



# Boiling Points

HOT DOCUMENTS IN ANTITRUST MERGER CASES

Dechert  
LLP

## Boiling Points: An introduction on hot antitrust merger documents

The Boiling Points collection features real-world documents that government antitrust agencies used against merging companies. Dechert's antitrust/competition practice curated the collection from an exhaustive review of publicly available court and antitrust agency records — it is the first and only comprehensive collection of actual documents that have caused deals unwanted attention from government authorities.

The tool is intended to help counsel and business teams develop pro-competitive, fact-based deal themes and to

spot hot content that may need to be analyzed or explained. Inclusion in the collection does not necessarily mean that the document supported the government's case to block a merger. Additional context, explanation, or documents often provide more probative evidence and can rebut use of isolated statements in documents.

However, inclusion does highlight the types of statements that are likely to be drawn into the spotlight in merger investigations and potentially create sideshows that distract from other substantive issues.



## The importance of deal documents

While the Federal Trade Commission (FTC), Department of Justice (DOJ), and State Attorneys General (State AGs) use both deal documents and ordinary-course-of-business documents in their merger decision-making, the Boiling Points collection focuses on deal documents. These are typically documents prepared by or for a company's most senior management or its board.

The government places the greatest weight on deal documents because they speak most directly to the core antitrust issue – whether the merger is likely to harm consumers. When reporting transactions under the Hart-Scott-Rodino (HSR) Act, companies must collect senior management documents prepared “for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets.”<sup>1</sup>

The FTC, in explaining its merger enforcement decisions, highlighted and even measured the importance of “hot documents.”<sup>2</sup> For these purposes, the FTC has defined a document as “hot” if “it predicts that the merger will produce an adverse price or non-price effect on competition.”<sup>3</sup>

Another key reason to focus on deal documents is that the content of deal documents can be centered on pro-competitive deal themes when supported by the commercial realities. It is hard to manage the content of ordinary-course-of-business documents prepared every day by thousands of employees. In contrast, deal documents arise from smaller teams in a concentrated time period. Counsel oversight, grounded in fact-based messaging, can make a big difference in deal document content and thus in merger investigation outcomes.

1. 16 C.F.R. § 803, Appendix (Notification and Report Form for Certain Mergers and Acquisitions, Instructions, at V).

2. FTC, Horizontal Merger Investigation Data, Jan. 2013, at 4.

3. *Id.* at 4 & n. 19 (referring to tables 5.1, 5.2, 6.1, and 6.2 used to measure the impact of hot documents).



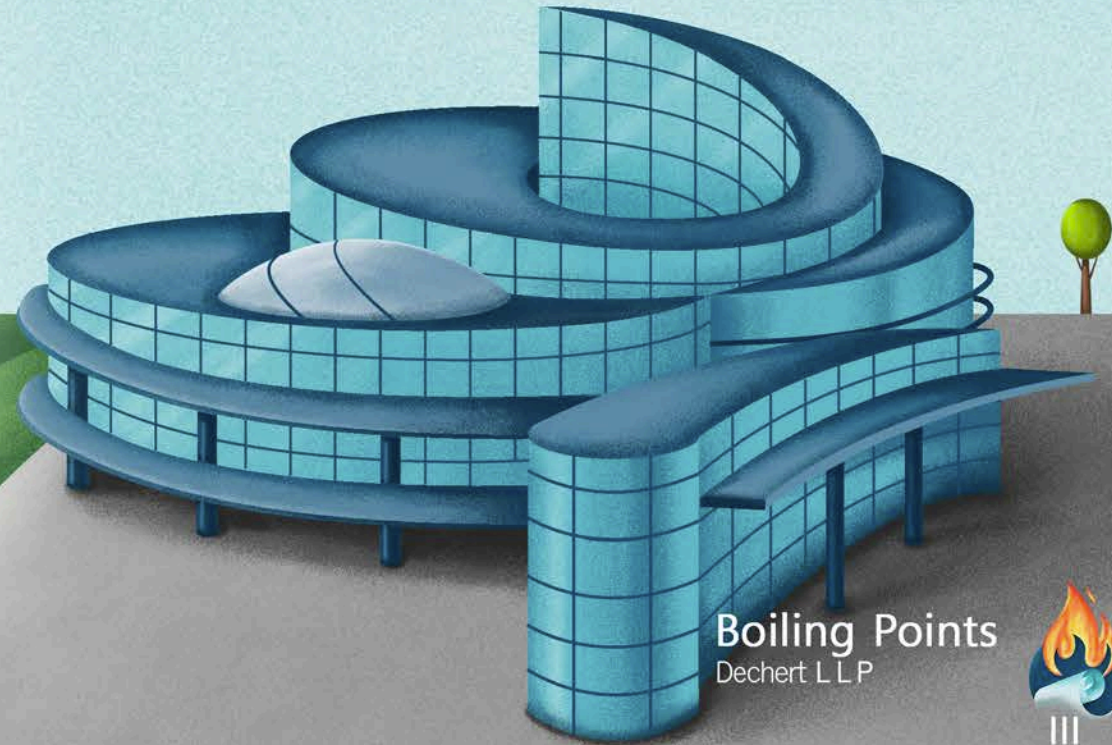
## Using real-world illustrations to counsel

The best way to counsel with the collection, is to select a few illustrations that best fit the setting. A user-friendly roadmap makes this easy. This roadmap, set forth in the table of contents, organizes the deal documents in the collection by types of common analyses: (1) describing the combined firm; (2) describing the seller; (3) deal rationale; (4) synergies and valuation; (5) pricing or financial analyses; and (6) antitrust risk. The table of contents will assist in selecting illustrations to provide tailored counseling.

As you consider which slides to use, you should keep the following in mind:

- Guidance should be industry-tailored and deal-tailored, accounting for the particular antitrust sensitivities presented in the setting.
- Consideration of the audience, whether bankers or senior management, may be important.

- The timing of the counseling or training – e.g., pre-signing, post-signing, or part of the integration planning process – may impact the nature of the guidance. Preparation prior to the flurry of a live deal may be the best preventive medicine.
- Stress the need to adopt genuine, procompetitive deal themes that align with commercial realities. These procompetitive themes can serve as the foundation for internal and external communications.
- Dechert's antitrust lawyers are here to help. We would be happy to discuss more insights on putting the collection to practical use and customizing solutions for your organization.



## About Dechert's antitrust/competition practice

Dechert's global antitrust practice, named a Law360 "Competition Practice Group of the Year" for the last two years, has an unmatched reputation for practical antitrust advice. Across industries and regions, leading companies rely on Dechert's knowledge of the government process and successful track record securing clearance for the most visible, challenging deals.

Dechert is also the creator of the Dechert Antitrust Merger Investigation Timing Tracker, better known as **DAMITT**. The quarterly report is the leading source of analysis for significant U.S. and EU antitrust merger investigation and litigation trends.

**Get essential guidance to prevent hot documents and successfully steer your deals.**

**Request a consultation with our antitrust lawyers or visit [dechert.com/boiling](https://dechert.com/boiling) to learn more.**

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## Boiling Points key contacts



### Mike Cowie

Co-chair and Partner

Washington D.C.

+1 202 261 3339

[mike.cowie@dechert.com](mailto:mike.cowie@dechert.com)

Mike Cowie, co-chair of Dechert's global antitrust/competition group, has handled high-profile, strategic projects for some of the world's largest and most successful companies. His advice builds upon insights gained while directing antitrust investigations for the government. In 2018, *The National Law Journal* recognized him as a "Trailblazer," in 2019 the *Financial Times* honored him for achieving "some of the most complex antitrust approvals," and in 2020 *Global Competition Review* placed him among the antitrust advisors of the year "based on practical judgement and excellence in client service."

Prior to joining Dechert, Mr. Cowie served in the Federal Trade Commission's Bureau of Competition as Assistant Director, where he managed a 25-attorney team responsible for antitrust merger investigations.



### Rani Habash

Partner

Washington D.C.

+1 202 261 3481

[rani.habash@dechert.com](mailto:rani.habash@dechert.com)

Rani A. Habash advises clients on the antitrust aspects of mergers, acquisitions, and joint ventures. He has helped guide industry-leading companies to successful strategic transactions in the face of intense antitrust scrutiny by the U.S. Department of Justice, U.S. Federal Trade Commission, Senate and House Judiciary Committees, state attorneys general, and international competition authorities.

Mr. Habash is recognized as a "Future Leader" by *Who's Who Legal: Competition*. *The National Law Journal* also named Mr. Habash a "D.C. Rising Star" for his substantial legal influence and innovation in his practice area, as well as his commitment to pro bono and professional volunteer work.

**Get essential guidance to prevent hot documents and successfully steer your deals.**

**Request a consultation with our antitrust lawyers or visit [dechert.com/boiling](https://www.dechert.com/boiling) to learn more.**




# **DESCRIBING THE COMBINED FIRM**



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**The combined firm  
will be a  
“900 pound gorilla.”**

**- Buyer’s CFO**

In re Chicago Bridge & Iron Co.,  
Proposed Findings of Fact and Conclusions of Law,  
at 105 (Feb. 14, 2003)

We are by far  
the “big dog”  
of the industry.

- Buyer’s Executive,  
after closing

In re Chicago Bridge & Iron Co.,  
Proposed Findings of Fact and Conclusions of Law,  
at 105 (Feb. 14, 2003)



BEAST

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“Our future is both vulnerable and would benefit from Godzilla’s strengths... Our combination gives [our customers] one clear option, eliminating a bloody share war and speeding adoption.”

- Chairman of Seller’s Board

U.S. v. Microsoft,  
Complaint, at 3 (Apr. 27, 1995)

BEAST



Boiling Points  
Dechert LLP





GX-610

### Additional Value Drivers as 1 co resulting in hiring multiple

- Monopoly in the market
- Additional products to upsell existing customers
- Additional products makes more defensible
  - They offered to buy 500 friends and looked at Revue
- Better Cogs today and future
- More predictable revenue growth (less competition)
- Better monetization w/o pricing pressure
- Bigger Story
- Faster sales cycle
- Faster Product dev
- Silicon Valley presence – ego and hiring
- Not having us in the hands of a competitor, especially one with deep pockets and existing channels
- Less existing customer attrition

U.S. v. Bazaarvoice, Inc.,  
DOJ Opening Statement,  
at 67 (Sept. 23, 2013)

MONOPOLY

Boiling Points  
Dechert LLP

U.S. v. Bazaarvoice, Inc.,  
DOJ Opening Statement,  
at 58 (Sept. 23, 2013)

GX-320

1. Literally, no other competitors.
2. Our share of the IR500 would move close to 50% in absolute terms and higher in retail sales coverage.
7. Pricing accretion due to combination.
8. Faster sales cycles.
9. Help us to focus 100% on our strategy without the whipsaw effect of reacting to a feisty competitor.



MONOPOLY

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Dechert LLP



**“They only want us to create a monopoly.  
In this case, they will, most likely, sooner or later,  
rationalize us to the ground, toasting us all, freezing  
our products and milking all the customers for a while.”**

**- Seller’s Division  
President**

In re Aspen Tech., Inc.,  
Pretrial Brief, at 32 (May 13, 2004)





**The merger “will create a market monopoly... Market dominance and technology lead will continue in mid-term for the combined company.”**

**- Seller’s COO**

In re Aspen Tech., Inc., Pretrial Brief, at 31-32 (May 5, 2004)



**The “North American Glass Expansion”  
would make it “the #1 Player [with a]  
49% Market Share.”**

---

**- Buyer’s Executive**

**HIGH MARKET SHARE**

In re Ardagh Group S.A., Complaint, at 38 (July 1, 2013)

**Boiling Points**  
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**Post-merger,  
the two companies  
“collectively will control  
almost 90% of the market.”**

**- Seller’s CEO**

In re Cabell Huntington Hospital, Inc.,  
Complaint, at 3 (Nov. 5, 2015)

**HIGH MARKET SHARE**

**Boiling Points**  
Dechert LLP



An illustration of a pilot from the back, wearing a white shirt and a blue headset with a microphone. The pilot is looking forward at a detailed cockpit dashboard with various gauges, dials, and control panels. The background shows a blue sky with clouds.

**“Benefits: Dominate the entire simulation market space, and reduce competitive and pricing pressure.”**

**- Buyer’s Executive**

In re Aspen Tech., Inc., Pretrial Brief,  
at 4 (May 5, 2004)

**DOMINANCE**

**Boiling Points**  
Dechert LLP



**The merger will give:  
“Market dominance in  
Western Hemisphere.”**

**- Seller’s Executive**

In re Chicago Bridge & Iron Co., Proposed Findings of  
Fact and Conclusions of Law, at 105 (Feb. 14, 2003)

**DOMINANCE**



**Boiling Points**  
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# “Benefits of Combining”: “Dominance of the cryogenic (LNG/LOX/LIN) markets.”

