

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION**

BRET A. BIELEMA

PLAINTIFF

V.

5:20-cv-05104-PKH

THE RAZORBACK FOUNDATION, INC.

DEFENDANT

BRIEF IN SUPPORT OF MOTION TO DISMISS

Defendant, The Razorback Foundation, Inc. (the “Foundation”), by and through its attorneys, Friday, Eldredge & Clark, LLP, for its Brief in Support of its Motion to Dismiss Plaintiff’s Complaint, states as follows:

INTRODUCTION

Former Razorback Coach Bret Bielema brings claims against the Foundation for breach of contract, contending that the Foundation has failed to pay him what he is owed and claiming that he was painted in a false light by the Foundation. Bielema preemptively filed suit in an effort to avoid being sued himself in Washington County Circuit Court and presumably to frame the media’s report of the dispute. In truth, while Bielema attempts to point the finger at the Foundation, he shoulders the blame. Had he abided by his rather simple promises to the Foundation in the Release and Waiver Agreement (“Release Agreement”), there would be no dispute. Instead, he violated his promises to mitigate the Foundation’s financial obligations by failing to use his best efforts to obtain, or even to look for, other employment that would fulfill his obligations of mitigation. Specifically, his obligations would be satisfied only by obtaining a job that paid more than \$150,000.¹ Correspondingly, he failed to report his efforts to find other

¹ During the first full year of the Release Agreement, Bielema was permitted to earn \$150,000 prior the Foundation’s offset rights being triggered. With the help of others, Bielema intentionally stayed under

employment (because he failed to seek other employment), and in fact, agreed to a well-below-market position with the New England Patriots that failed to even remotely fulfill his mitigation obligation. Perhaps most egregious, Bielema signed a contract that (i) legally bound himself to a prohibition from fulfilling his affirmative duty of mitigation and (ii) granted the Patriots the unilateral right to extend this scheme for an additional year, all while being underpaid. In other words, he signed a contract that violated his express promises to the Foundation. Consequently, he is not entitled to further payment, and he is liable to the Foundation for the payments made to him.

Bielema's 64-page² complaint is chock full of distorted facts, mischaracterizations, and baseless claims. Although the Foundation sharply contests the allegations in the Complaint, the Court need not reach those issues. The Release Agreement contains a forum selection clause

this number. He did so because compensation over \$150,000 would inure to the Foundation's financial benefit instead of his under the offset provisions of the Release Agreement. Unlike former Razorback Coach Chad Morris, who obtained a coordinator position at a major college football program with a lucrative contract that included a seven-figure annual base salary within weeks of being terminated for convenience by the University of Arkansas, Bielema claims that the highest paying position he could find initially was a part-time consulting role that paid a mere \$35,000. Moreover, by the start of the 2018 football season, each member of Bielema's coaching staff was re-employed in comparable or higher paying positions and most were in higher paying positions than Bielema.

Bielema was obligated to use his best efforts to maximize his compensation during the buy-out period. Unfortunately, he did the exact opposite of what the contract required. Bielema and his agent conspired to suppress Bielema's compensation during the buy-out term. If permitted to stand, that conspiracy maximizes, rather than mitigates, the Foundation's losses under the buy-out provision contrary to the terms of the Release Agreement. Bielema intentionally breached the Release Agreement, and his agent orchestrated the arrangements while willfully disregarding the Release Agreement's requirements. That is the case that a court will eventually decide. However, for the reasons discussed hereinafter, that case must be presented to the Washington County Circuit Court rather than this Court.

