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 11 STATE OF CALIFORNIA

12 UNITED STATES DISTRICT COURT
 13 EASTERN DISTRICT OF CALIFORNIA

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

17 Plaintiffs,

18 v.

19 RITE AID CORPORATION,

20 Defendant.

21 STATE OF CALIFORNIA, *ex rel.* LOYD F.
 22 SCHMUCKLEY, JR.,

23 Plaintiffs,

24 v.

25 RITE AID CORPORATION,

26 Defendant.

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

**PARTIES' JOINT MOTION TO
 AMEND THE SCHEDULING ORDER
 TO PERMIT ADDITIONAL TIME TO
 CONDUCT DISCOVERY; ORDER**

Related to ECF No. 128 (original order),
 316 (most recent extension)

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1 **PARTIES’ JOINT MOTION TO AMEND THE SCHEDULING ORDER TO PERMIT**
2 **ADDITIONAL TIME TO CONDUCT DISCOVERY**

3 **TO THE HONORABLE COURT:**

4 Plaintiff-Intervenor State of California (“California”), *Qui Tam* Plaintiff Loyd F.
5 Schmuckley, Jr. (“Relator,” together with California, “Plaintiffs”), and Defendant Rite Aid
6 Corporation (“Defendant” or “Rite Aid,” together with Plaintiffs, the “Parties”), by and through
7 their respective counsel of record, for good cause shown, hereby request this Court to amend the
8 scheduling order to permit additional time for the Parties to conduct discovery.

9 As described in detail below, the Parties are making progress toward completing fact-
10 discovery. However, the Parties request that the current dates in the scheduling order be extended
11 for six months to allow the Parties adequate time to complete written discovery and to depose all
12 necessary fact witnesses.

13 **I. Rite Aid’s Production of Electronically Stored Information from Custodians**

14 On October 5, 2020, to resolve a pending motion, the Parties filed a “Stipulated Order re:
15 Defendant’s Production of Electronically Stored Communications.” ECF No. 355. The Court
16 signed the stipulated order on October 14, 2020 (“ESI Order”). ECF No. 359. Since that time, Rite
17 Aid has worked to collect, review, and produce responsive communications from the Parties’
18 agreed list of Rite Aid custodians. Consistent with the ESI Order, Rite Aid has made rolling
19 productions on October 30, 2020, November 30, 2020, and December 23, 2020, and plans to make
20 another production on December 31, 2020. In doing so, Rite Aid expects to substantially complete
21 its production of non-privileged responsive custodial communications by December 31, 2020.

22 On December 21, 2020, pursuant to Section E of the ESI Order, Rite Aid informed
23 Plaintiffs’ counsel that, despite Rite Aid’s significant progress, it may not be able to complete its
24 production of all responsive custodial communications by December 31, 2020. For example, Rite
25 Aid is still actively working to collect and review some potentially responsive documents that may
26 exist in sources outside of its custodians’ e-mail collections. In addition, a number of documents
27 are subject to ongoing privilege review and privilege logging efforts, including documents that
28 ultimately may be determined to be non-privileged, and therefore will be produced.

1 As a result, Rite Aid has requested in a joint motion filed with Judge Brennan that the Court
2 extend to February 26, 2021 its deadline to complete its production of documents covered by the
3 ESI Order. California has consented to this extension conditioned on the Court modifying the
4 scheduling order dates as requested in this Stipulation.

5 Depending on the scope of Rite Aid's privilege claims, which will be set forth in a privilege
6 log, the Parties may need additional time to resolve issues related to Rite Aid's ESI production after
7 it is complete.

8 **II. Rite Aid's Production of Documents related to the Operations and Governance of Rite**
9 **Aid Corporation and its Subsidiaries**

10 On October 16, 2020, the Court ordered Rite Aid to produce all documents responsive to
11 California's RPD Nos. 69, 72, 75, 84, 88, and 121-123 by no later than November 16, 2020. ECF
12 No. 365. Due to a prolonged power outage at Rite Aid's corporate headquarters, the Court granted
13 a stipulated Order extending the date of Rite Aid's production to December 7, 2020. ECF No. 376.
14 The outage persisted much longer than Rite Aid expected and the Court granted a second stipulated
15 Order extending the date to December 31, 2020. ECF No. 378. Rite Aid has just recently resolved
16 the power outage, so the Parties have jointly filed a motion with Judge Brennan requesting an
17 additional extension of Rite Aid's deadline to January 15, 2021.