---

- Seller’s Executive

In re Chicago Bridge & Iron Co.,  
Proposed Findings of Fact and Conclusions of Law,  
at 105 (Feb. 14, 2003)



**“As a combination,  
we would be dominant.”**

**- Buyer’s Manager of  
Business Development**



**DOMINANCE**

U.S. v. Microsoft,  
Complaint, at 3 (Apr. 27, 1995)

**Boiling Points**  
Dechert LLP



**“The combined entity would have a dominant position as a market leader.”**

**- Buyer's Executive**

U.S. v. AB Electrolux,  
Complaint, at 3 (July 1, 2015)



**DOMINANCE**

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“A company may make an acquisition for different reasons. One is certainly to fill gaps in their offerings. However, another is to build dominance in an existing area of strength.”

- Communication to Buyer's Employees

In re Aspen Tech., Inc., Pretrial Brief,  
at 33 (May 5, 2004)

DOMINANCE

Boiling Points  
Dechert LLP

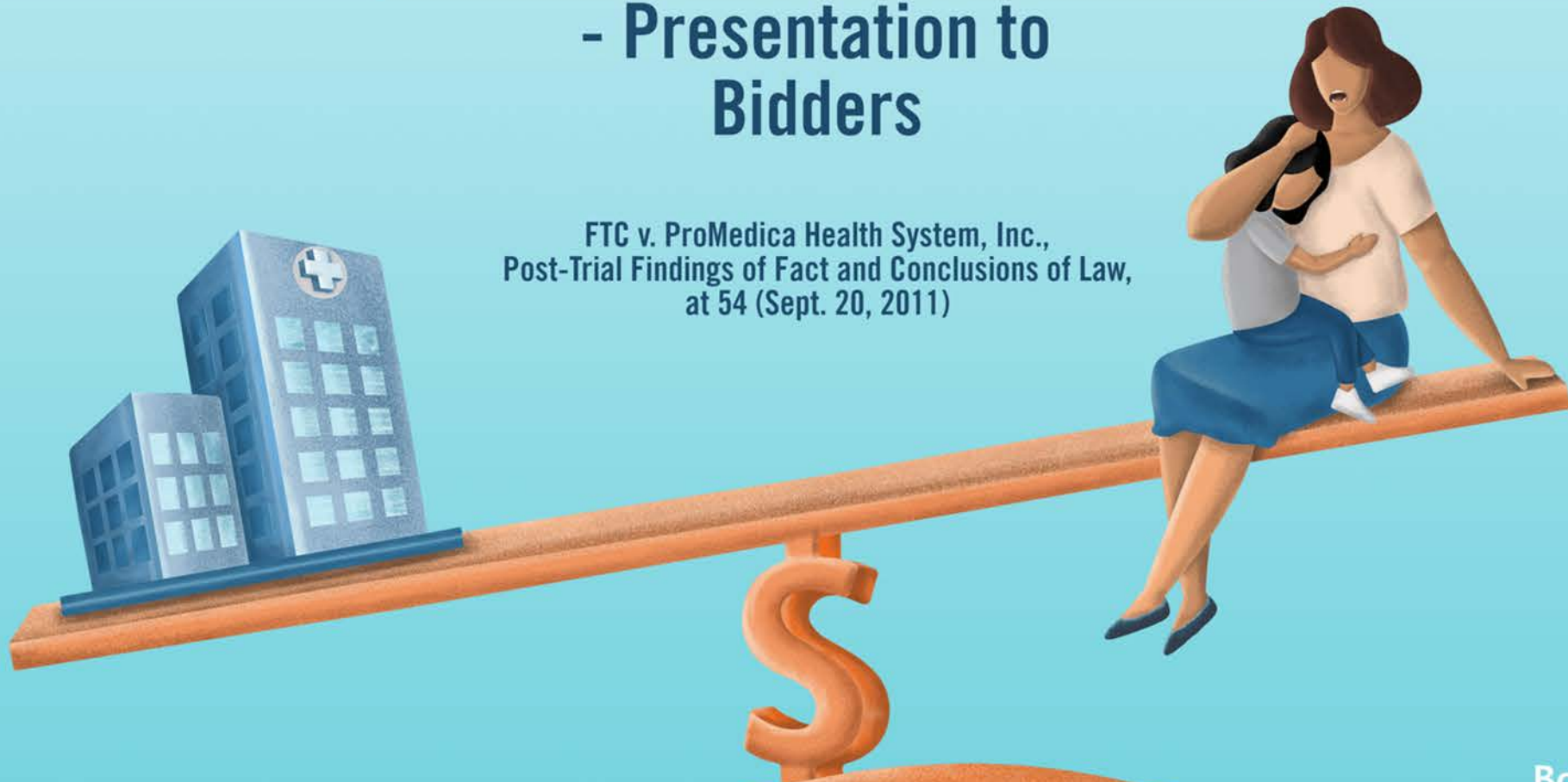


# “Why [this target]?... Payer System Leverage.”

---

## - Presentation to Bidders

FTC v. ProMedica Health System, Inc.,  
Post-Trial Findings of Fact and Conclusions of Law,  
at 54 (Sept. 20, 2011)



LEVERAGE, CLOUT, OR BARGAINING POWER

Boiling Points  
Dechert LLP







**“If you’re bigger,  
you are able to negotiate  
better contracts.”**

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**- Seller’s Leadership**

State of Washington v. Franciscan Health System,  
Complaint, at 4 (Aug. 31, 2017)



**LEVERAGE, CLOUT, OR BARGAINING POWER**

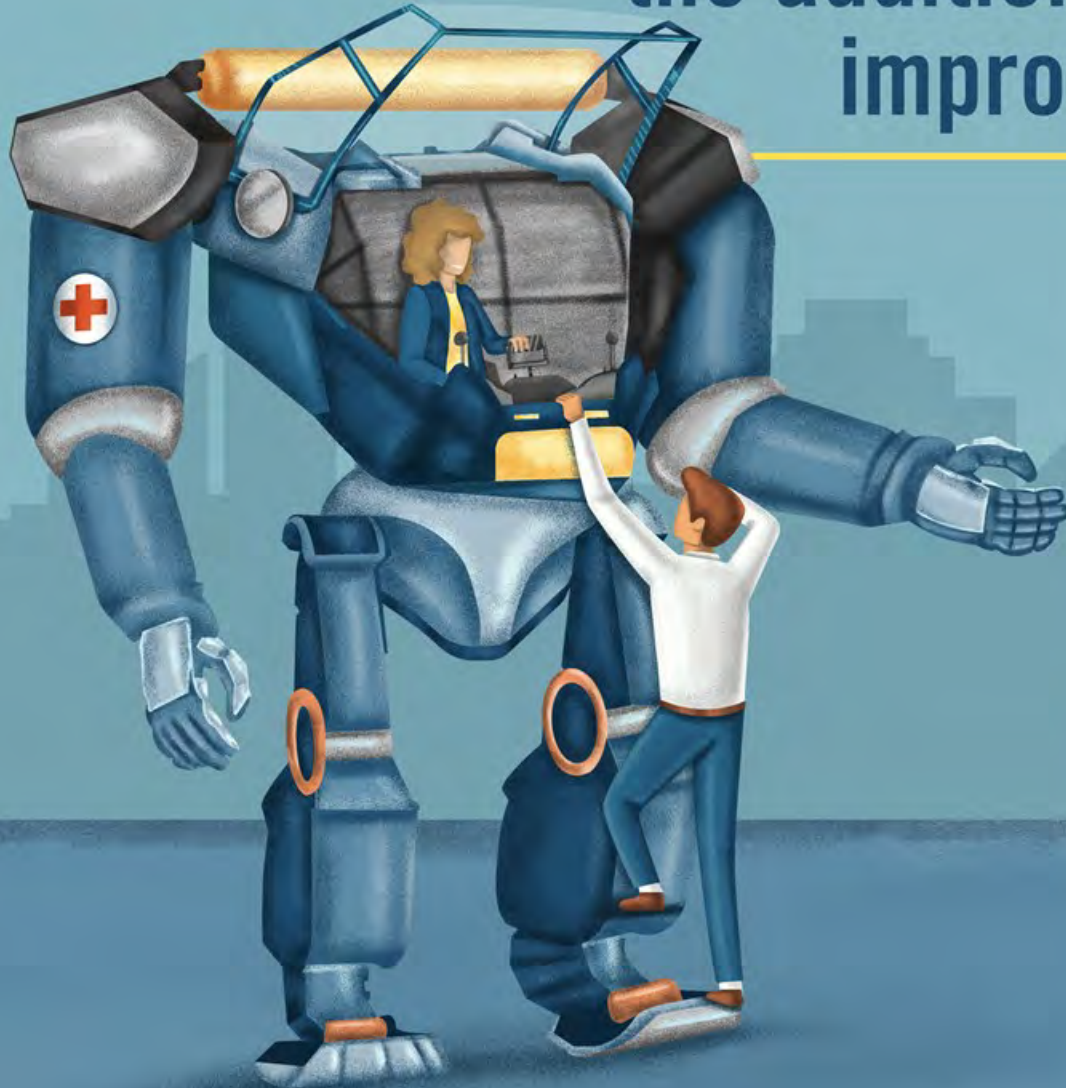
**Boiling Points**  
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“Better integration with the [Buyer] and the addition of [the Seller] will substantially improve [the Buyer]’s leverage.”

- Buyer’s Consultant

In re Evanston Northwestern Healthcare Corp.,  
Opinion of the Commission, at 16 (Aug 6, 2007)



LEVERAGE, CLOUT, OR BARGAINING POWER

Boiling Points  
Dechert LLP



**A benefit of the merger  
is the “enhancement  
of collective bargaining  
power with third-party payors.”**

**- Hospital’s Executive**

Darren S. Tucker, A Survey of Evidence Leading to  
a Second Request, 78 Antitrust L.J. 591, 599 n.20 (2013)  
(quoting document from FTC investigation)



**LEVERAGE, CLOUT, OR BARGAINING POWER**

**Boiling Points**  
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The merger will “strengthen negotiation capability with managed care companies through merged entities.”

- Buyer’s Board of Directors

In re Evanston Northwestern Healthcare Corp.,  
Opinion of the Commission, at 15 (Aug 6, 2007)



LEVERAGE, CLOUT, OR BARGAINING POWER

Boiling Points  
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**The acquisition will provide “the clout of the entire network.”**

**- Seller’s Executive to Seller’s CFO**

St. Alphonsus Medical Center – Nampa, Inc., v. St. Luke’s Health Sys. Ltd., Findings of Fact and Conclusions of Law, at 22 (Jan. 24, 2014)

“[Buyer-Seller] partnership  
would have a lot of  
negotiating clout.”

- Presentation to Seller’s Board

FTC v. ProMedica Health Sys., Inc.,  
Post-Trial Findings of Fact and Conclusions of Law,  
at 2 (Sept. 20, 2011)



LEVERAGE, CLOUT, OR BARGAINING POWER



**“[Buyer] will have complete control of 100% of the industrial flooded reserve power markets.”**

**- Seller’s CEO,  
in email to Seller’s  
Management**

In re Polypore Int’l, Inc.,  
Post-Trial Findings of Fact,  
at 123 (July 17, 2009)

**CONTROL**

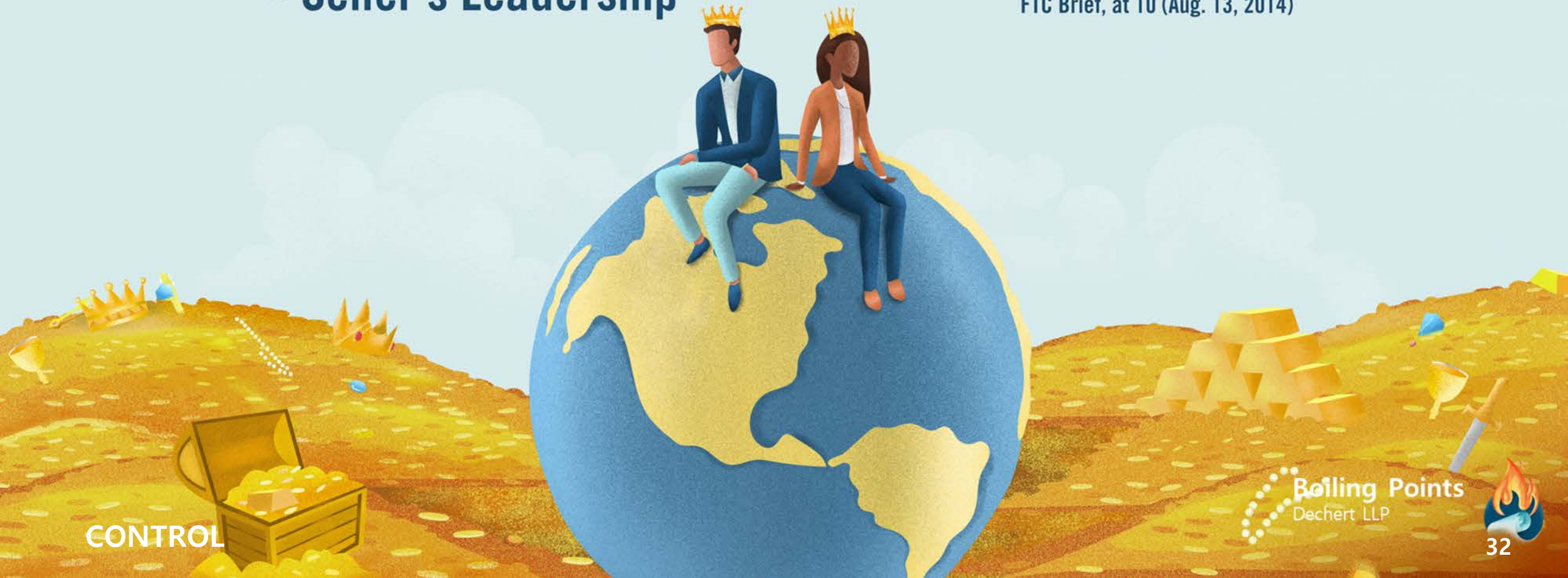
**Boiling Points**  
Dechert LLP



**“Fundamental Reasons” in support of deal  
include “control market share” and  
“one competit[or] compared to two.”**

**- Seller’s Leadership**

FTC v. St. Luke’s Health Sys.,  
FTC Brief, at 10 (Aug. 13, 2014)



