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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BRYON STAFFORD, Individually
and on Behalf of All Others
Similarly Situated,

Plaintiff,

v.

RITE AID CORPORATION,

Defendant.

Lead Case No.: 3:17-cv-01340-AJB-JLB
(Consolidated with Case No. 3:18-cv-
00152-AJB-JLB)

ORDER:

- (1) GRANTING PLAINTIFFS’
MOTION TO APPOINT INTERIM
CO-LEAD CLASS COUNSEL, (Doc.
No. 105);**
- (2) GRANTING EX PARTE MOTION
TO STAY PENDING APPEAL, (Doc.
No. 183); AND**
- (3) STAYING PLAINTIFFS
STAFFORD AND JOSTEN’S
MATTERS**

Presently pending before the Court are: (1) Bryon Stafford (“Stafford”) and Robert Josten’s (“Josten”) (collectively, “Plaintiffs”) unopposed motion to appoint interim co-lead class counsel. (Doc. No. 105), and (2) Defendant Rite Aid Corporation’s (“Rite Aid”) *ex parte* motion to stay pending appeal. (Doc. No. 183.) Plaintiff Stafford filed an opposition

1 to Rite Aid’s *ex parte* motion. (Doc. No. 185.) For the reasons set forth in detail below, the
2 Court **GRANTS** (1) Plaintiffs’ unopposed motion to appoint, (2) **GRANTS** Rite Aid’s *ex*
3 *parte* motion, and (3) **STAYS** Plaintiffs’ matters pending Rite Aid’s appeal.

4 **I. BACKGROUND**

5 This is a putative class action filed against Rite Aid Corporation and Rite Aid Hdqtrs.
6 Corporation (“Rite Aid HQ”) for an alleged deceptive and unfair pricing scheme involving
7 Rite Aid’s Rx Savings Program. (Third Amended Complaint (“TAC”), Doc. No. 145.)

8 As general background, the overwhelming majority of Rite Aid’s clients are enrolled
9 in either a private or public health care plan that covers some or all medical and
10 pharmaceutical expenses. (*Id.* ¶ 28.) In almost every one of these plans, the cost of
11 prescription drugs is shared between the third-party payor (“TPPs”) (i.e., the health
12 insurance plan) and the actual user of the drug (i.e., the plan participant). (*Id.*) When a plan
13 participant fills a prescription at a pharmacy under a third-party health care plan, the plan
14 pays a portion of the cost, and the plan participant pays the remaining portion of the cost
15 directly to the pharmacy as a copayment. (*Id.*) Because of the cost savings associated with
16 generic drugs as opposed to brand name drugs, TPPs incentivize plan participants to
17 purchase generic drugs by offering a lower price, which in turn, results in a lower
18 copayment. (*Id.* ¶ 6.) By law, Rite Aid cannot charge a copayment that exceeds its “usual
19 and customary” price, which is generally defined within the pharmaceuticals industry. (*Id.*
20 ¶ 7.) The process by which financial responsibility between TPPs and plan participants is
21 determined is called “adjudication.” Rite Aid contracts with pharmacy benefit managers
22 (“PBMs”) and TPPs to “adjudicate” the claims of customers for prescription drug coverage.
23 (Doc. No. 78-1 at 7.) The contracts specify Rite Aid’s obligations to the TPP or PBM when
24 submitting claims for prescription coverage at the point of sale, as well as the amount Rite
25 Aid will receive as payment when filling prescriptions. (*Id.* at 8.) Generally, the TPP or
26 PBM determines the amount of reimbursement according to those contracts as well as the
27 copayment or deductible amount. (*Id.*) The TPP or PBM then transmits the information

1 back to Rite Aid, instructing Rite Aid on the amount to collect from the customer. (*Id.*)

2 Plaintiffs allege Rite Aid overcharges customers for generic prescription drugs by
3 submitting to TPP/PBMs claims for payment at prices that Rite Aid has inflated above its
4 “usual and customary” prices. (TAC ¶ 8.) As a result, customers who purchase generic
5 prescription drugs through third-party plans pay copayments that are significantly higher
6 than Rite Aid’s “usual and customary” prices for those same drugs. (*Id.*) Central to this
7 scheme, according to Plaintiffs, is the Rx Savings Program. (*Id.* ¶ 9.)

