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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Andrew Berrey,

10 Plaintiff,

11 v.

12 Plaintiff Investment Funding LLC, et al.,

13 Defendants.  
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No. CV-14-00847-PHX-BSB

**ORDER**

15 Plaintiff Andrew Berrey has filed a Motion for Rule 11 Sanctions against  
16 Defendant Injury Assistance, LLC (Injury Assistance), and its counsel.<sup>1</sup> (Doc. 84.)  
17 Berrey asserts that the Court should impose sanctions on Injury Assistance and its  
18 counsel based on Injury Assistance's Motion to Disgorge Michael Love's Attorney's  
19 Fees (Doc. 79), which the Court denied. (Doc. 93.) Berrey seeks a sanctions award of  
20 \$26,588, with additional sanctions to be determined after the deposition of Injury  
21 Assistance's counsel. (Doc. 84 at 1.) Injury Assistance has responded to the motion for  
22 sanctions (Doc. 87), and Berrey has filed a reply. (Doc. 88.) For the reasons below, the  
23 Court denies the motion for sanctions.

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25 <sup>1</sup> Berrey also filed a First Supplement to His Motion for Rule 11 Sanctions.  
26 (Doc. 85.) Berrey filed this supplement shortly after Injury Assistance filed its reply in  
27 support of its motion to disgorge attorney's fees. (Doc. 82.) In the supplement, Berrey  
28 asserts that Injury Assistance has filed "yet another frivolous pleading" (apparently  
referring to Injury Assistance's reply in support of its motion to disgorge attorney's fees)  
and, therefore, he has "no other option" but to supplement his motion for sanctions.  
(Doc. 85 at 1.) The supplement, however, reargues the merits of the motion to disgorge  
attorney's fees in what appears to be an improper surreply. Therefore, the Court strikes  
and does not consider Berrey's First Supplement to His Motion for Sanctions. (Doc. 85.)

1     **I.     Motion for Sanctions**

2             In the motion for sanctions,<sup>2</sup> Berrey argues that the motion to disgorge attorney’s  
3 fees was filed for an improper purpose and that it was frivolous because it was based on  
4 inadequate legal research and factual investigation. (Doc. 84 at 8, 12.) In response,  
5 Injury Assistance opposes the motion for sanctions by arguing the merits of the motion to  
6 disgorge attorney’s fees. (Doc. 87.)

7             **A.     Rule 11 Standard**

8             Pursuant to Rule 11(b) of the Federal Rules of Civil Procedure, a lawyer who  
9 signs and files a paper in federal court “certifies that to the best of the person’s  
10 knowledge, information, and belief, formed after an inquiry reasonable under the  
11 circumstances[,]” that the motion “is not being presented for any improper purpose” and  
12 that “the claims, defenses, and other legal contentions are warranted by existing law or by  
13 a nonfrivolous argument for extending, modifying, or reversing existing law.” Fed. R.  
14 Civ. P. 11(b)(1) and (2).

15             Rule 11 permits sanctions “when a filing is frivolous, legally unreasonable or  
16 without factual foundation, or is brought for an improper purpose.” *Estate of Blue v.*  
17 *Cnty. of Los Angeles*, 120 F.3d 982, 985 (9th Cir. 1997) (plaintiff’s complaint in third  
18 lawsuit violated Rule 11 because it was time barred and “alleged the identical § 1983  
19 claims at issue in [prior two lawsuits] against the same defendants”) (citations omitted).  
20 The objective standard of reasonableness applies when determining whether a motion is  
21 frivolous or has been filed for an improper purpose. *Hudson v. Moore Bus. Forms, Inc.*,  
22 836 F.2d 1156, 1159 (9th Cir. 1987) (citation omitted); *see also G.C. and K.B. Invs., Inc.*,  
23 *v. Wilson*, 326 F.3d 1096, 1110 (9th Cir. 2003) (reasonableness is viewed from the  
24 perspective of a competent attorney admitted to practice before the district court). When  
25 applying Rule 11, courts must prevent abuse of the judicial process while also allowing  
26 zealous advocacy. *Hudson*, 836 F.2d at 1159-60.

