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10
11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **COUNTY OF LOS ANGELES**

13
14 THE STATE OF CALIFORNIA, ex rel.
VEN-A-CARE OF THE FLORIDA KEYS,
15 INC., a Florida Corporation, by and
through its principal officers and directors,
16 ZACHARY T. BENTLEY and T. MARK
JONES,

17 Plaintiffs,

18 v.

19 ABBOTT LABORATORIES, INC.,
20 WYETH INC., WYETH
PHARMACEUTICALS INC. and DOES
21 1-200,

22 Defendants.

CASE NO. BC 287198 A

Assigned for all purposes to
Honorable Peter D. Lichtman

**DEFENDANT ABBOTT LABORATORIES,
INC.'S REPLY IN SUPPORT OF MOTION
TO DISMISS FOR FAILURE TO SERVE
DEFENDANTS WITHIN THREE YEARS
OF COMMENCEMENT OF ACTION**

Date: March 25, 2003
Time: 10:00 a.m.
Dept: 322-CCW

Complaint Filed: July 28, 1998
Trial Date: None Set

TABLE OF CONTENTS

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

Page

- I. INTRODUCTION..... 1
- II. THE THREE-YEAR RULE FOR SERVICE IS TRIGGERED BY COMMENCEMENT OF THE ACTION, NOT LIFTING OF THE SEAL..... 2
 - A. The Three-Year Rule Provides Expressly That It Is Triggered By Filing An Action And Mandatory Dismissal Reflects Important State Policy..... 2
 - B. The Legislature Expressly Required Service Under the FCA Be Made “Pursuant To” The Three-Year Rule And Retained The Commencement Of The Action Trigger..... 3
 - 1. The California Legislature expressly incorporated the three-year rule into the False Claims Act..... 3
 - 2. The Legislature did not modify or otherwise qualify the three-year rule in making it applicable to the False Claim Act..... 3
 - C. Federal False Claim Cases Are Not Controlling And There Is No Federal Analogue To California’s Three-Year Rule..... 5
 - D. There Is No Structural Conflict Between C.C.P. § 583.210 And The FCA 7
- III. NO STATUTORY EXCEPTIONS APPLY TO EXCUSE PLAINTIFFS’ FAILURE TO SERVE DEFENDANTS WITHIN THREE YEARS 8
 - A. A Stay Was Never Issued In This Action And There Is No Exception For Orders “Tantamount To A Stay.”..... 8
 - B. The Tolling Rule For Lack Of Amenability To Process Is Not Applicable. 9
 - C. Service Was Not Rendered Impossible, Impractical Or Futile For Four And One-Half Years 10
- IV. CONCLUSION..... 11

TABLE OF AUTHORITIES

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

Page

Cases

Bishop v. Silva,
234 Cal. App. 3d 1317 (1991)..... 2, 3

Brown v. Kelly Broadcasting Co.,
48 Cal. 3d 711 (1989) 5

City of Pasadena v. AT&T Communications of Cal., Inc.,
103 Cal. App. 4th 981 (2002) 3

Dale v. ITT Life Ins. Corp.,
207 Cal. App. 3d 495 (1989)..... 6

Dresser v. Superior Court,
231 Cal. App. 2d 68 (1964)..... 4

Elling Corp. v. Superior Court,
48 Cal. App. 3d 89 (1975)..... 2, 6

Equilon Enterprises v. Consumer Cause, Inc.,
29 Cal. 4th 53 (2002) 1, 5

Espinoza v. United States,
52 F. 3d 838 (10th Cir. 1995)..... 6

Highland Stucco & Lime, Inc. v. Superior Court,
222 Cal. App. 3d 637 (1990)..... 9

In re Marriage of Biddle,
52 Cal. App. 4th 396 (1997) 11

In re Sheehan,
253 F. 3d 507 (9th Cir. 2001)..... 6

People v. Bland,
28 Cal. 4th 313 (2002) 9

People v. Garcia,
21 Cal. 4th 1 (1999) 8

Shipley v. Sugita,
50 Cal. App. 4th 320 (1996) 6, 9

Smith v. Herzer,
270 Cal. App. 2d 747 (1969)..... 2

Trailmobile, Inc. v. Superior Court,
210 Cal. App. 1451 (1989)..... 2

TABLE OF AUTHORITIES
(continued)

