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 16 RITE AID CORPORATION

17 *(Additional counsel listed on signature page.)*

18 UNITED STATES DISTRICT COURT
 19 FOR THE EASTERN DISTRICT OF CALIFORNIA

20 UNITED STATES OF AMERICA, and the
 21 STATE OF CALIFORNIA, et al., ex rel. LLOYD
 22 F. SCHMUCKLEY, JR.

23 Plaintiffs,

24 vs.

25 RITE AID CORPORATION,
 26 Defendant.

27 STATE OF CALIFORNIA *ex rel.* LLOYD F.
 28 SCHMUCKLEY, JR.,

Plaintiffs,

Vs.

RITE AID CORPORATION,
 Defendant.

Case No.: 2:12-cv-1699 KJM EFB

**JOINT STIPULATED
 CONFIDENTIALITY AGREEMENT
 AND PROTECTIVE ORDER;
 [PROPOSED] ORDER THEREON**

Complaint Filed: September 21, 2017

1 and procedures;
2 The Parties contend that the need for protection should be addressed by an Order of the Court, rather
3 than a private agreement among the Parties, because the terms hereof establish deadlines and
4 procedures for an appropriate Party, as set forth herein, to seek the intervention of the Court should a
5 meet and confer regarding a challenged designation fail to resolve a dispute. Further, the entry of an
6 Order by the Court may provide assurance to address the concerns of Non-Parties, such as certain
7 governmental entities whose confidential internal documents will be potentially relevant to this
8 litigation, that the terms of this Order to protect such confidential documents will be enforced subject
9 to the oversight of the Court rather than merely the Parties to this matter.

10 The Parties acknowledge that this Order does not confer blanket protections on all
11 disclosures or responses to discovery and that the protection it affords from public disclosure and use
12 extends only to the limited information or items that are entitled to confidential treatment under the
13 applicable legal principles. The Parties further acknowledge, as set forth in Section 12.3, below, that
14 this Order does not entitle any Party to file confidential information under seal; Federal Rule of Civil
15 Procedure 5.2(d), Local Rules 141 and 141.1(e), and the Court’s Standing Order [ECF No. 78-1] set
16 forth the procedures that must be followed and the standards that will be applied regarding the filing
17 of motions to seal.

18 2. DEFINITIONS

19 2.1 Challenging Party: a Party or Non-Party that challenges the designation of
20 information or items under this Order.

21 2.2 “CONFIDENTIAL” Information or Items: information (regardless of how it is
22 generated, stored or maintained) or tangible things that qualify for protection under Federal Rule of
23 Civil Procedure 26(c).

24 2.3 Counsel (without qualifier): Outside Counsel of Record and House Counsel (as well
25 as their support staff).

26 2.4 Designating Party: a Party or Non-Party that designates information or items that it
27 produces in disclosures or in responses to discovery as “CONFIDENTIAL.”

1 the ambit of this Order.

2 Mass, indiscriminate, or routinized designations are prohibited. Designations that are shown
3 to be clearly unjustified or that have been made for an improper purpose (e.g., to unnecessarily
4 encumber or retard the case development process or to impose unnecessary expenses and burdens on
5 other Parties) expose the Designating Party to sanctions.

6 If it comes to a Designating Party's attention that information or items that it designated for
7 protection do not qualify for protection, that Designating Party must promptly notify all other Parties
8 that it is withdrawing the mistaken designation.

9 5.2 Manner and Timing of Designations. Except as otherwise provided in this Order
10 (see, e.g., second paragraph of section 5.2(a) below), or as otherwise stipulated or ordered,
11 Disclosure or Discovery Material that qualifies for protection under this Order must be clearly so
12 designated before the material is disclosed or produced.

13 Designation in conformity with this Order requires:

14 (a) for information in documentary form (e.g., paper or electronic documents, but
15 excluding transcripts of depositions or other pretrial or trial proceedings), that the Producing Party
16 affix the legend "CONFIDENTIAL" to each page that contains protected material. If only a portion
17 or portions of the material on a page qualifies for protection, the Producing Party also must clearly
18 identify the protected portion(s) (e.g., by making appropriate markings in the margins).

