STATE OF IDAHO)
County of KOOTENAI)ss
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AT 4:05 O'Clock P. M
CLERK, DISTRICT COURT
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

POWDERHORN LAND & CATTLE CORPORATION, an Idaho Corporation,

Plaintiff,

VS.

JEFFREY ALEXANDER and LAUREEN MIILER, husband and wife, and KOOTENAI COUNTY TITLE COMPANY, INC.,

Defendants.

Case No. **CV28-18-9063**

MEMORANDUM DECISION AND ORDER: 1) DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, 2) GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND 3) DENYING DEFENDANTS' MOTION TO STRIKE AND/OR DISQUALIFY PLAINTIFF'S COUNSEL

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on cross-motions for summary judgment filed by Defendants Jeffrey Alexander (Alexander) and Laureen Miller (Miller) and by Plaintiff Powderhorn Land & Cattle Corporation (Powderhorn). Also before the Court is Defendants' Motion to Strike and/or Disqualify Plaintiff's Counsel. The Court heard oral arguments on each motion on June 26, 2019. The Court denied Defendants' Motion to Strike and/or Disqualify Plaintiff's Counsel, finding the motion to be premature. At the hearing, the Court stated it would include its reasoning in its written decision. The Court took the cross-motions for summary judgment under advisement.

In 2018, Alexander and Miller discovered a listed property being sold by Powderhorn and contacted real estate agent John Beutler (Beutler), the listing agent for Powderhorn. Decl. of Jeffrey Alexander, ¶¶ 2, 4. Beutler informed Alexander of a pending application for a Conditional Use Permit (CUP) submitted by the owner of the adjacent property, which requested the allowance of surface mining. *Id.* at ¶ 6. Beutler provided Alexander with information regarding the CUP application, which included Powderhorn's detailed written objection to the CUP, submitted by Fulgham, counsel for Powderhorn. *Id.* at ¶¶ 7, 8. One of the concerns raised by Fulgham was that "[t]he main residence on the Powderhorn property sits at an elevation above the proposed pit and would have a direct site line view of the mining operation from its living room."[1] *Id.* at ¶ 9. Beutler told Alexander that if he wanted any additional information regarding the hearing on the CUP application, he should contact Fulgham. *Id.* at ¶ 6. Alexander stated, "[i]n my April 24, 2018 phone conversation with Ms. Fulgham, she told me that she had timely objected to the neighbor's requested CUP and that she believed that the CUP would ultimately not be issued." *Id.* Alexander stated, "[b]ased upon the information and opinions conveyed by Ms. Fulgham," he and Miller decided to make an offer to purchase the Powderhorn property. *Id.* at ¶ 12.

Alexander, Miller, and Powderhorn executed the Real Estate Purchase and Sale Agreement (REPSA) (also referred to as the Agreement) for the purchase of the Powerderhorn property for four-million dollars. *Id.* at Ex. C. On May 12, 2018, Powderhorn signed the REPSA and accepted the terms outlined therein. *Id.* at ¶ 15.

[1] Other objections include, "[t]here was a risk of contamination to the Powderhorn well, which was located approximately 200 yards from the proposed surface mine," "[t]he proposed surface mine would cause very significant environmental impacts," and "[a] perennial stream is located on the Powderhorn property and runoff or water migration from the proposed mien could negatively and adversely impact both the stream and the Lake Coeur d'Alene." Decl. of Jeffrey Alexander, ¶ 9.

On May 15, 2018, Alexander and Miller deposited $100,000.00 in earnest money with Kootenai Title, pursuant to the REPSA.[2] *Id.* at ¶ 16. On May 19, 2018, Beutler informed Alexander that the CUP was approved, thereby allowing surface mining on the property adjacent to the Powderhorn property. *Id.* at ¶ 17. On May 21, 2018, Alexander and Miller received a Preliminary Title Report, also referred to as a Preliminary Title Commitment, from Beutler which identified, among other things, a "[m]ortgage to secure an indebtedness" in the amount of $150,000.00. *Id.* at ¶¶ 18, 19, Ex. D.

Pursuant to Section 9(A) of the REPSA, after having received the Preliminary Title Commitment, Alexander and Miller had two business days to object in writing to a condition of the title as set forth in the report.[3] Decl. of Jeffrey Alexander, ¶ 20; *see* Compl., Ex. B. On May 21, 2018, the same day the Preliminary Title Commitment was received, Alexander and Miller provided a written objection to multiple items contained in the Preliminary Title Commitment, including the $150,000.00 mortgage. *Id.* at ¶ 20, Ex. E. Section 9(A) of the REPSA states: "It is agreed that if the title of said PROPERTY is not marketable, and cannot be made so within 2 business days after SELLER'S receipt of a written objection and statement of defect from BUYER, then BUYER'S Earnest Money deposit shall be returned to BUYER and [...]." Compl., Ex. B.

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[2] Earnest money is "[a] deposit paid (usually in escrow) by a prospective buyer (especially of real estate) to show a good-faith intention to complete the transaction, and ordinarily forfeited if the buyer defaults." Black's Law Dictionary, 526–27 (7th ed. 1999). "[I]t's primary purpose is to serve as a source of payment of damages should the buyer default." *Id.*

[3] Section 9, "Title Insurance," subsection A, "Preliminary Title Commitment," of the REPSA reads: "Within 6 business days of final acceptance of all parties[,] SELLER shall furnish to BUYER a preliminary commitment of a title insurance policy showing the condition of the title to said PROPERTY. BUYER shall have 2 business days after receipt of the preliminary commitment, within which to object in writing to the condition of the title as set forth in the preliminary commitment. If BUYER does not so object, BUYER shall be deemed to have accepted the conditions of the title. It is agreed that if the title of said PROPERTY is not marketable, and cannot be made so within 2 business days after SELLER'S receipt of a written objection and statement of defect from BUYER, then BUYER'S Earnest Money deposit shall be returned to BUYER and SELLER shall pay for the cost of title insurance cancellation fee, escrow and legal fees, if any." Compl., Ex. B.

On May 23, 2018, Defendants received a response from David Glod (Glod), on behalf of Powderhorn, which stated, in relevant part, "only title conditions which render title to the Property unmarketable can provide a basis for termination of the P&S. [...]. The...loan identified in your May 21, 2018 letters [does] not in any way render title to the Property unmarketable, uninsurable or otherwise violate Powderhorn's title obligations." Compl., Ex. E.