² The Complaint arguably violates Rule 8's requirement of a short and plain statement of the facts. *See* 5 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1217 (3d ed. 2010) (collecting cases holding that Rule 8(a) is violated by a pleading that is "needlessly long"); *see also In re Buffets, Inc. Sec. Litig.*, 906 F. Supp. 1293, 1297-99 (D. Minn. 1995) (dismissing 55-page complaint, in part, for failure to comply with Rule 8 because "Plaintiffs engage[d] in lengthy narrative that serves to conceal rather than reveal" the elements of their claim).

requiring this dispute to be heard in Washington County Circuit Court. As such, the Court should dismiss the Complaint under the doctrine of *forum non conveniens*, or alternatively under Fed. R. Civ. P. 12(b)(6). Additionally, because Bielema alleges that the Foundation is an arm of the state that is immune from suit, he cannot also claim that federal court jurisdiction is proper.³ Therefore, the Eleventh Amendment to the U.S. Constitution is a jurisdictional bar to suit requiring dismissal. Further, the Court lacks subject matter jurisdiction over the dispute, and the Complaint should be dismissed under Fed. R. Civ. P. 12(b)(1).

FACTUAL BACKGROUND

Coach Bielema worked as the University of Arkansas's head football coach from 2012 through 2017.⁴ Compl. ¶ 8. According to the Complaint, during all relevant times, Bielema was represented by Neil Cornrich, his agent. *Id.* ¶ 9. On August 20, 2012, the University and Bielema entered into an Employment Agreement. *Id.*, Ex. 1. The Employment Agreement was amended in December 2012. *Id.*, Ex. 2. On October 23, 2013, Bielema and the Foundation entered into a Personal Services and Guaranty Agreement effective December 4, 2012 (the "2012 Buyout"). *Id.*, Ex. 3. This Agreement included a forum selection clause providing that venue would lie "solely with the Circuit Court of Washington County, Arkansas." *Id.*, ¶ 15. After two seasons, the Foundation and Bielema entered into another Personal Services and Guaranty Agreement in February 2015 (the "2015 Buyout"). *Id.*, Ex. 4. The 2015 Buyout Agreement also included a

³ The Foundation *denies* that it is an "arm of the state," but at the motion to dismiss stage, the allegations in the Complaint are taken as true. Bielema cannot have it both ways; he cannot claim that federal court jurisdiction exists and at the same time allege that the Foundation is an arm of the State.

⁴ The Foundation assumes the allegations in the Complaint are true only for purposes of this motion. See *Goldfarb v. Channel One Russia*, ___ F. Supp. 3d ___, 2020 WL 1048673, at *4 (S.D.N.Y. Mar. 4, 2020) ("On a motion to dismiss for *forum non conveniens*, a court must accept the facts alleged in the complaint as true.").

forum selection clause providing that venue would lie “solely with the Circuit Court of Washington County, Arkansas.” *Id.*, ¶ 15.

On November 24, 2017, the University terminated Bielema’s employment for convenience, after which he and the Foundation entered into the Release Agreement that is at the core of this dispute. *Id.*, Ex. 5. The Release Agreement dated January 30, 2018, included a total buyout of \$11,935,000, provided that Bielema complied with the terms of the agreement, including an affirmative duty to mitigate. *Id.* ¶¶ 33, 37. The Release Agreement contains a choice-of-law provision designating Arkansas law and a forum selection clause that provides that “Washington County, Arkansas, shall be the exclusive venue for any action arising under or relating to the agreement.” *Id.* ¶ 6 & Ex. 5.

In early 2018, Bielema began working for the New England Patriots as an independent contractor to assist the Patriots’ coaching staff in assessing NFL draft prospects. *Id.* ¶ 66. Bielema’s agreement with the Patriots is memorialized in an independent contractor agreement dated March 1, 2018. *Id.* The Patriots paid Bielema \$25,000 for seven weeks of work under this arrangement. *Id.* In July 2018, Bielema accepted a job as Special Assistant to the Patriots and accepted an annual salary of \$100,000. *Id.* ¶ 67. The Employment Agreement for the Special Assistant position is dated July 15, 2018, and *prohibited him from accepting any other employment* during the term of the agreement while also giving the Patriots the unilateral right to extend the agreement (including the employment bar) for an additional year. In April 2019, Bielema was promoted to Assistant Coach with an annual salary of \$250,000. *Id.* ¶ 70. *Well after the Foundation’s written notice of breach*, Bielema entered into a new Assistant Coach Employment Agreement that—unlike his previous Patriots’ contract—permitted him to accept other employment. *Id.* In effect, Bielema’s act of modifying the post-breach contract constitutes an

admission of wrongdoing. In January 2020, Bielema accepted a position with the New York Giants as Outside Linebackers/Senior Assistant with an annual salary of \$400,000. *Id.* ¶ 74.