**CONTROL**





**DESCRIBING THE  
SELLER**

**Boiling Points**  
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**“Eliminate primary competitor,  
thereby reducing comparative  
pricing pressure.”**

**- Buyer’s Co-founder**

U.S. v. Bazaarvoice, Inc., DOJ Opening Statement, at 2  
(Sept. 23, 2013)



**PRIMARY COMPETITOR**

# Merger “would take away [our] main competitor.”

- Seller’s Executive

FTC v. Wilhelmsen,  
FTC Brief, at 2 (May 8, 2018)



PRIMARY COMPETITOR

Boiling Points  
Dechert LLP





**Buyer's management  
told sales team to  
“embrace being the gorilla”  
and boasted it had acquired  
the “#2 competitor.”**

**- Buyer**

*In the Matter of Axion and Viewu.,  
Complaint, at 6-7 (Jan. 3, 2020)*

**PRIMARY COMPETITOR**

**The Seller would be the only  
“possible significant threat”  
absent the transaction.**

---

**- Medical Device Company’s  
Board of Directors**

Darren S. Tucker, *A Survey of Evidence Leading  
to a Second Request*, 78 Antitrust L.J. 591, 599 n.20 (2013)  
(quoting document from FTC investigation)



“I remember you said to me a long time (6 months ago): ‘we can just buy them’ when I said to you that [target] is the company I fear most. That was prescient! :)”

- Buyer



State of New York v. Facebook, Inc.,  
Complaint, at 25 (Dec. 9, 2020)

SIGNIFICANT THREAT

Boiling Points  
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38

**“I remember your internal post about how [the target] was our threat and not [other company]. You were basically right. One thing about startups though is you can often acquire them.”**

**- Buyer’s CEO**

FTC v. Facebook, Inc., Complaint, at 5 (Dec. 9, 2020)

**SIGNIFICANT THREAT**

**Boiling Points**  
Dechert LLP



**Seller was “clearly, on their own or owned by a competitor going to create some threat to our important US debit business” and purchasing Seller would be an “insurance policy to protect our debit biz in the US.”**

**- Buyer’s CEO**

U.S. v. Visa, Complaint, at 4-5 (Nov. 5, 2020)



**SIGNIFICANT THREAT**

**Boiling Points**  
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“I’m pleased to announce that [Seller] will merge with [Buyer]... I know this may be a shock to many of you, as [Buyer] has been our most fierce competitor.”

- Seller’s CEO

In re Aspen Tech., Inc.,  
Pretrial Brief, at 7 (May 5, 2004)



FIERCE COMPETITOR



Case: 13-10001  
 Date Filed: 11/23/13  
 Page: 10 of 10

U.S. v. Bazaarvoice, Inc.,  
 U.S. Opening Statement, at 63 (Sept. 23, 2013)

... I believe that the marketplace does not desire the competition because they value reach at scale and if we can provide that in one place we will derive a financial benefit from providing the efficiency to the marketplace.

\*\*\*

Here is a list of other potential benefits from a combination:

1. No meaningful direct competitor. Shortened sales cycles, less pricing dilution.
2. Dramatic increase in reach and overall market share making future competition extremely difficult and will increase switching costs.

\*\*\*

**7. Help us to focus 100% on our strategy without the whipsaw effect of reacting to a competitor that will only be focused on disrupting our lead position as the market is not likely to support two players.**

DISRUPTIVE COMPETITOR



U.S. v. Bazaarvoice, Inc.,  
U.S. Opening Statement,  
at 63 (Sept. 23, 2013)





**“[Seller] is a ‘strategic’ play on [Buyer’s] part and not based on current financials but the prospect of taking [Buyer’s] most dangerous competitor out of play.”**

**- Email to Seller’s CEO**

In re Polypore Int’l, Inc.,  
Post-Trial Findings of Fact,  
at 121 (July 17, 2009)

**DANGEROUS COMPETITOR**

**Boiling Points**  
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The merger was an opportunity to “tak[e] out [Buyer’s] only competitor, who... suppress[ed] [Buyer’s] price points by as much as 15%.”

- Buyer’s CEO

U.S. v. Bazaarvoice, Inc., Complaint, at 3 (Jan. 10, 2013)

ONLY COMPETITOR



The seller was  
“the only competitor  
they worry about.”

- Email among  
Technology Company’s  
Senior Executives

Darren S. Tucker, *A Survey of Evidence Leading to a Second Request*, 78 Antitrust L.J. 591, 599 n.20 (2013)  
(quoting document from FTC investigation)



ONLY COMPETITOR

**“Only two options. If this deal is approved that will dwindle to one. For companies wanting savings, new terms, or additional incentives now is the time to ink those details.”**

**- Email to Office Depot Customer**

FTC v. Staples, Inc., FTC Closing Argument, at 56 (Apr. 25, 2016)



**ONLY COMPETITOR**

**Boiling Points**  
Dechert LLP



**“The businesses are nascent but the networks are established, the brands are already meaningful and if they grow to a large scale they could be very disruptive to us. These entrepreneurs don’t want to sell...but at a high enough price -- like \$500m or \$1b -- they’d have to consider it.”**

**- Buyer’s CEO**

FTC v. Facebook, Inc.,  
Complaint, at 26-27 (Dec. 9, 2020)



**Recent acquisition “[p]revents probably the only company which could have grown into the next [leader] on mobile. . . . [10]% of our market cap is worth that.”**

**- Instant Message from Buyer’s Manager**

FTC v. Facebook, Inc., Complaint, at 37 (Dec. 9, 2020)

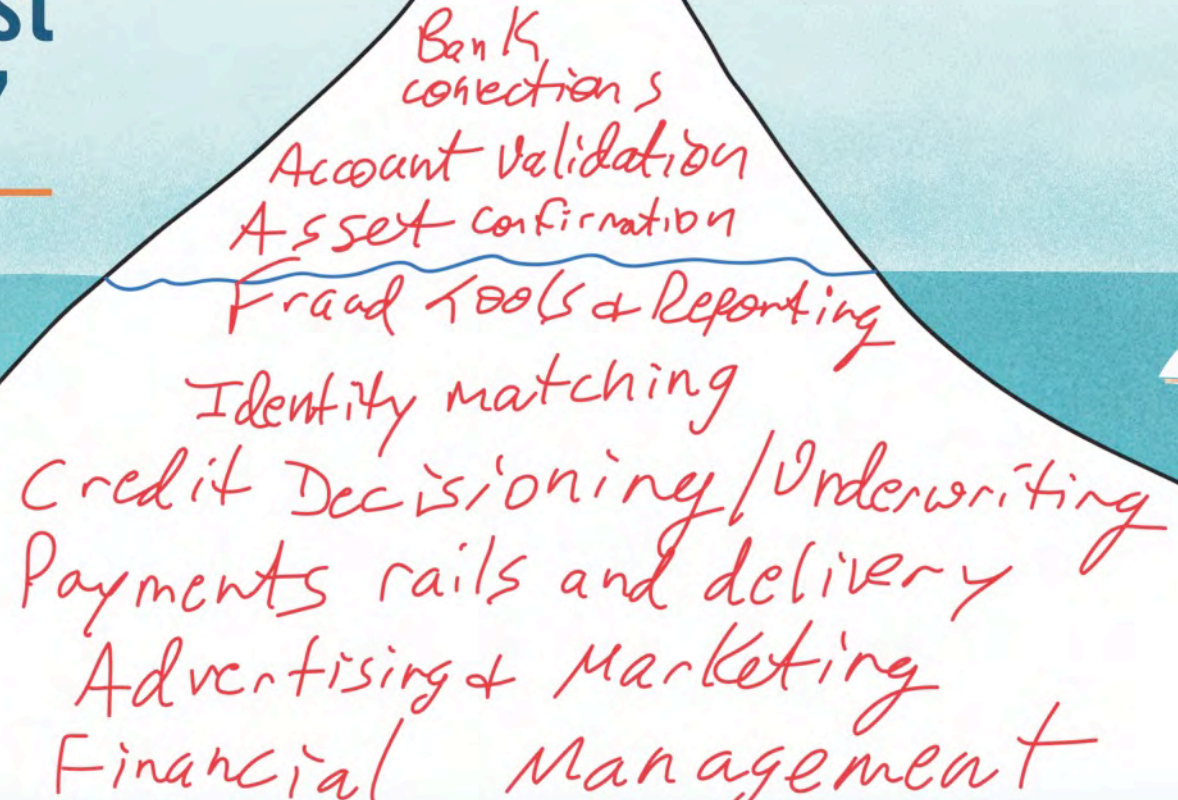




**Buyer called Seller  
an “island ‘volcano’ whose  
current capabilities are just  
‘the tip above the water.’”**

**- Buyer’s VP of Corporate  
Development**

U.S. v. Visa, Complaint, at 4 (Nov. 5, 2020)



Bank  
collections  
Account validation  
Asset confirmation  
Fraud tools & Reporting  
Identity matching  
Credit Decisioning/Underwriting  
Payments rails and delivery  
Advertising & Marketing  
Financial Management

A horizontal graphic element with a ruler-like scale at the bottom. On the right side, there is a circular icon containing a stylized flame above a rolled-up document. The background is a solid teal color.

# DEAL RATIONALE

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Acquisition enabled buyer to “effectively dominate” the market, and it would not be “require[d] to do much work to maintain or extend” that dominance.

- Buyer Product Manager

FTC v. Facebook, Inc.,  
Complaint, at 29-30 (Dec. 9, 2020)

DOMINANT



Boiling Points  
Dechert LLP



**“By buying them we will greatly enhance our comps over the next few years and will avoid nasty price wars in Portland (both Oregon and Maine); Boulder, Nashville, and several other cities which will harm our gross margins and profitability.”**

**- Buyer's CEO**

FTC v. Whole Foods Mkt., Inc., FTC's Corrected Brief  
on Its Motion for Preliminary Injunction,  
at 1 (Aug. 1, 2007)



Boiling Points  
Dechert LLP



Potential acquisition  
would be “taking out  
a strong competitor vs.  
continued competition and  
price pressure in market.”

- Seller’s Chief Strategy Officer

U.S. v. Sabre,  
Complaint, at 17 (Aug. 20, 2019)



The merger will stop  
“tactical ‘knife-fighting’  
over competitive deals.”

- Buyer’s Co-Founder

U.S. v. Bazaarvoice, Inc.,  
Complaint, at 3 (Jan. 10, 2013)



**Buyer was “not interested” in continuing price competition or in “lead[ing] a new round . . . of value destruction.”**

**- Buyer’s CFO**

In the Matter of Edgewell Pers. Care Co. and Harry’s Inc.,  
Complaint, at 3 (Feb. 3, 2020)





**Under the “Rule of three,”  
acquisition of #4 player has  
“potential to reduce price competition.”**

**- Buyer’s Deal Presentation**

State of New York v. Deutsche Telekom AG.,  
Order, at 133 (Feb. 11, 2020)

**REDUCE COMPETITION**

**Boiling Points**  
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# The acquisition would “temper” sale of seller’s technology.

---

## - Buyer’s Executive

U.S. v. Deere & Co., Complaint, at 3 (Aug. 31, 2016)





“A merger would accomplish the following:  
a. Reduce competition.”

