

1 MORGAN, LEWIS & BOCKIUS LLP  
 ERIC W. SITARCHUK, Admitted *pro hac vice*  
 2 eric.sitarchuk@morganlewis.com  
 KELLY A. MOORE, Admitted *pro hac vice*  
 3 kelly.moore@morganlewis.com  
 BENJAMIN P. SMITH, Bar No. 197551  
 4 benjamin.smith@morganlewis.com  
 One Market, Spear Street Tower  
 5 San Francisco, California 94105-1596  
 Tel: +1.415.442.1000; Fax: +1.415.442.1001

6 Attorneys for Defendant  
 7 RITE AID CORPORATION

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 9 UNITED STATES DISTRICT COURT  
 10 EASTERN DISTRICT OF CALIFORNIA

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 12 UNITED STATES OF AMERICA and the  
 STATES OF CALIFORNIA, *et al.*, *ex rel.*  
 13 LOYD F. SCHMUCKLEY, JR.,

14 Plaintiffs,

15 v.

16 RITE AID CORPORATION,

17 Defendant.

18 STATE OF CALIFORNIA, *ex rel.* LOYD F.  
 19 SCHMUCKLEY, JR.,

20 Plaintiffs,

21 v.

22 RITE AID CORPORATION,

23 Defendant.

Case No. 2:12-cv-01699-KJM-EFB

**PARTIES' JOINT MOTION TO  
 EXTEND TIME FOR PARTIES TO  
 MEET AND CONFER RE:  
 DEFENDANT'S 11TH AFFIRMATIVE  
 DEFENSE (IMPROPER DEFENDANT)  
 AND JOINT MOTION TO AMEND  
 SCHEDULING ORDER; ORDER**

**Related to ECF No. 187, 188, 239, 241,  
 242**

1 **PARTIES’ JOINT MOTION TO EXTEND TIME FOR PARTIES TO MEET AND**  
2 **CONFER RE: DEFENDANT’S 11TH AFFIRMATIVE DEFENSE (IMPROPER**  
3 **DEFENDANT) AND JOINT MOTION TO AMEND SCHEDULING ORDER**

4 **TO THE HONORABLE COURT:**

5 Plaintiff-Intervenor State of California (“California”), *Qui Tam* Plaintiff Loyd F.  
6 Schmuckley, Jr. (“Relator,” together with California, “Plaintiffs”), and Defendant Rite Aid  
7 Corporation (“Defendant” or “Rite Aid,” together with Plaintiffs, the “Parties”), by and through  
8 their respective counsel of record, for good cause shown, hereby request this Court to extend the  
9 time for the Parties to further meet and confer regarding Rite Aid’s Eleventh Affirmative Defense  
10 (Improper Defendant) set forth in Rite Aid’s First Amended Answer to Relator’s First Amended  
11 Complaint [ECF NO. 146].<sup>1</sup>

12 On January 25, 2019, the Court ordered the Parties to submit a joint statement concerning  
13 Rite Aid’s Eleventh Affirmative Defense (Improper Defendant). ECF No. 187. On February 8,  
14 2019, the Parties filed a joint statement setting forth their agreement that more time is warranted  
15 to continue to address, and hopefully resolve, the issues and present them to the Court at a more  
16 appropriate time. ECF No. 188 (“Joint Statement”). In the Joint Statement, the Parties proposed  
17 to the Court that the Plaintiffs should have until July 15, 2019 to either stipulate with Rite Aid for  
18 an agreed-upon amendment to correct the naming of Rite Aid in this matter, or to otherwise seek  
19 leave of the Court to amend their pleadings to do so. *Id.* at 1.

20 Plaintiffs further agreed that they would not file a motion to add a new defendant during  
21 this time until July 15, 2019, or earlier upon exhaustion of good-faith discussions. The Parties  
22 noted that the proposed timeline factored in the scheduling relating to Rite Aid’s motion  
23 challenging Plaintiffs’ sampling methodology and design, hearing of which the Court originally  
24 set for June 28, 2019. *Id.* at 1, n.2.

25 On June 28, 2019, due to the continuance of the hearing on Defendant’s motion regarding  
26 the sampling methodology and to allow the Parties adequate time to meet and confer, the Parties

27 <sup>1</sup> The same affirmative defense is set forth by Defendant as the Thirteenth Affirmative  
28 Defense in its First Amended Answer to the State’s Complaint-in-Intervention [ECF No. 147].

