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### RASER TECHNOLOGIES ORDER ON DEFENDANTS' MOTION TO TEMPORARILY STAY PROCEEDINGS PENDING A RELATED U.S SUPREME COURT DECISION

John J. Goger  
*Fulton County Superior Court*

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IN THE SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA

RASER TECHNOLOGIES, INC., et al.,

Plaintiff,

v.

MORGAN STANLEY & CO., INC., et al.,

Defendants.

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Civil Action File No.  
2012CV214140

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**ORDER ON DEFENDANTS' MOTION TO TEMPORARILY STAY PROCEEDINGS  
PENDING A RELATED U.S SUPREME COURT DECISION**

Defendants move the Court to temporarily stay the proceedings pending a decision in a case before the Supreme Court of the United States, *Merrill Lynch, Pierce, Fenner & Smith, Inc., et al. v. Manning*, No. 14-1132 (“*Manning*”), 135 S. Ct. 2938, granting cert., June 30, 2015. In deciding whether to grant a temporary stay pending a decision of another proceeding case, Georgia law states:

“The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can be best done calls for the exercise of judgment, which must weigh competing interest and maintain an even balance.”

*Bloomfield v. Liggett & Meyers, Inc.*, 230 Ga. 484, 486 (1973) (quoting *Landis v. North American Company*, 299 U.S 248, 254 (1936)). The *Manning* case is scheduled for oral arguments in December 1, 2015, and Defendants anticipate that an opinion will be issued in March or April of 2016. Plaintiffs oppose the motion to stay litigation.

Plaintiffs claim that Defendants engaged in a practice called “naked short selling,” which caused the unlawful manipulation of the price of Raser’s common stock from the years 2003 to 2011. Short selling stocks requires that the seller borrow the shares it purports to sell from

another shareholder in a transaction typically arranged by a broker dealer, and those shares are then sold on the open market at the existing price and delivered to the buyer within three days. Short selling is federally regulated under Regulation SHO, 17 C.F.R. § 242.22 *et seq.*, pursuant to the SEC's authority under the Securities Exchange Act of 1934, "Exchange Act"), 15 U.S.C. § 78a *et seq.* In a "naked" short sell, the seller does not own, and does not otherwise borrow, the securities it purports to "short" sell in time to make the delivery to the buyer within the requisite three days sale period. Plaintiffs claim that Defendants' conduct essentially amounts to the creation of "phantom" shares, which are analogous to counterfeit money. This practice allegedly flooded the market with tens of millions of unauthorized and/or counterfeit Raser shares, which diluted the value of legitimate, authorized Raser shares, and thereby artificially depressed the price of those shares for Plaintiffs who bought, sold, and held Raser shares during the Relevant Period.

Plaintiffs filed the instant action in April of 2012, and in their most recent amended Complaint,<sup>1</sup> Plaintiffs allege violations of various states' securities laws and assert claims of racketeering. Defendants removed this case to the Northern District of Georgia on May 23, 2012, contending that the federal court has exclusive jurisdiction over this action because violations of federal securities laws and regulations, specifically the Exchange Act and Regulation SHO, in addition to violations of state securities laws, were pled as predicate acts in Plaintiffs' asserted state law RICO claims. Therefore, Plaintiffs argued, the claims were subject to federal jurisdiction because the claims were "arising from" a federal question under 28 U.S.C. § 1331 and were subject to exclusive federal jurisdiction under a provision of the Exchange Act. However, on October 30, 2012, Judge Orinda D. Evans remanded the case back to the Superior

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<sup>1</sup> On June 26, 2015, Plaintiffs filed their Third Amendments to First Amended Complaint filed on February 8, 2013. The Third Amendments added claims under other states' laws, including their RICO and securities laws for certain non-Georgia Plaintiffs and amended out other claims.

Court of Fulton County, concluding that reliance on the Exchange Act did not establish exclusive federal jurisdiction over state law claims but rather concurrent jurisdiction.