On May 30, 2018, Defendants responded to Glod's letter explaining that they provided a timely objection to the condition of title provided in the Preliminary Title Commitment, and that they had not received a sufficient response from Powderhorn regarding that objection. Decl. of Jeffrey Alexander, ¶ 25. As was anticipated by Powderhorn, Defendants did not attend the real estate closing. Compl., ¶ 31, Ex. E; Decl. of Jeffrey Alexander, ¶¶ 26–28, Ex. I ("If you reconsider your position before the closing date, please contact me. Otherwise, we will take your correspondence as confirmation that you do not intend to close, and proceed accordingly.").

Powderhorn filed a Complaint for Interpleader and Breach of Contract on November 26, 2018, against Alexander and Miller, as well as Kootenai County Title Company, Inc.[4] Alexander and Miller filed their Answer on January 4, 2019. On May 22, 2019, Alexander and Miller filed their Motion for Summary Judgment, Memorandum in Support of Defendants' Motion for Summary Judgment, Declaration of Jeffrey Alexander, and Declaration of John F. Magnuson. On May 29, 2019, Powderhorn filed Plaintiff's Motion for Summary Judgment, Memorandum in Support of Plaintiff's Motion

[4] Kootenai County Title Company, Inc. was named as a defendant in this matter because it held the $100,000.00 earnest money deposit. Compl., ¶ 41, Ex. F. On February 11, 2019, this Court entered an Order re: Motion and Stipulation, based on the stipulation by Powderhorn and Alexander/Miller, that Kootenai County title shall deposit the $100,000.00 it held to the Clerk of the Court, and then Kootenai County Title Company would be dismissed with prejudice from this case.

for Summary Judgment, Statement of Undisputed Material Facts in Support of Plaintiff's Motion for Summary Judgment, Declaration of Mischelle R. Fulgham in Support of Plaintiff's Motion for Summary Judgment, Declaration of A. Michael Flaherty in Support of Plaintiff's Motion for Summary Judgment. On June 12, 2019, Powderhorn filed Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment and Statement of Disputed Material Facts in Support of Opposition to Defendants' Motion for Summary Judgment. On June 13, 2019, Alexander and Miller filed Memorandum of Defendants Alexander and Miller in Opposition to Plaintiff's Motion for Summary Judgment and Declaration of Jeffrey Alexander in Opposition to Plaintiff's Motion for Summary Judgment. Lastly, on June 19, 2019, Powderhorn filed Reply Brief in Support of Plaintiff's Motion for Summary Judgment.

Counsel for Alexander and Miller filed Motion to Strike and/or Disqualify Plaintiff's Counsel on June 13, 2019. Pursuant to Idaho Rule of Professional Conduct (I.R.P.C.) 3.7 and Idaho Rule of Evidence (I.R.E.) 601, Defendants request an order striking the May 29, 2019, Declaration of Mischelle R. Fulgham and/or disqualifying Fulgham from further representation of Plaintiff Powderhorn. Alexander and Miller also filed Memorandum in Support of Defendants' Motion to Strike and/or Disqualify Plaintiff's Counsel. On June 19, 2019, Powderhorn filed its Objection and Opposition to Defendants' Motion to Strike and/or Disqualify Plaintiff's Counsel.

II. STANDARD OF REVIEW

Idaho Rule of Civil Procedure 56 governs motions for summary judgment. According to Rule 56, summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). A party asserting that there is no genuine dispute as to any material fact, or a party asserting that a genuine dispute exists, must

support that assertion by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." I.R.C.P. 56(c).

> If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:
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> (1) give an opportunity to properly support or address the fact;
>
> (2) consider the fact undisputed for purposes of the motion;
>
> (3) grant summary judgment if the motion and supporting materials, including the facts considered undisputed, show that the movant is entitled to it; or
>
> (4) issue any other appropriate order.

I.R.C.P. 56(e).

The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Fin. Corp.*, 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997)). "Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party" to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer*, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)). To do so, the non-moving party "must come forward with evidence by way of affidavit or otherwise that contradicts the evidence submitted by the moving party, and that establishes the existence of a material issue of disputed fact." *Chandler v. Hayden*, 147 Idaho 765, 769, 215 P.3d 485, 489 (2009) (citing *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 865 (2007)). "Circumstantial evidence can create a genuine issue of material fact. . . . However, the non-moving party may not rest on a mere scintilla of evidence." *Shea*

v. Kevic Corp., 156 Idaho 540, 545, 328 P.3d 520, 525 (2014) (quoting *Park West Homes, LLC v. Barnson*, 154 Idaho 678, 682, 302 P.3d 18, 22 (2013)).

> In determining whether material issues of fact exist, all allegations of fact in the record and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion. *City of Kellogg v. Mission Mountain Interests Ltd., Co.*, 135 Idaho 239, 240, 16 P.3d 915, 919 (2000). When a jury is to be the finder of fact, summary judgment is not proper if conflicting inferences could be drawn from the record and reasonable people might reach different conclusions. *State Dep't of Fin. v. Res. Serv. Co., Inc.*, 130 Idaho 877, 880, 950 P.2d 249, 252 (1997).

Edmondson v. Shearer Lumber Prod., 139 Idaho 172, 176, 75 P.3d 733, 737 (2003).

The moving party may also meet "the 'genuine issue of material fact' burden . . . by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial." *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994). "Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence or by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking." *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000) (citing *Dunnick* at 311, 882 P.2d at 478).

> Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to show, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial, or to offer a valid justification for the failure to do so under [I.R.C.P. 56(d)]. *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994) (alteration added).

Dunnick at 311, 882 P.2d at 478; *see also Heath* at 712, 8 P.3d at 1255.

