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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 NOTICE OF MOTION AND
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 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that, on March 25, 2003, at 10:00 a.m., or as soon thereafter as
3 counsel may be heard, in Department 322 of the above-entitled Court, located at 600 South
4 Commonwealth Avenue, Los Angeles, California, before the Honorable Judge Peter D. Lichtman,
5 defendant Abbott Laboratories, Inc. ("Abbott") will and hereby does move this Court for an order
6 dismissing this action for failure to serve defendants within three years of the commencement of
7 the action, and for a judgment of dismissal based thereon.

8 This motion is made pursuant to Chapter 1.5 of Title 8 of the California Code of Civil
9 Procedure, including sections 583.210 and 583.250, on the grounds that plaintiffs failed to serve
10 the complaint and summons on Abbott within three years of the commencement of this action.

11 This Motion is based upon this Notice of Motion and Motion, the supporting
12 Memorandum of Points and Authorities, the declaration of Daniel D. McMillan filed concurrently
13 herewith, exhibits submitted in support of this motion and such other evidence or argument that
14 may be submitted at or before the hearing on this matter.

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Dated: February 28, 2003

Respectfully Submitted,

JONES DAY

By: 
Daniel D. McMillan

Attorneys for Defendant
ABBOTT LABORATORIES, INC.

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PROOF OF PERSONAL SERVICE

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

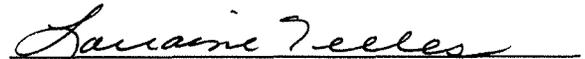
STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, the undersigned, declare that I am a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action. My business address is 555 West Fifth Street, Suite 4600, Los Angeles, California 90013-1025. I am readily familiar with Jones Day's practice for causing documents to be served by hand delivery. Following that practice, on February 28, 2003, I caused the sealed envelope containing the documents described in the attached **DOCUMENT LIST** to be hand delivered to the addressee specified below:

Adam D. Miller, Esq.
Engstrom, Lipscomb & Lack
10100 Santa Monica Blvd., 16th Floor
Los Angeles, CA 90067-4107

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

Executed on February 28, 2003, at Los Angeles, California.


Lorraine Telles

DOCUMENT LIST

The following documents were served via Personal Service on **Adam Miller**:

- DEFENDANT ABBOTT LABORATORIES, INC.'S NOTICE OF MOTION TO DISMISS FOR FAILURE TO SERVE DEFENDANTS WITHIN THREE YEARS OF COMMENCEMENT OF ACTION
- DEFENDANT ABBOTT LABORATORIES, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO SERVE DEFENDANTS WITHIN THREE YEARS OF COMMENCEMENT OF ACTION
- DECLARATION OF DANIEL D. McMILLAN IN SUPPORT OF DEFENDANT ABBOTT LABORATORIES, INC.'S MOTION TO DISMISS FOR FAILURE TO SERVE DEFENDANTS WITHIN THREE YEARS OF COMMENCEMENT OF ACTION
- DEFENDANT ABBOTT LABORATORIES, INC.'S COMPENDIUM OF NON-CALIFORNIA AUTHORITIES IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO SERVE DEFENDANTS WITHIN THREE YEARS OF COMMENCEMENT OF ACTION
- DEFENDANT ABBOTT LABORATORIES, INC.'S NOTICE OF MOTION AND MOTION TO UNSEAL ALL RECORDS ON FILE AND JOINDER IN DEFENDANTS WYETH INC. AND WYETH PHARMACEUTICALS INC.'S MOTION TO UNSEAL, INCLUDING ALL SUPPORTING PAPERS, DOCUMENTS AND ARGUMENTS

1 **PROOF OF SERVICE**

2 (multi)

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

6 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

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

10 _____ (BY MAIL) I am "readily familiar" with the firm's practice of collection and processing
11 correspondence for mailing. Under that practice it would be deposited with the U.S. postal
12 service on that same day with postage thereon fully prepaid at Los Angeles, California in the
13 ordinary course of business. I am aware that on motion of the party served, service is presumed
14 invalid if postal cancellation date or postage meter date is more than one day after date of deposit
15 of mailing in affidavit. I served by mail a true copy thereof enclosed in a sealed envelope to the
16 addressee(s) as follows:

17 XX (BY FACSIMILE) On February 28, 2003, I caused the documents described in the
18 attached **DOCUMENT LIST** to be served by facsimile by placing true copies of the documents
19 with fax cover sheets in the facsimile center of our office directed to the following parties:

20 **William S. Schneider, Esq.** Fax: (619) 688-4200
21 Fax: (760) 436-2490

22 **Frank M. Pitre, Esq.** Fax: (650) 697-0577

23 XX (BY FEDERAL EXPRESS) On February 28, 2003, I caused the documents described in
24 the attached **DOCUMENT LIST** to be served by placing true copies of the documents in sealed
25 envelopes designated by Federal Express with Jones Day's Federal Express Account Number and
26 delivery fees already provided for, and causing such envelopes to be delivered to a courier or
27 driver authorized by Federal Express to receive documents for overnight delivery by Federal
28 Express to the addressee as follows:

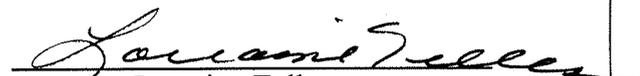
29 **William S. Schneider, Esq.**
30 132 North El Camino Real
31 Encinitas, CA 92024

32 **Frank M. Pitre, Esq.**
33 Cotchett, Pitre & Simon
34 840 Malcolm Road, Suite 200
35 Burlingame, CA 94010-1413

36 _____ (PERSONAL DELIVERY) I caused to have personally served a true copy thereof in a
37 sealed envelope to the addressees as follows:

38 I declare under penalty of perjury under the laws of the State of California that the above
39 is true and correct.

40 Executed on February 28, 2003

41 
42 Lorraine Telles

DOCUMENT LIST

The following documents were served as follows on **Frank M. Pitre** and **William S. Schneider**:

VIA FACSIMILE:

- DEFENDANT ABBOTT LABORATORIES, INC.'S NOTICE OF MOTION TO DISMISS FOR FAILURE TO SERVE DEFENDANTS WITHIN THREE YEARS OF COMMENCEMENT OF ACTION
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PROOF OF SERVICE BY FEDERAL EXPRESS

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

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES) ss.

