

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

Nos. 06-2286 & 06-2301

WASHINGTON UNIVERSITY
Appellee-Plaintiff,

v.

WILLIAM J. CATALONA,
Appellant-Defendant,

and

RICHARD WARD, et al.
Appellant-Defendants.

**On Appeal from the United States District Court
for the Eastern District of Missouri, Central Division
The Honorable Stephen L. Limbaugh, District Judge**

REPLY BRIEF OF APPELLANT-DEFENDANTS RICHARD WARD, *et al.*

**Paul M. Smith
Elaine J. Goldenberg
Matthew S. Hellman
Jenner & Block LLP
601 13th Street N.W.
Washington, DC 20005
Tel: (202) 639-6000
Fax: (202) 639-6066**

*Counsel for Appellant-Defendants Richard
Ward, et al.*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	4
I. WU AND THE DISTRICT COURT MISREAD <i>MOORE</i> AND <i>GREENBERG</i>	4
II. WU MAY NOT USE THE SAMPLES AFTER THE RPs WITHDRAW CONSENT.....	7
A. The Forms’ Plain Language Bars WU From Using The Samples After The RPs Withdraw.	8
B. WU’s Interpretation Of the Forms Is Inconsistent With The Common Rule.	12
III. THE RPs DID NOT MAKE A GIFT OF THE SAMPLES.	17
A. There Was No Gift Here.	17
B. The RPs’ Samples Are Governed By A Bailment Contract.	22
IV. THE RPs’ RIGHT TO WITHDRAW INCLUDES THE RIGHT TO TRANSFER THE SAMPLES	24
V. PUBLIC POLICY AND EQUITABLE FACTORS FAVOR THE RPs....	26
CONCLUSION.....	29

TABLE OF AUTHORITIES

CASES

<i>Cornelio v. Stamford Hospital</i> , No. Civ. 960155779S, 1997 WL 430619 (Conn. Super. Ct. July 21, 1997), <i>aff'd</i> , 717 A.2d 140 (Conn. 1998)	6
<i>Donnelly v. Donnelly</i> , 951 S.W.2d 650 (Mo. Ct. App. 1997)	18
<i>Glover v. Standard Federal Bank</i> , 283 F.3d 953 (8th Cir. 2002).....	20
<i>Greenberg v. Miami Children's Hospital Research Institute, Inc.</i> , 264 F. Supp. 2d 1064 (S.D. Fla. 2003)	4
<i>Hecht v. Superior Court of Los Angeles County</i> , 16 Cal. App. 4th 836 (1993)	5
<i>Mansaw v. Midwest Organ Bank</i> , No. 97 CV 0271, 1998 WL 386327 (W.D. Mo. July 8, 1998).....	7
<i>Moore v. Regents of University of California</i> , 793 P.2d 479 (Cal. 1990)	4
<i>State v. Powell</i> , 497 So. 2d 1188 (Fla. 1986).....	7
<i>Suits v. Electric Park Amusement Co.</i> , 249 S.W. 656 (Mo. Ct. App. 1923)	23
<i>York v. Jones</i> , 717 F. Supp. 421 (E.D. Va. 1989)	5

REGULATIONS

45 C.F.R. § 46.101(b)(4).....	15
45 C.F.R. § 46.102(f)	14, 15
45 C.F.R. § 46.116	13, 20
45 C.F.R. § 46.116(d)(1).....	14
45 C.F.R. § 46.116(d)(2).....	14
45 C.F.R. § 46.116(d)(3).....	14

10 C.S.R. § 80-7.010(1)(A)(3).....6

MISCELLANEOUS

71 Fed. Reg. 2518411

[http://www.umich.edu/~stopflu/consent07.pdf#search=
%22university%20of%20michigan%20consent%20forms%22](http://www.umich.edu/~stopflu/consent07.pdf#search=%22university%20of%20michigan%20consent%20forms%22)11

Amy L. McGuire & Richard A. Gibbs, *No Longer De-Identified*, 312
Science 370 (April 21 2006) *available at*
<http://www.sciencemag.org/cgi/content/full/312/5772/370>15

RAND Corp., “Case Studies of Existing Human Tissue Repositories
Practices for Biospecimen Resource for Genomic and Proteomic Era,”
available at [http://www.rand.org/pubs/monographs/2004/RAND_
MG120.pdf](http://www.rand.org/pubs/monographs/2004/RAND_MG120.pdf).....12

St. Louis Cord Blood Bank, [http://www.slcb.org/donor/public_vs_
private.html](http://www.slcb.org/donor/public_vs_private.html); http://www.slcb.org/participating_hospitals.html (last
visited September 20, 2006)7

INTRODUCTION

The seeming complexities of this case can be boiled down to a few simple propositions. Richard Ward and the other research participants (the “RPs”) allowed Dr. Catalona to take custody of their blood and tissue samples for the purpose of assisting research into the genetic causes of prostate cancer. The samples the RPs provided are very valuable – that is why Washington University (“WU”) filed this action to keep them. But the samples are also the literal flesh and blood of the RPs, who have a powerful interest in ensuring that materials taken from their bodies are used in ways that are not ethically objectionable to them.