		Page
1		
2		
3	<i>United Food & Commercial Workers Union Locals v. Alpha-Beta Co.</i> ,	
4	736 F. 2d 1371 (9th Cir. 1984).....	6
5	<i>United States ex rel. Costa v. Baker & Taylor, Inc.</i> ,	
6	955 F. Supp. 1188 (N.D. Cal. 1997)	11
7	<i>Watts v. Crawford</i> ,	
8	10 Cal. 4th 743 (1995)	9, 10
9		
10	<u>Statutes</u>	
11	31 U.S.C. § 3730(b)(3).....	6
12	Cal. Code Civ. Proc. § 415.50.....	10
13	Cal. Code Civ. Proc. § 418.10(b).....	2
14	Cal. Code Civ. Proc. § 583.210.....	1, 2, 3, 4, 5, 6, 7
15	Cal. Code Civ. Proc. § 583.210(a).....	3
16	Cal. Code Civ. Proc. § 583.240(a).....	9
17	Cal. Code Civ. Proc. § 583.240(d).....	8, 10, 11
18	Cal. Code Civ. Proc. § 583.250(a)(1).....	7
19	Cal. Code Civ. Proc. § 583.250(a)(2).....	2, 6
20	Cal. Code Civ. Proc. § 583.250(b).....	9
21	Cal. Code. Civ. Proc. § 1858.....	5
22	Cal. Fam. Code § 3601(a)-(b).....	4
23	Cal. Gov't Code § 12652 (a)(1).....	7
24	Cal. Gov't Code § 12652(c)(2).....	9
25	Cal. Gov't Code § 12652(c)(3).....	11
26	Cal. Gov't Code § 12652(c)(5).....	9, 11
27	Cal. Gov't Code § 12652(c)(6)(A)-(B).....	11
28	Cal. Gov't Code § 12652(c)(9).....	1, 3, 5, 6
	Cal. R. Ct. 56(i).....	2
	Cal. Rev. & Tax. Code § 3638.....	4

TABLE OF AUTHORITIES
(continued)

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

Page

Chapter 1.5 of Title 8 of the Code of Civil Procedure 4

Other Authorities

Black's Law Dictionary 862 (7th Ed. 1991) 3

1 **I. INTRODUCTION.**

2 Plaintiffs' Opposition ("Opp.") is a thinly veiled request for the Court to rewrite the False
3 Claims Act ("FCA") to change the "trigger" for service under Section 583.210 of the California
4 Code of Civil Procedure ("C.C.P. § 583.210" or "three-year rule") from the "commencement of
5 the action" to the "lifting of the seal." This request is contrary to the plain language and
6 legislative history of the pertinent statutes.

7 The FCA requires expressly that defendants be served "pursuant to Section 583.210."
8 Cal. Gov't Code § 12652(c)(9). In turn, C.C.P. § 583.210 requires service within three years after
9 "the action is commenced" measured from the time the *original* complaint "is filed." Because
10 plaintiffs waited four and one-half years to serve defendants, plaintiffs essentially ask the Court to
11 add the following sentence to the end of Section 12652(c)(9): "For purposes of applying the
12 service requirements of C.C.P. § 583.210, the action shall be deemed commenced at the time the
13 complaint is unsealed rather than the commencement of the action." The Legislature, however,
14 did not enact that sentence and a court "has no power to rewrite the statute." *Equilon Enterprises*
15 *v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 59 (2002).

16 No good reason exists to depart from the plain meaning of the words used by the
17 Legislature. The Legislature knows how to modify the applicability of the three-year rule when it
18 so desires, *has expressly done so* on a number of occasions, but declined to do so when it enacted
19 the FCA. Indeed, in 1987 when the FCA was first enacted, the Legislature originally provided a
20 maximum cap of 90 days on the seal period. In 1996, when it amended the FCA to eliminate the
21 90-day cap, as a tradeoff to protect defendants, the Legislature also amended the FCA to
22 expressly require service "pursuant to Section 583.210" without modifying the trigger. In light of
23 this legislative history and the plain language chosen by the Legislature, there is no conflict
24 between the policies of the FCA and C.C.P. § 583.210. Accordingly, the Court should decline to
25 rewrite the applicable statutes, follow the specific direction of the Legislature, and dismiss this
26 action without prejudice.

1 **II. THE THREE-YEAR RULE FOR SERVICE IS TRIGGERED BY**
2 **COMMENCEMENT OF THE ACTION, NOT LIFTING OF THE SEAL.**

3 **A. The Three-Year Rule Provides Expressly That It Is Triggered By Filing An**
4 **Action And Mandatory Dismissal Reflects Important State Policy.**

5 Two points ignored by plaintiffs need to be reiterated.

6 First, the three-year rule established by the Legislature provides unequivocally that the
7 time period for service is triggered when an action is originally commenced: “The summons and
8 complaint shall be served upon a defendant within three years after the action is commenced
9 against the defendant. *For the purpose of this subdivision an action is commenced at the time the*
10 *complaint is filed.”* Cal. Code Civ. Proc. § 583.210 (emphasis added). This has been the settled
11 rule in California since long before enactment of the FCA in 1987. *See, e.g., Elling Corp. v.*
12 *Superior Court*, 48 Cal. App. 3d 89, 94 (1975) (the three-year rule runs from the filing of the
13 original complaint); *Smith v. Herzer*, 270 Cal. App. 2d 747, 752 (1969) (same).

14 Second, the three-year rule embodies a strong public policy consistently reaffirmed by the
15 California Legislature. “[T]he purpose of the service statutes is ‘to move suits expeditiously
16 towards trial and to promote trial before evidence is lost, destroyed or unavailable.’” *Bishop v.*
17 *Silva*, 234 Cal. App. 3d 1317, 1325 (1991) (citation omitted). In particular, the policy behind the
18 three-year rule is designed to protect defendants who face the potential loss of favorable evidence.
19 *Trailmobile, Inc. v. Superior Court*, 210 Cal. App. 1451, 1456-57 (1989). So strong is this policy
20 that a defendant need not even make a “showing of prejudice.” *Elling*, 48 Cal. App. 3d at 983.
21 The violation of the three-year rule leaves a court with no discretion except to dismiss the action.
22 Cal. Code Civ. Proc. § 583.250(a)(2) & (b). In short, the Legislature intended “to impose a stiff
23 penalty upon those who fail to effect timely service.” *Bishop v. Silva*, 234 Cal. App. 3d 1317,
24 1326 (1991).¹

25
26
27 ¹ The Legislature underscored the importance of the policy of the three-year rule by providing
28 defendants with a right to file an immediate petition for writ of mandate, which suspends the time to
respond to the complaint. Cal. Code Civ. Proc. § 418.10(b); Cal. R. Ct. 56(i).

