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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 *In re:*

12 SUBPOENA ON SORRENTO
13 THERAPEUTICS, INC. AND
14 QIANGZHONG MA

15
16 IMMUNOMEDICS, INC.,

17 Plaintiff,

18 v.

19 ROGER WILLIAMS MEDICAL
20 CENTER, et al.,
21 Defendants.

Case No.: 3:17-cv-2442-WQH-NLS

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION TO ENFORCE
SUBPOENAS**

[ECF No. 1]

*Underlying action pending in the
District Court of New Jersey:
Case No. 2:15-cv-04526-JLL-SCM*

22 Before the Court is plaintiff, Immunomedics, Inc.'s ("Plaintiff"), Motion to
23 Enforce Subpoenas Served on Third Parties Sorrento Therapeutics, Inc. ("Sorrento") and
24 Dr. Qiangzhong Ma ("Dr. Ma"). ECF No. 1. Plaintiff asks the Court to transfer this
25 motion to the District Court of New Jersey, where the underlying action is pending,
26 pursuant to Rule 45(f). In the alternative, Plaintiff seeks to compel third parties Sorrento
27 and Dr. Ma to comply with the document and deposition subpoenas previously served by
28 Plaintiff. ECF No. 1-2. This Court set a briefing schedule. ECF No. 2. Both third

1 parties, Sorrento and Dr. Ma, filed oppositions. ECF Nos. 4, 5. Plaintiff filed a reply.
2 ECF No. 8.

3 After consideration of the papers and arguments submitted by the parties, this
4 Court **GRANTS IN PART** and **DENIES IN PART** Plaintiff’s motion to enforce
5 subpoenas.

6 I. BACKGROUND

7 This case arises from the alleged misappropriation of property via a series of
8 transactions, including Material Transfer Agreements and the creation of various shell
9 corporations, being litigated in the District of New Jersey. ECF No. 1-2 at 4-5. Relevant
10 to the instant motion are the following facts as set forth by the parties.

11 Plaintiff is a biopharmaceutical company with interests in certain “Research
12 Materials.”¹ *Id.* at 4. Plaintiff entered into a series of agreements with the Defendants² in
13 the underlying action permitting experimentation with the Research Materials, but
14 restricting the use of “Research Products.” *Id.* Plaintiff alleges that in order to convert
15 and/or misappropriate Plaintiff’s property, Defendants in the underlying action created
16 two shell corporations, “CARgenix” and “BDL Products, Inc.,” to “serve as repositories
17 for the Research Materials and/or Research Products.” *Id.* at 7-8. The Research
18 Materials/Products were then “contributed” to CARgenix and BDL Products, Inc. ECF
19 No. 4 at 4.

20 Following the contribution of the Research Products, in August 2015, the stock of
21 BDL Products, Inc. was sold to TNK, a subsidiary of Sorrento. ECF No. 1-2 at 5, ECF
22 No. 4 at 4. In addition, TNK agreed to indemnify Dr. Ma against claims arising from
23 these transactions.³ ECF No. 1-2 at 5. The targets of the third party subpoenas at issue
24 here have significant ties to the alleged shell corporations: Sorrento shares a manager
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26 ¹ Specifically, “anti-CEA, MN-14.” ECF No. 1-2 at 7.

27 ² The Defendants in the underlying action are Roger Williams Medical Center (“RWMC”), Dr.
28 Junghans, and Dr. Katz.

³ The Court notes the initial complaint was filed in June 2015. *See* DNJ Docket, ECF No. 1.

1 and principal place of business with CARgenix, and Dr. Ma is one of the two owners of
2 BDL Products, Inc. ECF No. 1-2 at 8.

