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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

In re:
JAMSTER MARKETING LITIGATION,

This document relates to all cases.

MDL NO. 1751
Master File: 05cv-0819 JM(CAB)

ORDER DENYING PLAINTIFFS’
MOTION FOR SANCTIONS;
GRANTING IN PART AND
DENYING IN PART PLAINTIFFS’
MOTION TO ENJOIN AT&T FROM
PROSECUTING MCFERREN
ACTION; DENYING AT&T’S
MOTION TO STAY THIS ACTION

Plaintiffs move (1) to enjoin Defendants Cingular Wireless, LLC, also known as AT&T Wireless Services, Inc., New Cingular Wireless Services, and AT&T Mobility (collectively “AT&T”) from consummating or otherwise moving forward with the proposed settlement in Tracie McFerren v. AT&T Mobility, LLC, Civil No. 2008EV004400F (the “Georgia Action” or “McFerren”), an action pending in Fulton County, Georgia state court and (2) to impose sanctions on AT&T on the ground that it failed to disclose related or tag-along actions. Defendants VeriSign, Inc. and Jamster LLC oppose Plaintiffs’ motion to stay. AT&T opposes the motions and separately moves to stay all pretrial proceedings in this MDL proceeding as they relate to AT&T. Plaintiffs oppose AT&T’s motion to stay. Having carefully considered the record, pertinent legal authorities, the arguments of counsel, and for the reasons set forth below, the court denies Plaintiffs’ motion for sanctions, grants in part and

1 denies in part Plaintiffs' motion to enjoin AT&T from prosecuting the McFerren action, and denies
2 AT&T's motion to stay.

3 **BACKGROUND**

4 On March 8, 2005 Plaintiff Charles Ford filed an action entitled Charles Ford, et al. v.
5 VeriSign, Inc., et al., in the Superior Court of San Diego County seeking to represent a class of
6 individuals who had been charged for unauthorized mobile content on their mobile telephone bills
7 arising from allegedly deceptive marketing practices. (Compl., Docket No. 1). In addition to the
8 AT&T defendants, the putative class action also named as defendants VeriSign Inc. ("VeriSign,"),
9 Jamster International SARL ("Jamster") and T-Mobile USA, Inc. ("T-Mobile"). Jamster and VeriSign
10 are in the business of selling mobile content. On April 18, 2005 Defendants filed a Notice of Removal
11 alleging that the court had original jurisdiction under the Class Action Fairness Act ("CAFA"), 28
12 U.S.C. §1332(d).

13 After the commencement of the Ford action, five other complaints were filed that are now
14 pending before this court as part of the MDL proceeding (as of June 1, 2008):

- 15 • Cervantes v. Pacific Bell Wireless, LLC, No. 05cv146, filed on July 22, 2005 in the
16 Southern District of California;
- 17 • Herrington, et al. v. VeriSign, Inc., et al., No. 05cv1915, filed on October 7, 2005 in
18 the Southern District of California;
- 19 • Page v. VeriSign Inc., et al., No. 05cv1629, filed on October 26, 2005 in Pulaski
20 County Circuit Court in Arkansas and transferred to this court by Judicial Panel on
21 Multidistrict Litigation; and
- 22 • Harmon v. VeriSign, Inc., et al., No. 06 C0926, filed on January 16, 2006 in Cook
23 County Circuit Court in Illinois and transferred to this court by the Judicial Panel on
24 Multidistrict Litigation.
- 25 • Steffan v. VeriSign Inc., et al., No. 08cv0579, filed on March 27, 2008 in the Southern
26 District of California.

27 AT&T is named as a defendant in the Ford, Cervantes, and Steffan actions. AT&T represents that the
28 proposed class-wide settlement in the McFerren action encompasses the class of plaintiffs in the three

1 actions pending against them in the present MDL action. (AT&T Oppo. at p.3:3-6).