8 The Rx Savings Program allows cash-paying customers (customers who pay for
9 prescription drugs without using insurance) to buy the most commonly prescribed generic
10 drugs at significantly discounted prices. (*Id.*) The Rx Savings Program prices are often
11 significantly lower than the prices Rite Aid reports to health insurance companies as Rite
12 Aid’s “usual and customary” prices. (*Id.*) Plaintiffs claim Rite Aid was required by law to
13 report to the TPP/PBMs the Rx Savings Program prices as Rite Aid’s “usual and
14 customary” prices for the prescription generic drugs. (*Id.* ¶ 11.) The failure to do so
15 distorted the overall prescription calculations, resulting in higher copayments to customers.
16 (*Id.*) Based on this alleged scheme, Plaintiff Stafford brings claims against Rite Aid for:
17 (1) negligent misrepresentation, (2) unjust enrichment, (3) violation of the Consumer Legal
18 Remedies Act (“CLRA”), (4) and violation of the California Unfair Competition Law
19 (“UCL”). Plaintiff Josten brings similar claims, and asserts an additional claim for
20 declaratory and injunctive relief. (Doc. No. 146 at 42.)

21 **II. PROCEDURAL HISTORY**

22 Plaintiff Stafford’s Complaint was first filed in June 30, 2017. (Doc. No. 1.) A First
23 Amended Complaint was filed on July 28, 2017, (Doc. No. 18), and Rite Aid moved to
24 dismiss for failure to state a claim. (Doc. No. 19.) The Court granted Rite Aid’s motion to
25 dismiss with leave to amend. Plaintiff Stafford filed a Second Amended Complaint on
26 January 9, 2018. (Doc. No. 30.) On January 23, 2018, another plaintiff, Plaintiff Josten,
27 instituted a substantially similar action against Rite Aid. (*See* Case No. 18-cv-00152-AJB-

1 JLB, Doc. No. 1.) Plaintiff Stafford and Josten’s actions were consolidated by the Court on
2 October 24, 2019. (Doc. No. 101.)

3 On January 23, 2018, Rite Aid filed its second motion to dismiss Plaintiff Stafford’s
4 Second Amended Complaint for failure to state a claim. (Doc. No. 32-1.) On September
5 28, 2018, the Court denied Rite Aid’s motion to dismiss, holding that Plaintiff Stafford
6 plausibly stated a claim on all four causes of action. (*Id.*) On June 17, 2019, Ride Aid then
7 filed a motion to compel arbitration. (Doc. No. 78.) On February 25, 2020, the Court denied
8 the motion to compel arbitration, holding Rite Aid failed to show equitable estoppel should
9 apply, thus Rite Aid did not have a right to arbitrate. (Doc. No. 134.) The Court concluded
10 that in any event, Rite Aid waived any rights to compel arbitration by filing multiple
11 motions to dismiss on the merits. (*Id.*) On March 24, 2020, Rite Aid filed a notice of appeal
12 of the Court’s order denying the motion to compel Stafford to arbitration. (Doc. No. 148.)

13 Rite Aid similarly filed two motions to dismiss in Plaintiff Josten’s case before filing
14 a motion to compel arbitration, which is currently pending before the Court. (Case No. 18-
15 cv-00152-AJB-JLB, Doc. Nos. 15, 28.)

16 On March 3, 2020, before Rite Aid filed the notice of appeal, the parties filed a joint
17 motion for leave to amend both Stafford’s and Josten’s Complaints to add party defendant
18 Rite Aid HQ, which was granted by the Court. (Doc. No. 136.) Rite Aid HQ also filed
19 motions to compel Stafford and Josten to arbitration, which currently pending before the
20 Court, along with Rite Aid’s motion to compel Josten to arbitration. (Doc. Nos. 114, 163,
21 166.)

22 On June 10, 2020, Rite Aid filed an *ex parte* motion to stay pending resolution of its
23 appeal to the Ninth Circuit. (Doc. No. 183.) Stafford opposed. (Doc. No. 185.) This order
24 follows.

25 **III. PLAINTIFFS’ MOTION TO APPOINT INTERIM CO-LEAD CLASS**
26 **COUNSEL**

27 First, Stafford and Josten seek an order appointing Robbins Geller Rudman & Dowd
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1 LLP (“Robbins Geller”) and Scott+Scott Attorneys at Law LLP (“Scott+Scott”) as Interim
2 Co-Lead Class Counsel. (Doc. No. 105.) Rite Aid filed a non-opposition to the motion.
3 (Doc. No. 108.)

