement filed on March 3, 2020 and the Proxy Statement, revealed that by the time Advent had signed the Original Merger Agreement, Forescout no longer believed in the veracity of its previously provided projections upon which the Planned Acquisition had been premised because of an acknowledged shift in the Company's business and that the Illustrative Guidance it was planning to provide to investors reflected substantially lower projected revenues.

63. As a result, the Company's relationship with Advent started to sour after the March 3, 2020 filing of the Preliminary Proxy Statement. This situation worsened by March 24, 2020—the same day the Company issued the Proxy Statement—by which point it had become clear that Forescout would not even achieve the $62 million Q1 2020 revenue target in the Illustrative Guidance.

64. As these adverse facts were disclosed regarding the Company's operations and future business prospects, Advent was pressing for updated forecasts, which Forescout refused to fully provide, that were needed to obtain funding to close on the Original Merger Agreement. Thus, on March 27, 2020 and April 6, 2020, Forescout prepared updated forecasts which Advent considered to be of low quality because they contained troubling analysis.

65. On April 20, 2020, Advent informed Defendants that it was unsure whether it could proceed with the terms of the Original Merger Agreement. The Tender Offer Recommendation explains (at p. 32) that Advent stated that it "was reviewing Forescout's business, operations, future prospects and financial condition in order to assess whether the conditions to closing provided in the Original Merger Agreement would be met." Defendants, recognizing the distinct and real risk that Advent would seek to back out of the Original Merger Agreement, began internally discussing the Company's options should Advent act in that manner.

66. Nonetheless, Defendants began framing all their discussions with Advent and public disclosures to investors as based upon a certainty that the Planned Acquisition would close as planned on May 18, 2020 for $33.00 per share as purportedly required by the Original Merger Agreement.

67. On May 5, 2020, Advent learned from a whistleblower email that Forescout had been manipulating its results, including in Q4 2019, by selling products to Merlin in order to improperly accelerate revenue recognition.

68. On May 8, 2020, a representative of Advent told DeCesare that Advent could not "make the numbers work" for the Planned Acquisition and expressed concerns regarding whether conditions precedent to the Planned Acquisition would be met. Answer and Counterclaim ¶8.

69. On May 11, 2020, Forescout disclosed its results for Q1 2020. In reaction to this disclosure, the price of Forescout's common stock declined by nearly 5% from its closing price of $32.09 on the previous day, to close at $30.50 per share on May 12, 2020, on heavy trading volume.

70. On May 18, 2020, Forescout shocked investors by disclosing that Advent was refusing to proceed with the Planned Acquisition of the Company for $33.00 per share. Instead, Advent had sent the Termination Letter to Forescout on May 15, 2020, identifying its bases for refusing to proceed with the Planned Acquisition, including that:

A. "[B]ased on the Company's actual recent financial performance, information received from the Company regarding the Company's expected future financial performance for the fiscal year 2020 and beyond, it is clear that the Company's decline in earnings potential and financial performance will last for a durationally significant period of time";

B. Forescout "is continuing to provide non-standard discounts and payment terms on its products to a significant number of customers [which] are material and substantially adversely affect the near- and long-term prospects of the Company"; and,

C. If the Acquisition were to be consummated, "the Company would not be solvent ... under any relevant test of solvency" because, among other things, "the Company's debts will likely exceed its estimated enterprise value."

71. In reaction to the Company's disclosure of Advent's refusal to proceed with the Acquisition and the statements contained in the Termination Letter, which the Company publicly disclosed at that time, Forescout's stock plummeted by nearly 24% from its closing price of $29.52 on the previous day to close at $22.57 per share on May 18, 2020, $20.93 on May 19, 2020, and $19.84 per share on May 20, 2020.

72. This price implosion followed a previous decline in the price of the Company's stock on May 11, 2020, when Forescout reported revenues of $57.2 million for Q1 2020, well below the $62 million the Company had provided as its Illustrative Guidance for Q1 2020 and the $355 million then projected for 2020, and further below the projected Alternate Plan provided to Advent on January 27, 2020, which projected revenue of $386 million for 2020. The Company's disastrous results were only able to be achieved by receiving revenue of $4.787 million by selling hardware at approximately 8% ***below*** cost, compared with margins from the year-prior of 24%, in transactions described as "one offs." *See* Q1 2020 Form 10-Q at 26.

G. Facts Revealed in SEC Filings and the Delaware Litigation Establish the Falsity of Defendants' Earlier Statements

73. On May 19, 2020, Forescout filed a Verified Complaint in Delaware Chancery Court seeking, among other things, an Order requiring Advent – or more precisely Ferrari – to proceed with the Acquisition on the terms described in the Merger Agreement, *i.e.*, for $33.00 per share. *See* Forescout Complaint and Prayer for Relief ¶C. Advent answered the Complaint and asserted a counterclaim with respect to which Forescout filed an answer.

74. On July 15, 2020, Advent and Forescout ultimately settled the Delaware Litigation with Advent entering into a revised merger agreement pursuant to which Ferrari would make a

tender offer for Forescout's stock at $29.00 per share pursuant to a revised acquisition agreement (the "Revised Acquisition"), representing an approximately $300 million discount from the Proposed Acquisition as provided for in the Original Merger Agreement.

75. On July 20, 2020, the Company filed the Tender Offer Recommendation with the SEC, recommending that Forescout shareholders tender their stock to Ferrari for $29.00 per share.

76. On August 14, 2020, the tender offer closed and Advent completed its acquisition of Forescout for $29.00 per share.

77. The pleadings in the Delaware Litigation and the Tender Offer Recommendation disclosed the following material adverse facts which Plaintiffs and other public investors had not previously known:

A. On April 20, 2020, Advent sent a letter to the Company stating that it "was reviewing Forescout's business, operations, future prospects and financial condition in order to assess whether the conditions to closing provided in the Original Merger Agreement would be met." Tender Offer Recommendation at 32;

B. On May 8, 2020, "**Advent Signal[ed] its Intention to Renege on the Merger Agreement"** (Delaware Complaint at p. 38 (emphasis in original));

C. Two multinational professional services companies that were substantial business partners as well as a third major business partner of Forescout terminated their relationships with the Company and the Company lost several customers after the Acquisition was announced (Delaware Complaint ¶93);

D. Advent was sufficiently skeptical of the guidance previously provided by Forescout in connection with negotiating the terms of the Planned Acquisition and other due diligence that it received that, by April 14, 2020, it had prepared its own forecasts of the Company's expected results for 2020 and 2021 (Delaware Complaint ¶70, Answer and Counterclaim ¶37);

E. Forescout had routinely engaged in end-of-quarter discounting of products for sale which appeared to be designed to meet public projections (Delaware Complaint ¶94).

F. In response to the Termination Letter, Forescout initially engaged "in an effort to find a resolution that would result in Advent consummating an acquisition of Forescout" (Tender Offer Recommendation at 32);

G. A July 2020 forecast (the "July Case") serving as the basis for the fairness opinion provided by Morgan Stanley in connection with the Tender Offer Recommendation reflected 2020 revenues of $321 million, materially lower than the $386 million to $389 million range originally provided to Advent and also below the 2020 projection of $355 million contained in the Illustrative Guidance (Tender Offer Recommendation at 45; Proxy Statement at 61, 63-65); and,

H. The July Case reflected that, contrary to the projections originally provided to Advent of 15% growth in revenue for FY 2021, revenues were expected to be flat with those of 2020 (Tender Offer Recommendation at 44-45).

78. In addition, other SEC filings made by Forescout after the Acquisition's announcement on February 6, 2020 revealed the following additional facts demonstrating that the Company's prior public statements were materially false or misleading at the times they were made:

A. Auditing the timing of the Company's revenue recognition was "challenging" and that "certain arrangements required judgment to determine the distinct performance obligations and the appropriate timing of revenue recognition" (2019 Form 10-K at 73);

B. The level of Forescout's sales force experience had declined from 50% to 38% having been with the Company for more than two years during 2019 (2019 Form 10-K at 11); and,

C. Forescout, during Q1 2020, had restructured its sales force, eliminating approximately 90 employees within the sales, marketing, and engineering functions (Q1 2020 Form 10-Q at 17).

H. Materially False or Misleading Statements

79. These material facts caused a series of statements made between February 7, 2019 and May 11, 2020 to be materially false or misleading. These facts were, as alleged above and as

alleged below with respect to each particular statement, at all relevant times known to or recklessly disregarded by Defendants:

1. The February 7, 2019 Press Release and Form 8-K

80. On February 7, 2019, Forescout issued a press release announcing its financial results for the fourth quarter of 2018, and for the full fiscal year that ended on December 31, 2018. This press release also provided revenue guidance within the range of $363.1 million to $373.1 million for FY 2019, representing year-over-year growth of 24% at the midpoint.

81. Forescout's revenue guidance was materially false or misleading because it lacked any objective basis and, in fact, was inconsistent with Forescout's actual performance, which was known to Defendants, at the time this guidance was disclosed. The objectively false nature of this guidance is evidenced by: (a) the shift in the market for cybersecurity products towards the cloud in 2018, well before the Class Period, resulted in significant pricing pressure from Forescout's competitors who offered cloud delivered services when Forescout could not launch its core cloud-based security software until late 2019 (*see* ¶¶33-37, *supra*); (b) the Company already having experienced the loss of experienced sales representatives necessary to help drive sales growth (*see* ¶¶38-41, *supra*); (c) DeCesare and Harms receiving regular analytical reports regarding Forescout's sales pipeline and their involvement in the sales process (*see* ¶¶44-45, *supra*); and (d) the February 7th guidance facilitating the sale of over $29 million worth of common stock by the Pitango Group of venture capital funds in which Rami Kalish, the Vice Chairman of the Board, was a partner.

82. Defendants knew, as of February 7, 2019, that most deals in Forescout's pipeline barely had a 50% chance of success because, CW18, Forescout's former GTEM, together with Redman and Gumbel, developed a new sales tracking methodology known as the CEP which was scheduled to be implemented by the Company in early 2019 which Defendants then refused to fully implement. *See* ¶¶49-51, *supra*.

83. CW18 explains further that the CEP model was never implemented at Forescout because implementing its structured methodology would have forced the Company to recognize that a large proportion of deals identified as "committed" would, in fact, not close because of the failure to obtain consent from the "economic buyers," such as clients' CFOs, to proceed forward with large

transactions. Thus, CW18 states that he was able to recognize based upon the CEP model that ***the Company would miss its sales targets for the next three or four quarters consecutively*** just as Force Management had already warned senior executives at Forescout before the Class Period.

84. There is additional corroboration that Forescout had a Company-wide policy of identifying deals as "committed" even when deals were only in the negotiations stage. CW19, a SEAE who worked at Forescout from September 2019 to June 2020, recalls an in-person meeting at the "sales kickoff" event in January 2020 where, during a breakout session, the Vice President of the Americas for Forescout, Matt Hartley ("Hartley"), instructed sales representatives to list deals as "committed" into the Salesforce platform only on the basis of a single conversation with a potential customer's C-suite executives or employees in the procurement group. Hartley oversaw all American sales at Forescout towards the end of the Class Period.

85. According to CW19, at this breakout session in January 2020, where CW19 was present, CW19 heard Hartley tell sales personnel that deals should be identified as "committed" in the Salesforce platform "once the negotiations started" even though there was never a real commitment from potential customers such as a purchase order or other indicia of a real commitment.

86. Rather than implementing CEP, CW9 explained that Forescout categorized deals into three key areas: (1) committed deals expected to close during a certain quarter, (2) upside deals that had a 50-50 chance of closing in a particular quarter, and (3) pipeline deals where the Company had simply engaged in a discussion with a customer without any commitment. CW9 described constant pressure from upper management to list deals as "committed" as a juggling act whereby Forescout placed uncertain deals into the committed category to support its misleading forecasts. Indeed, CW9 had been pressured to identify a seven figure deal as committed no later than February 2019 even though there was no commitment from a buyer given that CW9 was no longer employed at Forescout in February 2019. Hence, given that Forescout resorted to its past practice of including a majority of deals with only a 50% chance of success in its forecasts and chose to abandon the CEP despite knowing what its implementation would entail, Defendants knew before the FY 2019

guidance was given that the underlying deals that the guidance was based upon barely had a 50% chance of success.

2. March 4, 2019 Investor Day

87. On March 4, 2019, Forescout hosted an investor day in San Francisco, California. At this event, Defendant DeCesare made the following materially false and misleading statements:

> So there'll be no questions today around go-to-market, so I'll try to give you a little bit of this, and then Brian can dig into the detail if you guys have questions towards the end. First is we've shared this with you is at the end of 2016, 14% of our sales organization was what we call tenured. That is a arbitrary definition for us. We have chosen that to be two years in your territory. We think it's about two years when a reps in the same territory, not just for the company but in their territories, that's when they start to really get kind of the pipeline, everything else that we need flowing. That rose to 35% at the end of 2017 and 50% at the end of 2018. I don't ever expect this to get to 100%.
>
> ***We're obviously hiring like crazy and not everybody works out.*** So there's going to be a good kind of critical mass that we get to, but we still think there is upside above and beyond the 50% for sure. The new step we want to share with you is where we are on pipeline. So this shows you what the total pipeline would be as a multiple of our internal bookings plan which is, no, we are not disclosing to you. But it gives you a sense of how big that multiple could be at the start of the year. So, that was 3.8% start of 2016; 3.4% at the end of 2017; and then $4.2 million as we go into 2019.
>
> ***So, it's given us increased visibility which is you'd expect as reps are longer and the marketing team is getting going, we get kind of better visibility into pipeline.*** This is something that we certainly track on a very, very, very consistent basis. (emphasis added).

88. The statements identified in Paragraph 87 were materially false or misleading when made because DeCesare omitted to disclose that:

A. Any new hiring the Company was doing was necessitated by the departure of experienced sales representatives necessary to continue driving the Company's revenue growth. In fact, as per CW7, Forescout had already fired a significant number of employees in the Commercial division in February 2019. CW1 states that 25 to 30 BDRs/SDRs were terminated or left the Company in the first few months of 2019. This was a significant reduction given CW18's statement that the entire team of SDRs and BDRs at the end of 2019 consisted of only 60 individuals.

B. According to CW18, the Company began to eliminate or otherwise lose through voluntary departures "ramped up" NAMs, ultimately replacing 25 to 30 NAMs in 2019 with

inexperienced employees. Per CW19, each NAM had a quota of deals worth $2.5 million per year. CW18 states that the elimination or voluntary departure of the "ramped up" NAMs due to poor sales prevented Forescout from closing deals and securing "tech wins."

C. As a result, the Company's "visibility" into the sales pipeline was diminishing, not increasing as DeCesare misleadingly stated, at the time this statement was made because Forescout had already started to eliminate or otherwise lose a significant number of sales representatives across multiple divisions.

D. DeCesare also failed to disclose that, as CW18 states, Force Management had already told senior executives at Forescout in 2018 that a majority of the Company's deals in the sales pipeline were miscategorized as "committed" because the Company did not have "tech wins" or agreement from senior executives with authority to sign contracts or issue purchase orders on behalf of customers. CW18 states that Forescout considered initiating the CEP model's steps in early 2019, but never implemented it and continued to include a significant number of deals with only a 50% chance of success into its forecasts.

