IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF LANE

STATE OF OREGON, Plaintiff, v. TERRENCE PATRICK BEAN, Defendant.	)	Case No. 19CR00847 **MOTION IN LIMINE TO EXCLUDE DEFENDANT TERRENCE BEAN'S SETTLEMENT ACTIVITIES**

Introduction

As the Court knows, this is the second time the state has indicted Bean on the same charges. While the first criminal action was pending, the complaining witness, M.S.G., threatened to file a civil lawsuit against Bean. Counsel for Bean and M.S.G. negotiated the following settlement agreement: M.S.G. would delay the filing of the threatened civil suit in exchange for a $20,000 payment. This is the agreement that counsel negotiated while the criminal action was pending. Subsequently, after the criminal case was dismissed, counsel for Bean and M.S.G. negotiated a settlement of the threatened civil claim.

This is not evidence of consciousness of guilt, nor is it "bribery" or "tampering," as now alleged. Rather, it was a typical effort to avoid the reputational and economic harms, to Bean and his business, that litigation would inflict.

Nevertheless, on June 4, 2019, in the course of attempting to explain the state's failure to produce discovery in this case, Deputy District Attorney Erik Hasselman

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proclaimed to this court that he had "probable cause" to believe defendant Terrence Bean (Bean) and his attorney, Derek Ashton (Ashton), along with M.S.G.'s attorney, Lori Deveny (Deveny), and an attorney for a state's witness, committed the crimes of bribery witness tampering and "possibly" money laundering. At the same time, Mr. Hasselman conceded that he had statute of limitations problems that would likely prevent him from charging Bean or Ashton with these false allegations, but that he nonetheless intended to introduce "evidence" of bribery or tampering at trial to show Bean's consciousness of guilt. At the time, Mr. Hasselman had not provided Bean with any discovery related to that allegation.

Although there is nothing either Bean (or any other person implicated) can do to undue the reputational harm that Mr. Hasselman's public "probable cause" allegations have caused, Bean can move to exclude any reference to settlement, including trumped-up allegations of bribery or tampering, from his criminal trial. Now that Bean has received the discovery comprising the "evidence" promised by Mr. Hasselman, it is clear that the state's theory against Bean is premised solely on the fact that Bean reached a partial civil settlement with M.S.G. during the pendency of his criminal proceeding, and then fully resolved M.S.G.'s threatened civil claims following the dismissal of Bean's criminal charges. As the out-of-court resolution of a civil action is not only lawful – but encouraged – such "evidence" is irrelevant to the case at hand and creates a significant danger of unfair prejudice, confusion of the issues, and undue delay.

Moreover, OEC 408 provides that the out-of-court settlement – and related discussions – are plainly *inadmissible*. No exception to that rule applies in this case, and the court must exclude any and all references to Bean (or Ashton's) attempts to settle the civil claims threatened by M.S.G. and his lawyer, Deveny. Bean moves this court for an order excluding any evidence related to his attempts to settle the civil claims

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threatened by M.S.G. or Deveny. This motion is supported by the Declaration of Kimberlee Petrie Volm, Declaration of Clifford Davidson, and the Points and Authorities below.

Memorandum of Law

I. Background Facts

Alleged victim, M.S.G., hired civil attorney Lori Deveny (upon the recommendation of Portland Police Bureau Victim Advocate, Susan Lehman) immediately after testifying before the grand jury in November, 2014. According to M.S.G. the sole purpose of Deveny's representation was to "get [him] money." Declaration of Kimberlee Petrie Volm, Ex 1, p. 5.

Deveny then began her efforts to do just that. Deveny contacted Bean's attorneys, alerting them to M.S.G.'s intent to file a civil action as a result of the alleged sexual conduct at issue in the criminal case. Petrie Volm Dec, Ex 2. The parties then began discussing potential settlement of those civil claims, and Deveny began negotiating the specific terms of a settlement. Petrie Volm Dec., Ex 2, pp. 4-5. And on June 10, 2015, Deveny and M.S.G.'s legal guardian participated in a formal mediation with Bean and his counsel, presided over by an independent mediator, Jim Pippin, wherein the terms of a civil compromise were negotiated in good faith, with the knowledge that the court would have the purview to grant or deny a motion to dismiss the criminal matter pursuant to ORS 135.705. Petrie Volm Dec., Ex 2, ¶ 5.

