

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

BRET A. BIELEMA

PLAINTIFF

v.

Case No. 5:20-cv-05104-PKH

THE RAZORBACK FOUNDATION, INC.

DEFENDANT

COMPLAINT

Through the undersigned counsel, the plaintiff, Bret Bielema, brings this action for Breach of Contract and False Light Invasion of Privacy against the defendant, The Razorback Foundation, Inc., and alleges:

JURISDICTION

1. Bret A. Bielema (“Coach Bielema”) is a citizen and resident of Norfolk County, Massachusetts.
2. The Razorback Foundation, Inc. (“the Foundation”) is an Arkansas non-profit corporation. The Foundation’s principal place of business is in Fayetteville, Washington County, Arkansas.
3. There is “diversity of citizenship” between the plaintiff and the defendant, and the amount in controversy exceeds \$75,000. Therefore, the Court has subject-matter jurisdiction of this dispute pursuant to 28 U.S.C. § 1332.

VENUE

4. This action is based on the Foundation’s breach of a “Release and Waiver Agreement” entered into between the parties on January 30, 2018 in Washington County, Arkansas. As further explained below, the “Release and Waiver Agreement” is one of five interrelated written contracts that Coach Bielema entered into as the head football coach, and then former head coach, of the Arkansas Razorbacks.
5. Coach Bielema and the Board of Trustees of the University of Arkansas (“the University”) were parties to two of those contracts, Coach Bielema’s Employment Agreement, *Exhibit 1*, and the First Amendment to Employment Agreement, *Exhibit 2*. Coach Bielema and the Foundation were parties to the other three contracts, a 2012 Personal Services and Guaranty Agreement, *Exhibit 3*, a 2015 Personal Services and Guaranty Agreement, *Exhibit 4*, and a Release and Waiver Agreement, *Exhibit 5*. These five interrelated contracts are attached to this Complaint and are incorporated herein by reference. In collegiate sports, the Personal Services and Guaranty Agreements and the Release and Waiver Agreement would commonly be referred to as “buyout agreements.” For the sake of clarity, the 2012 Personal Services and Guaranty Agreement will be referred to as the “2012 Buyout Agreement,” the 2015 Personal Services and Guaranty Agreement will be referred to as the “2015 Buyout Agreement,” and the Release and Waiver Agreement will be referred to as the “Final Buyout Agreement.”
6. The 2012 and 2015 Buyout Agreements included a forum selection clause that provided venue would lie “solely with the *Circuit Court of Washington County, Arkansas*.” *Exhibit 3*, at 5–6 ¶ 15; *Exhibit 4*, at 5 ¶ 15 (emphasis added). Instead of referring to a particular state or federal court, the forum selection clause in the Final Buyout Agreement is only a

geographical restriction on where the parties may file a lawsuit to enforce its terms: “*Washington County, Arkansas*, shall be the exclusive venue for any action arising under or relating to the Agreement.” *Exhibit 5*, at 6 ¶ 6 (emphasis added). As such, pursuant to 28 U.S.C. § 1391 and the precedent established by Judge Holmes’s opinion in *Northport Health Services of Ark., LLC v. Ellis*,¹ the Fayetteville Division of this Court is a proper venue for this action.

PARTIES

Coach Bielema

7. Coach Bielema is currently the “Outside Linebackers Coach and Senior Assistant” for the New York Giants (“Giants”), a professional sports organization that is part of the National Football League (“NFL”). Before joining the Giants earlier this year, Coach Bielema worked for the New England Patriots (“Patriots”), another professional sports organization that is part of the NFL. Coach Bielema’s tenure with the Patriots involved three consecutive contracts that progressively increased his responsibilities and compensation – the last of which involved a promotion from “Special Assistant to the Head Coach” to “Defensive Line Coach.” Contrary to published media reports based on anonymous sources associated with the Foundation and/or the Razorbacks Athletic Department (“Athletic Department”), Coach Bielema was never a “volunteer” for the Patriots. Nor did he ever perform services for the Patriots “for free.”

8. From 2012 until 2017, Coach Bielema was the University’s head football coach, ending with a 29–34 win/loss record. From 2006 until 2012, Coach Bielema was the head football

¹ No. 2:20-CV-02021, 2020 U.S. Dist. LEXIS 62901 (W.D. Ark. Apr. 10, 2020).

coach for the University of Wisconsin (“Wisconsin”), where he achieved three consecutive conference titles and a 68–24 win/loss record.

9. Like virtually every other NCAA Division I (“DI”) head football coach, Coach Bielema is assisted by a sports agent in all his dealings with universities and their fundraising affiliates. At all times relevant to the allegations in this Complaint, Coach Bielema was represented by Neil Cornrich, President and owner of *NC Sports, LLC*. Mr. Cornrich has been a leader in the field of sports management for over 25 years. In 2013, *Sports Illustrated* ranked Cornrich among the 15 most influential agents in sports and called him “arguably the leading agent of football coaches, both professional and collegiate.” A graduate of The University of Michigan and a licensed attorney, Mr. Cornrich lectures on a variety of sports management topics throughout the country. He frequently serves as an expert in his field, appearing in the national media from *Sports Illustrated* and *USA Today* to *ESPN* and *CNN*, and speaking at colleges and universities such as Harvard Law School.

The Razorback Foundation

10. According to the records of the Arkansas Secretary of State, the Foundation was formed as a domestic non-profit corporation on October 17, 1980. The Foundation’s website identifies its mission “to support the athletic endeavors of the University of Arkansas Razorbacks,” ostensibly one of a handful of DI Athletic Departments “that is financially self-sustaining and requires no UA student fees revenue or taxpayer support.”
11. The mission of the Foundation is to support the athletic endeavors of the University of Arkansas Razorbacks (“Razorbacks”). The Foundation is so intertwined with every aspect of the University’s Athletics Department that it functions as an arm of the Athletics Department.

12. Scott Varady, a well-liked member of the Arkansas Bar, is the Executive Director and General Counsel of the Foundation. Mr. Varady was named Executive Director and General Counsel of the Foundation on or about October 6, 2015. Before his appointment, Mr. Varady spent nineteen years with the University of Arkansas' Office of the General. The Secretary of State's records reflect that Mr. Varady (hereinafter "Executive Director") is one of fourteen Arkansans who serve as officers and/or directors of the Foundation's Board of Directors.
13. In-depth knowledge about the intricacies of coaching contracts is not a prerequisite to being named Executive Director of the Foundation or being elected to its Board. Nor does anyone expect the Executive Director and Board members to be familiar with the career progression of college football coaches, standard accepted paths for assistant coaches to advance to head coach positions, standard accepted practices used by displaced head football coaches to transition from one head coach position to another, or the extraordinary challenges facing a head coach at the highest level of college football who has been fired for not winning enough games. Likewise, nobody expects the Executive Director and Board members to know anything about the average compensation paid to assistant coaches or administrative staff members for NFL head coaches: Those compensation arrangements are considered confidential, and the accuracy of published reports about average compensation for those positions is not easily verified.
14. As a practical matter, it is far more important to the success of the Foundation that its Board members have extensive backgrounds in business, be financially sophisticated and well connected, and have the ability to understand and analyze complex financial statements. In short, Board members are there to make sure the Foundation is in healthy financial

condition, that donations are in line with projections, and that the Foundation can afford its financial commitments to third parties. Whenever there is any doubt about all of these objectives being met, the Board faces significant external pressure, and sometimes criticism, from the Razorbacks' biggest donors to do whatever needs to be done to "right the ship."

15. On occasion, the Executive Director and the Board will also receive and respond to internal pressure from the Athletics Director ("AD") to take certain actions. Given that the Executive Director works closely with the AD, travels with the AD during the off-season, and is otherwise in frequent contact with him, pressure from the AD to have the Foundation take certain action carries more weight than external pressure from big donors.
16. The Foundation works hand-in-hand with the University's Athletics Department leadership to ensure that revenues from donations keep pace with or exceed the increase in spending on Razorback athletics. According to a report published by the Knight Commission, total spending on athletics just by schools in the Southeastern Conference ("SEC") exceeded \$1.7 billion in 2018. The same report reflected that compensation paid to SEC coaches in 2018 accounted for 18% of that amount, totaling more than \$320 million.
17. With respect to the Razorbacks, the Knight Commission observed that, between 2013 and 2018, the University's total expenses on athletics increased 38% while revenues increased by only 30%. Consistent with that observation, in May 2019, the *Arkansas Democrat-Gazette* reported that, during the twenty-four months from June 30, 2016 to June 30, 2018, the Foundation suffered a *\$20 million decrease* in annual revenues (from \$48.9 million to \$28.1 million) – a staggering decline by any measure. Razorback Foundation Sees Drop in Donations, *Arkansas Democrat-Gazette* (May 29, 2019). The Foundation's most recent publicly available financial report (IRS Form 990) reflects annual revenues increased by

only \$3 million during the last reporting period – adding back just a small percentage of the \$20 million revenue decline that began in 2016. The Foundation’s most recent Form 990 included an adjustment to its balance sheet of \$7.07 million that referenced a “change in guaranty payment” (to Coach Bielema, the Foundation has since confirmed). By removing this liability from the Foundation’s balance sheet, the Foundation was able to avoid reporting a year-to-year decline in the Foundation’s total net worth, which would have raised even more questions from journalists. The Foundation’s concern about its financial health and the appearance of its publicly available Form 990 provided a strong incentive to breach the terms of the Final Buyout Agreement on the premise that Coach Bielema would have no appetite for litigation and would eventually decide to settle for pennies on the dollar.

NATURE OF DISPUTE

18. This civil action, and Coach Bielema’s request for an award of compensatory and punitive damages, arises from the Foundation’s calculated, bad faith efforts to renege on its contractual obligations to Coach Bielema without cause by actively pursuing a strategy that involved: (a) declaring without any basis in law or fact that Coach Bielema was in breach of contract as a pretext to stop making monthly payments required by the terms of the Final Buyout Agreement; (b) embellishing and distorting key facts which could have easily been established through the exercise of due diligence; (c) surreptitiously providing false and misleading information to a sports journalist that portrayed Coach Bielema in a false light and lessened his chances of being selected to fill a head coach position in the months that followed; (d) consciously disregarding that Coach Bielema has followed standard, established practices of collegiate head football coaches who are fired without cause and are obliged by the terms of a buyout agreement to seek new employment; and (e) turning a

blind eye to other admissible evidence that is completely contrary to the Foundation's assertion that it "has no further payment obligation to Bret Bielema."³

FACTUAL BACKGROUND

Coach Bielema's Employment Agreement and the 2015 and Final Buyout Agreements

19. On August 20, 2013, the University and Coach Bielema entered into a 44-page Employment Agreement that was retroactively effective on December 4, 2012. *Exhibit 1*. This is the first of the five interrelated contracts referenced hereinabove. The Employment Agreement included what were then, and still are, standard components of compensation for Power Five head football coaches, *i.e.*, base salary, incentive bonuses, use of loaned automobiles, tickets to games, health insurance, outside income from media appearances and summer football camps, etc. Coach Bielema's Employment Agreement described his buyout compensation with reference to using a formula:

"The total amount of the Total Guaranty Payment owed to Coach as of the effective date of the termination shall be determined by the following formula: The numerator shall be the full amount of the Guaranty Payment identified in the foregoing chart depending upon the year of termination and shall be divided by the denominator, which shall be the total number of months of the Term of the Employment Agreement (with any partial months being pro-rated), to yield the "Monthly Value of the Total Guaranty Payment." The Monthly Value of the Total Guaranty Payment shall then be multiplied by the number of months remaining on the Term (with any partial months being prorated) as of the effective date of the termination to yield the "Total Guaranty Payment." The Total Guaranty Payment shall be paid to Coach in equal monthly installments on the last calendar day of each month (with any partial months being pro-rated) as determined from the effective date of the termination for convenience through the remaining balance of the Term. Notwithstanding any other term or condition in this Agreement, Coach *shall have an affirmative duty of mitigation to diligently seek and accept other employment in the event this Employment Agreement is terminated for convenience* as well as an obligation to comply

³ \$1M gifts roll in for UA athletics, *Arkansas Democrat-Gazette* (June 7, 2020).

with any mitigation and/or other conditions set forth in the Guaranty Agreement. . . .

