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August 3, 2023

VIA ELECTRONIC MAIL

Utah Supreme Court
450 South State St., 5th Floor
P.O. Box 140210
Salt Lake City, UT 84114
supremecourt@utcourts.gov

Re: Request for Retention in *Kilgore Companies, LLC v. Dumar, LLC*

Dear Clerk of Court:

In response to the Court's Order dated July 27, 2023, Appellants Dumar, LLC, and Duane Shaw respectfully request that the Court retain this appeal on its own docket rather than transfer it to the Utah Court of Appeals. As explained below, the appeal presents important questions of first impression involving statutory interpretation and the interaction of Utah's Preconstruction and Construction Liens statute, Utah Code § 38-1a-101 *et seq.*, and the Condominium Ownership Act, Utah Code § 57-8-19.

1. Name of Case and Appellate Case Number

Case name: *Kilgore Companies, LLC v. Dumar, LLC*

Appellate Case No.: 20230639-SC

2. Parties and Counsel

Appellee Kilgore Companies, LLC, is represented by Ryan C. Bullock and Graden P. Jackson of the law firm Strong & Hanni.

Appellee New Star General Contractors, Inc., is represented by Brian J. Babcock and Andrew L. Berne of the law firm Babcock Scott & Babcock, P.C.

Appellants Dumar, LLC, and Duane Shaw are represented by Dana T. Farmer and J. Tayler Fox of the law firm Dentons Durham Jones Pinegar P.C.

Sirote > Adepetun Caxton-Martins Agbor & Segun > Davis Brown > East African Law Chambers > Eric Silwamba, Jalasi and Linyama > Durham Jones & Pinegar > LEAD Advogados > Rattagan Macchiavello Arocena > Jiménez de Aréchaga, Viana & Brause > Lee International > Kensington Swan > Bingham Greenebaum > Cohen & Grigsby > Sayarh & Menjra > For more information on the firms that have come together to form Dentons, go to [dentons.com/legacyfirms](https://www.dentons.com/legacyfirms)

3. Background and Concise Statement of the Issues Presented on Appeal

New Star General Contractors was the builder on the Sage Creek Condominiums development in Moab, Utah, which consists of nine buildings and 108 total condominium units. Sage Creek owned the development. After New Star and Sage Creek executed a contract for initial excavation work for the entire development, they executed separate contracts for each separate building – nine total – within the development.

In January 2018, New Star filed three preliminary notices for the development with the State Construction Registry, covering the development's three parcels with unique tax identification numbers. In November of that year, Sage Creek recorded the Declaration of Condominium for the development, which changed the tax parcel numbering from the three parent parcels to separate parcel numbers for each condominium unit. Then, in December, Sage Creek and New Star signed the construction contract particular to Building C, the building at issue. Building C's twelve units were later sold to Appellants – six to Dumar, LLC, and six to Duane Shaw.

Before construction on Building C began, New Star filed three additional preliminary notices that identified the same three parent parcels as before. When Sage Creek subsequently failed to pay New Star for its work on Building C, New Star filed a Notice of Construction Lien against the building and later filed a third-party complaint in the proceeding below to foreclose on the lien. In its final judgment, the district court ruled that New Star's original preliminary notices and subsequent construction lien were valid against Building C and that New Star was entitled to foreclose on the lien.

These facts, and the district court's final judgment, give rise to the following issues on appeal:

- a. Whether the district court erred when it determined that New Star's original, pre-plot preliminary notices were valid as against Building C because a contract for the construction of that building was a mere amendment and not an "original contract" for a distinct "construction project" that re-triggered the preliminary notice requirement under Utah Code § 38-1a-501(3).
- b. Whether the trial court erred when it determined that New Star was not required, under the construction lien statute and the Condominium Ownership Act, to separately identify the value of work provided to a condominium unit and the value of work provided to that unit's share of improvements to the common areas in order for the lien to be valid.

