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Litigators of the Week: Eliciting a Mea Culpa From the IRS For Citadel Founder Over Leaked Tax Records

By Ross Todd
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Good morning. It's Friday, June 28, and I'm Litigation Daily editor and columnist Ross Todd here with our latest batch of Litigator of the Week Runners-Up and Shout-Outs. The close readers among you might notice a recent style change. What once were "Shout Outs" without a hyphen are now "Shout-Outs" with a hyphen. After some lengthy debate with our friends at the copy desk, we realized that even the act of shouting them out might not involve a hyphen, they are indeed shout-outs.

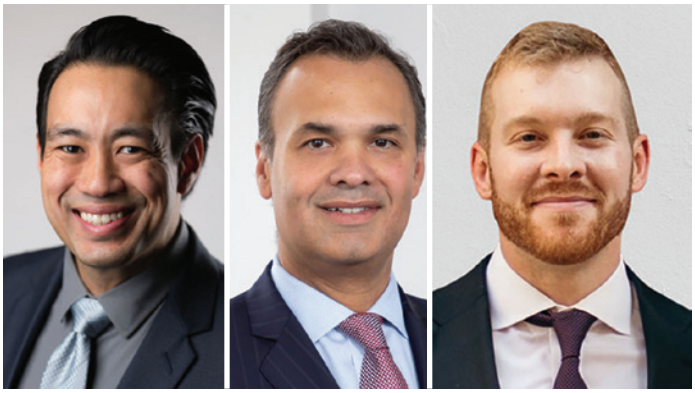
On a separate note, this week we received a record number of nominations for Litigator of the Week. So rest assured if your firm's case wasn't among the 10 that made the cut this week, you have plenty of good company. As always, keep the nominations coming to rtodd@alm.com.

How does the old Chicago power ballad go?

 "It's hard for me to say 'I'm sorry.'" 

Well, Peter Cetera's got nothing on the Internal Revenue Service.

In a previously unheard of move, the IRS this week issued a public apology to billionaire investor Ken Griffin, the founder of hedge fund Citadel, as well as thousands of others who had their confidential tax information leaked to the press.



William Burck, AJ Merton and Peter Fountain of Quinn Emanuel Urquhart & Sullivan

The mea culpa was part of a settlement the agency reached in litigation brought by Griffin, who sued to hold the IRS accountable for what he claimed were willful and intentional failures to safeguard taxpayers' personal information.

After the government previously argued in the case that the leak could have been the product of a "hostile foreign state actor," federal prosecutors last year charged former IRS contractor Charles

Littlejohn with disclosing tax return information without authorization. He has since pleaded guilty and been sentenced to a five-year prison term. Griffin's legal team, led by **William Burck**, **AJ Merton** and **Peter Fountain** of **Quinn Emanuel Urquhart & Sullivan**, successfully pushed to depose Littlejohn before he reported to prison.

Lit Daily: How did this matter come to you and the firm?

Bill Burck: Ken and Citadel have been firm clients for years. We love working for Ken and his team because they are so dynamic and fearless. Ken was deeply disturbed by the unlawful leak of taxpayer information and even more troubled that the IRS was refusing to take responsibility for it or even acknowledge that it was most likely an inside job (as it turned out to be). To Ken, it seemed that the IRS was failing to live up to some of the most basic standards we expect from the government—that it comply with the law and be transparent with the public about its failures. I expect that Ken wanted us to represent him because of our history with him and Citadel and because we aren't the type of firm to reflexively tell a client all the reasons litigation against a powerful adversary like the IRS might be a bad idea. This is our sweet-spot—cases where creativity and innovation are at a premium.

Who all worked on Mr. Griffin's case and how did you divide the work?

AJ Merton: First and foremost, Ken's phenomenal in-house lawyers—**Brooke Cucinella** and **Tom McDonald**—are among the most talented, strategic, thoughtful, and dedicated lawyers I have ever worked with for a client, and we could not have obtained this victory for Ken without their leadership. Brooke and Tom were in the trenches with us every step of the way, they attended every hearing and deposition, they provided critical strategic insight on case management decisions, they were dynamic when we needed to be, and they set a clear path and resolve about what Ken ultimately wanted from this litigation, which we obtained.

On the QE side, the assignment and division work on this case really exemplified one of the hallmarks of our unique approach here at QE—we leveraged the passions and intrinsic strengths of our team members to empower them to take complete ownership of the work that they are in charge of, regardless of title or class year. Practically, this means that sometimes partners or newly-minted associates alike with specialized knowledge of a nuanced legal issue could take initial cuts at drafting a brief so issues are properly framed the first time, which saves client resources and time by cutting down on multiple drafting iterations on the front end. It also means we were able to staff our case more leanly, because when our team members own a particular issue or a group of related deponents, for example, we assign those team members the substantive responsibility over those entire projects rather than staffing multiple people on projects that only have limited or piecemeal exposure or responsibilities on an issue-by-issue basis. Ultimately, this translates to better work product and client services because every team member on Ken's case was completely bought-in on our mission, people covered for one another, and everyone had a meaningful and significant role to play when our team made hard strategic decisions. This outcome was truly a team effort and, in my view, it showcases our firm's deep bench of really talented lawyers across all levels.