1 jointly moved for an order allowing Plaintiffs until August 26, 2019 to either stipulate with  
2 Defendant for an agreed-upon amendment to correct the naming of Defendant in this matter, or to  
3 otherwise seek leave of the Court to amend their pleadings. ECF No. 224. The Court, finding  
4 good cause, granted the motion. ECF No. 227.

5       Thereafter, the parties continued to meet and confer in an attempt to come to an agreement  
6 on the identity of the correct defendant for this case without further discovery or law and motion  
7 practice, and exchanged a draft and final declaration of a Rite Aid Hdqtrs. Corp. officer in this  
8 regard.

9       On or about August 20, 2019, the parties jointly moved for an order allowing Plaintiffs  
10 until October 18, 2019 to either stipulate with Defendant for an agreed-upon amendment to  
11 correct the naming of Defendant in this matter, or to otherwise seek leave of the Court to amend  
12 their pleadings. ECF No. 241. This Court granted the motion on August 26, 2019. ECF No. 242.

13       After filing their joint motion on August 20, 2019, the Parties continued to meet and  
14 confer regarding the issues involved with Rite Aid's Eleventh Affirmative Defense (Improper  
15 Defendant), including California's issuance of related document requests and a 30(b)(6)  
16 deposition notice. To date, the parties have been unable to reach an agreement, and Plaintiffs  
17 seek discovery from Defendant. Additional meet and confer efforts are ongoing regarding:

- 18       • whether the Parties will agree that pleadings in the case will be amended pursuant to  
19       Federal Rule of Civil Procedure ("Rule") 15(c) to substitute or add Thrifty Payless,  
20       Inc. d/b/a Rite Aid, a California Corporation, and/or Rite Aid Hdqtrs Corp, a Delaware  
21       corporation, as the defendants in this action in the place of, or in addition to, Rite Aid  
22       Corporation, a Delaware Corporation;
- 23       • whether all of Rite Aid's prior discovery responses, representations, and stipulations  
24       would bind any newly named defendant as if it had originally appeared as the  
25       defendant in this action from the outset;
- 26       • whether the amendment shall relate back to the original pleadings for all purposes,  
27       including applicable statutes of limitation; and

- how discovery requests to Rite Aid and/or any newly named defendant(s) would be addressed.

Due to the ongoing meet and confer and discovery efforts, the recent departure of Michael Q. Eagan from Morgan Lewis, and the involvement of Benjamin Smith in a Delaware Chancery Court trial in September 2019, the Parties jointly submit that good cause exists to extend deadlines for the Parties to complete the above meet-and-confer process, as follows:

<b>Event</b>	<b>Current Deadline [ECF No. 242]</b>	<b>Proposed Modified Date</b>
Rite Aid Corporation's declaration under oath regarding relationship with/among subsidiaries and Written Responses/Objections to California's Requests for Production ("RFP") Set No. 7	Served by August 30, 2019	N/A – completed
Rite Aid's service of Written Responses/Objections to California's Requests for Production ("RFP") Set No. 7 and Rite Aid's service of Written Responses/Objections to Relator's RFP Set No. 2.	N/A	Served by October 2, 2019
Rite Aid Corporation's production of documents responsive to RFP Set No. 7	Completed by September 27, 2019	Completed by October 25, 2019
Parties' stipulation, if agreed upon, to amend the named defendant with relation back (including removal of Rite Aid Corporation from pleadings)	Filed by October 18, 2019	Filed by November 12, 2019
Plaintiffs' motion to amend the pleadings (if necessary following Parties' inability to stipulate)	Filed by November 1, 2019	Filed by December 2, 2019
Defendant's opposition to motion to amend	Filed by December 6, 2019	Filed by January 10, 2020
Plaintiffs' reply re motion to amend	Filed by December 20, 2019	Filed by January 24, 2020
Hearing on Plaintiffs' motion to amend the pleadings	January 17, 2020, 10:00 a.m., Courtroom 3	TBD

1 The Parties maintain their respective positions and reservations of rights as set forth in the  
2 Joint Statement while these discussions continue. ECF No. 188 at 3-4. The Parties also maintain  
3 that no Party may claim prejudice based on the extended discussions in connection with a motion  
4 to amend the pleadings under Rule 15(c).

