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7 UNITED STATES DISTRICT COURT  
8 SOUTHERN DISTRICT OF CALIFORNIA  
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10 CLAYTON DEL THIBODEAU, Pro Se,  
11 Plaintiff,

12 v.

13 ADT SECURITY SERVICES, a/k/a/  
14 ADT HOLDINGS, INC.,  
15 Defendant.

Case No.: 3:16-cv-02680-GPC-AGS

**ORDER**

**(1) DENYING MOTION FOR  
DISQUALIFICATION AND  
REMOVAL OF DEFENDANT ADT  
LLC’S ATTORNEY OF RECORD**

**(2) DENYING DEFENDANT’S  
REQUEST FOR SANCTIONS**

**[DKT. NO. 86.]**

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20 On March 1, 2018, Plaintiff Clayton Del Thibodeau (“Plaintiff” or “Thibodeau”) filed a “Motion for Disqualification & Removal of Defendant ADT LLC’s Attorney of Record.” Dkt. No. 80. Defendant ADT filed a response on May 10, 2018. Dkt. No. 91. Plaintiff filed a reply on May 22, 2018. Dkt. No. 95.<sup>1</sup> Plaintiff is represented In Propria

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25 <sup>1</sup> On May 29, 2018, this Court received a supplemental reply from Plaintiff wherein Plaintiff stated that while researching the docket in this case, he saw the Dkt. No. 94 discrepancy order and interpreted that

1 Persona (“pro se”). Defendant ADT is represented by Fisher & Phillips LLC with three  
2 assigned attorneys—Lonnie D. Giamela, Nathan V. Okelberry, and Rayan Naouchi.

3 Pursuant to Civil Local Rule 7.1(d)(1), the Court finds the matter suitable for  
4 adjudication without oral argument. For the reasons set forth below, the Court **DENIES**  
5 Plaintiff’s Motion for Disqualification and **DENIES** Defendant’s Request for Sanctions  
6 made in their opposition.

## 7 **I. MOTION FOR DISQUALIFICATION**

### 8 **A. Standing**

9 Defendant first argues that Plaintiff lacks standing to raise a motion to disqualify  
10 counsel. Citing *Colyer v. Smith*, 50 F. Supp. 2d 966 (C.D. Cal. 1999), Defendant asserts  
11 that typically a party moving to disqualify must be either a current or former client of an  
12 attorney or have an expectation of confidentiality. Under *Colyer*, non client litigants  
13 must establish a personal stake in the motion to disqualify sufficient to satisfy the  
14 “irreducible constitutional minimum” of Article III standing. 50 F. Supp. 2d. at 972.  
15 Moreover, Defendant asserts that an exception identified in *Colyer* for ethical breaches so  
16 egregious that it “so infects the litigation in which disqualification is sought that it  
17 impacts the moving party’s interest in a just and lawful determination of her claims” does  
18 not apply to allow third party standing. *Id.*

19 This Court recently held in *Greenfield MHP Associates, L.P. v. Ametek, Inc.*, 2018  
20 WL 538961, at \*2-3 (S.D. Cal. Jan. 24, 2018), that it “possesses the power to consider

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22 document to mean that the Court had ordered Plaintiff to file a revised reply. However, the Court  
23 *accepted* that filing and there was no need to file a supplemental pleading, nor a court order directing  
24 Plaintiff to do so. Accordingly, the operative reply is Thibodeau’s timely submitted Dkt. No. 95 Reply.  
25 The supplemental reply and declaration included therein have been rejected for filing as Plaintiff has not  
26 sought leave to file a supplemental reply in this case. *See* Dkt. No. 96. In future filings, Plaintiff should  
27 take note that a filing that is “to be filed nunc pro tunc to date received” has been accepted for docketing  
28 and is appropriately filed before this Court. In contrast, a “rejected” filing is not accepted for docketing.

1 and decide [a] motion for disqualification by virtue of its inherent power to preserve the  
2 integrity of the adversary process.” In so holding, the Court reasoned that it made little  
3 sense to apply the requirements of Article III standing to a party seeking disqualification  
4 of another party’s counsel, given that the Court possessed an inherent power to disqualify  
5 attorneys appearing before it. *Id.* Consequently this Court concluded that “[t]he fact that  
6 the Court possesses an inherent power to disqualify Plaintiffs’ Counsel *sua sponte*  
7 requires the conclusion that Article III has conferred that power regardless of how the  
8 ethical violation comes to the Court’s attention.” *Id.* at \*3.