1 **B. The Legislature Expressly Required Service Under the FCA Be Made**
2 **“Pursuant To” The Three-Year Rule And Retained The Commencement Of**
3 **The Action Trigger.**

4 1. **The California Legislature expressly incorporated the three-year rule**
5 **into the False Claims Act.**

6 Plaintiffs’ contention that the Legislature changed the trigger for the three-year rule from
7 commencement of the action to lifting of the seal is premised on the false assumption that
8 Section 12652(c)(9) “makes no reference to a three-year period.” (Opp. at 3:23.) In fact, the
9 California Legislature expressly and directly incorporated the three-year rule into the FCA: “The
10 defendant shall not be required to respond to any complaint filed under this section until 30 days
11 after the complaint is unsealed and *served upon the defendant pursuant to Section 583.210 of the*
12 *Code of Civil Procedure.*” Cal. Gov’t Code § 12652(c)(9) (emphasis added). Thus, the FCA
13 requires service “pursuant to Section 583.210.” As noted, C.C.P. § 583.210 expressly requires
14 “service upon a defendant within three years after the action is commenced” and further specifies
15 that an “action is commenced at the time the complaint is filed.” Cal. Code Civ. Proc.
16 § 583.210(a). Defendants are baffled by plaintiffs’ contention that Section 12652(c)(9) “makes no
17 reference to a three-year period.” (Opp. at 3:23.)² In all events, this incorrect assumption serves
18 as the cornerstone for plaintiffs’ entire argument that the Legislature changed the trigger in
19 Section 583.210 when it amended the FCA. As demonstrated, the assumption is without
20 foundation.

21 2. **The Legislature did not modify or otherwise qualify the three-year**
22 **rule in making it applicable to the False Claims Act.**

23 For purposes of the FCA, the Legislature did not change the trigger contained in
24 Section 583.210 from commencement of the action to lifting of the seal. Plaintiffs’ argument to
25 the contrary fails on a number of levels.

26 First, the FCA requires service “pursuant to” Section 583.210. Cal. Gov’t Code
27 § 12652(c)(9). The phrase “pursuant to” means “according to.” Black’s Law Dictionary 862 (7th
28 Ed. 1991); *see City of Pasadena v. AT&T Communications of Cal., Inc.*, 103 Cal. App. 4th 981,

² Perhaps plaintiffs mistakenly contend there is no reference to the three-year rule because they
misquote Section 12652(c)(9), substituting “Section 583.240” for “Section 583.210.” (Opp. at 3:22.)

1 984-85 (2002) (“courts apply a plain meaning rule when interpreting words contained in
2 legislative enactments”; dictionaries consulted “to learn the plain meaning” of word). Thus,
3 under the plain meaning of the statute, service must be accomplished “according to” C.C.P. §
4 583.210, which in turn requires service within three years of the commencement of the action.

5 Second, the California Legislature knows very well how to modify expressly the three-
6 year rule and related rules in Chapter 1.5 of Title 8 of the Code of Civil Procedure, but did not do
7 so when it adopted the FCA. For example:

- 8 • The statute concerning good faith settlement hearings expressly provides: “The running of
9 any period of time after which an action would be subject to dismissal pursuant to
10 [Section 583.210 and the other statutes in that Chapter] shall be tolled during the period of
11 review of a determination pursuant to this subdivision.” Cal. Code Civ. Proc. § 877.6(e)(3).
- 12 • The Legislature specified that child support orders remain in effect until termination by the
13 court or by operation of law “notwithstanding that the proceeding has not been brought to
14 trial within the time limits specified in Chapter 1.5 (Commencing with Section 583.110) of
15 Title 8 of Part 2 of the Code of Civil Procedure.” Cal. Fam. Code § 3601(a)-(b).
- 16 • Former Section 3638 of the Revenue and Taxation Code, which required that actions be
17 brought to trial in one year, specified: “Chapter 1.5 (commencing with Section 583.110) of
18 Title 8 of Part 2 of the Code of Civil Procedure does not apply to an action commenced
19 under this chapter.” See Supplemental Compendium of Authorities (“Supp. Compendium”).

20 These statutes demonstrate the Legislature’s cognizance of the time limits set forth in Chapter 1.5
21 of Title 8 and each of these statutes was in place *before* the Legislature amended the FCA in 1996
22 to require service “pursuant to Section 583.210.” If the Legislature had intended to change the
23 trigger in Section 583.210 or toll the three-year rule during the period of the seal, it would have
24 done so directly and in plain language, as it has in other statutes. Courts have rebuffed similar
25 attempts by public entities to change the operation of the three-year rule because the result would
26 be that actions could “be continued *in perpetuum*.” *Dresser v. Superior Court*, 231 Cal. App. 2d
27 68, 74, 78 (1964) (reversing trial court’s denial of defendant’s motion to dismiss, noting that the
28 three-year rule “means what it says”).

