EXHIBIT 2

tIN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

MICROUNITY SYSTEMS ENGINEERING, INC., a California corporation,	§	
Plaintiff,	§	
vs.	§	**Civil Action No. 2:05cv505 TJW (JURY)**
SCEA COMPUTER ENTERTAINMENT AMERICA INC., a Delaware Corporation,	§	
Defendant.	§	

PLAINTIFF MICROUNITY'S COMBINED OPPOSITION TO SCEA'S MOTION FOR PROTECTIVE ORDER AND REPLY IN SUPPORT OF ITS MOTION TO COMPEL DEFENDANT SCEA TO PRESENT WITNESSES TO TESTIFY AT A LOCATION IN THE UNITED STATES UNDER FED. R. CIV. P. RULE 30(b)(6)

MicroUnity files this brief in opposition to SCEA's motion for a protective order and in reply to SCEA's response to MicroUnity's motion to compel.

MicroUnity brought its motion to compel defendant Sony Computer Entertainment America, Inc. ("SCEA") to designate and prepare witnesses to testify on its behalf under Rule 30(b)(6) on topics that are undeniably critical to this patent infringement lawsuit – *i.e.*, the design, development, manufacture and operation of the accused products. In its response to the motion, SCEA disclaims any corporate knowledge as to the noticed topics and, on that basis, refuses to designate a current or former SCEA employee to testify on its behalf. SCEA does not deny that the information is available to it but rather suggests that instead of taking the time to educate an SCEA employee to testify on its behalf, it should be permitted to designate as its representatives individuals who work for SCEA's parent corporation in Japan who allegedly are more familiar with the information. However, SCEA refuses to present those representatives in the United States, where SCEA is incorporated and has its principal place of business and where

this lawsuit is pending. SCEA instead insists that MicroUnity wait six months after noticing the depositions to depose SCEA's representatives in Japan.

SCEA is playing games in order to keep MicroUnity from obtaining discovery on issues critical to its claims until just before the discovery cutoff and either just before or perhaps after MicroUnity's expert reports are due. If SCEA intends to stand on its assertion that for SCEA to "educate its employees with this information defies any factual or logical reality," then surely SCEA should be precluded from later educating its witnesses so that they may testify on these topics at trial. Additionally, SCEA should not by its choice to designate non-party witnesses rather than prepare its own witnesses be allowed to force MicroUnity to depose SCEA's representatives in Japan, where no space is available for the next five months. Nor may SCEA make MicroUnity choose between using the limited time available in Japan either to depose SCEA's 30(b)(6) representatives or to depose individual witnesses identified as persons having knowledge of relevant facts. SCEA has shown no reason why it should not be ordered to present its corporate representatives in the United States, where SCEA is incorporated and has its principal place of business and where MicroUnity filed this lawsuit. And there is none.

I. SCEA Cannot Use Its Claimed Lack Of Knowledge To Prevent MicroUnity From Obtaining Discovery When The Information Admittedly Is Available.

SCEA seeks to avoid its obligation to designate a corporate representative to testify on its behalf by claiming that SCEA "has no employee with sufficient knowledge" regarding the design, development, manufacture and operation of the accused products. (Opposition at 8) But even if SCEA intends to rely upon testimony from third parties or their documents to establish its defenses, SCEA still must designate an SCEA representative to "present an opinion as to why the corporation believes the facts should be so construed." *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996). Rule 30(b)(6) indeed *requires* SCEA to designate persons to testify on its behalf as to all matters "known *or reasonably available* to the organization." Fed. R. Civ. P. 30(b)(6). Thus, SCEA has an affirmative obligation to *prepare* a representative to give complete, knowledgeable and binding answers on its behalf. *Id.* at 360-361; *see also Brazos River Authority v. GE Ionics, Inc.*, 469 F.3d 416, 433 (5th Cir. 2006) (corporation must "make a

conscientious good-faith endeavor to designate the persons having knowledge of the matters sought [by plaintiff] and to prepare those persons in order that they can answer fully, completely, unevasively, the questions posed"); *Resolution Trust Corp. v. Southern Union Co., Inc.*, 985 F.2d 196, 197 (5th Cir. 1993) (corporate party is required to designate and prepare a witness to appear on its behalf and failure to prepare a witness is "for all practical purposes, no appearance at all").

SCEA does not dispute – nor could it – that it has access to the information MicroUnity seeks. SCEA acknowledges that the information is available but claims that it would be too burdensome to take the time to prepare SCEA's own personnel to testify on its behalf. (Opposition at 4) Congress was not ignorant of the potential burden involved in preparing a knowledgeable witness when it enacted Rule 30(b)(6), but rather recognized that "this burden is merely the result of the concomitant obligation from the privilege of being able to use the corporate form in order to conduct business." *Taylor*, 166 F.R.D. at 362. Thus, SCEA cannot avoid is obligations by relying on its claimed lack of knowledge when the information is readily available to it. *See Taylor*, 166 F.R.D. at 362 (corporate defendant does not fulfill its obligations under Rule 30(b)(6) by claiming to lack knowledge with respect to facts available to it).