2 After removal of the actions, AT&T and T-Mobile moved to compel arbitration pursuant to
3 the arbitration provision included in customer service agreements. The court denied the motions to
4 compel arbitration on the ground that the class action waiver contained in the arbitration provisions
5 was unconscionable, thereby causing the entire arbitration agreement to be unenforceable. On March
6 8, 2006 the court granted Defendants' motion to stay pending resolution of the appeal from this court's
7 denial of the motion to compel arbitration. Ultimately, the Ninth Circuit denied Defendants' appeal
8 and T-Mobile filed a petition for certiorari before the Supreme Court. On May 26, 2008 the Supreme
9 Court denied the petition for certiorari.

10 At the time of the May 30, 2008 status conference, this court authorized the parties to proceed
11 with the litigation by filing a coordinated complaint and set a briefing schedule on the anticipated
12 motions to dismiss. A hearing on the motions to dismiss is calendared for November 6, 2008.

13 The MDL Proceeding

14 On January 16, 2006, Plaintiff's counsel in Ford filed a motion before the Judicial Panel on
15 Multidistrict Litigation, requesting all related cases be centralized before this court. AT&T and T-
16 Mobile initially opposed Multidistrict Litigation ("MDL") but subsequently withdrew their opposition.
17 On April 14, 2006 the MDL Panel transferred Page to this court and assigned the MDL Docket No.
18 1751. Pursuant to J.P.M.D.L. Rules of Procedure, and this court's Pretrial Order, the parties were
19 required to promptly advise the court of any potential tag-along action. Only two tag -along actions
20 have been identified: Harmon v. VeriSign, Inc., et al., No. 06 C0926 (S.D. No. 06cv1380), originally
21 filed in the Northern District of Illinois and Edwards v. VeriSign, Inc., No. 06-61234 (S.D. No.
22 06cv2277), originally filed in the Southern District of Florida but subsequently voluntarily dismissed
23 by plaintiff Edwards.

24 The Georgia Action

25 On April 1, 2008 plaintiff McFerren commenced the Georgia Action naming AT&T Mobility,
26 LLC as the sole defendant. The McFerren complaint defines the putative class as "all AT&T wireless
27 telephone subscribers in the nation who suffered losses or damages as a result of AT&T billing for
28 mobile content products and services not authorized by the subscriber." (Ricket Decl., Exh. G at 192-

1 93).

2 The docket in McFerren reflects little activity. No answer has yet been filed nor any other
3 pleading or motion. However, on May 30, 2008 counsel for AT&T, the same counsel that represents
4 AT&T and VeriSign in this action, and McFerren's counsel, presented a proposed settlement to the
5 Fulton County court for preliminary approval. The class period in McFerren is defined as the period
6 from January 1, 2004 to the date of notice of settlement (the class period in Ford extends back to
7 March 2001).¹

8 The settlement generally provides the class with refunds equal to the amount of all
9 unauthorized third-party mobile content damages. (Ricket Decl. Exh. F). Class members must
10 identify and provide a certification of the date of the charges, description of the charge, and the
11 amount of each third party mobile content charge. Id. Further, AT&T agreed to take other steps to
12 inform its customers about mobile content and the use of parental controls to limit access to mobile
13 content. The settlement also encompasses 15 additional cases commenced between 2007 and 2008
14 that name AT&T as a defendant. Id. AT&T has not provided notice to the court of the existence of
15 these potentially tag-along or related cases. Further, the settlement also provides for the payment of
16 \$4.3 million in attorney's fees.

17 The McFerren class counsel have, since January 2006 filed a total of 15 additional actions that
18 joined in support of the Georgia settlement. Defendants in those cases were "AT&T Mobility, every
19 major U.S. aggregator, and several third party content providers." (Special Appearance Oppo. at
20 p.2:25-26).

21 DISCUSSION

22 **Plaintiffs' Motion for Sanctions**

23 Plaintiffs move for sanctions against AT&T on the ground that its failure to notify this court
24 of the McFerren litigation violated both JPML Rule 7.4(e) and Southern District of California Civil
25

26 ¹ On August 4, 2008 the court entered an order requested further briefing and evidentiary
27 support related to AT&T's representation that no purported plaintiff "would predate January 1, 2004
28 in terms of having a [mobile content] transaction." (R.T. 27:18-20). In response, AT&T submitted
substantial evidence in support of this representation. Plaintiffs responded, in essence, that discovery
has yet to commence in this case and therefore this representation can neither be rebutted nor
confirmed. (Docket No. 253).