4 “The court may designate interim counsel to act on behalf of a putative class before
5 determining whether to certify the action as a class action.” Fed. R. Civ. P. 23(g)(3). Where
6 multiple firms seek appointment as class counsel, “the court must appoint the applicant
7 best able to represent the interests of the class.” Fed. R. Civ. P. 23(g)(2). The Court must
8 consider various factors in appointing class counsel, including: “(i) the work counsel has
9 done in identifying or investigating potential claims in the action; (ii) counsel’s experience
10 in handling class actions, other complex litigation, and the types of claims asserted in the
11 action; (iii) counsel’s knowledge of the applicable law; and (iv) the resources that counsel
12 will commit to representing the class.” Fed. R. Civ. P. 23(g)(1)(A). In addition the Court
13 “may consider any other matter pertinent to counsel’s ability to fairly and adequately
14 represent the interests of the class.” Fed. R. Civ. P. 23(g)(1)(B).

15 Having reviewed, Plaintiffs’ briefing and authority, and in light of the non-
16 opposition, the Court concludes that Robbins Geller and Scott + Scott are adequate and
17 able to represent the interest of the proposed class. As such, Plaintiffs’ motion to appoint
18 is **GRANTED**.

19 **IV. RITE AID’S *EX PARTE* MOTION TO STAY**

20 Next, the Court will turn to Rite Aid’s request that the Court stay Stafford’s and
21 Josten’s proceedings pending its appeal to the Ninth Circuit. (Doc. No. 183.)

22 **A. Legal Standard**

23 The Federal Arbitration Act (FAA) reflects a strong federal policy favoring
24 arbitration. *See* 9 U.S.C. § 16(a); *A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d
25 1401, 1404 n.2 (9th Cir. 1992). To further this federal policy, section 16 of the FAA
26 “endeavors to promote appeals from orders barring arbitration and limit appeals from
27 orders directing arbitration.” *Sanford v. Memberworks, Inc.*, 483 F.3d 956, 961 (9th Cir.
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1 2007) (quoting *Bushley v. Credit Suisse First Boston.*, 360 F.3d 1149, 1153 (2d. Cir.
2 2004)). Accordingly, under the FAA, a party may immediately appeal a court order
3 denying a motion to compel arbitration. *See* 9 U.S.C. § 16(a). This ensures that the issue
4 of whether a dispute is to be resolved through arbitration is decided before excess time,
5 money, and judicial resources are spent in litigation. *See C.B.S. Employee Federal Credit*
6 *Union v. Donaldson*, 716 F. Supp. 307, 310 (W.D. Tenn. 1989).

7 The system created by the FAA allows the district court to stay the proceedings
8 pending an appeal from its refusal to compel arbitration if the court finds that the motion
9 presents a substantial question for the court of appeal to consider. *See Britton v. Co-op*
10 *Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990). Courts generally consider four
11 factors when determining whether to grant a stay pending the appeal of a civil order: first,
12 whether the applicant has made a strong showing that he is likely to succeed on the merits;
13 second, whether the moving party will be irreparably injured absent a stay; third, whether
14 a stay will substantially injure the opposing party; and fourth, whether the public interest
15 favors a stay. *See id.* (approving *C.B.S.*, 716 F. Supp. at 309 (quoting *Hilton v. Braunskill*,
16 481 U.S. 770, 776 (1986)).

17 **B. Analysis**

18 **1. Whether Rite Aid Has Made A Strong Showing That It Is Likely**
19 **To Succeed On The Merits**

20 To satisfy the first prong, the applicant must make “a strong showing that he is likely
21 to succeed on the merits.” *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011). That
22 showing must establish “more than a mere possibility of relief.” *Id.* at 967 (quoting *Nken*
23 *v. Holder*, 556 U.S. 418, 434 (2009)). However, the standard does not require much more
24 than that; the applicant must only show a “fair prospect” of success or be “reasonably
25 likely” to succeed. *Id.* (quoting *O’Brien v. O’Laughlin*, 557 U.S. 1301, 1302 (2009)).
26 Certainly, the applicant “need not demonstrate that it is more likely than not that he will
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1 win.” *Id.* at 967.