9 The Court explicitly recognized that this decision conflicted with *Colyer* and a  
10 series of decisions in this circuit that have relied on *Colyer*. See *Ametek*, 2018 WL  
11 538961, at \*4 n.3 (citing *inter alia Kaufmann v. Pima Cty.*, No. CV 11-534 TUC DCB,  
12 2012 WL 12873766, at \*2 (D. Ariz. Sept. 19, 2012); *So v. Land Base LLC*, No. CV 08-  
13 03336 DDP (AGR<sub>x</sub>), 2010 WL 3075641, at \*2 (C.D. Cal. 2010)).

14 Given the Court’s holding in *Ametek*, the Court concludes that the requirements of  
15 Article III standing do not prevent a non-client litigant such as Thibodeau from pursuing  
16 his motion for disqualification. Nonetheless, “[this] conclusion, of course, does not  
17 require that such a motion [for disqualification] be granted.” See *Ametek*, 2018 WL  
18 538961, at \*5. Having found that Plaintiff has standing to bring the motion to disqualify,  
19 the Court proceeds to analyze the merits of his disqualification motion.

## 20 **B. Whether Disqualification is Appropriate**

21 The Court next considers whether disqualification is appropriate under these  
22 circumstances.

23 “The disqualification of counsel because of an ethical violation is a discretionary  
24 exercise of the trial court’s inherent powers.” *Crenshaw v. MONY Life Ins. Co.*, 318 F.  
25 Supp. 2d 1015, 1020 (S.D. Cal. 2004). When considering the merits of the claim of a  
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1 violation of ethical rules, this Court considers California law. *See In re Cty. of Los*  
2 *Angeles*, 223 F.3d 990, 995 (9th Cir. 2000). The Court is well aware, however, that a  
3 motion for “disqualification is a drastic measure that is disfavored . . . [b]ecause [it is]  
4 often tactically motivated.” *Crenshaw*, 318 F. Supp. 2d at 1020. “Because of this  
5 potential for abuse, disqualification motions should be subjected to particularly strict  
6 judicial scrutiny.” *Optyl Eyewear Fashion Int’l Corp. v. Style Cos.*, 760 F.2d 1045, 1050  
7 (9th Cir. 1985) (internal quotation marks omitted). Even a violation of the California  
8 Rules of Professional Conduct does not automatically compel disqualification. *Crenshaw*  
9 *v. Mony Life Insurance Co.*, 318 F. Supp. 2d 1015, 1020 (S.D. Cal. 2004) (citing *Gregori*  
10 *v. Bank of America*, 207 Cal. App. 3d 291, 303 (1989.)) Moreover, the significant  
11 question is “whether there exists a genuine likelihood that the status or misconduct of the  
12 attorney in question will affect the outcome of the proceedings before the court.”  
13 *Gregori*, 207 Cal. App. 3d at 303. Disqualification is inappropriate simply to punish a  
14 dereliction that will likely have no substantial continuing effect on future judicial  
15 proceedings; other sanctions such as imposition of attorneys fees and costs or reporting  
16 misconduct to the State Bar of California is more appropriate in this situation. *Id.*

17 “Disqualification proceedings are equitable in nature . . . For this reason, courts  
18 may properly consider the totality of the circumstances, including whether the motion is  
19 being brought in bad faith or otherwise for tactical reasons.” *Sherman v. CLP Res., Inc.*,  
20 No. CV 12-8080-GW (PLAx), 2015 WL 13542762, at \*7 (C.D. Cal. Feb. 4, 2015)  
21 (citations omitted). “Because a motion to disqualify a party’s counsel may implicate  
22 several important interests, it is important that judges examine such motions carefully,  
23 bearing in mind such considerations as a client’s right to chosen counsel, an attorney’s  
24 interest in representing a client, the financial burden on a client to replace disqualified  
25 counsel, and the possibility that tactical abuse underlies the disqualification motion.”