On July 20, 2015, this court denied Bean's motion to dismiss for civil compromise. Following that denial – and as promised – Deveny again demanded Bean settle M.S.G.'s civil claim, or she'd (publicly) file a civil suit while his criminal case was pending. Petrie Volm Dec., Ex 2, ¶ 7. Accordingly, Bean entered into a legal civil settlement agreement with M.S.G. (negotiated between Deveny and Ashton) where – in exchange for $20,000 – M.S.G. agreed to delay filing his threatened civil suit until after

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the conclusion of the criminal matter, and settled the economic damages portion of M.S.G.'s threatened civil claim. *Id.* Then, in a separate agreement, after the state dismissed Bean's criminal charges, the parties legally resolved the remaining claims in M.S.G.'s threatened civil action for $200,000. *Id.* at ¶ 8.

Despite the fact that M.S.G. had advised prosecutors and investigators since testifying at grand jury in November, 2014 that he was unwilling to voluntarily participate in the criminal trial – the state has expended *significant* resources trying to link Bean's civil settlement to M.S.G.'s non-appearance at trial in order to save face. Although the state has documented M.S.G.'s dedicated attempts to avoid service, the state has been unable to directly link Bean to those efforts. Indeed, neither M.S.G., M.S.G.'s mother, nor M.S.G.'s lawyer report ever having direct communication with Bean.

Simply put, there is absolutely no evidence Bean ever conditioned the settlement of M.S.G.'s threatened civil claims on M.S.G.'s non-appearance at the criminal trial. At best, the state has stacked speculation on inferences to conclude that the settlement agreements were a farce, and mere "cover" for their true purposes – to induce M.S.G. into not testifying – but has produced zero evidence to suggest *Bean* ever knew of such a "farce." Because the State has no evidence to support its speculative theory, it should be precluded from presenting it to the jury, as this would constitute considerable bias.

A. Settling a civil lawsuit with an alleged victim (who is threatening to publicly file a civil lawsuit) during the pendency of a criminal prosecution is not illegal.

Given Mr. Hasselman's representations on June 4, 2019, it seems the state's position is that Bean's attempt to privately resolve M.S.G.'s threatened civil claims during the pendency of his criminal case is *per se* unlawful. However, there is absolutely no legal support for such a proposition. *C.f.,* ORS 135.705(1) (authorizing the dismissal of certain criminal actions if – at any time before trial – the alleged victim

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has received satisfaction for the injury caused by defendant); *State v. Rodriguez*, 88 Or App 429 (1987) (a defendant cannot be required to pay the victim restitution for injury/damages *if he settled with the victim for that injury/damage before he was convicted*).

Bean settled M.S.G.'s threatened civil suit to protect his reputation and business interests. The settlement of civil claims is commonplace, and there is no law prohibiting a criminal defendant from settling a civil claim while a criminal case is pending. Furthermore, the existence of a settlement agreement or offer to compromise is inadmissible to prove the defendant's guilt or culpability. OEC 408(1). This rule is intended not only to encourage the out of court settlement of disputes, but also as an acknowledgment that parties settle suits for a variety of reasons, most of which have nothing do to with a party's guilt or innocence, such as to avoid excessive attorney fees, to avoid negative publicity, or to protect business interests. *See Cyberco Holdings, Inc. v. Con-Way Transp. Services, Inc.*, 212 Or App 576 (2007) (acknowledging OEC 408 was enacted for the purpose of promoting the public policy favoring compromise and settlement of disputes); OEC 408, Legislative Commentary (1)(a) ("[A]n offer to compromise may stem as much from a desire for peace as from a sense of weakness"); *see also* Petrie Volm Dec, Exs 3-4 (excerpts from the executed settlement agreements, wherein Bean expressly denies any culpability or liability). Indeed, all of the above were at play in this case – Bean (a public figure) was experiencing significant media scrutiny and financial consequences as a result of M.S.G.'s allegations. The threat of *another* public lawsuit during the pendency of the criminal case would only have exacerbated those issues. *That* is why Bean settled.