E. DeCesare made the misleading statements identified in Paragraph 87 with actual knowledge or reckless disregard for the truth because:

i. DeCesare told investors that "sales ramping and productivity is always one of those areas that both [Harms] and I spend a lot of time on."

ii. CW18 heard DeCesare state that, at least with respect to the Company's own terminations, Forescout reduced its sales force in 2019 and additional cuts needed to be made in early 2020 because the Company had failed to grow revenues in 2019, demonstrating that DeCesare knew about the terminations and departures and why they occurred.

iii. According to CW18, DeCesare also knew that the Company had considered implementing the CEP model before this false statement was made but failed to implement it because DeCesare acted as the chief sales representative himself for large deals and knew that the steps of the CEP model had not been applied for deals that he pitched to clients himself. CW18 worked with Gumbel and Redman to initiate the CEP model in the beginning of 2019 even though it was quickly abandoned. CW17 states that Redman and Gumbel both answered

DeCesare's pointed questions and shared information with DeCesare about the sales pipeline. DeCesare thus knew when he made this statement that misidentifying as "committed" deals with a 50% chance of success, as CW18 explained was normal practice, reduced "visibility" into the sales pipeline.

3. May 9, 2019 Press Release and Earnings Conference Call

89. On May 9, 2019, Forescout issued a press release that announced the Company's financial results for its first quarter ("Q1") that ended on March 31, 2019. In this press release, Forescout conditioned the market for a soft landing about the impending deterioration in its business due to the shift to the cloud, and the Company stated that revenues for the second quarter of 2019 would be within the range of $75.3 million to $78.3 million, now representing year-over-year growth of 14% at the midpoint.

90. On this partial disclosure or the materialization of the risks thereof, the price of Forescout's common stock declined by $7.02, or over 16% from its previous day closing price of $43.30 per share, to close at $36.28 per share on May 10, 2019, on heavy trading volume.

91. To hasten Defendants' expectation of a decrease in Forescout's share price due to declining revenues resulting from the Company's illusory pipeline of deals and loss of its seasoned sales force in the second quarter of 2019, Defendants increased the full year guidance for 2019 and touted that the Company would still finish the fiscal year with revenues between $365.3 and $375.3 million, again representing year-over-year growth of 24% at the midpoint.

92. The full fiscal year 2019 increased revenue guidance was materially false or misleading because it lacked any objective basis and, in fact, was inconsistent with Forescout's actual business performance, which was known to Defendants at the time this guidance was disclosed for the same reasons identified in Paragraphs 81-86 and 88.

93. On May 9, 2019, Forescout also held an earnings conference call to announce Q1 results. At this conference call, analysts requested further information regarding the slipped deals and deals that Defendants said would close in the back half of the year. For example, Fatima Boolani questioned both Individual Defendants regarding the Company's sales capacity, and both DeCesare and Harms provided the following materially misleading response:

Fatima Boolani, Analyst

If I can just sneak in a follow-up. In terms of sales capacity, do you have comfort in the current levels of capacity that you have? Or should we anticipate there should be sort of a ramp in rep hiring, in capacity hiring as we progress through the year?

Michael DeCesare, Chief Executive Officer and President

Yeah, no, consistent with the theme I just hit upon, look, we feel like we are tracking very well against our sales productivity, the investment levels that we have been making and plan to make through the rest of the year, follow the -- that path to profitability and investing at levels below where our top line is growing. Nothing has changed at those levels. There was another facet I wanted to hit on. Perhaps as Mike's adding to it, I'll remember what it was.

Christopher Harms, Chief Financial Officer

No. I'm good. He nailed it. (emphasis added).

94. The statements identified in Paragraph 93 were material because analysts, as surrogates for the market, pointedly questioned Defendants about the sales force, and DeCesare and Harms assured them that the Company would meet its objectively false guidance because ***nothing had changed*** about the sales capacity or productivity from its high of 50% at the end of 2018.

95. These statements were materially misleading when made because contrary to Defendant DeCesare's false statement, quite a lot "had change[d]" at this time with respect to the Company's sales capacity and productivity, including the following:

A. Contrary to DeCesare's statement, the sales capacity and productivity level of sales representatives had not only changed but ***declined*** because CW7 states that significant cuts were made in the Commercial division in February 2019, and CW1 states that an entire sales team was gutted in the spring of 2019 and 25 to 30 BDRs/SDRs were terminated or left the Company in the first few months of 2019. This was a significant reduction given CW18's statement that the entire team of SDRs and BDRs at the end of 2019 consisted of only 60 individuals.

B. CW16 and CW17 confirm that layoffs occurred in waves with five rounds of layoffs in 2019 and 2020, and the most significant cuts were made in 2019. On or about when this false statement was made, according to CW16 and CW17, Forescout planned to initiate another round of cuts in the summer of 2019 to become leaner in anticipation of a planned acquisition.

C. According to CW18, Forescout also terminated or otherwise lost 25 to 30 "ramped up" NAMs in 2019, losing tens of millions of dollars in potential business.

96. DeCesare's false statement that "nothing had changed" about the Company's sales capacity and productivity, and Harm's false affirmation of that statement were made with actual knowledge or extreme disregard for the truth. At this same earnings conference call held on May 9, 2019, DeCesare himself told investors that "sales ramping and productivity is always one of those areas that both [Harms] and I spend a lot of time on," so he knew about the waves of layoffs and cuts. CW18 also heard DeCesare state at a "sales kick off" event in the beginning of 2020 that Forescout reduced its sales force in 2019 and additional cuts needed to be made in early 2020 because the Company had failed to grow revenues in 2019, demonstrating DeCesare's knowledge of the massive turnover in 2019 and the reasons for the reduced level of productivity.

97. Other analysts also requested more specificity about the preannounced poor quarter and the raised full year guidance, and Defendants continued to mislead investors:

> **Sterling Auty, Analyst**
>
> Yeah. Thanks. Hi guys. So I'm sure a bunch of folks are going to pile on the deals moving later in the year. You mentioned just not materializing until later. Well, can you just give us a little bit more insight, choose one or two of them and just kind of walk through why. ***Is it they need more signatures, the project timeline has shifted, there is other technology priorities? Why do you think they're materializing later in the year?***
>
> **Michael DeCesare, Chief Executive Officer and President**
>
> ***Sure. So first, understand that every one of those deals is still in pipeline.*** It's just our – we had an expectation that a couple of them would have been far enough along to be in guidance by this point, that's the major issue for us, right?
>
> We have high degree of confidence they close for the year. We had originally thought they would be more naturally suited for Q2 and they just slipped a little bit. So I said earlier kind of there is not really a single flavor to them in the sense that they span different industries and different figures for us and things like that. There is not really anything there that you could be thrilled into. I guess the one that I would share with you, Sterling, is I'll just give you one example. ***As you know we had one very large account – by the way, it's also worth pointing out, in every one of those deals, we have the technology win already. We've already been awarded the business.***
>
> ***The question now is what I would call the business win, which is when we actually get the money and the commitment towards timing. So that's why we have a fairly high degree of confidence that they will materialize in the back half of the year.*** (emphasis added).

98. The statements identified in Paragraph 97 were material because analysts, as surrogates for the market, specifically asked Defendants the reason why the deals had slipped, including whether authority from an economic buyer was missing, as CW18 states was usually the case with the illusory deals, or if the project timeline had shifted, as CW7 explains occurred with the UWM deal.

99. The statements identified in Paragraph 97 were materially false or misleading when made because Defendants failed to disclose that:

A. Forescout could not, and did not, "have the technology win already," was not "awarded the business" and "every one of those deals" was not still in the pipeline. This fact is confirmed by the rapid shift to cloud computing in 2018 and Forescout's inability to adjust to the changing dynamics of the market that rendered its products obsolete. CW1, CW2, CW3, CW4, CW8, CW10 and CW17 also corroborate that Forescout's declining revenue in 2019 was directly caused by pricing pressure and superior cloud delivered solutions offered by competitors.

B. In 2018, Force Management told senior management at Forescout, including CW18, that implementation of the CEP model would result in a majority of deals miscategorized as "committed" because Forescout identified deals with only a 50% chance of success as "committed." CW18 states that the Company's decision to abandon the steps of the CEP model in early 2019, including securing "tech wins" from representatives of buyers with economic decision-making authority, resulted in Forescout's failure to meet its sales targets for the next three to four quarters.

C. Before this false statement was made, CW17 states that Forescout lost every single customer in CW17's territory in southern Texas by April 2019. CW17 also states that Forescout lost the largest customer in Texas, AMD, with millions in potential business, by May 2019.

D. CW18 further states that an $80 million potential deal with Booz Hamilton repeatedly slipped in 2019, and further estimates that 1 out of 5 deals in the global sales pipeline was miscategorized as "committed," and 1 out of every 3 seven or eight figure deals was miscategorized as "committed."

E. CW7, CW9, CW10, CW11 and CW14 state that each one of them as well as other sales representatives were pressured by senior executives such as Redman to identify numerous seven figure deals as "committed" even though buyers had no interest. This pressure campaign was so widespread that it extended to SecurityMatters, a new acquisition of the Company's at the end of 2018. According to CW13, the head of sales at SecurityMatters left that organization because he was fed up with Defendants' pressure campaign to fudge the numbers. CW13 states that DeCesare applied the pressure on SecurityMatters. CW12 confirms that "committed" deals "evaporated" in the middle of 2019. CW15, a manager on the Deal Desk at Forescout from June 2016 to June 2020, states that "committed" deals listed in the forecast file lingered for months or years with no prospects of closing. CW19 affirmatively states that "committed" deals were included in the Company's forecasts. CW20 confirms that despite the length of Forescout's sales cycle, deals were forecasted to close within weeks of a quarter, and inevitably slipped into the next quarter as a result.

F. That this was Company policy is confirmed by CW19 who attended a breakout session at a sales kickoff event in early 2020 where Hartley, the head of Americas for Forescout, in the presence of CW19, instructed sales representatives to identify deals as "committed" in the Salesforce platform based only on a single conversation with a senior executive of the customer in the negotiations stage when there was no purchase order or any kind of actual commitment. Indeed, CW9 was pressured to identify a $1 million deal with only a 50% chance of success as "committed" even though the buyer had no interest in the product before February 2019.

100. DeCesare's knowledge or extreme recklessness in making this false statement is evidenced by, at least, the following specific facts pertinent to this false statement:

A. The Company's statements in its Annual Reports that the sales cycle was between 9 and 24 months for new customers, and 3 to 12 months for existing customers, demonstrating that Defendants had substantial lead time to understand and know that the Company could not meet its sales targets or secure "tech wins" or that the deals would continue to "slip."

B. CW8 and CW18 state that DeCesare was a micromanager, and CW18 further states that DeCesare acted as the sale representative himself for the larger deals, meeting clients face-to-face and participating in conference calls.

C. CW17, CW18 and CW20 state that DeCesare, Redman and other senior executives at Forescout used Clari, an add-on-revenue operation platform to track sales, monitor sales representatives, deals and forecasts. DeCesare and Redman used Clari's real time information to learn when the Company was short on its pipeline, identify deals that were at risk, predict outcomes early in the quarter, and spot churn risk of failure. This tool gave DeCesare information on the Company's forecasts and sales pipeline on a company-wide level with real time accuracy. It is thus implausible that DeCesare would not know about the pressure campaign, the illusory deals or that a majority of Forescout's deals identified as "committed" had only a 50% chance of success as CW18 explained.

D. With information provided on Smartsheet by CW20 after gathering information from sales representatives, Martin, the Senior Vice President of Revenue Operations at Forescout, provided to DeCesare information about all deals over $500,000 in weekly meetings as the quarter progressed. According to CW20, Martin's weekly updates to DeCesare included information about the status of negotiations, the steps remaining to close a deal, and the expected dollar amount for each deal.

E. CW20 also attended "all hands" conference calls where CW20 heard DeCesare discuss revenue forecasts, current bookings, "tech wins," and the Company's inability to generate new business in 2019. CW16 similarly recounts that DeCesare held quarterly internal review calls where he discussed the status of "tech wins."

F. Information provided to other senior executives was rolled up into updates provided to DeCesare. CW10 states that Redman reviewed sales pipeline reports on Salesforce, and Gumbel received automatic alerts about all deals over $1 million. CW17 states that Redman and Gumbel then answered DeCesare's pointed questions and provided him with updates on the status of deals and the sales pipeline.

G. According to CW7 and CW14, Redman pressured sales representatives to identify illusory deals as committed. According to CW13, DeCesare also instigated the pressure campaign on the head of sales at SecurityMatters.

H. On the August 7, 2019 earnings conference call, Harms told investors that he and DeCesare analyzed and "probed" the sales pipeline, spent time in the field asking about customers' buying preferences, and both of those pieces of information were "baked into" the full year guidance.

101. Similarly, an analyst from Morgan Stanley questioned Defendant Harms regarding why the deals that had failed to close in the second quarter of 2019 could not potentially slip even further into fiscal year 2020:

> **Melissa Franchi, Analyst**
>
> Perfect. Thanks. And then just a follow-up for Criss on the large deal volatility. Just to clarify, were there any large deals that got pulled forward for Q2 into Q1? And then what's your level of confidence in the deals that got flipped from Q2 into Q3 or Q4, what's the level of confidence in those deals actually closing in the second half of the year? Is there risk that they could potentially slip into FY '20?
>
> **Christopher Harms, Chief Financial Officer**
>
> Yeah. So no major pull in a deal to get to Q1. So let's address that directly. ***As it relates to the second half of the year, kind of reiterating some of the points Mike hit upon. Those deals are ones where we've already got the tech win.*** There are kind of each nuanced elements to why we still feel we're going to close those deals in 2019, we just weren't prepared to put them into our guidance for Q2. ***So inclusive in that, as we're looking at that second half of the year, we feel like we've got plenty of pipeline for the coverage of what we need to do. Those deals are part of the portfolio that we look at. Those, we still have a very high degree as we're assessing the deals that are taking shape of the cross-expansion and land -- and land is getting larger, we feel like there is plenty of pipeline to deliver upon the guidance we've given you for the full year.*** (emphasis added).

102. Analysts, as surrogates for the market, again focused on asking about the slipped deals and whether Defendants had a basis for stating that there was no risk of further slippage into the next fiscal year, again demonstrating that Defendants' false statements in response were material.

103. The statements identified in Paragraph 101 were materially false or misleading when made for the same reasons described in Paragraphs 99-100.

104. In addition, evidence that Harms made the misleading statements identified in Paragraph 101 with actual knowledge or reckless disregard for the truth is evidenced by the fact that Harms himself told investors during the Class Period that he and DeCesare analyzed and "probed" the sales pipeline, spent time in the field asking about customers' buying preferences, and both of those pieces of information were "baked into" the full year guidance.

105. Another analyst from Bank of America pointedly asked Defendants about their decision to pre-announce poor results for the second quarter of 2019 while raising the full year revenue guidance for 2019 even higher than the previous estimate:

> **Tal Liani, Analyst**
>
> Hi, guys. I'm asking almost the same question that someone else asked, but I want to ask it differently. You missed 2Q guidance, but you are raising. You're not keeping -- you're not only -- you're not keeping the guidance for the year you're raising the guidance for the year. So that means you have some kind of confidence on the materialization of the contracts in the second half. Can you share with us what is -- what kind of arrangement you have for these contracts? Why are you increasing the guidance for the year? And what's the risks that it doesn't materialize? I just want to understand on what basis you're increasing the guidance? Thanks.
>
> **Michael DeCesare, Chief Executive Officer and President**
>
> This is Mike. I'll take that. I think, as we said, in the second quarter, this is a deal timing issue for us right? When we started off the year, we had more of substantial pipeline, we had a number of larger deals that we thought at that point were much more naturally going to close in the second quarter, and we're now realizing that they need a little bit more time in the oven before they're going to be done. ***As I've mentioned, we have tech win in those accounts, meaning that they've chosen us. So it's very, -- it's not common for a customer to award a technology win to a vendor and then not buy their product for an extended period of time. So that gives us a high degree of confidence.***
>
> We've also got 50% of our sales organization, as we mentioned, at the end of 2018 is ramped, which means they've been in their territory for more than a couple of years. ***So many of these deals are into accounts that we've had the same account manager on the same accounts for a longer period of time, which gives us more visibility. So obviously, we would not raise 2019 if we did not have a very high degree of confidence. The building of pipeline, the maturation of our reps, the success we're seeing in some of the international territories that were kind of later high risk for us from a cohort perspective are all giving us that confidence.*** (emphasis added).