Consistent with the applicable federal regulations, the consent forms and related documents drafted by WU addressed the RPs’ concerns by specifically guaranteeing their right to withdraw from participation and their right to destroy the tissue samples. It follows as a matter of hornbook Missouri law that the samples were never given as a gift to anyone. The RPs allowed researchers to use them for a particular purpose unless and until the RPs changed their mind.

The district court nonetheless concluded that the RPs made an irrevocable gift, relying primarily on the fact that custody of the samples was transferred and dismissing the consent forms as “inconsequential.” WU, for its part, alternately ignores the forms and tries to distort what they say by misleadingly picking and choosing language from them. Neither approach works – and neither approach is

aided by WU's reliance on the federal regulations or on out-of-state cases, all authorities that actually support the RPs' position. The explicit rights retained by the RPs mean there was no "gift" to anyone, and that the samples are governed by straightforward contract principles. Those retained rights also mean that the RPs can direct that the samples be transferred to another biorepository.

Having no viable legal claim, WU suggests that enforcing the RPs' contractual and property rights would be a radical departure from how research is usually conducted. The truth is precisely the opposite, as WU's own consent forms suggest. Research institutions in the United States *routinely* recognize research participants' right to decide later that they do not want their bodily tissues used any further. That right is reflected not only in WU's forms but those used by some of the same universities that have appeared here as *amici* supporting WU. The right has not unduly interfered with research. The real radical departure would be acceptance of WU's claim that researchers may lawfully defy an RP's request to withdraw by de-identifying the person's sample without consent and continuing to use the supposedly "anonymized" sample in further research, possibly including research as to which the RP expressly refused consent from the beginning.

Compare WU-Br.-4 *with id.* 31. And the real harm to research would arise if participants could no longer have any assurance of any future say in the use of their own tissue, blood, and genetic material.

It is nothing short of extraordinary that WU, a major research institution, would stoop to asking for its own forms to be judicially rewritten in its favor *ex post* for the supposed good of the very cancer victims whose expressed wishes WU feels wholly free to disregard. But perhaps the reason is not so hard to discern. WU stands to reap substantial financial benefits under the district court's order (as do the *amici* universities). Notably, the record gives the lie to WU's claim that it has never sought to profit from the samples, and its suggestion that it would not do so in the future. WU-Br.-20. For instance, when Dr. Catalona wanted to use some of the samples for a research project in 2001, WU balked, complaining that "this should be worth nearly \$100,000 to the university. The only consideration Hybertech is offering is the potential for Catalona to get a publication." RP-App.-157. In contrast, the RPs are not seeking money, but simply the freedom to exercise their rights.

WU protests mightily that it can be trusted and that federal regulations protect the RPs. But WU now has a court order permitting it far broader leeway than the consent forms or the regulations contemplate. The RPs are not obliged to trust WU; instead, it is WU that is obliged to follow the law. And it is the height of hypocrisy for WU to ask the RPs to take solace in the federal regulations when WU's litigation position is that those regulations allow it to do whatever it wants with samples.

The discussion below first explains why out-of-state case law does not support WU’s outlandish argument that property rights in tissue can never be retained through contracts like the RPs’ consent forms. It then addresses the proper interpretation of the forms in detail, explaining why WU must cease using the samples (and cannot continue to use them upon “de-identifying” them). The discussion demonstrates that the RPs’ interpretation of the forms is confirmed by their plain language, federal law, and every relevant canon of interpretation. Next, it shows that the forms – having reserved rights of withdrawal and destruction to the RPs – defeat the existence of an *inter vivos* gift under Missouri law, and instead conclusively prove that WU is bound by contract to carry out the RPs’ wishes, including their direction to transfer the tissue to another biorepository. Finally, it addresses WU’s equitable and policy arguments – and shows that these factors overwhelmingly favor the RPs.

ARGUMENT

I. WU AND THE DISTRICT COURT MISREAD *MOORE* AND *GREENBERG*

The district court and WU inexplicably rest their argument on two cases from other jurisdictions that offer no help to them: *Moore v. Regents of University of California*, 793 P.2d 479 (Cal. 1990), and *Greenberg v. Miami Children’s Hospital Research Institute*, 264 F. Supp. 2d 1064 (S.D. Fla. 2003). As the RPs previously explained, RP-Br.-40-42, neither *Moore* nor *Greenberg* supports the

brehtaking conclusion that a RP can never have a property right in his tissue once it has been removed, and that any writing governing the disposition of the tissue can simply be ignored. Neither case dealt with patients who had explicitly reserved rights in the samples as part of their informed consent.¹ Here, the RPs' contracts – the consent forms and documents incorporated by reference therein – guarantee the rights to withdraw from the study and to require that samples be destroyed.

WU thus gets it backwards when it claims that *Moore*'s reliance on the informed consent doctrine shows that “ownership and informed consent are separate issues,” WU-Br.-22, as if *Moore* meant that the terms on which consent is given could never control issues of ownership. Instead, under the California court's analysis, there is every reason to think the patient would have had ownership rights had he, like the RPs, signed a form reserving those rights. In the wake of *Moore*, other courts have recognized that people can enter into agreements to retain rights to tissue that has been separated from their bodies. *See York v. Jones*, 717 F. Supp. 421 (E.D. Va. 1989) (transferring samples based on contract between couple and fertility bank); *Hecht v. Superior Court of Los Angeles County*, 16 Cal. App. 4th 836, 850 (1993) (recognizing that sperm donor's writing could govern the disposition of his sperm). It was thus clear error for the district

¹ Notably, neither case involved federally funded research, and thus the plaintiffs were not protected by the Common Rule.

court to apply *Moore* and *Greenberg* to hold that the transfer of custody of the samples necessarily transferred ownership.² RP-Add.-17. The court's reliance on mere custody to establish ownership makes no more sense than deciding who owns a piece of land based on who currently occupies it, without looking at the lease contract between the parties.

