



*presents*

# Protecting Trade Secrets When Key Employees Move to Competitors

## Recovering Confidential Business Information and Defending Against Misappropriation

**A Live 90-Minute Teleconference/Webinar with Interactive Q&A**

**Today's panel features:**

Jessica Brown, Partner, **Gibson Dunn & Crutcher**, Denver

Jason C. Schwartz, Partner, **Gibson Dunn & Crutcher**, Washington, D.C.

Seth P. Berman, Managing Director and Deputy General Counsel, **Stroz Friedberg**, Boston

**Tuesday, February 2, 2010**

The conference begins at:

**1 pm Eastern**

**12 pm Central**

**11 am Mountain**

**10 am Pacific**

You can access the audio portion of the conference on the telephone or by using your computer's speakers. Please refer to the dial in/ log in instructions emailed to registrations.

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Key Employee Departures to Competitors:  
**How to Find and Use Smoking Gun Evidence to  
Protect Your Business**

February 2, 2010



**GIBSON DUNN**

**STROZ FRIEDBERG**



## The Speakers



Jason C. Schwartz  
Employment Partner  
Gibson, Dunn & Crutcher LLP



Seth Berman  
Managing Director  
Stroz Friedberg



Jessica Brown  
Employment Partner  
Gibson, Dunn & Crutcher LLP



## Our Scenario

You are the General Counsel of Vulnerable, Inc., a technology company with operations in Texas, Colorado, and the District of Columbia.

You get an urgent call from your CEO, Victor Vexed, who is in a state of distress. He tells you that your VP of Sales, Rex Ruthless, has just accepted an offer to join your fierce competitor, Rival, Inc. You remember that Rex was a charismatic Texan who was laid off last month with a significant severance package.



## Our Scenario

After you put the phone down, you find out:

1. Vulnerable's biggest customer has just pulled out of negotiations for a contract renewal after weeks of dragging its feet.
2. The office gossip is that Rex's sales team is about to quit and its members won't discuss their plans.
3. Your assistant cannot find any sign of Rex's laptop or company cell phone.

What do you do?



## Initial Steps

Locate employment contracts

Assemble internal and external team

Preserve evidence and safeguard assets

- recover employee laptops, PDAs, etc. immediately
- summon expert IT assistance
- revoke building and remote IT access rights
- take steps to prevent tampering by other employees
- issue document preservation/hold notices

Take action with respect to those employees still in the office?

Brief internal team on privilege issues, compliance with contracts



## Review Employment Contracts

Review the contracts in question

- are they signed?
- what state's law will apply?
- are they enforceable?

In Rex's case, assume his contract contains these relevant provisions:

- express confidentiality clause
- express prohibition against outside business interests during employment
- 24 month post-termination employee non-solicit
- 24 month post-termination customer non-solicit
- 24 month post-termination non-compete



## Gather the Facts: Issues to Be Investigated

Can the rumor that Rex is joining Rival, Inc. be substantiated?

Are the three sales employees leaving to join Rival, Inc. too? May others follow? Has there been any “solicitation” of employees by Rex and/or Rival, Inc.?

Is Rex behind the failed negotiations? Are other customers being targeted?

Has Rex undertaken competitive activities for Rival, Inc. during work hours, in breach of his outside interests restriction or otherwise in breach of fiduciary duties?



## Gather the Facts: Issues to Be Investigated

Has confidential information been misused, copied, and/or removed?

Has Rex informed customers of his departure or sought to entice them away?

Was Rex aware of any wrongdoing on the part of any of the other employees?

Is Rival aware of the employees' contractual obligations to Vulnerable, Inc.? Any indicia of bad faith on the part of Rival, Inc.?

What is the financial position of Rex/Rival, Inc. to satisfy any award of damages?



## Gathering Evidence – The Traditional Way

Search employee offices: desk files, notepads, post-its, whiteboards etc.

Make a forensic image of the employees' laptops, PCs

Review access to computer systems

Check cellular and office telephone records, call logs, dial-outs

Preserve voicemail messages, and voice recordings if applicable

Review photocopying records

Read expense reports

Review building security records/card access readers

Consider covert surveillance – but proceed carefully, using an experienced investigator who knows the bounds of the law



## Gathering Evidence – What Might You Find?

Recently accessed information/restricted data

Business plans

Resumes

Letters, calls, emails, faxes to competitors or potential competitors

Evidence of malice/bad faith



## Gathering Evidence – Then What?

Collect documentary evidence first

Then proceed with witness interviews

Interview friendly sources first

- did Rex tell you where he was going?
- did he ask you to join him?
- did he take anything from Vulnerable?