3 TNK and Sorrento were, at one time, named as parties to the underlying action but
4 were dismissed for lack of personal jurisdiction. ECF No. 1-2 at 6; ECF No. 4 at 4.
5 Accordingly, Plaintiff pursued information from TNK, Sorrento, and now Dr. Ma, as
6 non-parties pursuant to Rule 45. ECF No. 4 at 5-6; *see also*, 3:16-cv-1527-BAS-KSC
7 (Motion to Enforce Subpoena issued to TNK Therapeutics, Inc., filed June 17, 2016);
8 3:16-cv-1531-BAS-KSC (Motion to Enforce Subpoena issued to Sorrento Therapeutics,
9 Inc., filed June 17, 2016); 3:17-cv-1039-AJB-BLM (Motion to Enforce Subpoena issued
10 to Sorrento Therapeutics, Inc. and TNK Therapeutics, Inc. filed May 19, 2017). TNK
11 and Sorrento have produced some documents in response to the prior subpoenas, but the
12 parties reached agreement regarding the prior motions to compel in light of a then-
13 upcoming settlement conference and mediation. ECF No. 1-2 at 8. The settlement
14 conference and mediation were both unsuccessful. *Id.*

15 Towards the end of discovery in the underlying action, Plaintiff served additional
16 subpoenas on Sorrento and Dr. Ma. ECF No. 4 at 7. Sorrento and Dr. Ma served written
17 objections and the parties began a meet and confer process, but were unable to reach
18 agreement. *Id.*

19 Plaintiff filed the instant a motion to compel enforcement of various subpoenas
20 issued to Sorrento and Dr. Ma. At issue in this motion are the following subpoenas:⁴

- 21 (1) March 6, 2017 Subpoena for Documents to Sorrento; (ECF No. 1-11)
- 22 (2) October 20, 2017 Subpoena to Testify to Sorrento; (ECF No. 2-1, Exhibit 2)
- 23 (3) October 30, 2017 Subpoena to Testify at Deposition to Dr. Ma; (ECF No. 1-17)
- 24 (4) October 30, 2017 Subpoena for Documents to Dr. Ma; (ECF No. 1-18)

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28 ⁴ The other subpoenas against Sorrento and other discovery that may be outstanding against other third-
parties or the underlying Defendants are not at issue before this Court.

1 **II. MOTION TO TRANSFER ENFORCEMENT TO DISTRICT COURT OF**
2 **NEW JERSEY**

3 As a threshold issue, the parties dispute whether this Court should rule on this
4 motion or whether the motion should be transferred to the district where the underlying
5 litigation takes place, the District of New Jersey.

6 **A. Legal Standard**

7 Subpoenas are governed by Federal Rule of Civil Rule of Procedure 45. Under
8 this Rule, if compliance with the subpoena is required outside the district from where the
9 subpoena issued and the underlying action takes place, then the compliance court may
10 “transfer a motion under this rule to the issuing court if the person subject to the
11 subpoena consents or if the court finds exceptional circumstances.” Fed. R. Civ. P. 45(f).
12 Here, the parties subject to the subpoena, Sorrento and Dr. Ma, have not consented to
13 transfer, so transfer may be granted only the court finds “exceptional circumstances.”

14 The advisory notes to Rule 45 provide some guidance as to when exceptional
15 circumstances may exist:

16 The prime concern should be avoiding burdens on local nonparties subject to
17 subpoenas, and it should not be assumed that the issuing court is in a
18 superior position to resolve subpoena-related motions. In some
19 circumstances, however, transfer may be warranted in order to avoid
20 disrupting the issuing court’s management of the underlying litigation, as
21 when that court has already ruled on issues presented by the motion or the
22 same issues are likely to arise in discovery in many districts. Transfer is
23 appropriate only if such interests outweigh the interests of the nonparty
24 served with the subpoena in obtaining local resolution of the motion.

25 Fed. R. Civ. P. 45 Advisory Committee’s Notes (2013). The proponent of the transfer
26 bears the burden to show that exceptional circumstances exist. *Id.* Ultimately, whether
27 to transfer the motion is at the discretion of the court where compliance is required.
28 *Youtoo Techs., LLC v. Twitter, Inc.*, No. 17-MC-80006-JSC, 2017 WL 431751, at *1
(N.D. Cal. Feb. 1, 2017).