106. The statements identified in Paragraph 105 were materially false or misleading when made for the same reasons identified in Paragraphs 88, 95-96, and 99-100. These statements were further false and misleading because, according to CW6 and CW16, there were numerous hiring

freezes in 2019. DeCesare also failed to disclose to investors that major cuts were instituted in the summer of 2019 in anticipation of finding an acquirer as CW16 explained.

107. DeCesare made these false statements with actual knowledge or reckless disregard for the truth for the same reasons explained in Paragraphs 96 and 100.

108. Towards the end of the conference call, Defendant DeCesare went even further than the above-mentioned misrepresentations, and told an analyst that the Company's sales pipeline was so large and robust that the Company would easily meet its revenue guidance for the full year even if the slipped deals from Q2 2019 never materialized:

> **Alex Henderson, Analyst**
>
> Thank you. I wanted to go back to the issue associated with the timing of the closure of these deals into the back half. It's pretty easy to come to the conclusion that those transactions will in fact close. But the other side of the coin, when these deals get pushed out, it notoriously causes some diminishment of growth because it requires sales capacity to push them to close and push them to the revenues. Have you adequately thought through the impact that it has on your sales team's ability to do the secondary deals or third deals as a result of their timeline here? Or alternatively, is the deal size increasing enough to offset the impact of them spending more time closing deals that were expected in the first half?
>
> **Michael DeCesare, Chief Executive Officer and President**
>
> So I would caution not to read too much into the handful of deals that's in the second quarter. There are new customers in that, so certainly, those customers haven't bought our products yet. But there is expand opportunities inside of that as well. ***We have a very large pipeline. We've been working this for many years to build pipeline. So we are not dependent on those deals in the second half for us to be able to be successful.*** We're just pointing out to you that we had maybe a sense that they were going to close a little bit earlier, and now we've got a high degree of confidence that they're going to close in the back half of the year. ***So it doesn't have a material impact on kind of the overall productivity, we've got hundreds of sales reps. We feel good about those transactions in the second half of the year.***
>
> **Alex Henderson, Analyst**
>
> So that would be, you feel like you -- the deals are large enough that they would absorb any capacity issues?
>
> **Michael DeCesare, Chief Executive Officer and President**
>
> ***I feel our pipeline is large enough where we can still achieve our capacity expectations without those deals closing in the second quarter.*** (emphasis added).

109. The statements identified in Paragraph 108 were materially false or misleading when made for the same reasons identified in Paragraphs 95-96 and Paragraphs 99-100.

4. The August 7, 2019 Press Release and Earnings Conference Call and the Related Investor Conference

110. On August 7, 2019, Forescout issued a press release that announced the Company's financial results for its second quarter that ended on June 30, 2019. In this press release, Forescout stated that revenues for the third quarter of 2019 would fall within the range of $98.8 million and $101.8 million. On the same day, the Company also held a conference call, in which Defendant DeCesare falsely claimed that Forescout's rate of closing deals "remain[s] very strong" and "very healthy," misleadingly blamed a poor performance in the second quarter to "pent-up demand," and said the Company was "very comfortable in our pipeline, rolling in both the third and the fourth quarter, but we think we've kind of measured those two things appropriately in our guidance." On the August 7, 2019 conference call, Defendant Harms misrepresented that "the pipeline is absolutely taking shape very effectively."

111. The third quarter 2019 revenue guidance was materially false or misleading because it lacked any objective basis and, in fact, was inconsistent with Forescout's actual business performance, which was known to Defendants at the time it was issued, as fully explained in Paragraphs 95-96 and Paragraphs 99-100.

112. The statements identified in Paragraph 110 were also materially false or misleading for the reasons identified in Paragraphs 95-96 and Paragraphs 99-100. Furthermore, these statements were also knowingly or recklessly false when made because, according to numerous CWs, significant cuts had already been made across divisions, including cuts in the healthcare and financial services division in August 2019 as CW8 confirms, and the entire SLED section of the Public Sector was on course to be eliminated in September 2019 per CW7 and CW19. In addition, before this statement was made, Jensen and Redman pressured CW7 and CW14 to report that the $2 million deal with UWM would close before September 2019 even though UWM had told Jensen in a conference call with CW7 that it could not meet Forescout's chosen timeline to close the deal. According to CW7, this deal ultimately failed to materialize into a "tech win." It is inconceivable that Redman, or Gumbel did not inform DeCesare about the status of negotiations with UWM given the channels of communication to DeCesare through senior executives, updates prepared on

Smartsheet, Salesforce data or that DeCesare did not know himself based on his own use of Clari to monitor and track the sales pipeline with real time accuracy.

113. At the August 7, 2019 conference call, Defendant DeCesare also made the following materially false or misleading statements regarding the maturity of Forescout's sales force and the then-current strength of the Company's sales pipeline:

> And just to remind you, that our definition of ramped is they've been with Forescout for more than two years and they're in the territory for more than two years. ***That was 50% at the end of 2018 up from 35% a year prior, and although it's tracking very well for us, we're going to hold-off on disclosing what that percentage is until we finish 2019. With that said, you're kind of looking at like softer data points that are underneath that, we're quite happy with the level of pipeline we're building, the percentage of our sales reps that have been hired in the more recent cohorts like Asia-Pacific that did very well this quarter for us, there's a lot of indicators for us inside the business that are pointed in the right direction.*** You can always do better here, and until you're at a place where every single sales rep is making their numbers and producing results. (emphasis added).

114. The statements identified in Paragraph 113 were materially false or misleading when made for the same reasons identified in Paragraphs 95-96 and 99-100.

115. On August 12, 2019, Defendant Harms participated in the KeyBanc Capital Markets Technology Leadership Forum. At this event, Defendant Harms stated that Forescout raised its full year guidance for revenues in the second quarter of 2019 because "we still had great visibility into the rest of the year and still the confidence we have about how deals were taking shape." Defendant Harms also claimed that Defendant DeCesare and he had "spent a lot of our July time frame really diving into the field to shape how Q3 was taking shape, how Q4 was taking shape, so that we could reflect that additional insight and give you an appropriate level of guidance, which the Q3 was still very solid, consistent with how I guided at the beginning of the year."

116. The statements identified in Paragraph 115 were materially false or misleading when made for the same reasons identified in Paragraphs 95-96 and Paragraphs 99-100.

5. The October 10, 2019 Press Release

117. On October 10, 2019, Forescout issued a press release that announced preliminary financial results for the third quarter that ended on September 30, 2019. Based upon a purported preliminary review of financial information, Forescout announced that total revenue for the third quarter was expected to be in the range of $90.6 million to $91.6 million, compared to the

Company's prior guidance of $98.8 million to $101.8 million. In the press release, to address the materialization that revenues would fall short of the earlier guidance, Defendant DeCesare blamed the disappointing results on "extended approval cycles which pushed several deals out of the third quarter" due to deteriorating macroeconomic conditions in the EMEA region. DeCesare was further quoted in the press release as falsely stating that the fundamentals of the business had not changed and the sales pipeline "continued to grow."

118. On this partial disclosure or the materialization of the risks thereof, the price of Forescout's common stock declined by over 37% from its closing price of $39.20 on the previous day, to close at $24.565 per share on October 10, 2019, on heavy trading volume.

119. Nevertheless, the statements identified in Paragraph 117 were materially false or misleading when made because the fundamentals of Forescout had changed substantially and its sales pipeline did not continue to grow but had already substantially deteriorated as fully explained in Paragraphs 95-96 and Paragraphs 99-100.

6. The November 6, 2019 Press Release and Earnings Conference Call

120. On November 6, 2019, Forescout issued a press release that announced financial results for the third quarter of 2019. Total revenue was $91.6 million, missing guidance by at least $7.2 million on the low end, or approximately 7% for the quarter. Defendant DeCesare again shifted blame from the U.S. market to "extended sales cycles" in the EMEA region for the revenue miss. The November 6, 2019 press release also stated that revenues would fall within the range of $93.5 million to $96.5 million for the fourth quarter of 2019.

121. The fourth quarter 2019 revenue guidance was materially false or misleading because it lacked any objective basis and, in fact, was inconsistent with Forescout's actual business performance, which was known to Defendants, at the time it was issued for the same reasons identified in Paragraphs 95-96 and Paragraphs 99-100.

122. The statements identified in Paragraph 120 were also materially false or misleading when made because by this time:

A. According to CW6 and CW16, there were numerous hiring freezes in 2019, and CW6 states that another hiring freeze was instituted in September 2019 to increase cashflow

and blunt the impact of poor financial results. CW5, the Interim Director of International Accounting and Business Operations at Forescout from April 2018 to July 2019, and CW8, who both left the Company before these false statements were made confirm that the cuts to the sales force were widespread across divisions and departments and encompassed secondary roles in marketing and accounting. CW7 further confirms that the entire SLED section of the public sector division was eliminated in September 2019.

B. As CW18 confirms, by this point, Forescout had nearly eliminated the entire team of 60 SDRs and BDRs at the Company, fired or otherwise lost almost 25 to 30 NAMs with two or more years of experience, was on course to replace nearly 100 "ramped up" employees with inexperienced representatives who could not generate deals and revenue, all of which caused a loss of tens of millions in potential business. As a result, given that so many CWs confirm that the reduction of the sales force was a process that began as early as February 2019, by November 2019, Forescout was very close to wiping out all the gains in sales productivity from 2018 that Defendants misleadingly touted throughout 2019, and which declined from 50% to 38% no later than December 31, 2019.

C. Numerous NAMs, including CW7, CW10, CW11 and CW14 had already been forced to report illusory deals with no commitment as "committed" in the Company's sales pipeline platforms. The accounts of CW7, CW13 and CW14 show that the pressure was instigated by ***both*** DeCesare and Redman. In fact, CW19 confirms that he heard Hartley, the head of Americas for Forescout, state that deals should be listed as "committed" in the Salesforce platform based only on a single conversation with a senior executive during the negotiations stage although there was no purchase order or any kind of actual commitment.

123. The statements identified in Paragraph 120 were also knowingly or recklessly false when made for, at least, the following additional reasons:

A. Within two months of these false statements, CW18 heard DeCesare state at a sales kickoff event that Forescout reduced its sales force in 2019 and additional cuts needed to be made in early 2020 because the Company had failed to grow revenues in 2019, demonstrating his knowledge about the massive turnover in 2019 as well as the reasons for that turnover.

B. On the August 7, 2019 earnings conference call, DeCesare refused to disclose the percentage of productive sales representatives who worked at the Company for more than 2 years "until we finish 2019," demonstrating that, at least, by November 2019, he was aware of the massive decline in sales productivity that did not occur overnight.

C. DeCesare acted as the chief sales representative himself for large deals, was informed by Martin about the status of all deals over $500,000, viewed data on Clari to learn when the Company was short on its pipeline, identify deals that were at risk, and there were many at risk by this point, predict outcomes early in the quarter, and spot churn the risk of failure before time ran out. DeCesare also received real-time information about deals through various other channels of communications as explained in Paragraph 100.

7. The February 6, 2020 Form 8-K

124. On February 6, 2020, the Company issued a press release, which was also attached as Exhibit 99.1 to a Form 8-K filed that same day with the SEC, announcing its results for Q4 2019. The first line of the press release reported "*Fourth Quarter Revenue of $91.3 million, compared to $84.7 million in fourth quarter of 2018. Full Year Revenue of $336.8 million, compared to $297.7 million in the full year 2019.*" (emphasis in original). Elsewhere, the press release under a title "**Fourth Quarter 2019 Financial Highlights**" stated that: "[t]otal revenue was $91.3 million, an increase of 8% over the fourth quarter of 2019" and that "[l]icense revenue was $48.4 million, an increase of 2% over the fourth quarter of 2018."

125. These statements made in the February 6, 2020, press release were materially false or misleading because they failed to disclose that Q4 2019 revenues, particularly license revenues, had been distorted and inflated through the frontloading of sales to Merlin, one of Forescout's largest resellers. This front loading of sales resulted in both the total amount of revenues as well as license revenues being overstated, as well as the reported year-over-year rate of growth in those revenues from Q4 2018.

126. The front loading of sales to Merlin and related distortion of the Company's reported revenue growth is evidenced by the following facts:

A. A whistleblower identifying Merlin as a business partner through which Forescout frontloaded sales in Q4 2019, according to a June 5, 2020, Subpoena Duces Tecum and Ad Testificandum Directed to Merlin in the Delaware Litigation defines "Whistleblower Email" as "the email sent from forescout.whistleblower@protonmail.com to Advent on May 5, 2020, alleging that Forescout involved Merlin in a channel stuffing scheme for Q4 2019."

B. CW15 asserted that Merlin agreed to resell Forescout's products for high value deals even though Merlin could not close the deals with the customers before the end of each quarter.

C. Forescout suffering an otherwise unexplained implosion of ***more than 60%*** in reported licensing revenue from $37,680,000 in Q1 2019 to $14,799,000 in Q1 2020. *See* Q1 2020 Form 10-Q at 7. This was followed by Q2 2020 in which total licensing revenue showed a less than 2% decline in reported total licensing revenue from $31,865,000 reported in Q2 2019 to $31,334,000 reported in Q2 2020, notwithstanding the economy suffering the same level of disruption from COVID-19 in Q2 2020 as in Q1 2020 (*see* Q2 2020 Form 10-Q at 14) and Forescout's peers not having suffered a similar decline in revenues. *See* Answer and Counterclaim ¶¶2-3 (characterizing Forescout's Q1 2020 results as "disastrous" and comparing them to Forescout's peers which "were almost uniformly reporting significant first quarter earnings and revenue gains"). The Company's Q1 2020 results are particularly telling because they came after the signing of the Original Merger Agreement giving Advent contractual right to monitor Forescout's internal reporting and operations allowing Advent to review the integrity of the revenues being reported by the Company and prevent similar frontloading of revenues in Q1 2020.

D. Forescout also suffered an otherwise unexplained deviation in total revenue from the $62 million Illustrative Guidance for Q1 2020 formulated in late January 2020 as disclosed in the Proxy Statement, representing a 24% decline from reported Q1 2019 revenue. *See* Proxy Statement at 61. The Company's actual results for Q1 2020 were $57.2 million, representing a 7.7% negative deviation in a relatively short period of time and that deviation would have been greater than 15% had Forescout not acted to sell $4.787 million in hardware ***at a loss.*** *See* Q1 2020 Form 10-Q at 14, 26. The Company, in response to Advent's allegation that these Q1 2020 sales were

"highly unnatural (and detrimental) actions … to pull additional bookings into the quarter" "in a failed attempt to maintain at least some of its Q1 revenues, albeit at the expense of long-term value." *See* Answer and Counterclaim ¶¶32, 41.

E. Forescout's independent auditor in the 2019 Form 10-K, filed with the SEC on February 28, 2020, openly questioned the Company's revenue recognition policies by including the following statement on "Critical Audit Matters" ***which had not been made with respect to Forescout's prior year financial statement*** contained in the 2018 Form 10-K filed with the SEC on March 1, 2019, by stating that:

> Auditing the Company's revenue recognition was challenging, specifically related to the identification and determination of the distinct performance obligations and the timing of revenue recognition. For example, certain arrangements required judgment to determine the distinct performance obligations and the appropriate timing of revenue recognition.

