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:

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[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
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