- Report by Joint Task Force of Merging Parties

FTC v. Univ. Health Inc.,  
938 F.2d 1206,1220 n. 27 (11th Cir. 1991)

REDUCE COMPETITION

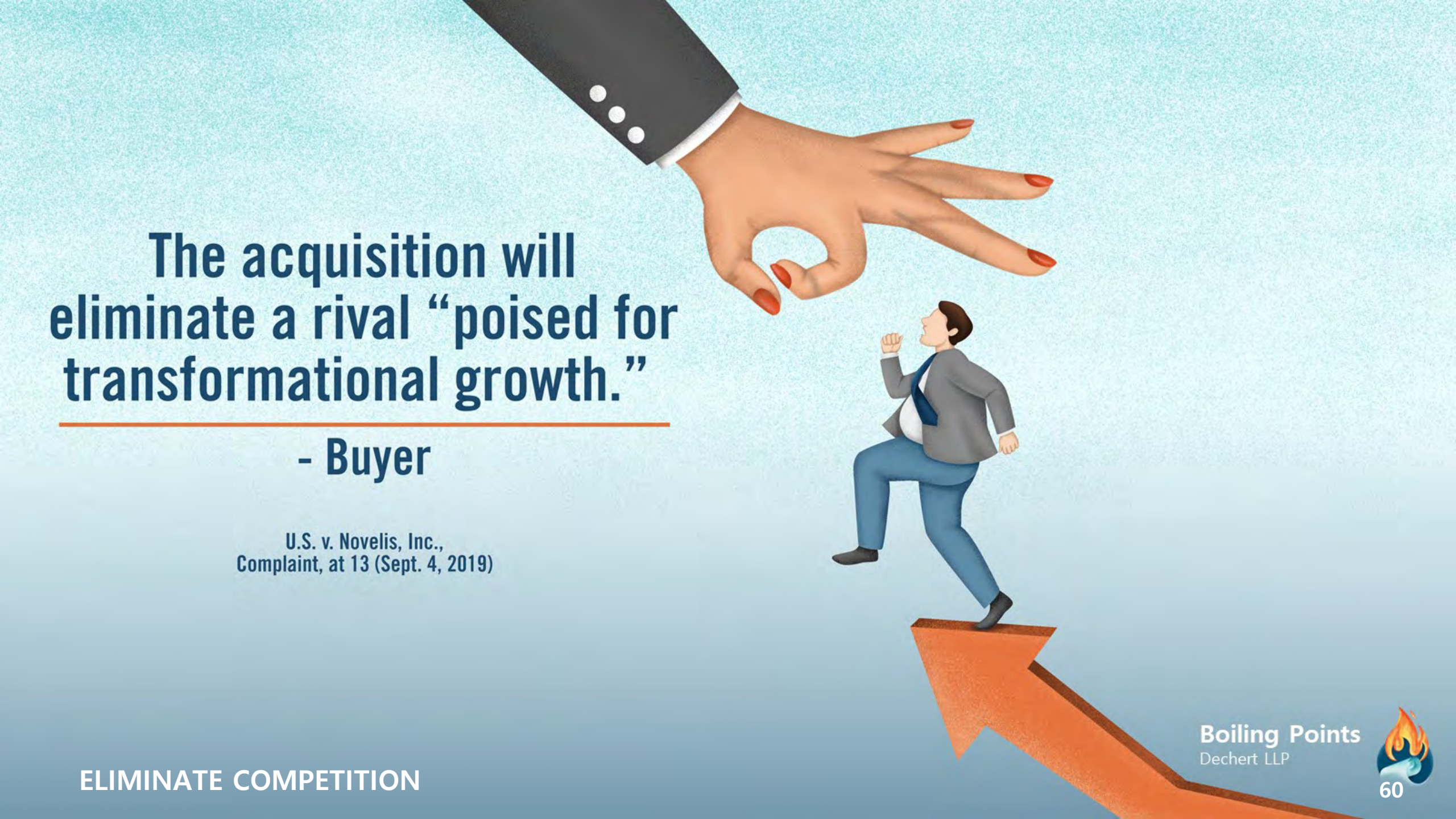
**“Elimination of competition will enhance that success, perhaps greatly.”**

**- Seller’s Chairman**

U.S. v. Microsoft,  
Complaint, at 3 (Apr. 27, 1995)



**ELIMINATE COMPETITION**



**The acquisition will  
eliminate a rival “poised for  
transformational growth.”**

**- Buyer**

U.S. v. Novelis, Inc.,  
Complaint, at 13 (Sept. 4, 2019)

**ELIMINATE COMPETITION**

**Boiling Points**  
Dechert LLP



**“Furthermore we eliminate forever the possibility of [competitors] using their brand equity to launch a competing national natural/organic food chain to rival us.”**

**- Buyer’s CEO**

FTC v. Whole Foods Mkt., Inc.,  
FTC’s Corrected Brief on Its Motion for  
Preliminary Injunction, at 1 (Aug. 1, 2007)



**ELIMINATE COMPETITION**

**Boiling Points**  
Dechert LLP



**“The big [value created  
by the acquisition]...  
is removal of the  
competitive threat.”**

**- Buyer’s CEO**

FTC v. Procter & Gamble Co.,  
Complaint, at 2 (Dec. 8, 2020)



**ELIMINATE COMPETITION**

**Boiling Points**  
Dechert LLP





**Seller had been a customer's  
"Trojan horse to f\*\*\* us...  
[customer's] bill is going up  
big time."**

**- Buyer's Senior VP**

U.S. v. Sabre,  
Complaint, at 4 (Aug. 20, 2019)



**ELIMINATE COMPETITION**

**Boiling Points**  
Dechert LLP



# A merger affords the opportunity to “get the rivalry behind us.”

- Buyer’s CEO

In re Phoebe Putney Health System, Inc.,  
Complaint, at 3 (Apr. 19, 2011)



ELIMINATE COMPETITION

Boiling Points  
Dechert LLP





**“We have to continue strategically on the path to essentiality and the Seller is the key... We become the path to any new payor that wants to serve Philadelphia.”**

**- Buyer's CEO**

U.S. v. Thomas Jefferson University,  
Complaint, at 27 (Aug. 20, 2019)



**ELIMINATE COMPETITION**

**Boiling Points**  
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“[W]e should buy them and own this leverage point . . . .”

- Buyer Executive

State of New York v. Facebook, Inc.,  
Complaint, at 26 (Dec. 9, 2020)



FORECLOSE COMPETITORS

Boiling Points  
Dechert LLP



When asked whether a purpose of the acquisition was to “neutralize a potential competitor,” the CEO answered that it was.

- Buyer’s CEO

State of New York v. Facebook, Inc.,  
Complaint, at 29-30 (Dec. 9, 2020)





Merger “benefits” include  
no longer “beating  
each other up.”

---

- Buyer

In re The J.M. Smucker Co.,  
Complaint, at 12 (Mar. 5, 2018)

STOP FIGHTING

Boiling Points  
Dechert LLP



“We are so serious about acquiring new customers that we bought the [company] that has been kicking our butts.”

- Buyer

In re CDK Global and Auto/Mate, Complaint, at 11 (Mar. 19, 2018)

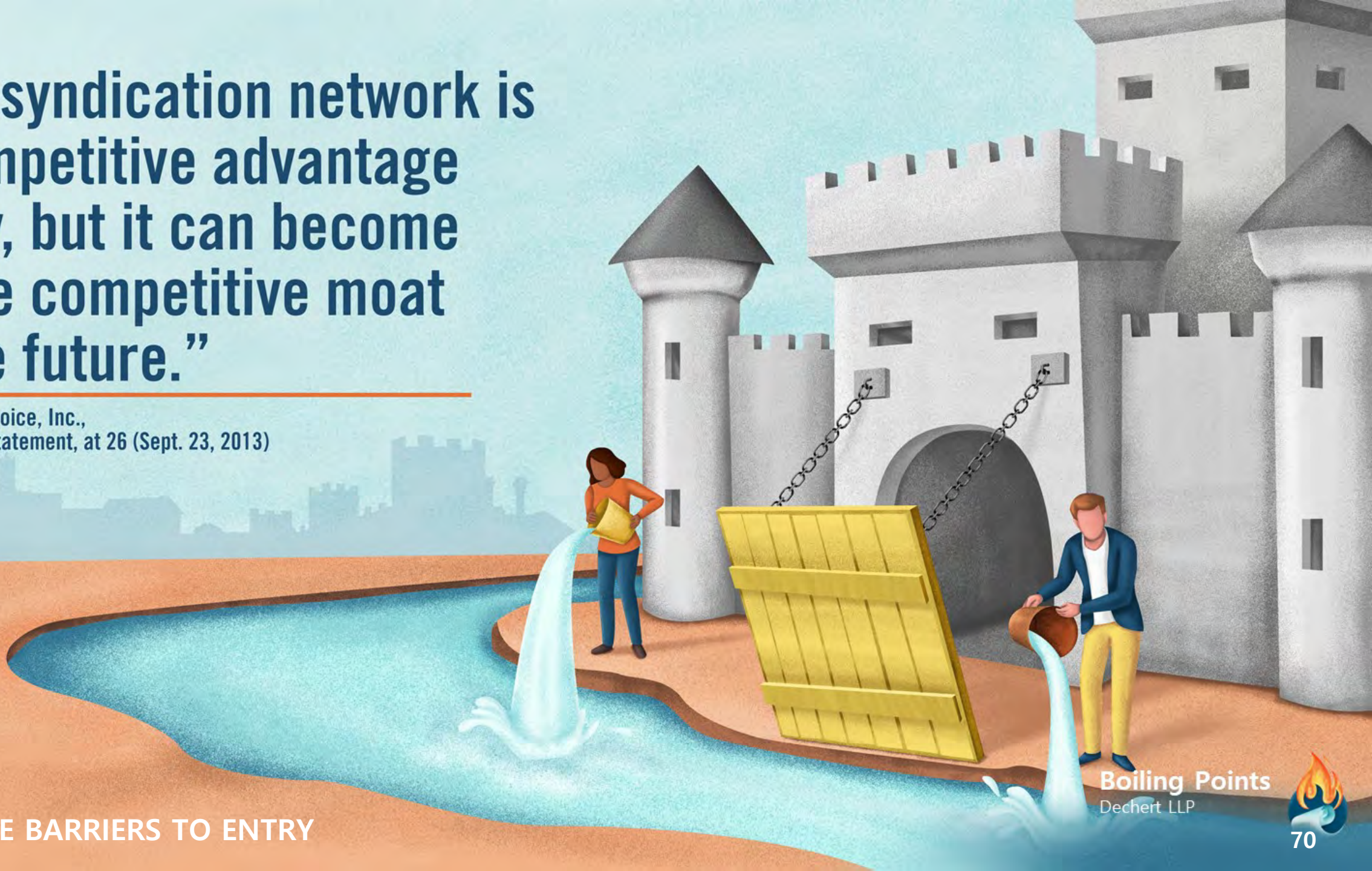


STOP FIGHTING

Boiling Points  
Dechert LLP

**“Our syndication network is a competitive advantage today, but it can become a true competitive moat in the future.”**

U.S. v. Bazaarvoice, Inc.,  
DOJ Opening Statement, at 26 (Sept. 23, 2013)



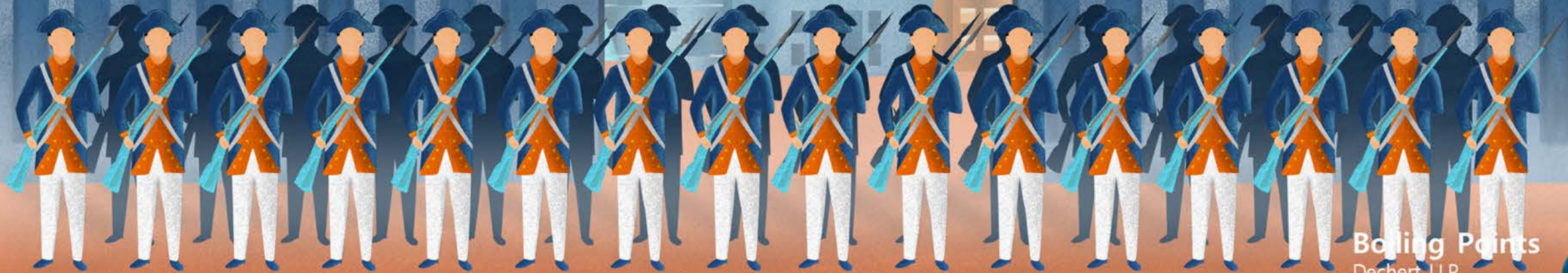
**CREATE BARRIERS TO ENTRY**

**Boiling Points**  
Dechert LLP



“Creates significant competitive barriers to entry and protects our flank.”

U.S. v. Bazaarvoice, Inc.,  
DOJ Opening Statement,  
at 65 (Sept. 23, 2013)



CREATE BARRIERS TO ENTRY

Boiling Points  
Dechert LLP



# The merger will “block entry by competitors.”

---

- Buyer’s Executives, in memo to Board of Directors

# Benefits to the merger: “Create significant competitive barriers to entry.”

---

- Buyer’s CFO



U.S. v. Bazaarvoice, Inc., Complaint, at 4 (Jan. 10, 2013)



The merger would “further increase... switching costs” and “deepen [the buyer’s] protective moat.”