19 A Party or Non-Party that makes original documents or materials available for inspection need not
20 designate them for protection until after the inspecting Party has indicated which material it would
21 like copied and produced. During the inspection and before the designation, all of the material made
22 available for inspection shall be deemed "CONFIDENTIAL." After the inspecting Party has
23 identified the documents it wants copied and produced, the Producing Party must determine which
24 documents, or portions thereof, qualify for protection under this Order. Then, before producing the
25 specified documents, the Producing Party must affix the "CONFIDENTIAL" legend to each page
26 that contains Protected Material. If only a portion or portions of the material on a page qualifies for
27 protection, the Producing Party also must clearly identify the protected portion(s) (e.g., by making

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1 appropriate markings in the margins).

2 (b) for testimony given in deposition or in other pretrial or trial proceedings, that the
3 Designating Party identify on the record, before the close of the deposition, hearing, or other
4 proceeding, all protected testimony.

5 (c) for information produced in some form other than documentary and for any other
6 tangible items, that the Producing Party affix in a prominent place on the exterior of the container or
7 containers in which the information or item is stored the legend "CONFIDENTIAL." If only a
8 portion or portions of the information or item warrant protection, the Producing Party, to the extent
9 practicable, shall identify the protected portion(s).

10 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to
11 designate qualified information or items does not, standing alone, waive the Designating Party's
12 right to secure protection under this Order for such material. However, the Parties expressly reserve
13 the right to oppose or challenge on grounds of waiver any attempt to correct any failure to designate
14 as Protected Material any Disclosure or Discovery Material produced prior to filing of the State of
15 California's Complaint-in-Intervention [ECF No. 75]. Upon timely correction of an inadvertent
16 failure to designate, the Receiving Party must make reasonable efforts to assure that the material is
17 treated in accordance with the provisions of this Order.

18 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

19 6.1 Timing of Challenges. Any Party or Non-Party may challenge a designation of
20 confidentiality at any time. Unless a prompt challenge to a Designating Party's confidentiality
21 designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic burdens,
22 or a significant disruption or delay of the litigation, a Party does not waive its right to challenge a
23 confidentiality designation by electing not to mount a challenge promptly after the original
24 designation is disclosed.

25 6.2 Meet and Confer. The Challenging Party shall initiate the dispute resolution process
26 by providing written notice of each designation it is challenging and describing the basis for each
27 challenge. To avoid ambiguity as to whether a challenge has been made, the written notice must

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1 recite that the challenge to confidentiality is being made in accordance with this specific paragraph
2 of the Order. The Parties shall attempt to resolve each challenge in good faith and must begin the
3 process by conferring directly (including voice to voice dialogue, when other forms of
4 communication are not sufficient) within 14 days of the date of service of notice. In conferring, the
5 Challenging Party must explain the basis for its belief that the confidentiality designation was not
6 proper and must give the Designating Party an opportunity to review the designated material, to
7 reconsider the circumstances, and, if no change in designation is offered, to explain the basis for the
8 chosen designation. A Challenging Party may proceed to the next stage of the challenge process only
9 if it has engaged in this meet and confer process first or establishes that the Designating Party is
10 unwilling to participate in the meet and confer process in a timely manner.

11 6.3 Judicial Intervention. If the Parties cannot resolve a challenge without court
12 intervention, the Designating Party shall file and serve a notice of motion to retain confidentiality
13 pursuant to the terms and procedures of Local Rules 251 and 302 (and in compliance with Local
14 Rules 141 and 141.1(e), if applicable) within 21 days of the initial notice of challenge or within 14
15 days of the Parties agreeing that the meet and confer process will not resolve their dispute,
16 whichever is earlier. Such deadlines may be reasonably extended pursuant to the agreement of the
17 Parties. Each such motion must be accompanied by a competent declaration affirming that the
18 movant has complied with the meet and confer requirements imposed in the preceding paragraph.
19 Failure by the Designating Party to make such a motion including the required declaration within 21
20 days (or 14 days, if applicable) shall automatically waive the confidentiality designation for each
21 challenged designation. In addition, the Challenging Party may file a motion challenging a
22 confidentiality designation at any time if there is good cause for doing so, including a challenge to
23 the designation of a deposition transcript or any portions thereof. Any motion brought pursuant to
24 this provision must be accompanied by a competent declaration affirming that the movant has
25 complied with the meet and confer requirements imposed by the preceding paragraph.

26 The burden of persuasion in any such challenge proceeding shall be on the Designating
27 Party. Frivolous challenges, and those made for an improper purpose (e.g., to harass or impose

1 unnecessary expenses and burdens on other Parties) may expose the Challenging Party to sanctions.
2 Unless the Designating Party has waived the confidentiality designation by failing to file a motion to
3 retain confidentiality as described above, all Parties shall continue to afford the material in question
4 the level of protection to which it is entitled under the Producing Party’s designation until the court
5 rules on the challenge.