F. The Company acknowledging in the Delaware Litigation that it routinely provided end of quarter discounts in order to promote sales. *See* Delaware Complaint ¶94 ("[a]ny discounts Forescout gave were consistent with the way Forescout has operated in the past.").

127. Defendants' knowledge or extreme recklessness in making the materially false or misleading statements of February 6, 2020 is evidenced by at least the following facts:

A. Forescout refused to provide Advent with a satisfactory explanation for the sudden dramatic implosion in the Company's revenue. *See* Answer and Counterclaim ¶33.

B. DeCesare was a micromanager who paid close attention to the Company's operations and sales through the Company's comprehensive system for internal reporting. *See* ¶¶44-45, *supra.*

C. The amount of licensing revenue earned by the Company is a material fact which had been separately reported upon by the Company (except in the Q3 2019 Form 10-Q) and discussed in the Management Discussion and Analysis section of the Company's SEC filings required by Item 303 of Regulation S-K, including the 2019 Form 10-K which was signed by both Defendants DeCesare and Harms.

D. Forescout's Q4 2019 results had a direct impact on the price which Advent was negotiating to pay for the Company and were sufficiently material to potential acquirers that

one such potential bidder refused to make an offer until it saw the Company's Q4 2019 results and their effect on its stock price. *See* Proxy Statement at 43-44. That price, in turn, had a material and substantial impact on the Forescout RSUs and stock owned by DeCesare and Harms. *See* ¶¶24-25, 61 *supra*.

8. The 2019 Form 10-K Filed on February 28, 2020

128. On February 28, 2020, Forescout filed its 2019 Form 10-K which represented, under a title "**Our Growth Strategy**[,]" that one of the primary drivers of the Company's growth was to:

> ***Expand our presence in the market by leveraging our ecosystem of channel partners***. We will continue to broaden and invest in our value added and system integrator channel partner relationships to increase distribution of our products. We are focused on educating existing partners and investing in sales enablement to expand our market reach through our channel partner network, particularly into mid-market enterprises.

129. The 2019 Form 10-K also purported to disclose certain "risks and uncertainties" relating to Forescout's condition and prospect, including that "[t]he announcement and pendency of our agreement to be acquired by Advent could adversely affect our business."

130. These statements made in the 2019 Form 10-K were materially false or misleading because, by that very time, two multinational professional services companies that were substantial business partners of Forescout had ***terminated*** their relationships with the Company and a third major partner had said that it could no longer be a go-to market partner for Forescout. *See* Delaware Complaint ¶93. The disruption in those relationships "caused tens of millions of dollars of Forescout's pipeline to be deregistered." *Id.*

131. The terminations and downgrading of these business relationships, according to Forescout, were the direct outgrowth of the Company entering into the Original Merger Agreement. *Id.* In addition, "[o]ther customers ... simply expressed their unwillingness to work with a private equity buyer post-closing." *Id.* These issues manifested themselves through Forescout's sales pipeline and sales pipeline predictor tool during the last week of February 2020 and before the 2019 Form 10-K was filed with the SEC. *See* Counterclaim Answer ¶26.

132. Defendants' knowledge or reckless disregard of these facts is evidenced by the materiality of those business relationships to Forescout, the Company monitoring those business

relationships through its sales pipeline predictor tool, Defendant Harms being actively involved in the Company's financial forecasting, and the ongoing communications between, DeCesare and Harms, on the ones hand, and senior executives of Advent, on the other hand, regarding the Planned Acquisition and the Company's ongoing business operations. *See* Answer and Counterclaim ¶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] indicated that Forescout was on track to [redacted.]"); Counterclaim Answer ¶26 ("Forescout ... admits that Advent purports to characterize indications derived from Forescout's sales pipeline predictor tool during the last week of February 2020 regarding booking targets").

9. The Proxy Statement Filed on March 24, 2020

133. On March 24, 2020, Forescout issued and filed with the SEC its Proxy Statement in connection with the Planned Acquisition with respect to a special meeting of the Company's shareholders to be held on April 23, 2020 to consider and vote on a proposal to approve the Planned Acquisition. The Proxy Statement identified the following risk factor with respect to the Planned Acquisition: "the effect of the announcement of pendency of the merger on our business relationships, customers, operating results and business generally...."

134. That risk factor discussion contained in the Proxy Statement was materially false or misleading because, by that time, the Company had already actually suffered adverse consequences from announcing the Planned Acquisition since, according to Forescout's allegations later made in the Delaware Litigation, the announcement of the Planned Acquisition caused two multinational professional services companies that were substantial business partners of Forescout to ***terminate*** their relationships with the Company and a third major partner had said that it could no longer be a go-to market partner for Forescout. *See* Delaware Complaint ¶93. The disruption in those relationships "caused tens of millions of dollars of Forescout's pipeline to be deregistered." *Id.*

135. The Proxy Statement also incorporated by reference, *inter alia*, the 2019 Form 10-K and the Form 8-K filed with the SEC on February 6, 2020. *See* Proxy Statement at 121. As a result, the Proxy Statement was materially false or misleading for the same reasons as the statements made in those SEC filings. *See* ¶¶125-27, 130-32, *supra*.

136. The Proxy Statement also stated that the Company had prepared Illustrative Guidance in late January 2020 of $62 million and $355 million in revenue for the first quarter and all of 2020 and had prepared various financial models forecasting Forescout's future results, all of which showed steady increases in revenues from 2020 through FY 2029. *See* Proxy Statement at 61, 64-65. Defendants stated that Illustrative Guidance as well as the other financial forecasts contained in the Proxy Statement were forward looking statements which management believed were reasonable at the time they were made subject to the following generalized risk factors: "(1) general economic conditions; (2) the accuracy of certain accounting assumptions; (3) changes in actual or projected cash flows; (4) competitive pressures; and (5) changes in tax laws." Proxy Statement at 62. In addition, the Proxy Statement generically stated that: "[a]dditional factors that may impact Forescout and its business can be found in the various risk factors included in Forescout's periodic filings with the SEC. All of these factors are difficult to predict, and many of them are outside of Forescout's control." *Id.*

137. The five current risk factors disclosed in connection with presenting the Illustrative Guidance and the other forecasts contained in the Proxy Statement were not meaningful because they related to either generic economic events or risks the Company previously encountered rather than current risks affecting the viability and reasonableness of the financial forecasts contained in the Proxy Statement. Indeed, the risk factors themselves were materially false or misleading because, by the time the Proxy Statement was filed with the SEC on March 24, 2020, Defendants knew that the Illustrative Guidance as it related to Q1 2020, as well as the periods going forward, could not possibly be achieved as on that very date Forescout's management reported sharply worsening financial conditions to Advent (Answer and Counterclaim ¶¶28-29) and Defendants knew of the ***already existing facts*** material impairment of the Company's business through the loss of key customer relationships. *See* ¶¶77.C, 130, 134, *supra* (citing Delaware Complaint ¶93).

138. Additionally, Defendants knew that the projections provided to potential acquirers, including the Illustrative Guidance, were generated from a defective system for reporting sales as committed when deals categorized as "committed" by the Company were not, in fact, committed to by customers. *See* ¶¶49-52, *supra*. Moreover, according to CW 19, at a January 2020 "sales kickoff"

event, Forescout's Vice President of the Americas instructed sales representatives to list deals as "committed" into the Salesforce platform on the basis of a single conversation with a potential customer's C-suite executives or employees in the procurement group.

139. Indeed, on July 20, 2020, the Company, in the Tender Offer Recommendation, reported substantially more realistic revenue forecasts, prepared on July 13, 2020, reflecting estimated revenue of $321 million for 2020, declining to $317 million for FY 2021, and then starting to increase once again in FY 2022 to $358 million and in FY 2023 to $410 million compared to a previous plan utilized by Morgan Stanley projecting $359 million in revenue, increasing steadily by approximately 15% per year to $414 million, $461 million and $549 million for FY 2021, FY 2022 and FY 2023.

140. The Proxy Statement also made the following disclosure with respect to Advent's expected financing of the Planned Acquisition:

> Pursuant to a debt commitment letter, as amended and restated (which we refer to as the "debt commitment letter"), the financial institutions party thereto have severally and not jointly committed (1) to provide to Merger Sub on the closing date of the merger senior secured term loans in an aggregate principal amount of $400,000,000; and (2) to make available to Merger Sub (or, after the closing date of the merger, to the surviving corporation) senior secured revolving commitments in an aggregate principal amount of $40,000,000 (a portion of which may be made available to Merger Sub on the closing date of the merger), in each case, on the terms and subject to the conditions set forth in the debt commitment letter.

141. This statement concerning the debt commitment letter was materially misleading because Advent's ability to obtain the financing was dependent upon the projections of Forescout's future operations, the prospects of which had been rapidly deteriorating in a manner which made achieving the prior forecasts unrealistic. Thus, Advent alleged in the Delaware Litigation that "on March 20, when Forescout gave Buyers a preview to its 1Q2020 results, management reported to Buyers that Forescout expected to [redacted.] During a subsequent call on the same day, Forescout's Chief Financial Officer, Christopher Harms admitted that he understood Parent's desire for the updated forecasts and that he would have been conducting similar ***liquidity planning*** in light of Forescout's recent performance and trajectory if the merger were not planned." Answer and Counterclaim ¶27 (emphasis added).

10. The April 23, 2020 Extraordinary Shareholders' Meeting

142. On April 23, 2020, at the extraordinary shareholders meeting, Daniel J. Milliken, the Company's general counsel, stated that: "We currently expect the merger to be consummated on or about May 18, 2020, after buyer's remarketing period ends." The remarketing period referred to Advent obtaining the necessary debt necessary to complete the funding of the Planned Acquisition.

143. The April 23, 2020, statement was materially false or misleading because it omitted material facts that conflict with what a reasonable investor would take from the statement itself. Defendants failed to disclose that Advent had expressed reservations whether the conditions to the closing of the Original Merger Agreement would be met. Forescout admitted this fact in July 20, 2020 the Tender Offer Recommendation on which stated that:

> On April 20, 2020, Forescout received a letter from Parent in which Parent expressed concern about deteriorations in the performance and prospects of Forescout's business. The letter also stated that Parent was reviewing Forescout's business, operations, future prospects and financial condition in order to assess whether the conditions to closing provided in the ... Merger Agreement would be met.

144. Defendants knew of this letter because:

A. it was sent to Forescout and, as explained in the filings in the Delaware Litigation, DeCesare and Harms communicated with Advent on behalf of Forescout. S*ee* Answer and Counterclaim ¶38; Counterclaim Answer ¶38 (admitting that DeCesare explained to Parent on April 20, 2020, that Forescout continued to operate under its Board-approved plan);

B. DeCesare and Harms were intimately involved in the ongoing discussion with Advent following the signing of the Original Merger Agreement (*see* Delaware Complaint ¶¶1, 75, 78, 89; Answer and Counterclaim ¶¶27, 35, 38, 63); and,

C. after April 20, 2020, the Strategic Committee began considering the possible effect of Advent refusing to proceed with the Planned Acquisition as negotiated in the Original Merger Agreement. *See* Tender Offer Recommendation at 32.

145. The statements made at the April 23, 2020, extraordinary shareholders meeting were transcribed by Thomson Reuters and are available at https://east.virtualshareholdermeeting.com/vsm/web?pvskey=FSCT2020. The transcription and recording demonstrate that the statements

Defendants made on April 23, 2020, were not identified as forward-looking statements and that no meaningful risk factors were identified at the time they were made.

11. The April 23, 2020 Press Release

146. On April 23, 2020, Forescout also issued a press release which was attached as an exhibit to a Form 8-K filed the next day, stating in relevant part that:

> Forescout continues to expect the transaction to close in the second calendar quarter of 2020 following the completion of a customary debt "marketing period" by Advent. Upon completion of the transaction, Forescout common stock will no longer be listed on any public market.

147. Forescout's April 23, 2020, press release was materially false and misleading, and Defendants knew Forescout's April 23, 2020, press release was materially false and misleading for the same reasons the statement made at Forescout's April 23, 2020, shareholders' meeting was materially false and misleading, and for the same reasons they knew that statement was materially false and misleading.

148. Despite Advent having already expressed concerns about closing the Planned Acquisition and Forescout working on contingency plans, Forescout's press release contained only generic warnings about risks and uncertainties regarding the Planned Acquisition, including "the risk that the conditions to the closing of the transaction are not satisfied; potential litigation relating to the transaction; uncertainties as to the timing of the consummation of the transaction and the ability of each party to consummate the transaction; … and the risks described in the filings that Forescout makes with the Securities and Exchange Commission from time to time, including the risks described under the headings "Risk Factors" and "Management Discussion and Analysis of Financial Condition and Results of Operations" in Forescout's Annual Report on Form 10-K, which was filed with the Securities and Exchange Commission on February 28, 2020, and which should be read in conjunction with Forescout's financial results and forward-looking statements…."

12. The Form 10-K/A Filed April 29, 2020

149. On April 29, 2020, the Company filed the Form 10K/A with the SEC which, incorporated the 2019 Form 10-K by reference and also stating that:

> Forescout expected to hold its 2020 Annual Meeting of Stockholders ("2020 Annual Meeting") in late May 2020; however, Forescout expects the proposed acquisition of Forescout by entities affiliated with Advent ... to close in the second quarter of 2020

> and, as such, our Board of Directors has decided not to hold the 2020 Annual Meeting at this time.

150. The Form 10K/A was materially false or misleading because, by that very time, Defendants knew that Advent had expressed significant concerns about closing the transaction. *See* ¶77, *supra*. In addition, the Form 10K/A was materially false or misleading for all the same reasons as the 2019 Form 10-K.

151. Defendants knew the Form 10K/A was materially false and misleading for the same reasons they knew Forescout's April 23, 2020, statements were materially false and misleading.

152. The false and misleading statements Defendants made on April 29, 2020, were not protected statements of opinion protected by meaningful cautionary language because like Forescout's April 23, 2020, statements they were made at a time when Defendants knew that Advent had expressed reservations about its ability to close on the Original Merger Agreement.

13. The May 11, 2020 Press Release

153. Despite Advent having already expressed concerns about closing the Planned Acquisition and Forescout working on contingency plans, Forescout's press release contained only generic warnings about risks and uncertainties regarding the Planned Acquisition, including "the risk that the conditions to the closing of the transaction are not satisfied; potential litigation relating to the transaction; uncertainties as to the timing of the consummation of the transaction and the ability of each party to consummate the transaction; … and the risks described in the filings that Forescout makes with the Securities and Exchange Commission from time to time, including the risks described under the headings "Risk Factors" and "Management Discussion and Analysis of Financial Condition and Results of Operations" in Forescout's Annual Report on Form 10-K, which was filed with the Securities and Exchange Commission on February 28, 2020, and which should be read in conjunction with Forescout's financial results and forward-looking statements…."

154. On May 11, 2020, Forescout disclosed that its Q1 2020 results were $57 million, or $5 million less than the Illustrative Guidance disclosed just eight days before the end of that quarter. Forescout also disclosed that during Q1 2020 it had deeply discounted two large hardware deals resulting in a negative gross margin of 8% for hardware sales for the fiscal quarter. Forescout,

however, blunted a further decline in its stock price by quoting DeCesare in its May 11, 2020, press release as stating that "we look forward to completing our pending transaction with Advent."

155. The statement made in the May 11, 2020 press release was materially false or misleading because it failed to disclose that on May 8, 2020, "**Advent Signal[ed] its Intention to Renege on the Merger Agreement."** Delaware Complaint at p. 38. Specifically, "[o]n 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***[.]'" (emphasis added). Delaware Complaint ¶8. *See also* Counterclaim Answer ¶63 (Forescout "admits that on May 8, 2020, a representative of Advent contacted Forescout's CEO and told him, among other things, that Advent was considering not closing the Merger."). The May 8, 2020, conversations were not the first time Advent expressed serious concerns that the proposed transaction could not close. *See* Answer and Counterclaim ¶63 (on May 8, 2020, "Parent also ***reiterated*** its *bona fide* belief that consummation of the Transaction would render Forescout insolvent, effectively preventing Parent from closing the financing.") (emphasis added).