"[W]hen simultaneous cross-motions for summary judgment on the same claim are before the court, the court must consider the appropriate evidentiary material identified and submitted in support of both motions, and in opposition to both motions, before ruling on each of them." *Tulalip Tribes of Washington v. Washington*, 783 F.3d 1151, 1156 (9th Cir. 2015) (quoting *Fair Hous. Council of Riverside Cnty., Inc. v.*

Riverside Two, 249 F.3d 1132, 1134 (9th Cir.2001)). "When parties submit cross-motions for summary judgment, each motion must be considered on its own merits." *Fair Hous. Council of Riverside Cnty., Inc.* at 1136. "The filing of cross-motions for summary judgment, with both parties asserting that there are no uncontested issues of material fact, does not vitiate the court's responsibility to determine whether disputed issues of material fact are present, since a summary judgment cannot be granted if a genuine issue as to any material fact exists." *Id.*

"Summary judgment proceedings are decided on the basis of admissible evidence." *La Bella Vita, LLC v. Shuler*, 158 Idaho 799, 804, 353 P.3d 420, 425 (2015) (quoting *Campbell v. Kvamme,* 155 Idaho 692, 696, 316 P.3d 104, 108 (2013)). "The admissibility of evidence contained in affidavits and depositions in support of or in opposition to a motion for summary judgment is a threshold matter to be addressed before applying the liberal construction and reasonable inferences rule to determine whether the evidence creates a genuine issue of material fact for trial." *Id.* (quoting *Fragnella v. Petrovich,* 153 Idaho 266, 271, 281 P.3d 103, 108 (2012)). "This Court applies an abuse of discretion standard when determining whether testimony offered in connection with a motion for summary judgment is admissible." *Id.* (quoting *Gem State Ins. Co. v. Hutchison,* 145 Idaho 10, 15, 175 P.3d 172, 177 (2007)).

"The decision to grant or deny a motion to disqualify counsel is within the discretion of the trial court." *Foster v. Traul*, 145 Idaho 24, 32, 175 P.3d 186, 194 (2007) (citing *Weaver v. Millard*, 120 Idaho 692, 696, 819 P.2d 110, 114 (Ct. App. 1991)). When reviewing a trial court's discretionary decision, Idaho appellate courts apply a four-part test, which asks whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3)

acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason. *Lunneborg V. My Fun Life*, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018). The burden is on the moving party to establish grounds for disqualification. *Weaver* at 697, 819 P.2d at 115 (citing *Alexander v. Superior Court*, 141 Ariz. 157, 685 P.2d 1309, 1313 (1984); *Woodard v. District Court*, 704 P.2d 851 (Colo. 1985)). "The goal of the court [is] to shape a remedy which will assure fairness to the parties and the integrity of the judicial process." *Id.* (citing *Alexander* at 1313). Where possible, the Court will work to find a solution that does not unduly burden the client of the attorney sought t0 be disqualified. *Id.* Any motion to disqualify brought by an opposing party is viewed with caution and such motions are disfavored by the court. *Foster* at 33, 175 P.3d at 195.

III. ANALYSIS

First, the Court must decide whether the existing $150,000.00 mortgage on the Powderhorn property rendered the Powderhorn property unmarketable. Based on the reasons provided below, the Court finds that the existing mortgage on the Powderhorn property did not render title unmarketable. Next, the Court must determine if Powderhorn was required by the REPSA to provide affirmation or proof that the existing mortgage would in fact be paid out of purchase money on the closing date. Based on the reasoning below, the Court finds that Powderhorn was not required by the REPSA to provide affirmation or proof that the existing mortgage would in fact be paid out of purchase money on the closing date.

A. The existing $150,000.00 mortgage on the Powderhorn property did not render title to the property unmarketable.

In support of their argument that the motion for summary judgment should be granted, Alexander and Miller argue they are entitled to a judicial decree awarding them

the earnest money deposit because they provided a timely written objection to a condition of title as set forth in the preliminary title commitment and, though it responded within two business days, Powderhorn failed "to address, remove, or satisfactorily resolve Defendants' objection" to the mortgage. Mem. in Supp. of Defs.' Mot. for Summ. J., 4. Therefore, pursuant to the language contained in Section 9(A) of the REPSA, Alexander and Miller's earnest money deposit shall be returned to them. *Id.* at 4–5.

Powderhorn responded to Alexander and Miller's argument by asserting that Glod's response did sufficiently address their written objections, including the mortgage. Plaintiff's Mem. in Opp'n to Defs.' Mot. for Summ. J., 3. "Because the mortgage did not render title to the property unmarketable...Glod rejected...Defendants' attempt to terminate the REPSA..." *Id.* After having concluded "that the mortgage did not render title [to the Powderhorn property] unmarketable, the REPSA did not require Plaintiff to take any further action." *Id.*

In support of its argument that its motion for summary judgment should be granted, Powderhorn argues it is entitled to a judicial decree establishing its right to the earnest money deposit because the plain language of Section 29 of the REPSA states that the earnest money can be accepted as liquidated damages in the event of default by the buyers, Alexander and Miller. Mem. in Supp. of Pl.'s Mot. for Summ. J., 3–4; *see* Compl., Ex. B. Because Defendants defaulted by not performing under the REPSA, Powderhorn is entitled to the earnest money as liquidated damages. *Id.* at 4.

Alexander and Miller responded to Powderhorn's argument by asserting that Glod's response was insufficient because no proof was provided stating that the mortgage would in fact be released at closing. Mem. of Defs.' Alexander and Miller in

Opp'n to to Pl.'s Mot. for Summ. J., 4. Therefore, the response did not comply with Powderhorn's obligations under Section 9(A) of the REPSA, and their earnest money should have been returned to them. *Id.*

Section 8 states, "[t]itle of SELLER is to be conveyed by warranty deed...and is to be marketable and insurable except for...rights of way and easements established or of record." Compl., Ex. B. It further states that "[l]iens, encumbrances or defects to be discharged by SELLER may be paid out of purchase money at date of closing." *Id.* Lastly, Section 8 states, "[n]o liens, encumbrances or defects which are to be discharged or assumed by BUYER[,] or to which title is taken subject to, exist unless otherwise specified in this Agreement." *Id.* The plain language of the REPSA makes clear that unless it is specified elsewhere in the Agreement, no encumbrances exist which Alexander and Miller would have to assume or take subject to. The Agreement does not otherwise specify that there exists an encumbrance which Alexander and Miller would be required to assume or take subject to. Therefore, such an encumbrance does not exist. Pursuant to the clear language of the REPSA, Alexander and Miller would not be assuming or taking subject to any liens, encumbrances, or defects.