* * * * *

<u>YEAR</u>	<u>AMOUNT</u>
First Contract Year (12/04/12-12/31/13)	\$12,800,000.00
Second Contract Year (1/1/14-12/31/14)	\$12,800,000.00
Third Contract Year (1/1/15-12/31/15)	\$12,800,000.00
Fourth Contract Year (1/1/16-12/31/16)	\$9,600,000.00
Fifth Contract Year (1/1/17-12/31/17)	\$6,400,000.00
Sixth Contract Year (1/1/18-12/31/18)	\$3,200,000.00

* * * * *

Further, Coach covenants and agrees that, in the event the University exercises its right to terminate this Agreement for convenience at any time, Coach will accept the guaranty of the Razorback Foundation, for the amounts set forth below, as provided in the Personal Services and Guaranty Agreement ('Guaranty Agreement') and any amendments thereto as entered into between Coach and the Razorback Foundation or other financially responsible third party in full and complete satisfaction of any obligations of the University."

Exhibit 1, at 24–26 ¶ 15(a) (reordered).

20. Coach Bielema's Employment Agreement also included an "offset" clause, which is shown below in italics:

"Notwithstanding any other term or condition in this Agreement, Coach shall have an affirmative duty of mitigation to diligently seek and accept other employment in the event this Employment Agreement is terminated for convenience as well as an obligation to comply with any mitigation and/or other conditions set forth in the Guaranty Agreement."

* * * * *

The parties covenant and agree that the Total Guaranty Payment paid to Coach paid by the University's third-party guarantor shall be offset and reduced on a monthly basis by the gross compensation *earned by Coach personally or*

through business entities owned or controlled by Coach from employment as a head or assistant coach or as an administrator either at a college or university or with a professional sports organization (collectively referred to hereafter as a ‘Coaching Position’).⁵

21. On October 23, 2013, Coach Bielema and the Foundation signed a closely related contract referenced in the original Employment Agreement as a third-party guaranty of the University’s buyout obligations. This contract is referred to herein as the 2012 Buyout Agreement and was intended to replace the buyout compensation language in the Employment Agreement, thus obligating the Foundation to pay the applicable amount listed on the above chart and relieving the University of this obligation. The 2012 Buyout Agreement was retroactively effective as of December 4, 2012, which was also the effective date of the Employment Agreement.
22. Consistent with standard practices, on February 6, 2015, after two winning football seasons, the University and Coach Bielema entered into a First Amendment of the Employment Agreement, which extended the term of his head coach contract by two years (until December 31, 2020). The amended employment agreement also increased Coach Bielema’s annual salary from \$2,950,000 to \$3,250,000, with annual increases thereafter of \$100,000. Furthermore, the amendment replaced the buyout compensation chart in the initial Employment Agreement with a new, more generous buyout compensation chart. For the next three years, the new chart added \$2.6 million to Coach Bielema’s buyout compensation, increasing it from \$12.8 million to \$15.4 million:

⁵ *Id.* at 28 ¶ 15(b) (reordered) (emphasis added). The phrase “college, university or professional sports organization” also appears in the section of the Employment Agreement that addresses Coach Bielema’s obligation to pay the University if he terminated the contract to accept another head coach position. *Id.* at 30 ¶ 16(a) (emphasis added).

<u>YEAR</u>	<u>AMOUNT</u>
Feb. 6, 2015 through Dec. 31, 2015	\$15,400,000.00
Jan. 1, 2016 through Dec. 31, 2016	\$15,400,000.00
Jan. 1, 2017 through Dec. 31, 2017	\$15,400,000.00
Jan. 1, 2018 through Dec. 31, 2018	\$11,700,000.00
Jan. 1, 2019 through Dec. 31, 2019	\$7,900,000.00
Jan. 1, 2020 through Dec. 31, 2020	\$4,000,000.00

23. On the same day the Amended Employment Agreement was signed by the University and Coach Bielema (February 5, 2015), the Foundation and Coach Bielema signed the 2015 Buyout Agreement, which was identical to the 2012 Buyout Agreement in all material respects and was intended to replace that agreement.
24. Like the initial Employment Agreement, the 2015 Buyout Agreement contained an “offset” clause regarding Coach Bielema’s obligation to seek new employment if he was terminated “for convenience.” However, the “offset” clause in both the 2012 and 2015 Buyout Agreements was worded differently than the “offset” clause in Coach Bielema’s Employment Agreement. In reference to the Foundation’s right of “offset” against any future income Coach Bielema might earn during the buyout period, the wording in the 2012 and 2015 Buyout Agreements was as follows:

“Bielema shall have the duty to mitigate his damages *by making reasonable efforts to gain re-employment*. The parties understand and agree that if Bielema is successful in gaining such re-employment, or alternative employment of any kind the Foundation’s Guaranty Payment obligations shall be reduced by the amount of compensation Coach earns from such employment (so long as such employment coincides with the Guaranty Payments).”

Exhibit 3 and 4 (emphasis added).

25. The 2015 Buyout Agreement included the new buyout compensation chart that was included in the First Amendment to the Employment Agreement. Notably, however, neither the 2012 nor the 2015 Buyout Agreement included the buyout-reducing formula that was part of the

initial Employment Agreement. The application of that formula would have reduced the total amount shown on the buyout compensation chart by dividing that amount by “the total number of months of the Term of the Employment Agreement,” multiplying that sum by the number of months that had elapsed in the term and then subtracting that product from the chart amount. Since there was no buyout-reducing formula in either the 2012 or 2015 Buyout Agreements, when Coach Bielema and the Executive Director of the Foundation signed the 2015 Buyout Agreement, Coach Bielema had every reason to believe the Foundation would be obligated to pay him \$15.4 million if he was terminated “for convenience” on or before December 31, 2017.

26. It has yet to be determined whether the buyout-reducing formula was omitted from the 2012 and 2015 Buyout Agreements intentionally or the result of negligence by whoever drafted and approved those two contracts on behalf of the Foundation. Either way, almost three years later it became publicly known that someone acting on behalf of the Foundation or the University had dropped the ball. The actions the Foundation took in an effort to recover from that fumble, including its decision to stop paying Coach Bielema, can all be traced back to the omission of the formula in the 2012 and 2015 Buyout Agreements.

Coach Bielema is Fired While Leaving the Field after a Loss to Missouri

27. The Razorbacks’ last couple of seasons under Coach Bielema did not go as well as the first two. When Coach Bielema’s fifth season at Arkansas wasn’t showing enough improvement, the Razorback fan base, the Athletics Department’s biggest donors, and certain local sports journalists started calling for his head – a Razorback tradition that would be repeated much sooner than anyone imagined at that time.

28. In mid-November 2017, the University fired AD Jeff Long, setting the stage for Coach Bielema to be fired as well. A few days later, *Whole Hog Sports* reported the amount of buyout compensation the Foundation thought it owed Coach Bielema based on internal University documents:

“Bielema received a new contract and an \$18 million buyout after beating a bad Texas team in a lower-tiered bowl. Using documents received through an FOIA request, it has been reported the buyout is not \$15.4 million but less than \$6 million, but you can bet your grandma's cornbread dressing recipe that will be disputed if Bielema is fired.”

Long’s Firing Didn’t Just Happen Overnight, *Whole Hog Sports* (Nov. 16, 2017).

29. Following a loss to Missouri on November 24, 2017, the University’s Acting AD handed Coach Bielema a letter informing him that his employment was terminated, effective immediately. The letter made clear that Coach Bielema was being fired “for convenience.” At the same time, the University issued a press release announcing that Coach Bielema had just been fired. The firing of a DI head football coach always receives a lot of press attention. However, national sportswriters and fans were appalled by the way the University handled the situation, describing the University’s administration as “cold” and low rent.”
30. The firing of Jeff Long and Coach Bielema in November 2017 had a substantial and detrimental impact on the Foundation’s financial state. Head football coaches aren’t the only people in a collegiate Athletics Department whose contracts promise buyout compensation: Having been “terminated for convenience,” Jeff Long’s buyout agreement entitled him to receive \$4.625 million. Not long thereafter, it became apparent to the University and the Foundation leadership that the Foundation might owe Coach Bielema \$6 million more than the University and Foundation had assumed.

31. After Coach Bielema was fired, the *Arkansas Democrat-Gazette* made these observations about the absence of the buyout-reducing formula in the 2015 Buyout Agreement:

“The employment contract with the university included language saying that figure was to be plugged into a formula to determine the “total [buyout] payment,’ which equated to about \$5.9 million, the *Arkansas Democrat-Gazette* previously reported. But Bielema’s agreement with the Razorback Foundation does not mention a formula, instead saying ‘the amount specified in this paragraph shall be the total amount that will be paid.’ The nonprofit, funded by donors to support university athletics, is responsible for the final agreement with Bielema and for paying his severance.”

Bielema Buyout Terms Revealed After AG Opinion, Arkansas Democrat-Gazette (Dec. 29, 2017); *see also Bret Bielema’s Buyout Document with Arkansas Says He Gets 15.4M*, The Associated Press (Dec. 29, 2017).

32. Not long after Coach Bielema was fired, the Executive Director had a phone conversation with Mr. Cornrich (Coach Bielema’s agent) in which he informed Mr. Cornrich that the Foundation did not believe it owed Coach Bielema \$15.4 million. Without disclosing whether the omission of the buyout-reducing formula in the 2012 and 2015 Buyout Agreements was intentional or an oversight, the Executive Director told Mr. Cornrich that the “spirit” of the agreement called for the formula to be applied.⁶ Mr. Cornrich was left with the impression that the Foundation was either grasping at straws or attempting to unilaterally change the deal the Foundation and Coach Bielema had made three years earlier.
33. The Executive Director and the members of the Foundation Board knew that Coach Bielema, like any other DI head football coach who planned to coach again, would be

⁶ Among Arkansas lawyers, defending one’s interpretation of a contract by referring to the “spirit” of the agreement is regarded as a tacit admission that the contract doesn’t say what the lawyer wishes it said.

extremely hesitant to take legal action against a school he had coached for or that school's non-profit fundraising affiliate. They were right about that. Coach Bielema had no more appetite for litigation against the Razorbacks in late 2017 than he does now. For that reason, Coach Bielema took the high road and agreed to the Foundation's first settlement proposal, with no negotiation, resulting in a total buyout of \$11.935 million – roughly \$3.5 million less than he was owed under the contract.

34. The University's Board of Trustees apparently didn't share Coach Bielema's view that he had left money on the table. As reported by *ESPN* sportswriter Mark Schlabach when the \$11.935 million number became public, the new buyout compensation the Foundation had promised to pay Coach Bielema was *almost \$6 million more* than some members of the University Board of Trustees thought it should be:

Former Arkansas football coach Bret Bielema will receive an \$11.8 million buyout to pay off the final three years of his contract, a source familiar with the situation told ESPN on Friday. Some members of Arkansas' board of trustees tried to argue that it owed Bielema between \$5 million and \$6 million, and Bielema's attorney wanted a full \$15.4 million buyout, but the sides agreed on the negotiated settlement, which should be executed in the next few days, the source told ESPN.



Mark Schlabach, ESPN Senior Writer
2y ago

35. Following the announcement, it was common knowledge in the Fayetteville legal and business community that certain members of the University's leadership, as well as certain members of the Foundation's Board, were upset about the way Coach Bielema's buyout agreement had been handled.

The Ambiguous "Offset Clause" in the Final Buyout Agreement

36. The agreement between the Foundation and Coach Bielema regarding the \$11.935 million compromise was memorialized in the Final Buyout Agreement, dated January 30, 2018.

Exhibit 5. For reasons known only to the Foundation, the language used to define Coach Bielema's mitigation and offset obligations did not track any previous one. The third and final version of the "offset" clause is set forth below:

"Bielema shall have an affirmative duty of mitigation to diligently seek and to obtain other employment. Every six (6) months during the life of this Agreement, Bielema shall provide a written summary to the Foundation of his efforts to find other employment."