156. Advent's action did not surprise Defendants, because as the Tender Offer Recommendation-9 later filed with the SEC on July 20, 2020 disclosed, from April 23, 2020 through the first half of May, Advent and Forescout had "discussions regarding Forescout's business and financial condition, as well as the information requests in Parent's letter of April 20, 2020. In addition, the ***Strategic Committee and the Forescout Board met regularly to discuss***, among other things, (1) Forescout's business; (2) the information requests from Parent; and (3) ***Forescout's options should Parent not proceed with consummating the acquisition of Forescout pursuant to the terms of the Original Merger Agreement***." (emphasis added).

157. The Termination Letter itself also references earlier discussions by stating "***[a]s we have discussed***, while Parent continues to satisfy its obligations under the Merger Agreement, we have been actively reviewing the Company's business, operations, future prospects, and financial condition, in keeping with Parent's obligations to its investors." (emphasis added).

LEAD PLAINTIFFS' CLASS ACTION ALLEGATIONS

158. Lead Plaintiffs bring this action as a class action pursuant to Federal Rule of Civil Procedure 23(b)(3) on behalf of all persons or entities that purchased or otherwise acquired Forescout common stock during the period from February 7, 2019 through May 15, 2020 (the "Class Period"), both dates inclusive. Excluded from the Class are Defendants, officers and directors of Forescout, any entity in which the Defendants have or had a controlling interest; and affiliates, family members, legal representatives, heirs, successors or assigns of any of the above.

159. The Class is so numerous that joinder of all members is impracticable. Throughout the Class Period, Forescout common stock was actively traded on the NASDAQ Global Select Market under the ticker symbol "FSCT." Lead Plaintiffs believe that there are thousands of members in the proposed Class, with the overwhelming majority of Class members having held shares in a street name. Potential Class members may be identified from records maintained by Forescout, its transfer agents, and brokers and banks that hold shares beneficially for investors in a street name and may be notified of the pendency of this action by mail, using the form of notice similar to that customarily used in securities class actions.

160. Lead Plaintiffs' claims are typical of the claims of those of the Class, as all Class members were similarly affected by Defendants' wrongful conduct in violation of federal law complained of herein.

161. Lead Plaintiffs will fairly and adequately protect the interests of the members of the Class and have retained counsel competent and experienced in class action and securities litigation.

162. Common questions of law and fact exist as to all Class members and predominate over any questions solely affecting individual Class members. Among the questions of law and fact common to the Class are:

A. whether Forescout and the Individual Defendants made false statements or failed to disclose material information that rendered their Class Period statements as misleading;

B. whether the Individual Defendants are control persons of Forescout for purposes of Section 20(a) of the Exchange Act;

C. whether Forescout and the Individual Defendants made the misrepresentations or omissions with scienter;

D. whether the federal securities laws were violated by Defendants' acts as alleged herein;

E. whether the prices of Forescout's securities during the Class Period were artificially inflated because of the Defendants' misconduct complained of herein; and,

F. whether the Class has sustained damages with respect to its Exchange Act claims and, if so, what is the proper measure of damages.

163. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impracticable. Furthermore, as the damages suffered by individual Class members may be relatively small, the expense and burden of individual litigation make it impossible for Class members to individually redress the wrongs done to them. There will be no difficulty in the management of this action as a class action.

164. With respect to the Exchange Act claims, Lead Plaintiffs will rely, in part, upon the presumption of reliance established by the fraud-on-the-market doctrine in that:

A. Defendants made public misrepresentations or failed to disclose material facts during the Class Period;

B. the omissions and misrepresentations were material;

C. Forescout's common stock traded in an efficient market;

D. the Company's common stock was liquid and traded with moderate to heavy volume during the Class Period;

E. the Company traded on the NASDAQ Global Select Market, and was covered by multiple analysts;

F. the misrepresentations and omissions alleged would tend to induce a reasonable investor to misjudge the value of the Company's common stock; and,

G. Lead Plaintiffs and other Class members purchased or otherwise acquired Forescout common stock between the time that the Defendants failed to disclose or misrepresented

material facts, and the time that the true facts were disclosed or materialized, without knowledge of the omitted or misrepresented facts.

165. Based upon the foregoing, Lead Plaintiffs and other Class members are entitled to a presumption of reliance upon the integrity of the market if they did not actually rely on Defendants' materially false or misleading statements.

166. Alternatively, Lead Plaintiffs and the Class members are entitled to the presumption of reliance established by the Supreme Court in *Affiliated Ute Citizens of the State of Utah v. United States*, 406 U.S. 128 (1972), as Defendants omitted material information in violation of a duty to disclose such information, as detailed above.

COUNT I:

(Against Defendants Forescout, DeCesare and Harms for Violations of Section 10(b) and Rule 10b-5)

167. Lead Plaintiffs repeat and reallege the allegations contained in Paragraphs 1 to 166 above as if fully set forth herein.

168. This Count is asserted against Forescout and each of the Individual Defendants for violations of Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder by the SEC.

169. During the Class Period, Defendants engaged in a plan, scheme, conspiracy and course of conduct, pursuant to which they knowingly or recklessly engaged in acts, transactions, practices and courses of business which operated as a fraud and deceit upon the Lead Plaintiffs and the other members of the Class; made various untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and employed devices, schemes and artifices to defraud in connection with the purchase and sale of securities. Such scheme was intended to, and, throughout the Class Period, did: (i) deceive the investing public, including the Lead Plaintiffs and other Class members, as alleged herein; (ii) artificially inflate and maintain the market price of Forescout common stock; and (iii) cause Lead Plaintiffs and other members of the Class to purchase or otherwise acquire Forescout common stock at artificially inflated prices.

170. Specifically, Forescout and the Individual Defendants made material misrepresentations and omitted to disclose material information that rendered their statements misleading as particularized in Paragraphs 80 through 157.

171. The Individual Defendants had actual knowledge of the materially false and misleading statements and material omissions alleged herein and intended thereby to deceive the Lead Plaintiffs and the other members of the Class, or, in the alternative, acted with reckless disregard for the truth in that they failed or refused to ascertain and disclose such facts as would reveal the materially false and misleading nature of the statements made, although such facts were readily available to Forescout and the Individual Defendants. In addition to the facts alleged herein demonstrating a strong inference of scienter, certain information showing that Defendants acted knowingly or with reckless disregard for the truth is peculiarly within these Defendants' knowledge and control. As the senior managers of Forescout, the Individual Defendants had knowledge of the details of Forescout's internal affairs that were inconsistent with their public statements.

172. As officers and directors of a publicly held company, the Individual Defendants had a duty to disseminate timely, accurate, and truthful information regarding Forescout's business, operations, and finances. As a result of the dissemination of the aforementioned false and misleading statements, the market price of Forescout common stock was artificially inflated throughout the Class Period. Additionally, as sellers of Forescout common stock during the Class Period, the Individual Defendants had a duty to disclose or refrain from trading on Forescout's artificially inflated stock price.

173. In ignorance of the adverse facts concerning Forescout's business, operations and finances, which were concealed by the misrepresentations and omissions alleged herein, Lead Plaintiffs and the other members of the Class purchased or otherwise acquired Forescout common stock at artificially inflated prices and relied upon the price of the common stock, the integrity of the market for the common stock or upon statements disseminated by Defendants and were damaged thereby.

174. During the Class Period, Forescout's common stock was traded on an active and efficient market. Lead Plaintiffs and the other members of the Class, directly relying on the

materially false and misleading statements described herein, or relying upon the integrity of the market, purchased or otherwise acquired shares of Forescout at prices artificially inflated by Defendants' wrongful conduct. Had Lead Plaintiffs and the other members of the Class known the truth, they would not have purchased or otherwise acquired said common stock or would not have purchased or otherwise acquired it at the inflated prices that were paid. At the time of the purchases or acquisitions by Lead Plaintiffs and the Class, the true value of Forescout's common stock was substantially lower than the prices paid by Lead Plaintiffs and the other members of the Class. The market price of Forescout's common stock declined sharply upon public disclosure of the facts or materialization of the risks alleged herein to the injury of Lead Plaintiffs and other Class members.

175. By reason of the conduct alleged herein, Forescout and the Individual Defendants knowingly or recklessly violated Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder.

176. As a direct and proximate result of these Defendants' wrongful conduct, Lead Plaintiffs and the other Class members suffered damages in connection with their respective purchases of the Company's common stock during the Class Period when the risk of Defendants' wrongdoing materialized or upon the disclosure thereof, causing the price of Forescout common stock to decline. Forescout and the Individual Defendants are liable for damages in connection with these losses under Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder.

COUNT II:

(Against Defendants DeCesare and Harms for

Violations of Section 20(a) of the Exchange Act)

177. Lead Plaintiffs repeat and reallege the allegations contained in Paragraphs 1 to 176 above, as if fully set forth herein.

178. During the Class Period, DeCesare and Harms participated in the operation and management of Forescout, and conducted and participated, directly and indirectly, in the conduct of Forescout's business affairs. Because of their senior positions, they knew the adverse non-public information that rendered Forescout's public statements false and misleading.

179. As officers and directors of a publicly owned company, DeCesare and Harms had a duty to disseminate accurate and truthful information with respect to Forescout's financial information and results of operations, and to correct promptly any public statements issued by Forescout, which had become materially false or misleading.

180. Because of their positions of control and authority as senior officers, DeCesare and Harms were able to, and did, control the Company's statements, which Forescout disseminated in the marketplace during the Class Period concerning Forescout's financial information and business. Throughout the Class Period, DeCesare and Harms exercised their power and authority to cause Forescout to engage in the wrongful acts complained of herein. DeCesare and Harms, therefore, were "controlling persons" of Forescout within the meaning of Section 20(a) of the Exchange Act. In this capacity, they participated in the unlawful conduct alleged which artificially inflated the market price of Forescout common stock.

181. DeCesare and Harms, therefore, acted as controlling persons of Forescout. By reason of their senior management positions and/or being directors of Forescout, DeCesare and Harms had the power to direct the actions of, and exercised the same to cause, Forescout to engage in the unlawful acts and conduct complained of herein. DeCesare and Harms exercised control over the general operations of Forescout and possessed the power to control the specific activities, which comprise the primary violations about which Lead Plaintiffs, and the other members of the Class, complain.

182. As control persons, DeCesare, and Harms are liable pursuant to Section 20(a) of the Exchange Act for the primary violations of the Exchange Act committed by Forescout.

PRAYER FOR RELIEF

WHEREFORE, Lead Plaintiffs demand judgment against Defendants as follows:

A. Determining that the instant action may be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure, and certifying Lead Plaintiffs as the Class Representatives;

B. Requiring Defendants to pay damages sustained by the Lead Plaintiffs and the Class by reason of the acts and transactions alleged herein;

C. Awarding Lead Plaintiffs and the other members of the Class prejudgment and post-judgment interest, as well as their reasonable attorneys' fees, expert fees and other costs; and,

D. Awarding such other and further relief as this Court may deem just and proper.

DEMAND FOR TRIAL BY JURY

Lead Plaintiffs hereby demand a trial by jury.

Dated: May 10, 2021

POMERANTZ LLP

By: /s/ *Omar Jafri*[2]

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[2] Orly Guy and Eitan Lavie, who are Of Counsel to Pomerantz LLP and admitted to practice in Israel, also provide advice to Meitav in connection with this matter.

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Co-Lead Counsel

CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2021, a copy of the foregoing was filed electronically via the Court's CM/ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

Dated: May 10, 2021

POMERANTZ LLP

By: */s/Omar Jafri*
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Lead Counsel for Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CHRISTOPHER L. SAYCE, on behalf of themselves and all other similarly situated,

Plaintiff,

v.

FORESCOUT TECHNOLOGIES, INC., MICHAEL DECESARE and CHRISTOPHER HARMS,

Defendants.

Case No. 3:20-cv-00076-SI

CLASS ACTION

TRANSMITTAL DECLARATION OF OMAR JAFRI

I, Omar Jafri, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am an attorney with Pomerantz LLP, which was appointed co-lead counsel with Abraham, Fruchter & Twersky, LLP, on November 19, 2020. I am over eighteen years of age and have personal knowledge of the facts and, if called as a witness, I would testify competently regarding those facts.

2. On May 10, 2021, Lead Plaintiffs Glazer Capital Management, L.P., Glazer Enhanced Fund L.P., Glazer Enhanced Offshore Fund, Ltd., Glazer Offshore Fund, Ltd., Highmark Limited, in respect of its Segregated Account Highmark Multi-Strategy 2, and Meitav Tachlit Mutual Funds Ltd. filed their Consolidated Second Amended Complaint for Violations of the Securities Laws (the "Second Amended Complaint").

3. The Second Amended Complaint was informed by, *inter alia*, filings made in *Forescout Technologies, Inc. v. Ferrari Holdings, L.P.*, C.A. No. 2020-0385-SG (Del. Ch.) (the "Delaware Litigation").

4. True and correct copies of the following filings made in the Delaware Litigation are attached:

Exhibit No.	Description
1	Forescout's Verified Complaint, filed on May 19, 2020 (defined in the Second Amended Complaint as the "Delaware Complaint")
2	The public, redacted version of Advent's Answer to the Verified Complaint, which includes Advent's Verified Counterclaims, filed on June 5, 2020 (defined in the Second Amended Complaint as the "Answer and Counterclaim")
3	The public, redacted version of Forescout's Reply to Advent's Verified Counterclaims, filed on June 12, 2020 (defined in the Second Amended Complaint as the "Counterclaim Answer")

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 10th day of May, 2021.

/s/ *Omar Jafri*
OMAR JAFRI

CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2021, a copy of the foregoing was filed electronically via the Court's CM/ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ *Omar Jafri*
OMAR JAFRI

EXHIBIT 1

EFiled: May 19 2020 11:56PM EDT
Transaction ID 65640163
Case No. 2020-0385-

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

FORESCOUT TECHNOLOGIES, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. _____
	)	
FERRARI GROUP HOLDINGS, L.P., and FERRARI MERGER SUB, INC.,	)	
	)	
	)	
Defendants.	)	

VERIFIED COMPLAINT

Plaintiff Forescout Technologies, Inc. ("Forescout" or the "Company"), by and through its undersigned counsel, for its verified complaint against Defendants Ferrari Group Holdings, L.P. ("Parent" or "Ferrari Group") and Ferrari Merger Sub, Inc. ("Merger Sub" and, together with Parent, "Advent" or "Defendants"), upon knowledge as to itself and information and belief as to all other matters, alleges as follows:

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.

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.

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."

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.

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.

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.

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.

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.

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]

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

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

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

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]

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 8.1(i).

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

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

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.

13. Advent's assertions that Forescout has "material[ly] 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.

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.

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 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.

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

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

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

[8] The Guarantee is attached as Exhibit F.

Agreement, the closing should have occurred yesterday, but Advent refused to close. Advent should be compelled to comply with its contractual obligations.

17. Finally, in the alternative (only if specific performance is not available), Forescout seeks damages arising from Defendants' breach of the Merger Agreement in the form of payment of the Parent Termination Fee, backed by the Guarantee.

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."

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.

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.

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.

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.

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.

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.

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]."

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.

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.

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.

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.

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.

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.

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.

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.

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

[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.

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]

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.

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.

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.

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

[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.

sophisticated and experienced legal counsel and financial advisors.

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 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.