1 *Yumul v. Smart Balance, Inc.*, No. CV 10-00927 MMM (AJWx), 2010 WL 4352723, at  
2 \*3 (C.D. Cal. Oct. 8, 2010) (internal quotation marks and alterations omitted). “The  
3 district court is permitted to resolve disputed factual issues in deciding a motion for  
4 disqualification and must make findings supported by substantial evidence.” *CrossFit*  
5 *Inc. v. JB&AP CFLA BIZ LLC*, No. CV1301374DMGRNBX, 2013 WL 12142635, at \*2  
6 (C.D. Cal. Oct. 24, 2013) (citations omitted).

### 7 **1. Deposition Notice**

8 Here, Plaintiff argues that Fisher & Phillips, ADT’s counsel, has repeatedly engaged  
9 in professional misconduct in violation of California’s Rules of Professional Conduct and  
10 other standards. Plaintiff presents a host of alleged violations discussed below.

11 First, Plaintiff argues that ADT’s counsel committed misconduct by noticing a  
12 deposition in Los Angeles when Thibodeau lives in San Diego, California. Mot. at 15.  
13 Plaintiff argues that several local rules were violated by failing to discuss his availability  
14 in advance. ADT asserts that Plaintiff conveniently omitted that while the deposition was  
15 first inadvertently noticed for the Los Angeles office, an amended notice updated the  
16 location to San Diego and the deposition actually took place in the San Diego office.  
17 Okelberry Decl. ¶ 2. Plaintiff, in his reply, asserts that he emailed ADT to request a change  
18 to Fisher & Phillips’ San Diego office on April 26, 2017, and that ADT did not issue an  
19 amended notice until May 15, 2017, approximately three weeks later and two weeks before  
20 the scheduled deposition. See Ex. 18-19.

21 Given that Attorney Okelberry has stated that this was an inadvertent error, the Court  
22 finds no ethical violation took place that rises to the level of a sanctionable offense, let  
23 alone the high bar for disqualification of ADT’s chosen counsel. However, the Court  
24 cautions ADT to be wary of glossing over the facts as the Court finds that a three week  
25 delay is far too long a period to claim—as ADT did in its briefing—that it “quickly served”  
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1 an amended notice. *See Opp.* at 4.

2 **2. Deposition Transcript**

3 Next, Plaintiff argues that ADT’s counsel made false statements with regard to the  
4 litigation of his motion to dismiss his deposition transcript in front of the Honorable  
5 Magistrate Judge Andrew Schopler (Dkt. No. 36). Specifically, Plaintiff challenges a  
6 statement made by Defendant that: “Instead of ensuring that H&B [the deposition  
7 company] received these alleged letters, Plaintiff decided to sit back and wait to file a  
8 motion to dismiss his entire deposition transcript. Plaintiff did not call, send an email, or  
9 follow up in any way to ensure receipt of his alleged letters . . .” Mot. at 16. As support  
10 for his allegation that he did make sure H & B received the letters, Plaintiff submits Exhibit  
11 7, a USPS tracking receipt confirming that H & B received his letters. Defendant’s  
12 opposition does not specifically address this issue. Even so, the Court observes that  
13 Defendant’s statement does not rise to the level of a sanctionable offense or the high bar of  
14 requiring disqualification. Rather, it is at most an inaccurate statement and the type of  
15 garden variety hyperbole frequently seen in attorney argumentation. Moreover, Judge  
16 Schopler has previously resolved the merits of that motion and found that “Even assuming  
17 there was a Rule 30(e) violation, the Court has found no legal authority to justify such  
18 drastic sanctions.” Dkt. No. 64 at 1 (finding that the evidence of a Rule 30(e) violation  
19 was “marginal, at best.”).<sup>2</sup> As such, neither disqualification nor sanctions are not merited  
20 under these facts.

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23 <sup>2</sup> On Reply, Thibodeau asserts that he did not make any changes to his deposition transcript because he  
24 did not receive Judge Schopler’s Dkt. No. 64 order until February 3, 2018. As such, he challenges ADT  
25 counsel’s statement that “Notably, despite crying foul about the inability to review his transcript,  
26 Plaintiff subsequently made **no** revisions to his deposition transcript.” The Court observes that  
27 Thibodeau could have filed a motion for an extension to Judge Schopler based on the asserted facts but  
28 chose not to do so at that time.