I, the undersigned, declare that I am a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 555 West Fifth Street, Suite 4600, Los Angeles, California 90013. On February 28, 2003, I served the foregoing documents described in the attached **DOCUMENT LIST** by placing true copies thereof enclosed in sealed envelopes designated by Federal Express with Jones Day's Federal Express Account Number and delivery fees already provided for, and causing such envelopes to be delivered to a courier or driver authorized by Federal Express to receive documents for overnight delivery by Federal Express.

The foregoing sealed envelopes were addressed as follows:

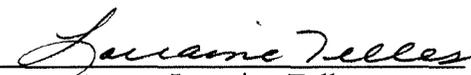
S. Craig Holden, Esq.
Ober Kaler
120 East Baltimore Street
Baltimore, MD 21202

Lawrence A. Cox
Arnold & Porter
777 S. Figueroa Street, 44th Floor
Los Angeles, CA 90017-2513

I am "readily familiar" with the firm's practice of arranging for packages, envelopes and other documents to be delivered on an overnight basis by Federal Express. Under that practice, the firm has a customer account with Federal Express whereby Federal Express will send its authorized courier or driver to pick up packages, envelopes and other documents which are placed in sealed envelopes designated by Federal Express with Jones, Day, Reavis & Pogue's Federal Express Account Number at the firm's office in Los Angeles, California and that thereafter, Federal Express will deliver such sealed envelopes on an overnight basis in the ordinary course of business.

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

Executed on February 28, 2003, at Los Angeles, California.


Lorraine Telles

DOCUMENT LIST

The following documents were served via Federal Express on **S. Craig Holder & Lawrence Cox**:

- DEFENDANT ABBOTT LABORATORIES, INC.'S NOTICE OF MOTION TO DISMISS FOR FAILURE TO SERVE DEFENDANTS WITHIN THREE YEARS OF COMMENCEMENT OF ACTION
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9 Attorneys for Defendant
10 ABBOTT LABORATORIES, INC.

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
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14 THE STATE OF CALIFORNIA, ex rel.
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22 Defendants.

CASE NO. BC 287198 A

Assigned for all purposes to
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**DEFENDANT ABBOTT LABORATORIES,
INC.'S MEMORANDUM OF POINTS AND
AUTHORITIES 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

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I. INTRODUCTION.

This action asserting violations of the California False Claims Act ("FCA") must be dismissed as a matter of law because defendants Abbott Laboratories, Inc. ("Abbott"), and the Wyeth defendants (*i.e.*, Wyeth Inc. and Wyeth Pharmaceuticals Inc.) were not served with the currently operative Complaint (the "Complaint") until almost four and one-half years after the commencement of the action. This action was originally commenced on **July 28, 1998**; however, Abbott (the earliest served defendant) was not served until **January 7, 2003**. When a summons and complaint are not served on defendants within three years of the commencement of the action, the "action shall not be prosecuted further" and the "action shall be dismissed." Cal. Code Civ. Proc. §§ 583.210, 583.250(a) (the "three-year rule"). Indeed, the FCA itself expressly requires that all FCA complaints be served in compliance with the three-year rule, notwithstanding other provisions that require a *qui tam* action be filed under seal and do not allow service until the seal is lifted. *See* Cal. Gov't Code § 12652(c)(2) & (9). Notably, the duration of the seal is within plaintiffs' control, and the Attorney General could have lifted the seal at any time before the three years for service lapsed. *Id.* § 12652(c)(6)(A)-(B). The strategic decision to perpetuate the seal for four and one-half years does not excuse the failure to serve defendants timely. *See, e.g., Williams v. Los Angeles Unified Sch. Dist.*, 23 Cal. App. 4th 84, 97-98 (1994) ("counsel's strategic considerations are not relevant" where defendants are not served timely). In sum, this action must be dismissed because the defendants were not served within the three years of the commencement of the action.

II. BACKGROUND.

22 The Attorney General's decision not to serve defendants timely cannot be excused. To
23 place that failure in context, this section provides the following background: (i) a summary of the
24 so-called *qui tam* provisions of the FCA; (ii) the procedural history of this case; (iii) an overview
25 of the allegations of the Complaint; and (iv) the regulatory framework related to Medi-Cal drug
26 reimbursement.
27
28

1 **A. Qui Tam Provisions Of The False Claims Act.**

2 Plaintiff Ven-A-Care of the Florida Keys, Inc. ("Ven-A-Care") filed the original
3 Complaint in this action on July 28, 1998 under the *qui tam* provisions of the California FCA.
4 *See* Cal. Gov't Code § 12652(c). The *qui tam* provisions permit private parties (called "relators")
5 to file suit on behalf of themselves and the State alleging fraud against the State, in this case in
6 connection with the Medi-Cal program.¹ *See id.* § 12652(c)(1). The relator is required to file a
7 *qui tam* action under seal. *See* Cal. Gov't Code § 12562(c)(2). On the "same day," the relator
8 must also serve the Attorney General with a copy of the complaint as well as a "written disclosure
9 of substantially all material evidence and information" possessed by the relator. *Id.*
10 § 12562(c)(3).