- Buyer’s Due Diligence Memo

U.S. v. Bazaarvoice, Inc., Complaint, at 19 (Jan. 10, 2013)

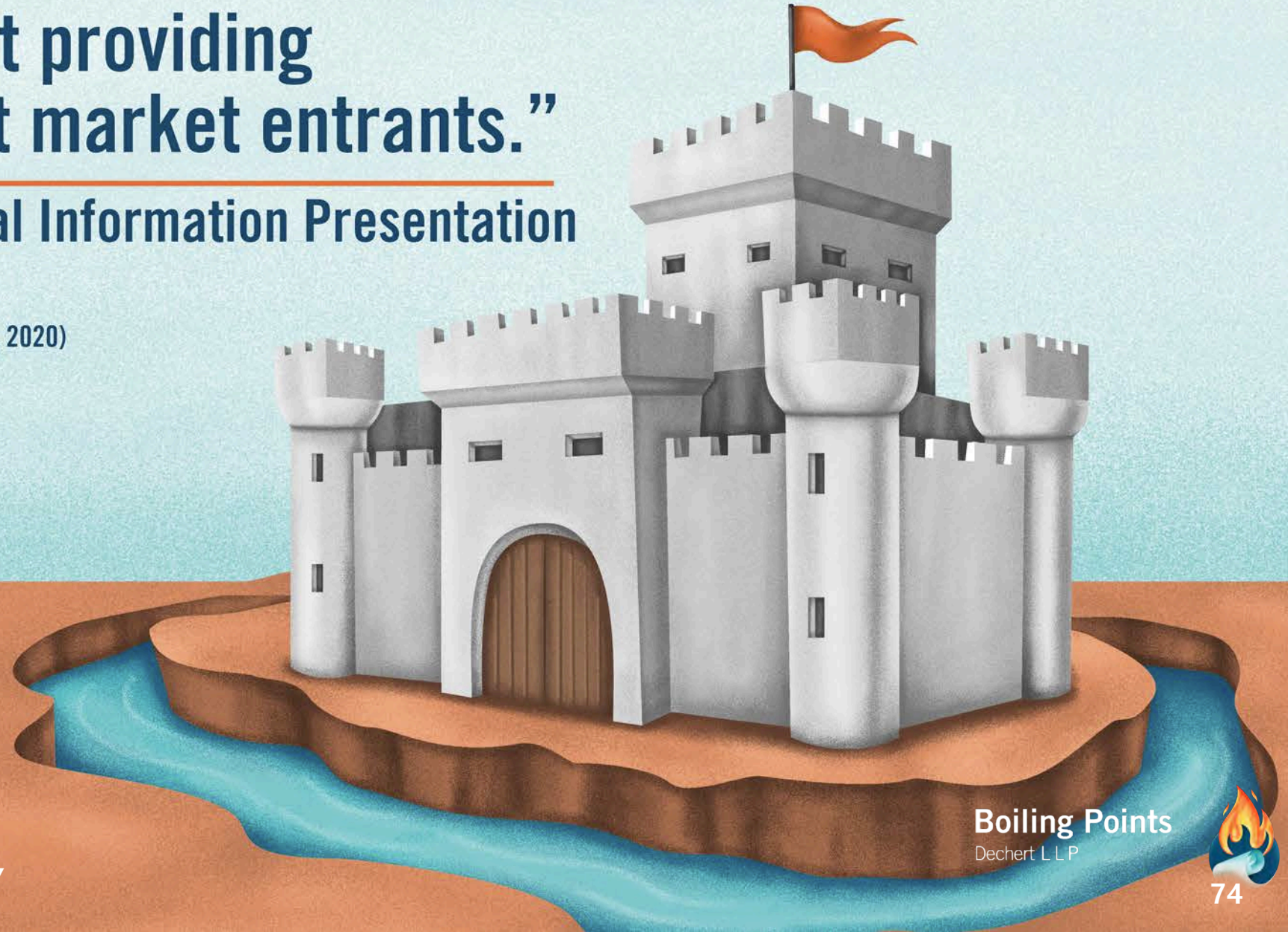


CREATE BARRIERS TO ENTRY

**The target’s “platform offers a wide moat providing protection against market entrants.”**

**- Seller, Draft Confidential Information Presentation**

FTC v. Costar Grp., Inc., Complaint, at 11 (Nov. 30, 2020)



**CREATE BARRIERS TO ENTRY**

**Boiling Points**  
Dechert LLP



# “PDM Merger Objectives Brainstorm Results... (1) Create barriers to entry as they can be built.”

- Seller’s Executive

In re Chicago Bridge & Iron Co., Proposed Findings of Fact and Conclusions of Law, at 106 (Feb. 14, 2003)



CREATE BARRIERS TO ENTRY

**“Preemptive defensive strategy that prevents them from being acquired by a larger competitor that could use their scale and reach to disrupt us.”**

---

U.S. v. Bazaarvoice, Inc., DOJ Opening Statement,  
at 54 (Sept. 23, 2013)

**DEFENSIVE MERGERS**

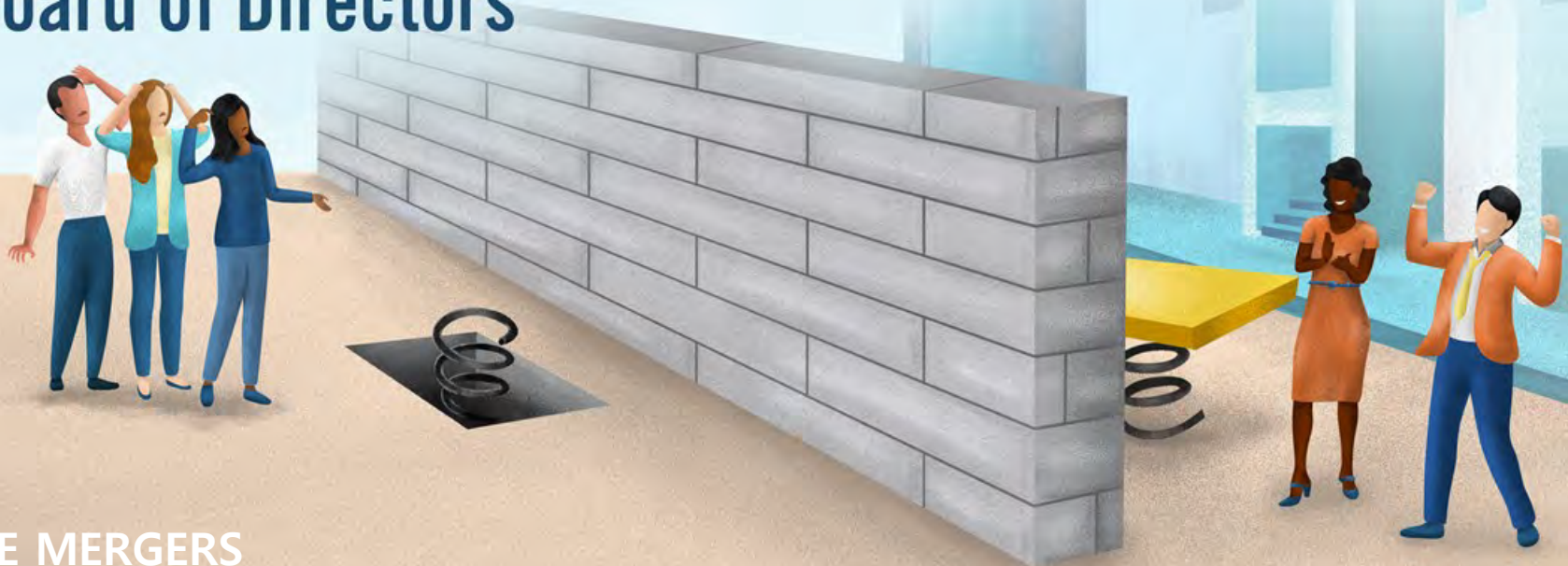
**Boiling Points**  
Dechert LLP

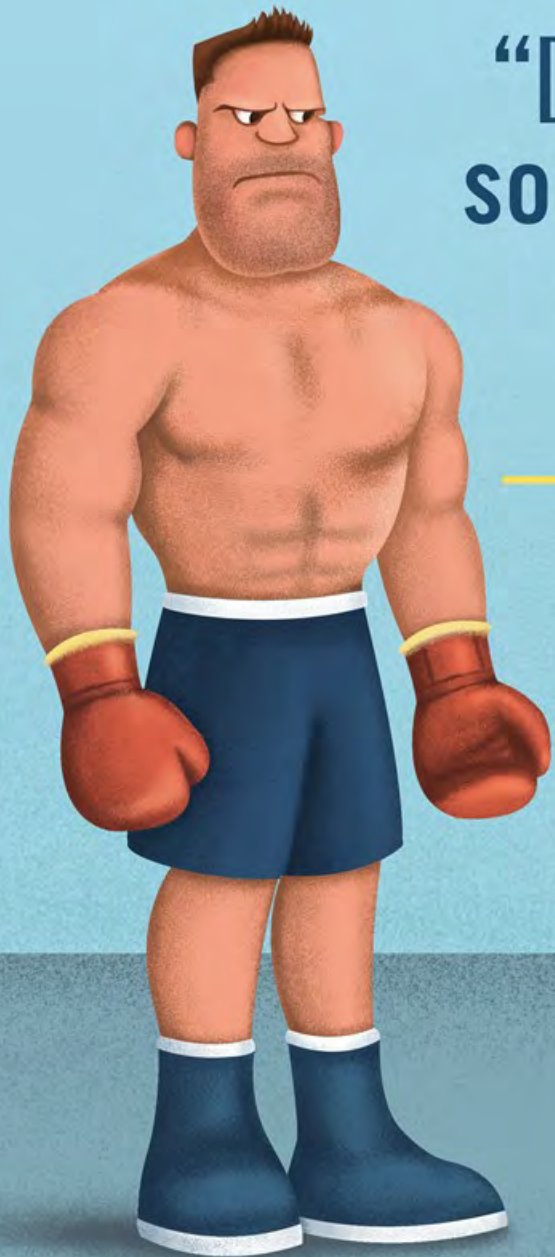


**“[Seller] is the only existing company that has the brand and number of stores to be a meaningful springboard for another player to get into this space. Eliminating them means eliminating this threat forever, or almost forever.”**

**- Buyer’s CEO to Board of Directors**

FTC v. Whole Foods Market, Inc.,  
548 F.3d 1028, 1045 (D.C. Cir. 2008)





“[The acquisition is] a blocking maneuver so that our largest competitor does not get acquired by a well-funded competitor to [Buyer].”

- Buyer's Executive



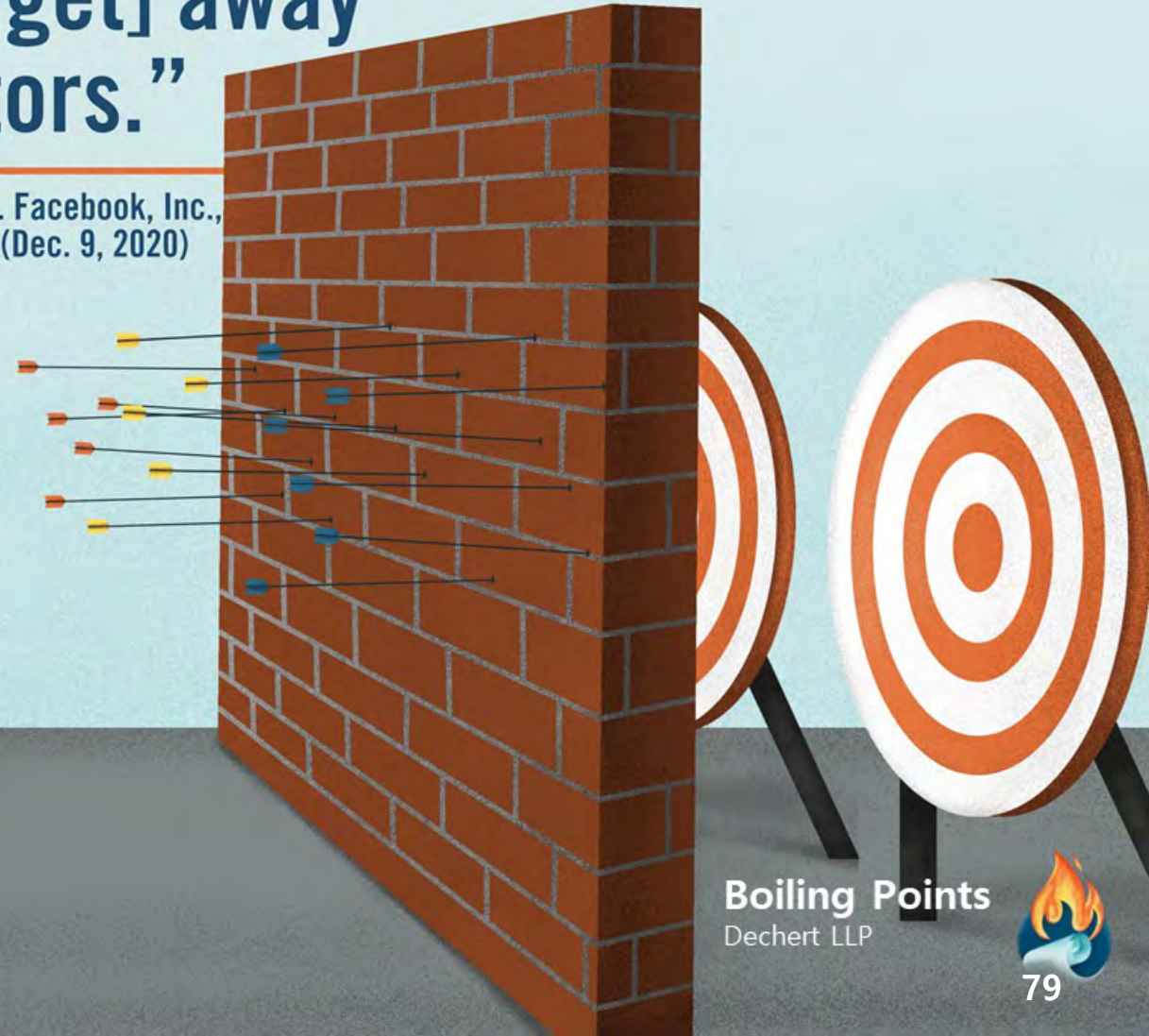
In re Aspen Tech., Inc., Pretrial Brief, at 32 (May 5, 2004)