1 Local Rule 40.1. The Local Rule provides that “[w]henver counsel has reason to believe that a
2 pending action or proceeding on file or about to be filed is related to another pending action or
3 proceeding on file in this or any other federal or state court)whether pending, dismissed or otherwise
4 terminated), counsel shall promptly file and serve on all known parties to each related action or
5 proceeding a notice of related case . . .” L.R. 40.1(e). The criteria for determining whether an action
6 is related is set forth in L.R. 40.1(d). An action is deemed related where the actions appear:

7 (1) to arise from the same or substantially identical transactions, happenings, or events;
8 or (2) involve the same or substantially the same parties or property, or (3) involve the
9 same patent or the same trademark, except where in one or both of the actions
10 concerned, the same patent or trademark is joined with other patents or trademarks
11 which do not cover the same or substantially identical things or devices; or (4) call for
determination of the same or substantially identical questions of law; or (5) where a
case is refiled within one year of having previously been terminated by the Court; or
(6) for other reasons would entail substantial duplication of labor if heard by different
judges.

12 L.R. 40.1(d). Whether a potential tag-along action is a related action is to be determined “in
13 accordance with local rules for the assignment of related actions.” JPML 7.5(a).

14 As a threshold matter, the parties are in general agreement that the MDL action and the
15 McFerren action, as presently pled, are virtually the same action given that the present focus in both
16 actions is the core allegation that class members were improperly billed for third party content. The
17 recently filed (July 1, 2008) Coordinated Class Acton Complaint (“CCAC”) clearly seeks to represent
18 a class of individuals who were “charged and paid for unauthorized products or services by Wireless
19 Providers.” (CCAC ¶¶67, 68). The CCAC also makes clear that the unauthorized charges arise from
20 third party mobile content. (CCAC ¶¶80-130). The McFerren settlement, as preliminarily approved
21 on May 30, 2008 by the Fulton County Superior Court, provides relief to class members who were
22 improperly “billed for third party mobile content.” (Plaint. Exh. Y at 556).

23 When commenced, however, the central class-wide allegation in the Ford action centered on
24 a class of individuals “who responded to VeriSign’s advertisements” and were subsequently billed for
25 text messages. (Ford Compl. ¶ 22). The class allegations in the Cervantes action centered on third
26 party providers who sponsored “advertisements run on cable television channels targeting children
27 and young adults.” (Cervantes Compl. ¶¶25-26). Similarly, the Steffan action centered on
28 “advertisement[s] offering a free mobile content product or service.” (Steffan Compl. ¶12). As seen

1 from a review of the original complaints in Ford, Cervantes, and Steffan the predominate focus of the
2 complaints is the false advertising for mobile content which resulted in the improper billing for such
3 mobile content.

4 The McFerren related cases originally comprised two distinct theories of liability. In Jiran,
5 class members consist of individuals who were charged for mobile content “where the date of
6 authorization for such charges preceded the date that the telephone number was assigned by AT&T
7 to such subscriber.” (Plaint. Exh. O at 388, ¶93(A). These allegedly unauthorized charges arise from
8 AT&T’s failure to remove services and charges to recycled mobile telephone numbers. (Id. at ¶¶1-2).
9 The Fiddler and Dedek complaints identify a class consisting of AT&T subscribers “who suffered
10 losses or damages as a result of AT&T billing for mobile content products and services not authorized
11 by the subscriber.” (Fiddler Compl. ¶43(A), Plaintiff. Exh. Q at 437). The alleged wrongful conduct
12 arises from mobile content aggregators, like m-Qube, instructing AT&T to charge subscribers for
13 mobile content that was never requested by the subscriber. (Id. at ¶¶14-33). The McFerren related
14 cases do not allege injuries caused by false advertising content. (Danos Decl. Exh. 4). Rather, the
15 focus centers on allegations that AT&T possessed insufficient internal controls to prevent
16 unauthorized billing practices by mobile content providers and aggregators. (Id. ¶¶ 5-22).