For the year-long period between the date Bielema signed the Release Agreement in January 2018 and the date the Foundation sent a notice of breach in January 2019, the Complaint recites only one alleged instance in which Bielema possibly attempted to explore other employment opportunities, but the Complaint notably fails to allege whether Bielema accepted a proposed meeting to do so. *Id.* ¶ 87; *see generally id.* ¶¶ 84 - 91. Over the course of 64 pages of allegations, the Complaint illuminates Bielema's uncontested failure to seek other employment prior to receiving notice of uncurable breach in January 2019, a stark contrast to his post-breach efforts. *Compare id.* ¶¶ 63-65, 72-76 & 93, *with id.* ¶¶ 84-91; *see also id.* ¶ 70 (conceding that he was not contractually allowed to seek other employment until April 2019).

In sum, Bielema made no effort to look for another job; did not obtain another job; did not report his efforts to find a job; and signed a contract in violation of the Release Agreement by contractually prohibiting himself from meeting his affirmative duty of mitigation, including his duty to seek other employment. *See generally id.* ¶¶ 80-90. As a result, the Foundation notified him in January 2019 that he had breached the Release Agreement and the Foundation therefore would cease all future payments. *Id.* ¶ 97. Despite failing to fulfill his contractual obligations, Bielema now brings a lawsuit that must be dismissed as a matter of law.

LAW & ARGUMENT

I. THE FORUM SELECTION CLAUSE REQUIRES THAT THE DISPUTE BE RESOLVED IN WASHINGTON COUNTY CIRCUIT COURT

A. Legal Standard

As a threshold matter, it is an open question as to whether federal or state law applies when determining the enforceability of the forum selection clause at issue. The Eighth Circuit has not

taken a definitive position on the issue but has expressed its inclination to find that federal law governs the issue in diversity cases. See *Rainforest Cafe, Inc. v. EklecCo, L.L.C.*, 340 F.3d 544, 546 (8th Cir. 2003); *Fountain v. Oasis Legal Fin., LLC*, 86 F. Supp. 3d 1037, 1044 (D. Minn. 2015) (explaining that neither Supreme Court nor Eighth Circuit has decided whether state or federal law governs enforceability of forum selection clause and applying federal law to *forum non conveniens* analysis). Regardless of whether the court applies federal or state law, the result will be the same. See *Bright Harvest Sweet Potato Co. v. H.J. Heinz Co., L.P.*, No. 2:12-CV-02155-PKH, 2013 WL 2458685, at *2 (W.D. Ark. June 6, 2013) (Holmes, J.) (applying federal law in determining enforceability of forum selection clause and explaining that “the result would be the same” under either federal or state law). Thus, for purposes of this motion, Defendant will apply federal law.

Likewise, the standard by which to enforce a forum selection clause also is unsettled. The Supreme Court has instructed that “the appropriate way to enforce a forum-selection clause pointing to a state . . . forum is through the doctrine of *forum non conveniens*.” *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 571 U.S. 49, 60 (2013). In *Atlantic Marine*, the Supreme Court explained that courts should evaluate a forum selection clause designating a state forum using a modified section 1404(a) analysis. *Id.* at 61, 63-65. The *Atlantic Marine* court left open the possibility of enforcing a forum selection clause through a Rule 12(b)(6) motion (*id.* at 61); however, the propriety of enforcing a forum selection clause under Rule 12(b)(6) is unclear in the Eighth Circuit. See *In re Union Elec. Co.*, 787 F.3d 903, 907 (8th Cir. 2015) (recognizing that viability of Rule 12(b)(6) as enforcement mechanism for forum selection clause is open question). For purposes of this motion, the Foundation applies the modified section 1404(a) analysis based on the Supreme Court’s instruction in *Atlantic Marine* and this Court’s holding in