Defendant anticipates the state will argue that the July, 2015 and September, 2015 settlement agreements will be offered for the purpose of proving Bean's "effort to obstruct a criminal investigation or prosecution," rendering them admissible under OEC

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408(2)(b). However, such an argument is circular, as it *presupposes* that the mere attempt to settle a threatened civil claim during the pendency of a criminal case is unlawful. Again, there is no authority for that premise. The only evidence of Bean's knowledge of the settlement is his signature on the settlement agreements and performance under those agreements (i.e., the payment of settlement funds). Nothing on the face of those agreements suggests that Bean paid M.S.G. with the intent to induce him to avoid service of a subpoena in 2015. Unless and until the state is able to prove *Bean* – in executing the settlement agreements and performing under said agreements – intended to obstruct the criminal prosecution, OEC 408(1) expressly prohibits the use of any settlement communications and/or documents in this case.

B. To the extent there is any evidence that the settlement agreements were a "farce" – any probative value in admitting the settlement agreements is vastly outweighed by the undue risk of prejudice to Bean.

1. The state lacks any evidence implicating Bean in uncharged misconduct

The only question for the jury to decide in this case is whether Bean engaged in legally prohibited sexual contact with M.S.G. on September 27, 2013. Thus, it is wholly irrelevant to this proceeding under OEC 401 whether M.S.G. refused to cooperate with prosecutors in 2015, whether M.S.G's attorney encouraged him to avoid service of a trial subpoena or decline to testify in 2015, or even whether Ashton or Deveny intended the settlement of civil claims to motivate M.S.G. into not participating in the criminal trial. The only thing that bears any relevance to this proceeding is whether *Bean* voluntarily and purposefully engaged in some activity for the purpose of inducing M.S.G. not to testify. Absent that, the conduct of any other player involved in this case does not – as a matter of law – go toward the issue of Bean's consciousness of guilt.

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Acts intended to obstruct justice or avoid punishment are generally relevant to prove consciousness of guilt. *State v. Kelley*, 29 Or App 321, 325-26 (1977). However, there must be a logical connection between the defendant's conduct and obstruction. If a defendant's conduct has multiple plausible explanations – only one of which is the defendant's consciousness of guilt – it should not be admitted. *Id.* (reversing the defendant's denial of a sale that could have had multiple plausible explanations, only one of which was the defendant's consciousness of guilt; thus the "inferential force of the evidence to prove a relevant fact" was "remote" and "speculative", therefore the prejudicial effect of the evidence was far outweighed by any negligible relevance); *Ecklund v. U.S.*, 159 F2d 81, 84 (6th Cir 1947) (reversing conviction where trial court allowed evidence of a civil-liability settlement, where there was not proof the defendant attempted to avoid criminal liability by settling the claim, rather "he made the settlement * * * on the advice of his attorney, because he 'did not want any unfavorable publicity with reference to that lawsuit.'").

Here, the only evidence of "wrongdoing" by Bean is (1) he partially settled M.S.G.'s threatened civil claims during the pendency of his pending criminal action, in consideration for M.S.G.'s promise to delay filing a civil suit until *after* his criminal case concluded, and (2) his settlement of M.S.G.'s remaining threatened civil claims shortly after the criminal charges were dismissed. Those acts do not give rise to any inference that Bean's secret motive and intent was to obstruct the criminal prosecution. Rather, Bean's actions prove he is like 98-99% of individuals facing civil claims. *See* E. Rosenthal, "Second Thoughts on Mediation, A Trial Lawyer's View," OSB Bar Bulletin (Feb./Mar. 2012), *available at* https://www.osbar.org/publications/bulletin/12febmar/mediation.html (accessed March 19, 2019) (citing American Bar Association statistics indicating that only one to two percent of civil lawsuits go to trial).