6 7. ACCESS TO AND USE OF PROTECTED MATERIAL

7 7.1 Basic Principles. A Receiving Party may use Protected Material that is disclosed or
8 produced by another Party or by a Non-Party in connection with this case only for prosecuting,
9 defending, or attempting to settle this litigation. Such Protected Material may be disclosed only to
10 the categories of persons and under the conditions described in this Order. When the litigation has
11 been terminated, a Receiving Party must comply with the provisions of section 13 below (FINAL
12 DISPOSITION).

13 Protected Material must be stored and maintained by a Receiving Party at a location and in a
14 secure manner that ensures that access is limited to the persons authorized under this Order.

15 7.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless otherwise ordered by
16 the court or permitted in writing by the Designating Party, a Receiving Party may disclose any
17 information or item designated “CONFIDENTIAL” only to:

18 (a) the Receiving Party’s Outside Counsel of Record in this action, as well as employees
19 of said Outside Counsel of Record to whom it is reasonably necessary to disclose the information for
20 this litigation and who have signed the “Acknowledgment and Agreement to Be Bound” that is
21 attached hereto as Exhibit A;

22 (b) the officers, directors, and employees (including House Counsel) of the Receiving
23 Party to whom disclosure is reasonably necessary for this litigation and who have signed the
24 “Acknowledgment and Agreement to Be Bound” (Exhibit A);

25 (c) Experts (as defined in this Order) of the Receiving Party to whom disclosure is
26 reasonably necessary for this litigation and who have signed the “Acknowledgment and Agreement
27 to Be Bound” (Exhibit A);

- 1 (d) the court and its personnel;
- 2 (e) court reporters and their staff, professional jury or trial consultants, mock jurors, and
- 3 Professional Vendors to whom disclosure is reasonably necessary for this litigation and who have
- 4 signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);
- 5 (f) during their depositions, witnesses in the action to whom disclosure is reasonably
- 6 necessary and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A),
- 7 unless otherwise agreed by the Designating Party or ordered by the court. Pages of transcribed
- 8 deposition testimony or exhibits to depositions that reveal Protected Material must be separately
- 9 bound by the court reporter and may not be disclosed to anyone except as permitted under this
- 10 Order.
- 11 (g) the author or recipient of a document containing the information or a custodian or
- 12 other person who otherwise possessed or knew the information.

13 8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER

14 LITIGATION

15 If a Party is served with a subpoena or a court order issued in other litigation that compels

16 disclosure of any information or items designated in this action as “CONFIDENTIAL,” that Party

17 must:

- 18 (a) promptly notify in writing the Designating Party. Such notification shall include a
- 19 copy of the subpoena or court order;
- 20 (b) promptly notify in writing the Party who caused the subpoena or order to issue in the
- 21 other litigation that some or all of the material covered by the subpoena or order is subject to this
- 22 Order. Such notification shall include a copy of this Order; and
- 23 (c) cooperate with respect to all reasonable procedures sought to be pursued by the
- 24 Designating Party whose Protected Material may be affected.

25 If the Designating Party timely seeks a protective order, the Party served with the subpoena

26 or court order shall not produce any information designated in this action as “CONFIDENTIAL”

27 before a determination by the court from which the subpoena or order issued, unless the Party has

1 obtained the Designating Party’s permission. The Designating Party shall bear the burden and
2 expense of seeking protection in that court of its confidential material – and nothing in these
3 provisions should be construed as authorizing or encouraging a Receiving Party in this action to
4 disobey a lawful directive from another court.

5 9. A NON-PARTY’S PROTECTED MATERIAL SOUGHT TO BE PRODUCED IN THIS
6 LITIGATION

7 (a) The terms of this Order are applicable to information produced by a Non-Party in this
8 action and designated as “CONFIDENTIAL.” Such information produced by Non-Parties in
9 connection with this litigation is protected by the remedies and relief provided by this Order.
10 Nothing in these provisions should be construed as prohibiting a Non-Party from seeking additional
11 protections.