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27             <sup>2</sup> The factual and procedural background of this interpleader action, and the  
28 motion to disgorge attorney’s fees, has been set forth in previous orders (Docs. 89, 93)  
and is not repeated here.

1           **B.     Improper Purpose under Rule 11(b)(1)**

2           Berrey argues that Injury Assistance filed the motion to disgorge attorney’s fees  
3 for an improper purpose. A litigant files a motion for an improper purpose when the  
4 motion is meant to “harass or to cause unnecessary delay or needless increase in the cost  
5 of litigation.” *G.C. and K.B. Invs., Inc.*, 326 F.3d at 1110 (explaining that successive  
6 complaints based on propositions of law previously rejected may constitute harassment  
7 under Rule 11). Berrey argues that Injury Assistance filed its motion to disgorge  
8 attorney’s fees in a spiteful and vindictive response to Berrey’s reply in support of his  
9 motion for partial summary judgment because, based on Berrey’s reply, Injury Assistance  
10 realized its claims to the settlement proceeds would fail.<sup>3</sup> (Doc. 84 at 2, 5, 12.) This  
11 argument is speculative and based on Berrey’s unsupported allegations of ill motive.  
12 Berrey has not presented any objective evidence that Injury Assistance filed the motion to  
13 disgorge attorney’s fees for an improper purpose. Therefore, Berrey has presented no  
14 basis from which the Court could conclude that Injury Assistance filed the motion out of  
15 spite, to be vindictive, or to lash out and personally attack Berrey’s counsel.

16           Furthermore, Berrey’s argument is based on his counsel’s perception of the  
17 strength of his reply to support his motion for partial summary judgment. However, as  
18 set forth in the Court’s March 30, 2015 Order, the cross motions for summary judgment  
19 were complicated, presented an issue of first impression, and were not adequately briefed  
20 and thus required supplemental briefing. (Doc. 89.) Given the nature of the briefing on  
21 summary judgment, it is very unlikely Injury Assistance perceived Berrey’s reply in the

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23           <sup>3</sup> Berrey argues that Injury Assistance realized its claims were “marginalized” by  
24 his reply and therefore “lashed out” and “personally attack[ed]” Berrey’s counsel.  
25 (Doc. 84 at 2.) Berrey also argues that his reply “all but assur[ed] that Injury  
26 Assistance’s claims . . . would fail” and, therefore, Injury Assistance “took vindictive  
27 action.” (*Id.*) In addition, Berrey argues that his reply “strongly demonstrate[ed] that  
28 Injury Assistance’s . . . claims against the settlement proceeds must fail as a matter of  
law” and therefore Injury Assistance “spitefully” filed its motion to disgorge attorney’s  
fees. (*Id.* at 5.) Berrey also argues that “a thirst for vengeance motivated” Injury  
Assistance, and that Injury Assistance “fear[ed] the success of Berrey’s summary  
judgment motion so much it was willing to use the judicial system for an improper  
purpose.” (*Id.* at 12.) Finally, Berrey argues that Injury Assistance filed its motion to  
disgorge attorney’s fees to retaliate against Berrey because of his “strong reply.” (*Id.* at  
14.)

1 same way that Berrey perceived it. Thus, the Court concludes that Berrey has not  
2 established that Injury Assistance was motivated to file its motion to disgorge attorney’s  
3 fees for an improper purpose in reaction to the strength of Berrey’s reply.

4 The record contains no evidence that Injury Assistance intended to harass Berrey,  
5 cause unnecessary delay, or needlessly increase the cost of this litigation. Therefore,  
6 Berrey has not established that Injury Assistance filed the motion to disgorge attorney’s  
7 fees for an improper purpose and the Court denies the motion for sanctions on this basis.

