

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

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

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

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

4 **Memorandum of Law**

5 **I. Background Facts**

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

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

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

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

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

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

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

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

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

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

24 Defendant anticipates the state will argue that the July, 2015 and September,
25 2015 settlement agreements will be offered for the purpose of proving Bean's "effort to
26 obstruct a criminal investigation or prosecution," rendering them admissible under OEC

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

11 **B. To the extent there is any evidence that the settlement agreements**
12 **were a “farce” – any probative value in admitting the settlement**
13 **agreements is vastly outweighed by the undue risk of prejudice to**
14 **Bean.**

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

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

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

15 Here, the only evidence of “wrongdoing” by Bean is (1) he partially settled
16 M.S.G.’s threatened civil claims during the pendency of his pending criminal action, in
17 consideration for M.S.G.’s promise to delay filing a civil suit until *after* his criminal case
18 concluded, and (2) his settlement of M.S.G.’s remaining threatened civil claims shortly
19 after the criminal charges were dismissed. Those acts do not give rise to any inference
20 that Bean’s secret motive and intent was to obstruct the criminal prosecution. Rather,
21 Bean’s actions prove he is like 98-99% of individuals facing civil claims. See E.
22 Rosenthal, “Second Thoughts on Mediation, A Trial Lawyer’s View,” OSB Bar Bulletin
23 (Feb./Mar. 2012), available at
24 <https://www.osbar.org/publications/bulletin/12febmar/mediation.html> (accessed March
25 19, 2019) (citing American Bar Association statistics indicating that only one to two
26 percent of civil lawsuits go to trial).

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

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

23 ² To the extent the state’s theory is that Bean tampered with M.S.G. by
24 encouraging him to avoid service, that does not – as a matter of law – constitute
25 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).”

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

1 implicating *Bean* in wrongdoing, any reference to Bean’s civil settlement and/or
2 “tampering” or “bribery” generally is inadmissible.

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

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

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

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

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

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

12 The admission of such evidence is highly prejudicial. Bean's ties to the above-
13 mentioned activities is beyond tenuous. Bean's link to this collateral issue is non-
14 existent, and it would severely prejudice Bean to have the case focus so strongly on the
15 alleged wrongdoing of others when it bears no relevance to his own conduct on
16 September 27, 2013. Allowing the evidence to come in runs the risk of a jury convicting
17 Bean simply because of his relationship to these other individuals and their actions.
18 Furthermore, even if the jury concludes Bean had no knowledge of the others' activities,
19 the jury's mere knowledge of civil settlement, alone, is highly prejudicial and cannot be
20 undone by a curative instruction. See *U.S. v. Hays*, 872 F2d 582, 589 (5th Cir 1989) ("It
21 does not tax the imagination to envision the juror who retires to deliberate with the
22 notion that if the defendants had done nothing wrong, they would not have paid the
23 money back.") OEC 403 prohibits the evidence. See *State v. Williams*, 357 Or 1, 18
24 (2015) (when the probative value of evidence is outweighed by its prejudicial value, a
25 defendant's due process rights are in jeopardy and requires the evidence's exclusion).

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

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

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

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

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

11 **Conclusion**

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

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17 Dated this 23rd day of August, 2019.

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SUSSMAN SHANK LLP

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By *s/ Kimberlee M. Petrie Volm*
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1 **CERTIFICATE OF SERVICE**

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

5 Erik V. Hasselman
6 Lane County District Attorney's Office
7 125 E. 8th Avenue, Suite 400
8 Eugene, OR 97401
Erik.Hasselmann@co.lane.or.us

9 by the following indicated method(s):

- 10 First Class Mail, postage prepaid, deposited in the US mail at Portland, OR
11 Hand delivery
12 Facsimile transmission
13 Overnight delivery
14 Email
15 Electronic filing notification

16 Dated: August 23, 2019

17 s/ Kimberlee M. Petrie Volm

18 Derek J. Ashton, OSB 871552
19 Kimberlee M. Petrie Volm, OSB 114906