# Part of acquisition rationale: “Competitive defense – We could keep [target] away from competitors.”

- Buyer

State of New York v. Facebook, Inc.,  
Complaint, at 50 (Dec. 9, 2020)



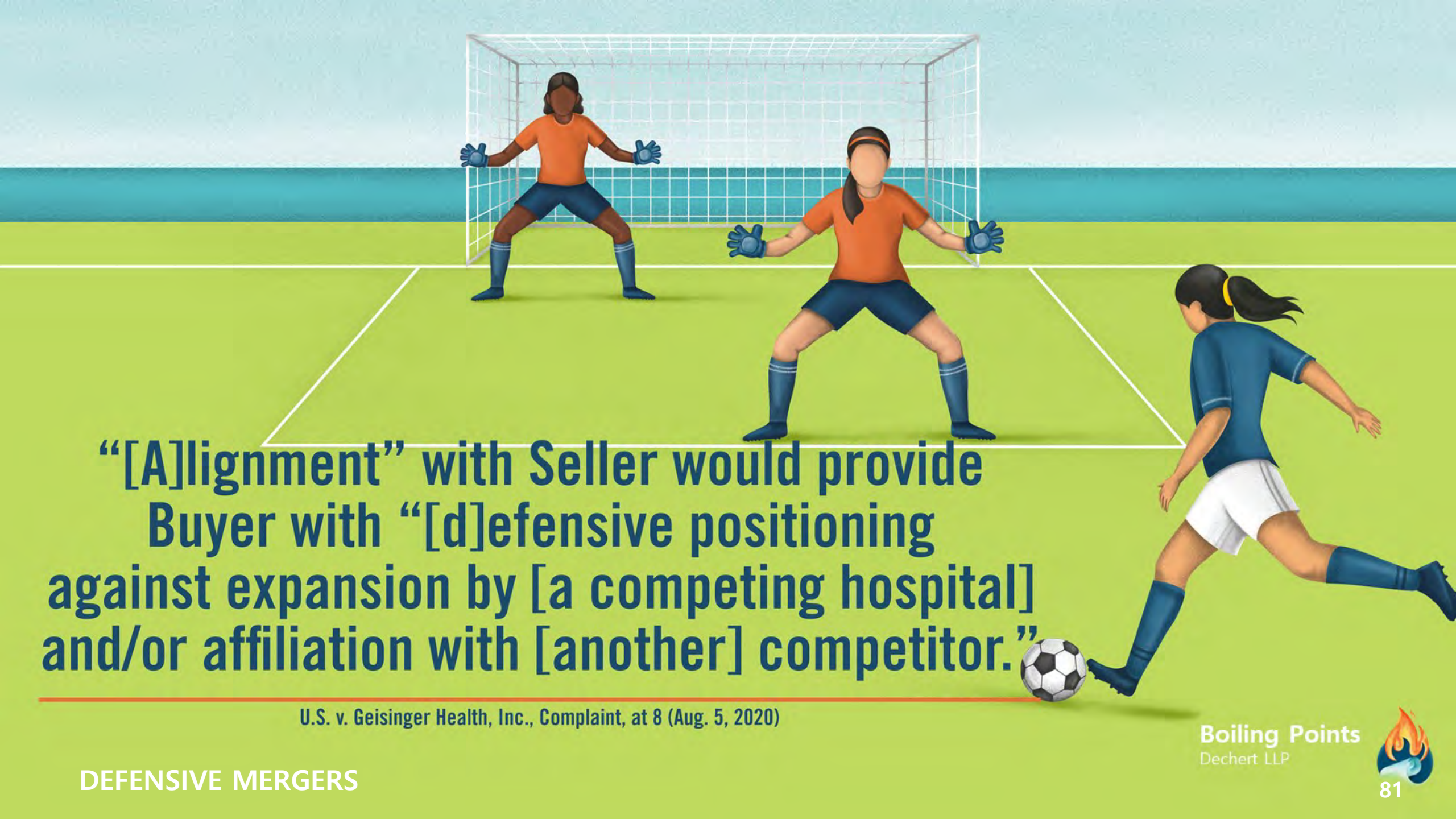
The acquisition is “a smart defensive move to protect the hospital’s market share.”

- Buyer’s CEO

In re Reading Health Sys., Complaint, at 8 (Nov. 16, 2012)





An illustration of a soccer field. Two goalkeepers in orange jerseys and blue shorts are positioned in front of a goal. A player in a blue jersey and white shorts is running towards the goal, about to kick a soccer ball. The background is a light blue sky and a green field.

**“[A]lignment” with Seller would provide Buyer with “[d]efensive positioning against expansion by [a competing hospital] and/or affiliation with [another] competitor.”**

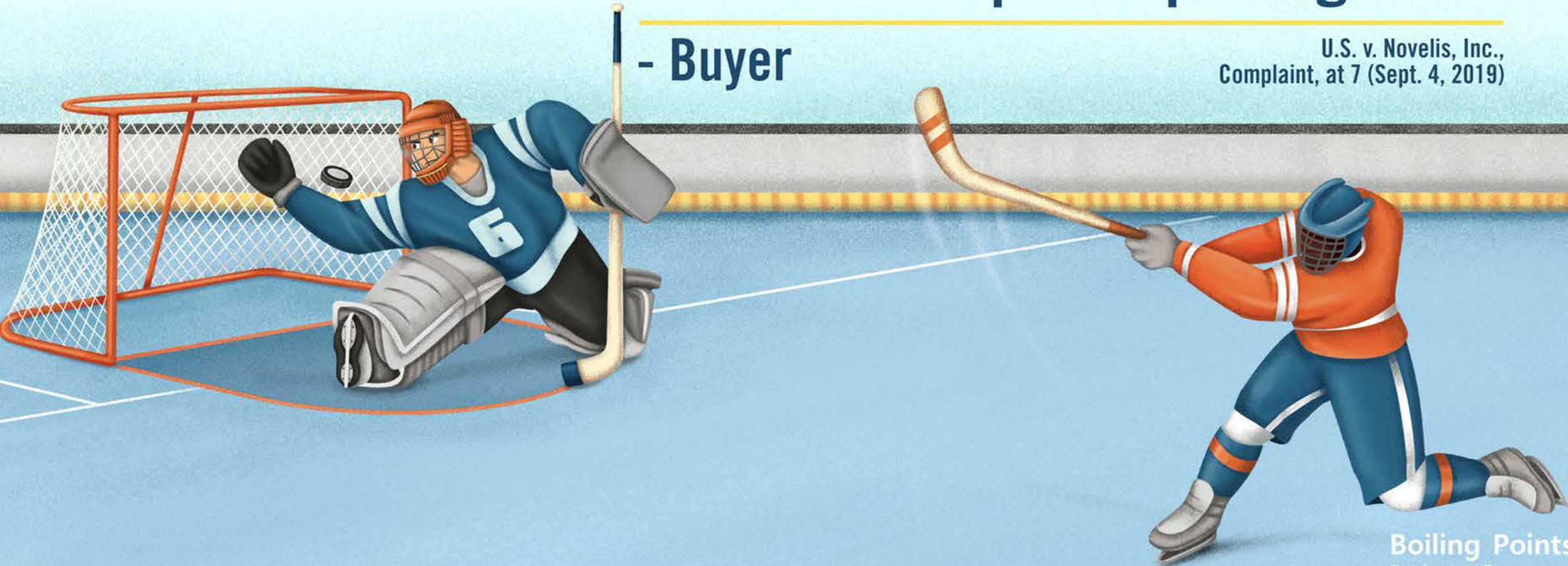
U.S. v. Geisinger Health, Inc., Complaint, at 8 (Aug. 5, 2020)



By acquiring the seller,  
the buyer sought to “[p]revent[] competitors  
from acquiring assets and driving  
less disciplined pricing.”

- Buyer

U.S. v. Novelis, Inc.,  
Complaint, at 7 (Sept. 4, 2019)



After the merger, the merged firm can  
“operate [its] pay-TV business as a ‘cash cow’  
while slowly pivoting to new models.”

- Buyer

U.S. v. AT&T, Inc., Complaint, at 3 (Nov. 20, 2017)



CASH COW



Boiling Points  
Dechert LLP





“A big concern expressed is that we are going to spend 5-10% of our market cap every couple years to shore up our position.... I hate the word ‘land grab’ but I think that is the best convincing argument [to justify the recent acquisition] and we should own that.”

- Buyer's Executive

FTC v. Facebook, Inc.,  
Complaint, at 37 (Dec 9, 2020)



# **SYNERGIES AND VALUATION**



**Boiling Points**  
Dechert LLP

**“Synergies from a merger amount to US \$40-million per year from loss of competition, rationalization of R&D efforts.”**

**- Buyer’s Executive**

In re Aspen Tech., Inc., Pretrial Brief,  
at 32 (May 5, 2004)



**LOSS-OF-COMPETITION SYNERGY**

**Boiling Points**  
Dechert LLP



**“[N]ot losing  
strategic position  
in [business line] is  
worth a lot of money.”**

**- Buyer Executive**

FTC v. Facebook, Inc.,  
Complaint, at 27 (Dec. 9, 2020)

**PAY A PREMIUM**

**Bolling Points**  
Dechert LLP



**“They have acquired momentum and it will be very difficult to stop them unless the BOARD will approve its purchase at any price (it will be more now than a year ago).”**

**- Buyer’s CEO**

In re Polypore Int’l, Inc.,  
Post-Trial Findings of Fact,  
at 98 (July 17, 2009)



**PAY A PREMIUM**

**Boiling Points**  
Dechert LLP





**“[L]et’s be realistic.  
Employing physicians is not  
achieving better cost,  
it’s achieving better profit.”**

**- Buyer’s Board Member**

FTC v. St. Luke’s Health System, Ltd., Complaint, at 4 (Mar. 26, 2013)



**NO COST SAVING**

**Boiling Points**  
Dechert LLP



**Benefits to the acquisition:**  
“eliminate feature driven one-upmanship  
and tactical competition... eliminate  
the cost in time and money to take  
[the seller’s] accounts.”