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

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

$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.

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, 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.

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.

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

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.

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]

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

[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.

debt financing for the Merger.[16]

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]

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***

[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.

consummate the Merger.[18]

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

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.

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:

> 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

[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.

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

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

> 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]

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 [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]

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[21] Ex. A, Merger Agreement § 5.1.

[22] *Id.* § 5.2.

[23] *Id.* § 5.2(i)(F).

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]

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]

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

[24] *Id.* § 5.4.

[25] *Id.* § 6.1(a).

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]

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]

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

[26] *Id.* § 7.2(b).

[27] *Id.* § 7.2(a)(ii).

[28] *Id.* §§1.1(f), 3.12(b).

[29] *Id.* § 7.2(b).

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

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 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); . . .

[30] *Id.* § 7.2(d).

> (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]

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

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

[31] *Id.* § 1.1(t) (emphasis added).

[32] *See supra* ¶ 34.

"materially disproportionate adverse effect" on Forescout compared to peer companies and—even then—only the incrementally disproportionate impact on Forescout can be considered.

D. Required Time of Closing

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]

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

E. Termination and Remedies for Breach

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]

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:

> 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

[34] Ex. A, Merger Agreement § 8.3(h).

[35] Ex. B, Equity Commitment Letter § 4.5.

> 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 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

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

such bond or other security.[37]

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]

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

[37] *Id.* § 9.10(b)(iii).

[38] *Id.* § 8.1(c).

[39] *Id.*

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]

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

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

[41] *Id.* § 7.2(d).

expressly allocated the risk of a pandemic to Defendants.

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.

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.

[42] *Id.* §§ 6.6(a)(v), 1.1(ggg).

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 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.

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.

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.

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]

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 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

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

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

[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

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).

Information" as of April 23, 2020 and that the Marketing Period had commenced as Exhibit J.

[46] Ex. I, April 23, 2020 Letter.

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.

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.

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."

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.

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.

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

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.

IV. DEFENDANTS' REFUSAL TO CLOSE IS INVALID.

80. On May 15, 2020, Ferrari Group, through Advent, sent a letter to

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

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, 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.

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:

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

[49] *Id.*

[50] *Id.*

> 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.

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.

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

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

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

that Forescout would return to business as usual in fiscal 2021—in both a "base" and "downside" case. That fact alone shows that Advent cannot credibly believe an MAE has occurred.

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

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

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.

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.[56]

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

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

[55] Ex. A, Merger Agreement § 7.2.

[56] *Id.* § 3.12(b).

the ordinary course or failed to obtain Advent's consent to any deviations from ordinary course operations.[57] 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 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.

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

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

[58] *Id.*

[59] *Id.*

those efforts occurred on May 15, 2020, and a summary of that information was provided to Advent on May 18, 2020.

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.

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

[60] *See supra* ¶¶ 29, 33, 68.

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 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.

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]

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

[62] Ex. A, Merger Agreement § 5.1(ii).

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 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]

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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

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.

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

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").

pipeline of customer opportunities remains strong, Q2 2020 sales activity looks promising, and Forescout's competitive position as the category leader is clear.

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]

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 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

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

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

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.

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.

[68] *Id.*

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.

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 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.

98. In any event, it is the Company, not Advent, that must provide "a

[69] *Id.*

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

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.

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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.

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

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.

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]

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

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

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]

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.

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.

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

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

[76] *Id.* § 6.5(b).

Defendants, however, are in material breach of the Merger Agreement.

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.

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

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.

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.

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.

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.

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.

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.

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.

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

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.

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.

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.

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."

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.

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

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

122. Forescout has no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Forescout respectfully requests that this Court grant the following relief:

A. Judgment in favor of Forescout on all claims asserted against Defendants;

B. A declaration that Defendants' refusal to close the Merger is a violation of the Merger Agreement and that Defendants have knowingly and willfully breached, repudiated, and further threatened to breach their obligations under the Merger Agreement;

C. An Order requiring Defendants to specifically perform their obligations under and in connection with the Agreement, including the obligations to close the Merger, use reasonable best efforts to consummate the closing of the Merger, pay the purchase price provided for in the Merger

Agreement upon the satisfaction of all closing conditions, fund Ferrari Group in accordance with the terms of the Equity Commitment Letter, and take all steps necessary to enforce Defendants' rights under the Debt Commitment Letter, such that Defendants pay the purchase price of $33.00 per share in cash to Forescout's stockholders as required by the Merger Agreement;

D. A temporary restraining order prohibiting Defendants from terminating the Merger Agreement or otherwise asserting the passing of the Termination Date as a defense to specific performance of their contractual obligations under the Merger Agreement;

E. An Order equitably extending the Termination Date in the Merger Agreement through the later of five business days after a final decision on the merits or the closing of the Merger;

F. An Order, in the alternative, awarding Forescout monetary damages in the form of the Parent Termination Fee, in the event Forescout's request for specific performance of the Merger Agreement is not granted; and

G. An Order awarding Forescout such other relief as the Court deems necessary, equitable, just, and proper under the Transaction Documents.

Dated: May 19, 2020

WILSON SONSINI GOODRICH & ROSATI, P.C.

/s/ Lori W. Will

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EXHIBIT 2

EFiled: Jun 05 2020 04:55PM EDT
Transaction ID 65680793
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

[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

[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,

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

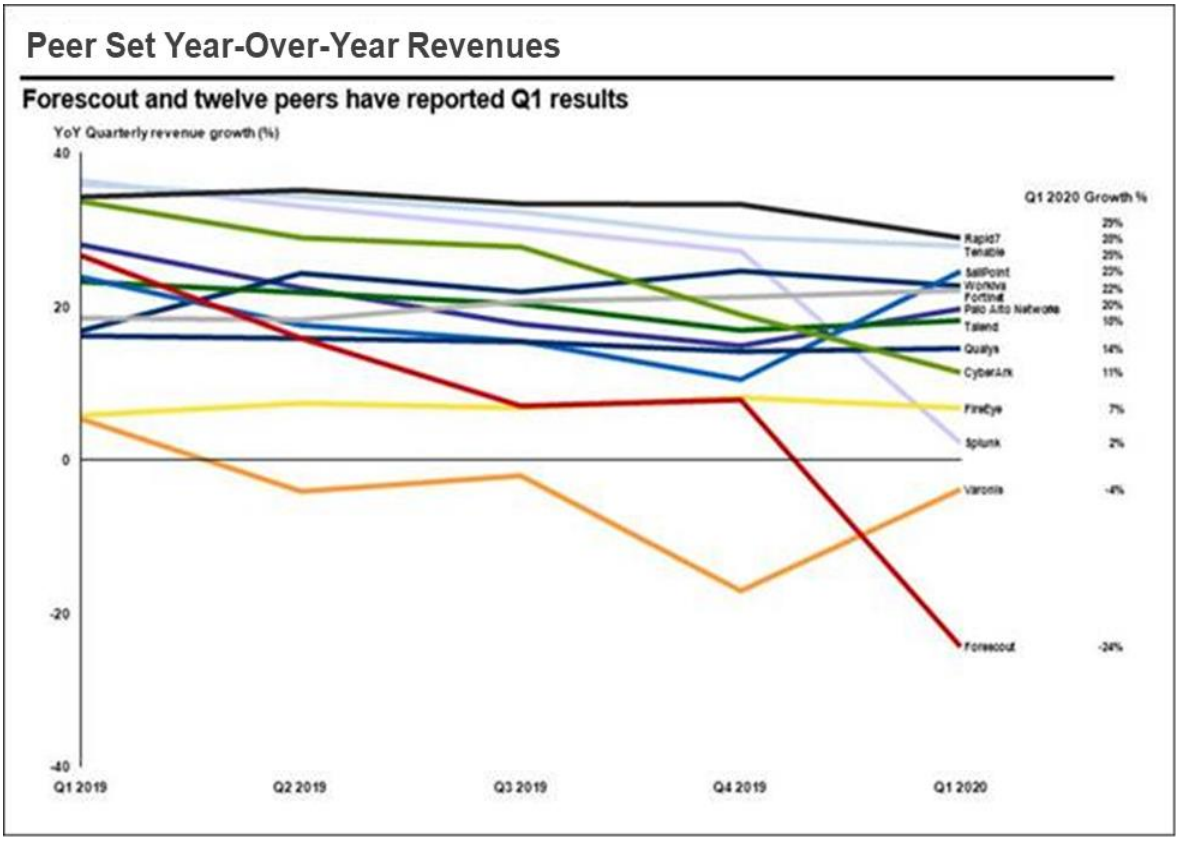
reported that Forescout [redacted]

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.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ William M. Lafferty
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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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EXHIBIT 3

EFiled: Jun 12 2020 04:58PM EDT
Transaction ID 65696053
Case No. 2020-0385-SG

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

FORESCOUT TECHNOLOGIES, INC.,	)	
	)	
Plaintiff and	)	
Counterclaim Defendant,	)	
	)	
v.	)	C.A. No. 2020-0385-SG
	)	PUBLIC VERSION
FERRARI GROUP HOLDINGS, L.P. and	)	FILED JUNE 12, 2020
FERRARI MERGER SUB, INC.,	)	
	)	
Defendants and	)	
Counterclaim Plaintiffs.	)	

PLAINTIFF FORESCOUT TECHNOLOGIES, INC.'S
REPLY TO DEFENDANTS' VERIFIED COUNTERCLAIMS

Plaintiff/Counterclaim Defendant Forescout Technologies, Inc. ("Forescout" or the "Company"), by and through its undersigned counsel, hereby responds to Defendants' Verified Counterclaims (the "Counterclaims").[1]

Although no response to the headings in the Counterclaims is required, Forescout denies any allegations contained in the headings. Forescout otherwise responds to the Counterclaims as follows:

Paragraph No. 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

[1] Unless otherwise defined, capitalized terms used herein shall have the same meaning as in the Counterclaims.

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.

Response to Paragraph No. 1:

Forescout lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 1 of the Counterclaims and denies them on that basis, except Forescout admits that Ferrari Group Holdings, L.P. ("Ferrari Group") and Ferrari Merger Sub, Inc. ("Merger Sub," and together with Ferrari Group, "Advent") signed an Agreement and Plan of Merger (the "Merger Agreement") with Forescout on February 6, 2020.

Paragraph No. 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 admitted that new customer business through the rest of 2020 was expected to be [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] ***in EBITDA from 2019 to 2020***. Remarkably, while Forescout's performance was falling, its peers were almost uniformly reporting significant first quarter earnings and revenue gains.

Response to Paragraph No. 2:

Forescout denies the allegations in the first and sixth sentences of Paragraph 2 of the Counterclaims. Forescout denies the allegations in the second and third sentences of Paragraph 2 of the Counterclaims, except admits that Advent purports to characterize certain of Forescout's public filings which reflect lower first quarter earnings and revenue compared to the first quarter of 2019. Forescout refers the Court to the referenced public filings for a complete and accurate description of their contents. Forescout denies the characterization in the fourth sentence of Paragraph 2 of the Counterclaims, except admits that Advent purports to quote from an email sent by Forescout's Vice President of Business Development. Forescout refers the Court to the referenced email for a complete and accurate description of its contents. Forescout lacks knowledge or information sufficient to form a belief about the truth of the allegations in the fifth sentence of Paragraph 2 of the Counterclaims and denies them on that basis, except admits that Advent purports to characterize certain projections created by Advent. Forescout refers the Court to the referenced projections for a complete and accurate description of their contents.

Paragraph No. 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 second quarter results might [redacted]

Response to Paragraph No. 3:

Denied, except Forescout admits that during the first quarter of 2020, large parts of the United States were shut down due to COVID-19.

Paragraph No. 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.

Response to Paragraph No. 4:

Denied, except Forescout admits that Paragraph 4 of the Counterclaims purports to characterize certain analyses prepared by Advent and that Forescout provided detailed information to Advent and discuss data and analysis with Advent throughout the diligence process.

Paragraph No. 5:

Financially, the analysis revealed that as a [redacted] if the parties closed the proposed transactions as contemplated. Given the rapid depletion of its [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, ***Forescout's own*** [redacted] ***showed*** [redacted], which is unsustainable for any business.

Response to Paragraph No. 5:

Denied. Forescout refers the Court to the referenced analysis and estimates for a complete and accurate description of their contents.

Paragraph No. 6:

Operationally, Buyers determined that Forescout's sales function had retracted significantly between February and April, with the Company performing nearly [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, that the Company had still not [redacted].

Response to Paragraph No. 6:

Forescout lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of Paragraph 6 of the Counterclaims and denies them on that basis. Forescout denies the characterization in the second sentence of Paragraph 6 of the Counterclaims, except admits that in mid-April a member of Forescout's sales team spoke with a representative of Advent regarding

Forescout's product and that by that time, much of the United States had adopted social distancing regulations.

Paragraph No. 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—even as it granted what it described as [redacted] discounts and price terms to customers 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.

Response to Paragraph No. 7:

Denied.

Paragraph No. 8:

Forescout's financial decline, which shows no prospect of improvement, 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.

Response to Paragraph No. 8:

Denied.

Paragraph No. 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.

Response to Paragraph No. 9:

Forescout denies the allegations in the first sentence of Paragraph 9 of the Counterclaims, except admits that Advent sent Forescout a letter on May 15, 2020 stating its belief that conditions to closing had not been met. Forescout refers the Court to the referenced letter for a complete and accurate description of its contents. The second sentence of Paragraph 9 of the Counterclaims contains Advent's characterization of the nature of the allegations and purported claims in the Counterclaims, to which no response is required. To the extent a response is required, Forescout denies the allegations in the second sentence of Paragraph 9 of the Counterclaims.

Paragraph No. 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.

Response to Paragraph No. 10:

Forescout denies the allegations in Paragraph 10 of the Counterclaims, except admits that Forescout is a Delaware corporation with its principal place of business at 190 West Tasman Drive, San Jose, California 95134. Forescout admits the allegations in the second and third sentences of Paragraph 10 of the Counterclaims.

Paragraph No. 11:

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

Response to Paragraph No. 11:

Admitted.

Paragraph No. 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.

Response to Paragraph No. 12:

Denied.

Paragraph No. 13:

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

Response to Paragraph No. 13:

Admitted.

Paragraph No. 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.

Response to Paragraph No. 14:

Paragraph 14 of the Counterclaims contains legal conclusions to which no response is required. To the extent a response is required, Forescout admits the allegations in Paragraph 14 of the Counterclaims.

Paragraph No. 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).

Response to Paragraph No. 15:

Admitted. Forescout refers the Court to the Merger Agreement for a complete and accurate description of its contents.

Paragraph No. 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).

Response to Paragraph No. 16:

Forescout admits the allegations in the first sentence of Paragraph 16 of the Counterclaims. Forescout denies the allegations in the second, third, and fourth sentences of Paragraph 16 of the Counterclaims, except admits that the Merger Agreement provided for consideration of $33.00 per share, the repayment of certain outstanding debt, debt financing from third-party lenders subject to a debt commitment letter, and a total transaction value of less than $2 billion, and that Advent purports to characterize the Merger Agreement. Forescout refers the Court to the Merger Agreement for a complete and accurate description of its contents.

Paragraph No. 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).

Response to Paragraph No. 17:

Forescout denies the characterization in Paragraph 17 of the Counterclaims, except admits that Advent purports to quote and characterize Section 1.1(t) of the Merger Agreement. Forescout refers the Court to the Merger Agreement for a complete and accurate description of its contents.

Paragraph No. 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).

