

1 XAVIER BECERRA
 Attorney General
 2 VINCENT DICARLO
 Supervising Deputy Attorney General
 3 BERNICE L. LOUIE YEW
 Deputy Attorney General
 4 EMMANUEL R. SALAZAR (SBN 240794)
 Deputy Attorney General
 5 Emmanuel.Salazar@doj.ca.gov
 2329 Gateway Oaks Drive, Suite 200
 6 Sacramento, CA 95833
 Tel.: (916) 621-1835

7 Attorneys for Plaintiff-Intervenor
 8 STATE OF CALIFORNIA

9 UNITED STATES DISTRICT COURT
 10 EASTERN DISTRICT OF CALIFORNIA

11
 12 UNITED STATES OF AMERICA and the
 13 STATES OF CALIFORNIA, *et al.*, *ex rel.*
 LOYD F. SCHMUCKLEY, JR.,

14 Plaintiffs,

15 v.

16 RITE AID CORPORATION,

17 Defendant.

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

20 Plaintiffs,

21 v.

22 RITE AID CORPORATION,

23 Defendant.

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

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

**Related to ECF No. 187, 188, 241, 242,
 244, 258**

24
 25
 26
 27
 28

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

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 time
9 for Parties to conduct discovery and further meet and confer regarding Rite Aid’s Eleventh
10 Affirmative Defense (Improper Defendant) set forth in Rite Aid’s First Amended Answer to
11 Relator’s First Amended Complaint [ECF NO. 146].¹

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 ¹ 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 In July 2019, California propounded Request for Production of Documents, Set No. 7, and
6 Relator propounded Request for Production of Documents, Set No. 2, both of which seek
7 documents relevant to Rite Aid’s purported “improper defendant” defense.

8 The parties continued to meet and confer in an attempt to come to an agreement on the
9 identity of the correct defendants for this case without further discovery or law and motion
10 practice, and exchanged a draft and final declaration of a Rite Aid officer in this regard.

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

15 The Parties continued to meet and confer regarding the issues involved with Rite Aid’s
16 Eleventh Affirmative Defense (Improper Defendant), including Plaintiffs’ pending document
17 requests and California’s 30(b)(6) deposition notice.

18 On September 20, 2019, due to the ongoing meet and confer and discovery efforts, the
19 recent departure of Michael Q. Eagan from Morgan Lewis, and the involvement of Benjamin
20 Smith in a Delaware Chancery Court trial in September 2019, the Parties jointly moved to extend
21 deadlines for the Parties to complete the above meet-and-confer process. The Court granted the
22 motion. ECF No. 244.

23 On October 9, 2019, California filed a motion to compel Rite Aid to designate the
24 documents responsive to each of its pending requests for production of documents. On October
25 23, 2019, Rite Aid Corporation filed a motion to extend the deadline for Rite Aid Corporation to
26 produce documents responsive to California’s Request for Production of Documents, Nos. 1, 2,
27 15, 16, and 17-38. The Court granted both motions, extending the deadline for Rite Aid
28

1 Corporation to so produce until November 25, 2019. ECF No. 258.

2 Relevant to this subject matter, still pending is Rite Aid Corporation's production of
3 documents responsive to Relator's Request for Production of Documents Set No. 2. After good-
4 faith meet-and-confer efforts, to date, the parties have been unable to reach an agreement, and
5 Plaintiffs seek discovery from Defendant. Additional meet and confer efforts are ongoing
6 regarding:

- 7 • whether the Parties will agree that pleadings in the case will be amended pursuant
8 to Federal Rule of Civil Procedure ("Rule") 15(c) to substitute Thrifty Payless,
9 Inc. d/b/a Rite Aid, a California Corporation, as the defendant in this action in the
10 place of Rite Aid Corporation, a Delaware Corporation;
- 11 • whether all of Rite Aid's prior discovery responses, representations, and
12 stipulations would bind any newly named defendant as if it had originally
13 appeared as the defendant in this action from the outset;
- 14 • whether the amendment shall relate back to the original pleadings for all purposes,
15 including applicable statutes of limitation; and
- 16 • how discovery requests to Rite Aid and/or any newly named defendant would be
17 addressed.