2 Alternatively, if an applicant cannot reach this threshold, they may still comply with
3 the first prong by establishing a “substantial case” for relief. *Id.* at 970. A “substantial case”
4 exists where the applicant’s claims raise “serious legal questions,” i.e., “issue[s] of first
5 impression” or issues causing a split in legal authority. *Wilson v. Huuuge, Inc.*, No. 3:18-
6 CV-05276-RBL, 2019 WL 998319, at *2 (W.D. Wash. Mar. 1, 2019). An applicant may
7 only rely on the “substantial case” threshold where “the balance of hardships tips sharply
8 in the [applicant’s] favor.” *Leiva-Perez*, 640 F.3d at 970.

9 Here, Rite Aid argues the issues presented to the Ninth Circuit involves matters of
10 first impression including the questions of (1) whether a plaintiff can plead around
11 California’s equitable estoppel doctrine while pursuing claims that “depend on the
12 contract’s terms,” (2) whether sophistication or lack thereof of a plaintiff “affects the
13 enforceability of a delegation clause,” and (3) to “what extent litigation conduct constitutes
14 waiver when a motion to compel arbitration is based on equitable estoppel.” (Doc. No.
15 183-1 at 10–13.) Furthermore, Rite Aid states that while the Ninth Circuit has not addressed
16 some of these issues, some of these questions have been resolved differently by other
17 Circuits. (*Id.* at 11.) While Plaintiff does not believe these issues constitute substantial
18 questions that raise genuine matters of first impression, (Doc. No. 185 at 7), the Court holds
19 that the issues at the very minimum, present serious legal questions, not frivolous in nature.
20 Thus, this factor weighs in favor of a stay.

21 **C. Whether Rite Aid Will Be Irreparably Injured Absent A Stay**

22 Next, the second factor is whether the moving party, Rite Aid, will be irreparably
23 injured absent a stay. *Leiva-Perez*, 640 F.3d at 964. Here, Rite Aid’s main purpose in
24 appealing this Court’s order is to avoid litigation by obtaining a ruling from the Ninth
25 Circuit that the Rite Aid may compel Plaintiff to arbitration. Therefore, arbitration may be
26 rendered meaningless if Rite Aid is required to litigate this case pending the appeal. As the
27 Ninth Circuit has stated, if the “party must undergo the expense and delay of a trial before
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1 being able to appeal, the advantages of arbitration—speed and economy—are lost forever.”
2 *See Alascom, Inc. v. ITT North Electric Co.*, 727 F.2d 1419, 1422 (9th Cir. 1984) (finding
3 the consequence serious, perhaps, irreparable, and effectually challenged only by
4 immediate appeal). Because Rite Aid will lose the advantages of arbitration if the Ninth
5 Circuit ultimately reverses the order, the harm to Rite Aid would be irreparable. Thus, the
6 Court finds that the second factor weighs in favor of granting the motion to stay.

7 **D. Whether A Stay Will Substantially Injure The Opposing Party**

8 As to the third factor, Plaintiff Stafford clearly will suffer some prejudice if his action
9 is delayed during the pendency of the appeal in the Ninth Circuit. However, “[w]hen a
10 defendant appeals an order refusing to compel arbitration, the general disadvantage to
11 plaintiff caused by delay of proceedings is usually outweighed by the potential injury to
12 defendant from proceeding in district court during pendency of appeal.” *Eberle v. Smith*,
13 No. 07-CV-0120 W(WMC), 2008 WL 238450, at *3 (S.D. Cal. Jan. 29, 2008). However,
14 “a plaintiff may be able to show prejudice by citing particular witnesses or documents that
15 may be adversely affected by a stay.” *Id.* Plaintiff has not identified any specific evidence,
16 arguing only generally that his ability to access evidence will be prejudice as the case
17 becomes more stale. Thus “any risk of lost evidence is entirely speculative at this point.”
18 *Murphy v. DirecTV, Inc.*, No. 2:07-CV-06465-FMC, 2008 WL 8608808, at *3 (C.D. Cal.
19 July 1, 2008). Accordingly, the Court concludes that this factor too supports stay.

20 **E. Whether The Public Interest Favors A Stay**

21 The fourth factor is whether the issuance of a stay is in the public interest. In a case
22 such as this, where a party is seeking a stay to appeal the denial of a motion to compel
23 arbitration, the Court concludes that the public interest ultimately tips the balance in favor
24 of the appealing party, Rite Aid. Congress, through the FAA, has expressed that arbitration
25 is in the public interest. *See A.G. Edwards & Sons, Inc., v. McColloueh*, 967 F.2d 1401,
26 1404 n.2 (9th Cir. 1992). By specifically allowing for an immediate appeal from a decision
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1 denying arbitration, Congress has further indicated that all questions of whether a dispute
2 should be arbitrated should be resolved before time and money is spent in litigation.