11 A *qui tam* action "may remain under seal for up to 60 days." Cal. Gov't Code
12 § 12652(c)(2). While the action is under seal, the Attorney General must make a decision to
13 "proceed" with the action or leave the action to be prosecuted solely by the relator. *See id.* §
14 12652(c)(4). If the Attorney General elects to "proceed with the action" and take control of the
15 litigation, the relator is entitled to between 15% and 33% of any recovery. *See id.* § 12652(g)(2).
16 If the Attorney General declines to "proceed with the action," then the relator may go forward
17 with the litigation and retain between 25% and 50% of any eventual recovery, with the remainder
18 going to the State. *See id.* § 12652(g)(3). In either case, the court determines the relator's share
19 of the recovery.

20 According to the FCA, the defendant is not to be served until after the action is unsealed.
21 *See* Cal. Gov't Code § 12652(c)(2). Although the statute provides a seal period of "up to 60
22 days," the Attorney General may request an extension of the duration of the seal "for good cause
23 shown." Cal. Gov't Code § 12652 (c)(2) & (5). In all events, however, the FCA also requires that
24 defendants be served within three years of when the action is commenced as specified by Section
25 583.210 of the Code of Civil Procedure. *See* Cal. Gov't Code § 12652(c)(9).

26
27 _____
28 ¹ Medi-Cal is the California version of Medicaid, a joint federal-state health benefits
 program for the poor.

1 Here, the Attorney General waited over four years before deciding whether to proceed
2 with the action. As a result, this action was not served within three years of its commencement
3 and, as explained more fully below, must be dismissed.

4 **B. Procedural Background Of This Action.**

5 The original complaint in this action was filed on July 28, 1998. This date appears on the
6 caption of the Complaint served on defendants in January 2003. Although defendants have been
7 served with the Complaint, they have not been provided the docket sheet or any other documents
8 in the Court's file; and the seal has not been lifted as to any documents. As a result, defendants
9 are disadvantaged in responding to the Complaint and will file a motion to lift the seal.²

10 After the original complaint was filed, the Attorney General waited over two years to seek
11 documents from the defendants by way of administrative subpoena. The Attorney General
12 eventually served Abbott with an administrative subpoena dated September 18, 2000. [Exh. A.]³
13 Abbott understands that Wyeth also was not served with administrative subpoenas until
14 September and November 2000. [Exhs. B-D (subpoenas dated Sept. 18, 2000 and Nov. 17,
15 2000).]

16 **C. Allegations of the Complaint and Medi-Cal Regulatory Background.**

17 The plaintiffs allege that Abbott somehow misrepresented the "direct prices" of its drugs
18 in communications with pharmaceutical industry publishers. They allege further that these
19 purported misrepresentations caused Medi-Cal to pay too much to pharmacies, physicians and
20 other healthcare providers (collectively "providers") who administered drugs manufactured by
21 Abbott. According to the Complaint, Medi-Cal reimburses providers based on the "direct prices"
22 that Abbott reports to pharmaceutical industry publishers. *See* Compl. ¶¶ 11-16, 19.

23
24 _____
25 ² The parties originally discussed a stipulation lifting the seal as to the Attorney General's
26 applications to extend the seal, case management orders, and the original and amended
27 complaints. On reflection, counsel for the State and the relator balked as to even providing
28 redacted, "for counsel's eyes only," applications and court orders. Thus, defendants have yet to
gain access to the Court's file.

³ Citations to "Exh. ___" are to Exhibits attached to the Declaration of Daniel D. McMillan
filed in support of Abbott's motion to dismiss.

1 Though not discussed in the Complaint, the "direct price" of a manufacturer is little more
2 than a "sticker price" or a "list price." Not surprisingly, a drug's "direct price" exceeds the
3 discounted price at which pharmacies and other providers negotiate to purchase the drugs.
4 Frequently, a pharmacy, HMO or other large provider can purchase drugs at a discounted price
5 far below the direct price.

6 For its part, Medi-Cal appears to make individualized decisions regarding the manner in
7 which it reimburses for drugs. While Medi-Cal reimburses drugs manufactured by Abbott and
8 Wyeth based on "direct price," Medi-Cal pays for drugs manufactured by some other
9 manufacturers on the basis of the drug's "average wholesale price." *See* Compl. ¶¶ 11, 22; Cal.
10 Code Regs. tit 17, §§ 51513 & 51513.5. Medi-Cal pays no money to drug manufacturers,
11 including Abbott. Rather, providers buy the drugs from manufacturer or from wholesalers, and
12 dispense them to patients and customers. Some of these patients and customers are Medi-Cal
13 beneficiaries. For these beneficiaries, Medi-Cal then reimburses the provider dispensing the drug.
14 In some circumstances, the provider earns a profit equal to the difference between Medi-Cal's
15 reimbursement and the provider's actual acquisition cost.

16 The regulatory history of Medicaid makes clear that the federal government and the states
17 have long been aware of this provider profit, yet have continued this reimbursement system to
18 ensure that an adequate number of retail pharmacies participate in Medicaid. Significantly, in
19 1990, when Congress sought to reduce Medicaid drug expenditures, it did not reduce Medicaid
20 payments to providers (and risk having pharmacies cease participating in Medicaid). Instead,
21 Congress amended the federal Medicaid Act to require pharmaceutical manufacturers to pay state
22 Medicaid agencies "enormously lucrative rebates." *Nebraska Pharmacists Ass'n, Inc. v.*
23 *Nebraska Dep't of Social Servs.*, 863 F. Supp. 1037, 1043 (D. Neb. 1994). In fact, at the same
24 time that Congress began requiring that pharmaceutical manufacturers pay the "enormously
25 lucrative rebates," Congress prohibited any reductions in payments to Medicaid providers. *See id.*
26 at 1043-47; 42 U.S.C. § 1396r-8(c) (setting forth the rebate provisions of the Medicaid Act).
27 Congress feared that reducing Medicaid payments to providers "could cause many retail
28 pharmacies to drop out of the Medicaid program." United States General Accounting Office,

1 Rep. HRD-93-55FS, *Medicaid: Outpatient Drug Costs and Reimbursements for Selected*
2 *Pharmacies in Illinois and Maryland* at 2 (Mar. 18, 1993).

