UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
Baltimore Division

Ron L. Lacks, Personal Representative of
The Estate of Henrietta Lacks,

Plaintiff,

v.

Thermo Fisher Scientific Inc.,

Defendant.

Case No. 1:21-cv-02524

REPLY IN SUPPORT OF
THERMO FISHER SCIENTIFIC'S MOTION TO DISMISS

Table of Contents

PAGE

TABLE OF AUTHORITIES

CASES **PAGE(S)**

OTHER AUTHORITIES

INTRODUCTION

The law sets a three-year time limit for bringing unjust enrichment claims, and Plaintiff[1] missed that deadline by years, if not decades. The same "widespread publicity" Plaintiff alleges put Defendant Thermo Fisher Scientific Inc. ("Thermo Fisher") on notice—that the HeLa cell line originates from cellular material taken from Henrietta Lacks's cancerous tumor without her consent—also put Plaintiff on notice of this claim well before October 4, 2018. And, no matter what occurred at Johns Hopkins Hospital in 1951, Johns Hopkins is not the defendant in this case. The defendant is Thermo Fisher, and the case against Thermo Fisher is time-barred. Because no set of facts can change that, the Complaint must be dismissed with prejudice.

Plaintiff's opposition brief[2] seeks to avoid the statute of limitations through a novel-but-incorrect formulation of unjust enrichment—one in which a new unjust enrichment claim accrues every time Thermo Fisher allegedly makes a sale of products to a third party. Pl. Opp'n, at 26-28, Feb. 14, 2022, ECF No. 37. While that theory might have some superficial appeal, it is legally defective. Unjust enrichment accrues when a defendant *receives or retains a benefit from a plaintiff* under unjust circumstances, not when a defendant later monetizes that benefit. Thus, Plaintiff's claim accrued at the latest when Thermo Fisher first received HeLa cells; it does not continually re-accrue every time Thermo Fisher makes a new sale or introduces a new product.

Evidence put forward by Plaintiff himself shows Plaintiff knew, or reasonably should have known, well before October 4, 2018, that companies, including Thermo Fisher, had acquired the HeLa cell line. Plaintiff's only response is that the Court cannot yet look at this evidence. Though

[1] We use "Plaintiff" here to refer to past and present personal representatives of the Lacks Estate.

[2] Though dated in accordance with this Court's February 11, 2022 deadline, Order, Dec. 17, 2021, ECF No. 22, the brief was timely filed on February 14, 2022, in accordance with Standing Order 2022-02.

Plaintiff's own complaint and opposition brief repeatedly cite various sources of "widespread publicity" about HeLa cells' origin as putting Thermo Fisher on notice, Plaintiff argues the Court cannot consider whether those same sources and that same publicity also put Plaintiff on notice. This is wrong; this Court can consider materials cited in the Complaint as well as publicly available information showing, beyond dispute, that Plaintiff was on notice that many entities, specifically including Thermo Fisher, possessed HeLa cells and were using them commercially.

Plaintiff offers no explanation for having sat on this claim despite this notice. Nor does Plaintiff attempt to justify why Thermo Fisher should bear the prejudice of Plaintiff's delay. Plaintiff also provides no limiting principle for the Complaint's theory of liability. The Complaint singles out Thermo Fisher from the countless individuals, companies, hospitals, universities, and research organizations that today possess or use HeLa cells, but under Plaintiff's case theory, every one of them is liable for unjust enrichment. Under Plaintiff's theory, anyone using "one of the most important and widely used cell lines in human history" (Opp'n at 1) could at any time—forever—be sued, enjoined from using HeLa cells without Plaintiff's permission, and ordered to pay Plaintiff all they have earned.

Denial of Plaintiff's untimely and legally deficient claim in no way diminishes the role in medical research and innovation played by HeLa cells. But statutes of limitation must be followed, as must Maryland's requirements that unjust enrichment based on tortious conduct be pleaded with an underlying tort and not against bona fide purchasers. Without these requirements, unjust enrichment would become unbounded. Plaintiff's claim must be dismissed with prejudice.

ARGUMENT

I. Plaintiff's Claim Is Time-Barred.

a. Plaintiff's Claim Accrued When HeLa Cells Were Conferred On Thermo Fisher, Not When Thermo Fisher Later Allegedly Sold HeLa Products.

Plaintiff misunderstands the "enrichment" that started the limitations clock in this action. "Enrichment" in an unjust enrichment claim does not refer to the defendant selling something to a third party. Instead, it is "[a] benefit conferred upon the defendant by the plaintiff." *Jason v. Nat'l Loan Recoveries, LLC*, 227 Md. App. 516, 533 (2016); Opp'n at 9. A benefit is "any form of advantage." *State of Md. Cent. Collection Unit v. Kossol*, 138 Md. App. 338, 347 (2001) (quoting Restatement (First) of Restitution § 1 cmt. b (1936)). The Complaint alleged that the benefit conferred by Plaintiff was "the HeLa cell line." Am. Compl. ¶¶ 48-51, Jan. 26, 2022, ECF No. 34 ("Compl."). Thus, to the extent any unjust enrichment occurred with respect to Thermo Fisher, it occurred when the HeLa cell line was conferred to Thermo Fisher. As explained in Thermo Fisher's motion and in Part I(b) below, that conferral—and Plaintiff's notice of it—occurred long before the limitations period. The claim is therefore time-barred.