The district court and WU also claim that *Moore's* analysis of California's hazardous waste regulations shows that RPs could not retain a property interest in their samples. RP-Add.-17; WU-Br.-24. But what matters here is *Missouri's* hazardous waste law, which regulates only *disposal* – through incineration or similar means – of infectious waste. 10 C.S.R. § 80-7.010(1)(A)(3) (regulating only “*discarded* human blood and blood products,” and defining samples as infectious waste only “when *discarded*” (emphasis added)). The samples at issue plainly are not discarded “waste,” and transfer to another institution plainly is not the same as disposal. Indeed, WU allows individuals to transfer blood samples to other institutions every day. For example, like virtually all other hospitals, WU's Barnes-Jewish Hospital allows patients to take their child's cord blood – a specimen no less “hazardous” than the tissues here – and store it at a private cord

² WU's citation of *Cornelio v. Stamford Hospital*, No. Civ. 960155779S, 1997 WL 430619 (Conn. Super. Ct. July 21, 1997), *aff'd*, 717 A.2d 140 (Conn. 1998), is similarly inapposite in this regard, as there was no writing there delineating the patient's rights to her excised tissue. *Id.* at *7.

blood bank for their own personal use. *See* The St. Louis Cord Blood Bank, http://www.slcb.org/donor/public_vs_private.html.

Greenberg is also distinguishable for another reason. In rejecting the claim that the donors retained property interests, that court relied in part on *State v. Powell*, 497 So. 2d 1188, 1192 (Fla. 1986), which established limits under Florida law on the ability of one person to “own” the body of a decedent. But those limits do not exist under Missouri law. *See Mansaw v. Midwest Organ Bank*, No. 97 CV 0271, 1998 WL 386327, at *4 (W.D. Mo. July 8, 1998) (expressly rejecting *Powell*). *Greenberg* thus cannot inform this Court’s ruling on the RPs’ state law rights.

II. WU MAY NOT USE THE SAMPLES AFTER THE RPs WITHDRAW CONSENT.

The RPs have the right under the consent forms to discontinue participation and withdraw from WU’s research program. Once they exercise this right, WU *may not continue to use the samples*. WU recognizes that the RPs do have a right to withdraw, but it grossly understates the scope of this right. Under WU’s formulation – which the district court adopted – WU may continue to use the samples (without regard to withdrawal of consent) so long as it “deidentif[ies]” them.³ WU-Br.-30; RP-Add.-22. Indeed, as WU and the district court would have

³ WU also claims the right to destroy or store the samples after withdrawal. It is highly unlikely that WU would choose either of these courses given that the district

it, once the samples are de-identified, WU may use them for *any* purpose, whether related to the original research or not, because “the Common Rule does not regulate research on specimens not linked to specific individuals.” WU-Br.-31; RP-Add.-22.

WU’s assertion of the right to forcibly de-identify and continue to use the samples after the RPs withdraw their permission is wholly foreclosed by the agreement between the parties and governing law. The consent forms, despite having been drafted by WU, speak not a word about giving WU the option to de-identify the samples. In fact, they give the right to *destroy* the samples to the *RPs*. Moreover, the Common Rule, as reflected in the contracts, requires that a researcher obtain consent before obtaining and using the samples – including consent to anonymization of tissue samples. While the Common Rule does allow researchers additional leeway to use pre-existing anonymous samples, it does not allow WU to evade its ironclad consent requirements by unilaterally choosing to de-identify the samples *ex post*.

A. The Forms’ Plain Language Bars WU From Using The Samples After The RPs Withdraw.

The consent forms explicitly give the RPs the right to withdraw from the protocol – and approximately 6000 RPs, including the RP appellants, have already

court’s order gives express permission to de-identify samples and make further (lucrative) use of them.

asked to do so. RP-Add.-11.⁴ As a result, the RPs have the right to require WU to cease using the samples. WU recognizes that each consent form provides that the RP may “withdraw [his] consent,” and that “consent [is] necessary for participation in the research.” WU-Br.-30. The forms’ plain language ends the inquiry: because consent is necessary for participation in the research, withdrawing that consent means halting further research using the participant’s sample. An individual cannot continue as a Research *Participant* once he has withdrawn his consent to participate.

