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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Hon. Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2016-001691  
Case No. 2015-CP-23-06023

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FEB 24 2017

SC Court of Appeals

iStar Tara, LLC, ..... Respondent,

v.

Stevens Aviation, Inc., Greenville County,  
South Carolina, and City of Greenville,  
South Carolina, ..... Defendants,

Of whom

Stevens Aviation, Inc., is the ..... Appellant.

MOTION TO STRIKE FOOTNOTE ONE  
OF RESPONDENT'S BRIEF

Appellant Stevens Aviation, Inc. ("Stevens") hereby moves for entry of an order striking footnote one of the initial brief of Respondent iStar Tara, LLC ("iStar"), filed on February 13, 2017. This motion is made pursuant to Rules 208, 210(h), 211, and 240, SCACR.

BACKGROUND

Stevens, the defendant below, appeals the circuit court's dismissal of its counterclaims against iStar, the plaintiff below. Discovery is ongoing regarding iStar's claims, which were not stayed by the filing of this appeal.

In footnote one of its Initial Brief of Respondent, iStar claims that unspecified "evidence [obtained] in discovery" contradicts certain factual allegations of Stevens's counterclaims. Initial Br. of Resp. at 2 n.1. Whatever this evidence is, it was never presented to the circuit court and is not included in the Record on Appeal.

### ARGUMENT

In deciding an appeal, this Court's consideration is limited to the record on appeal; "the appellate court will not consider any fact which does not appear in the Record on Appeal." Rule 210(h), SCACR. This is consistent with the role of a South Carolina appellate court, which is "to review the judgment of the circuit court for reversible error based on the issues and evidence presented to that court." *Sanders v. Salley*, 283 S.C. 458, 460, 322 S.E.2d 829, 830 (Ct. App. 1984).

This Court, and the Supreme Court sitting in its appellate capacity, have steadfastly refused to consider matters presented in appellate briefs that were not before the circuit court and/or not included in the Record on Appeal. *See, e.g., State v. Parker*, 391 S.C. 606, 615, 707 S.E.2d 799, 803 (2011) (holding Court of Appeals erred in basing ruling on material not contained in the record); *Forner v. Butler*, 319 S.C. 275, 277 n.1, 460 S.E.2d 425, 427 n.1 (Ct. App. 1995) (chastising both parties for making "factual assertions in their briefs which have no basis in the record on appeal"); *Paxton v. Hinkle*, 282 S.C. 273, 274 n.1, 318 S.E.2d 123, 124 n.1 (Ct. App. 1984) (refusing to consider allegations of fact appearing in Appellant's brief but not appearing in the record on appeal).

iStar has not sought to include its alleged evidence in the Record on Appeal;<sup>1</sup> indeed, any such attempt would be improper. Rule 210(c), SCACR, establishes that the Record on Appeal “shall not ... include matter which was not presented to the lower court or tribunal.” By the same token the parties on appeal are prohibited from citing or relying on materials not properly included in the Record on Appeal. *See* Rule 208(b)(4), SCACR; *SCNB v. Joyner*, 289 S.C. 382, 386, 346 S.E.2d 329, 331 (Ct. App. 1986)

Moreover, Stevens is appealing the circuit court’s dismissal of its counterclaims under Rule 12(b)(6), SCRCP. In reviewing the circuit court’s decision, this Court may consider only the factual allegations of Stevens’s counterclaims, and it must accept those allegations as true. *See Chestnut v. AVX Corp.*, 413 S.C. 224, 227, 776 S.E.2d 82, 84 (2015); *Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 148, 714 S.E.2d 537, 539 (2011). Stevens disputes iStar’s claims about what is shown by the evidence obtained through discovery. Regardless, any such evidence cannot be considered by this Court and should not have been referenced in iStar’s brief.

### CONCLUSION

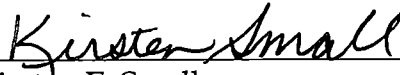
Our Supreme Court has instructed that “the South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State.” *Henning v. Kaye*, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992). Footnote one of iStar’s Initial Brief of Respondent violates

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<sup>1</sup> iStar did not serve and file a Designation of Matter to be Included in the Record on Appeal when it served and filed its Initial Brief of Respondent. *See* Rule 209(a), SCACR.

these rules by asserting facts that are not part of the Record on Appeal and which were not presented to the circuit court. Therefore, Stevens respectfully asks for entry of an order striking footnote one and directing that it not appear in iStar's final brief.

Respectfully submitted,

  
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*Attorneys for Appellant Stevens Aviation, Inc.*

February 22, 2017  
Greenville, South Carolina

# NEXSEN | PRUET

**Kirsten E. Small**  
Member  
Admitted in SC, NC, MD

February 22, 2017

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
PO Box 11629  
Columbia, SC 29211

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SC Court of Appeals

Re: *iStar Tara, LLC v. Stevens Aviation, Inc., et al.*  
Appellate Case No. 2016-001691

Dear Ms. Kitchings:

Regarding the above-referenced case, enclosed please find the original and 7 copies of Appellant's Motion for Extension of Time to File Initial Reply Brief, the required filing fee, and the Proof of Service. In addition, please find the original and 7 copies of Appellant's Motion to Strike, along with the filing fee and Proof of Service. Please return file stamped copies in the enclosed, postage paid envelope. By copy of this letter, I have served counsel for all parties, as indicated in the Proofs of Service.

Charleston

Charlotte

Columbia

Greensboro

**Greenville**

Hilton Head

Myrtle Beach

Raleigh

Sincerely,



Kirsten E. Small

KES/vgp

cc: Counsel of Record

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