

RAÚL R. LABRADOR
ATTORNEY GENERAL

JAMES E. M. CRAIG, ISB #6365
Chief, Civil Litigation and
Constitutional Defense

BRIAN V. CHURCH, ISB #9391
Lead Deputy Attorney General
Office of the Attorney General
P.O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400
Facsimile: (208) 854-8073
james.craig@ag.idaho.gov
brian.church@ag.idaho.gov

Attorneys for Defendant

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

MAYDAY HEALTH,

Plaintiff,

v.

RAÚL R. LABRADOR, Attorney General
of Idaho, in his official capacity,

Defendant.

Case No. 1:26-cv-00334-AKB

**REPLY IN SUPPORT OF MOTION
TO STRIKE [Dkt. 22]**

On July 24, 2026, the Defendant filed a Motion to Strike, asking the Court to strike from the record Exhibit 1 of Dkt. 18-1 and related references to it in Dkt. 18 on the grounds that its inclusion in the record is contrary to Fed. R. Evid. 408(a)(2). *See* Dkt. 22 at 2. In its response, Plaintiff focuses its argument on Fed. R. Evid. 408(a)(1).

Federal Rule of Evidence 408 “identifies two types of inadmissible compromise evidence.” 23 Wright & Miller *Fed. Prac. & Proc. Evid.* § 5310 (2d ed. April 2026 update). The first is described in Fed. R. Evid. 408(a)(1) and the second in Fed. R. Evid. 408(a)(2). *See id.* at §§ 5309 and 5310. While the Defendant specifically cited and argued Fed. R. Evid. 408(a)(2) as its authority for the motion to strike, Dkt. 22 at 2, most of Plaintiff’s citations discuss Fed. R. Evid. 408(a)(1). For example, Plaintiff cites to section 5309 of the Wright and Miller legal encyclopedia, which specifically discusses Fed. R. Evid. 408(a)(1). Similarly, they quote language from cases that are clearly referencing Fed. R. Evid. 408(a)(1), including quoting language about “valuable consideration” from *IBEW Loc. 48 v. Rosendin Elec., Inc.*, No. 3:23-cv-00297-HZ, 2023 WL 3981282, at *9 (D. Or. June 12, 2023), language that comes from subsection (a)(1), not (a)(2), and *United States v. N.Y. City Transit Auth.*, No. 04–CV–4237 (SLT)(MDG), 2010 WL 3855191, at *18–19 (E.D.N.Y. Sept. 28, 2010) (quoting the same “valuable consideration” language from subsection (a)(1)).

Rule 408(a)(2) clearly and simply states that “a statement made during compromise negotiations about the claim” is not admissible to “prove ... the validity ... of a disputed claim.” Relying on the same “valuable consideration” language of subsection (a)(1), Plaintiff claims that there was no attempt at compromise from Plaintiff because “Mayday demanded all of the injunctive relief it seeks.” Dkt. 23 at 2. But a “party will often adopt a hardline position at the beginning of negotiations in order to extract greater concessions from an opponent. It would ignore

the realities of negotiation to hold that such a position necessarily means that the parties are not engaged in compromise negotiations.” *Eid v. Saint-Gobain Abrasives, Inc.*, 377 F. App'x 438, 444 (6th Cir. 2010). The simple fact is that the Plaintiff asked the Attorney General to agree to a consent decree to avoid litigation on Plaintiff’s Motion for Preliminary Injunction. The Attorney General’s statement in response to that offer was “made in direct response to the demand letter from [Plaintiff’s] counsel in an effort to avoid litigation,” and is therefore covered under Fed. R. Evid. 408(a)(2). *Edelstein v. Stephens*, Nos. 23-3205/24-3243, 2025 WL 2495863, at *4 (6th Cir. Aug. 19, 2025).

Plaintiff finally argues that the statement was not offered to prove the validity of Plaintiff’s claim, but was offered to show jurisdiction. Dkt. 23 at 3. In support of this argument, Plaintiff cites *Rhoades v. Avon Products, Inc.*, 504 F.3d 1151 (9th Cir. 2007). Dkt. 23 at 3. In that case, the Ninth Circuit did allow *pre-suit* threats of litigation made during the course of *pre-suit* settlement negotiations to “satisfy the jurisdictional requirements of an action for declaratory relief,” stating that “[t]his is perfectly acceptable under Rule 408.” *Rhoades*, 504 F.3d at 1161.