Against the backdrop of the forms’ plain language, WU asserts that “participation” is over once a RP provides a sample to researchers. WU-Br.-29. The district court seemed to agree. RP-Add.-23 (finding the right to discontinue “means nothing more than that the RP has chosen not to provide any more biological materials”). Yet WU does not really believe that. It goes on to recognize that a withdrawal from further participation by an RP does require some response, which in its view can be either discontinuing use of the RP’s sample *or* continuing use after de-identification. WU-Br.-30-31. That must mean the RP’s “participation” continues after the sample has been initially provided. The question then becomes whether it is plausible to conclude that the right to

⁴ WU’s suggestion that no RP has withdrawn is absurd. WU-Br.-45. Dr. Catalona’s method of communicating with the RPs is irrelevant. The consent forms allow the RPs to withdraw in an informal manner – *e.g.*, by making a phone call. RP-Add.-36.

withdraw is satisfied merely through anonymization followed by continued use. Nothing in the consent forms even hints that withdrawal will result in de-identification and ongoing use. Nor would that make sense since the relevant sample *is still being used*.

Indeed, WU's forms do specify what is to happen upon withdrawal, and they give the right to destroy the samples to the RP. *E.g.*, WU-App.-3:654; 4:824, 909, 926, 939, 942, 957. And while not every RP received a form that discusses destruction, every form that lacks this language dates from 1991 or later, when WU was also providing genetics brochures that promised that if an RP "change[d] [his] mind," his "tissue will identified and destroyed upon request."⁵ WU answers that under the consent documents the RPs may choose to destroy the samples only under "some circumstances." WU-Br.-10. But the *only* limitation the forms recognize is where a RP's tissue sample cannot be identified, an impossibility here given that all the samples are linked to the RPs.

⁵ In a brief footnote, WU challenges the district court's factual finding that every RP received this brochure. WU-Br.-9 n.2. WU's cursory assertions do not come close to showing the clear error necessary to overturn the district court's factual finding. And indeed, WU freely cites the brochures when it finds it helpful. *E.g.*, WU-Br.-9, 27, 37. But even if WU had shown error, it would be immaterial, because every version of the brochure specified the right to destroy the samples, WU-App.-4:934, 937, and every single one of the 15 consent forms in the record dates from 1991 or later, the time when the brochures were given out with the forms, RP-App.-116.

The *amici* universities also argue that an RP's withdrawal does not prevent WU from continuing to use the sample after de-identifying it, citing as their sole support voluntary guidelines issued by the National Cancer Institute. Univ.-Br.-25, 27 (citing NCI Guidelines, 71 Fed. Reg. 25184). Those Guidelines do not govern the RPs' forms, but in any case they definitively *refute* the position that WU can unilaterally de-identify samples. They provide that "[t]he option of stripping all ... identifiers from biospecimens should be included in consent forms for subjects who later withdraw consent." 71 Fed. Reg. at 25194. The Guidelines also provide a sample consent form that states "you can change your mind at any time. Just contact us and let us know that you do not want us to use your tissue. *Then any tissue that remains will no longer be used for research.*" *Id.* at 25197 (emphasis added); *see also id.* at 25196 (stating that biorepositories have "custodianship (not ownership)" (footnote omitted)).

That the NCI Guidelines *bar* WU's unilateral de-identification approach should come as no surprise to the *amici* universities, because they routinely include language seeking permission to anonymize samples in their own consent forms. The University of Michigan, for example, asks for express consent to anonymize samples for future use after a study is completed. *See* <http://www.umich.edu/~stopflu/consent07.pdf> #search= %22university%20of% 20michigan% 20consent%20forms%22. According to a 2003 report issued by the Rand

Corporation, *amici* Duke University, the University of Pittsburgh, and the Mayo Clinic follow these rules by allowing tissue sources to withdraw linked samples from research. RAND Corp., “Case Studies of Existing Human Tissue Repositories Practices for Biospecimen Resource for Genomic and Proteomic Era,” at 144, *available at* http://www.rand.org/pubs/monographs/2004/RAND_MG120.pdf. WU must be held to the same standards as these other institutions.

B. WU’s Interpretation Of The Forms Is Inconsistent With The Common Rule.

The plain language of the forms requires reversal of the district court. But even if there were any ambiguity in the forms, the Common Rule requires that they be interpreted in the RPs’ favor. WU states repeatedly that its consent forms comply with the Common Rule.⁶ *E.g.*, WU-Br.-29. But the Common Rule strictly forecloses the rights that WU asserts and the district court upheld in this case.

All parties to this litigation agree, and the district court found, that the consent forms signed by the RPs universally provided that an RP could “withdraw [his] consent” to participate in the research protocol. WU-Br.-9; RP-Add.-5.

⁶ *Amicus* American Cancer Society argues that there is no private right of action to enforce the Common Rule. ACS-Br.-22-24. But the RPs are pressing state common law rights. Missouri law presumes that contracts are drafted to comply with governing regulations, RP-Br.-31-32, and WU has stated that it intended the forms to comply with the Common Rule. The Common Rule thus provides an interpretative guide in this case, rather than an independent basis for the RPs’ rights.

Indeed, as WU recognizes, the Common Rule requires that RPs be given the right to withdraw. WU-Br.-29. It is also undisputed that under the Common Rule, a researcher *must* obtain informed consent from an RP “before involving that subject in research within the scope of the Common Rule.” WU-Br.-4.