17 After careful consideration of the complaints filed in the McFerren and Ford actions, the court
18 concludes that the actions, as originally filed, are not sufficiently related to the degree required for the
19 imposition of sanctions against AT&T. There is no precise acid test for determining the “relatedness”
20 of two actions. On the one hand, the MDL and McFerren actions both arise from alleged acts of
21 improper billing. However the genesis of the claims is fundamentally different for the McFerren and
22 MDL actions. The focus of the MDL claims, as they relate to AT&T, is that class members were
23 misled through false advertising. The focus of McFerren , in contrast, is that AT&T did not require
24 adequate proof of customer authorization prior to billing for third party mobile content.

25 While the court concludes that there is a good faith argument that the McFerren and MDL
26 actions were not sufficiently related at the time of their respective filings, the character of the
27 McFerren action changed over time. By May 30, 2008, the date of the preliminary approval hearing
28 before Judge Bonner of the Fulton County Superior Court, the actions encompassed substantially

1 similar and related transactions and occurrences. At some point in time prior to May 30, 2008 there
2 is no doubt that AT&T knew full well that the McFerren and MDL actions had morphed beyond the
3 original scope of the complaints and merged into substantially similar actions. Precisely when that
4 transition occurred is not determinable from the record before the court. Neither at the time of oral
5 argument, nor in the declarations submitted in relation to this motion, does AT&T inform the court
6 when it envisioned using the McFerren action as a vehicle to globally settle all claims broadly related
7 to allegations of improper billing for mobile content.

8 At the time of oral argument, Mr. Balser, counsel for AT&T, was asked if he ever “saw this
9 case - - that is, the Georgia case - - as a potential tag-along case until the ultimate settlement in this
10 case was tentatively reached.” (RT at p.8:18-20. Mr. Balser responded that he was not retained until
11 the end of the settlement process (sometime in May 2008)² and that the declaration of Mr. Duffy
12 provided an analysis on the relatedness of the actions. (RT at p.9:8-9, “that analysis is set forth [] in
13 Mr. Duffy’s affidavit”). The declaration of Mr. Duffy, however, while providing an analysis of the
14 relatedness of the actions at the time of filing, is silent on the time frame when AT&T sought to pursue
15 the litigation strategy of using the McFerren action as a vehicle to resolve all related litigation. (Duffy
16 Decl.). Presumably, counsel for AT&T first learned at the mediation sessions conducted in May of
17 the viability of its legitimate litigation strategy of folding in related actions to achieve a global
18 settlement. As AT&T moved to inform this court of the status of the McFerren action within days,
19 or a few weeks at most (the record is not fully developed on this point), of learning of the viability of
20 its settlement proposal, there is no basis to impose sanctions on AT&T. Accordingly, the court
21 concludes that the imposition of sanctions is not warranted under the circumstances.

22 In sum, the motion for sanctions is denied.

23 **Legal Standards, The Motions to Stay**

24 The All Writs Act provides that: “The Supreme Court and all courts established by Act of
25 Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and
26 agreeable to the usages and principles of law.” 28 U.S.C. §1651(a). This broad grant of authority is

27
28 ² AT&T has not provided clear and concise information of the dates of the mediation. Mr. Duffy, counsel for AT&T declares that the mediation occurred over a two day period “during May, 2008.” (Duffy Decl. ¶21).

1 tempered by the Anti-Injunction Act which provides that “[a] court of the United States may not grant
2 an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress,
3 or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment.” 28 U.S.C.
4 §2283. Moreover, “[a]ny doubts as to the propriety of a federal injunction against state court
5 proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion
6 to finally determine the controversy.” Atl. Coast Line R.R. Co. v. Brotherhood of Locomotive Eng’rs,
7 398 U.S. 281, 297 (1970). In exercising its authority under the All Writs Act, the Supreme Court
8 emphasized that such authority is necessary only if “some federal injunctive relief may be necessary
9 to prevent a state court from so interfering with a federal court’s consideration or disposition of a case
10 as to seriously impair the federal court’s flexibility and authority to decide that case.” Id. at 295.