Plaintiff attempts to recast the relevant benefit here to avoid a limitations problem, but the change is legally ineffective. Whereas the Complaint pleaded Thermo Fisher was liable for having accepted or retained "the HeLa cell line" from Plaintiff, Compl. ¶¶ 48-51, Plaintiff now argues "there was no 'benefit conferred' on TFS until it received payment from each sale of Mrs. Lacks's HeLa cells," and that "[e]ach sale represents a separate event of unjust enrichment for which a separate claim accrues."[3] Opp'n at 25-26. As one of Plaintiff's amici sums up this theory, "The

[3] This shift in theories is not permitted in an opposition brief. *Mylan Labs., Inc. v. Akzo, N.V.*, 770 F. Supp. 1053, 1068 (D. Md. 1991) ("[I]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss.") (citation and internal quotation marks omitted).

defendant's enrichment, if proved, comes from third persons, not from the plaintiff." Rendleman & Roberts Amicus Br. 7, Feb. 18, 2022, ECF No. 49.

This is simply not how the law of unjust enrichment works. Courts have uniformly rejected this argument because, in an unjust enrichment claim, the "enrichment" is the conferral of the benefit *by the plaintiff*, not the later downstream monetization of that benefit by the defendant. For instance, in *Bregman v. Perles*, a retired investigator sued a group of lawyers who had collected $111 million from Libya for the LaBelle discotheque bombing, arguing he deserved a cut of the lawyers' compensation based on his investigative assistance in the case. 747 F.3d 873, 875 (D.C. Cir. 2014). The court upheld dismissal of the unjust enrichment claim as time-barred, explaining that the defendant had been unjustly enriched at the time the investigator performed the services without compensation, not when the lawyers later received their payment. *Id.* at 877-79.[4]

Less than a year ago, the Southern District of New York ruled similarly, thoroughly rejecting the precise theory Plaintiff asserts here. In *DuBuisson v. National Union Fire Ins. of Pittsburgh*, the plaintiffs in 2015 brought a class action seeking recovery of all premiums and fee payments they made to insurance company-defendants in connection with allegedly illegal insurance policies sold in 2000. No. 15 Civ. 2259, 2021 WL 3141672, at *1 (S.D.N.Y. July 26, 2021). The court dismissed the claim as time-barred under Fed. R. Civ. P. 12(b)(6), holding the defendant "was enriched . . . when it sold the allegedly illegal insurance policies to Plaintiffs" in

---

The sources cited in this section are cited for the first time in response to Plaintiff's improper introduction of a new pleading theory through its opposition brief.

[4] In *Bregman*, the "enrichment" actually preceded the alleged circumstance that made it unjust—the lawyers' refusal to pay, but it was still time-barred. 747 F.3d at 879. Here, by contrast, the circumstance that allegedly made Thermo Fisher's enrichment unjust—a Johns Hopkins doctor's alleged treatment of Henrietta Lacks in 1951—came *before* the alleged enrichment (Thermo Fisher's receipt of the HeLa cell line), so it does not affect the accrual date. Compl. ¶¶ 30-33, 42.

2000. *Id.* at *17, *18. Thus, "Plaintiffs' unjust enrichment claim accrued" in 2000. *Id.* (citing *Pricaspian Dev. Corp. (Tex.) v. Royal Dutch Shell, PLC*, 382 F. App'x 100, 103-04 (2d Cir. 2010)). The court affirmatively rejected the plaintiffs' argument that the claim accrued when the defendant "received the money [premium payments] from the plaintiff," and that "a separate cause of action accrues for each payment." *Id.* at 17. As the court explained, "any increase in wealth—even if unrealized or illiquid—is an enrichment" that is "immediately actionable . . . *even when the enrichment is not realized as money until years later*." *Id.* (quoting *JPMorgan Chase Bank, N.A. v. Maurer*, No. 13 Civ. 3302(NRB), 2015 WL 539494, at *6 (S.D.N.Y. Feb. 10, 2015)) (emphasis added). *See also City of Almaty, Kazakhstan v. Ablyazov*, 278 F. Supp. 3d 776, 805 (S.D.N.Y. 2017) ("The claim accrues as soon as the unjust enrichment occurs, even if the increase in wealth is unrealized or illiquid.").[5]

Another recent decision from the Southern District of New York is equally instructive. In *City of Almaty, Kazakhstan v. Ablyazov*, the city sued its former mayor and others, alleging embezzlement and claiming unjust enrichment and other causes of action. No. 15-CV-5345 (AJN), 2018 WL 1583293, at *1 (S.D.N.Y. Mar. 27, 2018). The defendants moved to dismiss based on the statute of limitations. *Id.* at *2. The plaintiffs argued their claim was timely because it was "predicated in part on the [defendants'] more recent domestic conduct"—investment of the embezzled funds. *Id.* The court rejected this, granting dismissal and finding that the plaintiffs' claim had accrued "when the alleged embezzlement first occurred," and "not when those embezzled funds were transferred for domestic investment." *Id.* at *4.