WU and the opinion below accept these premises but maintain that after an RP withdraws his consent, the researcher may continue to use the RP’s samples, provided that they are de-identified. Yet as the NCI Guidelines reflect, the Common Rule contains no such massive loophole. A central function of the Common Rule is to ensure that the consent an RP gives is an informed consent, one element of which is informing a participant what will happen upon withdrawal from the protocol. 45 C.F.R. § 46.116. It makes a mockery of informed consent to require a researcher to obtain consent for a given protocol, but then to allow the researcher to use the sample for any protocol he chooses upon de-identification. Consider the following scenario: a research institution obtains consent from an identifiable RP to obtain a sample for genetics research regarding susceptibility to heart disease. Under WU’s position, if WU jettisoned identifying RP information, it could then use the sample to grow stem cells, or engage in any research

irrespective of the RP's consent. *See* WU-Br.-31 (“[T]he Common Rule does not regulate research on specimens not linked to specific individuals.”).⁷

WU's primary support for its implausible de-identification theory is a citation to 45 C.F.R. § 46.102(f), which provides that research involves a “[h]uman subject” – and thus requires informed consent – when the researcher “obtains [d]ata through intervention or interaction with the individual” or “[i]dentifiable private information.” But the researchers here indisputably did “obtain[] ... identifiable private information” about the RPs. WU wants to take a regulation that covers what can be done with pre-existing anonymous samples and transform it into a regulation that permits *ex post* anonymization of otherwise identifiable samples. But the regulation says nothing about such *ex post* anonymization – nor is such an omission surprising, given the gross intrusions on human dignity it would allow.⁸

⁷ The district court stated that it was “undisputed” that unilateral anonymization is permissible. RP-Add.-10. But experts Dr. Wright-Clayton and Dr. Goodman both testified that unilateral anonymization was *forbidden* under the Common Rule because it would “eviscerate the right of informed consent,” RP-App.-58-59 (Wright-Clayton), and constitute an “end run” around the Common Rule's protections, RP-App.-71 (Goodman).

⁸ In passing, WU claims that the Common Rule “assumes” the RPs are non-owners of their own tissue. WU-Br.-24. WU's sole support this assumption is a Common Rule provision permitting informed consent to be waived where, *inter alia*, the “research involves no more than minimal risk to the subjects,” the “waiver ... will not adversely affect the rights and welfare of the subjects,” and the “research could not practicably be carried out without the waiver [of consent].” 45 C.F.R. § 46.116(d)(1)-(3). Given the potential for abuse of the RPs' genetic material –

Moreover, even if subsequently de-identified samples lack “private identifiable information” within the meaning of the regulation (and samples of genetic material do not and cannot⁹), the research would still be subject to consent requirements because it triggers the other half of the regulation: the prohibition on unconsented research where the researcher has “obtained [d]ata [*i.e.*, genetic information] through intervention or interaction with the individual [*i.e.*, surgery].” 45 C.F.R. § 46.102(f). All the data at issue here were obtained through just such interventions.

WU also cites 45 C.F.R. § 46.101(b)(4), which exempts research from the Common Rule “involving the collection or study of existing ... specimens, if ... the information is recorded ... in such a manner that subjects cannot be identified.” On its face, this exemption applies only to “existing” specimens where the

risks that WU’s own research brochure states clearly but to which WU now turns a blind eye, *see infra* – and the fact that WU has made no showing of impracticability, these predicate requirements are not met.

⁹ Continued use of such samples poses a serious threat to the RPs. Genetic sequences for such samples are now routinely posted on-line, allowing insurers, employers, and others to obtain information about the RPs that way. As WU’s own brochure recognizes, “[i]f this information were to become known outside of the research, you (and family members) may be unable to obtain health, life, or disability insurance. You might also be refused employment or be terminated from your current employment.” RP-Add.-35. *See also* Amy L. McGuire & Richard A. Gibbs, *No Longer De-Identified*, 312 Science 370 (April 21, 2006), *available at* <http://www.sciencemag.org/cgi/content/full/312/5772/370>.

“subjects cannot be identified.” Thus, it does not apply to the samples in question, which are existing specimens where the subjects *can* be identified.¹⁰

WU’s erroneous reading of the Common Rule undermines its repeated assertions that the district court’s ruling and the Common Rule will give sufficient protection to the RPs. WU-Br.-19-20, 48 (“Under the Common Rule, a comprehensive federal regulatory regime is already in place to protect research participants.”). Under the approach offered by WU and adopted as law by the district court, the Common Rule is so watered down as to be meaningless.

* * *

The bottom line is that the consent forms, as drafted by WU, require WU to obtain the RPs’ consent to use their samples. To be sure, the RPs may *choose* to consent to further anonymous use of the samples, but once consent is withdrawn, WU cannot continue to use the samples through the impermissible bait and switch of unconsented-to de-identification – a step that would permit research on the tissue that the RPs never envisioned and would deprive them of any opportunity to learn of research advances affecting their clinical care (or that of their family members). As we explain below, once consent is withdrawn the RPs are free to

¹⁰ After arguing at length that the Common Rule gives it the right to proceed with research on samples “de-identified” after the fact, WU adds a footnote incorrectly claiming that this issue is not before the Court. WU-Br.-32-n.8. Yet this is precisely what is before the Court – indeed, the district court expressly ruled on the anonymization issue. Having entered into an agreement with the RPs that governs their samples, WU cannot now foreclose litigation on that agreement’s scope.

transfer the samples to another accredited institution. But at a bare minimum, consent requires WU to make no further use of the samples – and the district court’s holding to the contrary must be reversed.