8 **C. Frivolous under Rule 11(b)(2)**

9 Berrey argues that the motion to disgorge attorney’s fees was frivolous because  
10 Injury Assistance’s claims were “not well grounded in fact or law,” and Injury Assistance  
11 “failed to make reasonable inquiry into governing law.” (Doc. 84 at 6.) “Rule 11 sets a  
12 low bar: It deters ‘baseless filings’ by requiring a ‘reasonable inquiry’ that there is some  
13 plausible basis for the theories alleged.” *Strom v. United States*, 641 F.3d 1051, 1059  
14 (9th Cir. 2011) (citations omitted). Thus, frivolous filings are “both baseless and made  
15 without a reasonable and competent inquiry.” *Estate of Blue*, 120 F.3d at 985 (citation  
16 omitted); *In re Girardi*, 611 F.3d 1027, 1062 (9th Cir. 2010) (citation omitted). “The key  
17 question in assessing frivolousness is whether a complaint states an arguable claim — not  
18 whether the pleader is correct in his perception of the law.” *Hudson*, 836 F.2d at 1159.  
19 In addition, “ultimate failure on the merits is irrelevant.” *Id.* (citation omitted).

20 Furthermore, Rule 11 sanctions are not appropriate when a litigant has “some  
21 plausible basis, albeit quite a weak one” for the argument advanced. *United Nat’l Ins.*  
22 *Co. v. R & D Latex Corp.*, 242 F.3d 1102, 1117 (9th Cir. 2001). At least two circuit  
23 courts have reasoned that “to constitute a frivolous legal position for purposes of Rule 11  
24 sanction, it must be clear under existing precedents that there is no chance of success and  
25 no reasonable argument to extend, modify or reverse the law as it stands.” *Strom*, 641  
26 F.3d at 1059 (quoting *Simon DeBartolo Grp., L.P. v. Richard E. Jacobs Grp., Inc.*, 186  
27 F.3d 157, 167 (2d Cir. 1999)). A legal theory or argument is not frivolous simply  
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1 because it failed to persuade the district court. *Hurd v. Ralphs Grocery Co.*, 824 F.2d  
2 806, 811 (9th Cir. 1987).

3 To establish that the motion to disgorge attorney’s fees was frivolous, Berrey  
4 argues that Injury Assistance was attempting to assert a tort claim against Love, Berrey’s  
5 attorney, “in the nature of a breach of fiduciary duty.”<sup>4</sup> (Doc. 84 at 7.) Thus, Berrey  
6 argues that the motion “represents that a claim for relief exists when — in fact — it does  
7 not. Arguing for a legally impossible duty is frivolous on its face.” (*Id.* at 12.) This  
8 argument fails to establish that the motion to disgorge attorney’s fees was frivolous. As  
9 set forth in the Court’s order denying that motion, Injury Assistance was not attempting  
10 to assert a tort claim for breach of fiduciary duty against Love, but was requesting that  
11 the Court grant relief from an order and judgment under Rule 60. (Doc. 93 at 3-4.)  
12 Therefore, this argument is irrelevant and does not establish that the motion to disgorge  
13 attorney’s fees was frivolous.

14 Berrey also argues that “Injury Assistance believes [Love] owed it a fiduciary duty  
15 and that Love somehow breached that duty by depositing the settlement funds into the  
16 Court’s registry . . . .” (Doc. 84 at 6-7.) He further asserts that Injury Assistance failed to  
17 adequately investigate the facts of the case “causing it to jump to the erroneous  
18 conclusion that Love somehow failed to safeguard to funds at issue . . . despite the fact  
19 that Mr. Love deposited the entire balance of the action into the Court’s registry for  
20 safekeeping.” (*Id.* at 12.) This argument fails to establish that the motion to disgorge  
21 attorney’s fees was frivolous because Injury Assistance did not argue that Berrey failed to  
22 safeguard the settlement proceeds by depositing them in the Court’s registry.