[5] The court also expressly rejected the plaintiffs' arguments under the continuing wrong doctrine because the premiums "represent only the continuing effects of the earlier unlawful conduct," and the plaintiffs had documents that would have put them on notice of the unlawful insurance policies in 2005 but did not pursue their claims with any reasonable diligence. *Id.* at *18 n.10.

Plaintiff cites *Jason v. National Loan Recoveries* in support of its theory that Thermo Fisher's alleged unjust enrichment occurred only once the HeLa cell line was monetized. Opp'n at 25. Nothing in *Jason* supports that theory. In *Jason*, a debtor sued a debt collector for multiple counts, including a count of unjust enrichment, related to debts that were collected while the collector lacked a license. 227 Md. App. at 520-22. The collector had obtained a default judgment against Jason prior to the three-year limitations period,[6] and it had obtained assets sufficient to satisfy the debt through garnishment, but there was a legitimate question as to when that garnishment had occurred. *Id.* at 532-33. The Court of Special Appeals only reversed the circuit court's dismissal because that date—the date of conferral of a benefit from the plaintiff to the defendant—was unknown. *Id.* at 531-33. *Jason* thus simply confirms the alleged conferral of the HeLa cell line marks the accrual date in this case.[7] And, while the Complaint does not expressly provide that date, as discussed in the next section, it relies on materials from before the limitations period showing that Thermo Fisher possessed HeLa cells. Thus, it is impossible for Plaintiff's claim to be timely.[8]

Plaintiff's resort to the specific accrual and continuing tort doctrines is unavailing for the reasons above—Plaintiff's unjust enrichment claim accrued when the HeLa cell line was conferred

[6] The court assumed the judgment was void due to the alleged lack of a license, and his claim was subject to a three-year statute of limitations. *Id.* at 524, 530.

[7] In this Court, the accrual date is the date "the services are performed," not "the date a demand for payment is made or refused." *TransPacific Tire & Wheel, Inc. v. Orteck Int'l, Inc.*, No. CIV.A. DKC 06-0187, 2012 WL 2711375, at *6 (D. Md. July 6, 2012) (citing *Baltimore City Bd. Of Sch. Comm'rs v. Koba Inst., Inc.*, 194 Md. App. 400, 422-23 (2010)) (internal quotations omitted).

[8] The accrual timing would not change if Plaintiff alleged Thermo Fisher acquired *additional* HeLa cells during the limitations period. *See Wyne v. Medo Indus., Inc.*, No. RDB-02-CV-1812, 2004 WL 3217860, at *5 (D. Md. Mar. 25, 2004) (holding that, in the context of trade secret misappropriation, which is a similar claim to the allegations against Thermo Fisher, "the first discovered (or discoverable) misappropriation of a trade secret . . . commences the limitation period") (citing *Glue-Fold, Inc. V. Slautterback Corp.*, 82 Cal. App. 4th 1018, 98 (2000)).

to Thermo Fisher, not when Thermo Fisher allegedly later used it commercially. Plaintiff includes no authority from any court applying the separate accrual rule to an unjust enrichment claim, nor does Plaintiff cite any Maryland authorities applying the continuing harm doctrine to an unjust enrichment claim. The Court of Appeals of Maryland has made clear its skepticism of extending the doctrine to unjust enrichment claims. Its survey of "the *limited* contexts in which [the doctrine] has been applied" noted the doctrine was "usually applied in nuisance, trespass, and other tort cases," and then rejected its application to the unjust enrichment claim presented there. *Cain v. Midland Funding, LLC*, 475 Md. 4, 49-50 (2021) (emphasis added).[9] It would be inappropriate to extend the continuing harm doctrine to a place no Maryland court has gone, particularly based on an incorrect formulation of unjust enrichment. *City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981) ("Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision.").

b. Plaintiff Was On Notice Of Claims Well Before October 4, 2018.

Plaintiff's case theory—that widespread publicity about HeLa cells' origin put Thermo Fisher on notice of a claim regarding HeLa cells—must work both ways: the same widespread publicity cited in the Complaint put Plaintiff on notice of a need to investigate potential claims.

"[W]hen a plaintiff has knowledge of circumstances indicating that he may have been harmed, the law imposes a duty on that plaintiff to investigate whether in fact he has been harmed." *Russo v. Ascher*, 76 Md. App. 465, 470 (1988). A plaintiff is thus on "inquiry notice" and the statute of limitations will begin to run, when the plaintiff has "knowledge of circumstances which would cause a reasonable person in the position of the plaintiff to undertake an investigation which,

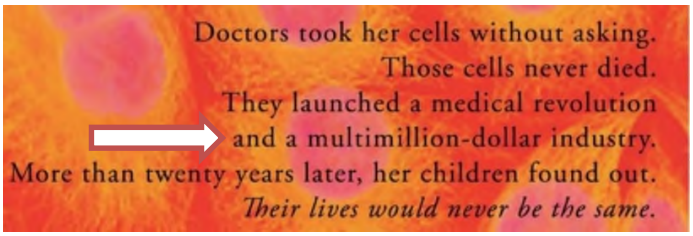
[9] *See also Ablyazov*, 2018 WL 1583293, at *4 (specifically rejecting the application of both doctrines to an unjust enrichment claim).