18 Depending on the scope of Rite Aid's privilege claims, which will be set forth in a privilege
19 log, the Parties may need additional time to resolve issues related to Rite Aid's production.

20 **III. California's Supplemental Responses to Rite Aid's Special Interrogatories Seeking**
21 **California's Contentions regarding the 1,904 Sample Claims**

22 On October 16, 2020, the Court ordered California to provide supplemental responses to
23 Rite Aid's Interrogatories 3-5, 7-9, and 13 by December 31, 2020. The Parties have worked
24 cooperatively to comply with the Court's October 16, 2020 Order. On October 19, 2020, California
25 provided Rite Aid with a list identifying the prescription records associated with the sample claims
26 that California claims were illegible, incomplete, or difficult to read. In preparing the list,
27 California discovered that the affected prescription records included a higher percentage of the
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1 sample claims than California had estimated at the hearing. Due to this, the Parties jointly moved
2 on October 26, 2020 for reciprocal two-week extensions for Rite Aid to produce the requested
3 prescription records and for the State to provide supplemental responses to Rite Aid's
4 Interrogatories 3-5, 7-9 and 13. ECF No. 372. The Court granted the request. ECF No. 373. On
5 November 25, 2020, Rite Aid produced new copies of the prescription records identified in
6 California's list. On December 2, 2020, to facilitate California's efficient review of these records,
7 Rite Aid re-produced an overlay production of the prescription records sequenced by sample claim
8 numbers as identified in California's list. California has worked to prepare supplemental responses
9 to Rite Aid's Interrogatories, but has discovered that the review process for the 1,904 sample claims
10 has been more time consuming than expected due to pandemic-related restrictions and staff
11 capacity. The review involves, among other things, carefully scrutinizing numerous pharmacy
12 business and other records related to each sample claim and documenting its findings from the
13 review. Nevertheless, California is making good progress and, at its current pace, is on track to
14 complete its review and serve supplemental responses for all 1,904 sample claims by no later than
15 January 29, 2021.

16 The Parties have therefore jointly filed a motion with Judge Brennan to extend California's
17 deadline to provide supplemental responses to January 29, 2021.

18 **IV. Rite Aid's Identification of Pharmacy Associate Witnesses**

19 California propounded its first set of interrogatories (consisting of Interrogatories Nos. 1-8)
20 on Rite Aid on August 21, 2020. California's interrogatories, among other things, asked Rite Aid
21 to identify and provide contact information for its pharmacy associates who performed key tasks
22 related to the Code 1 review and verification for each of the 1,904 sample claims (e.g. the person
23 who performed the Code 1 review and verification; the person who documented it; what Bates
24 labeled page constitutes the documentation; the person who entered the Code 1 override codes in
25 the computer-based dispensing system; etc.).

26 Rite Aid timely responded with charts that identify and provide the employment status of
27 each of the thousands of pharmacy associates involved with dispensing each sample claim.

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1 California contends that the lists do not adequately identify which of the pharmacy associates
2 performed the tasks referenced in California's interrogatories. California further contends that the
3 lists do not provide last known contact information for the pharmacy associates who are no longer
4 employed by Rite Aid. Rite Aid contends that its responses are adequate, and that providing
5 supplemental responses with the additional information that California requests at this time would
6 be unduly burdensome and disproportionate to the needs of the case, especially in light of the
7 Court's October 16, 2020 order (referenced in Part III above) that California supplement its
8 interrogatory responses next month to specify which of the 1,904 sample claims California still
9 contends are false based on the discovery provided to date. The Parties have agreed to meet and
10 confer further regarding the sufficiency of Rite Aid's interrogatory responses after California
11 begins providing rolling productions for the supplemental interrogatory responses referenced in
12 Part III above, so that Rite Aid can evaluate and potentially amend its interrogatory responses to
13 account for the additional information provided in California's amended responses.