3 Since 1990, as a result of the Medicaid rebate provisions, the California agency that
4 administers Medi-Cal (the Department of Health Services or "DHS") has had actual knowledge
5 that direct price often exceeded actual sales price. Under the Medicaid rebate provisions, Abbott
6 and other drug manufacturers have made payments to Medi-Cal that, for generic drugs, equal
7 11% of the "average manufacturers price" of the drug multiplied by the number of units of the
8 generic drug dispensed to Medi-Cal beneficiaries. *See* 42 U.S.C. § 1396r-8(c)(3). For brand-
9 name drugs, the rebate equals either: (i) 15.1% of "average manufacturer price," or (ii) the
10 difference between "best price" and "average manufacturer price," times the number of units of
11 the drug dispensed to Medi-Cal beneficiaries. *See* 42 U.S.C. § 1396r-8(c)(1). "Average
12 manufacturer price" is defined as the "average price paid to the manufacturer for the drug in the
13 United States by wholesalers for drugs distributed to the retail pharmacy class of trade, after
14 deducting customary prompt pay discounts." 42 U.S.C. § 1396r-8(k). The statute defines "best
15 price" as "the lowest price available from the manufacturer during the rebate period to any
16 wholesaler, retailer, provider, health maintenance organization, nonprofit entity or [certain
17 governmental purchasers]," inclusive of discounts. 42 U.S.C. § 1396r-8(c)(1)(C). As a result of
18 the federal rebate programs, Medi-Cal therefore knew the "average manufacturer price" or "best
19 price" of drugs manufactured by Abbott, as these prices could be computed from the rebate
20 payments.

21 Furthermore, in 1996, DHS acknowledged in response to an audit by the federal
22 government that Medi-Cal pays more for ingredient costs than provider acquisition cost. DHS
23 agreed that the federal report "indicates that a reduction in our drug ingredient cost
24 reimbursement would be appropriate at this time." *See* HHS Office of Inspector General, *Review*
25 *of Pharmacy Acquisition Costs for Drugs Reimbursed Under the Medicaid Prescription Drug*
26 *Program of the California Department of Health Services* (May 31, 1996) at Appx. 6. DHS
27 further stated that the audit "substantiate[s] [DHS]' position that current drug ingredient cost
28

1 reimbursement [by the Medi-Cal program] does not reflect actual purchasing activity of
2 California pharmacies." *Id.*

3 Thus, not only did California have actual "average manufacturer's price" and "best price"
4 information regarding drugs manufactured by Abbott since 1990, the Medi-Cal agency admitted
5 in 1996 that Medi-Cal payments for drug ingredient costs were higher than acquisition cost.

6 **III. THE THREE-YEAR RULE REQUIRES DISMISSAL OF THIS ACTION.**

7 **A. This Action Must Be Dismissed Because Defendants Were Not Served Until**
8 **More Than Three Years After The Filing Of The Original Complaint.**

9 California law requires that a "summons and complaint shall be served upon a defendant
10 within three years after the action is commenced against the defendant." Cal. Code Civ. Proc.
11 § 583.210(a). The statute specifies that "an action is commenced at the time the complaint is
12 filed." *Id.*; *see also Elling Corp. v. Superior Court*, 48 Cal. App. 3d 89, 94 (1975) (the three-year
13 period runs from the filing of the original complaint). There is no exception for an FCA case; the
14 FCA itself requires that defendants be served pursuant to Section 583.210 of the Code of Civil
15 Procedure:

16 The defendant shall not be required to respond to any complaint filed under
17 this section until 30 days after the complaint is unsealed *and served upon*
the defendant pursuant to Section 583.210 of the Code of Civil Procedure.

18 Cal. Gov't Code § 12652(c)(9) (emphasis added). Here, the original Complaint was filed against
19 defendants on July 28, 1998, but the defendants were not served until January 2003 – four and
20 one-half years later and well after the expiration of the three-year deadline.

21 The consequence for failing to serve a defendant within three years after commencing an
22 action is dismissal. The statute could not be any clearer: "If service is not made within the time
23 prescribed in this article . . . [t]he action *shall* be dismissed by the court on its own motion or on
24 motion of any person interested in the action . . ." Cal. Code Civ. Proc. § 583.250(a)(2)
25 (emphasis added). Moreover, "[t]he action shall not be further prosecuted and no further
26 proceedings shall be held in the action." *Id.* at § 583.250(a)(1). The three-year rule and the
27 requirement of dismissal apply with equal force where the plaintiff is a public entity or is suing on
28 behalf of the public. *See, e.g., County of Los Angeles v. Security Ins. Co.*, 52 Cal. App. 3d 808,

1 815-16 (1975) (affirming dismissal due to public entity's failure to serve "within three years from
2 date of commencement of the action"). In sum, "[o]nce the statutory period for . . . service of
3 process . . . has run, the action cannot be further prosecuted and must be dismissed." *Dale v. ITT*
4 *Life Ins. Corp.*, 207 Cal. App. 3d 495, 498 (1989).