11 The All Writs Act has had particular application in the context of MDL proceedings. “[W]here
12 complex [MDL] cases are sufficiently developed, mere exercise of parallel jurisdiction by the state
13 court may present enough of a threat to the jurisdiction of the federal court to justify issuance of an
14 injunction.” In re Diet Drugs Prods. Liab. Litig., 282 F.3d 220, 225 (3rd Cir. 2002). Where the Anti-
15 Injunction Act applies, “the injunction should be directed at a litigant . . . instead of the state court
16 proceedings itself.” California v. Randtron, 284 F.3d 969, 975 (9th Cir. 2002).

17 **The Motions to Stay**

18 Scope of the MDL Proceeding

19 One threshold issue not fully flushed out by the parties concerns the scope of this court’s
20 jurisdiction as it relates to the MDL litigation. The MDL panel concluded that the MDL actions
21 involve common factual allegations that:

22 (I) VeriSign and Jamster defendants have falsely represented to consumers that mobile
23 customers can get a free ring tone or other phone service by sending a message to
24 Jamster or by registering on the internet; and ii) instead of receiving the free content,
those customers then received repeated text messages from defendants for which they
were charged by defendants.

25 (Hartman Decl., Exh. A). These core common factual allegations, properly characterized as deceptive
26 marketing practices, form the basis for the MDL’s transfer and instructions to this court to preside
27 over coordinated or consolidated pretrial proceedings.

28 As presently pled in the CCAC, the nationwide class now consists of “[a]ll persons who were

1 charged [and] paid for unauthorized products or services by a Wireless Provider during” the class
2 period. CCAC ¶ 67. This a sweeping expansion of the scope of the MDL mandate. As presently
3 defined, virtually all claims that are capable of being characterized as “wrongful billing claims” would
4 now potentially be folded into the MDL proceeding. Claims arising from conduct unrelated to
5 deceptive marketing practices would significantly alter the course of this MDL proceeding. Claims
6 involving “unscrubbed numbers,” fees for “free” upgrades, inadequate internal controls, accounting
7 irregularities, deceptive billing practices, and the like would form a part of this MDL proceeding.
8 Virtually any state or federal claim that could loosely be characterized as a wrongful billing claim
9 could be identified as a potential tag along action. Among other things, such a broad view of the
10 scope of the MDL action, raises comity and federalism concerns and would exceed the scope of this
11 court’s MDL jurisdiction. See Manual for Complex Litigation, Fourth, §§22.36 - 22.4. This court’s
12 authority to interfere with on-going state court proceedings is limited and not all encompassing. See
13 Atl. Coast Line, 395 U.S. at 295.

14 For the reasons set forth below, and after careful review of these issues and the scope of the
15 JPML’s instructions as to the limits placed on the exercise of this court’s jurisdiction, the court finds
16 that claims unrelated to the deceptive marketing claims do not share the common facts or issues of the
17 core cases comprising the MDL litigation. The primary purpose of MDL proceedings is to provide
18 efficiencies in coordinated pretrial discovery and other pretrial matters - not to use the MDL
19 proceedings as a means to expand the scope of the litigation beyond the core issues identified by
20 JPML.

21 Plaintiffs’ Motion to Stay

22 Plaintiffs argue that AT&T must be enjoined from pursuing the settlement in the McFerren
23 action as a necessary aid to this court’s jurisdiction. Unless AT&T is enjoined, Plaintiffs conclude,
24 this court’s jurisdiction will be wrongfully usurped. “[W]here jurisdiction over federal MDL class
25 action litigation is threatened by a potential settlement of the same claims in a state court, the federal
26 court can act pursuant to the All Writs Act even when the federal court has not already entered an
27 order that requires preservation.” In re Lease Oil Antitrust Litigation No. II, 48 F.Supp.2d 699, 705
28 (S.D. Tex. 1998). Any litigant may be enjoined from proceeding with a state court action where it is

1 “necessary to prevent a state court from so interfering with a federal court’s consideration or
2 disposition of a case as to seriously impair the federal court’s flexibility and authority to decide the
3 case.” In re Diet Drugs Prod. Liab. Litig., 282 F.3d 220, 234 (3d Cir. 2002); Keith v. Volpe, 118 F.3d
4 1386, 1390 (9th Cir. 1997) (federal courts have authority to enjoin “state proceedings that interfere,
5 derogate, or conflict with federal judgments, orders, or settlements”).