SCEA also should not be permitted to later bring an SCEA witness to trial to testify on any of these subjects if SCEA persists in refusing to present an SCEA representative to testify on its behalf. *Taylor*, 166 F.R.D. at 362 (party who claims to lack knowledge for purposes of Rule 30(b)(6) "cannot argue for a contrary position at trial without introducing evidence explaining the reasons for the change"). If SCEA could educate its witnesses to testify at trial, then SCEA has no excuse for not doing so now so that they may be deposed as SCEA's corporate representatives. Indeed, the rule is aimed to prevent unfair tactics such as this. *Id.* ("This interpretation is necessary in order to make the deposition a meaningful one and to prevent the 'sandbagging' of an opponent by conducting a half-hearted inquiry before the deposition but a thorough and vigorous one before the trial.").

II. SCEA Must Present Its Corporate Representatives To Testify In The United States.

SCEA admits that there is a presumption that SCEA's 30(b)(6) representatives should be deposed in California, where SCEA has its principal place of business. (Opposition at 8) SCEA

attempts to avoid the presumed forum for these depositions by citing to cases addressing the *opposite* situation in which a plaintiff sought to depose a corporate defendant somewhere *other than* the defendants' principal place of business and the courts *denied* their requests. *See, e.g., Tailift USA, Inc. v. Tailift Co., Ltd.*, 2004 WL 722244 (N.D. Tex. March 26, 2004) (denying request to depose corporate representative in Texas rather than in Taiwan where defendant was headquartered); *Devlin v. Transportation Commc'ns. Int'l Union*, 2000 WL 28173 (S.D.N.Y. Jan. 14, 2000) (refusing to allow deposition of corporate representatives of Maryland company in New York). These cases support MicroUnity's position that SCEA should be deposed in the United States where SCEA is incorporated and has its principal place of business.

SCEA's reliance on other cases involving depositions of *individual* witnesses rather than 30(b)(6) representatives also is not helpful. Those cases simply acknowledge the rule that individually noticed witnesses normally should be deposed in their district of residence. *See, e.g., Salter v. Upjohn Co.*, 593 F.2d 649 (5th Cir. 1979) (trial court did not err in refusing to order that president of defendant corporation whose individual deposition plaintiff requested be deposed at someplace other than his district of residence in Michigan); *Zakre v. Norddeutsche Landesbank Girozentrale*, 2003 WL 22208364 (S.D.N.Y. Sept. 23, 2003) (plaintiff did not overcome presumption that co-worker's deposition should take place in his district of residence in Germany); *Six West Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp.*, 203 F.R.D. 98 (S.D.N.Y. 2001) (plaintiff did not overcome presumption that high-ranking Japanese corporate officials whose individual depositions plaintiff requested should take place in their district of residence in Japan). Of course, the presumption here is just the opposite: a corporation's designated 30(b)(6) representatives normally should be deposed at the corporation's principal place of business, *not* where the individual witness resides.

SCEA does not cite any case that supports its novel theory that a U.S.-based defendant can force a plaintiff to take its deposition abroad simply because the defendant would prefer to designate foreign non-party witnesses rather than prepare its own witnesses to testify. The cases SCEA cites instead recognize that "[i]t is well-settled that 'the deposition of a corporation by its

agents and officers should ordinarily be taken at its principal place of business,' especially when, as in this case, the corporation is a defendant." *Salter*, 593 F.2d at 651.

III. Taking The Depositions In Japan As SCEA Proposes Would Prejudice MicroUnity.

SCEA mistakenly characterizes MicroUnity's chief concern as being the cost and inconvenience associated with taking depositions in Japan. To be sure, cost and inconvenience are significant issues. While MicroUnity does not dispute that it must face the expense and difficulty of deposing Japanese residents whose depositions MicroUnity individually notices in Japan, it does not follow that this then makes it costless and efficient to depose SCEA's 30(b)(6) witnesses in Japan. To the contrary, as proven by both parties' papers, taking depositions in Japan is a time-consuming and difficult process procedurally. Naturally, the fewer depositions subject to this process, the easier it will be on the parties.

The key issue, however, is the prejudice MicroUnity would suffer if forced to wait months to depose SCEA in Japan. As MicroUnity stated in its motion (and SCEA admits), there are no dates available in Japan to take these depositions before October, which is *six months after* MicroUnity noticed SCEA's deposition. Whether manufactured by SCEA or not, this delay creates serious problems for MicroUnity. The *Markman* hearing in this case is scheduled for September 20, 2007, and the first round of expert reports will come due 15 days after the *Markman* ruling. Given that this Court has construed the claims in most of the patents-in-suit, it is possible that the *Markman* ruling in this case could come relatively quickly. Thus, there is a real chance that these depositions will occur either after MicroUnity's expert reports are due, or on the eve of their deadline. Obviously, these late-breaking fact depositions will make it impossible, or at least very difficult, for MicroUnity's experts to prepare their reports.