The federal circuit courts are split<sup>2</sup> on whether state-law claims relying on the violation of federal securities law as a predicate act creates exclusive federal jurisdiction and the Supreme Court will be deciding this exact jurisdictional issue in the *Merrill Lynch* case. The question presented in the *Manning* case is “Whether § 27 of the Securities Exchange Act of 1934 provides federal jurisdiction over state-law claims seeking to establish liability based on violations of the Act or its regulations or seeking to enforce duties created by the Act or its regulations.” The allegations in *the Manning* case are nearly identical to those in the present case: the *Manning* plaintiffs allege that the defendants engaged in illegal naked short selling of their shares and the creation of these counterfeit shares depressed their stock value. Plaintiffs’ Amended Complaint asserts ten claims all arising under New Jersey state law, including a claim under New Jersey’s RICO Act based on predicate acts of New Jersey securities fraud and theft. While the RICO claims rely on state law violations as predicate acts the plaintiffs also assert violations of federal law and Regulation SHO expressly and by implication. The District Court determined that the federal court had exclusive federal question jurisdiction and denied remand. *Manning v. Merrill Lynch*, 2013 WL 1164838 at \*7 (D.N.J. Mar. 20, 2013). The Third Circuit reversed on appeal, concluding that no federal issue had been necessarily raised and the RICO claims were not necessarily predicated on violations of Regulation SHO. *See Manning v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 772 F.3d 158,163-64 (3d Cir. 2014).

The Court agrees that if the Supreme Court in *Manning* follows the Fifth and Ninth Circuits finding federal jurisdiction exists under the exclusive jurisdiction provision of the

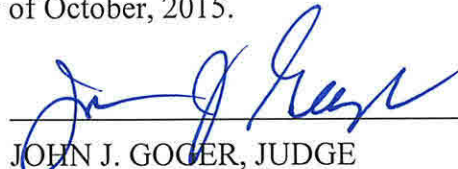
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<sup>2</sup> The Fifth and Ninth Circuits have determined that § 27 provides federal jurisdiction over state-law claims seeking to establish liability based on violations off the Act or its regulations. The Third and Second Circuits have decided that §27 does not itself create federal jurisdiction over state-law claims.

Exchange Act, Defendants may again seek to remove the case to federal court. However, in weighing the competing interests of both parties with concerns regarding the efficiency of judicial time and resources, impact on public interest, and the ramification of postponement of the case, there has been no showing of prejudice in continuing the proceedings while the issue is finally decided. Plaintiffs have filed four Motions to Compel that have been stayed pending resolution of Plaintiffs' Motion for Protective Order filed October 5, 2015.<sup>3</sup> The response to the Motion for Protective Order is due in early November. Also pending before the Court is Defendants' Motion to Dismiss, or in the Alternative for Judgment on the Pleadings on, the Appealing Plaintiffs' Claims which was filed on August 14, 2015. The parties have stipulated that reply briefing for this motion is not due until October 28, 2015. Given that the briefing is nearly complete on most of the pending motions, the Court sees no reason to delay resolution of these motions before the Supreme Court issues its opinion in the *Manning* case.

Thus, Defendants' motion to temporarily stay this proceeding pending a related U.S Supreme Court decision is **DENIED**.

SO ORDERED this 27 day of October, 2015.

  
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JOHN J. GOGER, JUDGE  
Superior Court of Fulton County  
Atlanta Judicial Circuit

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<sup>3</sup> Plaintiffs relied on the affidavit of non-party Michael Rosen in support of their four Motions to Compel. Defendants have subpoenaed Rosen for a deposition. Plaintiffs object to the deposition and filed their Motion for Protective Order. The Court entered its order on September 4, 2015, extending the time for Defendants to respond to the Motions to Compel to the earlier of (1) 21 days after the Rosen deposition or (2) 21 days after an order that Rosen should not be deposed.

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