Then interview the targets when you have good incriminating evidence

Such evidence might also be found through less traditional means



## Gathering Evidence - Forensic Reconstruction (1)

Link File analysis is conducted to reconstruct file access activity showing access to a particular document:

Name:	Burgundy PR UK 2006 v2.DOC.lnk
File Ext:	lnk
File Type:	Link
File Category:	Windows
Description:	File, Archive
Last Accessed:	05/22/07 09:11:14AM
File Created:	08/29/06 03:03:16PM
Last Written:	08/29/06 03:04:08PM
Entry Modified:	08/29/06 03:04:08PM
File Acquired:	05/21/07 06:38:35PM
Starting Extent:	0C-C1880790,448
File Extents:	1
Permissions:	•
References:	0
Physical Location:	7,703,748,544
Physical Sector:	15,046,383
Evidence File:	karachi_laptop
File Identifier:	17448
Full Path:	C:\Documents and Settings\hnaseem_olad\Recent\Burgundy PR UK 2006 v2.DOC.lnk
Short Name:	BURGUN~1.LNK

Link file shows this document was accessed...

On a particular date and time...

And was actually located on his computer in this location.



# Gathering

Analysis of D  
relevant docu

```
partial log.txt - Notepad
File Edit Format View Help
.....
.....
.....
Item: ODM_NAME
Returning #764343 v7 [REDACTED] o (Sep
2006)

ODMA->GetDocInfo: [9/12/2006 @ 13:29:0249]
called by MS word
calling Doc Id ::ODMA\PCDOCS\NYDOCS1\764343\7
Item: ODM_TITLETEXT
Returning #764343 v7 [REDACTED] (Sep
2006)

ODMA->GetLeadMoniker: [9/12/2006 @ 13:29:0249]
called by MS word
calling Doc Id ::ODMA\PCDOCS\NYDOCS1\764343\7
Returning ODM_E_FAIL

ODMA->CloseDoc: [9/12/2006 @ 13:30:0221]
called by MS word
DocId: ::ODMA\PCDOCS\NYDOCS1\764343\7
Shadow( 1 ) PagesPrinted( 0 )
```

(2)

file access to



## Gathering Evidence - Forensic Reconstruction (3)

Date/Time	Time Zone	Request IP	Request	URL
[25/Mar/2015 -0500]		169.37.161.75	GET	http://www.sowood.com/img/pagetext.gif
[25/Mar/2015 -0500]		169.37.161.75	GET	http://www.sowood.com/img/contact.gif
[25/Mar/2015 -0500]		169.37.161.75	GET	http://www.sowood.com/img/angle.gif
[25/Mar/2015 -0500]		169.37.161.75	GET	http://www.google.com/url?sa=Q&q=sowood+capital&start=0&ie=utf-8&oe=utf-8&client=firefox-a&rls=org
[25/Mar/2015 -0500]		169.37.161.75	GET	http://www.google.com/images/nav_logo.png
[25/Mar/2015 -0500]		169.37.161.75	GET	http://www.sowood.com/img/pr.gif
[25/Mar/2015 -0500]		169.37.161.75	GET	http://www.sowoodcapital.com/favicon.ico
[25/Mar/2015 -0500]		169.37.161.75	GET	http://www.google.com/url?sa=Q&q=waypoint+capital&start=0&ie=utf-8&oe=utf-8&client=firefox-a&rls=
[25/Mar/2015 -0500]		169.37.161.75	GET	http://www.google.com/search?q=waypoint+capital&start=0&ie=utf-8&oe=utf-8&client=firefox-a&rls=org
[25/Mar/2015 -0500]		169.37.161.75	GET	http://www.sec.gov/Archives/edgar/data/1372664/000119312507062959/0001193125-07-062959-index.htm
[25/Mar/2015 -0500]		169.37.161.75	GET	http://www.sec.gov/Archives/edgar/data/1372664/000119312507062959/g91657g46s98.jpg
[25/Mar/2015 -0500]		169.37.161.75	GET	http://www.sec.gov/Archives/edgar/data/1372664/000119312507062959/g91657page2.jpg
[25/Mar/2015 -0500]		169.37.161.75	GET	http://www.sec.gov/Archives/edgar/data/1372664/000119312507062959/g91657page3.jpg
[25/Mar/2015 -0500]		169.37.161.75	GET	http://www.sec.gov/Archives/edgar/data/1372664/000119312507062959/g91657page1.jpg
[25/Mar/2015 -0500]		169.37.161.75	GET	http://www.sec.gov/Archives/edgar/data/1372664/000119312507062959/g91657g37s44.jpg
[25/Mar/2015 -0500]		169.37.161.75	GET	http://www.sec.gov/Archives/edgar/data/1372664/000119312507062959/g91657g67g91.jpg
[25/Mar/2015 -0500]		169.37.161.75	GET	http://www.sec.gov/Archives/edgar/data/1372664/000119312507062959/g91657g88o70.jpg
[25/Mar/2015 -0500]		169.37.161.75	GET	http://www.sec.gov/Archives/edgar/data/1372664/000119312507062959/g91657g00p54.jpg
[25/Mar/2015 -0500]		169.37.161.75	GET	http://www.sec.gov/Archives/edgar/data/1372664/000119312507062959/g91657g47b83.jpg
[25/Mar/2015 -0500]		169.37.161.75	GET	http://www.sec.gov/Archives/edgar/data/1372664/000119312507062959/g91657g92g64.jpg
[25/Mar/2015 -0500]		169.37.161.75	GET	http://www.sec.gov/Archives/edgar/data/1372664/000119312507062959/ds1a.htm