Response to Paragraph No. 18:

Forescout denies the allegations in Paragraph 18 of the Counterclaims, except admits that "general economic conditions," "changes in the conditions of the financial markets," "natural disasters," and "epidemics, pandemics and other force majeure events" are carved out of the definition of Company Material Adverse Effect in the Merger Agreement and that Advent purports to quote and characterize Section 1.1(t) of the Merger Agreement. Forescout refers the Court to the Merger Agreement for a complete and accurate description of its contents.

Paragraph No. 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).

Response to Paragraph No. 19:

Forescout denies the characterization in Paragraph 19 of the Counterclaims, except admits that Advent purports to quote and characterize Sections 7.2(b) and 5.1 of the Merger Agreement. Forescout refers the Court to the Merger Agreement for a complete and accurate description of its contents.

Paragraph No. 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).

Response to Paragraph No. 20:

Forescout denies the allegations in Paragraph 20 of the Counterclaims, except admits that the Merger Agreement provides Forescout with a right to specific performance of Parent's obligations under the Merger Agreement and that Advent purports to quote and characterize Section 9.10(b)(ii) of the Merger Agreement. Forescout refers the Court to the Merger Agreement for a complete and accurate description of its contents.

Paragraph No. 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).

Response to Paragraph No. 21:

Forescout denies the allegations in Paragraph 21 of the Counterclaims, except admits that Advent purports to characterize Section 8.3(b) of the Merger Agreement. Forescout refers the Court to the Merger Agreement for a complete and accurate description of its contents.

Paragraph No. 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).

Response to Paragraph No. 22:

Forescout denies the allegations in the first sentence of Paragraph 22 of the Counterclaims, except admits that, 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 as Exhibit E to the Complaint, and that Advent purports to characterize the DCL. Forescout refers the Court to the DCL for a complete and accurate description of its contents. Forescout denies the allegations in the second sentence of Paragraph 22 of the Counterclaims, except admits that Advent purports to characterize Section 9.12(b) of the Merger Agreement. Forescout refers the Court to the Merger Agreement for a complete and accurate description of its contents.

Paragraph No. 23:

The lenders' obligations to fund under the DCL are subject to certain conditions precedent, including (1) [redacted] and (2) all of Merger Sub's [redacted] *Id.* at Conditions §§ 2, 5. [redacted] *Id.* § 6. As Merger Sub has no assets or liabilities on its own, that effectively means the solvency of Forescout on consummation of the proposed transaction. *See id.*

Response to Paragraph No. 23:

Forescout denies the allegations in Paragraph 23 of the Counterclaims, except admits that Advent purports to characterize the DCL. Forescout refers the Court to the DCL for a complete and accurate description of its contents.

Paragraph No. 24:

Another condition precedent to the Initial Funding under the Debt Commitment Letter is that the Borrower must provide a certification certifying that the surviving company will be solvent, after giving effect to the proposed transaction, under each of the three relevant tests of solvency: [redacted] To be true and correct, the combined company [redacted] if it fails any one of the tests, the certification by the "Borrower" would be invalid. *See id.* at Conditions § 1(b).

Response to Paragraph No. 24:

Forescout denies the allegations in Paragraph 24 of the Counterclaims, except admits that Advent purports to characterize the DCL. Forescout refers the Court to the DCL for a complete and accurate description of its contents.

Paragraph No. 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.

Response to Paragraph No. 25:

Forescout denies the allegations in Paragraph 25 of the Counterclaims, except admits that Advent purports to quote and characterize the DCL. Forescout refers the Court to the DCL for a complete and accurate description of its contents.

Paragraph No. 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] indicated that Forescout was on track to [redacted]

Response to Paragraph No. 26:

Forescout denies the allegations in the first sentence of Paragraph 26 of the Counterclaims. Forescout denies the characterization in the second sentence of Paragraph 26 of the Counterclaims, except admits that Advent purports to characterize indications derived from Forescout's sales pipeline predictor tool during the last week of February 2020 regarding booking targets. Forescout refers the Court to the referenced predictions for a complete and accurate description of their contents.

Paragraph No. 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 expected to [redacted]. During a subsequent call on the same day, Forescout's Chief Financial Officer, Christopher Harms, admitted that he understood Parent's desire for the updated forecasts and that he would have been conducting similar liquidity planning in light of Forescout's recent performance and trajectory if the Merger were not planned. Harms seemed to be suggesting that Forescout [redacted]

Response to Paragraph No. 27:

Forescout denies the characterization in the first sentence of Paragraph 27 of the Counterclaims, except admits that in March 2020, Forescout engaged in scenario planning with Forescout in connection with Forescout's first quarter 2020

results, which Advent purports to characterize. Forescout denies the allegations in the second sentence of Paragraph 27 of the Counterclaims, except admits that in March 2020, Forescout's CFO Christopher Harms had calls representatives of Advent. Forescout denies the allegations in the third sentence of Paragraph 27 of the Counterclaims.

Paragraph No. 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] and was now expecting [redacted]

Response to Paragraph No. 28:

Forescout lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 28 of the Counterclaims and denies them on that basis, except admits that in March 2020, members of Forescout management collaborated on numerous occasions with representatives of Advent regarding Forescout's business and scenario planning.

Paragraph No. 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.

Response to Paragraph No. 29:

Forescout lacks knowledge or information sufficient to form a belief about the truth of the allegations in the first sentence of Paragraph 29 of the Counterclaims and denies them on that basis, except admits that Advent pressured Forescout to abandon its Board-approved plan and create revised forecasts. Forescout denies the allegations in the second sentence of Paragraph 29 of the Counterclaims.

Paragraph No. 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 bottom-up analysis of how the changed circumstances were likely to impact its business, Forescout relied on [redacted]

Response to Paragraph No. 30:

Denied. Forescout refers the Court to the referenced scenarios for a complete and accurate description of their contents.

Paragraph No. 31:

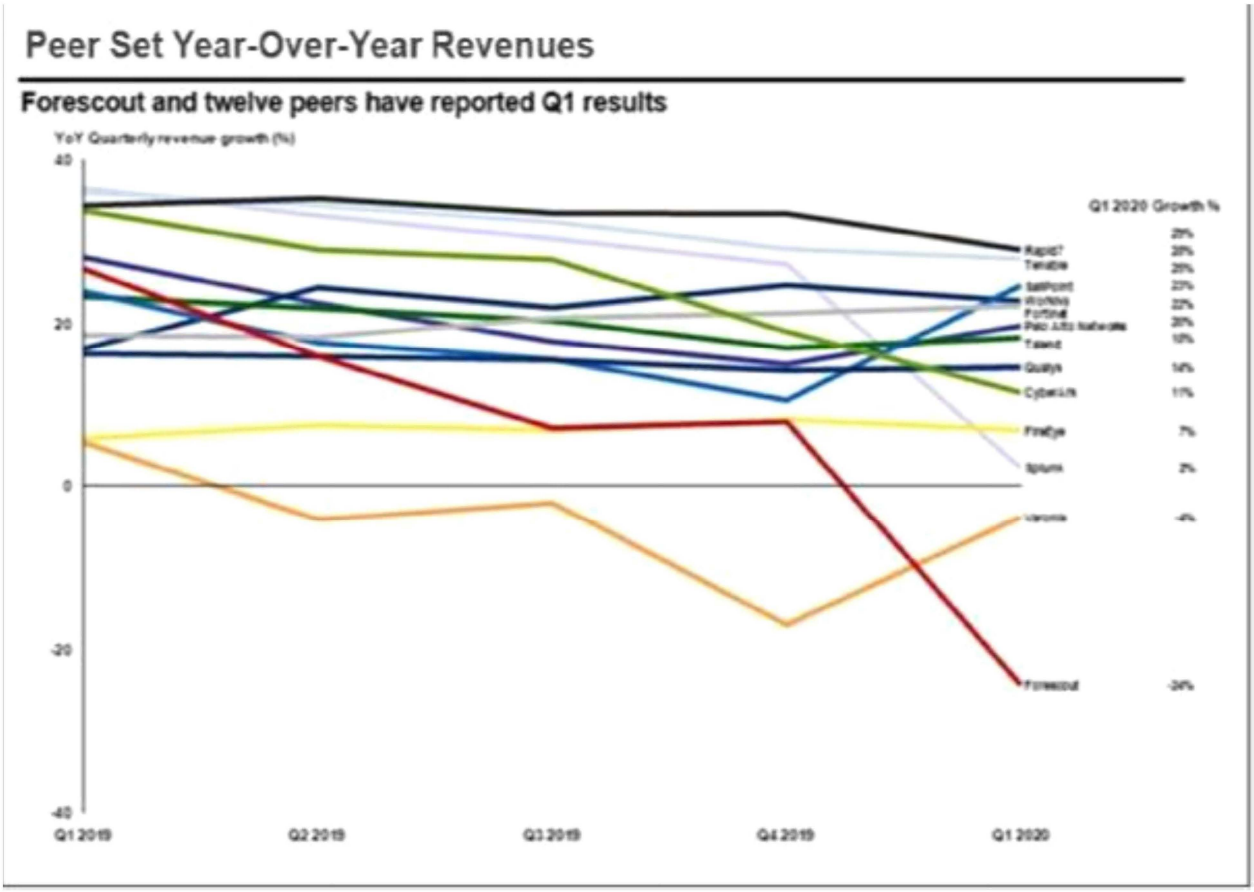
The conclusions from the analysis were just as troubling. This included two separate [redacted] under which Forescout would have [redacted] as soon as Q4 2020, without factoring in base interest expense under the Debt Financing. Under all scenarios, in Q2 alone, ***Forescout's own cash flow estimates showed*** [redacted]

Response to Paragraph No. 31:

Denied. Forescout refers the Court to the referenced scenarios for a complete and accurate description of their contents.

Paragraph No. 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 missed its Q1 bookings target by [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:



Footnote 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.

Response to Paragraph No. 32:

Denied. Forescout refers the Court to its referenced financial results and its financial advisor's fairness opinion for a complete and accurate description of their contents.

Paragraph No. 33:

On April 3, Forescout's Vice President of Business Enablement provided a read-out [redacted] From comments made by Forescout's management at this meeting, it was evident that the root causes of the miss in Q1 were not well understood by management, and did not show any signs of abating. On April 5, Parent asked Forescout whether it expected any meaningful change from its [redacted] to account for Forescout's fundamentally changed circumstances. Despite its disastrous Q1 performance and the ongoing economic crisis, Forescout responded that [redacted] according to management, everything else was just fine, and on plan.

Response to Paragraph No. 33:

Forescout denies the characterization in the first sentence of Paragraph 33 of the Counterclaims, except admits that, in April 2020, Forescout's Vice President of Business enablement shared with Advent certain information related to Forescout's Q1 2020 bookings and earnings. Forescout denies the allegations in the second, third and fourth sentences of Paragraph 33 of the Counterclaims, except admits that

in April 2020, Forescout and Advent corresponded regarding certain analyses that Forescout conducted of its business.

Paragraph No. 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.

Response to Paragraph No. 34:

Denied.

Paragraph No. 35:

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

Response to Paragraph No. 35:

Forescout denies the allegations in the first and second sentence of Paragraph 35 of the Counterclaims. Forescout denies the characterization in the third and fourth sentences of Paragraph 35 of the Counterclaims, except admits that, in April 2020, Forescout CEO Michael DeCesare and representatives of

Advent discussed scenario planning regarding Forescout's performance and financials.

Paragraph No. 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.

Response to Paragraph No. 36:

Forescout denies the characterization in the first and third sentences of Paragraph 36 of the Counterclaims, except admits that Forescout cooperated with Advent's requests for information regarding Forescout's business and provided Advent with comprehensive data. Forescout lacks knowledge or information sufficient to form a belief about the truth of the allegations in the second sentence of Paragraph 36 of the Counterclaims and denies it on that basis.

Paragraph No. 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.

Response to Paragraph No. 37:

Denied, except Forescout admits that Advent sent to Forescout a document titled "Draft Revised Base Case," dated April 14, 2020. Forescout refers the Court to the referenced document for a complete and accurate description of its contents.

Paragraph No. 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, who had been told previously by Forescout's management that sales representatives are the [redacted]

Response to Paragraph No. 38:

Forescout denies the allegations in the first and second sentences of Paragraph 38 of the Counterclaims, except admits that DeCesare explained to Advent why Forescout continued to operate under its Board-approved plan. Forescout denies the characterization in the third sentence of Paragraph 38 of the Counterclaims. Forescout lacks knowledge or information sufficient to form a belief about the truth of the allegations in the fourth sentence of Paragraph 38 of the Counterclaims and denies them on that basis.

Paragraph No. 39:

On April 23, reportedly at the direction of counsel, Forescout informed Parent that management had no plans to deliver its updated forecast. Finally, on April 23, Forescout wrote a letter to Parent, reporting:

> As you know, (1) Forescout's financial plan for 2020 remains the one approved by Forescout's board of directors and provided to Parent in advance of signing the Merger Agreement; and (2) any forecasting exercise beyond one calendar quarter is inherently speculative in light of the ongoing impact of COVID-19 on businesses worldwide.

Response to Paragraph No. 39:

Forescout denies the allegations in Paragraph 39 of the Counterclaims, except admits that Advent purports to quote and characterize a statement and letter from Forescout, dated April 23, 2020. Forescout refers the Court to the referenced letter for a complete and accurate description of its contents.

Paragraph No. 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]

Response to Paragraph No. 40:

Denied, except Forescout admits that Advent purports to characterize a letter from Forescout, dated April 23, 2020, that the COVID-19 outbreak was ongoing in April 2020, and that the economy and financial markets were negatively affected. Forescout refers the Court to the referenced letter for a complete and accurate description of its contents.

Paragraph No. 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:

- Forescout's sales function had completely fallen down. 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, Forescout told Parent that Forescout [redacted] In response to Parent's request for any guidance

that Forescout has recently provided its sales personnel, Forescout could not identify a single document.

- Forescout's 2020 pipeline [redacted]

- 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.

Footnote 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.

Response to Paragraph No. 41:

Forescout denies the allegations in the first sentence of Paragraph 41 of the Counterclaims, except admits that Advent created certain forecasts of Forescout's business and that Forescout cooperated with Advent in providing information that Advent requested. Forescout denies the characterization in the second, third, and fourth sentences of Paragraph 41 of the Counterclaims, except admits that Forescout received letters from Advent requesting a variety of information dated April 20, 27, and 30, 2020. Forescout refers the Court to the referenced letters for

a complete and accurate description of their contents. Forescout denies the allegations in the fifth partial sentence of Paragraph 41 of the Counterclaims.

- Forescout denies the allegations in the first bullet point of Paragraph 41 of the Counterclaims, except admits that Forescout has conducted various hardware and software proof of value assessments and that Advent purports to characterize information from Forescout's sales records that were shared with Advent. Forescout refers the Court to the referenced sales records for a complete and accurate description of their contents.
- Forescout denies the allegations in the second bullet point of Paragraph 41 of the Counterclaims, except admits that in April many businesses in the United States had transitioned to work-from-home and that Advent purports to characterize a discussion with Forescout in April 2020.
- Forescout denies the allegations in the third bullet point of Paragraph 41 of the Counterclaims, except admits that Advent purports to characterize certain sales pipeline records that Forescout shared with Advent. Forescout refers the Court to the referenced records for a complete and accurate description of their contents.
- Forescout denies the allegations in fourth bullet point of Paragraph 41 of the Counterclaims, except admits that Advent purports to quote and characterize Forescout's publicly-filed Form 10-Q for the first quarter of 2020.

Forescout refers the Court to the referenced Form 10-Q for a complete and accurate description of its contents.

- Forescout denies the allegations in the fifth bullet point of Paragraph 41 of the Counterclaims.

Forescout denies the allegations in Footnote 78 to the Counterclaims, except admits that Advent purports to describe Forescout's "POVs."

Paragraph No. 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.