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Moreover, the state's "bribery" or "tampering" theory is inadmissible under OEC 404 and OEC 403, even if the evidence in support of that theory has some minimal probative value. The state simply has no evidence to show that Bean's settlement activities were unlawful or *not* protected by OEC 408. If the state believes that Bean's settlement conduct was intended to obstruct a criminal prosecution so as to avoid the protections of OEC 408, the state must satisfy a three part test: (1) the evidence must be independently relevant for a noncharacter purpose, (2) the proponent of the evidence must offer sufficient proof that the uncharged conduct was committed and that defendant committed it, and (3) the probative value of the uncharged misconduct must not be substantially outweighed by the dangers set forth in OEC 403. *See State v. Stubblefield*, 279 Or App 483 (2016).[1] The state – to date – has not produced any discovery which would support even an inference that Bean himself engaged in any type of unlawful conduct.[2] Again, the only evidence is that Bean legally settled M.S.G.'s threatened civil claims. To the extent there is any evidence (which, there isn't) that supports an inference that Deveny or even Ashton attempted to induce M.S.G. to avoid cooperating in the criminal proceeding – such an inference does not (and cannot) extend to Bean. Thus, unless the state presents evidence at an OEC 104 hearing

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[1] Even under the 404(4) analysis set forth in *State v. Williams*, 357 Or 1 (2015), due process surely requires the state first demonstrate that the uncharged misconduct *actually* occurred and that the defendant himself committed it. There is absolutely no evidence of that in this case.

[2] To the extent the state's theory is that Bean tampered with M.S.G. by encouraging him to avoid service, that does not – as a matter of law – constitute witness tampering under ORCP 162.285:

> "It is not a violation of [ORS 162.285] to persuade a witness to lawfully refuse to testify on grounds of personal privilege or to induce a witness to avoid process by leaving the jurisdiction of the court . . . [N]either the means used nor the end sought is independently unlawful. Oregon Criminal Law Revision Commission, *Proposed Oregon Criminal Code, Final Draft and Report* § 203, Commentary (A) (July 1970)."

State v. Bailey, 346 Or. 551, 557, n.2 (2009) (quoting the foregoing in the context of analyzing ORS 162.285(1)(a)).

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implicating *Bean* in wrongdoing, any reference to Bean's civil settlement and/or "tampering" or "bribery" generally is inadmissible.

Even assuming *arguendo* the state could present even a modicum of evidence linking Bean to any wrongdoing, the "inferential force" of such evidence is undoubtedly outweighed by the prejudicial value. *Kelley*, 29 Or App at 325. Pursuant to OEC 403, even relevant evidence may be excluded if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence." According to the Oregon Supreme Court, the first step in an OEC 403 analysis is to determine the probative value of the evidence and whether a party actually needs it to argue its case. *State v. Mayfield*, 302 Or 631, 645 (1987). As set forth above, the probative value is diminutive, and completely unnecessary for the state to prove any element of its case. However, as set forth below, the risks of prejudice, confusion of the issues, and undue delay are high.

2. The risk of prejudice and confusion of the issues is high.

Based on the state's propounded discovery to date, its case for "bribery" or "tampering" will result in a prejudicial sideshow on a collateral issue, significantly detracting the jury from the only issues it needs to decide – did Bean engage in unlawful sexual contact with M.S.G. on September 27, 2013. Although no party disputes that M.S.G. was unwilling to participate in the criminal case in 2015, the reason for his unwillingness is *highly* contested, but irrelevant.

At the time of the 2015 proceedings, M.S.G. repeatedly told detectives and prosecutors that he had no desire to publicly testify and did not want to be involved in the criminal case. Nonetheless, prosecutors and detectives relentlessly pursued his testimony, "outing" him as gay to friends and family, handing out "sex crimes detective" business cards to his coworkers, and threatening individuals who declined to disclose

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M.S.G.'s location. Indeed, at one point, M.S.G. threatened to commit suicide (or did attempt suicide) because "no one was listening" to him or heeding his desire *not* to testify.

The state will argue M.S.G.'s desire not to testify was not caused by the prosecutors' or detectives' misconduct, but rather by a scheme to buy him off. The state will parade a series of witnesses into trial to show the great lengths to which M.S.G. went to avoid service, the involvement of his attorney Deveny and an attorney for another state's witness in his avoidance of service, and Ashton's ongoing efforts to settle the M.S.G.'s threatened civil claims. This sideshow will distract the jury from the actual issue to be decided in this case: whether Bean had sexual contact with M.S.G. on September 27, 2013.