* * * * *

Except as expressly excluded herein, the Foundation's right to offset shall apply to *all income earned or received, whether the type of such income is athletically related or not athletically related*

* * * * *

Given Bielema's duty of mitigation and the Foundation's right to offset, *Bielema (including, but not limited to, any individual or entity acting on his behalf) agrees to use his best efforts to maximize his earning potential with any new employer(s) consistent with compensation rates for similar positions in the given industry at the time such Other Employment is obtained."*

Exhibit 5, at 4 ¶ B(i) & -(iii), 5 ¶ B(v) (reordered) (emphasis added).

37. Material terms in this provision defining Coach Bielema's obligation to seek new employment are ambiguous and undefined – "affirmative duty to mitigate," "diligently seek," "best efforts," the requirement to maximize his "earning potential" with an employer, and comparison to compensation rates for "similar positions in the given industry."
38. The Final Buyout Agreement incorporates standards and customs in the unique setting of elite college football coaching. By those standards and customs, not only do Coach Bielema's actions reflect precisely what he was expected to do, but the Foundation could never have concluded only one year into the agreement that he was not trying to mitigate.

39. The Foundation reserved the right to offset “the average annual value of all amounts required to be paid to Bielema during the term of any multi-year contracts” – including “*guaranteed payments to be paid over the life of any multi-year contract,*” Exhibit 5, at 5 (emphasis added), *i.e.*, buyout payments. The parties’ demonstrated willingness to offset the Foundation’s present payment obligation with sums that are not due for years reinforces the universal assumption in the DI college football industry that these contracts will be honored.
40. Though there are several ambiguities about how the offset amount in the Final Buyout Agreement would be calculated if Coach Bielema succeeded in entering a lucrative multi-year contract, the Foundation left itself room to claim that at least one averaged annual salary should be applied to the offset obligation even if the contract were entered in the last hours of the term of the Final Buyout Agreement. Coach Bielema’s efforts to maximize his eligibility for a multi-year contract was perfectly consistent with a good faith effort to mitigate.
41. Under Arkansas law, the interpretation of ambiguous language in a written contract may be determined by reference to any practice or method of dealing that is uniform, reasonable, and so well established in the trade as to justify an expectation that it will be observed with respect to the contract in question. Arkansas law also mandates that words or phrases associated with a particular trade or occupation be interpreted as experienced and knowledgeable members of that trade or occupation use them. Applying these rules of contract construction to the case at hand, Coach Bielema not only met – but, in fact, exceeded – his obligations under the “offset” clause in the Final Buyout Agreement.

Standard Established Practices in College Football for Displaced DI Head Coaches Seeking New Employment as a DI Head Coach

42. The NCAA Division I (“DI”) Football Bowl Subdivision (“FBS”) is the top level of college football in the United States. The FBS is the most competitive subdivision in DI, which itself consists of the largest and most competitive schools in the NCAA. As of 2018, there were 10 conferences and 130 schools in the FBS.⁷ The Football Championship Subdivision (“FCS”) is the other subdivision of DI. Head coach salaries at FSC schools are significantly lower than the salaries paid to head coaches at FBS schools. Publicly available data indicates that the average head coach annual salaries at FSC schools (less than \$300,000) pales in comparison to the average head coach salaries at FBS schools (\$2.67 million).
43. The term “Power Five” refers to five conferences whose members are part of the FBS. The “Power Five” conferences are the Atlantic Coast Conference, the Big Ten Conference, the Big 12 Conference, the Pac-12 Conference, and the Southeastern Conference (“SEC”). As a member of the SEC, the University is one of the 64 schools in the “Power Five” conferences.

The Process for Selecting a New Head Football Coach

44. Collegiate football is the only big business in the United States where nearly one-fifth of the people who occupy senior leadership positions are replaced every year. “In the BCS era, the annual turnover rate for coaches is at 17 percent.” How a College Football Program Conducts a Coaching Search, *bleacherreport.com* (Dec. 16, 2013). Generally speaking, the firing and replacement of head football coaches occurs during or shortly after the college football season. Because head coach vacancies are generally filled by coaches who leave

⁷ Wikipedia.

the same position at another school or previously held the same position at another school, the annual firing and hiring of head football coaches is commonly referred to as the “coaching carousel.”

45. The process a university goes through to hire a head football coach has been described as “detailed and evolving, confusing and mysterious, exhausting and frustrating.” How a College Football Program Conducts a Coaching Search, *bleacherreport.com* (Dec. 16, 2013). As one sportswriter recently observed: “A Division I college football . . . coaching search isn’t your normal apply for a job, interview in-person, get offered the vacancy type of situation.” Anatomy of a Coaching Search, *Toledo Blade* (May 17, 2019).
46. As a general rule, unless the head coach has a prior relationship with someone in a position of influence, candidates for head coach positions typically don’t express their interest in a position to the AD, members of the search committee, or a search firm that’s been retained by the university. The people in these roles know exactly who’s available and know which candidates have the type of experience, personality, and coaching style to be the right “fit” for their football program. As one prominent sports agent observed, the AD and other decision-makers usually “have a pretty decent list of coaches together for at least a couple of weeks before making a change.” How a College Football Program Conducts a Coaching Search, *bleacherreport.com* (Dec. 16, 2013).
47. The way a search is conducted varies from school to school based on various factors which include, among others: (a) the influence and autonomy of the AD, (b) whether the AD has a prior relationship with any of the candidates, (c) the level of influence of the school’s boosters, and (d) whether the school retains a search firm.

48. The assessment process for evaluating collegiate head coach candidates in the Power Five conferences involves the following criteria:
- a. Previous Head Coaching Experience,
 - b. Track Record of Supporting Academic Mission,
 - c. Win/Loss Record as Head Coach or Coordinator,
 - d. Strong Leadership and Role Model for Student-Athletes,
 - e. Role as Ambassador for Institution with Public Affairs/Development,
 - f. High Integrity & Character, Strong Recruiter, and
 - g. Connection to Institution, and Connection to Region where Institution is Located.⁸
49. Sixty four percent (64.29%) of Power Five ADs surveyed in 2017 ranked “High Integrity and Character” as *the most important criteria* in selecting a head football coach. *Id.*
50. The conventional wisdom among experienced sports agents is that, if your client is known to be available, it’s not wise to be pushy. As one seasoned agent has observed, “[y]ou have to be careful about aggressively overselling your clients.” An Agent Explains How a “Normal” Coaching Hire Goes Down, *Banner Society* (Aug. 15, 2019).
51. Head coach searches are conducted in secrecy to the extent possible. On occasion, an AD may attempt to create the appearance that they are seriously considering several candidates by hiring a search firm or by following certain candidates on Twitter when, in fact, the AD knew from the outset which head coach he intended to hire.

⁸ An Assessment of Hiring Practices for Head Football Coaches at the “Power 5” NCAA Division I FBS Level, Zachery S. Saunders, *Dissertation at the University of Pittsburgh* (Mar. 21, 2017).

Collegiate Head Football Coach Buyout Compensation

52. Standard practices for head football coach contracts include “buyout” compensation in the event the university decides to terminate the coach’s employment “for convenience”⁹ during the life of his multi-year contract. Buyout compensation allows the university to terminate the head coach’s employment without cause before the end of its term and to pay the former head coach an agreed upon amount of money as “liquidated damages,” which is typically paid in a lump sum followed by monthly installments. The amount of compensation head coaches in college football are entitled to under their buyout agreements can be staggering.
53. Buyout agreements usually include an “offset” clause. The purpose of an “offset” clause when a coach has been fired “for convenience” is to require the coach to seek new employment, entitling the school to reduce the amount of the coach’s total buyout with a dollar-for-dollar credit for any income the coach earns from his next employer. The general idea expressed in every “offset” clause is that the coach must make a good-faith effort to seek other employment and not go into voluntary retirement during the term of the buyout agreement. In some buyout agreements, such as the one at issue here, the “offset” credit can be applied to income not yet earned by allowing the school to recoup on an annual basis the average annual income from a multi-year contract with annual salary increases. While “offset” clauses have become standard in head coach buyout agreements, there is nothing standard about how a university defines the coach’s obligation to seek new employment. As here, the words used to describe the coach’s obligations are usually susceptible to more than one interpretation.

⁹ In a college football head coach contract, “for convenience” is a term of art that basically means “for not consistently winning enough football games as quickly as our boosters expected.”

Standard Industry Practices for Former Head Football Coaches Who are Seeking Another Head Coach Position

54. Currently employed college head coaches with winning programs are unquestionably the most attractive candidates in any college football head coach search. At the other end of the spectrum, a head football coach who was fired for not winning enough games is usually viewed by ADs and search firms as “damaged goods” until he proves otherwise. In the past twenty years, there have been very few exceptions to this general rule – no more than a dozen in total.
55. Displaced college football head coaches sometimes decide to coach in the NFL knowing that professional football coaching experience will serve them well when they return to coaching college football as a head coach. Notably, the second and third highest paid college football coaches in the country right now returned to college football after coaching in the NFL. LSU head coach Ed Orgeron is a recent example of how a tour of duty in the NFL can remove the “damaged goods” tag from a former head coach and restore his marketability as a candidate for a Power Five head coach vacancy. Shortly after being fired by Ole Miss with a buyout agreement after its first winless season in 25 years, Coach Orgeron joined the New Orleans Saints as its defensive line coach. He later worked as an assistant coach at Tennessee and USC. In what could be described as the ultimate comeback, Coach Orgeron became LSU’s head coach in 2016 and led the Tigers to win the 2020 College Football Playoff National Championship.
56. Other DI head coaches who have been fired “for convenience” with buyout agreements and want to make a comeback as a head coach have taken a step down and taken on far less significant roles, with little or no pay, before returning to a DI head coach position. A number of those former head coaches have successfully enhanced their marketability by spending

time with the head coach of another successful football program. Examples include former Houston head coach Major Applewhite (\$43,350 salary per media reports) and former Tennessee head coach Butch Jones, whose title was recently changed from “intern/analyst” to “special assistant.” (\$35,000 salary per media reports).

57. Experienced sports agents who represent head coaches have publicly explained why this standard practice satisfies the obligations of former coaches who are required to seek new employment and why their former schools don’t view this practice as a violation of the coach’s buyout agreement:

“Jones, 51, instead is apparently meeting his contractual duty to Tennessee by getting a job as an analyst at Alabama for \$35,000, leaving Tennessee on the hook. To some, it might look like Alabama and Jones have conspired to extract maximum blood from Tennessee, one of Alabama’s hated rivals. *But it generally doesn’t work that way*, said attorneys Russ Campbell and Patrick Strong of Balch Sports, a firm that negotiates coaches’ contracts. “Most coaches want to coach at the highest level possible and staying in an analyst position simply to take advantage of contractual guarantees is contrary to that innate desire,’ Campbell and Strong said in response to an inquiry from *USA Today Sports*. ‘Some fired coaches end up as analysts because that was the best position available for them at that time. *The hiring carousel is an open market, coaches don’t often get to pick and choose where they land. Sometimes it’s an analyst position, sometimes it’s a media position, while other times it’s an on-the-field coaching position.*’”

Here’s why former UC Bearcats coach Butch Jones took a job making only \$35K at Alabama, *USA Today* (Dec. 12, 2019) (emphasis added).

58. Former Tennessee head coach Butch Jones’ post-termination experience bears many similarities to Coach Bielema’s experience. Coach Jones and Coach Bielema were both fired by SEC schools “for convenience” within twelve days of each other in late 2017. Both of them made serious efforts to become candidates for the few head coach vacancies that occurred in the first quarter of 2018 and thereafter. Both of them were offered and accepted

positions in the first quarter of 2018 while they continued their efforts to become contenders for head coach positions. While Coach Bielema chose to take a position with the New England Patriots, Butch Jones took a position working for the University of Alabama (“Alabama”) where he reportedly gets paid an annual salary of only \$35,000. Notably, the language used in their buyout agreements to describe their obligation to seek new employment is almost identical. The wording used in Tennessee’s buyout agreement with Coach Jones is as follows:

“Coach Jones must ‘make reasonable *best efforts* to mitigate the University’s obligation to pay [the money owed under Coach Jones’ buyout] by making *reasonable and diligent efforts* as soon as practicable following termination to obtain another [sic] comparable employment or paid services position.’”

Tennessee/Butch Jones Buyout Agreement, § 3.1.4 (emphasis added).