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1 **B. Discussion**

2 First, Plaintiff argues that exceptional circumstances exist here because Judge
3 Mannion in the District of New Jersey has familiarity with the claims at issue and the
4 factual history of the case. ECF No. 1-2 at 11. However, this is a concern that exists in
5 almost every such motion and cannot alone be sufficient to constitute an “extraordinary
6 circumstance.” *Personalized Media Commc'ns, LLC v. Top Victory Elecs. (Taiwan) Co.*,
7 No. 16-MC-80122-SK, 2016 WL 8542561, at *2 (N.D. Cal. Aug. 3, 2016) (“As to the
8 issue of judicial economy, such a risk would be inherent in any motion to compel
9 determined by an issuing court.”); *Isola USA Corp. v. Taiwan Union Tech. Corp.*, No.
10 12-CV-01361-SLG, 2015 WL 5934760, at *3 (D. Mass. June 18, 2015) (“[T]here is no
11 question that the [issuing court] is more familiar with the procedural and substantive
12 aspects of the underlying patent litigation. However, that cannot be what Congress meant
13 when it required a finding of exceptional circumstances, otherwise the exception would
14 swallow the rule. As a general matter, a Rule 45 subpoena-related motion will always be
15 resolved by a court less familiar with the underlying litigation.”).

16 Second, Plaintiff argues that this motion should be transferred in light of the
17 similar motion to compel that had been filed against Paul Hastings in the Northern
18 District of California, which has been transferred to the District of New Jersey. ECF No.
19 8 at 3-4. Specifically, Plaintiff argues that transfer would avoid the risk of inconsistent
20 rulings between this motion and the other pending motions in New Jersey related to Paul
21 Hastings and Dr. Junghans, because all these motions implicate whether a common
22 interest privilege exists between these parties and third-parties. *Id.* The common interest
23 privilege issue seems to implicate at least Request No. 1 from Plaintiff’s document
24 requests to Sorrento. *See* ECF No. 4 at 11. Beyond this one potential point of overlap,
25 however, Plaintiff does not take the position that the specific requests for documents or
26 topics here are identical or substantially similar to the requests pending in front of the
27 New Jersey court. Rather than finding an extraordinary circumstance here requiring
28 transfer, the Court notes that it can resolve any potential for inconsistency by leaving the

1 issue of the appropriateness of the common interest privilege to Judge Mannion to decide
2 and ordering the parties to adhere to Judge Mannion’s ruling, whatever it may be, as they
3 engage in the further discovery as outlined in the rest of this order.⁵

4 Plaintiff also argues that the resolution of this motion will impact the discovery
5 schedule in the underlying action. ECF No. 1 at 11. This argument is moot in light of
6 Judge Mannion’s ruling on January 22, 2018 that “the remaining limited third-party
7 discovery shall be completed concurrently with expert discovery to the fullest extent
8 practical.” DNJ case, ECF. No. 182. Judge Mannion was made previously aware of the
9 instant motion in this Court (*see* DNJ case, ECF No. 174) and thus, he has already ruled
10 on the length of extension of third-party discovery with knowledge of this motion.

11 Finally, Plaintiff argues that Sorrento and Dr. Ma have not demonstrated any
12 burden they would suffer if this motion were transferred to the issuing court. ECF No. 8
13 at 6. “The lack of a burden imposed on the nonparty by transfer is not in itself an
14 exceptional circumstance and is insufficient to warrant transfer.” *Woods v. Southern*
15 *Care, Inc.*, 303 F.R.D. 405, 407 (N.D. Ala. 2014). Plaintiff suggests that the “primary
16 factor” to consider is the burden imposed on the local parties and that lack of burden
17 would weigh heavily in favor of transfer. However, the Advisory Notes to Rule 45
18 clarify that “[t]he prime concern should be avoiding burdens on local nonparties subject
19 to subpoenas.” Thus, while burden would weigh heavily *against* transfer, lack of it does
20 not weigh equally as heavily *for* transfer. *See Woods*, 303 F.R.D. at 407-08 (“[L]ocal
21 nonparties should be burdened as little as practicable by litigation in which they are not
22 involved, and local resolution of the motion will typically impose a lighter burden.”).

23 In light of the consideration of the various factors above, the Court **DENIES**
24 Plaintiff’s request to transfer this motion to the District of New Jersey.

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27 ⁵ On January 22, 2018, Judge Mannion held a telephonic conference on various discovery issues in the
28 New Jersey case and ordered the Defendants in the underlying case to “provide affidavits or declarations
in support of their assertion of the common interest privilege.” DNJ ECF No. 182. On February 1,
2018, the Defendants filed their declarations. DNJ ECF Nos. 186-188.