The admission of such evidence is highly prejudicial. Bean's ties to the above-mentioned activities is beyond tenuous. Bean's link to this collateral issue is non-existent, and it would severely prejudice Bean to have the case focus so strongly on the alleged wrongdoing of others when it bears no relevance to his own conduct on September 27, 2013. Allowing the evidence to come in runs the risk of a jury convicting Bean simply because of his relationship to these other individuals and their actions. Furthermore, even if the jury concludes Bean had no knowledge of the others' activities, the jury's mere knowledge of civil settlement, alone, is highly prejudicial and cannot be undone by a curative instruction. *See U.S. v. Hays*, 872 F2d 582, 589 (5th Cir 1989) ("It does not tax the imagination to envision the juror who retires to deliberate with the notion that if the defendants had done nothing wrong, they would not have paid the money back.") OEC 403 prohibits the evidence. *See State v. Williams,* 357 Or 1, 18 (2015) (when the probative value of evidence is outweighed by its prejudicial value, a defendant's due process rights are in jeopardy and requires the evidence's exclusion).

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3. Allowing the settlement-related evidence would unnecessarily delay trial.

Bean is charged with crimes alleged to have occurred on September 27, 2013. The state re-indicted him on those charges January 18, 2019. And – despite this court's order that all discovery be produced by July 15, 2019, Bean first received the discovery related to the alleged "bribery" or "tampering" on July 30, 2019.

Given the nature of the allegations, testimony into this collateral issue will extend days – unnecessarily prolonging Bean's trial. More importantly, however, all parties to this current prosecution are witnesses to the "bribery" or "tampering" case. That is, Bean's current attorney is a witness to the settlement discussions the state now alleges were designed to obstruct the criminal prosecution. Additionally, current prosecutor Erik Hasselman, and presumably others at the Lane County District Attorney's office, are witnesses as well. M.S.G. reports meeting with Mr. Hasselman (as did Deveny), to discuss M.S.G.'s unwillingness to participate in the criminal proceeding, and defendant understands M.S.G. had been telling prosecutors and the lead investigator, Detective Myers, since early 2015 that he did not want to participate in the criminal trial. Despite this, the state - primarily through Detective Myers - undertook extreme and emotionally harmful measures to force M.S.G. to testimony. *See* Declaration of Clifford Davidson, Ex 3 (Tort Claim Notice sent on behalf of M.S.G. on August 8, 2016 to the City of Portland and Lane County District Attorney's Office outlining Detective Myers' "repeated[] and intentional[]" violation[s] of the Court's Protective order by "informing individuals * * * of [M.S.G.'s] status as a sexual abuse victim", "extraordinary measures taken in the attempts to serve the minor victim, and the extraordinary manipulation of the information gained in the course of the criminal investigation, as it relates to the minor victim", and other tortious conduct). Obviously, to the extent the state wishes to argue M.S.G. didn't testify because he was "paid off", Bean is entitled to discovery - and

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to call witnesses - from the state, to testify as to the reasons M.S.G. proffered at the time for his refusal to testify, *viz.* the relentless and emotionally damaging tactics of the detective and prosecutors. Thus, if this case were to proceed with the state presenting the alleged "bribery" and "tampering" evidence, *all parties* would presumably need to be assigned new counsel, significantly delaying the start date of a trial (as over 6,000 pages of discovery have been produced to date).

Given the state's weak evidence regarding any misconduct, non-existent evidence implicating Bean, and eleventh hour production of the "evidence", such a delay is wholly unreasonable. Bean is entitled to a speedy trial, and to be tried November 13, 2019 as scheduled.

Conclusion

For the reasons set forth above, this court should order that all evidence relating to Bean's settlement activities and M.S.G.'s non-appearance at the 2015 criminal trial be excluded from this case. Alternatively, no such evidence should be admitted unless and until the court evaluates admissibility at an OEC 104 hearing.

Dated this 23rd day of August, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 19 I caused to be served a full and exact copy of the foregoing **MOTION IN LIMINE TO EXCLUDE DEFENDANT TERRENCE BEAN'S SETTLEMENT ACTIVITIES** on the following persons:

Erik V. Hasselman
Lane County District Attorney's Office
125 E. 8th Avenue, Suite 400
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Erik.Hasselman@co.lane.or.us

by the following indicated method(s):

☒ First Class Mail, postage prepaid, deposited in the US mail at Portland, OR
☐ Hand delivery
☐ Facsimile transmission
☐ Overnight delivery
☒ Email
☐ Electronic filing notification

Dated: August 23, 2019

s/ Kimberlee M. Petrie Volm
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