if pursued with reasonable diligence, would have led to knowledge of the alleged [claim]." *O'Hara v. Kovens*, 305 Md. 280, 302 (1986). Where the plaintiff knows of facts that "should have raised their suspicions," that triggers the duty to diligently investigate and pursue any claims against all defendants. *Porter v. GreenPoint Mortgage Funding, Inc.*, No. DKC–11–1251, 2011 WL 6837703, at *6 (D. Md. Dec. 28, 2011). *See also Brown v. Neuberger, Quinn, Gielen, Rubin, & Gibber, P.A.*, 731 F. Supp. 2d 443, 451 (D. Md. 2010) (granting dismissal where the plaintiff possessed information that "was more than sufficient to cause people of ordinary prudence to be suspicious and investigate"); *Douglass v. NTI–TSS, Inc.*, 632 F. Supp. 2d 486, 493 (D. Md. 2009) (granting dismissal where the defendant knew of an injury but failed to pursue a personal injury claim based on a dental product because defendant "had a duty to pursue her rights against all potential defendants diligently, and she failed to do so").

Here, Plaintiff incorrectly claims Thermo Fisher "does not contend that Plaintiff even had knowledge of TFS's unjust enrichment outside of the statutory period." Opp'n at 20. This is not the standard. Whether or not Plaintiff was on notice of facts about "Thermo Fisher" specifically, the limitations clock here was triggered as soon as Plaintiff knew HeLa cells had allegedly been acquired and were being widely used commercially. *Clarks v. Priv. Money Goldmine*, No. GJH-19-1014, 2020 WL 949946, at *6 (D. Md. Feb. 26, 2020) ("[I]t is the discovery of the injury, and not the discovery of the identity of one of the agents of that injury, that triggers the statute of limitations period."). There is no question Plaintiff had such knowledge well before October 4, 2018. And, in any case, Plaintiff had such knowledge as to Thermo Fisher, specifically. *See* Def. Mot. Dismiss, 5, 6, 10, 12-13, 15, Dec. 16, 2021, ECF No. 20 ("Mot.") (making this argument).

There is abundant evidence already available in the record that the supposed "wrongful activities" in this case were widely known and knowable to Plaintiff before the limitations period.

First, the Complaint repeatedly references Rebecca Skloot's book, *The Immortal Life of Henrietta Lacks,* in arguing that Thermo Fisher was on notice of the origins of HeLa cells. Compl. ¶¶ 8, 11, 39-42. The book discusses the commercial use of HeLa cells at great length, starting on the front cover. Mot. Ex. 1[10]:



The book specifically identified Invitrogen, which was acquired by Thermo Fisher in 2014, as a seller of HeLa products. Corr. Ex. 1 at 158 ("What we do know is that today, Invitrogen sells HeLa products that cost anywhere from $100 to nearly $10,000 per vial.").

Second, the Complaint also contends HeLa cells are mentioned "in more than 2,700 academic articles discussing issues of patient consent and medical ethics[.]" Compl. ¶ 39(b). Readily found in those articles are references to the fact that HeLa products were being sold commercially by companies including Invitrogen. *See, e.g.*, Silberman, S., *The woman behind HeLa*, Nature 463, 610 (2010) ("The biotechnology firms now known as Invitrogen and BioReliance each got their start by marketing HeLa cells in industrial quantities."). Articles in publicly accessible medical journals likewise state that either Invitrogen or Thermo Fisher sold HeLa products, including products listed in Paragraph 43 of the Complaint. *See, e.g.*, Tran, Kevin et al., *Cell-free production of a therapeutic protein: Expression, purification, and characterization of recombinant streptokinase using a CHO lysate*, 115 Biotechnology and Bioengineering 1, 92-

[10] Thermo Fisher is attaching to this brief a corrected version of this book as Corrected Exhibit 1, to fix formatting and pagination issues in the original exhibit and to include additional excerpts. Furthermore, Thermo Fisher is providing the full book as a PDF, with bookmarks added at the excerpts cited.

102 (2017) ("HeLa cell-free reactions were performed using 1-Step Human High-Yield IVT Kit (Thermo Fisher Scientific))"; Compl. ¶ 43(k) (listing "1-Step Human High-Yield Maxi IVT Kit" as an accused product); Keem, Joo Oak et al., *Splitting and self-assembling of far-red fluorescent protein with an engineered beta strand peptide: Application for alpha-synuclein imaging in mammalian cells*, 32 Biomaterials 9051 (2011) ("T-REx HeLa cells . . . were purchased from INVITROGEN."); Compl. ¶ 43(c) (listing "T-Rex HeLa Cell Line" as an accused product); Ho, Kenneth K. Y. et al., *Engineering artificial cells by combining HeLa-based cell-free expression and ultrathin double emulsion template*, 128 Methods in Cell Biology 303, 308 (2015) ("HeLa lysate was obtained from a commercial source (Thermo Fisher Scientific).").

Third, the Skloot book also referenced Lawrence Lacks, who was the Estate's representative from August 9, 2010 until September 18, 2021, as eager to sue researchers working with HeLa cells.