1 **III. MOTION TO COMPEL⁶**

2 Plaintiff moves the Court to compel Sorrento to produce documents responsive to
3 its Second Subpoena for documents and to compel Sorrento to produce a witness or
4 witnesses for a 30(b)(6) deposition. ECF No. 1-2 at 13-14. Plaintiff also requests that
5 the Court compel Dr. Ma to produce documents responsive to his subpoena and testify at
6 deposition. *Id.* at 14.

7 **A. Legal Standard**

8 Federal Rule of Civil Procedure 45 governs discovery of third-parties by subpoena.
9 Under this Rule, a third-party is subject to the same scope of discovery as a party, as
10 defined under Rule 26(b). A party may seek discovery on:

11 “any nonprivileged matter that is relevant to any party’s claim or defense
12 and proportional to the needs of the case, considering the importance of the
13 issues at stake in the action, the amount in controversy, the parties’ relative
14 access to relevant information, the parties’ resources, the importance of the
15 discovery in resolving the issues, and whether the burden or expense of the
16 proposed discovery outweighs its likely benefit.”

17 Fed. R. Civ. P. 26(b)(1). Courts may limit the scope of subpoena if it imposes undue
18 burden on the person or entity subject to the subpoena. Fed. R. Civ. P. 45(d)(1). “Courts
19 have broad discretion to determine whether a subpoena is unduly burdensome.” *Brown v.*
20 *Deputy No. 1*, No. 12-CV-1938-GPC BGS, 2014 WL 842946, at *3 (S.D. Cal. Mar. 4,
2014).

21 **B. Discussion**

22 **i. Sorrento’s Second Document Subpoena**

23 Plaintiff’s second document subpoena to Sorrento at issue in this motion consists
24 of four requests.

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27 ⁶ The Court finds that Defendants’ argument that the Plaintiff was required to re-file its motion to
28 compel in order to comply with the Chambers Rules after the case was assigned lacks merit. However,
to the extent any future disputes are filed in this matter, they will be subject to the Chambers Rules.

1 Requests Nos. 2-4 are similar, with Request No. 2 stating:

2 2. Documents and communications related to pecuniary and non-pecuniary
3 benefits provided by Sorrento to RWMC.

4 ECF No. 1-11 at 8. Request Nos. 3 and 4 ask for the same information as to benefits to
5 Dr. Junghans and Dr. Katz. *Id.* Sorrento objects to these requests as overboard in its use
6 of the term “related to” pecuniary and non-pecuniary benefits, but submits that it would
7 be willing to produce documents that evidence the benefits received by these parties or
8 documents sufficient to show the benefits. ECF No. 4 at 11. The Court agrees that this is
9 an appropriate narrowing of these requests. Accordingly, the Court **GRANTS IN PART**
10 the motion to compel as to these requests and Sorrento is ordered to produce documents
11 and communications that either evidence or are sufficient to show the pecuniary and non-
12 pecuniary benefits provided by Sorrento to each of RWMC, Dr. Junghans, and Dr. Katz
13 in response to Requests Nos. 2-4.

14 Request No. 1 asks for:

15 1. Documents and communications related to the valuation of \$6,000,000 as
16 the “Base Price” consideration in the Stock Purchase Agreement and in the
17 Membership Interest Purchase Agreement, including, but not limited to:

18 a. Internal Sorrento communications;

19 b. Communications between and among Sorrento on the one hand,
20 and non-parties to the Stock Purchase Agreement and Membership
21 Interest Purchase Agreement on the other hand.

22 ECF No. 1-11 at 8. Sorrento objects that this request includes attorney-client privileged
23 materials and states that it will only agree to produce non-privileged documents
24 discussing the \$6 million base price. ECF No. 4 at 11. Sorrento additionally argues that
25 it should only be ordered to submit a categorical log of privileged documents involving
26 its alleged common interest privilege with BDL and CARGenix. *Id.*

27 As for this request, the Court finds that it is appropriate to **GRANT IN PART**
28 Plaintiff’s motion to compel, and limit production at this time to non-privileged