59. Despite all the striking similarities between these two “fired for convenience” SEC head coaches, there are equally striking differences as well. First, when Coach Bielema started working for the Patriots in 2018 at roughly the same time Coach Jones became an “intern/analyst” at Alabama, Coach Bielema’s annual earnings that year were more than three times the amount that Coach Jones was paid. In 2019, Coach Bielema’s annual earnings were more than seven times the amount Coach Jones was paid by Alabama. This year, Coach Bielema will earn more than eleven times what Coach Jones will be paid. That said, the most striking difference between Coach Jones’ and Coach Bielema’s experience is this: *While Coach Jones continues to make a small fraction of what Coach Bielema earns while having the same obligation to seek other employment, Tennessee hasn’t manufactured a baseless claim as a pretext to stop paying Coach Jones and to recoup all of his buyout payments.*

The Statistical Likelihood of Coach Bielema Being Hired as a DI Head Coach Soon After Being Fired Was Less Than Eleven Percent (11%)

60. An in-depth review of the last two annual “coaching carousels” creates a clear picture of the almost insurmountable obstacles facing Coach Bielema or any other former DI head coach who was fired “for convenience” in 2017-18. The Foundation could have conducted such an analysis on its own but elected not to do so because it knew, or should have known, that the results would thoroughly debunk its breach of contract claim. Indeed, an analysis of the hiring of FBS head coaches from 2018 to 2020 reveals that former head coaches who were recently fired “for convenience” accounted for less than eleven percent (11%) of the former coaches who were hired to fill head coach vacancies.

2018-19 “Coaching Carousel”

61. Of the 22 FBS head coach vacancies, only three head coaches who had recently been terminated “for convenience” were hired as a head coach at another FBS school.
62. Of the three exceptions to the general rule in 2018-19, only one displaced head coach was able to secure another head coach position quickly. That coach was Kevin Sumlin, who was hired by Arizona after being terminated “for convenience” by Texas A & M. (Notably, Coach Sumlin was fired after a winning season that apparently wasn’t winning enough for TAMU’s boosters.) Sonny Dykes took Chad Morris’s job at SMU about 11 months after being terminated “for convenience” by California. Coach Dykes spent the intervening time as an Offensive Analyst for TCU. Chip Kelly was hired by UCLA less than a year after he was fired by the San Francisco 49ers. He spent the intervening time as an analyst for *ESPN*.

2019-2020 “Coaching Carousel”

63. Of the 24 FBS head coach vacancies, only two head coaches who had recently been terminated “for convenience” were hired as a head coach at another FBS school.
64. The two coaches who were exceptions to the general rule in 2019-20 were Steve Addazio (who was hired by Colorado State after being fired by Boston College) and Willie Taggart (who was hired by Florida Atlantic after being fired by Florida State). Both of those hiring decisions occurred long after the Foundation accused Coach Bielema of breaching his contractual obligations. At the time the Foundation put Coach Bielema on notice of its breach of contract claim, not a single head coach who had recently been fired “for convenience” had been able to regain employment as an FBS head coach. Two coaches, Les Miles and Mack Brown, both of whom had been fired “for convenience,” had not coached for years. Notably, Coach Miles had a prior relationship with the AD who hired him, and Coach Brown was returning to a school where he had previously been the head coach.
65. Consolidating the number of vacancies in the last two seasons (46) and the number of coaches who landed another head coach job after being fired “for convenience” (5), less than eleven percent (11%) of the vacancies for which Coach Bielema might have been considered were filled with a former head coach who had recently been fired “for convenience.” Based on these statistics, it was highly improbable that Coach Bielema would have been hired as an FBS head coach in 2018-19 no matter what he had done. The undisputed facts show that Coach Bielema’s chances of being hired as an FBS head coach in 2019-20 improved considerably, as evidenced by the number of schools that expressed interest in him for the first time since he’d been fired at Arkansas. Even in 2019-20,

however, the statistics show that Coach Bielema still faced a significant challenge being hired as a head coach at an FBS school.

In 2018, Coach Bielema Accepted a Position with the New England Patriots that Allowed him to Remain on the Market for a DI Head Coach Position

66. After being approached by the New England Patriots in early 2018, Coach Bielema reached an agreement with the Patriots whereby he would serve as an independent contractor to assist the Patriots' coaching staff in assessing NFL draft prospects. The Patriots agreed to pay him a "fee" of \$25,000 for roughly seven weeks of work. This agreement (including the compensation terms) was memorialized in an independent contractor agreement dated March 1, 2018, that was signed by Coach Bielema at a later date. Before signing the agreement to perform assessments of draft prospects for the Patriots, Coach Bielema and the Patriots reached an understanding that Coach Bielema could end his independent contractor relationship with the Patriots at any time to accept a DI head coach position.
67. Following the 2018 NFL Draft, the Patriots' head coach approached Coach Bielema with an offer to become his "Special Assistant," a unique role in the Patriots organization. Considering that this unique role would afford Coach Bielema the opportunity to work closely with the head coach of the winningest NFL team in recent memory, Coach Bielema accepted the offer at an annual salary of \$100,000. This offer was presented to him with the understanding that it was in line with compensation for comparable positions in the Patriots organization. Before the signing of the employment agreement to become Special Assistant to the Head Coach, dated July 15, 2018, the Patriots reaffirmed their agreement that Coach Bielema could end his contractual relationship with the Patriots at any time to accept a DI head coach position.

68. Taking into account that Coach Bielema was occupying a unique position, his annual salary was both fair and reasonable when compared to the average annual salaries then being paid to NFL on-field assistant coaches. Coach Bielema’s role as Special Assistant to the Head Coach would have been viewed by human resources (“HR”) professionals in the NFL as a lesser role that would have called for a downward adjustment in his annual salary. Information about average salaries for typical on-field assistant coach’s positions is readily available online, as evidenced by an excerpt from a news story published just three months ago: “[In 2017], the average salary for [typical on-field] assistant coaches was in the \$150,000-\$175,000 range.” Wait, NFL Coaches Make How Much?, Work and Money (Feb. 2, 2020). Considering that Coach Bielema occupied a unique role as a Special Assistant, from an HR perspective, an annual salary of \$100,000 was completely in line with the most comparable, meaningful benchmarks.
69. Neither Coach Bielema nor anyone acting on his behalf has ever disclosed to Coach Belichick or anyone else in the Patriots organization that the first \$150,000 of income he earned in 2018 was exempt from repayment to the Foundation or that, for income he earned in 2019, the first \$125,000 would be exempt. Nor has Coach Bielema or anyone acting on his behalf ever given any hints about those contractual exemptions or attempted to convey that information to the Patriots organization surreptitiously. No one in the Patriots organization, including the head coach, has ever asked Coach Bielema about that subject or expressed any interest in Coach Bielema’s contractual arrangements with the Foundation.
70. Based on his performance and contributions as “Special Assistant to the Head Coach,” on April 22, 2019, Coach Bielema was promoted to the position of “Assistant Coach” and assumed additional responsibilities that included on-field coaching. Coach Bielema’s annual

salary was set at \$250,000. For reasons related to unfounded claims asserted by the Foundation earlier in 2019, Coach Bielema asked that his ongoing agreement with the Patriots about his ability to leave without penalty to accept a DI head coach position be memorialized in his new employment agreement. The Patriots agreed to this request, and the following language was included in Section 5 (D) of Coach Bielema's Assistant Coach Employment Agreement with the Patriots:

(D) In the event the Employee is offered and elects to accept a Division 1 college head coaching position during the Term, the Employee may terminate this Agreement. In the event of such election by the Employee, the Club will thereafter have no obligations or liability of any kind to the Employee.

71. As a result of his extensive experience and success as a college head football coach, his advancement within the Patriots organization, and his experience working directly for the Patriots' head coach, Coach Bielema became an attractive candidate for DI head coach vacancies that were likely to occur during the 2019-20 "coaching carousel." In fact, not long after Coach Bielema joined the Giants, it was common knowledge among people who follow NFL and college football that Coach Bielema was still trying to return to college football as a head coach. As one example of this widespread belief, on February 22, 2020, a sportswriter who covers the Giants for *USA Today Sports*, wrote:

"[T]here's just something about senior defensive assistant/outside linebackers coach Bret Bielema's continued flirtation with the college ranks that bugs me. It's almost as though he "settled" for the Giants job and is just waiting for a more attractive suitor to come along."

Bret Bielema's Continued Flirtation with College Football; and More, USA Today Sports
(Feb. 20, 2020).

72. What's more, before the 2019-20 "coaching carousel" was underway, prominent national sportswriters were observing that Coach Bielema was also well-positioned to become an NFL head coach – a position that commands annual salaries in the range of \$8-12 million.

"Bret Bielema, defensive line coach, New England Patriots

The former big-time college coach is moving up the ranks in New England at a time when the Patriots are touting an unstoppable defense. I like Bielema because he's been the head coach in high-pressure jobs before, has access to and knowledge of college offenses and has spent a few years in various roles under Bill Belichick. He is different from the slew of other Patriot assistants in that Bielema had success and his own persona before coming to New England."

NFL's Next Head Coaches? 15 Coordinators and Position Coaches to Watch, Sports Illustrated (Sept. 17, 2019).

"Bret Bielema, DL Coach, New England Patriots

The former Wisconsin and Arkansas coach is in his second season on Bill Belichick's staff, adding NFL coaching experience to his extensive college résumé. New England's defensive performance this season (and the latter part of 2018) is the kind of performance teams want to try to get a piece of, and the construction of the staff doesn't offer a lot of candidates. Belichick oversees the operation, and teams obviously can't get him. Inside linebackers' coach Jerod Mayo is in his first year of coaching. Secondary coach Steve Belichick is ... probably sticking around, you would think. Bielema is the most hirable of the bunch, and since he has 20-plus years of college coaching experience (including 12 as a head coach) before he was in New England, he doesn't necessarily carry the stigma of past Belichick assistants who couldn't hack it elsewhere."

13 NFL Assistants Who Could Get Head Coach Interviews: Get to Know These Names, ESPN (Oct. 11, 2019).

73. The same qualities and experience mentioned by *ESPN* and *Sports Illustrated* also made Coach Bielema an attractive candidate to other NFL teams that wanted to add coaches and coordinators to their staff. As someone who had decades of coaching experience and success

in various leadership roles, as well as a track record and reputation for leading with integrity, by the end of 2019, Coach Bielema had become a recruiting target for other NFL teams.

74. In January 2020, Coach Bielema was given the opportunity to join the Giants' coaching staff. After further conversations, Coach Bielema accepted a position with the Giants as "Outside Linebackers/Senior Assistant," an even larger role than the "Assistant Coach" role he had with the Patriots. Coach Bielema's annual salary with the Giants was set at \$400,000, an increase of \$150,000 compared to his salary with the Patriots. As he had done with the Patriots, Coach Bielema asked that his employment agreement include a provision that would allow him to leave the Giants at any time without penalty to accept a DI head coach position. The Giants agreed to do so, and language reflecting that agreement was included in Coach Bielema's Assistant Coach Employment Agreement, dated January 22, 2020.
75. When Coach Bielema joined the Giants, it was common knowledge both in college and professional football that he might soon leave the NFL to take another head coach position in one of the Power Five conferences. For example, less than a month after joining the Giants' coaching staff, sportswriters were mentioning Coach Bielema as a potential candidate to replace Coach Mark Dantonio at Michigan State University ("MSU") and reporting that Coach Bielema had a "definite" interest in that job. Giants assistant Bret Bielema could already be on way out, New York Post (Feb. 17, 2019); New York Giants' Bret Bielema has 'definite' interest in coaching at Michigan State, Elite Sports NY (Feb. 10, 2020).
76. Throughout his tenure with the New England Patriots and the New York Giants, Coach Bielema exercised his best efforts to be considered as a candidate and be hired as the head football coach at a DI school. ADs and search firms were fully aware that, during his time

with the Patriots, Coach Bielema was part of the coaching staff that won a Super Bowl and that he went on to be promoted as a defensive assistant on the team that led the NFL this past season. His employment by the Patriots and the Giants did not in any way impair his ability to obtain a DI head coach position and instead enhanced his candidacy for any such positions.