3 Additionally, the interest in judicial economy and efficiency urge a stay in
4 proceedings pending appeal. As the district court in *C.B.S.* observed, it “does not make
5 sense for this Court to expend its time and energy preparing this case for trial and possibly
6 trying it only to learn at a later date from the court of appeals that it was not the proper
7 forum to hear the case.” 716 F. Supp. at 310. A stay promotes the public interest in the
8 efficient allocation of judicial resources. Thus, the fourth factor weighs in favor of granting
9 a stay.

10 **F. Plaintiff Josten’s Action Is Also Stayed**

11 Rite Aid additionally seeks a stay in Plaintiff Josten’s action pending the resolution
12 of Rite’s motion to compel Josten to arbitration. But in the interest of judicial economy and
13 simplification of issues of law, the Court concludes that a stay in Josten’s case pending
14 resolution of Rite Aid’s appeal in Stafford’s action appropriate instead.

15 “[T]he power to stay proceedings is incidental to the power inherent in every court
16 to control disposition of the cases on its docket with economy of time and effort for itself,
17 for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). “The
18 exertion of this power calls for the exercise of sound discretion.” *CMAX, Inc. v. Hall*, 300
19 F.2d 265, 268 (9th Cir. 1962); *see Clinton v. Jones*, 520 U.S. 681, 706 (1997) (“The District
20 Court has broad discretion to stay proceedings as an incident to its power to control its own
21 docket.”); *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109 (9th Cir. 2005) (citing *Landis*,
22 299 U.S. at 255, for the same). Courts have the power to consider stays sua sponte. *See*,
23 *e.g., Fed. Home Loan Mortg. Corp. v. Kama*, No. 14-00137 ACK-KSC, 2016 WL 922780,
24 at *8-9 (D. Haw. Mar. 9, 2016) (ordering a stay, sua sponte, of the proceedings pending
25 resolution of related cases before the Ninth Circuit because resolution of those cases
26 “w[ould] likely involve an analysis of” obscure issues, thereby “provid[ing] further
27 guidance” to the court with respect to the case in question); *see also S.E.C. v. Chestman*,

1 861 F.2d 49, 50 (2d Cir. 1988) (noting that the district court can enter an order staying
2 discovery sua sponte).


3 The Court finds that staying proceedings pending the appeals of related cases will
4 serve the interests of judicial economy and will help to clarify the issues and questions of
5 law going forward. *See Landis*, 299 U.S. at 256 (“True, a decision in the case then pending
6 in New York may not settle every question of fact and law in suits by other companies, but
7 in all likelihood it will settle many and simplify them all.”). Currently pending before the
8 Court are Rite Aid’s motion to compel Josten to arbitration, in addition to newly added
9 party, Rite Aid HQ’s two motions to compel both Stafford and Josten to arbitration. The
10 resolution by the Ninth Circuit of whether Stafford’s case should proceed in federal court
11 will more than likely inform whether Josten will proceed to arbitration as well. Indeed, all
12 the pending motions involve the same issues and questions of law that will be settled by
13 the Ninth Circuit on appeal. Therefore, the same reasons that support a stay in Stafford’s
14 case also supports a stay in Josten’s case as well.

15 **V. CONCLUSION**

16 In light of the foregoing, the Court **GRANTS** Plaintiffs’ unopposed motion to
17 appoint Robbins Geller and Scott+Scott. (Doc. No. 105.) Additionally, having weighed the
18 relevant factors and considered the arguments of the parties, the Court concludes that Rite
19 Aid has demonstrated that a stay is appropriate. Thus, Rite Aid’s *ex parte* motion to stay is
20 **GRANTED**, and the matter is **STAYED** pending resolution of Rite Aid’s appeal. The
21 Court also exercises its discretion, and additionally **STAYS** Josten’s matter pending
22 resolution of Rite Aid’s appeal as well.

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24 **IT IS SO ORDERED.**

25 Dated: July 30, 2020

26 
27 Hon. Anthony J. Battaglia
28 United States District Judge

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