> A few days before the conference, Lawrence and Zakariyya called yelling again about how [Deborah Lacks, the then-administrator of the Estate] shouldn't talk to anyone, and saying they wanted to sue every scientist who'd ever worked on Henrietta's cells.

Rebecca Skloot, *The Immortal Life of Henrietta Lacks*, at 298 (Crown ed. 2010).

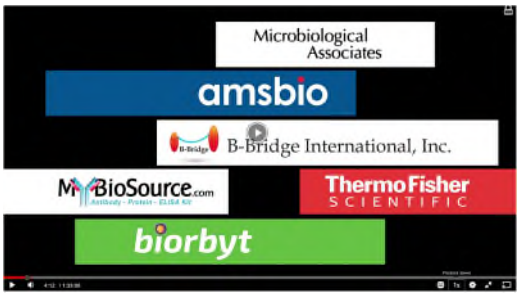
The book also quotes the preceding administrator of the Estate, Deborah Lacks, who died in 2009, as having specifically decided not to bring lawsuits relating to HeLa cells when that was her decision to make.

> "I know my life could be better and I wish it was," she told me. "When people hear about my mother cells they always say, 'Oh y'all could be rich! Y'all gotta sue John Hopkin, y'all gotta do this and that.' But I don't want that." She laughed. "Truth be told, I can't get mad at science, because it help people live, and I'd be a mess without it."

Id. at 256.

Fourth and fifth, the Complaint cites 2016 and 2017 articles from Thermo Fisher's website, discussing HeLa cells, and a 2017 House of Representatives Resolution honoring Henrietta Lacks and noting "the revenues [HeLa cells] generated."[11] Compl. ¶¶ 39(e), 41.

Finally, the 2017 film adaptation of Skloot's book, also repeatedly cited in the Complaint, Compl. ¶¶ 8, 39(c), identifies a host of companies during a montage on HeLa cells in its first five minutes, specifically including Thermo Fisher (see screen capture below):



The Immortal Life of Henrietta Lacks, HBO, at 4:12.

Whether or not the words in these materials referenced in the Complaint are true, they were certainly "extensively publicized." Compl. ¶¶ 8, 11, 39. They would have led a reasonable person in Plaintiff's position to investigate and learn that Thermo Fisher was among the many entities who, during the course of 70 years, had acquired the HeLa cell line for commercial use. *Cf. Tani v. Washington Post*, No. PJM 08-1130, 2009 WL 8652384, at *2 (D. Md. June 18, 2009) (dismissing a defamation action where the articles at issue "were widely available online and could have been discovered immediately"); *Wyne*, 2004 WL 3217860, at *7 (citing *Forcier v. Microsoft Corp.*, 123 F. Supp. 2d 520, 525 (N.D. Cal. 2000) (plaintiff's claim was time-barred because his

[11] Recognizing the life and legacy of Henrietta Lacks during Women's History Month, H. Con. Res. 38, 115th Cong. (2017). Notably, the Virginia House of Delegates passed a similar resolution *six years earlier*, "present[ed] to the surviving children and descendants of Henrietta Lacks," acknowledging "many fortunes have been made based on the research that utilized HeLa cells." Celebrating the Life of Henrietta Lacks, H.R. 74, Virginia General Assembly, 2011 Session.

cause of action accrued when he first suspected, through a newspaper article, that the defendant may have been using his alleged trade secrets)).

Plaintiff's only response to this extensive record of notice is that the Court cannot consider it. As explained in the next two sections, this is incorrect.

c. The Materials Cited in the Complaint May Be Considered.

"[T]he primary problem raised by looking to documents outside the complaint—lack of notice to the plaintiff—is dissipated where plaintiff has actual notice . . . and has relied upon these documents in framing the complaint." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) (internal quotation marks omitted). Thus, "[p]laintiffs cannot prevent a court from looking at the texts of the documents on which its claim is based by failing to attach or explicitly cite them." *Id.* This Court is permitted to consider materials cited in the Complaint because they are either integral or properly subject to judicial notice.

A document is integral where the plaintiff "relies on [the document] to justify her cause of action." *McCray v. Md. Dept. of Transp.*, No. CIV.A. ELH-11-3732, 2014 WL 4660793, at *11 (D. Md. Sept. 16, 2014), *aff'd* 662 F. App'x 221 (4th Cir. 2016).[12] This includes where a document is used to establish notice or knowledge. *Cozzarelli v. Inspire Pharm. Inc.*, 549 F.3d 618, 625 (4th Cir. 2008) (when considering the scienter element of a securities fraud action, the court noted the need to "examine the facts as a whole, including facts found in . . . analyst reports attached to defendants' motion to dismiss and cited in plaintiffs' complaint"); *DeLuca v. AccessIT Grp., Inc.*, 695 F. Supp. 2d 54, 60 (S.D.N.Y. 2010) (a document is "integral" to a complaint when the plaintiff

[12] *See also Howes v. New York Life Ins. Co.*, No. PWG-16-2952, 2017 WL 1176087, at *1 n.2 (D. Md. Mar. 30, 2017) (website link embedded in letters referenced in the complaint was "integral to and relied on in the Complaint because it contain[ed] the allegedly 'false and defamatory information' that appears to be the basis of [plaintiff's] claims").

has "(1) actual notice" of the extraneous information and (2) relied on it in framing the complaint) (internal citation and quotation marks omitted).

