

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
x  
In re TAKE-TWO INTERACTIVE x  
SECURITIES LITIGATION x  
x  
-----X

06 Cv. 803 (SWK)

ORDER

**SHIRLEY WOHL KRAM, U.S.D.J.**

On June 10, 2008, the Court appointed Charles G. Moerdler as special master for purposes of, inter alia, resolving Lead Plaintiffs' request for authorization to access the binary code of Grand Theft Auto: San Andreas ("GTA:SA"). On August 6, 2008, Special Master Moerdler issued a determination and order (the "Determination and Order") granting Lead Plaintiffs access to GTA:SA's binary code for the limited purposes of pursuing this litigation. On the following day, the defendants sent a facsimile to the Court, stating that the parties had reached a settlement regarding access to GTA:SA's binary code, which was contingent upon the Court's expunction of the Determination and Order from the record. The defendants indicated that they would appeal the Determination and Order under Federal Rule of Civil Procedure 53(f)(2) if the Court did not remove it from the record, which would delay the progress of the parties' proposed mediation. Accordingly, the defendants asked that the Court expunge the Determination and Order.

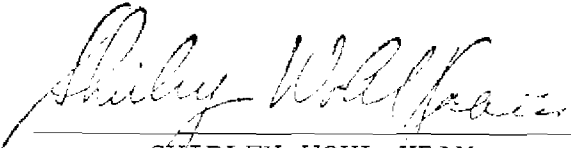
As support for the Court's authority to expunge the Determination and Order, the defendants cited United States v. Property, Parcel of Defendant Aguilar, which recognizes courts' inherent authority to expunge a judgment when a party commits a fraud that "does or attempts to defile the court itself so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication," 337 F.3d 225, 236 (2d Cir. 2003) (internal quotation marks, alteration, and citation omitted). There is no evidence on the record, however, suggesting that either party defrauded the Court or Special Master Moerdler. Aguilar is therefore inapposite.

District courts may relieve a party from an order for "any . . . reason that justifies relief," Fed. R. Civ. P. 60(b)(6), but "only upon a showing of exceptional circumstances," Nemaizer v. Baker, 793 F.2d 58, 61 (2d Cir. 1986) (citations omitted). In determining whether a settlement of the underlying litigation constitutes an exceptional circumstance that justifies the vacatur of a district court order, opinion, or judgment, district courts generally weigh the private interest in settling the litigation against the public interest in the development of decisional law, the deterrence of frivolous litigation, and the avoidance of wasted expenditures of judicial resources. See Austin v. Ford, 181 F.R.D. 283, 284-86 (S.D.N.Y. 1998); see also

Mattel, Inc. v. Goldberger Doll Mfg. Co., 236 F.R.D. 175, 176-77 (S.D.N.Y. 2006); In re Dubrowsky, 268 B.R. 6, 7-10 (E.D.N.Y. 2001); United States v. Reid, 96 Cv. 2004 (ILG), 2000 WL 1843291, at \*2-\*3 (E.D.N.Y. Oct. 31, 2000); Carter v. Rosenberg & Estis, P.C., 95 Cv. 10439 (DLC), 1999 WL 13036, at \*2-\*3 (S.D.N.Y. Jan. 13, 1999); Jeweler's Vigilance Comm., Inc. v. Vitale Inc., 177 F.R.D. 184, 187-88 (S.D.N.Y. 1998). It is not immediately clear, however, that this balancing framework should apply in the instant case, where the defendants seek vacatur of an order rendered by a special master, rather than a district judge, on the basis of a settlement that resolves only a single discovery dispute, rather than the entire litigation.

For the foregoing reasons, the Court requires further briefing on the appropriate standard for evaluating the defendants' request to expunge the Determination and Order. On or before August 18, 2008, the defendants shall file a memorandum not exceeding ten pages, which addresses (1) whether the balancing framework described above should apply to the defendants' request for expunction of the Determination and Order, or whether some other framework more properly applies; and (2) whether the defendants' request is justified under the applicable legal standard.

SO ORDERED.

  
SHIRLEY WOHL KRAM  
UNITED STATES DISTRICT JUDGE

Dated: New York, New York  
August 8, 2008