6 The court concludes that a partial stay of the McFerren action as it relates to the core MDL
7 deceptive marketing claims is required to preserve the integrity, efficiency and fairness of the MDL
8 related actions. Moreover, implementation of a stay will foster the proper administration of justice
9 and permit Plaintiffs to obtain complete relief on the core MDL claims to which they may be entitled.
10 In In re America Online Spin-Off Accounts Litig., 2005 WL 5747463 (C.D. Cal. 2005), 12 class
11 actions were transferred to the Central District by the MDL Panel for pre-trial proceedings. One
12 central allegation was that America Online, through the use of deceptive pop-up ads, allegedly opened
13 spin-off accounts without the permission of the account holders. The plaintiffs in America Online had
14 initiated settlement discussions with America Online when the plaintiffs sought injunctive relief under
15 the All Writs Act to enjoin America Online from proceeding with a settlement of plaintiffs’ claims
16 in Illinois state court. The district court concluded that a settlement in the Illinois action would
17 diminish the court’s “ability to bring the MDL litigation to a natural conclusion,” and therefore
18 enjoined America Online from proceeding with the state court settlement. Id. at *4. The court further
19 noted that America Online was under a duty to inform the court of the Illinois tag-along action and
20 concluded that “the underlying policy behind MDL litigation, coupled with a threat to the Court’s
21 jurisdiction over the MDL plaintiffs, weighs in favor of granting Plaintiffs motion for injunctive
22 relief.” Id.

23 Here, AT&T is one of the central figures in the alleged deceptive marketing scheme. The
24 dismissal of AT&T as a party, and potentially Jamster and VeriSign as well (as urged by AT&T,
25 Jamster, and VeriSign), will severely hinder this court’s ability to efficiently and effectively bring the
26 MDL litigation to a conclusion. See Id. In the context of complex litigation, the All Writs Act plays
27 an important role:

28 [W]e did recognize in In re Diet Drugs that complex class action cases are one
“category of federal cases for which state court actions present a special threat to the

1 jurisdiction of the federal court.” As we explained, [u]nder an appropriate set of facts,
2 a federal court entertaining complex litigation, especially when it involves a substantial
3 class of persons from multiple states, or represents a consolidation of cases from
4 multiple districts, may appropriately enjoin state court proceedings in order to protect
5 its jurisdiction.” This is so because “maintaining ‘the federal court’s flexibility and
6 authority to decide’ such complex nationwide cases makes special demands on the
7 court that may justify an injunction otherwise prohibited by the Anti-Injunction Act.”
8 500 F.3d at 300 n.3. Accordingly, in cases such as this, a federal court has the
9 discretion to enjoin parallel state actions which - - due to the risk of inconsistent
10 decisions - - may undermine or eliminate the court’s “authority” over a class action.

11 Grider v. Keystone Health Plan Cent., Inc., 500 F.3d 322 (3d Cir. 2007); In re Lease Oil Antitrust
12 Litigation No. 11, 48 F.Supp.2d 699, 705 (S.D. Tex. 1998) (“[W]here jurisdiction over federal MDL
13 class action litigation is threatened by a potential settlement of the same claims in a state court, the
14 federal court can act pursuant to the All Writs Act even when the federal court has not already entered
15 an order that requires preservation.”); In re Diet Drugs Prods. Liab. Litig., 282 F.3d at 234 (three
16 factors are considered in determining whether the state court action sufficiently interferes with the
17 MDL proceedings to warrant entry of an injunction under All Writs Act: (1) a determination of what
18 kinds of state court interference would sufficiently impair the federal proceeding; (2) the state court
19 actions are to be assessed to determine whether they present a sufficient threat to the federal action;
20 and (3) principles of federalism and comity are to be considered as the primary aim of the Anti-
21 Injunction Act is to prevent needless friction between state and federal courts).