III. THE RPs DID NOT MAKE A GIFT OF THE SAMPLES.

The preceding discussion makes crystal clear that the RPs did not make a legal gift of their samples to WU. The RPs’ right to withdraw consent, prevent further use of the tissues, and mandate their destruction flatly rules out the existence of an *inter vivos* gift under Missouri law. It is WU that has the burden of proving the existence of a gift by clear and convincing evidence. The district court inexplicably concluded that the RPs made a gift of their samples without even considering the language of the consent forms. That conclusion, and WU’s defense of it, are not defensible – let alone supported by the clear and convincing evidence that the law requires. Instead, the relationship between the parties is governed by contract.

A. There Was No Gift Here.

As an initial matter, the district court and WU have clouded the gift analysis by pointing to a number of entirely irrelevant facts. WU’s intellectual property policy is immaterial; that policy cannot imbue the RPs with a donative intent that they never possessed. RP-Add.-14; WU-Br.-25. Similarly, that Dr. Catalonia may have referred to WU as the owner of the tissues in his dealings with WU or other

universities does not affect whether the RPs believed that they were making a gift. RP-Add.-14; WU-Br.-25. Dr. Catalona's state of mind is not what matters here; the RPs are not bound by his acts or the terms of his employment.

WU also argues that because the research consumed some of the samples, the RPs must have intended to convey full ownership of them. WU-Br.-25. That is faulty logic. The RPs consented to the provision of their tissue and blood samples for a specified *use*, namely research into the genetic causes of prostate cancer by Dr. Catalona. Because such research can require the consumption of the sample, it would hardly be surprising if samples no longer exist. But consent to use – even use that could entail the destruction of the sample – is not equivalent to a grant of outright “fee simple” ownership.

a. *Donative intent.* WU devotes the bulk of its gift discussion to demonstrating that the mere existence of a condition does not defeat a gift. WU-Br.-32-35. But the RPs do not dispute that a gift may be subject to conditions under Missouri law, such as where a donation is made to a charity on the condition that it be used for a certain purpose. RP-Br.-46 n.9, 49 n.10. What Missouri law does not permit is a “gift” where the condition is the “donor’s” right to take back (and destroy) the gift at any time and for any reason. As the RPs explained in their opening brief, under cases like *Donnelly v. Donnelly*, 951 S.W.2d 650, 654 (Mo. Ct. App. 1997), there is no intent to donate under such circumstances. RP-Br.-39.

WU has not distinguished these cases because it cannot: an unconstrained right of revocation bars a finding of a gift.

The RPs' right to withdraw and destroy is clearly laid out in the consent forms and related documents. But, as noted above, the district court dismissed that language as "inconsequential." RP-Add.-20. WU, apparently recognizing this error, points to language in some of the forms and brochures using the word "donate" or referring to a "free and generous gift." WU-Br.-27. But each and every form and brochure that WU cites contains additional language providing that the RPs have a right to withdraw and that "your samples can be destroyed upon request." *E.g.*, RP-Add.-34. The general language in the forms and brochure about "free and generous gifts" – here, plainly nothing more than a colloquial reference to the RPs' grant of a right of use that WU would not otherwise have – cannot trump the specific reservation of the right to destroy the samples at any time, let alone satisfy WU's burden to show a gift by clear and convincing evidence. RP-Br.-29.

WU also seizes on language in the forms stating

Cell lines used for research sometimes result in the development of new chemical products. By agreeing to participate in this study, you agree to waive any claim you might have to the body tissues you donate. Participation in this research means you waive the right to any new material or process developed through research involving your tissues.

RP-Add.-31. But read in context, the waiver language in the second sentence refers to a waiver of claims regarding the fruits of the research, not the samples themselves. Indeed, this language could not effect a complete waiver because the same forms include the right to withdraw and a right to destroy. The waiver language, read broadly as WU proposes, would flatly conflict with the more specific language guaranteeing the RPs' right to withdraw and destroy the sample. In such cases, the ambiguity is resolved in favor of the more specific language, and against WU, the sophisticated drafter of the form. RP-Br.-29. Both rules of construction – as well as the requirement that WU must prove a gift by clear and convincing evidence – favor the RPs.

In addition, the Common Rule's prohibition on exculpatory language, 45 C.F.R. § 46.116, bars waiver of the RPs' ownership rights in the samples provided for research. As the RPs' opening brief explained, that regulatory provision has been authoritatively interpreted by OHRP to preclude RPs from waiving their right to "bodily fluids or tissue samples obtained in the course of the research." *See* RP-Br.-30-31. It is hornbook law that agency interpretations – even informal interpretations in the form of policy statements – of their own regulations are entitled to deference. *Glover v. Standard Federal Bank*, 283 F.3d 953, 962 (8th Cir. 2002).

WU (in a footnote) dismisses the OHRP’s interpretation as the product of “an outside committee” issuing an “informal guidance document.” WU-Br.-42-n.12. While the policy came from a committee, it has been adopted and *enforced* by OHRP, and posted on the agency’s website. WU cannot plausibly maintain that OHRP’s guidance is insufficiently “formal” to warrant deference.