29 Third, the changes to the FCA since the time of its original adoption confirm that the
30 trigger in C.C.P. § 583.210 was not altered. When the Legislature first enacted the FCA in 1987,
31 the initial 60-day seal period could not be extended more than 30 days, meaning the maximum
32 seal period was capped at 90 days, and there was no provision (and no need for a provision) in the

1 FCA specifying service “pursuant to Section 583.210.” (Supp. Compendium, Ex. F.) In 1996,
2 the Legislature amended the FCA and removed the maximum seal duration. (Supp.
3 Compendium, Ex. G.) At the same time, the Legislature amended the FCA to require service
4 “pursuant to Section 583.210” and did not modify the trigger in C.C.P. § 583.210 (*i.e.*, the filing
5 of the original complaint). Cal. Gov’t Code § 12652(c)(9). Thus, the 1996 FCA amendment
6 reflects a purposeful balancing of interests. The Legislature provided a mechanism for the
7 Attorney General to seek more than 90 days to investigate, but also protected defendants by
8 requiring that they be served within three years of filing the original complaint.

9 In the end, plaintiffs’ proposed interpretation would require that the Court rewrite the
10 FCA by adding the phrase “*the action shall be deemed commenced for purposes of C.C.P.*
11 *§ 583.210 at the time the complaint is unsealed rather than the filing of the original complaint.*”
12 The Legislature did not say this and it would be improper for the Court to add these words
13 directly or indirectly. *See* Cal. Code. Civ. Proc. § 1858 (“In the construction of a statute . . . , the
14 Office of the Judge is simply to ascertain and declare what is in terms or in substance contained
15 therein, not to insert what has been omitted, or to omit what has been inserted. . . .); *Equilon*
16 *Enter. v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 59 (2002) (“When interpreting statutes, we follow
17 the Legislature’s intent, as exhibited by the plain meaning of the actual words of the law. . . .
18 This Court has no power to rewrite the statute so as to make it conform to a presumed intention
19 which is not expressed.” (citation omitted)).

20 C. **Federal False Claims Cases Are Not Controlling And There Is No Federal**
21 **Analogue To California’s Three-Year Rule.**

22 Plaintiffs rely on four unpublished federal district court decisions interpreting the federal
23 FCA, all decided *after* the 1996 amendments to the California FCA, in an effort to support their
24 argument that the California Legislature intended for the trigger under the three-year rule to be
25 changed to the lifting of the seal.³ This argument fails for several reasons.

26 _____
27 ³ The unpublished federal decisions all dated in or after the year 2000 could not have been
28 considered when the California Legislature amended the state FCA in 1996 to require service “pursuant
to” the three-year rule and are therefore not relevant for determining legislative intent. *Brown v. Kelly*
Broadcasting Co., 48 Cal. 3d 711, 734-35 (1989).

1 Most importantly, the California FCA and the federal FCA provisions at issue here do not,
2 as plaintiffs contend (Opp. at 5:27), “mirror” each other. The service requirements of the
3 California FCA refer to the three-year rule at C.C.P. § 583.210, while the federal FCA refers to
4 Rule 4 of the Federal Rules of Civil Procedure (“FRCP”). *Compare* Cal. Gov’t Code
5 § 12652(c)(9) *with* 31 U.S.C. § 3730(b)(3). As explained above, the three-year rule is based on a
6 strong public policy codified in C.C.P. § 583.210 requiring mandatory dismissal without regard to
7 whether a defendant suffered actual prejudice from the delay in service. There is no federal
8 analogue to California’s three-year rule. The differences between C.C.P. § 583.210 and FRCP 4
9 on this point could not be more significant. The Court should not follow unpublished federal
10 cases applying the federal FCA requiring that defendants be served in accordance with FRCP 4.

11 Plaintiffs concede that California’s three-year rule has a much lengthier time period for
12 service than FRCP 4 (three years versus 120 days), but do not mention other fundamental
13 differences between the two rules:

- 14 • FRCP 4 is discretionary; in contrast, California’s three-year rule is *not discretionary but*
15 *mandatory*. *Compare In re Sheehan*, 253 F. 3d 507, 513 (9th Cir. 2001) *with* Cal. Code Civ.
16 Proc. § 583.250(b).
- 17 • A federal court need not dismiss a case for violation of FRCP 4 even absent good cause for
18 non-compliance; in contrast, violation of California’s three-year rule mandates dismissal.
19 *Compare Espinoza v. United States*, 52 F. 3d 838, 840-41 (10th Cir. 1995) (court has
20 discretion under FRCP 4(m) to extend time “even when the plaintiff has not shown good
21 cause”) *with* Cal. Code Civ. Proc. § 583.250(a)(2) (where service is untimely, “[t]he action
22 shall be dismissed”).
- 23 • Dismissal is warranted under FRCP 4 only where a defendant makes a showing of actual
24 prejudice to defendant; in contrast, no showing of prejudice is required under California’s
25 three-year rule. *Compare United Food & Commercial Workers Union Locals v. Alpha-Beta*
26 *Co.*, 736 F. 2d 1371, 1382 (9th Cir. 1984) *with Elling*, 48 Cal. App. 3d at 983.
- 27 • Extensions of time under FRCP 4 may be granted upon a showing of “good cause” or, in the
28 court’s discretion, for any other reason; in contrast, the time period for service can only be
extended or tolled under limited exceptions expressly provided by California’s three-year
rule, those statutory exceptions are to be strictly construed, and “the courts may not develop
additional exceptions” to the three-year rule “not provided for in the statutory scheme.”
Compare Fed. R. Civ. P. 4(m) *with Shipley v. Sugita*, 50 Cal. App. 4th 320, 324 (1996); *Dale*
v. ITT Life Ins. Corp., 207 Cal. App. 3d 495 (1989).