Section 9(A) of the REPSA states that the seller "shall furnish to BUYER a preliminary commitment of a title insurance policy showing the condition of the title to said PROPERTY." Compl., Ex. B. It further states, "BUYER shall have 2 business days after receipt of the preliminary commitment within which to object in writing to the condition of the title as set forth in the preliminary title commitment." *Id.* "If BUYER does not so object, BUYER shall be deemed to have accepted the conditions of the title." *Id.* The particular portion of Section 9(A) that is at issue in this matter states, "[i]t

is agreed that if the title of said PROPERTY is not marketable, and cannot be made so within 2 business days after SELLER'S receipt of a written objection and statement of defect from BUYER, then BUYER'S Earnest Money deposit shall be returned to BUYER..." *Id.*

Here, it is undisputed that Powderhorn furnished a preliminary title commitment to Alexander and Miller, which showed the condition of the title to the Powderhorn property. It is further undisputed that Alexander and Miller timely objected in writing to the condition of the title as set forth in the preliminary title commitment. In particular, they objected to the existing $150,000.00 mortgage on the Powderhorn property. Alexander and Miller provided the objection because had they not done so, they would have been deemed to have accepted the existing condition of title.

The last sentence of Section 9(A) of the REPSA can be broken down in the following manner: Alexander and Miller shall have their earnest money deposit returned to them if: (1) the title of the Powderhorn property is not marketable (also termed unmarketable), and (2) title cannot be made marketable within 2 business days after Powderhorn received a written objection. The Court must first determine whether the existing $150,000.00 mortgage made the title of the Powederhorn property unmarketable.

Marketable title is defined as "one free and clear of all encumbrances." *Brown v. Yacht Club of Coeur d'Alene, Ltd.*, 111 Idaho 195, 197–98, 722 P.2d 1062, 1064–65 (Ct. App. 1986) (quoting *Metzker v. Lowther*, 69 Idaho 155, 166, 204 P.2d 1025, 1033 (1949)). "A marketable title is 'one as free from apparent defects as from actual defects, one in which there is no doubt involved either as a matter of law or fact. Every title is doubtful which invites or exposes the party holding it to litigation.'" *Id.* at 198, 722

P.2d at 1065 (quoting *Bell v. Stadler*, 31 Idaho 568, 572, 174 P. 129, 131 (1918)). "Although the language quoted from *Bell* suggests that no doubt may exist as to title, the widely accepted—and more practical—rule has long been that marketable title must be free from reasonable doubt." *Id.* (internal quotations removed); *see also Eggers v. Busch*, 154 Ill. 604, 39 N.E. 619 (1895); *Howe v. Coates*, 97 Minn. 385, 107 N.W. 397 (1906); *Moore v. Williams*, 115 N.Y. 586, 22 N.E. 233 (1889); *Herman v. Somers*, 158 Pa. 424, 27 A. 1050 (1893). "Moreover, the test is not whether title ultimately might be adjudged free of defects. Rather, it is 'whether a reasonably prudent [person], familiar with the facts and apprised of the question of law involved, would accept the title in the ordinary course of business.'" *Id.* (quoting 77 AM. JUR. 2D Vendor and Purchaser § 132, at 316 (1975)).

In *Jensen v. Bledsoe*, the record revealed that a warranty deed was executed, "which stated that the 'premises are free from all encumbrances,'" although the appellant explained that the land had an existing mortgage tied to it. 100 Idaho 84, 89, 593 P.2d 988, 993 (1979). The record also showed that the respondent knew about the existing mortgage. *Id.* The Supreme Court of Idaho stated:

> In the absence of a contract provision to the contrary[,] this court has followed the general rule that "although the title of one who enters into an executory contract for the conveyance of land may be defective at the time he enters into such contract, if the vendor is able to convey a good title when the time for the conveyance of the land arrives, this is sufficient." 77 Am.Jur.2d Vendor and Purchaser, s 234. The application of the rule in this jurisdiction is stated in *Sherwood v. Daly*, 58 Idaho 744, 749, 78 P.2d 357, 359 (1938), where the court stated: "A vendor under a land contract is only required to have the title contracted for at the time performance is due." [*See also*] *Metzker v. Lowther*, 69 Idaho 155, 165, 204 P.2d 1025 (1949); *Barney v. Curtis*, 37 Idaho 742, 747, 218 P. 190 (1923). In harmony with this rule is the further rule that "the existence of an encumbrance which may be removed or discharged by application of the purchase money is not considered such a defect as to render the title unmarketable and excuse the purchaser from the performance of his contract." 77 Am.Jur.2d Vendor and Purchaser, s 192; C. Maupin,

> Maupin on Marketable Title to Real Estate 849, s 304 (3d ed. 1921); *Harrington v. Heaney*, 101 A.2d 838 (D.C.Mun.App.1953); *Sachs v. Owings*, 121 Va. 162, 92 S.E. 997 (1917).

Id. at 89–90, 593 P.2d at 993–94. The Court applied the rules to the case before it, and found that the "respondents' attack on the marketability of appellant's title was premature." *Id.* at 90, 593 P.2d at 994. The Supreme Court of Idaho stated:

> Under the above authorities, and the lack of a contractual provision to the contrary, the marketability of appellant's title was determinable, not as of the date the contract was executed, but as of the time respondents tender that which, under the contract, would require appellant to transfer the title he agreed to convey. If appellant was able to convey the title contracted for when the time for the conveyance of the property arrives, i. e. "upon the receipt of the full payment of the purchase price, with interest," that is sufficient. The trial court's finding that appellant breached the contract by having encumbered title must therefore be reversed.

Id.

Here, similar to *Jensen*, the Powderhorn property was also conveyed via warranty deed, and the accompanying REPSA indicated that the Powderhorn property was free from any liens, encumbrances, or defects that would have to be assumed or taken subject to by Alexander and Miller. Also similar to *Jenson*, there was an existing mortgage on the Powderhorn property, which Alexander and Miller were made aware of. Applying the rules of *Jensen* to the facts of the case currently before the Court, the existence of a mortgage, which may be removed or discharged by application of the purchase money, is not considered such a defect as to render the title unmarketable and excuse Alexander and Miller from performing pursuant to the REPSA. The REPSA explicitly states that any liens, encumbrances, or defects to be discharged by Powderhorn "may be paid out of purchase money at the date of closing." Compl., Ex. B. There is no contractual provision to the contrary contained in the REPSA.

Therefore, the Court finds that the existing mortgage does not render title to the Powderhorn property unmarketable.

Based on the above finding, title to the Powderhorn property was marketable and thus Powderhorn's obligation was satisfied. In other words, Powderhorn had no duty to make the title marketable within 2 business days because the title was already marketable. Thus, Alexander and Miller were not entitled to the return of the earnest money deposit based on the existence of the mortgage prior to closing.[5]

B. Powderhorn was not required by the REPSA to provide affirmation or proof that the existing mortgage would in fact be paid out of purchase money on the closing date.