---

**- Buyer’s CFO**

U.S. v. Bazaarvoice, Inc.,  
Complaint, at 4 (Jan. 10, 2013)





# **PRICING AND FINANCIAL ANALYSIS**



**Boiling Points**  
Dechert LLP



**“Funding for compensation increase[s]... is provided through higher hospital based reimbursement.”**

**- Buyer’s Internal Document**

St. Alphonsus Medical Center – Nampa, Inc., v. St. Luke’s Health Sys. Ltd.,  
Answer of St. Luke’s Health Sys., Ltd. To Government Plaintiffs’  
Complaint for Permanent Injunction, at 19 (Apr. 5, 2013)

**“St. Luke’s enters into an affiliation/partnership with a local health system with the express purpose to raise reimbursement rates to the level of our competitors.”**

**- Seller’s Internal Document**

FTC v. ProMedica Health Sys., Inc.,  
Initial Decision, at 45 (Dec. 12, 2011)

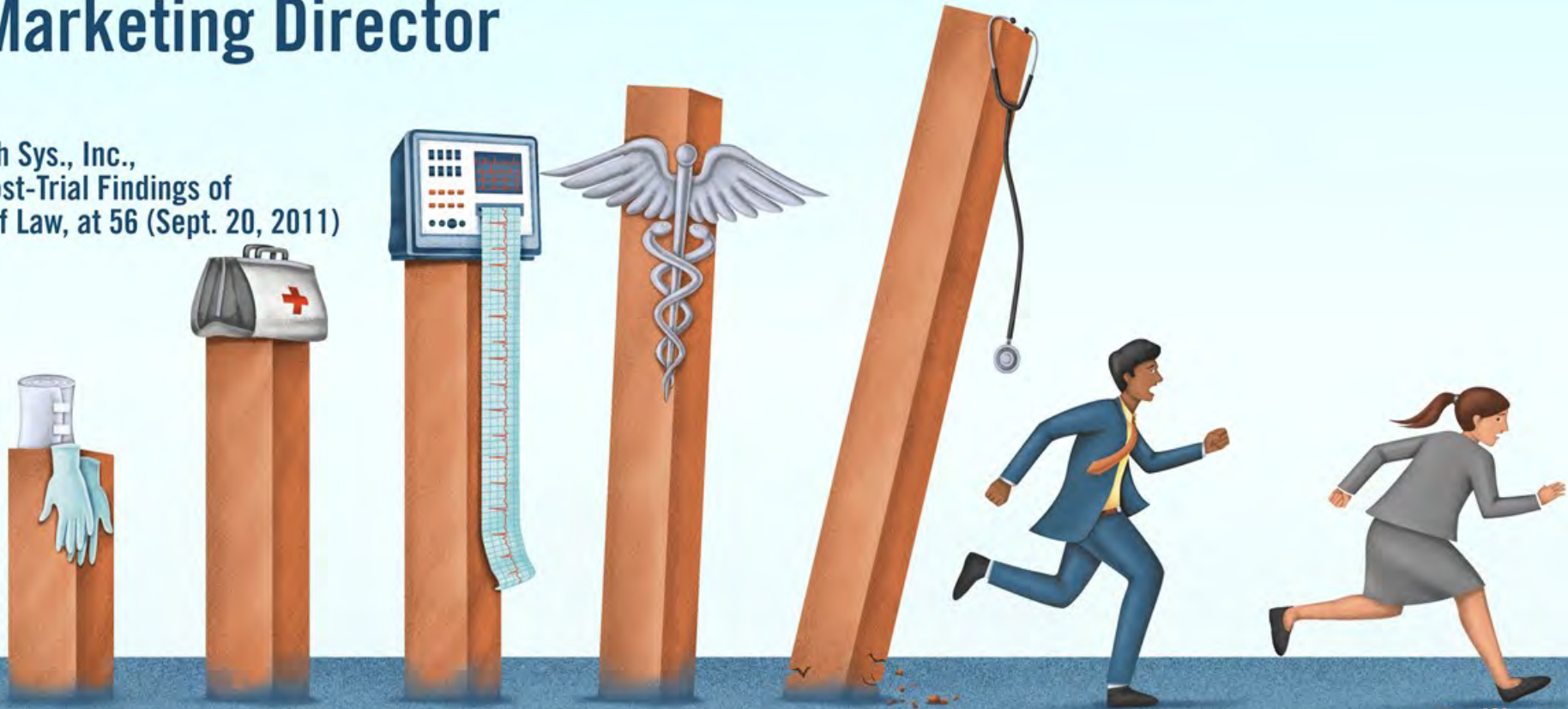


PROJECTING HIGHER PRICES

“[A]ffiliation could still stick it to employers,  
that is, to continue forcing high rates on  
employers and insurance companies.”

- Seller's Marketing Director

FTC v. ProMedica Health Sys., Inc.,  
Complaint Counsel's Post-Trial Findings of  
Fact and Conclusions of Law, at 56 (Sept. 20, 2011)



PROJECTING HIGHER PRICES

Boiling Points  
Dechert LLP



Buyer offers “incredible access to outstanding pricing on managed care agreements. Taking advantage of these strengths may not be the best thing for the community in the long run. Sure would make life much easier right now though.”

- Seller's CEO

FTC v. ProMedica Health Sys., Inc., Complaint Counsel's Post-Trial Findings of Fact and Conclusions of Law, at 53-54 (Sept. 20, 2011)



**“[Seller’s] affiliation with [Buyer] has the greatest potential for higher hospital rates.”**

**- Presentation to Seller’s Board of Directors**

FTC v. ProMedica Health Sys., Inc.,  
Complaint Counsel’s Post-Trial Findings of Fact  
and Conclusions of Law, at 56 (Sept. 20, 2011)





“[I]mplement price increase  
to non-contract customers on  
industrial product.”

- Buyer's Due Diligence Report

In re Polypore Int'l, Inc.,  
Opinion of the Commission,  
at 30 (Dec. 13, 2020)





I thought it was odd after the Max/Depot merger that global and large national organizations had basically only two options for office supplies. If this deal is approved that will dwindle to one

I thought it was odd after the Max/Depot merger that global and large national organizations had basically only two options for office supplies. If this deal is approved that will dwindle to one

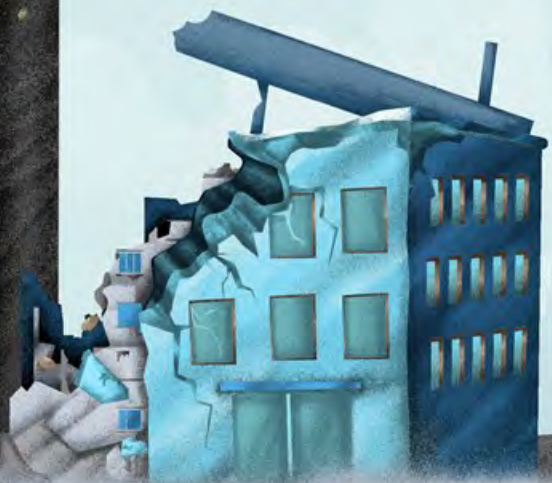
For companies wanting savings, new terms, or additional incentives now is the time to ink those details in a long term contract. with Depot

Kymberli Cutler  
Global Accounts Partnership (2016) Dept. 100  
Phone: 202-441-4200 ext. 2000

For companies wanting savings, new terms, or additional incentives now is the time to ink those details in a long term contract. with Depot.

## - Email to Seller's Customers

FTC v. Staples, Inc.,  
FTC Closing Argument Slides,  
at 56 (Apr. 25, 2016)



“The week of Dec 8th, the FTC is expected to approve the [acquisition], and it is my strong suggestion that [Redacted] consider any and all program offerings from [Buyer] beforehand.... will never get a more competitive offer than right now.

Over the last 90 days, I've presented five Fortune 300 organizations a program that offered an average of 18% YOY savings. Can we investigate our options for you... before time runs out on obtaining the most competitive offering available?”

- Email to Seller's Customers

FTC v. Staples, Inc.,  
FTC Closing Argument Slides,  
at 58 (Apr. 25, 2016)

PROJECTING HIGHER PRICES

Boiling Points  
Dechert LLP



“I am all for taking advantage of hospital based pricing.... It would be great to drop a couple of million more to our bottom line, if we think we can do it.”

- Buyer's CFO

State of Wash. v. St. Francis Health Sys.,  
Complaint, at 3 (Aug. 31, 2017)



A goal of the merger was to  
“[i]ntegrate with [Seller] and increase  
fares by 10% on combined businesses.”

- Presentation  
by Buyer's CEO

U.S. v. Twin America, LLC,  
Complaint, at 10 (Dec. 11, 2012)



PROJECTING HIGHER PRICES

Boiling Points  
Dechert LLP





**“Merger Objectives Brainstorm Results... Improve pricing to achieve margin growth from 12.5% to 17%.”**

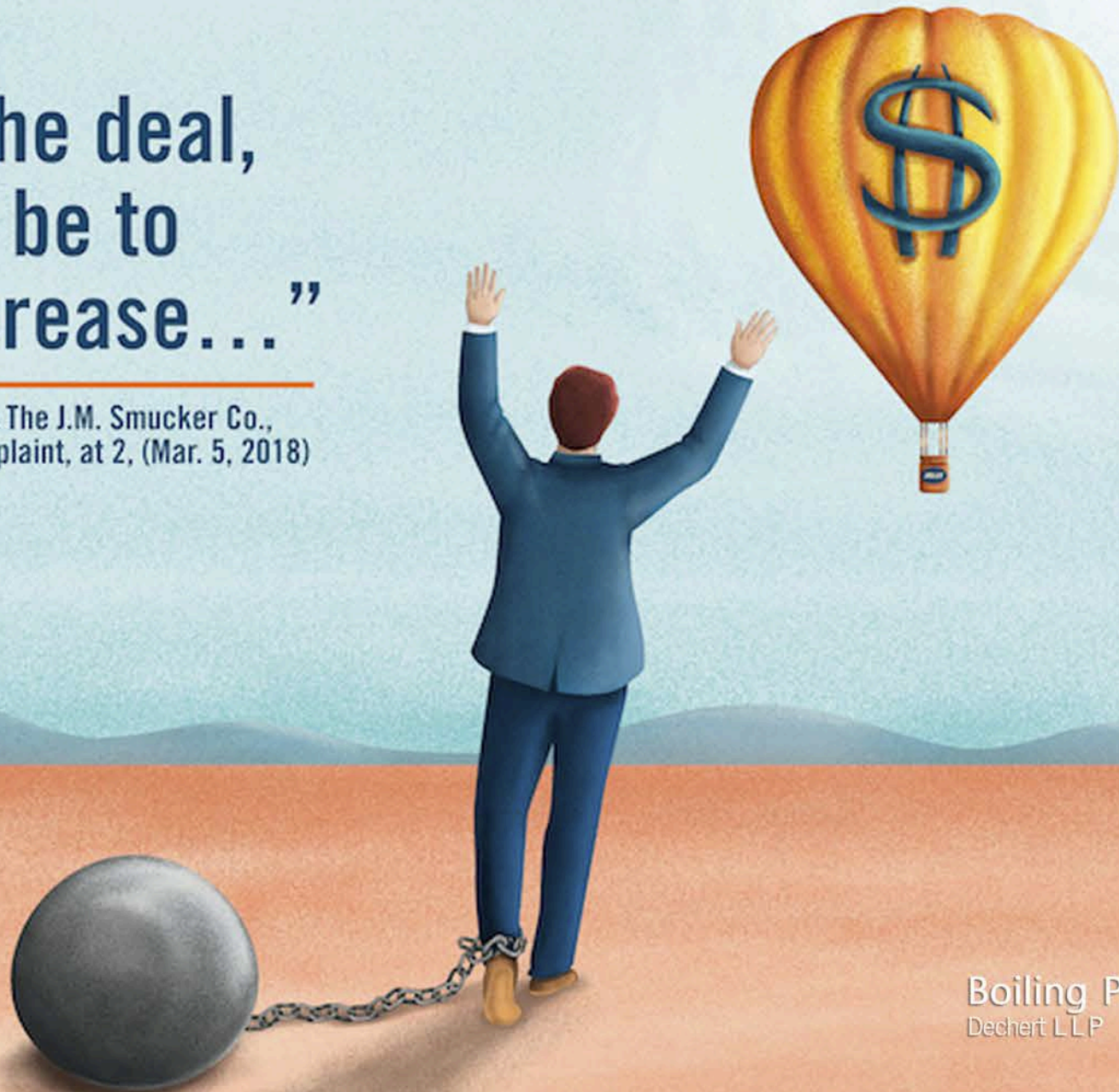
**- Seller’s Executive**

In re Chicago Bridge & Iron Co.,  
Proposed Findings of Fact and Conclusions of Law,  
at 106 (Feb. 14, 2003)

**“Once we close the deal,  
our plan would be to  
execute a price increase...”**

**- Buyer**

In re The J.M. Smucker Co.,  
Complaint, at 2, (Mar. 5, 2018)



**[A] potential merger  
“could increase our ability to  
charge far better prices and win  
across all segments.”**

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**- Statement of Seller’s Executive**

In the Matter of Wilhelmsen, Complaint, at 2 (Feb. 22, 2018)



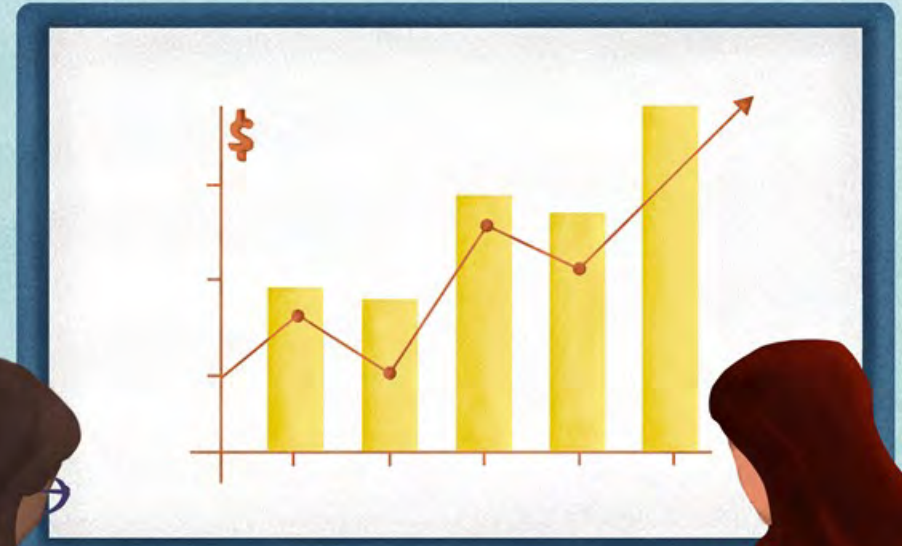
**PROJECTING HIGHER PRICES**



“Some \$24 million of revenue enhancements have been achieved – mostly via managed care renegotiations” and “none of this could have been achieved by either [Buyer] or [Seller]” alone.