Here, Plaintiff relies on widespread publicity, including Rebecca Skloot's 2010 book and the 2017 film adaptation, as proof that Thermo Fisher knew of the circumstances of HeLa cells' acquisition. Compl. ¶ 39-42, 52. The reverse must also be true: these same materials show Plaintiff (including past representatives of the Estate) was on notice of the facts underlying this claim before the limitations period. And, as explained below, even if the documents referenced in the Complaint are not integral, the Court can still take notice of them, not for their truth but as evidence of Plaintiff's notice of any injury to the rights of the Estate—and the concomitant duty to investigate and identify claims against any potential defendant—within the limitations period.

d. Judicial Notice Is Appropriate To Establish Plaintiff's Notice.

Thermo Fisher's cited extrinsic materials are properly subject to judicial notice. Plaintiff's only arguments contesting the materials are that they contain inadmissible hearsay and are selectively edited. Opp'n at 23-24. Both are unavailing.

First, the hearsay point is straightforward: Thermo Fisher is not citing any of these materials for their truth but as evidence of the timing of Plaintiff's notice of this claim. Mot. at 14 (explaining this). For instance, it is immaterial whether the Estate's attorney actually intended to sue Johns Hopkins "and possibly other institutions" including "pharmaceutical companies" using a "continuing tort" theory as he was quoted in the Baltimore Sun in 2017, because the Sun article was indeed published and Plaintiff was aware of it given it quoted him and his father. Mot. Ex. 14. This put Plaintiff and his father—the Estate representative in 2017—on notice of the need to investigate a claim against "pharmaceutical companies."

Thermo Fisher's motion cited authorities showing judicial notice is routinely taken for this purpose, none of which Plaintiff addresses. *See* Mot. at 14 (citing three cases and a treatise). An additional case from the U.S. District Court for the District of Columbia further illustrates the point. In *Sandza v. Barclays Bank PLC*, a former partner at the now-defunct Dewey & LeBoeuf law firm sued Barclays alleging it had engaged in a scheme to convince her and other partners to take out capital loans to prop up the failing firm. 151 F. Supp. 3d 94, 98 (D.D.C. 2015). In examining whether the partner's state law claims were time-barred, the court took judicial notice of news articles that made the information "readily available to her so that she must be charged with constructive knowledge of it." *Id.* at 112. She protested that the articles were "classic hearsay," and the court explained it was "not accepting these articles for the truth of their assertions, but rather for the fact that they contained certain information, which (true or not) should have put plaintiff on notice of the need to investigate her potential claims." *Id.* at 113. The court also rejected her argument that none of the press coverage mentioned "Barclays" by name, because the information in the public domain was sufficient to put a reasonable person on notice of the need to investigate. *Id.* at 114.

Here, as in *Sandza*, it is "entirely proper" to take judicial notice of the existence of articles that should have put Plaintiff on notice of the need to investigate potential claims. *Id.* at 113.

Second, Plaintiff's other argument—that Thermo Fisher selectively edited "many of the materials" submitted—borders on frivolous. Thermo Fisher did not attach the entire 381-page copy of *The Immortal Life of Henrietta Lacks* as an exhibit to its Motion (though it is attached here as Corrected Exhibit 1), but other parts of the book do not refute the fact, for instance, that the book publicized that Invitrogen sold HeLa products.

In any event, there is at least one extrinsic item both parties agree this Court may consider: Professor Alford's amicus brief, to whose filing Plaintiff consented. Alford Mot. for Leave, 1, Feb. 22, 2022, ECF No. 52. Professor Alford provides a decidedly counterproductive addition to the record of Plaintiff's notice, writing:

> It has been well known to the defendant and all involved for some time that the family of Henrietta Lacks had a "competing claim." Indeed, this Court's amicus wrote a published article about precisely this point nearly a decade ago.

Alford Amicus Br. 8, Feb. 22, 2022, ECF No. 52-1. Here, "all involved" includes the Lacks Family, as shown in Professor Alford's 2012 article, which quotes the Lacks Family's website: "[e]ven though *Henrietta's cells launched a multimillion-dollar industry that sells human biological materials*, the family never saw any of the profits." Deleso A. Alford, *HeLa Cells and Unjust Enrichment in the Human Body*, 21 Annals Health L. 223, 231, n.27, n.47 (2012) (emphasis added). The Lacks Family's website included that language going back to 2010, writing as well that Henrietta Lacks's cells were "taken without her knowledge."[13] Again, these words need not be considered for their truth or attributed to a specific author—they are simply another example of how publicly documented it was, long before the limitations period, that HeLa cells are used commercially. This, again, put Plaintiff on notice of the need to investigate potential legal claims against commercial holders of HeLa cells long before the limitations period.

[13] The Lacks Family Homepage Archive (Feb. 4, 2010), [https://web.archive.org/web/20100204213925/http://www.lacksfamily.com/].

II. Plaintiff Cannot Claim Stand Alone Unjust Enrichment Premised On Tortious Conduct Without Pleading An Actionable Tort.