1                   **3. Service Issues**

2           Plaintiff argues *inter alia* that counsel filed nine falsely sworn proof of service  
3 affidavits on September 1, 2017. Ex. 10; Thibodeau Decl. ¶ 16. Plaintiff alleges that  
4 counsel chose to actively deceive the Court and Plaintiff by mailing motion papers to  
5 Plaintiff on September 5, 2017 under fraudulently sworn proof of service affidavits dated  
6 September 1, 2017. See Exs. 9-10. ADT asserts that the documents were sent out via  
7 FedEx Delivery on September 1, 2017, a Friday, and that FedEx made the delivery on  
8 September 5, 2017.<sup>3</sup> Okelberry Decl. ¶ 3.

9           On September 20, 2017, Plaintiff filed a Motion to Quash ADT’s Motion for Partial  
10 Summary Judgment, arguing that the original motion for summary judgment had not been  
11 served on him in violation of the scheduling order. Dkt. No. 47. That day, the Court issued  
12 an order directing Defendants to either file an opposition brief or properly serve Plaintiff  
13 pursuant to *Magnuson v. Video Yesteryear*, 85 F.3d 1424 (9th Cir. 1996). Dkt. No. 48.  
14 ADT elected to re-serve Plaintiff pursuant to U.S. mail to correct this issue. Dkt. No. 49.

15           Fisher & Phillips’ conduct here is neither sanctionable, nor requires disqualification.  
16 The filing issues appear to have been the result of inadvertent mistake, which is not  
17 behavior rising to the level of sanctions. See Dkt. No. 39 (notice of errata stating that  
18 exhibits were not properly attached to compendium of evidence and revising citations).

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20 <sup>3</sup> On Reply, Thibodeau alleges that Okelberry Decl, Exhibit A is not authentic because it is not  
21 consistent with data available from online Fedex tracking information, presented at Exhibit 15-16, and  
22 with Exhibit 9, a FedEx receipt. Reply at 7. Thibodeau asserts that online tracking data shows the  
23 package was delivered to Bonita, CA, while the package was actually delivered to Alpine, CA. While  
24 on first glance there are some inconsistencies between the exhibits, one can infer an explanation for at  
25 least one of the inconsistencies. Exhibit 9 shows that the initial address mistakenly listed zip code  
26 91902, the zip code for Bonita, CA, the same city listed in Exhibit 15. It appears that FedEx later  
27 corrected the zip code to 91901, the zip code for Alpine, CA, a fact further corroborated by Exhibit A  
28 (“10:29 am—Incorrect address – Zip/Postal code”). This corroboration between Exhibit 9 and Exhibit  
A is enough for the Court to infer that counsel did not intend to fabricate evidence before this Court such  
that any sanctions or disqualification would be warranted.

1 Moreover, Plaintiff's grievances regarding service have already received an adequate  
2 remedy—the Court issued an order requiring Plaintiff to be properly served, which ADT  
3 promptly complied with. *See* Dkt. No. 48.

#### 4 **4. Deposition and Summary Judgment Issues**

5 Plaintiff challenges several acts by Fisher & Phillips related to his deposition and  
6 summary judgment. Mot. at 19-28. First, Plaintiff argues that ADT's counsel prevented  
7 Plaintiff from viewing his May 2015 ADT Salesforce Schedule and that ADT's counsel  
8 neglected to attach the May 2015 schedule as required by Federal Rule of Civil Procedure  
9 30(f)(2)(A). Next, Plaintiff argues that Defense counsel misleadingly phrased a question  
10 at his deposition to minimize his supervisory experience and that defense counsel  
11 subsequently misrepresented Plaintiff's lack of supervisory experience before this court.  
12 In particular, Plaintiff asserts that defense counsel was in possession of his resume,  
13 application letters, and other employment records. Further, Plaintiff argues that counsel  
14 misrepresented plaintiff's position regarding travel time and that the Declaration of Tricia  
15 Cole contains multiple false and misleading statements. Finally, Plaintiff argues that  
16 ADT's counsel suppressed completed copies of Tricia Cole's conversation records and  
17 reporting letters.

