UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 1:18-CIV-24145-WILLIAMS/TORRES

JOHN DOES et al.,

Plaintiffs,

vs.

MARK GLASS,

Defendant.

_____/

MOTION TO STRIKE REPLY TO MOTION TO DISMISS THIRD AMENDED COMPLAINT

Plaintiffs, through undersigned counsel, move this Court to strike Defendant's Reply to Plaintiffs' Response to Defendant's Motion to Dismiss Third Amended Complaint (TAC) (DE:263). In his Reply, Defendant (1) improperly raises two arguments that could have been raised in his Motion to Dismiss but were not; and (2) improperly rehashes two arguments already made in his Motion to Dismiss.

A. New Arguments Not Raised in Motion to Dismiss

1. A New Construction of § 943.0435(9)(d)

1. In their TAC, Plaintiffs challenged § 943.0435(9)(d)[1] as precluding a *mens rea*

[1] § 943.0435(9)(d) provides as follows:

> "An arrest on charges of failure to register when the offender has been provided and advised of his or her statutory obligations to register under subsection (2), the service of an information or a complaint for a violation of this section, or an arraignment on charges for a violation of this section constitutes actual notice of the duty to register. A sexual offender's failure to immediately register as required by this section following such arrest, service, or arraignment constitutes grounds for a subsequent charge of failure

defense to all but a first violation of the statute, including passive, non-willful and innocuous failures to make updates regarding "some detail of personal information," such as traveling for a long weekend, or having others' cars parked outside one's home. (DE:248 at ¶¶ 29, 47-56).

2. In his Motion to Dismiss, Defendant did not contest Plaintiffs' interpretation of (9)(d) as applying to failures to update personal information. He argued instead that (1) Florida courts continue to apply the holding of *State v. Giorgetti*, 868 So. 2d 512 (Fla. 2004) to the post-*Giorgetti* version of the statute; (2) a Florida jury instruction on violations of § 943.0435 rectifies the post-*Giorgetti* version's express limitation on the defense of lack of notice (the bolded sentence in fn.1); (3) the defense of lack of notice, the defense limited in (9)(d), is different from the defense of lack of knowledge, which remains available to registrants; and (4) other defenses are available to registrants, even if *mens rea* is not (DE:255 at 4-6). Plaintiffs responded fully to each of these arguments (DE:258 at 4-12).

3. For the first time by way of Reply, Defendant challenges Plaintiffs' construction of (9)(d), proposing a different construction entirely: that the express *mens rea* limitation applies only to failures to complete initial registration, not to failures to report informational updates (DE:263 at 2-4). Defendant argues that the meaning of the first clause of § 943.0435(9)(d) – "An arrest on charges of failure to register when the offender has been provided and advised of his or her statutory obligations to register under subsection [943.0435](2)" – was altered by a 2017

> to register. A sexual offender charged with the crime of failure to register who asserts, or intends to assert, a lack of notice of the duty to register as a defense to a charge of failure to register shall immediately register as required by this section. **A sexual offender who is charged with a subsequent failure to register may not assert the defense of a lack of notice of the duty to register. Registration following such arrest, service, or arraignment is not a defense and does not relieve the sexual offender of criminal liability for the failure to register.**" (emphasis supplied)

amendment to subsection 943.0435(2), which added the phrase "[U]pon initial registration" to the introductory language "A sex offender shall": "The plain meaning of the word 'initial', makes it clear that subsection (2) is referring to the **first time** a sex offender must register. This establishes that § 943.0435(9)(d) applies only to the failure to complete the initial registration." (DE:263 at 3) (emphasis in original).

4. To support this novel construction, Defendant quotes **only a brief excerpt from subsection § 943.0435(2)(a)**: "Upon initial registration, a sexual offender shall: (a) Report in person at the sheriff's office: 1. In the county in which the offender establishes or maintains a permanent, temporary, or transient residence within 48 hours after: a. Establishing permanent, temporary, or transient residence in this state; or b. Being released from the custody, control, or supervision of the Department of Corrections or from the custody of a contractor-operated correctional facility; or 2. In the county where he or she was convicted within 48 hours after being convicted for a qualifying offense for registration under this section if the offender is not in the custody or control of, or under the supervision of, the Department of Corrections, or is not in the custody of a contractor-operated correctional facility." (DE:263 at 3).

5. Defendant unaccountably fails to cite the rest of § 943.0435(2)(a), which clearly demonstrates that the limitation of a *mens rea* defense for all but a first violation applies *not solely* to initial registration *but to all* required informational updates:

> Any change in the information required to be provided pursuant to paragraph (b), including, but not limited to, any change in the sexual offender's permanent, temporary, or transient residence; name; electronic mail addresses; Internet identifiers and each Internet identifier's corresponding website homepage or application software name; home telephone numbers and cellular telephone numbers; employment information; and any change in status at an institution of higher education after the sexual offender reports in person at the sheriff's office must be reported in the manner provided in subsections (4), (7), and (8).

6. In making this new argument, Defendant also contends that *Doe as Next Friend of Doe #6 v. Swearingen*, 51 F. 4th 1295 (11th Cir. 2022) is inapposite to the strict liability issue because it addressed only the 2004 version of the statute and thus did not account for the change in § 943.0435(9)(d) wrought by the 2017 amendment to § 943.0435(2)(a). (DE:263 at 4). In fact, the lawsuit reviewed in that opinion challenged the 2018 version of the statute, and the Eleventh Circuit Court of Appeals explicitly addressed the 2018 version throughout its opinion in 25 separate references. *See* 51 F.4th at 1299, 1300, 1301, 1302, 1303, 1304, 1305, 1307, 1308, 1309.