- Merger Integration Report

In re Evanston Northwestern Healthcare Corp.,  
Opinion of the Commission, at 17 (Aug 6, 2007)



**“The larger market share created by adding [Seller] has translated to better managed care contracts.”**

**- Finance Committee of Buyer’s Board of Directors**

In re Evanston Northwestern  
Healthcare Corp.,  
Opinion of the Commission,  
at 66 (Aug 6, 2007)

**ACHIEVED PRICE INCREASES**

**Boiling Points**  
Dechert LLP





Pros

- **Elimination of our primary competitor in both the US and Europe.** An expected impact of this consolidation is relief from the price erosion that Sales experiences in 30-40% of deals, per Osborne, of up to 15-30%. In addition, the market will place a premium on us having such a dominant market position, which is a powerful competitive moat.



U.S. v. Bazaarvoice, Inc.,  
DOJ Opening Statement,  
at 52 (Sept. 23, 2013)



**The merger buyer would  
“ensure [Buyer’s] retail business  
[was] protected from direct competition  
and premature price erosion.”**

**- Memo to Buyer’s  
Board of Directors**

U.S. v. Bazaarvoice, Inc.,  
Complaint, at 4 (Jan. 10, 2013)



**PREVENTING PRICE EROSION**

**Boiling Points**  
Dechert LLP



**“[Buyer] estimated that its acquisition of [Seller] would avert the need for [Buyer] to reduce [its] pricing by 5-15% to maintain [its] market share.”**

**- Buyer Executive**

U.S v. Deere & Co.,  
Complaint at 14, (Aug. 31, 2016)



“[T]here is value in taking control of this ‘segment’ by not encouraging a race to free [and] preventing it through acquisition.” Buyer will “[r]egain control of industry pricing and avoid further price erosion.”

- Buyer’s Executive

U.S. v. H&R Block, Inc.,  
Complaint, at 2 (May 23, 2011)



# The combined company would have “increased pricing power.”

## - Buyer's Financial Model

In re Integrated Device Tech., Inc.,  
Complaint, at 2 (Dec. 18, 2012)



PRICING POWER, FLEXIBILITY, AND LEEWAY

Boiling Points  
Dechert LLP



The benefits of the combination include “easier decision making as the sole player in [the] double deck market,” and “flexibility regarding pricing.”

- Joint Venture Proposal

U.S. v. Twin America, LLC, Complaint, at 10 (Dec. 11, 2012)







The acquisition will allow the buyer to “manipulate the market more effectively” and obtain “[m]ore flexibility in price setting.”

- Buyer's Executive

U.S. v. Baker Hughes Inc.,  
713 F. Supp. 3, 12 n. 8 (D.D.C. 1990)





**The “[c]ombination...  
allows... more leeway  
to set market pricing.”**

**- Buyer’s  
Internal Planning Document**

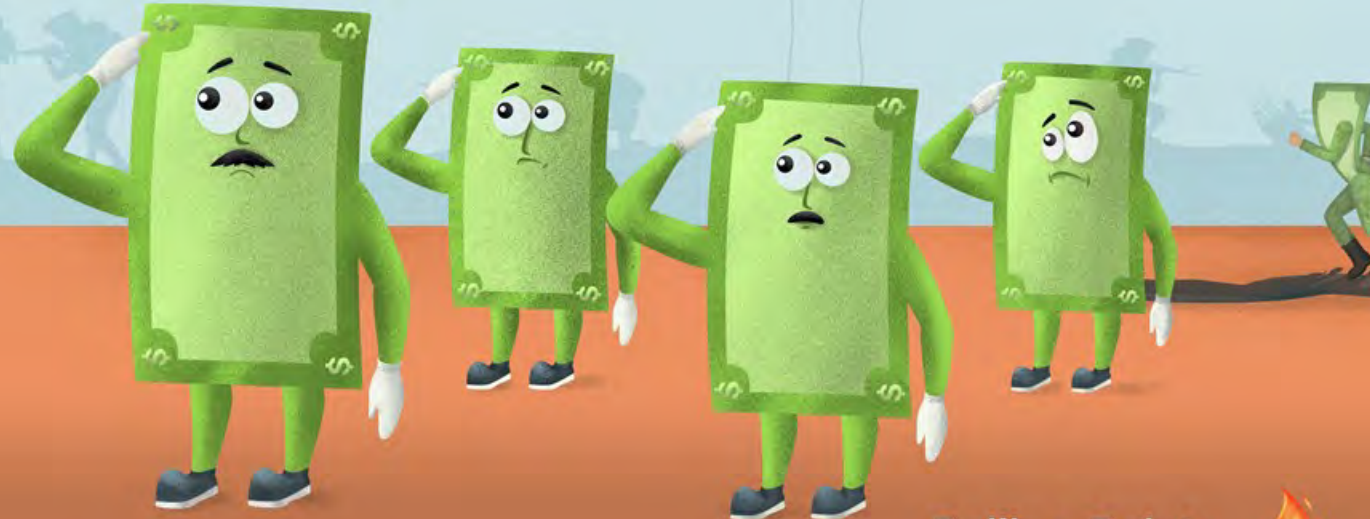
U.S. v. First Data Corp.,  
Complaint, at 14 (Oct. 23, 2003)

**PRICING POWER, FLEXIBILITY, AND LEEWAY**

# The transaction will bring pricing “discipline.”

- Seller’s CEO

U.S. v. UPM-Kymmene Oyj,  
Complaint, at 3 (Apr. 15, 2003)



**“Prices WILL NOT stay the same,  
it will almost be a monopoly.”**

---

**- Seller**

FTC v. Costar Grp., Inc.,  
Complaint, at 1 (Nov. 30, 2020)



# Acquisition may lead to “more stable pricing and fewer promotions in the long term.”

- Seller CEO, Message to Board of Directors

FTC v. Costar Grp., Inc.,  
Complaint, at 5 (No. 30, 2020)



Acquisition “[t]akes [a] competitor out of the marketplace and allows [the Buyer] to more effectively manage pricing/trade.”

- Buyer

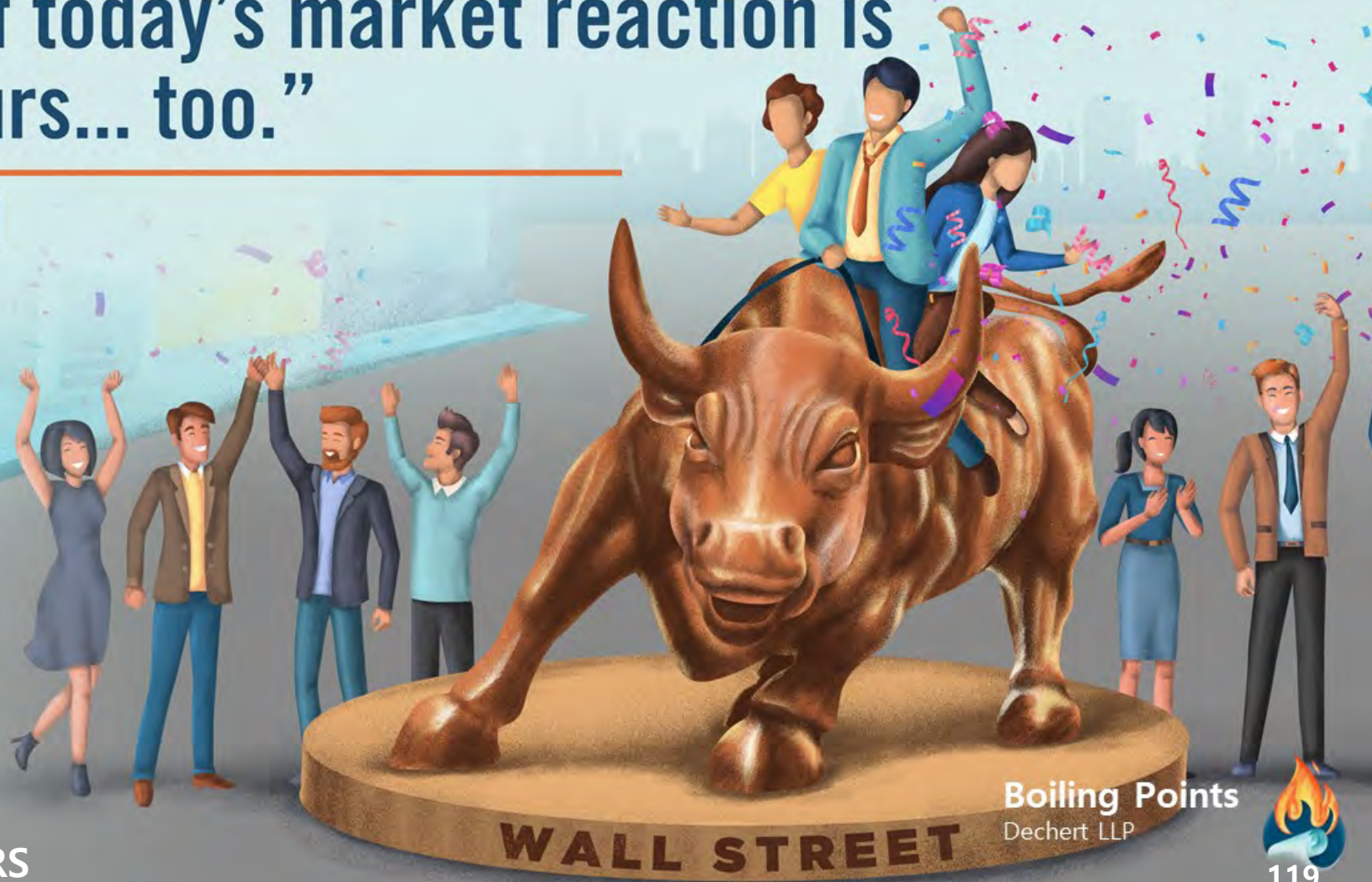
In re The J.M. Smucker Co.,  
Complaint, at 2 (Mar. 5, 2018)



“I am very happy that we are able to put [the acquisition] together since I think it will be very good for [our] shareholders – and if today’s market reaction is an indication, for yours... too.”

- Buyer’s CEO in an E-Mail to Competitor’s CEO

In the Matter of Tronox/Cristal USA, Complaint, at 2 (Dec. 5, 2017)



BENEFIT TO OTHER COMPETITORS

Boiling Points  
Dechert LLP



The image features a teal background with a central graphic of a saw blade. The blade is light blue with a brown spine and a white ruler along its edge. The text "ANTITRUST RISK" is written in bold, dark blue, sans-serif capital letters across the blade. To the right of the blade is a circular inset containing a stylized flame in shades of orange and yellow, positioned over a white scroll. The left end of the blade is jagged, resembling a saw cut.

# ANTITRUST RISK

**Boiling Points**

Dechert LLP



**“[W]e have both agreed that a combination of [Buyer and Seller] will raise significant issues under the antitrust laws of the United States and other jurisdictions. . . . [I]t remains unclear whether there are workable solutions that appropriately address the antitrust risk and the completion risk.”**

**- Seller’s CEO to Buyer’s CEO**

U.S. v. Halliburton Co., Complaint, at 3-4 (Apr. 6, 2016)





“[T]he state and federal government looks at these kinds of things for antitrust . . . and you can’t create a monopoly. And so you know the reality of it is even if they wanted to, [Buyer] would not have been able to acquire us.”

---

- Seller’s CEO

U.S. v. Geisinger Health, Inc., Complaint, at 9 (Aug. 5, 2020)

ACKNOWLEDGEMENT OF RISK

Boiling Points  
Dechert LLP



# Deal structure was “[k]inda smart really” because it “[d]oes not require AG [Attorney General] approval.”

- Buyer

U.S. v. Geisinger Health, Inc.,  
Complaint, at 9 (August 5, 2020)



ACKNOWLEDGEMENT OF RISK

Boiling Points  
Dechert LLP



123

**“The notable area of overlap”  
is “ground aviation fuel filtration.”  
Should we be “forthcoming” about  
this “aviation antitrust potential”?**

**- Buyer’s VP to Seller’s President**

U.S v. Parker-Hannifin Corp., DOJ Complaint, at 3 (Sept. 26, 2017)





**Buyer's CFO warned the CEO  
to stop using words like "dominant" and  
"market share" because they are  
"both sensitive words from  
a post deal review perspective."**

**- Buyer's CFO to CEO**

U.S. v. Anthem, Inc., Complaint, at 6 (July 21, 2016)





**Boiling Points Collection, First Edition (October 2021)**

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