Alexander and Miller argue that Glod's response to their written objections to the condition of title "failed in any manner to address, remove, or satisfactorily resolve Defendants' objection to [the mortgage]." Mem. in Supp. of Defs.' Mot. for Summ. J., 4. Alexander and Miller assert that because "the exception was not timely removed or resolved, and the property therefore made 'marketable' with respect to [the mortgage]," They properly and effectively terminated the Agreement pursuant to the clear and unambiguous language of Section 9(A) of the REPSA. *Id.* at 4–5. Therefore, Defendants are entitled to the return of the earnest money deposit. *Id.* at 5. In response, Powderhorn argues that its "only obligation under the REPSA was to deliver marketable and insurable title, and the [mortgage] did not render title to the Powderhorn property unmarketable or uninsurable." Pl.'s Mem. in Opp'n to Defs.' Mot. for Summ. J., 3. After having concluded that the existing mortgage did not render title to the

[5] During oral arguments, counsel for Powderhorn correctly asserted that the existence of the mortgage is not enough to render title unmarketable if the mortgage has the ability to be discharged at closing using the purchase money. Mot. Hr'g, June 26, 2019, 4:57 P.M. If the mortgage had not been discharged by Powderhorn using purchase money at closing, only then would Powderhorn have breached the terms of the REPSA. *Id.*; *see* Compl., Ex. B.

Powderhorn property unmarketable, Glod rejected Defendants' Notice of Termination and informed them that they were still contractually bound to perform under the REPSA. *Id.* "[T]he REPSA did not require [Powderhorn] to take any further action." *Id.*

Powderhorn argues that title to the Powderhorn property was marketable at all material times. Mem. in Supp. of Pl.'s Mot. for Summ. J., 5. Thus, "Powderhorn's position is that if the mortgage did not render title unmarketable, Section 9(A) of the REPSA did not require Powderhorn to prove anything to the Defendants within two days of receiving their objections." Reply Br. in Supp. of Pl.'s Mot. for Summ. J., 2. In response, Alexander and Miller assert that Glod had a duty to provide affirmation or proof that the existing mortgage would in fact be discharged at closing. Mem. of Defs.' Alexander and Miller in Opp'n to Pl.'s Mot. for Summ. J., 4. "No proof was made of the terms of the underlying indebtedness, the maturity date, or whether the indebtedness could in fact be paid (in accordance with the terms of the loan) at or about the time of closing." *Id.* Defendants argue that "[f]ailure to provide proof consistent with the terms of Section 9(A) of the REPSA, as to the timely-noted objection to [the mortgage], was not immaterial." *Id.* Defendants state "[i]n the absence of such proof, Defendants were left with the very real possibility of paying $4,000,000.00 for property, still subject to an existing indebtedness, and only obtaining title insurance for $3,850,000.00." *Id.* at 6. Defendants assert that "[t]o rectify this problem, Plaintiff needed to provide copies of supporting documentation to indicate that there were no prepayment limitations under the Note, that the Note was not for a term of a sufficient duration that would preclude early payment, or that the mortgage was not otherwise inconsistent with the terms of said Note." *Id.*

As discussed above, the existing mortgage did not render title to the Powderhorn property unmarketable. Based on that finding, the remainder of Section 9(A) is not applicable; Powderhorn had no obligation to make title marketable within 2 business days, as title was already marketable under Idaho law.

Additionally, whether title is marketable or unmarketable, Section 9(A) does not explicitly require the seller to provide the buyer with an explanation of any kind; it is devoid of any language requiring that the seller provide "affirmation or proof" that the existing mortgage will in fact be discharged at closing, as asserted by Defendants.[6] The only action the seller is required to take under Section 9(A) is to make title marketable within 2 business days, if title to the property is unmarketable.

Though it was not required by Section 9(A), nor was it required by any other provision in the REPSA, Glod, on behalf of Powderhorn, provided Defendants with a written reply addressing their objections. Glod provided the following relevant information to Defendants in his written response:

> Based upon the above [REPSA provision, Section 9(A)], only title conditions which render title to the Property unmarketable can provide a basis for termination of the P&S. Similarly, the Seller's sole obligation in relation to title is set forth in Section 8: title "is to be marketable and insurable" except for certain specifically identified matters [...]. The approval of a Conditional Use Permit ... and loan identified in your May 21, 2018 letters do not in any way render title to the Property unmarketable, uninsurable, or otherwise violate Powderhorn's title obligations. As such, your purported notice of termination is rejected.

Compl., Ex. E. The response by Glod does explain that the existing mortgage does not render title to the property unmarketable. The response, however, did not inform Defendants that the existing mortgage would in fact be paid out of purchase money on the date of closing. Even after reading Glod's response, Alexander and Miller's concern

[6] Section 8 of the REPSA is also devoid of any language requiring these actions be taken by the seller.

regarding the mortgage remained. Alexander stated that this was an important issue for him, "as [he] was acquiring a proposed title policy on the full purchase price ($4,000,000.00). With a mortgage left unresolved, [he] was exposed to a $150,000.00 encumbrance." Mem. of Defs. Alexander and Miller in Opp'n to Pl.'s Mot. for Summ. J., 4. During oral arguments, counsel for Alexander and Miller stated that all somebody had to do was respond with affirmation that the mortgage will indeed be paid out with the purchase money at closing. Mot. Hr'g, June 26, 2019, 4:45 P.M.

The Court finds that after reading and signing the REPSA, and after receiving Glod's response, Alexander and Miller knew the following facts: there was no lien, encumbrance, or defect on title that they would be required to assume or take subject to (Section 8 of REPSA); the mortgage was required to be discharged by Powderhorn (Section 8 of REPSA); the mortgage did not render title to the property unmarketable (Glod's written response); and the mortgage to be discharged by Powderhorn had the ability to be paid out of the purchase money on the date of closing (Section 8 of REPSA). Therefore, Defendants concern that they would potentially be "exposed to a $150,000.00 encumbrance" was unwarranted.