Northport dismissing on *forum non conveniens* grounds. See *Northport Health Servs. of Arkansas, LLC v. Ellis*, No. 2:20-CV-02021, 2020 WL 1846531 (W.D. Ark. Apr. 10, 2020). However, under either standard, the forum selection clause requires dismissal.⁵

Under the modified section 1404(a) analysis set forth in *Atlantic Marine*, “a valid forum-selection clause should be given controlling weight in all but the most exceptional cases[,]” and “[o]nly under extraordinary circumstances unrelated to the convenience of the parties should a § 1404(a) motion be denied.” *Atl. Marine*, 571 U.S. at 62-63. Plaintiff’s current choice of forum in federal court is entitled to “no weight.” *Id.* at 63. Instead, Bielema “bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted.” *Id.* Further, all of the private-interest factors are deemed to weigh in favor of dismissal. *Id.* at 64. As a result, the court may consider only the public-interest factors and “those factors will rarely defeat a transfer motion[.]” *Id.* Public-interest factors include “the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; and the interest in having the trial of a diversity case in a forum that is at home with the law.” *Id.* at 62 n.6. Because the forum selection clause at issue requires dismissal to an Arkansas state court, not a court far removed, the public interest factors weigh in favor of dismissal. Because the parties contracted for a forum that can afford complete relief to the parties on all claims and issues, the case should be dismissed under the doctrine of *forum non conveniens*.

⁵ Plaintiff attaches the mandatory forum selection clause to the Complaint. See Compl. Ex. 5. Dismissal under Rule 12(b)(6) therefore also would be appropriate. See *ABF Freight Sys., Inc. v. Int’l Bhd. of Teamsters*, 728 F.3d 853, 861 (8th Cir. 2013) (“If an affirmative defense is apparent on the face of the complaint that defense can provide the basis for dismissal under Rule 12(b)(6).” (alterations omitted)).

B. The Forum Selection Clause Requires That This Dispute Be Resolved in Washington County Circuit Court

The forum selection clause at issue provides: “Washington County, Arkansas, shall be the exclusive venue for any action arising under or relating to this Agreement.” Compl. Ex. 5, § 6. The question before the Court is a narrow one—whether a forum selection clause that designates a particular county without using the words “in” or “of” requires a state court to hear the dispute or allows either a federal or state court to hear the dispute. Although the Eighth Circuit has not addressed the issue, under this Court’s recent decision in *Northport*, which is in line with the majority of other courts that have addressed the matter, the forum selection clause requires that this dispute be heard in state court.

i. The Forum Selection Clause Is Mandatory and Enforceable

The forum selection clause at issue is mandatory, valid, and enforceable, and therefore requires that the case be dismissed. First, the forum provision is mandatory because it contains the phrase “exclusive venue.” See *Bright Harvest Sweet Potato Co.*, 2013 WL 2458685, at *3 (Holmes, J.) (explaining that word “exclusive” makes clear that a forum selection clause is mandatory); see also *Dunne v. Libbra*, 330 F.3d 1062, 1064 (8th Cir. 2003) (explaining that mandatory forum selection clauses employ terms such as “exclusive”). Additionally, the forum selection clause is valid and enforceable. The United States Supreme Court has held that forum selection clauses in contracts “are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances.” *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972); see also *Nelms v. Morgan Portable Bldg. Corp.*, 305 Ark. 284, 289, 808 S.W.2d 314, 316 (1991) (applying *Bremen* standard). Here, the provision is the result of an arm’s length negotiation, and Bielema does not dispute that the

provision is valid and enforceable. In fact, he relies on the forum selection clause in his Complaint, albeit to reach the wrong conclusion. Compl. ¶ 6. Therefore, the forum clause is binding.

ii. The Forum Selection Clause Exclusively Designates Washington County Circuit Court as the Chosen Forum