There are at least two issues with Plaintiff’s justification and citation to *Rhoades*. First, “[a]s with all questions of subject matter jurisdiction except mootness, standing is determined as of the date of the filing of the complaint The party invoking the jurisdiction of the court cannot rely on events that unfolded after the filing of the complaint to establish its standing.” *Yamada v. Snipes*, 786 F.3d 1182, 1203–04 (9th Cir. 2015) (quoting *Wilbur v. Locke*, 423 F.3d 1101, 1107 (9th Cir. 2005)). Thus, Plaintiff cannot rely on the email exchange that occurred after the suit was filed to establish standing, and hence its claim to use it for such doesn’t pass muster.

Second, Plaintiff specifically alleges in the Complaint as proof of the validity of its claim against the Attorney General that the “Attorney General’s unrenounced threats to prosecute

Mayday’s protected speech ... violates the First Amendment.” Dkt. 1 ¶ 41. Plaintiff then turns around and tries to use the Attorney General’s refusal to agree to a consent decree as additional evidence of these alleged “unrenounced threats to prosecute Mayday.” *Id.*, *see also* Dkt. 18 at 8 (citing the email chain as evidence of the Attorney General’s “refusal to end this action” and failure to “disavow[] the threat” of prosecution as “confirm[ing] the existence of a credible enforcement threat”). Thus, Plaintiff is very much attempting to use the Attorney General’s statement to prove the validity of the claim, i.e. that the Attorney General has violated the First Amendment through his alleged “unrenounced threats” to prosecute Mayday. And, if there is no credible threat of enforcement, there is no Article III standing, and no valid claim.

Finally, even if the Court declines to strike the statement under Rule 408, the Court should not consider the statement in its decision because it is irrelevant to whether the Plaintiff had standing on the date the lawsuit was commenced. Plaintiff appears to concede that the statement is not relevant in determining whether Plaintiff had standing on the date the lawsuit was filed, instead arguing that the statement is simply used to show that standing persists after the lawsuit was filed. Dkt. 23 at 3. However, the statement is irrelevant even to show that standing persists, and instead shows Plaintiff’s attempt to manufacture standing after the lawsuit was filed. The statement is not a threat to enforce any law against Plaintiff, but is simply the Attorney General refusing to agree to a consent decree. This does not show a credible threat of enforcement, but merely a state elected official not agreeing to a consent decree. The statement is irrelevant for the standing analysis, and the Court should not consider it

For all of the above reasons, the Court should grant the Attorney General's Motion to Strike, or in the alternative refuse to consider the statement in making its decision on the Motion for Preliminary Injunction.

DATED: August 12, 2026

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

/s/ James E. M. Craig
JAMES E. M. CRAIG
Chief, Civil Litigation and
Constitutional Defense

Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on August 12, 2026, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which sent a Notice of Electronic Filing to the following persons:

DAVIS WRIGHT TREMAINE LLP
Los Angeles, California

Adam S. Sieff
adamsieff@dwt.com

Farrah C. Vazquez
farrahvazquez@dwt.com

DAVIS WRIGHT TREMAINE LLP
Seattle, Washington

Ambika Kumar
ambikakumar@dwt.com

Nicole Saad Bembridge
nicolesaadbembridge@dwt.com

Attorneys for Plaintiff

DAVIS WRIGHT TREMAINE LLP
Washington, DC

Chelsea T. Kelly
chelseakelly@dwt.com

Laura R. Handman
laurahandman@dwt.com

Azeezat Adeleke
azeezatadeleke@dwt.com

LEGAL VOICE
Seattle, Washington

Wendy S. Heipt
wheipt@legalvoice.org

LEGAL VOICE
Boise, Idaho

Kelly O'Neill
koneill@legalvoice.org

/s/ James E. M. Craig

JAMES E. M. CRAIG