5 Because defendants were not served until almost four and one-half years after the
6 commencement of the action – well beyond the permitted three years – dismissal is mandatory.⁴

7 **B. Dismissal Is Consistent With The Policy Behind The Three-Year Rule.**

8 The policy behind the three-year rule is important and is designed to protect defendants
9 who find themselves in the position of Abbott. The rule serves to assure that evidence favorable
10 to the defendant will not disappear while the plaintiff delays serving the complaint. A delay in
11 service "is 'particularly pernicious' because of the potentially harmful consequences to an
12 unknowing defendant's ability to preserve evidence and conduct formal discovery." *Trailmobile,*
13 *Inc. v. Superior Court*, 210 Cal. App. 1451, 1456 (1989) (citation omitted). "[A] clear line of
14 authority hold[s] that mere awareness of an incident or a potential monetary claim does not
15 constitute a substitute for actual notice that litigation has been commenced. . . . The most obvious
16 justification for this principle is that, until the complaint is served, a defendant is unable to take
17 advantage of formal discovery devices such as depositions, interrogatories, and requests for
18 admissions and documents." *Id.* at 1457. The defendant need not make a "showing of prejudice
19 with respect to the ultimate resolution of the merits" and "[t]he salutary purpose of the three-year
20 limit requires that it be applied without examination of the merits" of the litigation. *Elling*, 48
21 Cal. App. 3d at 98.

22 The policy underlying the three-year rule dictates dismissal of this action. Although
23 Abbott need not demonstrate actual prejudice to prevail, it is easy to see how it was harmed by
24 the more-than-four-year delay in service. The passage of time makes it more difficult for Abbott
25 to collect the best and freshest evidence concerning numerous events in the mid-1990s (and many

26 ⁴ The dismissal is without prejudice and plaintiff may refile its action subject to applicable
27 statutes of limitation. Cal. Code Civ. Proc. § 581(g). The general statutory policy in favor of
28 resolving disputes on their merits "does not compel denial of [a motion to dismiss] for delay in
service." *Scarzella v. DeMers*, 17 Cal. App. 4th 1762, 1771 (1993).

1 years prior thereto) demonstrating DHS' knowledge of "average manufacturer's price" and "best
2 price" of Abbott's drugs, and the concomitant knowledge that "direct price" exceeds the
3 discounted actual purchase price paid by most providers. *See supra* Section II.C (explaining
4 several regulatory sources of DHS' knowledge). Moreover, in connection with the audit by
5 federal HHS Office of Inspector General, DHS officials and federal officials reportedly met from
6 1994 to 1995 to address federal government concerns that Medi-Cal was overpaying for drug
7 ingredient costs. *See HHS-OIG, Review of Pharmacy Acquisition Costs for Drugs Reimbursed*
8 *Under the Medicaid Prescription Drug Program of the California Department of Health*
9 *Services*, at 3 & Appendix 4 (May 31, 1996). Following the federal government report, the State
10 Controller also reportedly criticized Medi-Cal for paying providers too much for drug ingredient
11 costs. In response, DHS explained that "the Legislature rejected a reduction in drug
12 reimbursement rates . . . due to concerns about access for [Medi-Cal] beneficiaries." Bureau of
13 Nat'l Affairs, 4 *Health Care Policy Report* 50 (Dec. 23, 1996).

14 Accordingly, it appears that throughout the early and mid-1990s, the federal government,
15 as well as the California Executive and Legislative Branches knew that Medi-Cal was paying
16 sums to providers well above their acquisition cost, but the State Legislature wanted to do so for
17 policy reasons. However, because the Attorney General waited four and one-half years to serve
18 Abbott, the memories of federal and state government officials may have faded and documents
19 may have been destroyed. Further, important witnesses may be more difficult to locate, given
20 employee turnover at DHS and the federal government.⁵

21 Moreover, the Attorney General used the period of delayed service to engage in one-sided
22 discovery, even as defendants had no ability to take discovery and preserve evidence in this
23 action. A federal court decision involving claims under both the state and federal FCA has

24 ⁵ DHS' knowledge of average manufacturer's price, best price, and the fact that Medi-Cal
25 knowingly paid more for ingredient cost than acquisition cost (along with Abbott's knowledge
26 that DHS possessed such information) negates the falsity and intent elements of the FCA, and
27 defeats FCA liability. *See American Contract Servs. v. Allied Mold & Die, Inc.*, 94 Cal. App. 4th
28 854, 864-65 (2001); *United States ex rel. Durchholz v. FKW Inc.*, 189 F. 3d 542, 544-45 (7th Cir.
1999). Further, "the FCA is not an appropriate vehicle for policing technical compliance with
administrative regulations." *American Contract Servs.*, 94 Cal. App. 4th 865-66 (citation and
quotations omitted).

1 criticized the Attorney General for the very type of conduct employed in this case. *See United*
2 *States ex rel. Costa v. Baker & Taylor, Inc.*, 955 F. Supp. 1188, 1191 (N.D. Cal. 1997). Although
3 the *Costa* case concerned whether "good cause" existed to extend the seal, the court essentially
4 recognized that the policy underlying the three-year rule applies in FCA cases: "Defendants have
5 a legitimate interest in building their defense while the evidence is still fresh." *Id.* at 1189. In
6 *Costa*, the sixty day seal had been extended by eighteen months – a fraction of the almost four
7 and one-half years here. *Id.* The government had engaged in discovery by, among other things,
8 serving defendants with administrative subpoenas, "without giving defendants the opportunity
9 even to answer the complaint." *Id.* at 1190. The court recognized that the extensions to the seal
10 were a product of "the effects of inertia and the lack of an opposing party may have resulted in a
11 less searching inquiry regarding good cause than is appropriate." *Id.* at 1191. With "nine times"
12 the amount of time provided by statute, the government had had more than enough time to decide
13 whether to proceed with the action. *Id.* at 1191.

14 Notably, the court sharply criticized the California Attorney General for engaging in
15 one-sided discovery:

16 [T]he State of California . . . demonstrated candor by admitting . . . that it
17 determined long ago that the [FCA] accusations had merit and is now
18 seeking information only about the scope of the damage. This practice of
19 conducting one-sided discovery for months or years while the case is under
20 seal was not contemplated by Congress and is not authorized by the statute.