12 (b) In the event that a Party is required, by a valid discovery request, to produce a Non-
13 Party’s confidential information in its possession, and the Party is subject to an agreement with the
14 Non-Party not to produce the Non-Party’s confidential information, then the Party shall:

15 (1) promptly notify in writing the Requesting Party and the Non-Party that some or
16 all of the information requested is subject to a confidentiality agreement with a Non-Party;

17 (2) promptly provide the Non-Party with a copy of this Order in this litigation, the
18 relevant discovery request(s), and a reasonably specific description of the information requested; and

19 (3) make the information requested available for inspection by the Non-Party.

20 (c) If the Non-Party fails to object or seek a protective order from this court within 14
21 days of receiving the notice and accompanying information, the Receiving Party may produce the
22 Non-Party’s confidential information responsive to the discovery request. If the Non-Party timely
23 seeks a protective order, the Receiving Party shall not produce any information in its possession or
24 control that is subject to the confidentiality agreement with the Non-Party before a determination by
25 the court. Absent a court order to the contrary, the Non-Party shall bear the burden and expense of
26 seeking protection in this court of its Protected Material.

27 10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

1 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected
2 Material to any person or in any circumstance not authorized under this Order, the Receiving Party
3 must immediately (a) notify in writing the Designating Party of the unauthorized disclosures, (b) use
4 its best efforts to retrieve all unauthorized copies of the Protected Material, (c) inform the person or
5 persons to whom unauthorized disclosures were made of all the terms of this Order, and (d) request
6 such person or persons to execute the “Acknowledgment and Agreement to Be Bound” that is
7 attached hereto as Exhibit A.

8 11. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED
9 MATERIAL

10 When a Producing Party gives notice to Receiving Parties that certain inadvertently produced
11 material is subject to a claim of privilege or other protection, the obligations of the Receiving Parties
12 are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). This provision is not intended to
13 modify whatever procedure may be established in an e-discovery order that provides for production
14 without prior privilege review. Pursuant to Federal Rule of Evidence 502(d) and (e), insofar as the
15 Parties reach an agreement on the effect of disclosure of a communication or information covered by
16 the attorney-client privilege or work product protection, the Parties may incorporate their agreement
17 in the stipulated protective order submitted to the court.

18 12. MISCELLANEOUS

19 12.1 Right to Further Relief. Nothing in this Order abridges the right of any person to seek
20 its modification by the court in the future.

21 12.2 Right to Assert Other Objections. By stipulating to the entry of this Order no Party
22 waives any right it otherwise would have to object to disclosing or producing any information or
23 item on any ground not addressed in this Order. Similarly, no Party waives any right to object on any
24 ground to use in evidence of any of the material covered by this Order. The Parties expressly
25 reserve the right to oppose or challenge on grounds of waiver any attempt to modify any failure to
26 designate as Protected Material any Disclosure or Discovery Material produced prior to filing of the
27 State of California’s Complaint-in-Intervention [ECF No. 75].

1 Nothing in this Order shall be construed or deemed to modify the terms of the following
2 agreements: (1) Confidentiality and Nondisclosure Agreement dated November 25, 2013 entered
3 into by and between Rite Aid Corporation (referred to as “Rite Aid, Inc.” in the agreement,
4 hereinafter “Rite Aid”) and the United States Attorney’s Office for the Eastern District of
5 California; (2) Confidentiality and Non-Disclosure Agreement dated July 13, 2014 entered into by
6 and between Rite Aid (also referred to as “Rite Aid, Inc.” in the agreement) and the California
7 Attorney General’s Office, by and through the Bureau of Medi-Cal Fraud and Elder Abuse
8 (“Bureau” or the “State”), or (3) Agreement on Confidential Information dated April 23, 2015
9 entered into by and between Rite Aid (also referred to as “Rite Aid, Inc.” in the agreement) and
10 the Bureau (collectively, “Prior Agreements”). In the event of any conflict between the terms of
11 this Order and any of the Prior Agreements in connection with the procedure for a Party to
12 designate purported Protected Material, or the procedure for a Party to challenge such designations
13 of purported Protected Material, the terms of this Order shall prevail. However, Rite Aid shall not
14 seek to enlarge or broaden the scope of purported Protected Material identified during the pre-
15 intervention investigation beyond that which was set forth according to the terms of the Prior
16 Agreements without a showing made during good faith meet and confer discussions demonstrating
17 specific good cause and necessity for such a designation to be made.