## Gathering Evidence - Forensic Reconstruction (4)

Metadata analysis is conducted on all files of new company's laptop to show ownership.

Filename	Author	Company	CreateDate	LastSavedDate	LastSavedBy
IQ6UJ9A023PMYTax Research Consultant Customer Letter 11-06 (2).doc	CK		11/8/2006 15:52	11/8/2006 15:52	n
IQ6UJ9A023PN0Tax Research Consultant Options.xls	ye		6/12/2006 13:14	9/14/2006 11:24	C
IQ6UJ9A020F9KANALOGIC MYA 2007 - 2009 with FIN48.xls	CC		6/17/2003 16:30	10/31/2007 11:22	C
IQ6UJ9A020F9MANALOGIC MYA 2007 - 2009 without FIN48.xls	CC		6/17/2003 16:30	10/31/2007 11:22	C
IQ6UJ9A02RQY0ANALOGIC MYA 2007 - 2009 - CCH AGREEMENT.xls	CC		6/17/2003 16:30	10/31/2007 11:22	C
IQ6UJ9A0339DECCH Tax Research Internet Network.doc	CC		4/7/2008 12:08	4/7/2008 12:08	C
IQDCPKA10005MRiveroGordimerMya.xls	CC		6/17/2003 16:30	1/20/2009 19:17	C
IQDCPKA1001JBOgle Proposal.doc	W		4/2/2009 9:50	4/2/2009 9:50	W
IQRR44A10006HWarady & Davis LLP Addendum 02_2009.xls	CC		6/17/2003 16:30	2/4/2009 13:26	C
(FMR) Fidelity 3-5-2009.doc	CC		3/7/2009 15:46	3/8/2009 11:22	W
00000039.doc	CC		10/11/2007 21:09	10/11/2007 21:09	C
0511 end date 10-23-08.xls	Ka		10/18/2007 10:25	10/24/2008 22:07	K
0511 end date 1-16-08.xls	Ka		10/18/2007 15:55	1/16/2008 13:10	K
0511 end date 1-16-081.xls	Ka		10/18/2007 15:55	1/16/2008 13:10	K
0511 end date 12-20-08.xls	Ka		10/18/2007 10:25	1/9/2009 11:24	K
0511 end date 1-26-09 (2).xls	Ka		10/18/2007 15:37	2/2/2009 17:41	K
0511 end date 1-26-09.xls	Ka		10/18/2007 15:37	2/2/2009 17:41	K
0511 end date 1-26-091.xls	Ka		10/18/2007 15:37	2/2/2009 17:41	K

