

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

August Term 2020

Argued: August 17, 2020

Decided: November 23, 2020

Docket Nos. 19-2703, 19-2852

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BRAD PACKER, DERIVATIVELY ON BEHALF OF 1-800-FLOWERS.COM, INC.,

*Plaintiff - Appellee-Cross-Appellant,*

v.

RAGING CAPITAL MANAGEMENT, LLC, RAGING CAPITAL MASTER FUND, LTD.,  
WILLIAM C. MARTIN,

*Defendants - Appellants-Cross-Appellees,*

1-800-FLOWERS.COM, INC.,

*Defendant.*

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Before: NEWMAN, POOLER *Circuit Judges*.<sup>1</sup>

Appeal and cross-appeal from a judgment of the Eastern District of New York (Gary R. Brown, Magistrate Judge), granting summary judgment in favor of

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<sup>1</sup> Circuit Judge Peter W. Hall, originally a member of this panel, is currently unavailable. The appeal is being decided by the remaining members of the panel, who are in agreement. *See* 2d Cir. IOP E(b).

Brad Packer in a derivative suit on behalf of 1-800-Flowers.com, Inc. against Raging Capital Master Fund, Ltd. ("Master Fund"). The District Court ruled that Master Fund was the beneficial owner of more than ten percent of the shares of 1-800-Flowers, Inc., which were bought and sold within a period of six months. The judgment requires Master Fund to disgorge \$4,909,393 in short-swing profits for violating section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b). Master Fund contends in part that factual questions remain as to whether it was a beneficial owners of the shares.

Packer cross-appeals from the denial of prejudgment interest.

We conclude that factual questions remain on the issue of Master Fund's beneficial ownership and therefore remand. In view of that ruling, we dismiss the cross-appeal as moot.

Thomas J. Fleming, Olsham Frome Wolosky LLP,  
New York, NY (Martin D. Edel, Goulston &  
Storrs P.C., New York, NY, David M.  
Zucker, Goulston & Storrs P.C., Boston, MA,  
*on the brief*), for Defendants-Appellants-  
Cross-Appellees William C. Martin, Raging  
Capital Master Fund, Ltd., and Raging  
Capital Management, LLC.

Paul D. Wexler, New York, NY (Glenn F. Ostrager,  
Joshua S. Broitman, Roberto L. Gomez,  
Ostrager Chong Flaherty & Broitman P.C.,

New York, NY, *on the brief*), for Plaintiff-Appellee-Cross-Appellant Brad Packer.

(Douglas A. Rappaport, Akin Gump Strauss Hauer & Feld LLP, New York, NY, Z. W. Julius Chen, Akin Gump Strauss Hauer & Feld LLP, Washington, DC, Alan L. Dye, Hogan Lovells US LLP, Washington, DC, for *amicus curiae* Managed Funds Association, in support of Defendants-Appellants-Cross-Appellees.)

JON O. NEWMAN, Circuit Judge:

The issue on this appeal is whether the customer of a regulated investment advisor was the beneficial owner of more than ten percent of the shares of 1-800-Flowers.com, Inc. (“Flowers”), which were bought and sold within an interval of six months<sup>2</sup> (“trading period”), a transaction for which section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), requires a beneficial owner to disgorge such short-swing profits. Appellants Raging Capital Management, LLC (“RCM”), Raging Capital Master Fund, Ltd. (“Master Fund”), and William C. Martin appeal from the Aug. 21, 2019, judgment of the District Court for the Eastern District of New York (Gary R. Brown, Magistrate Judge), requiring Master

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<sup>2</sup> From April 30, 2014, to January 31, 2015. See *Packer v. Raging Capital Management, LLC*, No. 15-CV-5933, 2019 WL 3936813, at \*1 (E.D.N.Y. Aug. 20, 2019).

Fund to disgorge \$4,909,393 in short-swing profits in a derivative suit brought by Appellee Brad Packer on behalf of 1-800-Flowers.com, Inc. Packer cross-appeals from the denial of prejudgment interest.

We conclude that factual issues remain on the issue of whether Master Fund was the beneficial owner of the shares, and we therefore vacate the judgment against Master Fund and remand for further proceedings. In view of that ruling, we dismiss Packer's cross-appeal as moot.

### Background

Understanding the complicated factual background requires identification of four entities and several individuals:

RCM is a Delaware limited liability company, which is a registered investment advisor as defined by the Investment Advisers Act of 1940, 15 U.S.C. § 80b-2(a)(11).<sup>3</sup>

Master Fund is a Cayman Islands corporation, which is an investment fund and a customer of RCM.

Raging Capital Offshore Fund ("Offshore") is a Cayman Islands corporation, which is also a customer of RCM.

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<sup>3</sup> The amicus curiae brief refers to a registered investment advisor as an "investment manager." Br. for amicus curiae at 4.

Raging Capital Fund (QP), LP (“QP”), is a Delaware limited partnership, which is also a customer of RCM.

Both Offshore and QP accept investments from the public and funnel these investments to Master Fund.

Offshore and QP are referred to in this litigation as “feeder funds.” The feeder funds together own 100 percent of Master Fund’s “Common Shares.” During the trading period, the feeder funds had about 143 investors and now have about 230 investors.

Martin holds positions in RCM, Master Fund, and Offshore, and indirectly has a role in QP. He is the chairman, chief investment officer, and managing member of RCM, and owns most, and possibly all, of its shares.<sup>4</sup> Martin is also a member of the three-member board of directors of Master Fund. During the trading period, the other two directors of Master Fund were two Cayman Island LLCs, DMS Fund Governance I Ltd. (“DMS I”) and DMS Fund Governance II Ltd. (“DMS II”), characterized by Martin as “directors services firms.” Since November

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<sup>4</sup> Packer’s statement of undisputed facts asserts that Martin has “sole ownership of RCM,” A-643, and Martin stated in a deposition, “I am the only owner” of RCM, A-711. However, the Defendants dispute that Martin is the sole owner of RCM, and contend that he is the “majority owner” of RCM. A-793.

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