Response to Paragraph No. 42:

Forescout lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the first and second sentences of Paragraph 42 of the Counterclaims and denies them on that basis, except Forescout admits that Forescout's management engaged in discussions with representatives of Advent regarding Forescout's business on numerous occasions at Advent's request. Forescout denies the characterization in the third sentence of Paragraph 42 of the

Counterclaims, except admits that Advent and Forescout discussed certain cost-cutting measures in light of current circumstances.

Paragraph No. 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.

Response to Paragraph No. 43:

Forescout denies the allegations in the first and third sentences Paragraph 43 of the Counterclaims, except admits that Advent created so-called "Revised Base Case" and a "Downside Case" scenarios of Forescout and that Forescout corresponded with Advent about those documents on May 14, 2020, which Advent purports to characterize. Forescout refers the Court to the referenced documents for a complete and accurate description of their contents. Forescout denies the characterization in the second sentence of Paragraph 43 of the Counterclaims, except admits that on April 14, 2020, Advent shared with Forescout a so-called "Revised Base Case" scenario that it had created.

Paragraph No. 44:

In a made-for-litigation email to Advent, DeCesare acknowledged that Forescout [redacted]

[redacted] Forescout then brazenly put forward utterly implausible [redacted] that were somehow magically prepared in only days—something Forescout has consistently claimed since April is not possible.

Response to Paragraph No. 44:

Denied. Forescout refers the Court to the referenced email for a complete and accurate description of its contents.

Footnote 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 [sic] any and all rights under these provisions.

Response to Footnote 79:

Forescout denies the allegations in the first sentence of Footnote 79 to the Counterclaims (which is appended to a heading), except admits that Advent purports to characterize Section 9.12 of the Merger Agreement. Forescout refers the Court to the Merger Agreement for a complete and accurate description of its contents. Forescout lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence of Footnote 79 to the Counterclaims and denies them on that basis.

Paragraph No. 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]

[redacted]

Response to Paragraph No. 45:

Forescout denies the allegations in the first and second sentences of Paragraph 45 of the Counterclaims, except admits that Advent purports to characterize cash flow estimates and Q1 2020 results. Forescout refers the Court to the referenced estimates and results for a complete and accurate description of their contents.

Paragraph No. 46:

The Revised Base Case, reflecting a thorough re-forecasting of the Company's business, shows that Forescout will be [redacted] after giving effect to the proposed transaction, under all three relevant tests from the Debt Commitment Letter's form of solvency certification

Response to Paragraph No. 46:

Denied. Forescout refers the Court to the referenced document for a complete and accurate description of its contents.

Paragraph No. 47:

First, Forescout will have unreasonably small capital in relation to its business. Forescout's [redacted] will be insufficient to enable the Company to continue its operations in the same manner as it conducted them before the proposed transaction and below Forescout's own estimate of [redacted]

Response to Paragraph No. 47:

Denied.

Paragraph No. 48:

Second, by entering into the credit facility, Forescout would incur debts beyond its ability to pay. 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]

Response to Paragraph No. 48:

Forescout denies the allegations in the first, second, and third sentences of Paragraph 48 of the Counterclaims, except admits that Advent purports to characterize certain forecasts that Advent created. Forescout lacks knowledge or information sufficient to form a belief about the truth of the allegations in the fourth sentence of Paragraph 48 of the Counterclaims and denies them on that basis. Forescout refers the Court to the referenced document for a complete and accurate description of its contents.

Paragraph No. 49:

Third, the cash flow forecasts suggest that Forescout will be [redacted] at Closing. Specifically, the fair value of the Company's assets, based on

a customary discounted cash flow model, is an [redacted]

Response to Paragraph No. 49:

Denied. Forescout refers the Court to the referenced document for a complete and accurate description of its contents.

Paragraph No. 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, ***EBITDA decreased by more than 95%*** and revenue ***fell by more than 24%*** on a year-over-year basis from Q1 2019 to Q1 2020.

Response to Paragraph No. 50:

Denied.

Paragraph No. 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, it is clear that Forescout's decline in earnings potential and financial performance will be of long duration, continuing through all of 2020 and beyond.

Response to Paragraph No. 51:

Denied.

Paragraph No. 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]

[redacted] This large earnings loss is why the Company is burning through its cash at a rate that is not sustainable.

Response to Paragraph No. 52:

Denied, except Forescout admits that Advent purports to characterize certain forecasts that Advent created. Forescout refers the Court to the referenced documents for a complete and accurate description of their contents.

Paragraph No. 53:

Further confirming the accuracy of Buyers' view of Forescout's condition are Forescout's own Q2 estimates, which have gradually fallen into alignment with Buyers' as Forescout is forced to confront that reality is playing out far worse than its blindly optimistic expectations. Following its disastrous Q1 2020 bookings performance, [redacted] Forescout's Q2 estimate [redacted] as of May 11. Buyers' estimates have consistently included a Q2 estimate of [redacted]

Response to Paragraph No. 53:

Forescout denies the allegations in the first, second third, and fourth sentences of Paragraph 53 of the Counterclaims, except admits that Advent purports to characterize certain of Forescout's scenario planning and certain forecasts that Advent created. Forescout refers the Court to the referenced documents for a complete and accurate description of their contents. Forescout lacks knowledge or information sufficient to form a belief about the truth of the

allegations in the fifth sentence of Paragraph 53 of the Counterclaims and denies them on that basis.

Paragraph No. 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 declined by 95.3% year-over-year*** 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 will [redacted] while, based on analyst estimates, the median peer's EBITDA will decline by less than 27%—a difference of more than [redacted] Forescout is also vastly underperforming its peers in terms of profit margin, with its EBITDA margin falling by more than 31% from Q1 2019 to Q2 2019 while that of the median peer ***increased*** by 0.5%.

Response to Paragraph No. 54:

Forescout denies the allegations in the first, second, third and sixth sentences of Paragraph 54 of the Counterclaims, except admits that Advent purports to characterize Forescout's financial results and results of alleged "peers." Forescout refers the Court to the referenced financial results for a complete and accurate description of their contents. Forescout lacks knowledge or information sufficient to form a belief about the truth of the allegations in the fourth and fifth sentences of Paragraph 54 of the Counterclaims and denies them on that basis, except admits that Advent purports to characterize certain forecasts prepared by Advent.

Forescout refers the Court to the referenced documents for a complete and accurate description of their contents.

Paragraph No. 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.

Response to Paragraph No. 55:

Denied.

Paragraph No. 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, reiterating its original 2020 budget (created before the COVID-19 outbreak) while positing that forecasting beyond one quarter is "inherently speculative."

Response to Paragraph No. 56:

Forescout denies the allegations in the first and fourth sentences of Paragraph 56 of the Counterclaims, except admits that Forescout has informed Advent that forecasting beyond one quarter in the midst of the COVID-19 outbreak is inherently speculative. Forescout denies the characterization in the second sentence of Paragraph 56 of the Counterclaims, except admits that Advent purports to describe general business practices for business planning. Forescout lacks

knowledge or information sufficient to form a belief about the truth of the allegations in the third sentence of Paragraph 56 of the Counterclaims and denies them on that basis.

Paragraph No. 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 zero, [redacted] This decline was particularly devastating to Forescout because [redacted]

Response to Paragraph No. 57:

Forescout denies the allegations in the first, second, third, fourth, and sixth sentences of Paragraph 57 of the Counterclaims, except admits that certain of Forescout's sales are worth millions of dollars and that Forescout has conducted various hardware and software POVs as one aspect of its sales function. Forescout denies the characterization in the fifth sentence of Paragraph 57 of the Counterclaims, except admits that Advent purports to characterize information from Forescout's sales records that were shared with Advent. Forescout refers the

Court to the referenced sales records for a complete and accurate description of their contents.

Paragraph No. 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 non-standard payment terms and discounts on a significant portion of its bookings. In Q1 2020, two discounts in particular were described by Forescout to Buyers as [redacted] and, indeed, were so material that Forescout called them out specifically in its quarterly 10-Q, filed on May 11. [redacted] These actions all have the effect of taking Forescout's operations well outside the ordinary course of business.

Response to Paragraph No. 58:

Forescout denies the allegations in Paragraph 58 of the Counterclaims, except admits that Advent purports to characterize Forescout's Form 10-Q for the first quarter of 2020. Forescout refers the Court to the referenced Form 10-Q for a complete and accurate description of its contents.

Paragraph No. 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, Forescout would not be [redacted]

Response to Paragraph No. 59:

Forescout lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 59 of the Counterclaims and denies them on that basis.

Paragraph No. 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 a contractually required certificate attesting to the solvency of the post-closing Company as required by the Debt Commitment Letter, as Parent informed Forescout on May 15. Ex. E (Debt Commitment Letter), Exhibit C §§ 2 [redacted]

Response to Paragraph No. 60:

Denied, except Forescout admits that Advent purports to quote and characterize the DCL. Forescout refers the Court to the DCL for a complete and accurate description of its contents.

Paragraph No. 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.

Response to Paragraph No. 61:

Denied, except Forescout admits that Advent purports to quote and characterize the DCL. Forescout refers the Court to the DCL for a complete and accurate description of its contents.

Paragraph No. 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). Notably, the proposed loan terms under the current debt financing are favorable—*e.g.*, [redacted]—which present greater challenges to finding alternative debt financing on more favorable terms.

Footnote 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.

Response to Paragraph No. 62:

Forescout denies the allegations in the first sentence of Paragraph 62 of the Counterclaims, except admits that Advent purports to quote and characterize Section 6.5(d) of the Merger Agreement. Forescout refers the Court to the Merger Agreement for a complete and accurate description of its contents. Forescout denies the allegations in the second sentence of Paragraph 62 of the Counterclaims, except admits that Advent purports to characterize the DCL. Forescout refers the Court to the DCL for a complete and accurate description of its contents.

Forescout denies the allegations in Footnote 80 to the Counterclaims, except admits that Advent purports to describe "PIK'ing" or "Payment-in-Kind."

Paragraph No. 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.

Response to Paragraph No. 63:

Forescout denies the characterization in the first sentence of Paragraph 63 of the Counterclaims, except admits that on May 8, 2020, a representative of Advent contacted Forescout's CEO and told him, among other things, that Advent was considering not closing the Merger. Forescout denies the allegations in the second and third sentences of Paragraph 63 of the Counterclaims, except admits that Advent purports to characterize a letter from Ferrari Group, dated May 15, 2020. Forescout refers the Court to the referenced letter for a complete and accurate description of its contents.

Paragraph No. 64:

Forescout filed this instant lawsuit on May 19, 2020.

Response to Paragraph No. 64:

Admitted.

Paragraph No. 65:

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

Response to Paragraph No. 65:

Paragraph 65 of the Counterclaims contains no substantive allegations and, therefore, no response is required. To the extent a response is required, Forescout incorporates its responses to each and every allegation and all affirmative defenses as set forth herein.

Paragraph No. 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

Response to Paragraph No. 66:

Denied.

Paragraph No. 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).

Response to Paragraph No. 67:

Denied.

Paragraph No. 68:

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

Response to Paragraph No. 68:

Paragraph 68 of the Counterclaims contains legal conclusions to which no response is required.

Paragraph No. 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.

Response to Paragraph No. 69:

Paragraph 69 of the Counterclaims contains legal conclusions to which no response is required. To the extent a response is required. Forescout denies the allegations in Paragraph 69 of the Counterclaims.

Paragraph No. 70:

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

Response to Paragraph No. 70:

Paragraph 70 of the Counterclaims contains no substantive allegations and, therefore, no response is required. To the extent a response is required, Forescout incorporates its responses to each and every allegation and all affirmative defenses as set forth herein.

Paragraph No. 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.

Response to Paragraph No. 71:

Denied.

Paragraph No. 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 [redacted]

d. Forescout has managed its revenue outside the ordinary course, including by seeking [redacted]

Response to Paragraph No. 72:

Denied.

Paragraph No. 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.

Response to Paragraph No. 73:

Denied, except Forescout admits that Advent purports to quote and characterize Section 5.1(ii) of the Merger Agreement. Forescout refers the Court to the Merger Agreement for a complete and accurate description of its contents.

Paragraph No. 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.

Response to Paragraph No. 74:

Paragraph 74 of the Counterclaims contains legal conclusions to which no response is required.

Paragraph No. 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.

Response to Paragraph No. 75:

Paragraph 75 of the Counterclaims contains legal conclusions to which no response is required. To the extent a response is required, Forescout denies the allegations in Paragraph 75 of the Counterclaims.

Paragraph No. 76:

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

Response to Paragraph No. 76:

Paragraph 76 of the Counterclaims contains no substantive allegations and, therefore, no response is required. To the extent a response is required, Forescout incorporates its responses to each and every allegation and all affirmative defenses as set forth herein.

Paragraph No. 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.

Response to Paragraph No. 77:

Denied.

Paragraph No. 78:

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

[redacted]

Response to Paragraph No. 78:

Denied.

Paragraph No. 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").

Response to Paragraph No. 79:

Denied, except Forescout admits that Advent purports to quote and characterize Section 5.2(h) of the Merger Agreement. Forescout refers the Court to the Merger Agreement for a complete and accurate description of its contents.

Paragraph No. 80:

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

Response to Paragraph No. 80:

Paragraph 80 of the Counterclaims contains legal conclusions to which no response is required.

Paragraph No. 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.

Response to Paragraph No. 81:

Paragraph 81 of the Counterclaims contains legal conclusions to which no response is required. To the extent a response is required, Forescout denies the allegations in Paragraph 81 of the Counterclaims.

Paragraph No. 82:

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

Response to Paragraph No. 82:

Paragraph 82 of the Counterclaims contains no substantive allegations and, therefore, no response is required. To the extent a response is required, Forescout incorporates its responses to each and every allegation and all affirmative defenses as set forth herein.

Paragraph No. 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.

Response to Paragraph No. 83:

Paragraph 83 of the Counterclaims contains legal conclusions to which no response is required. To the extent a response is required, Forescout denies the allegations in Paragraph 83 of the Counterclaims.

Paragraph No. 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, Merger Sub cannot represent that the post-proposed transaction entity involving Forescout will be solvent, and cannot deliver a certification attesting to the same.

Response to Paragraph No. 84:

Denied.

Paragraph No. 85:

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

Response to Paragraph No. 85:

Denied.

Paragraph No. 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.

Response to Paragraph No. 86:

Paragraph 86 of the Counterclaims contains legal conclusions to which no response is required.

Paragraph No. 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.

Response to Paragraph No. 87:

Paragraph 87 of the Counterclaims contains legal conclusions to which no response is required. To the extent a response is required, Forescout denies the allegations in Paragraph 87 of the Counterclaims.

AFFIRMATIVE DEFENSES

First Affirmative Defense

The Counterclaims are barred, in whole or in part, because they fail to state a claim upon which relief may be granted.

Second Affirmative Defense

The Counterclaims are barred, in whole or in part, by the doctrines of laches, waiver, estoppel, acquiescence, and/or ratification.

Third Affirmative Defense

The Counterclaims are barred, in whole or in part, by the Merger Agreement, because Forescout has complied in all material respects with its representations and warranties, covenants, and agreements under the Merger Agreement.

Fourth Affirmative Defense

The Counterclaims are barred, in whole or in part, by the Merger Agreement, because Counterclaim-Plaintiffs are required by the Merger Agreement to close the Merger.

Fifth Affirmative Defense

The Counterclaims are barred, in whole or in part, by the Merger Agreement, because Counterclaim-Plaintiffs are in breach of the Merger Agreement.

Sixth Affirmative Defense

The Counterclaims are barred, in whole or in part, by the doctrine of unclean hands.

Dated: June 5, 2020

WILSON SONSINI GOODRICH & ROSATI, P.C.

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