21 *Costa*, 955 F. Supp. at 1191. Thus, the California Attorney General had been admonished one
22 year before this action was commenced for the very tactics employed here over an even longer
23 period of time (four and one-half years versus eighteen months).⁶ In all events, the policy behind
24 the three-year rule requires dismissal of this action because plaintiffs failed to serve Abbott within
25 three years of the filing of the original complaint.

26 ⁶ While the Attorney General's reasons for extending the seal can only reinforce the
27 appropriateness of dismissal for violation of the three-year rule, defendants do not cite *Costa* to
28 attack the propriety of the orders extending the seal for four and one-half years. As explained
below, the extensions do not excuse the failure to serve defendants within three years of the
commencement of the action and the "strategic considerations" of counsel in seeking extensions
are immaterial where, as here, defendants are not timely served.

1 C. Plaintiffs Cannot Satisfy Their Burden Of Proving An Exception To The
2 Three-Year Rule.

3 There is no legally justifiable excuse for failing to serve defendants for four and one-half
4 years. Time is excluded in computing the three-year rule in four narrow circumstances:

- 5 (a) The defendant was not amenable to the process of the court.
- 6 (b) The prosecution of the action or proceedings in the action was stayed
7 and the stay affected service.
- 8 (c) The validity of service was the subject of litigation by the parties.
- 9 (d) Service, for any other reason, was impossible, impracticable, or futile
10 due to causes beyond the plaintiff's control. *Failure to discover relevant*
11 *facts or evidence is not a cause beyond the plaintiff's control for the*
12 *purpose of this subdivision.*

13 Cal. Code Civ. Proc. § 583.240(a)-(d) (emphasis added); *see also id.* § 583.250(b) ("The
14 requirements of this article are mandatory and are not subject to extension, excuse, or exception
15 except as expressly provided by statute."). The burden of establishing an exception to the rule
16 rests with plaintiff. *Busching v. Superior Court*, 12 Cal. 3d 44, 53 (1974) (reversing trial court for
17 failing to grant motion to dismiss). None of the exclusions apply here.

18 The fact that the Attorney General may have sought, and received, *ex parte* extensions of
19 the seal for "good cause" does not give plaintiffs relief from the three-year rule.⁷ The extension
20 of the seal duration did not make service "impossible, impracticable, or futile due to causes
21 beyond the plaintiff's control." Cal. Code Civ. Proc. § 583.240(d). Rather, the duration and
22 extension of the seal were entirely within the control of the plaintiffs; the Attorney General could
23 have caused the seal to be lifted at *any time* to allow service within three years. *See* Cal. Gov't
24 Code § 12652(c)(6)(A)-(B). Thus, any disability in terms of accomplishing service was within
25 the control of plaintiffs.

26 ⁷ As noted, aside from the Complaint, all court filings in this case remain sealed.
27 Consequently, Defendants do not know the full procedural history or why exactly the Complaint
28 was not served for over four and one-half years. Defendants also are filing a motion to unseal the
file.

1 Presumably, the Attorney General sought extensions of the seal because he wanted more
2 time to investigate and review the facts. However, the governing statute expressly provides that
3 this is not a legally valid basis to suspend the three-year statute: "Failure to discover relevant
4 facts or evidence is not a cause beyond the plaintiff's control for the purpose of this subdivision."
5 Cal. Civ. Proc. § 583.240(d). Although the Attorney General has been criticized for failing to
6 make its election more promptly and engaging in one-sided discovery, the actual reasons behind
7 the Attorney General's "strategic considerations" and "calculated decision" to extend the seal for
8 four and one-half years are "not relevant" when service has not been made within three years of
9 commencing the action. *Williams v. Los Angeles Unified Sch. Dist.*, 23 Cal. App. 4th 84, 97-98
10 (1994); *Costa*, 955 F. Supp. at 1191.

11 The case law and other relevant authorities confirm that an extension of the seal does not
12 excuse a failure to serve defendants within three years of the filing of the original complaint,
13 especially given that plaintiffs themselves caused the extension of the seal. As an initial matter,
14 the official comment to the three-year statute underscores the importance of timely service and
15 the fact that excuses must be *outside the plaintiff's control*:

16 [Subdivision (d)] makes clear that there is only an excuse for causes
17 beyond the plaintiff's control and that failure to discover relevant facts or
18 evidence does not excuse compliance. This overrules *Hocharian v.*
19 *Superior Court*, 28 Cal. 3d 714 (1981). The excuse of impossibility,
20 impracticality, or futility should be *strictly construed* in light of the need to
21 give a defendant adequate notice of the action so that the defendant can
22 take necessary steps to preserve evidence. Contrast Section 583.340 and
comment thereto (liberal construction of excuse for failure to bring to trial
within a prescribed time). This difference in treatment is consistent with
one aspect of the policy announced in Section 583.130 – plaintiff must
exercise diligence – and recognizes that *service*, unlike bringing to trial, *is*
ordinarily within the control of the plaintiff.

23 Cal. Code Civ. Proc. § 583.240 (Law Rev. Comm. Cmt.) (emphasis added).

24 Similarly, the case law does not excuse plaintiffs, who like plaintiffs here, fail to take
25 steps within their power to serve defendants within three years of filing the original complaint.
26 This is vividly demonstrated by *Dale v. ITT Life Ins. Corp.*, 207 Cal. App. 3d 495, 499-503
27 (1989). In *Dale*, the defendant succeeded in setting aside entry of default and a default judgment
28 based on defective service of the original complaint. When plaintiff thereafter served the

1 defendant, more than three years had lapsed from the filing of the original complaint. *Id.* The
2 *Dale* court refused to excuse plaintiff's failure to serve defendants even though service could not
3 be accomplished during the period after a default had been entered and held that dismissal was
4 warranted. *Id.* at 502-03. The court noted that "strict construction" of the statutory grounds for
5 excuse was required. *Id.* at 502 & n.7. The court also emphasized the policy behind the three-
6 year rule – ensuring timely service on defendants so that defendants can initiate discovery and
7 preserve evidence. *Id.* at 500, 502. Moreover, delay in service could not be excused where
8 plaintiff could have avoided the delay: "[O]nce [defendant's] default was entered, [plaintiff]
9 engaged in considerable delay before either securing a default judgment or attempting to obtain
10 satisfaction of that judgment. . . . Because the circumstances making service impracticable were
11 entirely within [plaintiff's] control, there were no grounds for tolling the statutory period pursuant
12 to section 583.240." *Id.* at 502-03.