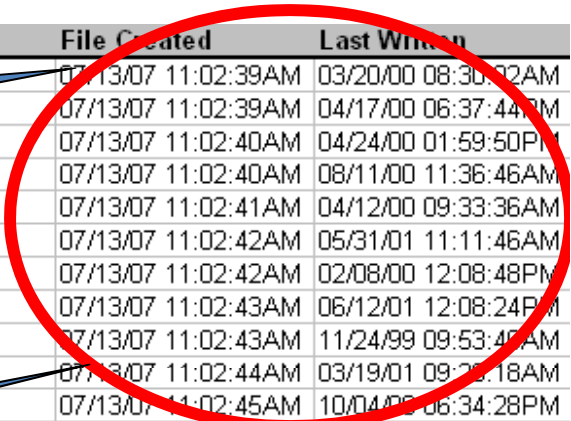


## Gathering Evidence - Forensic Reconstruction (5)

Full Path	File Created	Last Written
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\...e.doc	07/13/07 11:02:39AM	03/20/00 08:30:02AM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\...oc	07/13/07 11:02:39AM	04/17/00 06:37:44PM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\...oc	07/13/07 11:02:40AM	04/24/00 01:59:50PM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\...e.doc	07/13/07 11:02:40AM	08/11/00 11:36:46AM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\...e.doc	07/13/07 11:02:41AM	04/12/00 09:33:36AM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\...e.doc	07/13/07 11:02:42AM	05/31/01 11:11:46AM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\...oc	07/13/07 11:02:42AM	02/08/00 12:08:48PM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\...e.doc	07/13/07 11:02:43AM	06/12/01 12:08:24PM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\...EW.doc	07/13/07 11:02:43AM	11/24/99 09:53:40AM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\...e.doc	07/13/07 11:02:44AM	03/19/01 09:25:18AM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\...e.doc	07/13/07 11:02:45AM	10/04/00 06:34:28PM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\...s	07/13/07 11:02:45AM	04/24/00 11:32:54AM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\...um.doc	07/13/07 11:02:46AM	02/11/02 11:42:26AM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\...e.doc	07/13/07 11:02:47AM	01/09/02 03:09:34PM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\...s\p	07/13/07 11:02:48AM	01/02/02 08:57:46AM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\...s\p	07/13/07 11:02:49AM	04/03/00 11:07:38AM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\...s\p	07/13/07 11:02:50AM	10/17/00 01:43:50PM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\...s\p	07/13/07 11:02:50AM	07/17/00 04:53:10PM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\...e.doc	07/13/07 11:02:51AM	03/21/01 04:39:20PM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\...e.doc	07/13/07 11:02:51AM	11/24/99 08:43:06AM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\...DC	07/13/07 11:02:52AM	02/17/00 09:53:02AM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\...ph	07/13/07 11:02:53AM	11/24/99 09:57:02AM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\...e.doc	07/13/07 11:02:54AM	03/01/02 11:05:40AM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\...c	07/13/07 11:02:54AM	06/02/00 09:45:44AM
C:\Documents and Settings\labsmith\My Documents\ANDY\Resumes - All\Resumes\...e.doc	07/13/07 11:02:55AM	05/02/01 12:25:46PM

Note the Creation Date of the file is after the Last Written Date. This phenomena occurs when a file is moved from one device to another. The creation date in this instance is the date the file was moved.

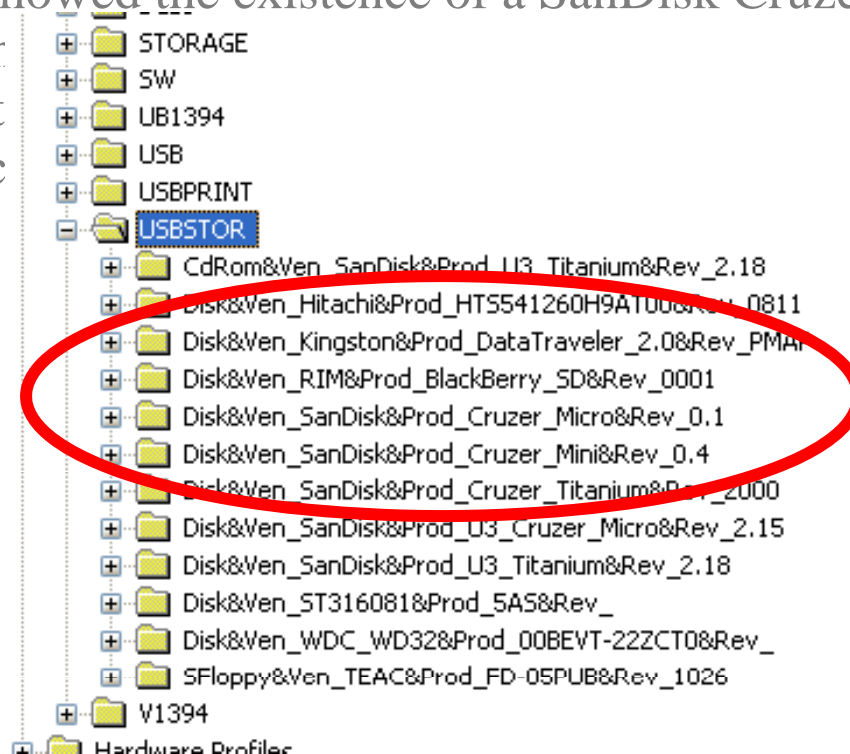
Note the incremental progression of creation date. Showing that a large number of files are being transferred from a thumb drive to this new computer.