Even if the Court were to find the statute of limitations does not bar Plaintiff's claim, the Complaint should still be dismissed on the independent ground that it alleges unjust enrichment based on tortious conduct without pleading an actionable tort.

This Court has twice recently held that, when a Maryland plaintiff asserts unjust enrichment based on allegedly tortious conduct, it must also *plead* an actionable tort as a count. *Wash. Cty. Bd. of Educ. v. Mallinckrodt ARD, Inc.*, 431 F. Supp. 3d 698, 712 (D. Md. 2020); *Temescal Wellness of Md. LLC v. Faces Human Capital, LLC*, No. CV GLR-20-3648, 2021 WL 4521343, at *1 (D. Md. Oct. 4, 2021). Plaintiff misunderstands *Washington County* and *Temescal Wellness*, claiming they "stand for a . . . proposition—that when a plaintiff alleges that a defendant was unjustly enriched because of an alleged underlying tort, but the court determines that the conduct alleged was not tortious, then the defendant cannot have been unjustly enriched." Opp'n at 11. That is not quite right. These cases stand for the proposition that, when a plaintiff alleges a defendant was unjustly enriched because of tortious conduct and the court determines the underlying pleaded tort was *not actionable* (different from finding the conduct non-*tortious*), then the plaintiff cannot maintain the unjust enrichment claim by itself.

This Court never found the alleged conduct in *Washington County* affirmatively not tortious. To the contrary, it found the plaintiff's underlying allegations "describe[d] problematic and perhaps even unlawful conduct," but the plaintiff had not pleaded a colorable violation of the statute under which he had chosen to bring a tort claim. 431 F. Supp. 3d at 715, 718. There were allegations of potentially tortious conduct, but there was no "actionable" pleaded tort.[14] This left

[14] The same was true in *Temescal Wellness*—the plaintiff alleged tortious conduct (outright theft) but did not provide sufficient detail to state a claim. 2021 WL 4521343, at *1, *8.

the Court with "principles of justice and fairness alone" on which to hang the plaintiff's unjust enrichment claim, and it refused to "overstep its bounds" and take the "significant step" of letting a standalone unjust enrichment claim premised on tortious conduct proceed "without more clearly supportive precedent." *Id.* at 718 (internal quotation marks omitted).

Monterey Mushrooms, cited by Plaintiff (Opp'n at 11), does not provide that precedent. It does not involve allegations of tortious conduct but instead overpayments, like the hypothetical offered by Plaintiff's amici (who do not address *Washington County* or *Temescal Wellness* at all). *See* Rendleman & Roberts Amicus Br. 3; *Monterey Mushrooms, Inc. v. HealthCare Strategies, Inc.*, No. CV CCB-20-3061, 2021 WL 1909592, at *1 (D. Md. May 12, 2021). The defendant's acceptance or retention of the money from the plaintiff in *Monterey Mushrooms* was allegedly unjust simply because it was not owed, not because the plaintiff had suffered a tort. Indeed, this Court acknowledged the "standard approach is to dismiss an unjust enrichment claim which is premised on an underlying tort when the underlying tort claim itself fails." *Id.* at *3.

The rule described in these cases is simple: an unjust enrichment claim premised on allegations of tortious conduct must be paired with a pleaded and actionable tort. In such a situation, if the pleaded tort proves non-actionable, the unjust enrichment claim fails. It must follow that, if there is no pleaded tort to begin with, the unjust enrichment claim also fails. Thus, because Plaintiff here concedes this claim is "based on tortious conduct" (Opp'n at 10), Plaintiff needed to plead an actionable tort.[15] Because Plaintiff did not do so, and because any other tort would be time-barred (Mot. at 23), dismissal should be with prejudice.

[15] Plaintiff's claim for disgorgement must at least be dismissed because Plaintiff fails to plead misconduct by Thermo Fisher. Restatement (Third) of Restitution and Unjust Enrichment § 51 (2011) ("[A] defendant who is enriched by misconduct [of a third-party] but who is not at fault in the underlying transaction is not liable for consequential gains, or for proceeds not constituting unjust enrichment.").

III. The Complaint Fails To Allege Facts Showing Thermo Fisher Was Not A Bona Fide Purchaser Of The HeLa Cell Line.

Finally, the Complaint must be dismissed because it fails to plead facts alleging Thermo Fisher was not a bona fide purchaser *at the time it acquired the cells.*

First, Plaintiff misunderstands what a *bona fide* purchaser is. A bona fide purchaser is "a purchaser for value who acquires property without notice of a competing claim." *Haley v. Corcoran*, 659 F. Supp. 2d 714, 724 (D. Md. 2009). *See also* Restatement (Third) of Restitution and Unjust Enrichment § 66 cmt. d (2011) ("the expression 'bona fide purchaser' (or 'good-faith purchaser') is a long-established term of art meaning 'a purchaser for value without notice.' Stated otherwise, a purchaser establishes 'good faith' (for purposes of obtaining a defense against prior equities) by giving value for rights without notice of the equities that the defense will cut off."). A purchaser for value is therefore protected when it purchases something from a third-party and gives value before receiving notice of a competing equitable interest. *Id.* at cmt. f. Maryland courts have confirmed that the status of a *bona fide* purchaser is determined at the time of purchase. *See, e.g., Mirjafari v. Cohn*, 412 Md. 475, 488 (2010) ("we hold that bona fide purchaser status for this purpose is determined based on what is known, or reasonably knowable, by the bidder as of the date of the successful bid at the foreclosure sale"); *Julian v. Buonassissi*, 414 Md. 641, 665 (2010) (a "bona fide purchaser" must have that "status *at the time it purchased the property*") (emphasis in original). Thus, to properly allege that Thermo Fisher is liable for unjust enrichment, the Complaint needed to allege facts showing Thermo Fisher had notice of a competing equitable claim *at the time it acquired the HeLa cells*. The Complaint does not do so.