This Court analyzed a very similar forum selection clause in *Northport Health Servs. of Arkansas, LLC v. Ellis*, 2020 WL 1846531 (W.D. Ark. Apr. 10, 2020). There, the court was asked to interpret the following forum selection clause: “Sebastian County, Arkansas shall be the sole and exclusive venue for any Dispute, special proceeding, or any other proceeding between the parties that may arise out of, in connection with, or by reason of this Agreement.” *Id.* at *2. Like the clause in this case, the clause in *Northport* did not include the words “in” or “of” which dictate the holdings in many other cases. *Id.* at *3. As a result, the court looked to parole evidence and determined that the clause “consign[ed]” the matter to Arkansas state court. *Id.* at *4. Specifically, the court held that “the doctrine of *forum non conveniens* requires dismissal of this action so that the state courts of Arkansas can hear Plaintiffs’ petition to compel arbitration, as the parties have agreed.” *Id.*

The *Northport* decision is supported by the weight of cases that have addressed the issue and found that forum selection clauses that designate a particular county without using the words “in” or “of” require that state courts resolve the disputes. For example, in *Switch, Ltd v. GEI Consultants, Inc.*, No. 219CV00371MMDDJA, 2019 WL 4803222, at *1 (D. Nev. Oct. 1, 2019), the court held that a provision stating “Clark County, Nevada, shall be the exclusive venue and jurisdiction for any dispute arising out of or related to this Agreement” . . . “require[d] this case be litigated in state court.” In *Robrinzine v. Big Lots Stores, Inc.*, No. 15-CV-7239, 2016 WL 3459733, at *6 (N.D. Ill. June 24, 2016), the court held that a provision stating “Franklin County Ohio shall be designated as the venue for the resolution of any claim arising hereunder” . . .

“designate[d] an Ohio state court forum.” In *Tri-Lakes Petroleum Co., LLC v. Brooks*, No. 14-CV-0005-CVE-FHM, 2014 WL 1789391, at *1 (N.D. Okla. May 5, 2014), the court held that a provision stating “the proper venue shall be Taney County, Missouri” required only a state court to hear the dispute.

Additionally, numerous other courts, including at least two circuit courts, have found that forum selection clauses that designate a particular county (regardless of whether they employ the terms “in” or “of”) commit the dispute to state court. For instance, in *Excell, Inc. v. Sterling Boiler & Mech., Inc.*, 106 F.3d 318, 320 (10th Cir. 1997), the Tenth Circuit interpreted a forum selection clause providing, “Jurisdiction shall be in the State of Colorado, and venue shall lie in the County of El Paso, Colorado.” Plaintiff filed suit in state court, and Defendant removed to federal court. The Tenth Circuit affirmed the district court’s remand of the case back to state court, finding that the clause unambiguously designated venue in Colorado state court. *Id.* at 321. The court explained, “For federal court purposes, venue is not stated in terms of ‘counties.’ Rather, it is stated in terms of ‘judicial districts.’ Because the language of the clause refers only to a specific county and not to a specific judicial district, we conclude venue is intended to lie only in state district court.” *Id.* at 321. That court rejected the argument that the clause was ambiguous and could be interpreted to allow venue in both state court and in federal district court, which also was located in El Paso County. *Id.* at 320.

Similarly, in *Docksider, Ltd. v. Sea Tech., Ltd.*, 875 F.2d 762, 763 (9th Cir. 1989), the Ninth Circuit affirmed the dismissal of a case based on the forum selection clause that stated: “Venue of any action brought hereunder shall be deemed to be in Gloucester County, Virginia.” The court held that “the venue provision of the forum selection clause . . . clearly designates the state court in Gloucester County, Virginia, as the exclusive forum.” *Id.* at 764.

As another example, in *Hot Shot Servs., Inc. v. Nanney*, the court interpreted a forum selection clause stating: “Any arbitration action, suit, or other legal [proceeding] arising out of this Agreement will be brought in Bernalillo County, New Mexico” and held that the provision unambiguously required “suits should be brought exclusively in state court.” 2010 WL 11493293, at *4 (D.N.M. Apr. 23, 2010). There, the court reasoned that “federal court venue is stated in terms of judicial districts rather than counties.” *Id.* Particularly relevant to the instant case, the court in *Nanney* found that the provision required dismissal to state court even though a federal courthouse was located in Bernalillo County.