1 documents discussing the \$6 million dollar valuation, as long as any privileged
2 documents are appropriately logged. As to the issue of the categorical privilege log in
3 lieu of a document by document log, Sorrento has provided no reason as to why it is
4 required here. *See Narayan v. EGL, Inc.*, No. C05-04181 RMW HRL, 2006 WL
5 3050851, at *2 (N.D. Cal. Oct. 24, 2006) (“Although categorical descriptions of
6 privileged documents may be appropriate in situations where the volume of privileged
7 documents is demonstrably large, here [the party] has made no effort to describe the
8 volume of documents . . . nor has it given the court a picture of the categorical scheme
9 that might be employed.”). Thus, request for a categorical log is **DENIED**. Documents
10 withheld on the ground of privilege must, individually, “describe the nature of the
11 documents . . . and do so in a manner that, without revealing information itself privileged
12 or protected, will enable other parties to assess the claim.” Fed. R. Civ. P. 26(b)(5).

13 As to documents that are otherwise responsive that Sorrento withholds on the
14 claim of common interest privilege, this Court **ORDERS** the parties to apply Judge
15 Mannion’s decision, when it issues, to evaluate whether the claim of common interest
16 privilege is appropriate for these documents. If the parties are unable to reach agreement
17 regarding the application of Judge Mannion’s order to the remaining documents, the
18 parties are then ordered to comply with this Court’s Chambers Rules for a discovery
19 dispute, including a meaningful meet and confer and, if unable to resolve the dispute,
20 submission of a Joint Motion regarding the remaining disputed documents and/or
21 requests.

22 **ii. Sorrento’s 30(b)(6) Deposition Subpoena**

23 Plaintiff also issued a deposition subpoena pursuant to Rule 30(b)(6) identifying
24 19 topics for questioning. Sorrento submits that it “has never taken the position that it
25 would not provide a witness or witnesses for testimony.” ECF No. 4 at 12. Indeed,
26 Sorrento’s written responses and objections include a statement of willingness to meet
27 and confer. *See* ECF No. 5-1, Ex. 2. However, Sorrento objects to the topics as
28 overbroad, irrelevant, and disproportionate to the needs of the case. *Id.* Plaintiff moves

1 to compel designation and deposition on the topics and argues that Sorrento’s objections
2 are improper, but does not meaningfully address the 30(b)(6) topics or objections in its
3 moving papers, or respond to Sorrento’s arguments in its reply brief. *See* ECF No. 8.
4 Plaintiff also states it is “willing to discuss further the scope of the Deposition Subpoena
5 topics...” *Id.* at 10.

6 The Court agrees with both parties: Some of the topics are overbroad, and the
7 objections are equally problematic.⁷ Though phrased broadly, the topics appear to seek
8 information relevant to the underlying case regarding the formation, valuation, and sale
9 of Research Products and corporations/shells at the heart of the underlying litigation.
10 What is clear to the Court is that both parties agreed to further meet and confer.

11 Under the circumstances, the Plaintiff’s motion to compel designation and
12 deposition is **GRANTED IN PART**. The Court hereby **ORDERS** the parties to
13 meaningfully meet and confer to narrow and tailor the topics to target information
14 reasonably necessary to address specific issues in the underlying case. *See Rankine v.*
15 *Roller Bearing Co. of Am., Inc.*, 12CV2065-IEG BLM, 2013 WL 3992963, at *3 (S.D.
16 Cal. Aug. 5, 2013) (holding non-party discovery “should be tailored to request only
17 information reasonably necessary to address specific issues in the case”). Following the
18 meet and confer session, Sorrento must designate deponents on the narrowed and tailored
19 topics. The parties must then meet and confer to find a mutually convenient date for the
20 deposition(s) of the designated individual(s) to proceed and be complete prior to the third
21 party discovery cut-off date set by Judge Mannion. To the extent Sorrento asserts any
22 topics are governed or implicated by the common interest privilege, the parties must
23 apply Judge Mannion’s ruling.

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27 ⁷ For instance, Sorrento argues that topic 1, “the formation of TNK” is overbroad and should instead be
28 limited to “when, how, and why [Sorrento] formed TNK.” ECF No. 4 at 12. These proposed “limits”
present a distinction without a difference.

1 **iii. Dr. Ma's Subpoenas**

2 Plaintiff also issued both a document subpoena and a deposition subpoena to Dr.
3 Ma. ECF Nos. 1-17, 1-18. The document subpoena includes 10 broad document
4 requests, to which Dr. Ma objected. ECF No. 1-19. In his opposition, Dr. Ma “realizes
5 he is a potential fact witness and is willing to produce documents in response to
6 *reasonable requests* and to sit for deposition afterward.” ECF No. 5 at 1:4-6 (emphasis
7 in original).