5 Further, in light of the above, the Parties jointly move the Court to amend its prior  
6 scheduling order, ECF No. 239, by moving the current dates by 5 weeks to accommodate the  
7 proposed changes above, as follows:

8 <b>Event</b>	<b>Current Date</b>	<b>Requested Modified Date</b>
9 Second Phase of Discovery Completed	February 21, 2020	March 27, 2020
10 Expert Disclosures (other than sampling methodology/design)	April 10, 2020	May 15, 2020
11 Rebuttal expert disclosures (other than sampling methodology/design)	May 22, 2020	June 26, 2020
12 Expert Discovery Completed	June 26, 2020	July 31, 2020
13 Last Day to Hear Dispositive Motions	October 23, 2020 at 10:00 A.M. in Courtroom No. 3	December 4, 2020 at 10:00 A.M. in Courtroom No. 3

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16 Respectfully Submitted,

17 Dated: September 26, 2019

XAVIER BECERRA  
Attorney General of the State of California

/s/ Emmanuel R. Salazar (authorized on 9/26/2019)

Emmanuel R. Salazar  
Deputy Attorney General  
2329 Gateway Oaks Drive, Suite 200  
Sacramento, CA 95833-4252  
Tel: (916) 621-1835; Fax: (916) 621-1835  
Email: Emmanuel.Salazar@doj.ca.gov  
Attorneys for Plaintiff-Intervenor  
STATE OF CALIFORNIA

1 Dated: September 26, 2019

WATERS & KRAUS LLP

2

/s/ Wm. Paul Lawrence II (authorized on 9/26/2019)

3

Wm. Paul Lawrence II (*Pro Hac Vice*)

4

Washington D.C. Metro Office

5

37163 Mountville Road

6

Middleburg, VA 20117

7

Tel: (540) 687-6999; Fax: (540) 687-5457

Email: plawrence@waterskraus.com

Attorneys for *Qui Tam* Plaintiff

LOYD F. SCHMUCKLEY, JR.

8 Dated: September 26, 2019

MORGAN, LEWIS & BOCKIUS LLP

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/s/ Benjamin P. Smith

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Benjamin P. Smith

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Attorneys for Defendant

RITE AID CORPORATION

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**ORDER**

The Court, having considered the Parties' Joint Motion to Extend Time for Parties to Meet and Confer re: Defendant's 11th Affirmative Defense (Improper Defendant) and Joint Motion to Amend Scheduling Order, finds good cause and ORDERS that the schedule for the Parties as follows:

<b>Event</b>	<b>Current Deadline [ECF No. 242]</b>	<b>Requested Modified Date</b>
Rite Aid Corporation's declaration under oath regarding relationship with/among subsidiaries and Written Responses/Objections to California's Requests for Production ("RFP") Set No. 7	Served by August 30, 2019	N/A – completed
Rite Aid's service of Written Responses/Objections to California's Requests for Production ("RFP") Set No. 7 and Rite Aid's service of Written Responses/Objections to Relator's RFP Set No. 2.	N/A	Served by October 2, 2019
Rite Aid Corporation's production of documents responsive to RFP Set No. 7	Completed by September 27, 2019	Completed by October 25, 2019
Parties' stipulation, if agreed upon, to amend the named defendant with relation back (including removal of Rite Aid Corporation from pleadings)	Filed by October 18, 2019	Filed by November 12, 2019
Plaintiffs' motion to amend the pleadings (if necessary following Parties' inability to stipulate)	Filed by November 1, 2019	Filed by December 2, 2019
Defendant's opposition to motion to amend	Filed by December 6, 2019	Filed by January 10, 2020
Plaintiffs' reply re motion to amend	Filed by December 20, 2019	Filed by January 24, 2020
Hearing on Plaintiffs' motion to amend the pleadings	January 17, 2020, 10:00 a.m., Courtroom 3	TBD
Second Phase of Discovery	February 21, 2020	March 27, 2020

Event	Current Deadline [ECF No. 242]	Requested Modified Date
Completed		
Expert Disclosures (other than sampling methodology/design)	April 10, 2020	May 15, 2020
Rebuttal expert disclosures (other than sampling methodology/design)	May 22, 2020	June 26, 2020
Expert Discovery Completed	June 26, 2020	July 31, 2020
Last Day to Hear Dispositive Motions	October 23, 2020 at 10:00 A.M. in Courtroom No. 3	December 11, 2020 at 10:00 A.M. in Courtroom No. 3

**IT IS SO ORDERED.**

DATED: September 27, 2019.

  
 UNITED STATES DISTRICT JUDGE