It is also true that there is a federal district courthouse in Bernalillo County, New Mexico—specifically, in Albuquerque. But a party who files suit in the Albuquerque federal courthouse is not guaranteed that his case will be assigned to a judge in Albuquerque; the case may be assigned to a judge in Las Cruces or Santa Fe—neither of which is located in Bernalillo County. By agreeing that any suit must be brought only in Bernalillo County, the parties were effectively limiting themselves to New Mexico state court.

Id. at *4.

Likewise, here, the forum selection clause calls for disputes to be exclusively resolved in Washington County, but the case was assigned to this court which sits in Sebastian County. The very facts of this case demonstrate that the language of the provision will not be given effect unless the case is heard by the Washington County Circuit Court. As the court in *Nanney* explained, if the parties had intended to permit suit in federal court, they easily could have specified that actions may be brought in the Western District of Arkansas or Washington County Circuit Court, but they did not do so. *See id.*

The Foundation does not dispute that there is a split of authority with respect to forum clauses that require suits to be filed in a particular county without reference to either state or federal court. Bielema likely will point to cases that hold that forum selection clauses that designate a

particular county allow either a federal or state court to hear the dispute. Importantly, however, the forum selection clauses in those cases contain the key word “in,” which is technically meaningful and distinguishable from this case. *See, e.g., Simonoff v. Expedia, Inc.*, 643 F.3d 1202, 1206 (9th Cir. 2011) (“exclusive jurisdiction and venue ... [in] the courts in King County”); *Alliance Health Grp., LLC v. Bridging Health Options, LLC*, 553 F.3d 397, 399 (5th Cir. 2008) (“exclusive venue for any litigation related hereto shall occur in Harrison County, Mississippi”); *Hodnett v. Heartland Res., Inc.*, No. CIV. 07-2092, 2007 WL 3500053 at *1, *4 n.5 (W.D. Ark. Nov. 14, 2007) (“venue and jurisdiction . . . shall also be in Warren County, Commonwealth of Kentucky”).

This court has recognized the “of/in distinction,” noting that when venue lies in “courts of” a particular county, courts have found that the provision imposes a jurisdictional limitation, but where venue lies in the “courts in” a particular county, courts have found that the provision imposes a geographical limitation. *Northport Health Servs.*, 2020 WL 1846531, at *2. Here, the forum selection provision does not contain the “in” or “of” language, so these cases are not instructive.

Because the forum selection clause in this case designates venue in a particular county without using the words “in” or “of,” the provision requires that Washington County Circuit Court resolve the dispute.

C. Should the Court Determine that the Forum Selection Clause Is Ambiguous, Extrinsic Evidence Shows that the Parties Intended for the Dispute To Be Heard in Washington County Circuit Court

Even if the Court determines that the forum selection clause is ambiguous, parole evidence conclusively shows that the parties intended for the dispute to be resolved in the Washington County Circuit Court.

As an initial matter, in this case the rebuttable presumption that the parties intended the interpretation favored by the non-drafter does not apply. *Compare Northport Health Servs.*, 2020 WL 1846531, at *3. Here, the parties agreed that “the rule of construction that ambiguity is construed against the drafting Party shall have no application in any dispute over the interpretation of this Agreement.” Compl. Ex. 5 § 14. Thus, the evidence should be weighed evenly. And all of the evidence shows that the parties intended for the dispute to be heard in state court.

First, the course of dealings between the parties demonstrates that they intended for any disputes between them to be heard in Washington County Circuit Court. The Foundation and Bielema had a total of three contracts between them over the course of six years. Bielema characterizes these agreements as “interrelated written contracts.” Compl. ¶ 4. Both of the other agreements contained forum selection provisions that provided: “venue for this Agreement shall lie solely with the Circuit Court of Washington County, Arkansas.” Compl. ¶ 15 & Exs. 3 & 4. Because the parties’ two prior contracts included forum selection clauses specifically designating Washington County Circuit Court, it is clear that the parties always intended for any dispute that should arise between them to be heard in Washington County Circuit Court.