13 The result should be no different here. The plaintiffs knew when three years from the
14 filing of the original complaint expired. The Attorney General could have ensured that the seal
15 was lifted before the three-year deadline but did not.⁸

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25 ⁸ In addition to the inapplicability of the exception where service "was impossible,
26 impracticable or futile," none of the other exceptions apply. Cal. Code Civ. Proc. § 583.240(a)-
27 (d). First, the "validity of service" has never been the subject of this litigation. Second, to
28 defendants' knowledge, this case has never been subject to a "stay," a fact orally confirmed by
counsel for the relator. Third, at no time were defendants "not amenable to the process of the
court;" instead, defendants at all times have been subject to personal jurisdiction under
California's service statutes. Cal. Code Civ. Proc. §§ 410.10 & 416.10.

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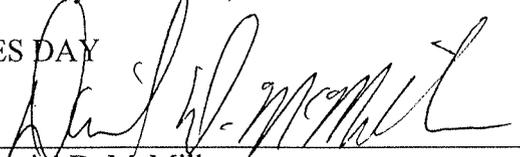
IV. CONCLUSION.

For the foregoing reasons, defendants respectfully request that the Court dismiss this matter for failure to serve the defendants within three years after the filing of the original complaint.

Dated: February 28, 2003

Respectfully Submitted,

JONES DAY

By: 

Daniel D. McMillan

Attorneys for Defendant
ABBOTT LABORATORIES, INC.

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PROOF OF PERSONAL SERVICE

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

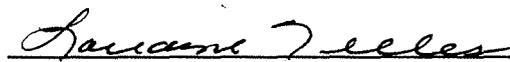
STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES) ss.

I, the undersigned, declare that I am a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action. My business address is 555 West Fifth Street, Suite 4600, Los Angeles, California 90013-1025. I am readily familiar with Jones Day's practice for causing documents to be served by hand delivery. Following that practice, on February 28, 2003, I caused the sealed envelope containing the documents described in the attached **DOCUMENT LIST** to be hand delivered to the addressee specified below:

Adam D. Miller, Esq.
Engstrom, Lipscomb & Lack
10100 Santa Monica Blvd., 16th Floor
Los Angeles, CA 90067-4107

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

Executed on February 28, 2003, at Los Angeles, California.



Lorraine Telles

DOCUMENT LIST

The following documents were served via Personal Service on **Adam Miller**:

- DEFENDANT ABBOTT LABORATORIES, INC.'S NOTICE OF MOTION TO DISMISS FOR FAILURE TO SERVE DEFENDANTS WITHIN THREE YEARS OF COMMENCEMENT OF ACTION
- DEFENDANT ABBOTT LABORATORIES, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO SERVE DEFENDANTS WITHIN THREE YEARS OF COMMENCEMENT OF ACTION
- DECLARATION OF DANIEL D. McMILLAN IN SUPPORT OF DEFENDANT ABBOTT LABORATORIES, INC.'S MOTION TO DISMISS FOR FAILURE TO SERVE DEFENDANTS WITHIN THREE YEARS OF COMMENCEMENT OF ACTION
- DEFENDANT ABBOTT LABORATORIES, INC.'S COMPENDIUM OF NON-CALIFORNIA AUTHORITIES IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO SERVE DEFENDANTS WITHIN THREE YEARS OF COMMENCEMENT OF ACTION
- DEFENDANT ABBOTT LABORATORIES, INC.'S NOTICE OF MOTION AND MOTION TO UNSEAL ALL RECORDS ON FILE AND JOINDER IN DEFENDANTS WYETH INC. AND WYETH PHARMACEUTICALS INC.'S MOTION TO UNSEAL, INCLUDING ALL SUPPORTING PAPERS, DOCUMENTS AND ARGUMENTS

1 **PROOF OF SERVICE**

2 (multi)

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

6 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

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

10 _____ (BY MAIL) I am "readily familiar" with the firm's practice of collection and processing
11 correspondence for mailing. Under that practice it would be deposited with the U.S. postal
12 service on that same day with postage thereon fully prepaid at Los Angeles, California in the
13 ordinary course of business. I am aware that on motion of the party served, service is presumed
14 invalid if postal cancellation date or postage meter date is more than one day after date of deposit
15 of mailing in affidavit. I served by mail a true copy thereof enclosed in a sealed envelope to the
16 addressee(s) as follows:

17 XX (BY FACSIMILE) On February 28, 2003, I caused the documents described in the
18 attached **DOCUMENT LIST** to be served by facsimile by placing true copies of the documents
19 with fax cover sheets in the facsimile center of our office directed to the following parties:

20 **William S. Schneider, Esq.** Fax: (619) 688-4200
21 Fax: (760) 436-2490

22 **Frank M. Pitre, Esq.** Fax: (650) 697-0577

23 XX (BY FEDERAL EXPRESS) On February 28, 2003, I caused the documents described in
24 the attached **DOCUMENT LIST** to be served by placing true copies of the documents in sealed
25 envelopes designated by Federal Express with Jones Day's Federal Express Account Number and
26 delivery fees already provided for, and causing such envelopes to be delivered to a courier or
27 driver authorized by Federal Express to receive documents for overnight delivery by Federal
28 Express to the addressee as follows:

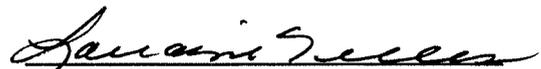
29 **William S. Schneider, Esq.**
30 132 North El Camino Real
31 Encinitas, CA 92024

32 **Frank M. Pitre, Esq.**
33 Cotchett, Pitre & Simon
34 840 Malcolm Road, Suite 200
35 Burlingame, CA 94010-1413

36 _____ (PERSONAL DELIVERY) I caused to have personally served a true copy thereof in a
37 sealed envelope to the addressees as follows:

38 I declare under penalty of perjury under the laws of the State of California that the above
39 is true and correct.

40 Executed on February 28, 2003

41 
42 Lorraine Telles

DOCUMENT LIST

The following documents were served as follows on **Frank M. Pitre** and **William S. Schneider**:

VIA FACSIMILE:

- DEFENDANT ABBOTT LABORATORIES, INC.'S NOTICE OF MOTION TO DISMISS FOR FAILURE TO SERVE DEFENDANTS WITHIN THREE YEARS OF COMMENCEMENT OF ACTION
- DEFENDANT ABBOTT LABORATORIES, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO SERVE DEFENDANTS WITHIN THREE YEARS OF COMMENCEMENT OF ACTION

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PROOF OF SERVICE BY FEDERAL EXPRESS

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

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, the undersigned, declare that I am a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 555 West Fifth Street, Suite 4600, Los Angeles, California 90013. On February 28, 2003, I served the foregoing documents described in the attached **DOCUMENT LIST** by placing true copies thereof enclosed in sealed envelopes designated by Federal Express with Jones Day's Federal Express Account Number and delivery fees already provided for, and causing such envelopes to be delivered to a courier or driver authorized by Federal Express to receive documents for overnight delivery by Federal Express.

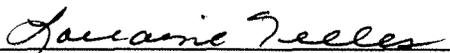
The foregoing sealed envelopes were addressed as follows:

S. Craig Holden, Esq. Ober Kaler 120 East Baltimore Street Baltimore, MD 21202	Lawrence A. Cox Arnold & Porter 777 S. Figueroa Street, 44 th Floor Los Angeles, CA 90017-2513
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I am "readily familiar" with the firm's practice of arranging for packages, envelopes and other documents to be delivered on an overnight basis by Federal Express. Under that practice, the firm has a customer account with Federal Express whereby Federal Express will send its authorized courier or driver to pick up packages, envelopes and other documents which are placed in sealed envelopes designated by Federal Express with Jones, Day, Reavis & Pogue's Federal Express Account Number at the firm's office in Los Angeles, California and that thereafter, Federal Express will deliver such sealed envelopes on an overnight basis in the ordinary course of business.

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

Executed on February 28, 2003, at Los Angeles, California.


Lorraine Telles

DOCUMENT LIST

The following documents were served via Federal Express on **S. Craig Holder & Lawrence Cox**:

- DEFENDANT ABBOTT LABORATORIES, INC.'S NOTICE OF MOTION TO DISMISS FOR FAILURE TO SERVE DEFENDANTS WITHIN THREE YEARS OF COMMENCEMENT OF ACTION
- DEFENDANT ABBOTT LABORATORIES, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO SERVE DEFENDANTS WITHIN THREE YEARS OF COMMENCEMENT OF ACTION
- DECLARATION OF DANIEL D. McMILLAN IN SUPPORT OF DEFENDANT ABBOTT LABORATORIES, INC.'S MOTION TO DISMISS FOR FAILURE TO SERVE DEFENDANTS WITHIN THREE YEARS OF COMMENCEMENT OF ACTION
- DEFENDANT ABBOTT LABORATORIES, INC.'S COMPENDIUM OF NON-CALIFORNIA AUTHORITIES IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO SERVE DEFENDANTS WITHIN THREE YEARS OF COMMENCEMENT OF ACTION
- DEFENDANT ABBOTT LABORATORIES, INC.'S NOTICE OF MOTION AND MOTION TO UNSEAL ALL RECORDS ON FILE AND JOINDER IN DEFENDANTS WYETH INC. AND WYETH PHARMACEUTICALS INC.'S MOTION TO UNSEAL, INCLUDING ALL SUPPORTING PAPERS, DOCUMENTS AND ARGUMENTS

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9 Attorneys for Defendant
ABBOTT LABORATORIES, INC.

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

**DECLARATION OF DANIEL D.
MCMILLAN IN SUPPORT OF
DEFENDANT ABBOTT LABORATORIES,
INC.'S 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 "Notice of
7 Motion to Dismiss for Failure to Serve Defendants Within Three Years of Commencement of
8 Action."

9 2. The cover sheet of the complaint served on Abbott on January 7, 2003, indicates
10 that the action was originally commenced on July 28, 1998. The Wyeth defendants were served
11 later in January 2003.

12 3. Abbott did not enter into a written stipulation with plaintiffs excusing timely
13 service under section 583.210 of the Code of Civil Procedure.

14 4. Abbott did not enter a general appearance in this action prior to service of the
15 complaint approximately four and one half years after commencement of the action.

16 5. Attached as Exhibits A-D are true and correct copies of administrative subpoenas
17 to Abbott dated September 18, 2000, Wyeth-Ayerst Laboratories dated November 17, 2000,
18 Lederle Oncology Corporation dated September 18, 2000, and Elkins-Sinn, Inc. dated September
19 18, 2000.

20 6. Attached as Exhibit E is a true and correct copy of the summons served on Abbott
21 on January 7, 2003 and the cover page to the accompanying complaint indicating that the action
22 was originally commenced on July 28, 1998.

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

25 Executed this 28th day of February 2003 at Los Angeles, California.

26 
27 Daniel D. McMillan
28