How did the tenor of this litigation change after the federal government identified IRS contractor Charles Littlejohn as the leaker and charged him

with disclosing tax return information without authorization?

Peter Fountain: From the government's perspective, the case changed entirely. They went from arguing that it could have been anyone that stole the tax information—even a "hostile foreign state actor"—to claiming that the government could not possibly be liable because Littlejohn was a contractor. That's what they kept telling us after it became public that Littlejohn was the leaker—sue Charles Littlejohn, don't sue the government. We obviously did not agree with that, and neither did the court, as it denied the government's motion to dismiss on that basis. From our client's perspective, by contrast, the case did not change very much at all—there were fundamental problems at the IRS that led to the unlawful disclosures and that needed to be rectified, and Ken had every intention of seeing that through to the end. And ultimately that's what we obtained in this settlement: an acknowledgement of responsibility and assurances from the IRS that it will do better.

Littlejohn sat for a deposition in this case before reporting to prison to start serving his five-year sentence. What did you learn during that deposition?

Merton: For us, the Littlejohn deposition confirmed the very theories that had animated the lawsuit to begin with—that the IRS was failing to safeguard the confidentiality of the American public's tax return information. Littlejohn testified that he could "access tax returns at will"—he had virtually limitless access to tax return information even though, in our view, he did not need that information to do his job. We also learned that contrary to what the government was saying in the litigation, it had zeroed in on Littlejohn as the likely perpetrator over a year before we filed the lawsuit. We were disappointed that the IRS had nonetheless taken positions before the court that they didn't know who the leaker was (including as Peter mentions that it could be a hostile foreign state actor!) when either they did know or had a really good idea who it was.

It's been reported that your client didn't request money for damages or attorneys' fees as part of his settlement with the government, but he did get this remarkable public apology from the IRS to him and thousands of others. Why was that important?

Burck: That's right, Ken had no desire to take money from the IRS because in reality that would be money from American taxpayers. Indeed, we learned from this lawsuit that Ken paid one of the highest effective tax rates (if not the highest effective tax rate) of any U.S. taxpayer for the years we learned about—so it was never about getting money damages or even his attorneys' fees. Ken never requested anything monetary from the government as part of the settlement. For Ken, this case has always been about holding the IRS accountable. After hiding the ball for a long time, the IRS admitted it was Littlejohn but even then took the position that since he was a contractor they weren't responsible, and tried to wash their hands of the whole thing and make it someone else's problem. That was unacceptable for our client, and it was frustrating to us as his lawyers. And at least one step in righting a wrong is acknowledging that something happened and that there are things to be done to prevent it from happening again. Having the IRS acknowledge that it failed to prevent this massive and intentional data breach—and massive and intentional breach of trust—and an assurance that it will do better going forward, in our view, is a necessary step to hold the IRS accountable and bring about meaningful change. That's why this was so important.

As part of its statement, the IRS said: "The agency believes that its actions and the resolution of this case will result in a stronger and more trustworthy process for safeguarding the personal information of all taxpayers." What do you think?

Merton: I tend to agree with the IRS's sentiments here, particularly because of what Bill just explained about why this case and the government's exceptional acknowledgement of responsibility was so important. Despite initially denying any responsibility for the leaks when we first filed our lawsuit, less than a year later, the government finally publicly identified the person responsible for the IRS data breach (Charles Littlejohn), secured a guilty plea for his unlawful disclosure, and obtained the maximum sentence under the law for his conviction. Littlejohn's deposition is also now in the public record as a result of this litigation, which confirmed the shortcomings that gave rise to the need for this lawsuit in the first place. And, as Bill mentioned, the IRS's acknowledgement of its failure and assurances that it will do better are necessary steps for the IRS to continue to build a stronger and more trustworthy process for safeguarding taxpayer information for everyone.

What can others take from what Mr. Griffin accomplished through this litigation?

Fountain: It's a reminder for me that litigation allows for creative solutions. Ken's goal was never money; he was willing to take a stand on principle and even a victory at trial would not have achieved a key goal—a promise that the IRS would fix these problems and do better. A trial win would have established the IRS's responsibility for Littlejohn's actions for sure, but that's it. This settlement is much more impactful than even a jury verdict in Ken's favor would have been. It took someone with Ken's commitment to holding a powerful government agency accountable to bring a lawsuit like this one. And at the same time, it takes special litigators to do what we did here: taking the fight to the other side, fighting for the discovery that we were entitled to, winning pre-trial litigation, all of which led to the point where the IRS was willing to admit publicly that they need to improve and commit to the American people that they will.

What will you remember most about this matter?

Burck: It's not often that the federal government apologizes and we are aware of no precedent for an apology of this kind from the IRS in the context of a lawsuit. I am going to remember the dedication of our client, his in-house counsel Brooke Cucinella and Tom McDonald, who were with us every step of the way, and the QE team—all of which came together to bring accountability to the IRS.

Merton: The dedication and herculean effort of our team, who consistently impressed me and were a beacon of our firm's commitment to excellence.

Fountain: This case involved thorny issues with limited precedent, which required creative problem solving—and doing that is a lot easier when you have a great team of lawyers and full buy-in from a client and their in-house team.