Second, the Release Agreement provides that the laws of the State of Arkansas govern. Compl. Ex. 5 § 6. Arkansas law designates circuit courts by county. *See* Ark. Code Ann. §16-60-101. Federal courts, on the other hand, are organized by district. *See* 28 U.S.C. § 1391. As the Tenth Circuit explained, “For federal court purposes, venue is not stated in terms of ‘counties.’ Rather, it is stated in terms of ‘judicial districts.’” *Excell, Inc.*, 106 F.3d at 321; *see also Robrinzine*, 2016 WL 3459733, at *6. Because the language of the forum selection clause refers only to Washington County, and not to the Western District of Arkansas, the parties intended for venue to lie only in state circuit court.

Third, as this court explained in *Northport*, interpreting the forum selection clause as imposing a jurisdictional limitation allows the word “exclusive” in the forum selection clause to take its “plain and ordinary meaning as [a] word[] that decrease[s], rather than increase[s], the different fora available for dispute resolution.” 2020 WL 1846531, at *4.

Fourth, based on the facts Bielema asserts in the Complaint, the Foundation would not be subject to suit in federal court. *See infra* Section II. With this understanding, Bielema likely would not have agreed to a forum in which the Foundation would be immune from suit.

II. TAKING THE ALLEGATIONS IN THE COMPLAINT AS TRUE, THE ELEVENTH AMENDMENT TO THE U.S. CONSTITUTION BARS THIS ACTION AND THE COURT LACKS SUBJECT MATTER JURISDICTION

Bielema asserts in his Complaint that the Foundation is “so intertwined with every aspect of the University’s Athletics department that it functions as an *arm of the Athletics Department*.” Compl. ¶ 11 (emphasis added). Further, Bielema characterizes the Executive Director of the Foundation as taking direction from, and being pressured by, the Athletics Director such that the “pressure from the AD to have the Foundation take certain action carries more weight than external pressure from big donors.” *Id.* ¶ 15. Although the Foundation denies the truth of these allegations, the Court must treat the Complaint’s allegations as true for purposes of a motion to dismiss. For this reason, the Eleventh Amendment to the U.S. Constitution bars this lawsuit, and the Court lacks subject matter jurisdiction over this action. *See Carlsen v. GameStop, Inc.*, 833 F.3d 903, 908 (8th Cir. 2016) (“In a facial attack, the court restricts itself to the face of the pleadings, and the non-moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6).”).

On the face of the Complaint, Bielema fails to assert federal subject matter jurisdiction. The Complaint asserts claims solely under Arkansas law. Compl. ¶¶ 139-153. He makes no

federal law claim and instead asserts jurisdiction is proper under diversity of citizenship. *Id.* ¶ 3. Federal courts have original jurisdiction over disputes if the amount in controversy exceeds \$75,000 and is between citizens of different states. 28 U.S.C. § 1332(a). It is well established that a state is not a citizen for purposes of diversity jurisdiction. *See Pub. Sch. Ret. Sys. of Missouri v. State St. Bank & Tr. Co.*, 640 F.3d 821, 826 (8th Cir. 2011). The same is true if the party is “an ‘alter ego’ or ‘arm’ of a State[.]” *Id.* (citing *Moor v. Cnty. of Alameda*, 411 U.S. 693, 717 (1973)). Because Bielema expressly alleges that the Foundation is an “arm of the Athletic Department,” the Foundation is not a “citizen” for diversity jurisdiction purposes. Compl. ¶ 11; *see also Tarasenko v. Univ. of Arkansas*, 63 F. Supp. 3d 910, 921 (E.D. Ark. 2014) (“It is well settled that the University of Arkansas is the State of Arkansas for purposes of the Eleventh Amendment and therefore is immune from suit.”). As a result, diversity of citizenship does not exist, and the Court lacks subject matter jurisdiction over this dispute.⁶