18 The Parties therefore submit this joint motion requesting this Court to find good cause and
19 approve the below proposed schedule, as follows:

20 Event	21 Current Deadline [ECF Nos. 244 and 258]	22 Proposed Modified Date
23 Rite Aid Corporation's production 24 of privilege logs relating to 25 California's RFP Set No. 7	N/A	Complete by December 20, 2019
26 Rite Aid Corporation's production 27 of documents responsive to 28 Relator's RFP Set No. 2 and service of amended written responses/objection to Relator's RFP Set No. 2, with designation of documents responsive to each RFP, and verification	N/A	Complete by January 10, 2020
Deposition(s) of Rite Aid 30(b)(6)	N/A	Complete by January 31,

1	witness(es) relating to Rite Aid's "improper defendant" defense ²		2020
2	Parties' stipulation, if agreed upon, to amend the named defendant with relation back (including removal of Rite Aid Corporation from pleadings)	File by December 13, 2019	File by February 28, 2020
3			
4			
5	Plaintiffs' motion to amend the pleadings (if necessary following Parties' inability to stipulate)	File by January 2, 2020	File by April 3, 2020
6			
7	Defendant's opposition to motion to amend	File by February 10, 2020	File by May 1, 2020
8	Plaintiffs' reply re motion to amend	File by February 24, 2020	File by May 15, 2020
9	Hearing on Plaintiffs' motion to amend the pleadings	TBD	TBD
10	Second Phase of Discovery Completed	March 27, 2020	August 7, 2020
11	Expert Disclosures (other than sampling methodology/design)	May 15, 2020	October 2, 2020
12			
13	Rebuttal expert disclosures (other than sampling methodology/design)	June 26, 2020	November 13, 2020
14	Expert Discovery Completed	July 31, 2020	December 18, 2020
15	Last Day to Hear Dispositive Motions	December 4, 2020 at 10:00 A.M. in Courtroom No. 3	May 28, 2021 at 10:00 A.M. in Courtroom No. 3

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

20
21 Dated: November 6, 2019

22 Respectfully Submitted,
23 XAVIER BECERRA
24 Attorney General of the State of California
25
26 /s/ Emmanuel R. Salazar
27
28 _____
Emmanuel R. Salazar
Deputy Attorney General
2329 Gateway Oaks Drive, Suite 200

26 ² The Parties understand that Rite Aid's 30(b)(6) witness(es) relating to other relevant topics may
27 be the same 30(b)(6) witness(es) designated for the "improper defendant" defense. In such a
28 case, Rite Aid agrees the same 30(b)(6) witnesses on different date(s) may again be deposed for
topics other than the "improper defendant" defense.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

Dated: November 6, 2019

WATERS & KRAUS LLP

/s/ Wm. Paul Lawrence II (authorized on 11/6/2019)

Wm. Paul Lawrence II (*Pro Hac Vice*)
Washington D.C. Metro Office
37163 Mountville Road
Middleburg, VA 20117
Tel: (540) 687-6999; Fax: (540) 687-5457
Email: plawrence@waterskraus.com
Attorneys for *Qui Tam* Plaintiff
LOYD F. SCHMUCKLEY, JR.

Dated: November 6, 2019

MORGAN, LEWIS & BOCKIUS LLP

/s/ Benjamin P. Smith (authorized on 11/6/2019)

Benjamin P. Smith
Attorneys for Defendant
RITE AID CORPORATION

ORDER

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

Event	Current Deadline [ECF Nos. 244 and 258]	Proposed Modified Date
Rite Aid Corporation's production of privilege logs relating to California's RFP Set No. 7	N/A	Complete by December 20, 2019
Rite Aid Corporation's production of documents responsive to Relator's RFP Set No. 2 and service of amended written responses/objection to Relator's RFP Set No. 2, with designation of documents responsive to each RFP, and verification	N/A	Complete by January 10, 2020
Deposition(s) of Rite Aid 30(b)(6) witness(es) relating to Rite Aid's "improper defendant" defense ³	N/A	Complete by January 31, 2020
Parties' stipulation, if agreed upon, to amend the named defendant with relation back (including removal of Rite Aid Corporation from pleadings)	File by December 13, 2019	File by February 28, 2020
Plaintiffs' motion to amend the pleadings (if necessary following Parties' inability to stipulate)	File by January 2, 2020	File by April 3, 2020
Defendant's opposition to motion to amend	File by February 10, 2020	File by May 1, 2020
Plaintiffs' reply re motion to amend	File by February 24, 2020	File by May 15, 2020
Hearing on Plaintiffs' motion to amend the pleadings	TBD	TBD
Second Phase of Discovery Completed	March 27, 2020	August 7, 2020

³ The Parties understand that Rite Aid's 30(b)(6) witness(es) relating to other relevant topics may be the same 30(b)(6) witness(es) designated for the "improper defendant" defense. In such a case, Rite Aid agrees the same 30(b)(6) witnesses on different date(s) may again be deposed for topics other than the "improper defendant" defense.

1	Expert Disclosures (other than sampling methodology/design)	May 15, 2020	October 2, 2020
2	Rebuttal expert disclosures (other than sampling methodology/design)	June 26, 2020	November 13, 2020
3	Expert Discovery Completed	July 31, 2020	December 18, 2020
4	Last Day to Hear Dispositive Motions	December 4, 2020 at 10:00 A.M. in Courtroom No. 3	May 28, 2021 at 10:00 A.M. in Courtroom No. 3

6 **IT IS SO ORDERED.**

7 DATED: November 8, 2019.

8 
 9
 10 UNITED STATES DISTRICT JUDGE

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28