8 In light of Dr. Ma correctly acknowledging that he will have to sit for deposition,
9 there is no dispute before the Court that Dr. Ma's deposition will proceed. Thus, the
10 Court **DENIES AS MOOT** Plaintiff's motion to compel Dr. Ma's deposition, but
11 **ORDERS** the parties to meet and confer to find a mutually convenient date for the
12 deposition to proceed such that it can be completed prior to the third party discovery cut-
13 off date set by Judge Mannion.

14 The dispute remaining before this Court is limited to the reasonableness and scope
15 of the document requests. Dr. Ma argues that the requests are “wildly overbroad,”
16 because as an “employee of Sorrento/TNK” whose work is to develop “CAR
17 biotechnology” the scope of the document requests as drafted include every work email
18 of Dr. Ma's for the last three years. ECF No. 5 at 1-2. Dr. Ma argues these requests are
19 overbroad, disproportionate, and will include voluminous irrelevant material. *Id.* at 5.
20 Plaintiff argues that it requested Dr. Ma “substantiate the purported burden” in producing
21 documents by providing a document hit report or to propose search terms, but that Dr.
22 Ma has refused. ECF No 1-2 at 9.

23 The Court agrees with Dr. Ma that this case is in the late stages of discovery and
24 that the document requests are overbroad and likely to capture matter (such as scientific
25 research) wholly irrelevant to the contract and misappropriation issues at the heart of the
26 underlying case. The requests, as currently phrased to include “all documents and
27 communications” related to broad categories such as “TNK,” Dr. Ma's employer, or
28 “CAR-T constructs,” the subject of Dr. Ma's research, are likely to produce a

1 burdensome and disproportionate volume of documents. The Court finds that documents
2 in Dr. Ma's possession and within the scope of the document requests are relevant to the
3 underlying litigation, but the requests are overbroad and disproportionate to the needs of
4 the case as phrased. However, the Court also finds that the parties are in the best position
5 to narrow and tailor search terms and appropriate connectors to gather targeted
6 documents relevant to the underlying case.

7 The Plaintiff's motion to compel is **GRANTED IN PART**. The parties are
8 **ORDERED** to meet and confer to develop a total of **20 search terms with appropriate**
9 **connectors**, consistent with the document request subjects, to yield limited, relevant
10 documents for production in response to the document subpoena. The Court finds the
11 time period of January 1, 2014 to the present reasonable and imposes that time limitation
12 on all requests. The parties are also **ORDERED** to agree on a timeline for production
13 that complies with the timeline for remaining third-party discovery as set by Judge
14 Mannion. To the extent Dr. Ma intends to assert privilege over any documents, they must
15 be individually identified in a privilege log consistent with the requirements of Rule
16 26(b)(5) and will be subject to any ruling on common interest privilege issued by Judge
17 Mannion.

18 **C. Request for Attorneys' Fees**

19 Plaintiff briefly requests "reasonable costs, including attorneys' fees," at the close
20 of its motion. ECF No. 1-2 at 15. This Court does not find the imposition of fees of
21 sanctions appropriate in the instant matter. Each parties' position was substantially
22 justified. *See* Fed. R. Civ. P. 37 (a)(5).

23 **IV. CONCLUSION**

24 Consistent with the terms and direction as set forth above,

25 (1) The Plaintiff's motion to transfer the motion to the District of New Jersey is

26 **DENIED;**

27 (2) The Plaintiff's motion to compel production of documents from Sorrento is

28 **GRANTED IN PART;**

1 (3) The Plaintiff's motion to compel designation and deposition of the 30(b)(6)
2 witness is **GRANTED IN PART**;

3 (4) The Plaintiff's motion to compel the deposition of Dr. Ma is **DENIED AS**
4 **MOOT**; and

5 (5) The Plaintiff's motion to compel the production of documents from Dr. Ma is
6 **GRANTED IN PART**.

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8 **IT IS SO ORDERED.**

9 Dated: February 8, 2018

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11 Hon. Nita L. Stormes
12 United States Magistrate Judge
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