7. In short, the Defendant's new textual analysis of (9)(d) rests entirely on his misrepresentation through omission of the meaning of § 943.0435(2)(a). It is unclear why Defendant would reserve this new argument for his Reply; it was certainly something Defendant could have asserted in his Motion to Dismiss, thus allowing Plaintiffs to respond to it in an appropriate fashion.

2. A New Challenge to Plaintiffs' Standing

8. Another argument Defendant makes for the very first time by way of Reply is that Plaintiffs lack standing to make an as-applied challenge to § 943.0435(9)(d) (DE:263 at 2-4). This new argument arises from Defendant's new interpretation of the statute: because (9)(d) applies only to a failure to complete initial registration, and because "Plaintiffs have completed their initial registration," "they are at no risk of being subject to § 943.0435(9)(d)." (DE:263 at 4). Because the standing challenge is based solely upon Defendant's newly minted statutory construction, he did not raise it in his Motion to Dismiss and Plaintiffs did not address it in their Response (DE:255, 268).

B. Rehashing of Arguments

9. Not only does Defendant's Reply advance two arguments never raised in his Motion to Dismiss, but it also improperly rehashes two arguments he had already made in his Motion to Dismiss: (1) in both his Motion to Dismiss (DE:255 at 2, 9-11) and his Reply (DE:263 at 1, 9-10), Defendant condemns the paucity of criminal history information and the absence of scientific citations in Plaintiffs' TAC; and (2) in both his Motion to Dismiss, DE:255, pp. 4-6 and his Reply, DE:263, pp. 5-8, Defendant argues that the inference of *mens rea* from the then-silent statute in *State v. Giorgetti*, 568 So. 2d 512 (Fla. 2004) applies equally to the current version, which expressly dispenses with *mens rea* for all but first violations.

MEMORANDUM OF LAW

A party is not permitted to introduce new arguments in a reply brief to a motion to dismiss. *Santana v. Starwood Hotels & Resorts Worldwide, Inc*., 2019 WL 12275952, at *5 (S.D. Fla. Nov. 20, 2019), *Roche Diagnostics Corp. v. Priority Healthcare Corp*., 2019 WL 4686353, at *1 (N.D. Ala. Feb. 28, 2019) (citing *Pacquiao v. Mayweather*, 2010 WL 3271961, at *1 (D. Nev. Aug. 13, 2010) ("[T]o the extent that a party raises a new argument or proffers new evidence and information in a reply brief [to a motion to dismiss], that argument or evidence is improper because the opposing party is deprived of an opportunity to respond."); *see also Cost Recovery Servs. LLC v. Alltell Commc'ns, Inc.,* 259 F. App'x 223, 226 (11th Cir. 2007) (movant cannot raise new argument in reply brief to motion for summary judgment unless non-movant has opportunity to respond)). The reason for this rule is that new arguments in a reply brief are outside the scope of the initial motion and deprive the non-movant of an opportunity to respond. *Santana, supra*, at *5, citing *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) (district court erred in denying plaintiffs' motion to strike and sur-reply where defendants presented new evidence in reply brief).

Defendant raised two arguments in his Reply Brief which could have been, but were not, raised in his Motion to Dismiss: (1) a novel construction of the challenged statute, § 943.0435(9)(d), which relies on distortion through omission of the statute's text, and which rendered nugatory plaintiffs' carefully-considered Response to the Motion to Dismiss; and (2) a challenge to Plaintiffs' standing, based on this distortion of the statute's text, to make an as-applied challenge. Under the above-cited case law, those portions of Defendant's Reply Brief in which these new arguments are made, (DE:263 at 2-4), are improper and should be stricken.

In addition, Defendant devotes a hefty portion of his Reply Brief to rehashing arguments already made in his Motion to Dismiss: (1) Plaintiffs have failed to allege sufficient detail about their criminal history and failed to provide citations for proffered empirical evidence about their low risk of recidivism, (DE:263 at 1, 9-10); and (2) *Giorgetti* applies equally to both the version of the statute that was silent about *mens rea*, and to the post-*Giorgetti* version that expressly precludes a *mens rea* defense for all but a first violation of the statute (DE:263 at 5-8).

Local rule 7.1 (c)(1), Local Rules of the Southern District Court of Florida, "strictly limit[s]" Reply memoranda "to rebuttal of matters raised in the memorandum in opposition without reargument of matters covered in the movant's initial memorandum of law." Defendant's reargument of the two issues cited above violates Local rule 7.1 (c)(1) and should be stricken from his Reply.

The above-identified impermissible arguments in Defendant's Reply are found on every page of that document. *See* DE:263 at 2-4 (two new arguments) and 1, 5-8, 9-10 (two rehashed arguments). Accordingly, the entire Reply should be stricken, and Defendant should be ordered to file a Reply that comports with the law and the rules. In the alternative, Plaintiffs seek leave to file a Sur-Reply to respond to the Defendant's Reply.

WHEREFORE AND BASED ON THE FOREGOING, Plaintiffs request that this Honorable Court strike Defendant's Reply or, in the alternative, that this Court grant them leave to file a Sur-Reply.

Respectfully submitted,

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CERTIFICATE OF CONFERRAL

Pursuant to Local Rule 7.1(a)(3), S.D. Fla. L.R., the undersigned certifies that he conferred with Defendant's counsel by E-Mail on Septmeber 22, 2025, and the Defendant opposes the relief sought herein.

s/Todd G. Scher
Todd G. Scher

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed on September 22, 2025, the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all persons registered to receive electronic notification for this case, including all opposing counsel.

s/Todd G. Scher
Todd G. Scher