The Court will briefly address Powderhorn's counterclaim for breach of contract against Alexander and Miller. As established above, each of the written objections to the condition of title, in particular the $150,000.00 mortgage, did not serve as valid objections so as to warrant termination of the Agreement between Alexander, Miller, and Powderhorn. "The elements for a claim for breach of contract are: (a) the existence of the contract, (b) the breach of the contract, (c) the breach caused damages, and (d) the amount of those damages." *Mosell Equities, LLC v. Berryhill & Co.*, 154 Idaho 269, 278, 297 P.3d 232, 241 (2013) (citing *O'Dell v. Basabe*, 119 Idaho 796, 813, 810 P.2d 1082, 1099 (1991) ("plaintiff has the burden of proving the

existence of a contract and the fact of its breach")). Here, all four elements are present: the REPSA is a valid contract which was signed by all parties; Alexander and Miller breached the REPSA by not fulfilling their promise to purchase the Powderhorn property; and the breach caused damages which, pursuant to Section 29 of the REPSA, amount to the earnest money deposit – $100,000.00.[7] In sum, Powderhorn has successfully proven its breach of contract claim as against Alexander and Miller, and it has therefore established its right to claim the earnest money deposit.

In conclusion, the Court has considered all appropriate evidentiary material identified and submitted both in support of, and in opposition to both motions for summary judgment. Each motion for summary judgment has been considered on its own merits.

On Defendants' Motion for Summary Judgment, Alexander and Miller have failed to show that there is no genuine dispute as to any material fact. Alexander and Miller argued that the existing mortgage rendered title to the Powderhorn property unmarketable. Alexander and Miller further argued that Powderhorn failed to make the property marketable within 2 days after receiving Alexander and Miller's written objections to title, and thus they are entitled to the return of the earnest money deposit. However, Powderhorn responded with evidence that contradicts the evidence submitted by Alexander and Miller, establishing the existence of a material issue of disputed fact. Therefore, Defendants' Motion for Summary Judgment is denied.

On Powderhorn's Motion for Summary Judgment, Powderhorn has demonstrated the absence of a genuine issue of material fact. Powderhorn correctly

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[7] Section 29 of the REPSA states: "If BUYER defaults in the performance of this Agreement, SELLER has the option of: (1) accepting the Earnest Money as liquidated damages or (2) pursuing any other lawful right and/or remedy to which SELLER may be entitled." Compl., Ex. B.

asserted that the existing mortgage did not render title to the Powderhorn property unmarketable so as to excuse Alexander and Miller from performing under the contract. Further, Powderhorn established that Alexander and Miller breached the contract, and thus defaulted pursuant to Section 29 of the REPSA. Alexander and Miller did not come forward with evidence that contradicts the evidence submitted by Powderhorn. Therefore, Powderhorn's Motion for Summary Judgment is granted and Powderhorn is entitled to the earnest money as liquidated damages.

C. The Defendants' Notice of Termination was invalid, and thus Defendants remained contractually bound to the REPSA.

At the motion hearing, though both parties focused mainly on the $150,000.00 mortgage on the Powderhorn property and Alexander and Miller's written objection to the mortgage, the approval of the CUP as it relates to the Notice of Termination was also discussed. Mot. Hr'g, June 26, 2019, 4:28 P.M., 4:44 P.M. Defendants assert they relied on Fulgham's statements that the CUP would likely not be approved when they made the offer to purchase the Powderhorn property. Defendants' Statement of Undisputed Material Facts, ¶ 12. The Notice of Termination that Alexander and Miller sent to Powderhorn was based on the approval of the CUP, and – along with the mortgage on the Powderhorn property – Alexander and Miller cite to the approval of the CUP as a reason they should to have the earnest money deposit returned to them. *Id.* at ¶ 27; Decl. of Jeffrey Alexander, Ex. F.

On this issue, Powderhorn provided multiple points at oral argument which this Court finds to be persusive. First, Powderhorn pointed to the following undisputed facts: Alexander and Miller knew the owner of the property adjacent to the Powderhorn property had applied for a CUP to allow for surface mining, knew the CUP was pending, and knew there would be a public hearing held on May 17, 2018, where the outcome of

the CUP would be definitively determined (the CUP was approved on May 19, 2018). Mot. Hr'g, June 26, 2019, 4:35 P.M.; Compl., ¶¶ 12–14; Decl. of Jeffrey Alexander, ¶¶ 6–7, 10–11, 17. Nonetheless, Alexander and Miller chose to make an offer to purchase the Powderhorn property on May 7, 2018. Mot. Hr'g, June 26, 2019, 4:35 P.M.; Compl., ¶ 15; Decl. of Jeffrey Alexander, ¶ 12.

Second, Powderhorn stated that Section 4 of the REPSA provided Defendants with the option to insert any special terms, considerations, or contingencies which would need to occur prior to closing; if the condition was not satisfied, then Defendants would not be contractually bound to the Agreement, as the Agreement was made subject to that condition. Mot. Hr'g, June 26, 2019, 4:35 P.M.; *see* Compl., Ex. B. For example, Defendants could have inserted a condition briefly explaining that their purchase of the Powderhorn property was contingent upon the denial of the CUP; if the CUP was approved, Defendants would not go forward with the purchase of the Powderhorn property. However, Defendants left Section 4 of the REPSA blank, choosing not to include any special terms, considerations, or contingencies. *Id.*; *see* Compl., Ex. B.

Third, Powderhorn asserts that "the approval of a land use permit on adjacent property does not affect or otherwise render Powdernorn's title to the [p]roperty unmarketable [under the Agreement]. As such, the Defendants' Termination Notice did not terminate the Agreement, and they were required to perform their contractual duties." Mem. in Supp. of Pl.'s Mot. for Summ. J., 7.

In sum, Alexander and Miller offered to purchase the Powderhorn property knowing full well that the CUP permit could be approved, Defendants did not include a contingency regarding the CUP in the Agreement, and the approval of a CUP allowing surface mining on the adjacent property does not render title to the Powderhorn

property unmarketable under the Agreement. Alexander and Miller have not cited to any rules, statutes, or case law that would otherwise allow the Agreement to be terminated based on the approval of the CUP. Therefore, the Notice of Termination was invalid and Alexander and Miller were still required to perform under the REPSA.

D. Defendants' Motion to Strike and/or Disqualify Plaintiff's Counsel is premature, and is therefore denied at this time.

On April 24, 2018, Alexander and Fulgham engaged in a telephone conversation regarding the pending CUP sought by the owner of the property adjacent to the Powderhorn property. Decl. of Jeffrey Alexander, ¶ 11; Decl. of Mischelle R. Fulgham, ¶¶ 9–11. Alexander and Fulgham each submitted a declaration detailing the telephone conversation. *Id.* Shortly thereafter, Alexander and Miller filed a Motion to Strike and/or Disqualify Plaintiff's Counsel (Motion).