Even if diversity jurisdiction were proper, the Eleventh Amendment to the United States Constitution bars Bielema’s claims against the Foundation. It is axiomatic that the Eleventh Amendment bars private parties from bringing actions for damages against states in federal courts. *See Thomas v. St. Louis Bd. of Police Comm'rs*, 447 F.3d 1082, 1084 (8th Cir. 2006). “Eleventh Amendment immunity extends to . . . arms of the state[.]” *Id.* (quotation marks omitted). As set forth above, because Bielema specifically alleges that the Foundation is an arm of the state, it is immune from suit under the Eleventh Amendment. *See Hill v. Arkansas Dep't of Human Servs.*,

⁶ Bielema’s counsel previously filed another lawsuit in federal court on behalf of former Ole Miss football coach Houston Nutt, which contained the same jurisdictional flaw. *See Houston Dale Nutt, Jr. v. Ole Miss Athletics Foundation et al.*, Case No. 3:17-cv-130-NBB-RP (N.D. Miss., Aug. 9, 2017) (Doc. No. 22) (granting motion to dismiss for lack of subject matter jurisdiction because “the issues are not between ‘citizens of different states’”).

No. 4:16-CV-00872 BSM, 2017 WL 2221701, at *3 (E.D. Ark. May 19, 2017) (affirming dismissal under Rule 12(b)(1) based on Eleventh Amendment immunity); *see also Souto v. Fla. Int'l Univ. Found., Inc.*, No. 19-21935-CIV, 2020 WL 1036537 (S.D. Fla. Mar. 3, 2020) (holding University Foundation was arm of the state for purposes of Eleventh Amendment and therefore immune from suit).

Bielema cannot have it both ways. He cannot argue that the Foundation is an arm of the State subject to certain obligations and also seek to sue the Foundation in federal court. Because Bielema contends that the Foundation is an arm of the State, he cannot claim that the Foundation is subject to suit in federal court. Accordingly, the case must be dismissed as a matter of law.

CONCLUSION

As set forth above, the forum selection clause in the parties' contract requires that this dispute be resolved in Washington County Circuit Court. Therefore, the Court should dismiss the Complaint under the doctrine of *forum non conveniens*, or alternatively under Fed. R. Civ. P. 12(b)(6). Additionally, as alleged in the Complaint, the Foundation is an arm of the State and is immune from suit. Therefore, the Court should dismiss the Complaint under Fed. R. Civ. P. 12(b)(1) and the Eleventh Amendment. For these reasons, The Razorback Foundation, Inc., hereby requests that Plaintiff's Complaint be dismissed with prejudice and that the Court grant it any other relief to which it is entitled, including, but not limited to, attorneys' fees and costs incurred for this motion.

Respectfully submitted,

Marshall S. Ney, AR91108
Robert W. George AR98134
Katherine C. Campbell, AR2013241
Blake Z. Brizzolara AR2017229
FRIDAY, ELDREDGE & CLARK, LLP
3350 S. Pinnacle Hills Parkway, Suite 301
Rogers, AR 72758
Office: (479) 695-6049
Facsimile: (501) 244-5389
mney@fridayfirm.com

By: /s/ Marshall S. Ney
Marshall S. Ney, AR Bar 91108

CERTIFICATE OF SERVICE

I, Marshall S. Ney, do hereby certify that the foregoing is being electronically filed with the Court and that the below listed persons will receive a copy of the foregoing via the Court's electronic notification system (ECF), on or about this 26th day of June, 2020:

Thomas A. Mars
tom@mars-law.com

R. Craig Wood
cwood@mcguirewoods.com

Benjamin P. Abel
babel@mcguirewoods.com

John C. Everett
john@everettfirm.com

John E. Tull, III
jtull@qgtlaw.com

Ryan K. Culpepper
ryan@theculpepperfirm.com

/s/ Marshall S. Ney

Marshall S. Ney