22 The proposed settlement in McFerren also appears inadequate to protect the rights of Plaintiffs
23 and the class they seek to represent. While AT&T represents that the contemplated settlement
24 provides a “full refund,” the court notes that the terms of the settlement place the burden on the
25 putative class members to discover any improperly billed mobile content. In order to receive a
26 refund, the class members must identify the transaction date, describe the charges, and set forth the
27 amount of third party content to be refunded. It is foreseeable that many class members have not
28 maintained their telephone billing records over the multi-year class period. The structure of the
settlement appears designed to limit a consumer’s incentive and ability to adequately assess their
claims. In In re Managed Care Litigation, 236 F.Supp.2d 1336 (S.D. Fl 2002), the district court
presided over a MDL proceeding where the plaintiffs, consisting of a class of physicians, alleged
RICO violations against managed care insurance companies. One insurance carrier, Cigna, had
engaged in settlement discussions in a parallel state court action. In the state court action the plaintiffs

1 amended the complaint to create federal jurisdiction and, on Friday November 22, 2002 Cigna
2 removed the action to federal court. Then, on Monday November 25, 2002 at 9:11 a.m. the parties
3 filed a settlement agreement and motion requesting preliminary approval of the settlement and
4 conditional certification of the settlement class. By 10:25 a.m. that same day, the state court approved
5 the motion to preliminarily approve the settlement. The motion for preliminary approval did not
6 advise the court of the existence of the MDL proceedings. The district court enjoined Cigna from
7 proceeding with the proposed settlement noting that the settlement “might” be “woefully inadequate”
8 and that the settlement would render the MDL panel’s “decisions and existence moot.” Id. at 1344.
9 The court enjoined Cigna from proceeding with the settlement.

10 Here, as in In re Managed Care, the state and federal courts have not been well-served by the
11 settling parties. On March 6, 2006 this court stayed the Ford action pending appeal of this court’s
12 order denying the motion to compel arbitration. The stay was imposed, in part, based upon AT&T’s
13 argument that it should not incur litigation costs pending appeal. (Docket No. 137). Then, after the
14 Ninth Circuit affirmed this court’s ruling denying the efforts of AT&T and others to compel
15 arbitration, this court again, over the strenuous objections of class counsel, continued to stay the
16 litigation to allow Defendants to seek Supreme Court review. Rather than forthrightly advising this
17 court that AT&T was devising a “global settlement” in the McFerren litigation, defense counsel
18 requested this court to maintain its stay on the premise of saving AT&T litigation costs in the event
19 of a favorable ruling by the Supreme Court. While the present action was stayed, AT&T litigated the
20 McFerren actions and, without informing this court or Plaintiffs, reached a purported global settlement
21 of all claims. On May 30, 2008 AT&T filed a motion for preliminary approval of settlement in the
22 McFerren action and several hours later the settlement had been preliminarily approved. At the
23 hearing before Judge Bonner, Mr. Balsler, counsel for AT&T, and Mr. Edelson, counsel for the
24 McFerren plaintiffs, represented that the MDL action “involves really a subset of the issues in
25 McFerren,” (RT 6:15), and that “some of those actions (the MDL related actions) are directed only
26 at the third party content providers.” (RT 7:21-22). Judge Bonner “understood from the (statements
27 of counsel) that the issues are not precisely the same, although, there may be some overlap in the
28 multi-district case and that the parties in that case have been at least aware of this case.” (RT 8:3-7).

1 The court highlights that counsel for AT&T represented before this court that the settlement in
2 McFerren would extinguish all of Plaintiffs' claims asserted against AT&T, (RT 15:24-25), and
3 possibly those of Jamster and VeriSign as well. (RT 15:12 - 16:18). From this portion of the record,
4 it does not appear that AT&T adequately corrected Judge Bonner's perception that, with respect to
5 AT&T, the issues in the two actions arise from substantially the same occurrences and transactions
6 and that the settlement in McFerren would significantly impact this court's flexibility and authority
7 to decide issues raised in the MDL related actions.