Coach Bielema Diligently and Faithfully Fulfilled His Obligations to the Foundation

77. On January 29, 2018 (the day before the Final Buyout Agreement was signed), sportswriter Andy Staples posted a *Sports Illustrated* story based on an interview he'd done with Coach Bielema about his future plans. Among other comments attributed to Coach Bielema in the story was the following statement about his desire to return to college coaching:

“I had a morning last week where I had to drop the dogs off to get groomed, pick up a UPS package, make a stop at the pharmacist to pick up a prescription for my daughter and pick the dogs back up,” said Bielema, who became a dad for the first time in July and who was fired in November after five seasons at Arkansas. ‘I said “I need to get back into coaching pretty quick. This is getting to be too much.”’

Offering his own commentary on Coach Bielema’s future, Andy Staples wrote:

“More than likely, Bielema will wind up back in college as a head coach at some point. He went 29–34 at Arkansas, but he has three Big Ten titles on his résumé from Wisconsin. He’ll get another chance.”

Lessons Learned from His Arkansas Tenure, Bret Bielema Has a Decision to Make, Sports Illustrated (Jan. 29, 2018).

78. As evidenced by numerous online sports news stories, podcasts, opinion columns, and other publicly available information that was easily accessible to ADs and search firms, from the date the Final Buyout Agreement was signed until the filing date of this Complaint, it has been common knowledge among ADs and search firms that Coach Bielema wanted to land

another head coach position at a DI school and was available to assume such a role. *See, e.g., Bret Bielema to Kansas makes sense – but so do these four schools, Sporting News* (July 6, 2018) (also mentioning Iowa, Illinois, and Colorado); *K-State AD on eventually replacing Bill Snyder: It's a matter of finding the right one that fits here, College Football Talk* (April 7, 2018).

79. As further alleged below, Coach Bielema has done nothing to breach the terms of the Final Buyout Agreement. To the contrary, by adhering to standard established practices in college football, Coach Bielema continues to be well-positioned to obtain a multi-year head coach contract next season that will extinguish most, if not all, of what he is owed in buyout compensation. Although not intended to be exhaustive, the following examples of Coach Bielema’s efforts to be hired as a collegiate head coach in 2018 show the absurdity of the Foundation’s intentionally uninformed perspective.
80. Three days after Coach Bielema was fired, Mr. Cornrich sent him two e-mails that included media accounts about Nebraska’s head coach search which mentioned Coach Bielema’s name as a potential candidate. Coach Bielema promptly contacted Tom Osborne, who had been the head football coach at the University of Nebraska for many years and later served as Nebraska’s AD. Coach Bielema’s specific purpose in reaching out to Mr. Osborne was to express his interest in the vacant head coach position at Nebraska. A few days later, Nebraska announced that Scott Frost would become the new head football coach at his alma mater.
81. Within a few days of being fired, Coach Bielema placed a phone call to Jean Boyd, Deputy AD at Arizona State (“ASU”) and shared with him his interest in ASU’s vacant head coach

position. On December 3, 2017, ASU announced that Herm Edwards had been hired as the school's new head football coach.

82. Between January 5-8, 2018, Mr. Cornrich corresponded with Glenn Sugiyama of DHR International (a well-known search firm) to make sure that he was aware of Coach Bielema's interest in the vacant head coach position at the University of Arizona.

From: Neil Cornrich
Sent: Friday, January 5, 4:00 PM
Subject: Bret Bielema - University of Arizona
To: Glenn T. Sugiyama

Glenn,

Please see the articles below about Coach Bret Bielema, particularly the highlighted portions.

Bret is very interested in the position of Head Football Coach. I look forward to discussing this possibility with you at your convenience (office 216-514-9999, mobile 216-402-5555).

Thank you very much.

NC

83. Mr. Sugiyama replied with the following message:

★ Glenn T. Sugiyama ☺
Re: Bret Bielema - University of Arizona
To: Neil Cornrich

I will call him....Arkansas is my client so I know the situation....
Please send me his cell.
Thanks Neil...I will keep you informed.
Best,
Glenn

A week after this e-mail exchange, Kevin Sumlin was named as Arizona's new head football coach.

84. On April 9, 2018, Mr. Cornrich sent an e-mail to Coach Bielema with a news story about the Kansas State AD eventually replacing Head Coach Bill Snyder, which mentioned Coach Bielema as a possible successor.

★ Neil Cornrich ☺

K-State AD on eventually replacing Bill Snyder: It's a matter of finding the right one that fits here

To: JenBret Bielema

85. On April 10, 2018, Mr. Cornrich sent an e-mail to Coach Bielema with a news story about the next coaches to join the Alliance of American Football, mentioning Coach Bielema as one to watch.
86. On July 9, 2018, Mr. Cornrich sent an e-mail to Coach Bielema regarding potential head coach openings in the near future at Kansas, Kansas State, Iowa, Illinois, and Colorado.
87. On September 17, 2018, Mr. Cornrich forwarded an e-mail to Coach Bielema from a prominent search firm, with whom Mr. Cornrich had spoken about Coach Bielema's interest in potential college head coach openings.

From: Chad Chatlos <Chad@ventura-partners.com>
Sent: Monday, September 17, 2018 4:07 PM
To: Neil Cornrich <neil@ncsports.us>
Subject: Wed, Sept 19

NC,

Good to catch up quickly. As I mentioned on the phone, I will be in Boston this Wed and have the entire morning open. If Bret has any time to catch up, let me know and I will make it happen. If this is a bad week, then no worries. Will catch up with him another time.

Best,
Chad

88. On November 8, 2018, Mr. Cornrich sent an e-mail to Coach Bielema with a list of potential head coach openings in the NFL.
89. On November 11, 2018, Mr. Cornrich sent an e-mail to Coach Bielema with a news story concerning what Jeff Long, the AD at Kansas, was looking for in head coach candidates. (Subsequent events revealed that Les Miles was the only candidate who was seriously considered for that position.)
90. On November 14, 2018, Mr. Cornrich sent an e-mail to Coach Bielema with an attached voice message from Dan Graziano of *ESPN*, with Mr. Graziano confirming that Mr. Cornrich had mentioned Coach Bielema on the record as a candidate for potential college head coach openings.

Bret,

FYI - please see the attached message from Dan Graziano of ESPN. When I spoke to Dan, I mentioned you as a candidate. Dan also remarked that he saw you coming out of the locker room in Nashville (he was there to cover the game).

NC

91. At no time during 2018 did any AD, member of a search committee, or anyone associated with a search firm reach out to Coach Bielema or Mr. Cornrich inquiring about Coach Bielema's: (a) interest in a DI head coach position; (b) availability to assume such a role; or (c) willingness to be considered for a particular position.
92. The Foundation contends that, by accepting employment with the Patriots in 2018, Coach Bielema took himself off the market for any DI head coach positions for which he may have been considered. The foregoing evidence indisputably establishes the falsity of that assertion. Not only was Coach Bielema still on the market as a DI head football coach while working for the Patriots; throughout 2018, he and his agent were proactively expressing Coach Bielema's interest to search firms and schools that had DI head coach vacancies.
93. Coach Bielema's efforts to improve his marketability paid off during the 2019-20 "coaching carousel." Representatives of several universities contacted him during this time frame about his interest in a head coach position. Coach Bielema promptly and enthusiastically engaged with each and every one of them and expressed his interest in filling their vacant head coach position. Those schools included Florida Atlantic University, Boston College, the University of South Florida, Baylor, Rutgers, Michigan State, and Colorado. Coach Bielema was a finalist for the head coach positions at Rutgers and Colorado and was interviewed by the Athletics Directors at both those schools as part of the selection process. Coach Bielema was one of two or three finalists at both Rutgers and Colorado. Coach Butch Jones, now "Special Assistant" at a highly successful Power Five program, was also a

finalist for the head coach vacancy at Rutgers. At the end of the selection process, both Rutgers and Colorado selected another candidate.

94. The members of the Foundation's leadership who assessed and made decisions about whether Coach Bielema had met his obligations under the Final Buyout Agreement turned a blind eye to the easily verifiable reasonable pathways that displaced head coaches have taken to obtain high-paying multi-year head coach contracts at another DI school. They also ignored and/or made no effort to review highly relevant data about the odds of Coach Bielema being hired in 2018, 2019, or the early part of 2020. Nor did they take into account what's common knowledge among ADs and search firms: with rare exceptions, a head coach who has been fired for not winning enough games is considered "damaged goods" and drops to the bottom of the candidate pool until he proves he still has what it takes to run a winning program. Based on the foregoing, the Foundation's leadership knew, or should have known, that no matter how much effort Coach Bielema made to be hired as a head coach at another DI school, the chance of that happening anytime soon were less than eleven percent (11%).

The University's AD Appears to Have Been the Driving Force Behind the Foundation's Decision to Stop Paying Coach Bielema

95. Hunter Yurachek was introduced as the University's new AD at a press conference on December 4, 2017. In his first public appearance as the Razorbacks' AD and on numerous public occasions thereafter, Mr. Yurachek expressed in strong terms his disdain for large buyout payments being made to head football coaches who don't maintain a winning track record:

"To me, losing football games is [reason for being] terminated with cause. And the protection that coaches are provided with in their contracts to me is ludicrous."

New Arkansas AD: ‘Get a handle on coaching contracts and buyouts’, *Talk Business* (Dec. 6, 2017). It was clear to sportswriters who attended Mr. Yurachek’s first press conference that his strident criticism was aimed at Coach Bielema’s buyout agreement, among others:

“In the two years since Hunter Yurachek arrived in Arkansas, he’s talked about the need to halt the practice of paying obscene coaching buyouts for coaches who have failed to produce wins. Yurachek was almost surely talking about the ridiculous buyouts of *Bret Bielema*, Gus Malzahn, Jimbo Fisher and, of course, Chad Morris. The list goes on. Yurachek also admitted that the University of Arkansas couldn’t do it alone because it would put us at a competitive disadvantage.”

Hunter Yurachek, Sam Pittman, and Wall Street’s Gordon Gekko, *Best of Arkansas Sports* (Dec. 11, 2019) (emphasis added). During his nineteen-month tenure as the Razorbacks’ AD, Mr. Yurachek has continued to voice his strong opinion about “ludicrous” buyout agreements:

“Obviously, it’s a challenge for us to take that money from somewhere and apply it to a buyout. . . . Well, the buyout situation throughout college athletics I don’t think is great,’ Yurachek said. ‘I mean, there’s huge buyouts in all these contracts, and I did say I thought that -- and I said it in my opening press conference -- that losing football games should be condition for terms of your employment to be nullified.’”

Hogs’ AD Yurachek dislikes big-figure buyouts, *Arkansas Democrat-Gazette* (Nov. 13, 2019).

“I said from Day One at my press conference that I don’t think we should pay a full buyout to coaches who aren’t successful at the job we hire them for,” Yurachek told the media. “We’ve got to stop in this industry these huge buyouts.”

Arkansas AD Hunter Yurachek Fed Up with High Buyouts, Explains How Sam Pittman’s Buyout Will Work, *Saturday Down South* (Dec. 9, 2019).

96. As alleged above, the AD has considerable influence over the Executive Director of the Foundation. At a minimum, Mr. Yurachek exerted pressure on the Executive Director to find some justification for terminating the monthly buyout payments to Coach Bielema. If Mr. Yurachek was not the architect of the Foundation's strategy to accomplish that objective, he certainly approved it.