There is no justification why MicroUnity should have to wait that long to depose SCEA, given that MicroUnity was diligent in noticing SCEA's depositions by April. Indeed, 30(b)(6) depositions often are the first discovery that a party takes because they are helpful in framing later discovery. SCEA itself has proven this fact – it recently served its own 30(b)(6) notice on MicroUnity, but has yet to request any individual depositions. (Grinstein Decl., ¶ 5). It is

therefore simply unfair to make MicroUnity wait six months, until the time of expert discovery, to take these foundational depositions.

Perhaps recognizing the seriousness of this problem, SCEA tries to blame MicroUnity. But its "blame-the-victim" approach is misguided. First, until SCEA declared in the second week of May that it would only produce its 30(b)(6) witnesses in Japan, MicroUnity had no way of knowing SCEA would take this unreasonable position about the location of these depositions. Although it is true that MicroUnity has secured deposition time in Japan in October to depose individual witnesses, the fact that MicroUnity may have to tolerate waiting that long to take individual witnesses' depositions has nothing to do with this 30(b)(6) issue.[1] Second, this Court no doubt encounters litigants who wait until the last minute to schedule depositions. To the extent that those parties cannot secure their depositions in time, perhaps some fault lies with them. But it is difficult to accuse MicroUnity of any lack of diligence here. MicroUnity noticed SCEA's 30(b)(6) deposition in April, approximately eight months before the discovery cutoff. The bottleneck instead results from the fact that there is only one room in all of Tokyo in which a U.S. deposition can be taken, and that room is in high demand from all sorts of litigants.[2]

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[1] SCEA asserts in its motion that it contacted the U.S. Embassy on March 27, 2007, and identified a few days before October in which the Embassy was available for depositions. Taking this to be true, it is not relevant to this motion. As of March 27, MicroUnity was focused on deposing Japanese witnesses and Japanese Sony entities, and was not attempting to schedule 30(b)(6) depositions of SCEA. MicroUnity had no reason to know then that SCEA would insist that its representatives be deposed in Japan. Although SCEA apparently was anticipating its next move, MicroUnity had no impetus then to attempt to secure earlier dates. When MicroUnity contacted the U.S. Embassy less than two weeks later to reserve space for individual depositions, May and October were the earliest dates available to it, and that situation has not changed. MicroUnity booked both blocks of time, and took four depositions in late May. (Grinstein Decl., ¶3). On Wednesday, June 20, 2007, MicroUnity again inquired as to any dates available for depositions in Japan. It was advised that there are no dates available in Tokyo any time in 2007, and that there are no dates available in Osaka until November 2007. (Grinstein Decl., ¶4).

[2] SCEA claims that MicroUnity could have booked deposition space in Osaka (the only other location allowed for U.S. depositions in Japan), and it accuses MicroUnity of misrepresenting the facts when MicroUnity asserted in its motion that SCEA refused to produce witnesses in Osaka. Yet MicroUnity asked SCEA in April 2007 whether it would permit witnesses to be deposed in Osaka, and SCEA responded that it would only produce its Japanese witnesses at the U.S. Embassy in Tokyo. (Grinstein Decl. Ex. 1) SCEA may claim now that it is willing to present witnesses in Osaka, but that is only because it has changed its position since this motion to compel was filed.

SCEA also wants to put MicroUnity in the unfair position of having to choose between using the limited time available in Japan either to depose SCEA's 30(b)(6) witnesses or to depose individual Sony witnesses.[3] Notably, many of the witnesses that SCEA designates as its 30(b)(6) witnesses are *not* listed on SCEA's initial disclosures. MicroUnity intends to depose persons that SCEA *did* include in its initial disclosures, as well as persons that MicroUnity identified based on its review of SCEA's document production as persons with knowledge pertinent to the claims. SCEA has made its position unmistakably clear that "all the witnesses living in Japan will need to be deposed in [Japan]." Thus, by insisting that SCEA's 30(b)(6) witnesses also be deposed in Japan, SCEA tries to force MicroUnity to choose between either the 30(b)(6) depositions or these individual depositions. This is improper and unfair.

IV. CONCLUSION

For the foregoing reasons, MicroUnity respectfully requests that the Court deny SCEA's motion for a protective order and grant MicroUnity's motion to compel, requiring SCEA to produce its 30(b)(6) witnesses in California, where SCEA has its principal place of business, or at another mutually agreeable location in the United States.

DATED: June 22, 2007 Respectfully submitted,

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[3] SCEA misleadingly asserts that MicroUnity "declined" additional dates that SCEA offered at the Osaka embassy in November. This is untrue. As is obvious from the email SCEA cites, MicroUnity's counsel advised SCEA that "waiting until November to take 30b6 depositions noticed in April is unreasonable," but that MicroUnity would proceed with the Osaka dates if this motion to compel is denied. (SCEA Ex. 13, p. 1) MicroUnity thus requested that "Sony itself continue to keep open the Osaka time." (*Id.*)

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CERTIFICATE OF SERVICE

I hereby certify that the following counsel of record who are deemed to have consented to electronic service are being served this 22nd day of June, 2007, with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3). Any other counsel of record will be served by, electronic mail, facsimile transmission and/or first class mail on this same date.

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