Alexander and Miller argued that Fulgham's declaration should be stricken from matters to be considered on summary judgment pursuant to Idaho Rule of Professional Conduct (I.R.P.C.) 3.7(a) and Idaho Rule of Evidence (I.R.E.) 601(a), or that Fulgham should be disqualified as counsel for Powderhorn pursuant to I.R.P.C. 3.7(a).[8] Mem. in Supp. of Defs.' Mot. to Strike and/or Disqualify Pl.'s Counsel, 6–7; Obj. and Opp'n to Defs.' Mot. to Strike and/or Disqualify Pl.'s Counsel, 2. Alexander and Miller made the following argument in support of their Motion:

> Under the Idaho Rules of Professional Conduct, Ms. Fulgham may not, as counsel for the Plaintiff, offer substantive testimony in the case by way of

[8] The only mention of I.R.E. 601(a) made by Alexander and Miller in their supporting memorandum is a one-sentence explanation that states, "IRE 601 allows the Court to exclude a witness, in its discretion, when the Court determines that the witness is not competent to testify." Mem. in Supp. of Defs.' Mot. to Strike and/or Disqualify Pl.'s Counsel, 6. Alexander and Miller provide no further explanation and provide no argument regarding I.R.E. 601 in their Motion to Strike and/or Disqualify Plaintiff's Counsel. The Court finds that I.R.E. 601 is not the proper rule under which to move to strike Fulgham's declaration in support of Powderhorn's motion for summary judgment, and it is not the proper rule under which to move to disqualify opposing counsel. Thus, I.R.E. 601(a) need not be discussed further.

> declaration as a witness for her client. Ms. Fulgham seeks to offer testimony as to disputed issues of fact. An attorney may be disqualified from representation in a pending matter, by an order of the Court, when the Court finds that the attorney will likely have to testify at trial as to substantive matters. *See, e.g., Frantz v. Hawley Troxell, Ennis Hawley, LLP*, 161 Idaho 60,383 P.3d 1230 (2016).

Mem. in Supp. of Defs.' Mot. to Strike and/or Disqualify Pl.'s Counsel, 6. In response, Powderhorn provided multiple arguments as to why the Court should deny the Motion. Obj. and Opp'n to Defs.' Mot. to Strike and/or Disqualify Pl.'s Counsel, 2–4. Upon the conclusion of oral arguments on this matter, the Court agreed with Powderhorn's argument that the Motion is premature and denied the Motion.

I.R.P.C. 3.7(a) reads:

> (a) A lawyer shall not act as advocate *at a trial* in which the lawyer is likely to be a necessary witness unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client.

I.R.P.C. 3.7 (emphasis added). The plain language of the rule limits a lawyer's activities "at a trial," and makes no prohibitions on a lawyer's activities during a pre-trial stage. Though the Court appreciates Alexander and Miller's argument that the rule should not be given such a narrow interpretation, no case law has been provided to the Court that supports such a broad application of the rule. On the contrary, as the cases discussed below make clear that Rule 3.7 only prohibits witness attorneys from acting as an advocate at trial.

The Court finds the following cases to be persuasive. In *In re Elias*, the United States Bankruptcy Court, District of Idaho, briefly discussed I.R.P.C. 3.7(a) after counsel for one party anticipated calling opposing counsel as a necessary witness. No. 02-41640, 2005 WL 4705220, at *2, *6 (Bankr. D. Idaho, June 10, 2005) ("[Opposing] Counsel is a creditor in Debtor's bankruptcy case because he is owed $70,000 for

prepetition legal fees."). The Court stated, "[u]nder the Rule, Counsel would likely not be prohibited from representing the bankruptcy estate during pre-trial matters even if he is called as a witness at trial." *Id.* at *6. The Court further stated, "[s]hould the issue arise prior to trial, Counsel could assume a dual role under the circumstances set forth in the Rule," but noted that the commentary to the Rule makes clear that "the relevant inquiry is fact specific, and depends upon the nature of the case and the tenor of the lawyer's testimony." *Id.*

The State of Washington's Rule of Professional Conduct 3.7(a) is identical to that of Idaho's rule, with the addition of a fourth exception. In *American Safety Casualty Insurance Company v. Happy Acres Enterprises Co., Inc.*, the defendants moved to disqualify the plaintiff's counsel because the defendants asserted he was a material witness and intended to call him at trial. No. C16-0044 RSM, 2017 WL 279616, at *3 (W.D. Wash. Jan. 20, 2017). The defendants' motion to disqualify the plaintiff's counsel and his firm from the litigation process was found by the Court to be premature. *Id.* at *3. The Court explained that "RPC 3.7 does not authorize such a broad disqualification." *Id.* "As this Court has previously stated, 'the plain language of Washington RPC 3.7(a) is unequivocally clear in only prohibiting attorneys from acting as an advocate *at trial*.'" *Id.* (quoting *Microsoft Corp. v. Immersion Corp.*, 2008 U.S. Dist. LEXIS 27442, *8, 2008 WL 682246 87 U.S.P.Q.2d (BNA) 1701, 1703-1704 (W.D. Wash. Mar. 7, 2008)) (emphasis in original). Therefore, the Court declined to disqualify Plaintiff's counsel or his firm from representing the client in this matter.[9] *Id.*

[9] The Court also found that the defendants failed to provide sufficient evidence supporting the disqualification of the plaintiff's counsel in the matter, and that if the plaintiff's counsel were to testify, his "proposed testimony would go directly to the nature and value of legal services rendered" – the second exception to Rule 3.7(a). *Am. Safety Cas. Ins. Co. v. Happy Acres Enterprises Co.*, No. C16-0044 RSM, 2017 WL 279616, at *3 (W.D. Wash. Jan. 20, 2017).