WU also obliquely cites a 1989 private letter ruling from HHS purporting to allow RPs to make “legitimate donations” of their cells. WU-Br.-41 (citing WU-App.-6:1309). This 17-year-old private letter ruling was issued before *Moore*, which brought to the fore the importance of protecting patients from overreaching research institutions. After this abuse was pointed out, the OHRP adopted the “no waiver” position described above on its website and its current letter rulings.

b. *Other gift elements.* WU erroneously states that the RPs challenged only the existence of donative intent, and conceded the other two elements of an *inter vivos* gift: complete and unconditional delivery of the subject matter to WU, and absolute relinquishment of control and dominion over the gift. WU-Br.-27. That is incorrect – the RPs have argued that WU has not carried its burden of proving these elements by clear and convincing evidence. RP-Br.-35-38. Little more needs to be said about these elements here as the right to withdraw precludes any finding of an “unconditional” delivery or an “absolute relinquishment of control.”

Finally, WU's consideration arguments fail. WU-Br.-36-38. A benefit need not be guaranteed to constitute consideration. Nor is the benefit to the RPs the type of "feel good" benefit inherent in all gift-giving; rather, it is a concrete benefit that is comfortably classified as consideration. RP-Add.-32 ("[P]ossible benefits *to you*" are improving "prediction of the nature or course of the disease *by you*" and "[t]o help in counseling *your family members* regarding cancer risks" (emphasis added)).

In sum, WU has not proven a gift by clear and convincing evidence. The district court found that there was a donation without even considering the writings that govern the agreement between the parties. WU has attempted to salvage the situation by finding a gift in the consent forms themselves, but the forms utterly stymie that effort. By reserving an unconditional right of withdrawal and destruction, the forms are clear and convincing evidence that *no* gift exists.

B. The RPs' Samples Are Governed By A Bailment Contract.

Because there was no gift, familiar principles of contract law govern the rights and obligations of the parties. The substance of the contractual arrangement is that the RPs have allowed their samples to be used for a limited research purpose, subject to the RPs' right to withdraw from the research at any time. Although WU resists the label associated with this type of contract – bailment – that is plainly the arrangement between the parties.

As the RPs previously explained at length, a bailment may exist even where the bailor has no expectation of receiving the entrusted item again. RP-Br.-44-45. The RPs made a delivery of the samples for the particular purpose of genetics research under a contract. And the contract provides that the samples shall be “dealt with according to his directions ... as the case may be,” *Suits v. Elec. Park Amusement Co.*, 249 S.W. 656, 657 (Mo. Ct. App. 1923) – that is, used for research unless and until the RP withdraws his consent for that research. WU offers essentially no response to this clear statement of Missouri law– indeed, WU largely ignores the governing law entirely.

It is, of course, irrelevant that some of the cases defendants rely on have facts involving consignment, *see* WU-Br.-39 – they stand for the broader proposition that return is not required. It is similarly irrelevant that the consented-to research might involve the consumption of the samples. There is nothing in bailment law that precludes the possibility that the samples might be entirely consumed in the research. What is relevant is that the samples were entrusted for a specific use, and that the RPs have the right to withdraw their consent to the research.

Moreover, even assuming *arguendo* that there was no bailment here, it would not change the fact that the parties have a contract that allows the RPs to withdraw their consent at any time and prohibit WU from making further use of

the samples. Regardless whether the consent forms set up a bailment (and they do), they indisputably reserve a withdrawal right to the RPs. That fact alone fatally undermines the district court and WU's assertion of unfettered ownership of the samples.

IV. THE RPs' RIGHT TO WITHDRAW INCLUDES THE RIGHT TO TRANSFER THE SAMPLES.

Under the terms of the consent forms, the RPs have not made a gift of their samples, but rather have retained the right to withdraw from the protocol and require WU to make no further use of the samples. The district court's order, which permits such use, must be reversed on this ground alone. It is also inherent in the right of withdrawal, however, that the RPs be able to transfer their samples to a researcher at another institution, and the injunction requested by the defendants should therefore have been granted.¹¹

This conclusion follows naturally from the contractual and property theories discussed above. WU's main argument against allowing transfer – other than to point to flawed policy arguments, *see infra* – is to argue that nothing in the consent

¹¹ WU incorrectly states that the RPs have not moved for injunctive relief. The RPs, who were joined only weeks before the injunction hearing (and against whom WU's summary judgment motion was not directed), clearly sought injunctive relief at the hearing and in their post-trial brief. WU-App.-6:1490. The district court also understood them to be asking for injunctive relief. RP-Add.-27 (“[T]he Court finds that (1) defendants, *i.e.*, ... the eight (8) research participants who are parties to this action, have failed to demonstrate that they are entitled to any injunctive relief.”).

form “divests an institution of ownership of physical specimens.” WU-Br.-15.

That puts the cart before the horse. What is key is that nothing in the consent form grants an institution “ownership” of the physical specimens in the first place.

These samples were taken from the persons of Richard Ward and the other RPs on the conditions set forth in the consent forms. Under the terms of the consent forms, the researcher has only a narrow right of use, and WU is, at best, a custodian. Once the grant of use is rescinded, WU has no further basis for retaining control over the samples.