27 Thus, federal courts have such broad discretion in applying FRCP 4 that they simply may extend
28 the time to serve under the FCA for permissive reasons. California’s three-year rule affords no

1 such discretion. In view of the stark differences between FRCP 4 and C.C.P. § 583.210, the
2 unpublished federal decisions cited by plaintiffs do not provide a sound basis for determining
3 California law.⁴

4 **D. There Is No Structural Conflict Between C.C.P. § 583.210 And The FCA.**

5 As part of their strategy to have the Court rewrite the FCA, plaintiffs try to manufacture a
6 structural conflict that they contend cannot be resolved except by changing the trigger for the
7 three-year statute to lifting of the seal. (Opp. at 6:8 to 9:24.) Plaintiffs point to the fact that a *qui*
8 *tam* complaint must be filed under seal and that the Attorney General is to investigate the
9 allegations while the action is sealed. From that, plaintiffs conclude that it would be “absurd” to
10 require dismissal where the Attorney General does not intervene for four and one-half years
11 because the Attorney General must do a “thorough” investigation. Not so.

12 Dismissal in these circumstances does not create any sort of conflict. Plaintiffs’
13 suggestion that the Attorney General may desire more than three full years to investigate does not
14 change the fact that the Legislature expressly granted only three years to investigate and serve
15 defendants. Even though the Attorney General says it must do a “thorough” investigation, the
16 Legislature also required it to “diligently” conduct its investigations. Cal. Gov’t Code § 12652
17 (a)(1). As noted in defendants’ opening brief (at 3:10-15), the Attorney General did not bother to
18 serve document subpoenas on Abbott and Wyeth or even obtain a delegation of authority for such
19 investigations until more than two years after the filing of this lawsuit.⁵ More importantly, while
20 “good cause” is the standard for obtaining an extension of the seal, “good cause” is *decidedly* not
21

22
23 ⁴ Plaintiffs’ suggestion (Opp. at 4:17-23) that federal cases should guide this Court because the
24 California FCA is patterned after the federal FCA is simply too quick and fails to take into account
25 significant differences between the two acts on the matter at issue. *See Debro v. Los Angeles Raiders*, 92
26 Cal. App. 4th 940, 949-50 (2001) (federal FCA cases cannot “dictate[] how [a California court] should
27 interpret” the California FCA where there are “difference[s]”).

28 ⁵ Although plaintiffs’ argue (Opp. at 2 n.2) that it is “inappropriate” for defendants to have
highlighted the State of California’s long-standing knowledge of matters alleged in this action, those
unrebutted facts (in addition to defeating the merits of plaintiffs’ claims) confirm that plaintiffs’ delay in
prosecuting this action reaches even further back than the four and one-half years this action has been
pending.

1 grounds for extending the three-year rule.⁶ Compare Cal. Gov't Code § 12652(c)(5) with Cal.
2 Code Civ. Proc. § 583.240. Indeed a “[f]ailure to discover relevant facts or evidence,” *i.e.*, a
3 failure to complete an investigation, is specifically *excluded* as a basis to extend the three-year
4 rule. Cal. Code Civ. Proc. § 583.240(d).

5 Thus, it is plaintiffs’ proposal that would create the anomaly: it would require the Court
6 to hold that “good cause” to extend the seal likewise extends the three-year rule, even though
7 good cause is specifically excluded as a basis to extend the three-year rule. The Legislature,
8 however, already has spoken directly to this issue. *See People v. Garcia*, 21 Cal. 4th 1, 15 (1999)
9 (a court may not ignore “necessary limitations” on its “role in statutory interpretation” and “must
10 limit” itself to “interpreting the law as written and leave for the People and the Legislature the
11 task of revising it as they deem wise”). By *not* modifying the trigger for the three-year rule, the
12 Legislature (i) reinforced the need for diligent investigation of FCA actions, and (ii) ensured that,
13 consistent with California’s strong public policy, defendants would be timely served so they can
14 collect evidence while relatively fresh. In short, there is nothing “backhanded” or “absurd” or
15 “anomalous” in requiring the Attorney General to complete an investigation and exercise an
16 election to intervene within three years.

17 **III. NO STATUTORY EXCEPTIONS APPLY TO EXCUSE PLAINTIFFS’ FAILURE**
18 **TO SERVE DEFENDANTS WITHIN THREE YEARS.**

19 **A. A Stay Was Never Issued In This Action And There Is No Exception For**
20 **Orders “Tantamount To A Stay.”**

21 By statute, time is excluded in computing the three-year rule when “[t]he prosecution of
22 the action or proceedings in the action was stayed and the stay affected service.” Cal. Code Civ.
23 Proc. § 583.240(b). Plaintiffs argue this exception applies based on the assertion that a seal is
24 “tantamount to a stay.” Plaintiffs’ argument admits there was no “stay” and must therefore fail.