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25 <sup>4</sup> Thus, Berrey argues that Love is not a party in the interpleader action and has  
26 not been served and, therefore, the Court lacks jurisdiction over the purported claim for  
27 breach of fiduciary duty and Injury Assistance must bring an action against Love.  
28 (Doc. 84 at 7). Berrey also argues that Love does not owe any “actionable duty” or  
“legal duty” to Injury Assistance. (*Id.* at 8, 9-10.) He also argues that the ethical rules  
cannot form the basis for civil liability, or establish duty or the standard of care, again  
treating Injury Assistance’s motion as an attempt to assert a claim against Love. (*Id.* at  
8.) Finally, Berrey asserts that the motion to disgorge attorney’s fees “demonstrated a  
fundamental misunderstanding of how to plead a case.” (*Id.* at 17.)

1           Instead, Injury Assistance argued that Berrey’s attorney, Love, did not disclose  
2 that he represented another Defendant, Plaintiff Investment Funding, LLC (PIF), in  
3 another matter in state court. (Doc. 82 at 2.) Injury Assistance further argued that by  
4 failing to disclose that he represented PIF, Love obtained the stipulation for the  
5 disbursement of attorney’s fees (Doc. 62) under false pretenses. (Doc. 82 at 2; *see also*  
6 Doc. 87 at 2, 5.) The Court rejected Injury Assistance’s arguments in the motion to  
7 disgorge attorney’s fees and found that Injury Assistance did not prove by clear and  
8 convincing evidence, as Rule 60 requires, that Berrey obtained the stipulation to disburse  
9 fees through false pretenses. (Doc. 93 at 5-6.)

10           The Court found that there was information in the state court docket that provided  
11 notice to Injury Assistance that Love represented PIF in that matter. (*Id.* at 5.) However,  
12 the Court also found that Berrey did not disclose that Love represented PIF in another  
13 matter (*id.* at 4), and Berrey has not argued in response to the motion to disgorge  
14 attorney’s fees, or in the motion for sanctions, that Love disclosed that he also  
15 represented PIF. Therefore, it is plausible that a court could have concluded that the  
16 failure to affirmatively disclose this information mislead Injury Assistance and caused it  
17 to enter the stipulation to disburse fees under false pretenses. Therefore, Injury  
18 Assistance’s argument had some plausible basis because Injury Assistance did not know  
19 that Love represented PIF. (Doc. 82 at 2.)

20           Berrey also argues that the motion to disgorge attorney’s fees was frivolous  
21 because Injury Assistance improperly asserted that Love owed Injury Assistance and the  
22 other parties a duty under E.R. 1.15(d) when Berrey was the “sole beneficiary of Love’s  
23 fiduciary duty.” (Doc. 84 at 8-9.) This argument also fails to establish that Injury  
24 Assistance’s motion to disgorge attorney’s fees was frivolous. Relying in part on E.R.  
25 1.15(d), Injury Assistance argued that Love had a fiduciary duty to Injury Assistance and  
26 the other claimants to safeguard the settlement funds. (Doc. 79 at 3; Doc. 82 at 2.) Injury  
27 Assistance argued that Love violated that duty when he failed to disclose that he  
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1 represented PIF in another matter and, thus, obtained the stipulation to disburse attorney's  
2 fees under false pretenses. (Doc. 79 at 2-3; Doc. 82 at 2.)

3 The Court found that Love did have a duty to protect the interests of the claimants  
4 under E.R. 1.15(d), and that Love apparently recognized that duty when he deposited the  
5 settlement proceeds in the Court's registry. (Doc. 93 at 8.) The Court, however, rejected  
6 Injury Assistance's argument that Love had violated this duty for the same reasons it  
7 rejected Injury Assistance's argument that Berrey had obtained the stipulation for  
8 disbursement of attorney's fees under false pretenses. (*Id.* at 9.) However, as set forth  
9 above, it is plausible that a court could find that Love's failure to affirmatively disclose  
10 his relationship with PIF mislead the other claimants, including Injury Assistance, thus  
11 leading them to enter the stipulation to disburse attorney's fees under false pretenses, in  
12 violation of E.R. 1.15(d). Therefore, Injury Assistance's argument, while not persuasive  
13 to the Court, was not frivolous.