The law offers full protection to all kinds of property, whether through licenses, leases, or numerous other arrangements, under just this reasoning. There is no basis for treating human tissue samples – where the potential for mistreatment may be of far greater concern – with any less dignity under the law. This is especially so given that the forms give the RPs the right to destroy the tissues. If they have that ultimate right, they surely have the right to send the tissues to another research institution – one that itself operates under the strictures of the Common Rule, shares tissue with other institutions as the RP’s consent permits, and otherwise acts to advance scientific knowledge through investigation and collaboration.

V. PUBLIC POLICY AND EQUITABLE FACTORS FAVOR THE RPs.

What the law requires in this case is very clear: the RPs are entitled to exercise their right to withdraw from WU's research, and request that their tissue be destroyed or transferred. In the face of this straightforward contractual obligation, WU and its *amici* come forward with a host of alarmist policy rationales. But public policy and the equitable injunctive factors strongly favor the RPs, not WU.

First, and most fundamentally, the claim made by WU and its *amicus* the American Cancer Society that allowing the RPs to withdraw will hinder medical research is simply not true. RPs *already* have this right and exercise it every day, while research continues unabated. Other institutions that want to conduct anonymized research simply ask for consent from their RPs. And other institutions transfer research samples on a daily basis. WU also raises the specter of RPs selling their tissue samples to the highest bidder. The threat is illusory. RPs already have the right to request the destruction of their samples, and thus have the right to ask that an institution transfer the sample for some consideration as opposed to destroying it. Yet there has been no surfeit of samples for sale. In other words, the balance of hardships favors not WU – which is seeking a change from the *status quo* – but the RPs, who will be denied their existing right under contract and law to retain some control over the samples.

Second, allowing RPs to control the destiny of their samples is hardly a novel idea. Indeed, patient consent is the guiding policy of the Common Rule. The district court expressed disdain for the idea that persons could “dictate” who received their blood or kidneys. RP-Add.-27. But individuals “dictate” these decisions every day: 85% of living organ donors designate a spouse or relative. People’s Medical Society Br.-15. WU points out that the RPs’ position forbids unconditional donations of research tissue. And it is true, for federally funded research, that RPs cannot give identifiable tissue unconditionally, allow it to be used for any purpose the researcher chooses, and waive their right to withdraw. But that highly sensible policy choice – a choice cognizant of the research institution’s comparative sophistication– has already been made through the Common Rule. If WU quarrels with those values, it should take it up with Congress, not this Court. The public interest, as embodied in the Common Rule and in the enforcement of written guarantees, favors the RPs here, not WU.¹² Indeed, were the district court affirmed, the RPs would suffer irreparable harm as their tissue would likely be quickly de-identified, limiting its medical value to them and allowing it to be used for any research WU likes, regardless of the RPs’ wishes.

¹² This also rebuts the claim that this Court is not an “appropriate forum for the policy change [the RPs] request.” ACS-Br.-19. The RPs are not asking for a “policy change.” The RPs are asking that their contracts be honored.

Third, to the extent that money is involved in this case, it is a motive for overreaching by WU, which has time and time again emphasized the value of the biorepository. The RPs have nothing to gain financially from this suit, but WU, and its similarly situated *amici*, are concerned that they will be unable to maximize their profits. WU seeks to make this case about science, but is surely just as much about the valuable nature of the samples at issue. This Court, though, need not pick winners and losers on the basis of policy. Whatever WU's motives, this Court need only enforce the terms of the consent forms.

Fourth, and finally, the only true way to protect research is to ensure that individuals have an incentive to take part in it. Most of us would like to aid the progress of science if we can. But we would also like to know how our cells, blood, and DNA will be used. WU asks this Court to give it *carte blanche* by reinterpreting contracts and rewriting the very regulations designed to encourage and protect individuals who are generous enough to grant the use of their tissue to aid science. Perhaps WU believes such a regime will aid its research, but it is far more likely to discourage participation by those – like cancer survivors Richard Ward, Thomas McGurk, Luis Garcia, Antonio Castro, Philip Wiland, Ivan Parron, James Ellis, and Michael Missios – who make research possible in the first place.

CONCLUSION

For all of the foregoing reasons, the District Court's judgment should be reversed, and the case remanded for entry of the permanent injunction sought by the Defendants and for judgment in their favor.

Respectfully submitted,

/s/

Paul M. Smith
Elaine J. Goldenberg
Matthew S. Hellman
Jenner & Block LLP
601 13th Street N.W.
Washington, DC 20005
Tel: (202) 639-6000
Fax: (202) 639-6066

Counsel for Appellant-Defendants Ward, et al.

September 21, 2006

CERTIFICATE OF SERVICE

I certify that on September 21, 2006, I caused to be served two copies of the reply brief of Appellants Richard Ward, *et al.*, on counsel of record for Appellee Washington University and Appellant William J. Catalona herein by mailing said copies via first class U.S. mail postage prepaid, addressed to the following:

Thomas E. Wack Bryan Cave LLP One Metropolitan Square 211 North Broadway, Suite 3600 St. Louis, MO 63102	Gene C. Schaerr Winston & Strawn LLP 1700 K Street, N.W. Washington, DC 20006
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I also served them with electronic copies of the brief on CD-ROMs enclosed in the same mailing, and served them with a courtesy electronic copy of the brief via email on this day.

/s/
Paul M. Smith