8 Finally, principles of federalism and comity are furthered by entry of an injunction narrowly
9 tailored to enjoin AT&T from proceeding with the McFerren settlement as it relates to the deceptive
10 marketing claims. See In re Diet Drugs, 282 F.3d at 234. Federal courts have long recognized that
11 principles of comity require federal district courts to exercise care to avoid interference with each
12 others's affairs. See Sutter Corp. v. P & P Industries, Inc., 125 F.3d 914, 917 (5th Cir. 1997). Here,
13 entry of a limited and narrowly crafted stay in the McFerren action as to the deceptive marketing
14 claims does not so much interfere with the Georgia action but, rather, prevents that action from
15 interfering with this federal proceeding consisting of MDL related actions that present complex issues
16 involving a substantial class of individuals from many different states.

17 Among other things, AT&T contends that this court's authority to issue the injunction is
18 limited to in rem proceedings, MDL proceedings with pending preliminarily approved settlement, or
19 proceedings involving collusive settlements. These arguments are not persuasive. While an in rem
20 action by its very nature may present more compelling reasons for entry of an injunction, entry of an
21 injunction also extends to complex in personam actions. Negrete v. Allianz Life Ins. Co. of North
22 America, 523 F.3d 1091, 1102 (9th Cir. 2008). In in personam actions "some federal injunctive relief
23 may be necessary to prevent a state court from so interfering with a federal court's consideration or
24 disposition of a case as to seriously impair the federal court's flexibility and authority to decide that
25 case." Id. at 1101 (quoting Atl. Coast Line, 398 U.S. at 295).


26 While the mere existence of a parallel state court action is insufficient to warrant injunctive
27 relief, here, the MDL action is sufficiently advanced and presents unique circumstances such that entry
28 of a limited injunction to enjoin AT&T from proceeding with the settlement of the deceptive

1 marketing claims is necessary to aid this court's jurisdiction. The parties have engaged in substantial
2 motion practice centered on the validity of the arbitration provisions contained in customer
3 agreements, filed several motions to dismiss, and filed several motions to stay (including the present
4 ones). Further, the proposed settlement threatens to prevent Plaintiffs from recovering damages from
5 either Jamster or VeriSign. These MDL defendants represent that, upon final approval of the
6 McFerren settlement, they must be dismissed from the MDL action because they will obtain liability
7 releases via the McFerren settlement as AT&T has made an indemnity demand against them. (R.T.
8 at pp. 43:16 - 44: 11; (RT 15:12 - 16:18) . The court notes that neither Jamster nor VeriSign are
9 parties to the McFerren action but are at the center of the deceptive marketing and advertising claims
10 in the MDL related actions. The complexities surrounding the nature of the deceptive and false
11 marketing claims present a unique challenge requiring a limited injunction to enjoin AT&T from
12 proceeding with the settlement in the McFerren action only as it relates to the deceptive marketing
13 claims asserted in the MDL action. Such a limited stay will likely have minimal impact on the state
14 court to globally settle all other claims related to third party mobile content. AT&T is not enjoined
15 from proceeding with any other claim in the Georgia Action.

16 In sum, the court denies Plaintiffs' motion for sanctions, grants in part and denies in part
17 Plaintiffs' motion for a stay, and denies AT&T's motion for a stay as moot. AT&T is hereby enjoined
18 in the McFerren action from proceeding to settle or otherwise litigate the deceptive marketing claims
19 encompassed within the scope of this court's MDL jurisdiction. Finally, the court is mindful that the
20 present order will likely impact the scope of the motions to dismiss and to compel arbitration presently
21 set for hearing on November 6, 2008. In the event any party to this action requires additional time to
22 address any issue raised by the present order (as it bears on the motions to dismiss), the court will
23 entertain limited ex parte motions for an enlargement of time to address such issues.

24 **IT IS SO ORDERED.**

25 DATED: September 29, 2008

26 
27 Hon. Jeffrey T. Miller
United States District Judge

28 cc: All parties