The Foundation Blindsided Coach Bielema with a Demand Letter on January 31, 2019

97. On January 31, 2019, without having made any inquiry of Coach Bielema, Mr. Cornrich, or the New England Patriots or conducting any investigation or research to determine the facts, the Foundation's outside counsel blindsided Coach Bielema by sending him a letter ("the Demand Letter") which made it appear that the Foundation's leadership had come completely unhinged. Among other things, the Demand Letter said it "seemed crystal clear" Coach Bielema was "well aware" of his "material breaches" and "made no efforts, diligent or otherwise, to obtain replacement employment of the same or similar character." Staying true to its reliance on baseless falsehoods, the Foundation went on to say; "[T]o the extent you did obtain employment, you did so only to maximize your personal income to the detriment of the Foundation and, at the same time, contractually bound yourself to avoid your obligations to the Foundation." The Demand Letter also included a litany of intentional or reckless misrepresentations that included: (a) false assertions based on mistaken assumptions that appeared to be the result of willful blindness, "perception bias," and erroneous interpretations and disregard of relevant contract provisions, or some combination of the foregoing; (b) an assertion about Coach Bielema's reporting obligations that was both inaccurate and squarely at odds with Arkansas law as well as the contractual requirement that any such claims be preceded by "notice and an opportunity to cure"; (c) a demand that

Coach Bielema pay the Foundation “not less than \$4,234,999.96” (*i.e.*, the full payments made to him under the Final Buyout Agreement); (d) notification that the Foundation would not make any further payments under the Final Buyout Agreement;¹² (e) an accusation that Coach Bielema manipulated his compensation arrangements with the New England Patriots to bring his salary just under the applicable exemption of \$150,000; (f) a statement of the Foundation’s intent to commence litigation against Coach Bielema in the Circuit Court of Washington County if he did not pay the Foundation \$4,234,999.96 on or before February 15, 2019. The Executive Director and the Foundation Board members knew, or in the exercise of reasonable diligence should have known, of the specific assertions set forth in the Demand Letter before it was sent to Coach Bielema. Given the long-term consequences for Razorback football of becoming known as the school that stiffed its former coaches,¹³ and considering the incestuous relationship between the Athletics Department and the Foundation, it is inconceivable that the Foundation would have stopped making the monthly buyout payments and threatened Coach Bielema with a multi-million dollar lawsuit unless Mr. Yurachek was either the architect of that plan or unequivocally expressed his support for it.

¹² Although the Foundation said in its Demand Letter that it would “cease all future payments,” the Foundation made another monthly buyout payment to Coach Bielema just a few days later. The Foundation has made no further payments to Coach Bielema since that time.

¹³ On November 18, 2019, with Mr. Yurachek’s approval, the University sued the Razorbacks’ former defensive line coach, John Scott, for \$187,863.32, alleging he had breached the terms of the buyout clause in his employment contract.

The Foundation Turned a Blind Eye to any Information that Might Reveal the Fallacy of its Legal Position

98. Prior to sending the Demand Letter to Coach Bielema on January 31, 2019, and continuing to the filing date of this Complaint, the Foundation deliberately failed to do any research or make any inquiries a reasonable, objective person would make under the circumstances before accusing Coach Bielema of failing to meet his obligation to seek new employment. Worse yet, after sending the Demand Letter to Coach Bielema, the Foundation intentionally took actions to remain uninformed despite the best efforts of Coach Bielema's lawyers to provide information that would reveal the legal significance of the truth and the glaring defects in the assumptions and reasoning that formed the basis for the Demand Letter. The Foundation's refusal to meet and confer with Coach Bielema's lawyers was not only evidence of the Foundation's bad faith. It was also a breach of section five (5) of the Final Buyout Agreement, which required the parties to "work in good faith to share any required information and make all permitted deductions or offsets required by this Agreement."
99. The Foundation's stubborn adherence to a position of willful blindness was based on a strategy to unlawfully reduce its buyout obligation to the amount the University and the Foundation had planned on paying when they became aware of the multi-million dollar gap between what Coach Bielema's Final Buyout Agreement actually said and what they wished it said. The methods used by the Foundation in seeking to accomplish this financial objective, and its conscious disregard of information that would have shown its legal position to be frivolous, exemplifies bad faith commercial behavior of the worst kind.

The Foundation Made Public Statements that Portrayed Coach Bielema in a False, Negative Light and Interfered with his Ability to Obtain a DI Head Coach Position During the 2019-20 “Coaching Carousel”

100. At the time the Foundation sent Coach Bielema the Demand Letter, it knew or should have known that it would be career-limiting for any former DI head coach to be characterized by his former employer as a person who can't be trusted to honor a contract. Knowing or having constructive knowledge of this truism, it was in the best interests of the Foundation and the University, and to a greater degree Coach Bielema, for the Foundation and the University to take steps to protect the confidentiality of any information that would suggest Coach Bielema had dishonored his agreement with the University. Instead of taking such steps, the Foundation made gratuitous public statements in 2019 and 2020 that interfered with Coach Bielema's efforts to obtain employment as a DI head coach.
101. On or about May 15, 2019, a journalist contacted the University and/or the Foundation seeking comment on information he had obtained from a reliable source who said that the Foundation had stopped making buyout payments to Coach Bielema. The Foundation could have referred the journalist to the University's media relations office or given the standard “we don't comment on personnel matters” response. Instead, with knowledge that it was about to create another obstacle for Coach Bielema to overcome in being hired as a DI head coach, the Foundation issued a carefully scripted statement that said:

“Consistent with normal practice, the Razorback Foundation is in communication with Coach Bret Bielema’s representatives regarding our agreement. The Razorback Foundation is enforcing its agreement with Coach Bielema to protect the interests of our members and the organization.”

Razorback Foundation says negotiations ongoing with Bret Bielema, katv.com (May 15, 2019). By using the phrase “enforcing its agreement” in this statement, Foundation knew or should have known that the most casual observer would probably conclude that Coach

Bielema had dishonored his contractual obligations to the Razorbacks. In fact, it didn't take long for the local media to report that information. The very next day, quoting a "a source familiar with the situation," *Arkansas Business* reported that the Foundation had stopped making monthly buyout payments to Coach Bielema. Razorback Foundation Enforces Contract, No Payments to Bret Bielema in 2019, *Arkansas Business* (May 16, 2019).

102. Apparently not content with publicly discrediting Coach Bielema just once, the Foundation decided to repeat its self-serving public criticism of Coach Bielema when responding to an inquiry from the *Arkansas Democrat-Gazette*. Instead of declining to comment as Coach Bielema's representatives did, the Foundation replied to the reporter with the following statement that was published in the *Arkansas Democrat-Gazette* on June 7, 2020: "[B]ased upon inquiry, investigation and consultation with legal counsel, the Foundation concluded that it has no further payment obligation to Bret Bielema." \$1M gifts roll in for UA athletics, *Arkansas Democrat-Gazette* (June 7, 2020). At the time the Foundation made this statement, it knew or should have known that the vast majority of readers of the *Arkansas Democrat-Gazette* would interpret its statement to mean that Coach Bielema had dishonored his agreement with the Foundation.

The Foundation Secretly Leaked False Information to the Press that Portrayed Coach Bielema in a False, Negative Light and Interfered with his Ability to Obtain a DI Head Coach Position During the 2019-20 "Coaching Carousel"

103. Prior to October 24, 2019, the Foundation surreptitiously gave blatantly false and misleading information to a prominent Arkansas journalist which portrayed Coach Bielema in a false, negative light and called into question his integrity and character. The Foundation's manipulation of the local media, and the national republication of negative

commentary that was based on false information, lessened the chances of Coach Bielema being selected as a Power Five head coach during the 2019-20 “coaching carousel.”

104. On March 19, 2019, during an exchange of e-mails between outside lawyers representing Coach Bielema and the Foundation, Coach Bielema’s lawyer sent an e-mail to the Foundation’s lawyer to share additional details of the efforts Coach Bielema had made to seek a DI head coach position in 2018. One of the entries in the timeline that was included in that e-mail said:

“1/5/18 – 1/8/18: Correspondence with Glenn Sugiyama of DHR International (search firm) regarding Coach Bielema and the Head Coach position at the University of Arizona. See attached.”

The referenced attachment was an e-mail from Mr. Cornrich to Mr. Sugiyama, which said: “Bret Bielema - University of Arizona” in the subject header. The full text of the e-mail confirmed Coach Bielema’s interest in the vacant head coach position at the University of Arizona:

“Glenn,

Please see the articles below about Coach Bret Bielema, particularly the highlighted portions.

Bret is very interested in the position of Head Football Coach. I look forward to discussing this possibility with you at your convenience. [office and mobile phone numbers redacted.]

Thank you very much.

NC”

The e-mail exchange between Mr. Cornrich and Mr. Sugiyama was a private matter, and the subject of the e-mail exchange was never disclosed to anyone else by Coach Bielema, Mr. Cornrich, or anyone acting on their behalf.

105. In contrast to the Foundation's approach of publicizing its decision to stop paying Coach Bielema, upon receipt of the Demand Letter, and continuing thereafter, Coach Bielema and Mr. Cornrich took measures to ensure that the existence and contents of the Demand Letter were known only to them and Coach Bielema's legal representatives, none of whom shared that information with anyone. Coach Bielema and Mr. Cornrich were fully aware that the public disclosure of this contract dispute, to say nothing of the Foundation's claim that Coach Bielema had not kept his word, would likely impede Coach Bielema's ability to obtain a Power Five head coach position. Since January 31, 2019 and continuing until the filing of this Complaint, Coach Bielema, his agent, and his lawyers have treated the existence and contents of the Demand Letter as highly confidential.
106. On October 24, 2019, Wally Hall, the most widely read Arkansas sports columnist, wrote a column entitled "Arkansas Should be Free of Buyout Burden" that was published the *Arkansas Democrat-Gazette*. In relevant part, Mr. Hall's commentary is quoted below with italics added for emphasis:

"It has become fairly common knowledge that the Razorback Foundation, with the blessing of the University of Arkansas, decided former head coach *Bret Bielema was not living up to his end of the contract*. His contract called for him to actively pursue another job. Instead, *Bielema became a volunteer for the New England Patriots for more than a year*. Then it was announced he would become the defensive line coach for the Patriots in 2019. His Arkansas contract, approved by former athletic director Jeff Long, even allowed Bielema to *make \$50,000 a year* and it not count against his monthly payments from his buyout. *If the Patriots are sticking it to the Razorback Foundation and paying Bielema just \$50,000 a year, ... [implying that the Patriots were doing that]. And shame on Bielema for not seeking a full-time job within weeks of being fired. He was very hireable [sic] off his Wisconsin resume -- probably not in the SEC, but certainly in other conferences.*"

Arkansas Should Be Free of Buyout Burden, *Arkansas Democrat-Gazette* (Oct. 24, 2019).

107. Two weeks later, on November 6, 2019, Mr. Hall, wrote another column about Coach Bielema entitled “Breached Bielema buyout agreement could be costly” that was also published in the *Arkansas Democrat-Gazette*. In relevant part, the commentary from Mr. Hall’s column is quoted below with italics added for emphasis and bold text used to identify words that were copied straight from the Foundation’s Demand Letter and pasted into Mr. Hall’s column:

“In January, Bielema received an email from Ney, of the Friday firm, informing the former Arkansas coach he had breached the agreement in which he was required to:

- ***Diligently seek and obtain other employment of the same or similar nature;***
- ***Provide a written summary to the Razorback Foundation of his efforts to find other employment twice a year;***
- ***Notify the Foundation in writing of other employment obtained and income received; and***
- ***Use his best efforts to maximize earning potential with any new employer.***

It seems the Foundation and Ney felt Bielema failed all four of those requirements and therefore breached the agreement. Bielema's lawyer answered with a laundry list of ways Bielema had searched for head coaching jobs, but when studied there were several emails between Bielema and Cornrich about various subjects. There was a hint about Arizona, which was already looking at Kevin Sumlin. There were several media speculations that Bielema was in line for a job, but there were no quotes from him. Meanwhile, Bielema was an unpaid volunteer for the Patriots for an entire year, and of the 10 Power 5 openings, he sought none. He was quoted last year as saying he may not return to the college ranks.”

Breached Bielema Buyout Agreement Could Be Costly, *Arkansas Democrat-Gazette* (Nov. 6, 2019).

108. To better illustrate that Mr. Hall must have had a copy of the Demand Letter when he wrote his column, what follows is a verbatim excerpt from the Demand Letter. The italicized

sentence in the first bullet point and the italicized words in the other three bullet points are identical to the words used by Mr. Hall in his November 6, 2019 column. The changes in pronouns and the other insignificant differences are shown in bold print:

“As you are aware, the Agreement requires that you attempt to mitigate the Foundation’s continuing payments to you by diligently seeking new employment and then using your best efforts to maximize your earnings. More specifically, beginning in January 2018, you were required to:

- *Diligently seek and obtain other employment of the same or similar character;*
- *Provide a written summary to the Foundation of your [WH changed to “his”] efforts to find other employment every six months [WH changed to “twice a year”];*
- *Notify the Foundation in writing of other employment you have [WH deleted these two words] obtained and the [WH deleted this word] income you have [WH deleted these two words] received from such employment; and*
- *Use your [WH changed to “his”] best efforts to maximize your [WH deleted this word] earning potential with any new employer.*

You have failed to comply with each and every one of these requirements, and therefore, you materially have breached the Agreement. [Reworded by WH to say “The Razorback Foundation believes that Bret Bielema failed to meet the requirements for his buyout.”]