4. Reasons the Court Should Retain the Appeal

These issues present important questions of first impression and statutory interpretation that the Court should answer in the first instance. With respect to the first issue, the construction lien statute provides that a person "is required to give only one notice for each construction project." *Id.* § 38-1a-501(3)(a). And a "construction project" is defined as "an improvement that is constructed pursuant to an original contract." *Id.* § 38-1a-102(10). Whether the district court

erred in determining that New Star's original, pre-plat preliminary notices were valid as against Building C calls upon the court to interpret the meaning of the terms "project property" and "construction project," which, although defined in the statute, have yet to be examined and applied by the Court.

The second issue calls upon the Court to examine the interaction of the construction lien statute and the Condominium Ownership Act. The construction lien statute provides that where "a claimant claims a . . . construction lien against two or more improvements owned by the same person, the claimant shall designate the amount claimed to be due on each of the improvements." Utah Code § 38-1a-304(2). And the Condominium Ownership Act provides that once a condominium declaration has been recorded, "liens or encumbrances shall arise or be created only against each unit and the percentage of undivided interest in the common areas and facilities appurtenant to such unit." Utah Code § 57-8-19(1). This case asks the Court to decide whether these requirements require a lien claimant to separately identify the value of the work provided to a condominium unit from the value of work provided to that unit's share of improvements to the common areas.

Because the answers to these questions will add clarity to the construction lien statute and the Condominium Ownership Act and provide important guidance in this oft-applied area of the law, the Court should answer these questions in the first instance.

Sincerely,

DENTONS DURHAM JONES PINEGAR P.C.

/s/ Dana T. Farmer

Dana T. Farmer

J. Tayler Fox

Attorneys for Appellants Dumar, LLC, and Duane Shaw

cc: Counsel of Record

Checklist for Appellate Jurisdiction

*(If a request for retention is submitted, this form **must** be returned with that request and **must** provide all applicable information or the request for retention will **not** be considered by the Court. Any additional information relevant to jurisdiction may be included in the letter requesting retention)*

The case number in the lower court 200700055

The date the final judgment was entered or, if the time for appeal was reinstated pursuant to Subparts (f) or (g) of Rule 4 of the Rules of Appellate Procedure, the date of reinstatement June 22, 2023

Whether the trial court entered a "separate document" as required by Rule 58A(a) of the Rules of Civil Procedure: Yes ☒ No ☐ Not Applicable ☐.

The date of entry of that document June 22, 2023

The date of the filing of the appeal to which this retention request is directed July 25, 2023

Whether any other appeals or cross-appeals in the same case have been filed: Yes ☐ No ☒.

The date(s) of those appeal(s) _____, _____, _____

Whether the judgment listed above resolved the case as to all claims and parties: Yes ☒ No ☐

If no, whether the judgment was certified as final pursuant to Rule 54(b) of the Rules of Civil Procedure: Yes ☐ No ☐ . List the date of certification _____

Whether the judgment listed above included a ruling concerning attorney fees: Yes ☒ No ☐

If attorney fees were awarded at any time, whether the amounts of all awards of fees were fixed prior to the date of your latest appeal: Yes ☒ No ☐ Not Applicable ☐ . List the date of the last order fixing the fees: June 22, 2023

Whether Rule 4(b) of the Rules of Appellate Procedure is applicable: Yes ☐ No ☒

If yes, list the date of any motion listed in Rule 4(b) _____ and the date of resolution of that motion _____

Whether Rule 4(c) of the Rules of Appellate Procedure is applicable: Yes ☐ No ☒

Whether the time to file the appeal was extended: Yes ☐ No ☒ . List the date of any motion for an extension _____ and the date of the order extending the time _____

Whether the appeal was filed pursuant to Utah Code § 78B-11-129: Yes ☐ No ☒ . If yes, list the subsection(s) of that provision that is (are) applicable: _____, _____, _____

The statutory provision conferring appellate jurisdiction on this Court — ie., the applicable subsection of Utah Code § 78A-3-102 (j)