Not all jurisdictions are in agreement on this matter. The best authority on this matter found by this Court is a law review article from the University of New Mexico School of Law. The citation is Douglas R. Richmond, *Lawyers as Witnesses*, 36 N.M.L. Rev. 47 (2006). (Available at: https://digitalrepository.unm.edu/nmlr/vol36/iss1/4). The pertinent portion of that article reads as follows:

> Although the plain language of Rule 3.7(a) clearly limits it to trials, and it is generally true that lawyers who are disqualified from serving as advocates at trial may nonetheless represent their clients in pretrial activities, some courts hold that pretrial disqualification is appropriate where the activity "includes obtaining evidence which, if admitted at trial, would reveal the attorney's dual rule." [footnote omitted] Depositions therefore pose a special problem. Because depositions often are read into evidence at trial--deposition transcripts may be used at trial to impeach witnesses, and videotaped depositions are regularly played for juries-a lawyer may be disqualified from representing clients in depositions if those depositions cannot be used at trial without revealing the lawyer's dual roles. [footnote omitted] This problem is most acute where depositions are videotaped because the jury may see the lawyer or recognize the lawyer's voice when the videotapes are played at trial. [footnote omitted] It is more likely that stenographic deposition transcripts can be read into evidence or used to impeach witnesses without revealing a lawyer's dual roles. [footnote omitted]
>
> Some courts have gone so far as to expand the rule to preclude lawyers' testimony in affidavits at summary judgment.[34] [34. *See, e.g., Int'l Res. Ventures, Inc. v. Diamond Mining Co. of Am., Inc.*, 934 S.W.2d 218, 220 (Ark. 1996) ("We have held that Rule 3.7 is applicable to a lawyer's giving evidence by affidavit as well as by testimony in open court."). In *Aghili v. Banks,* 63 S.W.3d 812 (Tex. App. 2001), the court affirmed a trial court's decision striking defense counsel's affidavit supporting his clients' summary judgment motion. *Id.* at 819. It is important to note, however, that Rule 3.08(a) of the Texas Disciplinary Rules of Professional Conduct, which was at issue in that case, differs significantly from Model Rule 3.7(a), inasmuch as it is not limited to trials. Rather, the Texas rule provides that a lawyer "'shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client,'" subject to five exceptions. *Id.* at 817 (quoting Texas rule).] Other courts decline to do so, [35] [35. *See, e.g., Carroll v. Town of Univ. Park*, 12 F. Supp. 2d 475, 486 (D. Md. 1997); *Zurich Ins. Co. v. Knotts*, 52 S.W.3d 555, 556 (Ky. 2001).] however, and those courts that broadly hold that Rule 3.7(a) does not apply to lawyers' pretrial activities would presumably hold that the rule does not preclude lawyers from offering affidavits at

summary judgment. [36] [36. *See Jackson v. Adcock*, No. Civ. A. 03-3369,2004 WL 1661199, at *4 (E.D. La. July 22, 2004); *Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell*, 239 F. Supp. 2d 1170, 1174 (D. Colo. 2003) ("[Rule 3.7(a)] does not automatically require that a lawyer be disqualified from pretrial activities, such as...motions practice."); *Caplan v. Braverman*, 876 F. Supp. 710, 711 (E.D. Pa. 1995) (stating that Rule 3.7 "only prevents a lawyer who will be a witness from acting as an 'advocate at trial'); *Columbo v. Puig*, 745 So. 2d 1106, 1107 (Fla. Dist. Ct. App. 1999); *DiMartino v. Eighth Judicial Dist. Court*, 66 P.3d 945,946-47 (Nev. 2003) (adopting the view that a lawyer who is likely to be a necessary witness may still represent a client in pretrial matters).] In addition to its clear language, there is no policy reason commending the rule's application to lawyers' affidavit testimony at summary judgment. Because it is the judge who reads motions, there is no chance that the lawyer's dual roles will be confusing.[37] [37. *See State v. Van Dyck*, 827 A.2d 192, 195 (N.H. 2003) (observing that, "[u]nlike a jury, a judge is unlikely to confuse the roles of advocate and witness or to deem an attorney credible simply because he is an attorney"); *see also Ramey v. Dist. 141, Int'l Ass'n of Machinists & Aerospace Workers*, 378 F.3d 269, 282 (2d Cir. 2004) (explaining that the lawyer-witness rule applies "first and foremost" where the lawyer-witness is representing a client "before a jury"); *Roberts v. State*, 840 So. 2d 962, 970 (Fla. 2003) (finding no basis for Rule 3.7 disqualification where prosecutor testified in a post-conviction evidentiary hearing before ajudge); *DiMartino,* 66 P.3d at 947 (noting that pretrial disqualification of lawyer-witness generally is not necessary because there is no danger of the confusion and prejudice that may result from a lawyer appearing as an advocate and a witness before a jury).] It is equally unlikely that a judge, as compared to a jury, will be unfairly influenced by the lawyer's dual roles.[38] [38. *See Van Dyck,* 827 A.2d at 195 (asserting that a judge is unlikely to deem an attorney credible as a witness simply because he is an attorney); *see also Roberts,* 840 So. 2d at 970 (noting that lawyer's dual role would not prejudice opponent in a hearing before a judge); *DiMartino,* 66 P.3d at 947 (noting that pretrial disqualification generally is not warranted because the lawyer-witness rule is intended to eliminate confusion and prejudice resulting from lawyer's dual roles in front of the jury).] To the extent that the rule focuses on client protection, it is difficult to see how a lawyer's submission of an affidavit could create a conflict of interest. If the lawyer faces a conflict because the lawyer has testimony to offer that is harmful to the client's cause, the lawyer will not offer that testimony in an affidavit; that sort of conflict is a problem where the opposing party seeks to call the lawyer as a witness, not where the lawyer volunteers testimony. In short, it is inappropriate for courts to extend Rule 3.7(a) to lawyers' affidavit testimony at summary judgment.

36 N.M.L. Rev. 47, 50-51.

Based on the above, the Court finds that I.R.P.C. 3.7(a) is only applicable at trial. Therefore, the Motion to Strike and/or Disqualify Plaintiff's Counsel made by Alexander and Miller is premature. Because the Court found that the Motion to Strike and/or Disqualify Plaintiff's Counsel is premature, the Court need not discuss whether Alexander and Miller have sufficiently shown that Fulgham is likely to be a necessary witness at trial.

IV. CONCLUSION AND ORDER.

Based on the reasons set forth above, Defendants' Motion for Summary Judgment is denied, Plaintiff's Motion for Summary Judgment is granted, and Defendants' Motion to Strike and/or Disqualify Plaintiff's Counsel is denied.

IT IS HEREBY ORDERED Defendants' Motion for Summary Judgment is DENIED.

IT IS FURTHER ORDERED Plaintiff's Motion for Summary Judgment is GRANTED.

IT IS FURTHER ORDERED Defendants' Motion to Strike and/or Disqualify Plaintiff's Counsel is DENIED.

Entered this 31st day of July, 2019.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 31st day of July, 2019 a true and correct copy of the foregoing was mailed, postage prepaid, or sent by interoffice mail or facsimile to:

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By Jeanne Clausen
Jeanne Clausen, Secretary