14 Finally, Berrey argues that Injury Assistance improperly argued that Love's  
15 representation of Berrey and PIF created a conflict of interest because only a client could  
16 assert that conflict, and Love's clients had waived any conflict under E.R. 1.7.<sup>5</sup> (*Id.* at  
17 13-14.) This argument also fails to establish that the motion to disgorge attorney's fees  
18 was frivolous. In that motion, Injury Assistance argued that Love's representation of PIF,  
19 another claimant to the interpleaded funds, created a "clear conflict of interest between  
20 Love, Berrey, and all parties to this action" and that "Love is clearly putting PIF's  
21 interests ahead of everyone, including Berrey and all other claimants." (Doc. 79 at 3, 5.)  
22 In its response to the motion for sanctions, Injury Assistance further argues that Love's  
23 representation of Berrey and PIF was a conflict of interest, and that Love had a duty to

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25 <sup>5</sup> Injury Assistance did not argue any violation of E.R.1.7 in its motion to disgorge  
26 attorney's fees or in its reply. (*See* Docs. 79, 82.) Instead, Berrey raised E.R. 1.7 by  
27 arguing that Love could obtain a waiver of any concurrent conflict between Berrey and  
28 PIF. (Doc. 80 at 2, 10.) Therefore, the Court considered E.R. 1.7(a) in its order denying  
the motion to disgorge attorney's fees. (Doc. 7-8.) Despite Berrey's argument that there  
was no conflict, the Court found, "from the limited record," that Love's representation of  
Berrey and PIF created a concurrent conflict, that both clients had waived that conflict,  
and it appeared that the elements of E.R. 1.7(b) had been satisfied. (Doc. 93 at 7-8.)

1 disclose this conflict. (Doc. 87 at 2, 5.) Injury Assistance argues that because Love did  
2 not disclose that he represented PIF, he violated his duty and obtained the stipulation to  
3 disburse fees under false pretenses. (*Id.*)

4 Thus, it appears that Injury Assistance was arguing in the motion to disgorge  
5 attorney's fees, in another form, that Love's undisclosed representation of PIF created a  
6 conflict with his duty to protect the interests of all claimants to the settlement funds.  
7 Although the Court found that Injury Assistance had not established that Love violated  
8 ethical obligations, it is plausible that a court could find that Love's failure to disclose  
9 that he represented PIF created a conflict with his duty to the other claimants under  
10 E.R. 1.15(d). Therefore, there is some plausible basis for the theories Injury Assistance  
11 asserted in the motion to disgorge attorney's fees. The Court finds that the motion was  
12 not frivolous and will not impose sanctions on this basis.

13 **II. Conclusion**

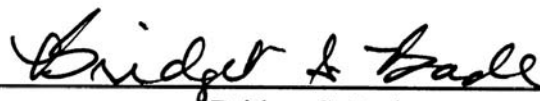
14 The Court concludes that Injury Assistance did not violate Rule 11 because the  
15 motion to disgorge attorney's fees was not filed for an improper purpose and was not  
16 frivolous.

17 Accordingly,

18 **IT IS ORDERED** that Berrey's Motion for Rule 11 Sanctions (Doc. 84) is  
19 **DENIED.**

20 **IT IS FURTHER ORDERED** that Berrey's First Supplement to His Motion for  
21 Rule 11 Sanctions (Doc. 85) is stricken.

22 Dated this 8th day of May, 2015.

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Bridget S. Bade  
26 United States Magistrate Judge  
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