109. Given that Coach Bielema had no incentive to share any of that information with Mr. Hall and that no one other than people within the Foundation (and perhaps the Athletics Department) had knowledge of the March 19, 2019 e-mail with the reference to Arizona or the contents of the Demand Letter, the evidence leads to the inescapable conclusion that before Mr. Hall wrote his first column on October 24, 2019, a representative of the Foundation, or someone else acting on its behalf, provided Mr. Hall with a copy of: (a) the Foundation’s Demand Letter; and (b) the e-mail Coach Bielema’s lawyer sent to the Foundation on March 19, 2019 that included a reference to Arizona and a number of

attached e-mails corroborating the events in the timeline. The transmittal of false and derogatory information to Mr. Hall by or on behalf of the Foundation was done with knowledge of the falsity of the derogatory information, or with reckless disregard for the truth, and with the specific intent to harm Coach Bielema.

110. The false information provided to Mr. Hall formed the basis for the following statements to be published about Coach Bielema,¹⁴ none of which were true and all of which falsely portrayed him as a person who can't be trusted to honor his commitments:

- a. "Bret Bielema was not living up to his end of the contract."
- b. "[S]hame on Bielema for not seeking a full-time job within weeks of being fired."
- c. "He was very hireable [sic] off his Wisconsin resume -- probably not in the SEC, but certainly in other conferences."
- d. "Bielema became a volunteer for the New England Patriots for more than a year."
- e. "[Inferring that] the Patriots are sticking it to the Razorback Foundation and paying Bielema just \$50,000 a year."

111. Both of Mr. Hall's October 24 and November 6 columns were republished, in whole or in part, by various local and national media outlets and other online news platforms including NBC Sports and MSN. Within 24 hours of his first column, what Mr. Hall had referred to as "fairly common knowledge" in Northwest Arkansas was suddenly common knowledge

¹⁴ Nothing alleged herein is intended as criticism of Mr. Hall or the *Arkansas Democrat-Gazette*. Coach Bielema assumes that Mr. Hall had no reason to believe that his source was using the media in an attempt to pressure Coach Bielema into agreeing to accept roughly half of what he is owed.

on a national scale. *See, e.g., Arkansas has reportedly stopped paying Bret Bielema's buyout, NBC Sports* (Oct. 25, 2019).¹⁵

112. The Foundation's conduct, as described hereinabove, constitutes a violation of the "non-disparagement clause" in the Final Buyout Agreement:

"The Parties agree not to make disparaging remarks regarding Bielema, the Foundation, its directors, officers, and employees, or the University of Arkansas, its governing Board, or its officers, representatives and employees, and to state, if asked, that any differences between or among them were resolved on an amicable basis. The promises set forth in this Agreement, and the document itself, shall not be used by either Party in any manner, whether directly or indirectly, for any purpose other than to enforce their respective rights hereunder, unless otherwise compelled by law."

Exhibit 5, at 7 ¶ 11.

The Foundation Ignored the Final Buyout Agreement Dispute Resolution Process

113. The timing of the Foundation's Demand Letter was strange considering that the 2018-19 "coaching carousel" could still spin off one or two more DI head coach openings for which Coach Bielema could be a strong candidate. What made the timing even more perplexing was the Foundation's disregard of a provision in the Final Buyout Agreement that was intended to facilitate the resolution of any dispute about the amount of money the Foundation owed Coach Bielema. By sending the Demand Letter to Coach Bielema without making any reasonable inquiry to determine the facts, the Foundation deliberately disregarded section 5.B(v) of the Final Buyout Agreement. Moreover, the contractual dispute resolution procedure in the Final Buyout Agreement wasn't optional; beginning in

¹⁵ On June 9, 2020, another column written by Mr. Hall was published in the *Arkansas Democrat-Gazette* in which Mr. Hall said the Foundation's decision to stop paying Coach Bielema wasn't "new news."

2018, that provision in the Final Buyout Agreement *required* the parties to meet in person or confer by phone to resolve any disputes of the kind the Foundation abruptly revealed in its Demand Letter. More specifically, the parties had agreed in section 5.B(v) to the following *mandatory* dispute resolution procedure:

“Within 60 days after each calendar year ending on December 31, 2018, December 31, 2019, and December 31, 2020, the Parties will meet in person or via telephone to conduct a reconciliation meeting regarding any outstanding amounts owed to either of them. The Parties will cooperate in good faith and share all necessary records to conduct and complete the reconciliation process.”

Exhibit 5, at 6 ¶ B(v).

114. Even though the Final Buyout Agreement made the dispute resolution meeting mandatory, the Foundation never proposed such a meeting either before or after sending the Demand Letter of January 31, 2019.

The Foundation Placed Unreasonable Conditions on its Willingness to Meet with Coach Bielema’s Lawyers for the Purpose of Discussing the Disputed Facts and Applicable Law

115. During 2018, the Foundation declined several written requests by Coach Bielema’s counsel to meet with the Foundation’s outside legal counsel (with or without the Executive Director being present) to share information and discuss the disputed facts of this matter and the applicable law. The Foundation agreed to meet, but only on the condition that Coach Bielema first make what the Foundation would consider to be a “serious” settlement offer. With nothing more than preconceived opinions, mistaken assumptions, and a strong incentive to avoid its financial commitments to Coach Bielema, the Foundation’s idea of what a “serious” settlement offer looked like was, of course, vastly different than the more informed perspective of Coach Bielema and his lawyers. Therefore, Coach Bielema’s lawyers continued to press for a meeting that wouldn’t require a multi-million dollar down

payment. In response to each such request, the Foundation steadfastly stood its ground – further evidencing its desire that the truth not contaminate its “fact-free” assessment of whether Coach Bielema had committed a breach of contract.

116. On January 31, 2020, exactly one year after receipt of the Foundation’s Demand Letter, Coach Bielema’s legal team requested the Foundation to participate in the annual dispute resolution meeting required by section 5.B.(v) of the Final Buyout Agreement. Again, the Foundation refused to meet or engage in a fact-sharing discussion with Coach Bielema’s legal team, never budging from its position of “make a serious settlement offer first, then we’ll talk.” Therefore, no fact-sharing meeting or discussion ever occurred.

Coach Bielema Fulfilled his Reporting Obligations

117. The Foundation’s assertion that Mr. Cornrich’s constant updates to the Foundation did not satisfy the reporting requirement in the Final Buyout Agreement ignores indisputable facts and firmly established principles of Arkansas law. The reporting requirement, as set out in the agreement, is as follows:

“Every six (6) months during the life of this Agreement, Bielema shall provide a written summary to the Foundation of his efforts to find other employment.”

Exhibit 5, at 4 ¶ 5.B(i).

118. As is common in commercial contracts with large sums of money at stake, the Final Buyout Agreement included a requirement that neither the Foundation or Coach Bielema could take action based on an alleged breach of contract by the other party without first giving the other party “notice and a reasonable opportunity to cure”:

“The Parties agree that a violation on their part of any covenants contained in this Agreement, *following notice and reasonable opportunity to cure*, will give

rise to an action to enforce this Agreement to the extent permitted by Arkansas law.”¹⁶

119. Coach Bielema’s Employment Agreement included a similar provision that more specifically addressed the parties’ intention that the failure to timely deliver an adequate summary could not be used in a “gotcha” fashion to claim a breach of contract:

“If Coach fails or refuses either to notify the University or its third-party guarantor of Coach’s employment in a Coaching Position or to furnish the monthly Coaching Position gross compensation reports after receiving a formal, written request to do so from the University’s third-party guarantor, then *after giving Coach fourteen (14) days written notice*, the obligation of the University’s third-party guarantor to continue paying the total Guaranty Payment shall cease immediately.”

Exhibit 1, at 29 ¶ 15(b).

120. As further alleged below, not once did the Foundation express any concerns about the timing or substance of Coach Bielema’s reporting during the first two six-month reporting periods. Nor would it have had any grounds to do so. After all, Mr. Cornrich was reporting everything of substance far in advance of the end of each six-month reporting period.
121. Nor did the Foundation ever give Coach Bielema “notice and a reasonable opportunity to cure” any perceived deficiencies in Coach Bielema’s reporting – a contractual prerequisite for claiming that a failure of his reporting obligation is an actionable breach of contract. The first mention of any alleged deficiency in Coach Bielema’s reporting was in the Demand Letter dated January 31, 2019, in which the Foundation made the self-serving and erroneous determination that providing Coach Bielema an “opportunity to cure” the alleged deficiencies would be “futile.” Furthermore, the form, substance, and timing of the semi-

¹⁶ *Id.* at 7, ¶ 12. The significance of this clause will become readily apparent in a later section of this Complaint.

annual reports was not “material” and, for that additional reason, was not actionable. Finally, the irrefutable facts alleged below establish a sequence of conduct between the parties that involved repeated occasions for performance by Coach Bielema. With knowledge of the nature of his performance and the opportunity to object, the Foundation accepted and acquiesced in the form, substance, and timing of the reports Mr. Cornrich sent to the Executive Director, who not only accepted them without objection, but thanked Mr. Cornrich for the “update.” Therefore, by virtue of the “course of performance” doctrine, the Foundation has no legal basis to assert that the form, substance, and timing of the semi-annual reports constitutes a breach of contract. The e-mail communications between the parties plainly establishes a course of performance that was deemed acceptable to the Foundation for an entire year.

122. Coach Bielema’s independent contractor agreement became effective on April 22, 2018, but Mr. Cornrich did not receive a fully executed copy of the agreement until April 30, 2018. Two days later, on May 2, 2018, Mr. Cornrich sent an e-mail to the Executive Director with the independent contractor agreement attached:

From: Neil Cornrich
Sent: Wednesday, May 2, 2018 8:40 AM
To: Scott Varady <svarady@razorbackfoundation.com>
Subject: Coach Bielema

Scott,

For your records, please see the attached agreement between Coach Bielema and the New England Patriots (**please keep this confidential**). I will continue to keep you informed.

NC

123. Less than thirty minutes later, the Executive Director replied to Mr. Cornrich’s e-mail to Mr. Cornrich *thank you for “keeping [the Foundation] informed”* and congratulating Coach Bielema on his new employment:

From: Scott Varady <svarady@razorbackfoundation.com>
Date: May 2, 2018 at 9:08:46 AM EDT
To: Neil Cornrich <Neil@ncsports.us>
Subject: Re: Coach Bielema

Dear Neil,

Thanks very much for keeping us informed. I wish Coach the best with this employment and hope it opens additional opportunities for him!

Sincerely,
Scott

124. Knowing that Mr. Cornrich was his point of contact for any questions regarding the Final Buyout Agreement, the Executive Director said nothing in his reply e-mail to suggest that Coach Bielema's new role with the Patriots did not satisfy his obligations under the Final Buyout Agreement. Nor did he inquire or express any concerns about Coach Bielema's compensation.
125. Neither the Executive Director or any other representative of the Foundation ever asked any questions or expressed any concerns about the independent contractor agreement, Coach Bielema's second contract with the Patriots, or anything else related to Coach Bielema's role with the Patriots or his compensation. The next e-mail from the Executive Director was a low-key inquiry about Coach Bielema's status with the Patriots that he sent on July 17, 2018:

From: Scott Varady <svarady@razorbackfoundation.com>
Sent: Tuesday, July 17, 2018 11:06 AM
To: Neil Cornrich <Neil@ncsports.us>
Subject: Update

Dear Neil,

Good morning! I hope all is well, and you're having a great summer!

I wanted to touch base and inquire about Bret's current status with the Patriots. I know his initial contract was set to expire at the end of June.

Can you please give us an update at this point? Please tell coach hello for me as well.

Thanks,
Scott

Coach Bielema's second contract with the Patriots had not yet been finalized on July 17, 2018. Knowing the contract would be finalized soon, Mr. Cornrich replied to the Executive Director's e-mail less than thirty minutes after receiving it and said:

From: Neil Cornrich <neil@ncsports.us>
Date: Tuesday, July 17, 2018 at 11:33 AM
To: Scott Varady <svarady@razorbackfoundation.com>
Subject: RE: Update

Hi, Scott.