18 Further, (i) any Disclosure or Discovery Materials produced by Rite Aid during the State’s
19 pre-intervention investigation that was not designated as “PROPRIETARY AND
20 CONFIDENTIAL” under any of the Prior Agreements, (ii) any Disclosure or Discovery Materials
21 which are quoted or presented in substantially complete form within the State’s Complaint-in-
22 Intervention, and/or (iii) any Disclosure or Discovery Material that was previously released from a
23 designation of “Proprietary”, “Confidential”, and/or “PROPRIETARY AND CONFIDENTIAL”
24 in writing between Rite Aid and the State, shall not be designated or re-designated as
25 “Proprietary” and/or “Confidential” by Rite Aid and shall not be Protected Material under the
26 terms of this Order. Following entry of this Order, the Parties shall meet and confer in good faith
27 to identify with specificity all such documents falling within categories (i), (ii) and (iii) in this

1 paragraph, and shall attempt to resolve in good faith any and all disputes that may arise from such
2 conferences before seeking Court intervention under the terms of this Order.

3 The Parties otherwise explicitly reserve any and all rights to designate, and/or challenge
4 the designation of, any Disclosure or Discovery materials under the terms of this Order.

5 15. EXEMPTION FROM FREEDOM OF INFORMATION ACT

6 The Parties agree and hereby stipulate that any Protected Material shall be deemed
7 presumptively exempt from disclosure under Exemption 4 of the Freedom of Information Act
8 (“FOIA”) (*see* 45 C.F.R. § 5.65). The Parties agree that, pursuant to the applicable laws and
9 regulations, in the event that any private Non-Party under FOIA seeks disclosure of, or access to,
10 the Protected Material of a Disclosing Party, such Disclosing Party shall be: (1) notified in
11 advance in accordance with 45 C.F.R. § 5.65(d); and (2) given opportunity to object to any such
12 disclosure or grant of access. **The court does not make any findings as to any such objection or
13 whether the information should be disclosed. That question, if and when it arises, should be
14 resolved according to the procedures under FOIA.**

15 16. OBJECTIONS TO DISCOVERY NOT COVERED

16 This Order is not intended to address discovery objections to produce, answer, or respond
17 on the grounds of attorney-client privilege or work product immunity, or to preclude any Party
18 from seeking further relief or protective orders from the Court as may be appropriate under the
19 Federal Rules of Civil Procedure.

20 17. MODIFICATION OF PROTECTIVE ORDER

21 This Order is without prejudice to the right of any Party or Non-Party to seek further
22 protection and/or relief from the Court, upon good cause shown, with respect to any of the
23 provisions hereof.

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1 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

2 Dated: December 26, 2018

3 By /s/ Emmanuel R. Salazar
(as authorized on 12/26/2018)

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11 Attorneys for STATE OF CALIFORNIA

12 Dated: December 26, 2018

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14 By /s/ Wm. Paul Lawrence, II
(as authorized on 12/26/2018)

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LOYD F. SCHMUCKLEY, JR.

Dated: December 26, 2018

MORGAN, LEWIS & BOCKIUS LLP

By /s/ Michael Q. Eagan, Jr.
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Attorneys for Defendant
RITE AID CORPORATION

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PURSUANT TO STIPULATION, IT IS SO ORDERED.

DATED: January 14, 2019.


EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE

1 EXHIBIT A

2 ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

3 I, _____ [print or type full name], of _____
4 [print or type full address], declare under penalty of perjury that I have read in its entirety and
5 understand the Stipulated Protective Order that was issued by the United States District Court for the
6 Eastern District of California on _____, 2018 in the case of *United States of America*
7 *and the State of California ex rel. Loyd F. Schmuckley, Jr. v. Rite Aid Corp.*, Case No. 2:12-cv-
8 01699-KJM-EFB [ECF No. ____]. I agree to comply with and to be bound by all the terms of this
9 Stipulated Protective Order and I understand and acknowledge that failure to so comply could
10 expose me to sanctions and punishment in the nature of contempt. I solemnly promise that I will not
11 disclose in any manner any information or item that is subject to this Stipulated Protective Order to
12 any person or entity except in strict compliance with the provisions of this Order.

13 I further agree to submit to the jurisdiction of the United States District Court for the Eastern District
14 of California for the purpose of enforcing the terms of this Stipulated Protective Order, even if such
15 enforcement proceedings occur after termination of this action.

16 I hereby appoint _____ [print or type full name] of
17 _____ [print or type full address and telephone number] as
18 my California agent for service of process in connection with this action or any proceedings related
19 to enforcement of this Stipulated Protective Order.

20
21 Date: _____

22 City and State where sworn and signed: _____

23
24 Printed name: _____

25
26 Signature: _____