14 **V. Depositions of Non-Expert Witnesses**

15 Thus far, California has deposed Rite Aid's Senior Manager of Cash Management Jennifer
16 Wagner-Parrish and Rite Aid has deposed Relator Loyd Schmuckley. The Parties have not yet
17 conducted any other depositions.

18 Rite Aid identified 21 document custodians pursuant to section "A" of the ESI Order.
19 Based upon their evaluation on Rite Aid's document productions referenced in Part I above,
20 Plaintiffs may seek to depose a number of these witnesses. Plaintiffs also intend to depose Rule
21 30(b)(6) witnesses from Rite Aid who may be different than the identified custodians. Plaintiffs
22 also believe that they may discover additional witnesses to depose after completing their review of
23 the Rite Aid document productions referenced in Parts I and II above.

24 Rite Aid also intends to depose additional witnesses, including from California's
25 Department of Health Care Services, which California claims is a third party that is only subject to
26 discovery through subpoena.

27 Of major import to this extension request, Rite Aid intends to call as witnesses a to-be-

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1 determined number of the pharmacy associates who were involved with dispensing some of the
2 1,904 sample claim prescriptions. The Parties will meet and confer further to discuss the extent to
3 which potentially voluminous pharmacy associate witnesses—and corresponding depositions—
4 may be necessary, and if so, since many of the pharmacy associates involved in dispensing the
5 sample claims no longer work for Rite Aid, the parties will need additional time to locate them.

6 **VI. The Scheduling Order's Current Deadlines and Proposed Modified Dates**

7 The current deadline for the Parties to complete all non-expert discovery is June 4, 2021.
8 The Parties respectfully submit that this does not give the Parties enough time to complete the
9 document productions and depositions set forth above, in addition to resolving current and potential
10 future discovery disputes. The Parties therefore submit this joint motion requesting the Court to
11 find good cause and approve the below proposed schedule, as follows:

12 Event	13 Current Deadline [ECF 316]	14 Proposed Modified Date
15 Second Phase of Discovery Completed	June 4, 2021	December 3, 2021
16 Expert Disclosures (other than sampling methodology/design)	August 6, 2021	February 7, 2022
17 Rebuttal expert disclosures (other than sampling methodology/design)	September 10, 2021	March 10, 2022
18 Expert Discovery Completed	October 15, 2021	April 15, 2022
19 Last Day to Hear Dispositive Motions	April 1, 2022	October 7, 2022

20 Dated: December 30, 2020

Respectfully Submitted,

21 XAVIER BECERRA
22 Attorney General of the State of California

23 */s/ Emmanuel R. Salazar*

24 _____
25 Emmanuel R. Salazar
26 Deputy Attorney General
27 Attorneys for Plaintiff-Intervenor
28 STATE OF CALIFORNIA

Dated: December 30, 2020

WATERS & KRAUS LLP

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/s/ Wm. Paul Lawrence II (auth. December 29, 2020)

Wm. Paul Lawrence II (*Pro Hac Vice*)
Waters & Krause LLP
Attorneys for *Qui Tam* Plaintiff
LOYD F. SCHMUCKLEY, JR.

Dated: December 30, 2020

MORGAN, LEWIS & BOCKIUS LLP

/s/ Benjamin P. Smith (auth. December 29, 2020)

Benjamin P. Smith
Attorneys for Defendant
RITE AID CORPORATION

1 **ORDER**

2 The Court, having considered the Parties' Joint Motion to Modify the Scheduling Order to
3 Permit More Time for Parties to Conduct Discovery (ECF No 382), finds good cause and
4 ORDERS that the schedule for the Parties is amended as follows:


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Event	Current Deadline [ECF 260]	Modified Date
6 Second Phase of Discovery Completed	June 4, 2021	December 3, 2021
7 Expert Disclosures (other than sampling methodology/design)	August 6, 2021	February 7, 2022
8 Rebuttal expert disclosures (other than sampling methodology/design)	September 10, 2021	March 10, 2022
9 Expert Discovery Completed	October 15, 2021	April 15, 2022
10 Last Day to Hear Dispositive Motions	April 1, 2022	October 7, 2022

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13 **IT IS SO ORDERED.**

14 DATED: January 11, 2021.

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16 _____
17 CHIEF UNITED STATES DISTRICT JUDGE