25 The Court is prohibited from creating a new exception for orders “tantamount to a stay”
26 and may not do so indirectly by broadly construing the stay exception. *See, e.g., Shipley v.*

27 ⁶ Plaintiffs misleadingly state that defendants “concede” that good cause existed for the seal
28 extensions. (Opp. at 8:12-13.) Only yesterday did defendants receive access to a portion of the redacted
file (which has not been fully reviewed) and defendants have consistently maintained that good cause to
extend the seal does not extend time for service under the three-year rule.

1 *Sugita*, 50 Cal. App. 4th 320, 324 (1996) (“Courts may not develop additional exceptions not
2 provided for in the statutory scheme.”); Cal. Code Civ. Proc. § 583.250(b) (court has no power to
3 create new exceptions). Further, plaintiffs have not cited a single case recognizing their
4 “tantamount to a stay” exception. Indeed, the only case cited by plaintiffs to support their novel
5 theory is inapposite. See *Highland Stucco & Lime, Inc. v. Superior Court*, 222 Cal. App. 3d 637,
6 640 (1990). *Highland Stucco* involved an actual “stay” – *not a seal* – and does not use the phrase
7 “tantamount to a stay.” *Id.* Additionally, the stay order in *Highland Stucco* actually specified that
8 the time period of the stay was to be excluded “for purposes of computing the time periods set
9 forth in” C.C.P. § 583.210. *Id.* at 641. No such specification was made in any of the seal orders
10 issued in this action.

11 Finally, plaintiffs' argument is defeated by the fact that the FCA contains both a “seal”
12 provision and a “stay” provision. Compare Cal. Gov't Code § 12652(c)(2) & (5) (seal) with *id.*
13 § 12657(h) (stay). Contrary to accepted canons of construction, plaintiffs would have this Court
14 read the term “seal” in the FCA to mean “stay” even though the Legislature provided separately
15 for each of those concepts. See, e.g., *People v. Bland*, 28 Cal. 4th 313, 337 (2002) (“when the
16 Legislature has carefully employed a term in one place and has excluded it in another, it should
17 not be implied where excluded”). Consequently, plaintiffs’ “tantamount to a stay” theory must be
18 rejected.

19 **B. The Tolling Rule For Lack Of Amenability To Process Is Not Applicable.**

20 By statute, the three-year rule is tolled for any period of time during which “[t]he
21 defendant was not amenable to the process of the court.” Cal. Code Civ. Proc. § 583.240(a).

22 Plaintiffs seek to invoke this exception based entirely on one quotation pulled out of
23 context from *Watts v. Crawford*, 10 Cal. 4th 743, 757-58 (1995), a case whose background
24 plaintiffs do not even discuss. (Opp. at 10:17 to 11:2.)⁷ Plaintiffs simplistically argue based on
25 the *Watts* quotation that “amenable to the process of the court” means that a party “was subject to
26

27 ⁷ The one quotation recited by plaintiffs is itself not accurate. It changes parts of one sentence and
28 combines parts of another sentence as if it were all a single sentence. Compare Opp. at 10:20-22
(purporting to quote *Watts*) with *Watts*, 10 Cal. 4th at 757-58.

1 being served under applicable constitutional and statutory provisions.” *Watts*, 10 Cal. 4th at 758.
2 In fact, *Watts* involved whether a defendant could be subject to personal jurisdiction, and the
3 “applicable constitutional and statutory provisions” referred to in *Watts* concerned *personal*
4 *jurisdiction*. Plaintiffs omit this information because it is fatal to their argument.⁸ Plaintiffs do
5 not contend that personal jurisdiction could not be obtained over defendants, ignore the fact that
6 the seal could have been dissolved at any point by act of the Attorney General and therefore fail
7 to establish the applicability of this subdivision.⁹

8 **C. Service Was Not Rendered Impossible, Impractical Or Futile For Four And**
9 **One-Half Years.**

10 Plaintiffs’ argument that service was “impossible, impractical, or futile” within the
11 meaning of C.C.P. § 583.240(d) (the “impossibility exception”) makes no sense and is
12 unsupported by any law.

13 First, plaintiffs assert that “C.C.P. 583.240(d), *as interpreted by the California courts, . . .*
14 *is applicable under the circumstances of this case.*” (Opp. at 10:13-14 (emphasis added).) Yet,
15 plaintiffs do not cite a single case where the impossibility exception excused failure to timely
16 serve a defendant.

17 Second, the impossibility exception provides expressly that the reason for not serving
18 defendants must be “due to causes beyond the plaintiff’s control” and that “[f]ailure to discover
19 relevant facts or evidence is not a cause beyond the plaintiff’s control.” Cal. Code Civ. Proc.

