

FILED

OCT 11 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NICOLAS AQUINO,

Plaintiff-Appellee,

v.

COUNTY OF MONTEREY SHERIFF'S
DEPARTMENT; IVAN RODRIGUEZ,
an individual,

Defendants-Appellants.

No. 16-16815

D.C. No. 5:14-CV-03387-EJD

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Edward J. Davila, District Court Judge, Presiding

Argued and Submitted September 12, 2017
San Francisco, California

Before: KOZINSKI and FRIEDLAND, Circuit Judges, and BENNETT, ** District
Judge.

Summary judgment was denied on defendant-appellant Ivan Rodriguez's
claims of qualified immunity because the district court found genuine issues of

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

** The Honorable Mark W. Bennett, United States District Judge for the
Northern District of Iowa, sitting by designation.

material fact remained unresolved concerning each claim. We agree and thus affirm.

Plaintiff-appellee Nicolas Aquino moved this court to impose sanctions against Rodriguez for filing a frivolous appeal. *See* FED. R. APP. P. 38 (“[I]f a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.”). “An appeal is considered frivolous if the result is obvious or the appellant’s arguments are wholly without merit.” *Ingle v. Circuit City*, 408 F.3d 592, 595 (9th Cir. 2005) (quoting *Adriana Int’l Corp. v. Thoeren*, 913 F.2d 1406, 1417 (9th Cir. 1990)).

The request for sanctions in Aquino’s answering brief does not provide Rodriguez sufficient notice. *See Higgins v. Vortex Fishing Sys., Inc.*, 379 F.3d 701, 709 (9th Cir. 2004) (“A request made in an appellate brief does not satisfy Rule 38” (quoting *State of Cal. Emp’t Dev. Dep’t v. Taxel (In re Del Mission Ltd.)*, 98 F.3d 1147, 1154 (9th Cir. 1996))). However, we may, *sua sponte*, impose sanctions for filing a frivolous appeal under Rule 38 “after . . . notice from the court and reasonable opportunity to respond.” FED. R. APP. P. 38. We order Rodriguez to show cause in writing, within 14 days after this memorandum

disposition is filed, why we should not award attorneys' fees and double costs to Aquino under Rule 38—including addressing the questions raised at oral argument about Rodriguez's potentially frivolous positions. Aquino may file a reply within 14 days after service of Rodriguez's response.

AFFIRMED.