Hope all is well and that you are having a great summer too! I hope to have an update for you shortly regarding Coach Bielema and the Patriots. I will keep you informed.

Thank you.

NC

126. On July 25, 2018, the *Arkansas-Democrat Gazette* published a news story about Coach Bielema joining the staff of the New England Patriots. The reporter who wrote the story sought a comment from the Executive Director about the level of Coach Bielema's cooperation in keeping the Foundation informed of his obligation to seek new employment. The Executive Director's response to that question was squarely at odds with the wild accusations in the Foundation's January 31, 2019 Demand Letter. In fact, the Executive Director could not have been more complimentary in describing Coach Bielema's compliance with his contractual obligations:

"Scott Varady, executive director and general counsel of the Razorback Foundation, said Tuesday he has been in contact with Bielema's agent, Neil Cornrich, to determine what his compensation will be from the Patriots. 'I have inquired about their current agreement, and they've agreed to respond to me shortly,' Varady said. 'But I don't have anything yet.'

'There's no question they're cooperating and acting in good faith. I would never expect them to act otherwise based on their past conduct.'"

Former Razorbacks Coach Bret Bielema Hired to Consult for New England, Arkansas-Democrat Gazette (July 25, 2018) (emphasis added).

127. On August 10, 2018, without any further requests from the Executive Director, Mr. Cornrich e-mailed a copy of Coach Bielema’s “Special Assistant to the Head Coach Employment Agreement” to the Executive Director with a cover note that said:

From: Neil Cornrich
Sent: Friday, August 10, 2018 4:31 PM
To: Scott Varady <svarady@razorbackfoundation.com>
Subject: CONFIDENTIAL: Coach Bielema

Scott,

For your records, please see the attached agreement between Coach Bielema and the New England Patriots (**please keep this confidential**). I will continue to keep you informed.

NC

128. Oddly, the Executive Director never acknowledged receipt of Mr. Cornrich’s August 10, 2018 e-mail. For the next 198 days, until receipt of the Demand Letter, Coach Bielema and Mr. Cornrich didn’t hear a peep out of the Foundation.

The Foundation Recklessly Mischaracterized a *CBS Sports* Story

129. Another egregious example of the Foundation’s reckless disregard of the truth arises from the following false assertion in the Foundation’s Demand Letter:

“You publicly stated to multiple people, *including the media*, that you had no intention of returning to college football—clear evidence of your failure to mitigate.”

(emphasis added).

130. In another section of the Demand Letter, the Foundation went further and said that Coach Bielema had his “representative advise the Foundation that [he] intended to seek a college head coaching position after reportedly *stating to a reporter that [he] had no intention of returning to college coaching*.” (emphasis added). At the time the Foundation’s outside counsel received authority from the Foundation to send the Demand Letter, Mr. Yurachek, the Executive Director, and the Foundation Board of Directors knew, or in the exercise of

reasonable diligence should have known, that there was not a shred of evidence to support that assertion. Coach Bielema has never made such a statement to anyone. The only comment attributed to Coach Bielema by the media about his future plans are those mentioned above in a story authored by *ESPN* sportswriter Andy Staples. Those comments, and Mr. Staples' commentary, are completely at odds with the Foundation's baseless assertion: Coach Bielema said "I need to get back into coaching pretty quick." Adding his own commentary, Mr. Staples said, "More than likely, Bielema will wind up back in college as a head coach at some point."

131. The Foundation's reference to Coach Bielema's statements to "the media" most likely stems from its careless reliance on a copy writer's choice of words in a headline that went far beyond what the sportswriter who interviewed Coach Bielema had actually written. *See Bret Bielema is Enjoying the NFL So Much, He May Never Go Back to College Football, CBS Sports* (July 13, 2018). Other than the *ESPN* story, this *CBS Sports* story, and secondhand reports of those stories with no new information, a diligent search revealed no other media reference to whether Coach Bielema planned to return to coaching at the collegiate level or continue coaching in the NFL.
132. The *CBS Sports* story was written by veteran sportswriter Dennis Dodd. The *CBS Sports* story doesn't contain a single word attributed to Coach Bielema that supports the headline or the false allegation in the Foundation's Demand Letter. Instead, Mr. Dodd reported the following:

"Bret Bielema isn't going to Kansas. And he might not be returning to college football. Bielema's name has come up as a popular choice to replace David Beaty, Kansas' embattled coach. New Kansas athletic director Jeff Long hired Bielema at Arkansas in 2013. *Long ultimately may have lost his job in Fayetteville because he didn't fire his coach after five mostly-disappointing*

seasons. Bielema was finally let go Nov. 24 as he walked off the field following a loss to Missouri. That was nine days after Long was fired. *While Bielema would not speak to the Kansas situation*, sources close to him said the 48-year-old coach would not be returning to college football with his former boss at KU.”

133. Had the Foundation conducted even the sketchiest due diligence, it would have known that:
 - (a) Mr. Dodd did not write the headline accompanying his story; and (b) Coach Bielema said nothing to Mr. Dodd – on or off the record – to suggest he “had no intention of returning to college football.” All Coach Bielema said to Mr. Dodd was that he was enjoying coaching in the NFL. Enjoying one’s job is not inconsistent with a desire to do something else if given the opportunity. In July 2018, Coach Bielema enjoyed his job with the Patriots no less than he enjoys his job with the New York Giants. But as much as he enjoys coaching for the Giants, that didn’t stop him from interviewing with Colorado for its head coach position. Whether intentional or reckless, the Foundation’s mischaracterization of Mr. Dodd’s news story is inexcusable and provides further evidence of bad faith.

The Foundation Abandoned Critical Reasoning to Find a Non-Existential Conspiracy

134. An additional example of the ease with which the Foundation jumped to baseless conclusions and made career-limiting accusations against Coach Bielema is the Foundation’s groundless assertion that Coach Bielema manipulated his compensation arrangements with the New England Patriots to stay below the exempt amount. Not only do these accusations go against every tenet of critical reasoning. They also demonstrate a conscious decision not to make a reasonable inquiry and an inexcusable failure to apply basic math to what the Foundation knew about Coach Bielema’s compensation arrangements with the Patriots.

135. Having made no reasonable inquiry before sending its Demand Letter to Coach Bielema, the only information the Foundation had about Coach Bielema’s July 15, 2018 employment agreement was the agreement itself, which Mr. Cornrich had sent to the Executive Director six months earlier. Although the Foundation has never explained its reasoning, it would appear that the Foundation jumped to the conclusion it wanted to reach by surmising that Coach Bielema’s \$100,000 a year salary was suspiciously close to the “exempt income cap” in the Final Buyout Agreement. (For any income Coach Bielema earned in 2018, the “exempt income cap” prevented the Foundation from claiming any “offset” rights to the first \$150,000 Coach Bielema earned in 2018.) That’s a pretty big assumptive stretch to make with nothing else to go on. What’s more, the application of basic math shows the absurdity of the Foundation’s conspiracy theory.
136. As alleged above, the Foundation never made any inquiry of Coach Bielema, his agent, or the New England Patriots about who decided Coach Bielema’s compensation, how his compensation was established, and whether and to what degree his compensation aligned with comparable benchmarks in the Patriots organization. Furthermore, as alleged above, neither Coach Bielema nor anyone acting on his behalf have ever disclosed or even hinted to the Patriots’ head coach or anyone else in the Patriots organization that the first \$150,000 of income he earned in 2018 was exempt from repayment to the Foundation or that, for income he earned in 2019, the first \$125,000 would be exempt. What’s more, no one in the Patriots organization, including the head coach, ever asked Coach Bielema about that subject or expressed any interest in his contractual arrangements with the Foundation.
137. The compensation terms in Coach Bielema’s employment agreement with the Patriots, dated July 15, 2018 (“2018 Patriots Contract”) provided that the Patriots would pay Coach

Bielema “in installments at the rate of the gross annual sum of One Hundred Thousand Dollars (\$100,000) for the period commencing on the Effective Date [July 15, 2018] and ending on January 31, 2019.” As of July 15, 2018, there were twenty-five weeks remaining in 2018, 48% of the year. Therefore, while \$100,000 might have caught the reader’s eye during a superficial reading, applying basic math to those contract terms would have revealed that the Patriots would pay Coach Bielema roughly \$48,000 in 2018. Accounting for the \$25,000 he had been paid earlier in the year, if Coach Bielema had intended to maximize his income at the Foundation’s expense – and one were to assume (as did the Foundation) that he had the ability to decide or influence what his salary would be – he would have attempted to set his salary at \$250,000 or an amount very close to that, not \$100,000. Whether the Foundation simply overlooked this critical fact in its rush to judgment or turned a blind eye to the result of a simple math equation, the audacity it took to make such an accusation without a shred of evidence would constitute bad faith, in and of itself, were it not so remarkably cumulative.

The Ultimatum in the Foundation’s Demand Letter was an Empty Threat

138. In the seventeen months since the Foundation threatened to sue Coach Bielema if he didn’t pay back \$4.234 million within fifteen days, the Foundation hasn’t gone anywhere near a local courthouse. After doing nothing to follow through on its empty threat, it would appear the Foundation mistakenly thought it could coerce Coach Bielema into an unjustifiable compromise to avoid being sued or having to sue the Foundation. In any event, having exhausted every other avenue to resolve this dispute, Coach Bielema deeply regrets that the Foundation left him no choice but to commence this litigation.

CLAIMS FOR RELIEF

COUNT ONE

Breach of Promise to Pay in Final Buyout Agreement

139. The allegations above are incorporated herein by reference.
140. Coach Bielema was in privity of contract with the Foundation. He has performed all conditions precedent to the Foundation's duty under the Final Buyout Agreement to make the buyout payments due in March 2019 and thereafter.
141. Without lawful excuse, the Foundation failed to comply in good faith with the terms of the Final Buyout Agreement governing its duty to pay Coach Bielema and engaged in a course of conduct that demonstrates the epitome of bad faith. Furthermore, the Foundation hindered Coach Bielema's attempts to demonstrate he had made the required effort to mitigate and materially broke its promise to make the buyout payments.
142. As a direct and proximate result of that breach, Coach Bielema is entitled to recover his actual and consequential damages.

COUNT TWO

Breach of Non-Disparagement Promise in Final Buyout Agreement

143. The allegations above are incorporated herein by reference.
144. Coach Bielema was in privity of contract with the Foundation. He has performed all conditions precedent to the Foundation's duty under the Final Buyout Agreement not to make disparaging remarks about him.

145. With the intent to recover buyout payments made before the breach and avoid its obligation to make future payments, the Foundation and its agents republished false accusations in the Foundation's Demand Letter for wide circulation in the sports media.
146. For the reasons stated above, the Foundation knew, or should have known, that the accusation that Coach Bielema was in breach of a buyout obligation would be understood by ADs and search firms as an indication that he did not wish to be considered for vacancies.
147. As a direct and proximate result of that breach, Coach Bielema is entitled to recover his actual and consequential damages, including damages for loss of earning potential.

COUNT III

False Light Invasion of Privacy

148. The allegations above are incorporated herein by reference.
149. As alleged above, the Foundation unnecessarily gave publicity to a matter concerning Coach Bielema that placed him before the public in a false light.
150. The false light in which Coach Bielema was placed would cause a reasonable person to be justified in feeling seriously offended and aggrieved by the publicity.
151. The Foundation caused the publication of the false light information, knowing it was false or with a high degree of awareness of its probable falsity.
152. The publication of the false light information alleged above was the proximate cause of harm to Coach Bielema's reputation and hindered his ability to be hired as a DI head coach.

JURY DEMAND

153. Coach Bielema requests a jury trial.

* * * * *

WHEREFORE, Coach Bielema requests that he be awarded:

- a. Compensatory damages in an amount to be determined at trial by a jury empaneled to try the issues of fact in this case, but not less than \$7,025,000.03;
- b. Punitive damages;
- c. Pre- and post-judgment interest;
- d. Reasonable attorney fees;
- e. His costs and expenses in this action; and
- f. All other just and proper relief to which he may be entitled.

Respectfully submitted,

By:/s/ Thomas A. Mars

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