20 ⁸ The issue in *Watts* was whether a trial court finding that a defendant cannot with reasonable
21 diligence be served in any manner other than publication under C.C.P. 415.50 is the equivalent of a
22 determination that the defendant “was not amenable to the process of the court” under the tolling provision
23 of C.C.P. § 583.240(a). 10 Cal. 4th at 745. The *Watts* Court traced the development of personal
24 jurisdiction jurisprudence and did nothing more than equate “amenability to process” under C.C.P.
25 § 582.240(a) with personal jurisdiction under the Constitution and statutes. *Id.* at 751-52, 757-58. The
26 Court held that, because personal jurisdiction could have been obtained over defendant by publication, the
27 three-year rule was *not* tolled. *Id.* at 762 (noting that the Legislature intended “amenable to process” to
28 refer to the State’s jurisdictional authority). The *Watts* holding is limited to the following: “a defendant is
not amenable to process, and the tolling exception applies only where the court lacks authority to exercise
jurisdiction over the defendant.” *Id.* at 761.

⁹ The plaintiffs’ argument is otherwise logically flawed. If Abbott and Wyeth were deemed not
“amenable” to service because a seal was in place, then the FCA’s provision requiring service “pursuant to
Section 583.210 of the Code of Civil Procedure” would effectively be rendered superfluous. That would
contravene the legislative history of the FCA, and would conflict with the fact that the Legislature knows
how to draft express exceptions to C.C.P. § 583.210 when it intends to.

1 § 583.240(d). The duration of the seal was entirely within the control of plaintiffs; the Attorney
2 General could have caused the seal to be lifted at *any time* to allow service within three years.
3 Cal. Gov't Code § 12652(c)(6)(A)-(B) ("seal shall be lifted" upon filing of notice by Attorney
4 General).¹⁰

5 Third, plaintiffs' proposed justification that the Attorney General needed to conduct a
6 thorough investigation merely underscores the inapplicability of the impossibility exception. The
7 fact that the Attorney General wanted to further investigate expressly fails to satisfy the
8 impossibility exception. Cal. Code. Civ. Proc. § 583.240(d) ("[f]ailure to discover relevant facts
9 or evidence is not a cause beyond the plaintiffs control"). Being required to make a decision to
10 intervene or not after three years is hardly a "Hobson's choice." (Opp. at 12:24.)¹¹ Plaintiffs
11 could have lifted the seal at any time to ensure service in compliance with the three-year rule and
12 cannot avoid the consequence of their failure to do so.

13 **IV. CONCLUSION.**

14 For the foregoing reasons, the Court should decline plaintiffs' invitation to rewrite the
15 controlling statutes and grant defendants' motions to dismiss.

16 Dated: March 20, 2003

JONES DAY

17
18 By: 

Daniel D. McMillan

19
20 Attorneys for Defendant
ABBOTT LABORATORIES, INC.

21
22 ¹⁰ Plaintiffs' argument is not salvaged by the implication that the relator could not lift the seal.
23 (Opp. at 12:1-2.) The real party in interest in a *qui tam* action is the State of California and the Attorney
24 General was provided a copy of the complaint when the action was filed on July 28, 1998. *See In re*
25 *Marriage of Biddle*, 52 Cal. App. 4th 396, 399 (1997); Cal. Gov't Code § 12652(c)(3). Moreover, the
26 relator may oppose any extension to a seal or seek to have the seal dissolved. *See, e.g., United States ex*
rel. Costa v. Baker & Taylor, Inc., 955 F. Supp. 1188, 1190, (N.D. Cal. 1997) (court lifted seal in its
entirety in response to motion by relator). The relator here joined in each of the many extensions of the
seal and never opposed any of the requested extensions.

27 ¹¹ After four and one-half years of investigation, plaintiffs' counsel stated at the recent status
28 conference that this is "not a complex case" and plaintiffs now believe that all necessary discovery and
trial preparation can be concluded so that this matter may be brought to trial within 18 months of lifting
the seal. (McMillan Supp. Decl. Exhs. A-B.)

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10
11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **COUNTY OF LOS ANGELES**

13
14 THE STATE OF CALIFORNIA, ex rel.
VEN-A-CARE OF THE FLORIDA KEYS,
15 INC., a Florida Corporation, by and
through its principal officers and directors,
16 ZACHARY T. BENTLEY and T. MARK
JONES,

17 Plaintiffs,

18 v.

19 ABBOTT LABORATORIES, INC.,
20 WYETH INC., WYETH
PHARMACEUTICALS INC. and DOES
21 1-200,

22 Defendants.
23
24
25
26
27
28

CASE NO. BC 287198 A

Assigned for all purposes to
Honorable Peter D. Lichtman

PROOF OF SERVICE

Date: March 25, 2003
Time: 10:00 a.m.
Dept: 322-CCW

Complaint Filed: July 28, 1998
Trial Date: None Set

1 State of California ex rel Ven-A-Care v. Abbott Laboratories, Inc., Wyeth, Inc., Wyeth
2 Pharmaceuticals
(LASC Case No. BC 287198A)

3 PROOF OF SERVICE
4 (multi)

5 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

6 I am employed in the County of Los Angeles, State of California. I am over the age of 18
7 and not a party to the within action; my business address is 555 West Fifth Street, Suite 4600, Los
8 Angeles, California.