18 Each of these actions allegedly undertaken by counsel involve the merits of the  
19 summary judgment motion and the corresponding deposition that preceded the filing of  
20 that motion. Plaintiff could have raised these objections at his deposition and could have  
21 challenged these issues in his opposition. For example, to the extent that Plaintiff alleges  
22 that Defendant did not present a complete record, he could have attached and cited those  
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1 documents in his opposition to summary judgment.<sup>4</sup> Moreover, Plaintiff has repeatedly  
2 asserted some of these arguments in prior briefing regarding the merits of the summary  
3 judgment motion and in his motion for reconsideration. The Court does not find that any  
4 of these allegations constitute any sanctionable activity, nor would require the extreme  
5 remedy of disqualification of counsel.

6 Given the lack of sanctionable misconduct asserted by Plaintiff and recognizing  
7 ADT's right to counsel of its choice and the financial burden it would cost to replace any  
8 disqualified counsel, the Court **DENIES** Plaintiff's Motion for Disqualification of  
9 Counsel. To the extent that Plaintiff's Motion also requests sanctions, this request is also  
10 **DENIED**.

## 11 **II. DEFENDANT'S REQUEST FOR SANCTIONS**

12 In their opposition, Defendant's request that the Court sanction Plaintiff under its  
13 inherent power to impose sanctions for bad faith conduct in litigation. Defendants  
14 request \$1,870.50 reflecting Defendant's fees and costs associated with opposing the  
15 motion for disqualification. Okelberry Decl. ¶ 4.

16 District courts have inherent power to impose sanctions even where the bad faith  
17 conduct also may be sanctioned under statutes or rules. *Chambers v. NASCO*, 501 U.S.  
18 32, 45 (1991). These powers are "governed not by rule or statute but by the control  
19 necessarily vested in courts to manage their own affairs so as to achieve the orderly and  
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22 <sup>4</sup> Embedded in Plaintiff's argument is the notion that the Court discouraged Plaintiff from introducing  
23 additional documentary evidence by striking Plaintiff's initial 58 page opposition as in violation of the  
24 local rule establishing a 25 page limit. On Reply, he asserts that he subjectively understood the Court's  
25 *Rand* notice to forbid Plaintiff from submitting new documentary evidence in his opposition. The Court  
26 observes that Plaintiff could have submitted a motion seeking leave to file a brief exceeding 25 pages,  
27 but did not do so. Additional exhibits, also, would have not counted against the 25 page limit. Moreover,  
28 he could have submitted an inquiry as to whether additional documentary evidence could have been  
submitted, but did not do so.

1 expeditious disposition of cases.” *Id.* When the court imposes sanctions under its inherent  
2 power, there must be some showing that the party acted willfully or in bad faith. *Id.* at 43.

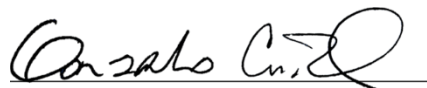
3 The Court will decline to find—at this time—that Plaintiff filed his motion for  
4 disqualification with bad faith. Plaintiff explicitly states that he has “weighed the  
5 possible perception of the Court that Plaintiff’s Motion may be a tactical device” and  
6 explains that there was no tactical advantage to gain through the Motion given that  
7 Summary Judgment has concluded. Mot. at 9. Plaintiff has clearly considered the  
8 possibility that Court could view his filing as in bad faith and has proffered acceptable  
9 reasoning for why he pursued the litigation of this motion. As such, the Court **DENIES**  
10 Defendant’s request for sanctions against Plaintiff.

### 11 12 **CONCLUSION**

13 The Court **DENIES** Plaintiff’s Motion for Disqualification and Removal of  
14 Defendant ADT LLC’s Attorney of Record. The Court **DENIES** Defendant’s Request  
15 for Sanctions. The Court **VACATES** the hearing currently set for June 8, 2018.

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17 **IT IS SO ORDERED.**

18 Dated: June 4, 2018



Hon. Gonzalo P. Curiel  
United States District Judge