## Gathering Evidence - Forensic Reconstruction (6)

Device analysis showed the existence of a SanDisk Cruzer thumb drive being plugged into the r  
analysis showed t  
from deleted spac



covered empty, but  
being recovered



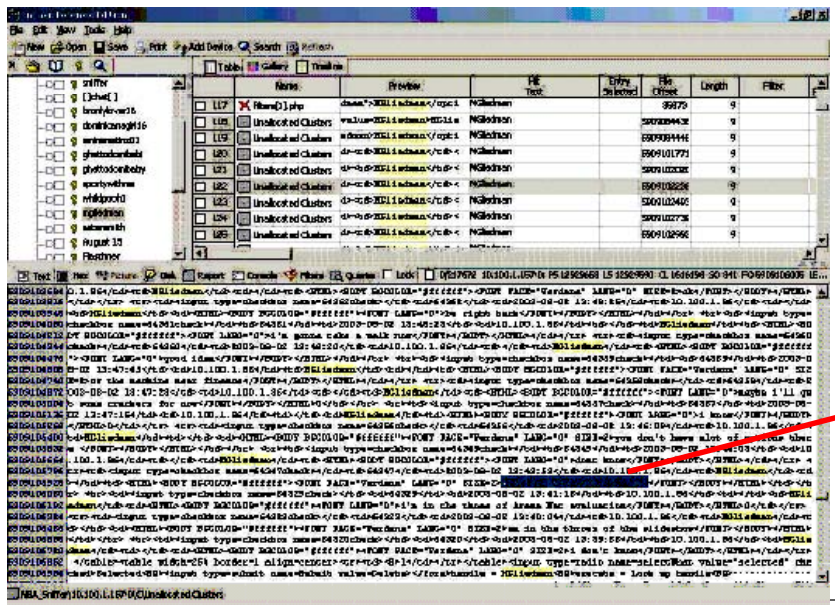
How to Find and Use Smoking Gun Evidence to Protect Your Business



Live Incidents  
 "Why is Norma getting transferred?"



Keyword search for AOL screen name: bigcompanycio



jsmith@http://5.18.1.170/  
 was/filters.php?handle1=  
 bigcompanycio&handle2=  
 none





## What Can Be Done?

Send a “cease and desist” letter? Purpose:

- To halt or slow the conduct
- To obtain admissions or further indicia of guilt
- To demand reaffirmation of contractual obligations and possibly other concessions
- To demonstrate reasonableness and the need for injunctive relief
- To provide additional time to gather evidence and draft pleadings



## What Can Be Done?

Include or otherwise notify Rival, Inc.? Purpose:

- Have the company reconsider its course of action
- Have Rival think twice before improperly recruiting any other Vulnerable, Inc. employees
- Put Rival on notice of the contracts so that, if it proceeds, it may be liable for intentional interference with contractual relations



## What Can Be Done?

Just lay low and then file suit? Purpose:

- Obtain quick legal relief
- Catch Rex and Rival by surprise
- Win the potential race to the courthouse

Need to decide first whether a lawsuit is worthwhile

- This is a question best considered very early on

If not, consider non-legal alternatives

- protect/consolidate customers – senior involvement
- reassure and motivate remaining employees
- motivate departing employees to remain?



## Should We Sue?

Evaluation of strength of case/likelihood of success

Harm suffered

Costs

- Legal costs
- Customer relationships
- Management time
- Cross-claims

Potential relief

- Injunctive relief
- Damages



## Should We Sue?

### Reputational issues

- Marketplace
- Competitors
- Employees and Prospective Employees

### Other alternatives

- Pre-suit discovery/settlement
- ADR
- Criminal referral



## Initial Litigation Issues

Who should you sue

Where should you sue

What claims should you assert

- Breach of contract
- Common law duties of loyalty/fiduciary obligations
- Misappropriation:
  - common law
  - statutory protections
  - “inevitable disclosure” doctrine
- Statutory protection of electronic data (*e.g.*, Computer Fraud and Abuse Act)



## Initial Litigation Issues

What claims should you assert (continued)

- Tortious interference with contractual or business relations
- Unfair business practices/employee raiding theories
- Conspiracy

Whether and how to file for a TRO

- What conduct should you seek to restrain

Whether and how to seek a preliminary injunction

Whether and how to seek expedited discovery



## Discovery Considerations

Exposure of Vulnerable's sensitive and trade secret information

Risks of "cross contamination" impacting future business activities

Use of confidentiality agreements and protective orders to restrict use of discovery

- "attorneys' eyes only" designations
- resulting need for expert support

Third party discovery considerations

- telephone records
- internet-based private email accounts

Document management and related considerations and burdens



## Settlement

Consent order vs. settlement agreement

Terms of settlement

Compliance monitoring



## Any Questions?

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