9 On March 20, 2003, I served the document(s) described below on the interested parties in
10 this action as follows: See Attached Service List

- 11 1. DEFENDANT ABBOTT LABORATORIES, INC.'S REPLY IN
12 SUPPORT OF MOTION TO DISMISS FOR FAILURE TO
13 SERVE DEFENDANTS WITHIN THREE YEARS OF
14 COMMENCEMENT OF ACTION
- 15 2. SUPPLEMENTAL DECLARATION OF DANIEL D.
16 MCMILLAN IN SUPPORT OF DEFENDANT ABBOTT
17 LABORATORIES, INC.'S REPLY IN SUPPORT OF MOTION
18 TO DISMISS FOR FAILURE TO SERVE DEFENDANTS
19 WITHIN THREE YEARS OF COMMENCEMENT OF
20 ACTION
- 21 3. SUPPLEMENTAL COMPENDIUM OF NON-CALIFORNIA
22 AUTHORITIES AND OTHER AUTHORITIES IN SUPPORT OF
23 DEFENDANT ABBOTT LABORATORIES, INC.'S REPLY IN
24 SUPPORT OF MOTION TO DISMISS FOR FAILURE TO
25 SERVE DEFENDANTS WITHIN THREE YEARS OF
26 COMMENCEMENT OF ACTION

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PHARMACEUTICALS INC. and DOES
21 1-200,

22 Defendants.

CASE NO. BC 287198 A

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**SUPPLEMENTAL DECLARATION OF
DANIEL D. MCMILLAN IN SUPPORT OF
DEFENDANT ABBOTT LABORATORIES,
INC.'S REPLY IN SUPPORT OF MOTION
TO DISMISS FOR FAILURE TO SERVE
DEFENDANTS WITHIN THREE YEARS
OF COMMENCEMENT OF ACTION**

Date: March 25, 2003
Time: 10:00 a.m.
Dept: 322-CCW

Complaint Filed: July 28, 1998
Trial Date: None Set

1 I, Daniel D. McMillan, do hereby declare:

2 1. I am a partner in the law firm of Jones Day, counsel of record for defendant Abbott
3 Laboratories, Inc. (hereinafter "Abbott"). I am licensed to practice in the State of California and
4 am admitted to practice before this Court. Unless otherwise indicated, this declaration is based
5 upon my personal knowledge and, if called as a witness, I could and would testify competently to
6 the matters described herein. I make this declaration in support of defendant Abbott's "Reply in
7 Support of Motion to Dismiss for Failure to Serve Defendants Within Three Years of
8 Commencement of Action."

9 2. Attached hereto as Exhibit A is a true and correct copy of excerpts from the Status
10 Conference before this Court on March 3, 2003.

11 3. Attached hereto as Exhibit B is a true and correct copy of the parties' Joint Initial
12 Status Conference Report.

13 4. Attached to the concurrently filed Supplemental Compendium of Non-California
14 Authorities and Other Authorities are true and correct copies of the following materials: (i) Cal.
15 Gov't Code § 12652, as enacted in 1987; (ii) Cal. Gov't Code § 12652, as amended in 1996; (iii)
16 former Cal. Rev. & Tax. Code § 3638, as enacted in 1943; and (iv) former Cal. Rev. & Tax. Code
17 § 3638, as amended in 1984.

18 I declare under penalty of perjury under the laws of the State of California that the
19 foregoing is true and correct.

20 Executed this 20th day of March 2003 at Los Angeles, California.

21 
22 _____
23 Daniel D. McMillan

24
25
26
27
28

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CASE NO. BC 287198 A

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**SUPPLEMENTAL COMPENDIUM OF
NON-CALIFORNIA AUTHORITIES AND
OTHER AUTHORITIES IN SUPPORT OF
DEFENDANT ABBOTT LABORATORIES,
INC.'S REPLY IN SUPPORT OF MOTION
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Complaint Filed: July 28, 1998
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1 Pursuant to California Rule of Court 313(f), defendant Abbott Laboratories, Inc.
2 ("Abbott") submits copies of the following non-California authorities and other authorities cited
3 in Abbott's Reply Brief and not previously submitted to the Court by any of the parties:

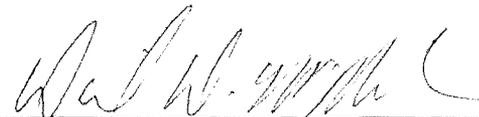
4 **TAB** **AUTHORITY**

- 5 A. *Espinoza v. United States*, 52 F.3d 838 (10th Cir. 1995)
6 B. *In re Sheehan*, 253 F.3d 507 (9th Cir. 2001)
7 C. *United Food & Commercial Workers Union Locals v. Alpha-Beta Co.*, 736 F.2d
8 1371 (9th Cir. 1984)
9 D. Cal. Code Civ. Pro. § 877.6
10 E. Cal. Fam. Code § 3601
11 F. Cal. Gov't. Code § 12652, as enacted in 1987
12 G. Cal. Gov't. Code § 12652, as amended in 1996
13 H. Former Cal. Rev. & Tax Code § 3638, as enacted in 1943
14 I. Former Cal. Rev. & Tax Code § 3638, as amended in 1984
15 J. 31 U.S.C. § 3730
16 K. Black's Law Dictionary 862 (7th Ed. 1991)

17 Dated: March 20, 2003

Respectfully Submitted,

JONES DAY

20 By: 
21 Daniel D. McMillan

22 Attorneys for Defendant
23 ABBOTT LABORATORIES, INC.