Second, to the contrary, the Complaint asserts Thermo Fisher had *already acquired* HeLa cells *before* learning about the origins of HeLa. *See, e.g.,* Compl. ¶ 9 (alleging that Thermo Fisher "*continued* to mass-produce" HeLa products after the origins of the HeLa cell line became widely

publicized) (emphasis added), ¶¶ 14-15 (alleging that Thermo Fisher made a "conscious choice" to "*continue* selling HeLa cells" *after* learning of the origins) (emphasis added). Plaintiff repeats this in the opposition brief. Opp'n at 16 (characterizing the Complaint as alleging that Thermo Fisher learned "that it *had* wrongfully acquired" the cells) (emphasis added). If Thermo Fisher had already acquired HeLa cells before allegedly obtaining notice, then it cannot be liable for unjust enrichment.

Third, Plaintiff's cited caselaw is inapposite. Plaintiff cites *Hobbs v. St. Martin*, for the proposition that a Court may infer from the facts alleged that a defendant retained a money transfer in bad faith. Opp'n at 16-17. True, but in *Hobbs*, the plaintiff's original complaint was dismissed on the exact ground found here: failure to allege that defendant was not a bona fide purchaser. *Hobbs v. St. Martin*, 198 F. Supp. 3d 530, 535 (D. Md. 2016) ("[W]hile a person is enriched if he has received a benefit, the law does not consider him unjustly enriched unless the circumstances of the receipt of the benefit are such as between the two that to retain it would be unjust. *For this reason, a claim for unjust enrichment requires an allegation that the defendant was not a bona fide purchaser*.") (emphasis added) (internal citations and quotation marks omitted). Like here, the plaintiff in *Hobbs* "devote[d] most of the factual allegations" to a third-party, "barely mention[ed] Defendant at all," and made "no . . . factual allegations" concerning the circumstances of the transfer or whether Defendant gave consideration for the funds or whether Defendant was even aware of the scheme at the time of the transfer. *Id.* The court dismissed the complaint because that information was "essential to the Court's determination as to the legal viability of Plaintiff's restitutionary theories." *Id.* at 536, 38. Later, the *Hobbs* court vacated the dismissal because the plaintiff filed an amended complaint alleging facts that raised an inference the defendant was aware

of the fraudulent behavior *before the transfer*, curing the issue. *Hobbs v. Martin*, No. CV JKB-16-749, 2017 WL 105675, at *3-4 (D. Md. Jan. 11, 2017).

Here, by contrast, Plaintiff's Complaint lacks any such allegations supporting an inference that Thermo Fisher was aware of an equitable claim to the HeLa cell line *prior to* acquiring the HeLa cell line. The Complaint is therefore more akin to the original *Hobbs* complaint, which was properly dismissed.

Finally, Plaintiff's amici ask this Court to simply not follow Maryland case law requiring the pleading of facts showing the defendant was not a bona fide purchaser. *See* Rendleman & Roberts Amicus Br. 6 n.2. Respectfully, this Court must follow Maryland law.

CONCLUSION

There is no set of facts Plaintiff could plead to avoid the statute of limitations in this case. The record is indisputable that Plaintiff was on notice as to any potential claim well before October 4, 2018, and that this Complaint is time-barred. The Complaint is also fatally defective in failing to plead an underlying tort, as well as facts showing Thermo Fisher was not a bona fide purchaser. And these defects cannot be cured—any other tort will be time-barred—and Plaintiff has already alleged Thermo Fisher acquired HeLa cells before widespread publicity of their origin. For these reasons, Defendant respectfully requests this Court dismiss the Complaint with prejudice.

Respectfully submitted,

/s/ Tonya Kelly Cronin

Tonya Kelly Cronin (Bar No. 27166)
BAKER DONELSON
100 Light St.
Baltimore, MD 21202
Tel.:410-862-1049
tykelly@bakerdonelson.com

Nadira Clarke (Fed. Bar No. 20254)
Andrew T. George (Fed. Bar No. 19755)
Adam Dec
Eileen F. Hyde*
JoAnna B. Adkisson*
BAKER BOTTS L.L.P.
700 K St. NW
Washington, DC 20001
Tel.: 202-639-7764
nadira.clarke@bakerbotts.com
andrew.george@bakerbotts.com
adam.dec@bakerbotts.com
eileen.hyde@bakerbotts.com
joanna.adkisson@bakerbotts.com

**Admitted pro hac vice*

Attorneys for Defendant