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January 20, 2015

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**RE: Commscope Credit Union v. Butler & Burke, LLP v. Barry D. Graham, et al
Supreme Court of North Carolina No. 5P15**

Dear Counsel:

Please find enclosed a Motion by the North Carolina Chamber for Leave to File Brief Amicus Curiae in the above matter that was electronically filed with the Supreme Court today. Should this generate any questions or concerns, please do not hesitate to contact our office.

Very truly yours,

Daphne P. Little, NC Certified Paralegal
Legal Assistant to Mel J. Garofalo

Enclosure

cc: Frederick K. Sharpless (w/encl.)
Richard A. Simpson/Ashley E. Eiler (w/encl.)
Alfred P. Carlton, Jr. (w/encl.)
Camden R. Webb (w/encl.)
Christopher C. Lam (w/encl.)
J. Michelle Armbruster (w/encl.)

No. 5P15

TWENTY-FIFTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

COMMSCOPE CREDIT UNION,)

Plaintiff-Respondent)

v.)

BUTLER & BURKE, LLP, a North)
Carolina Limited Liability Partnership,)

Defendant-Petitioner)

v.)

BARRY D. GRAHAM et al.,)

Third-Party Defendants)

From Catawba County
12 CVS 3021
COA14-273

**MOTION BY THE NORTH CAROLINA CHAMBER
FOR LEAVE TO FILE BRIEF *AMICUS CURIAE***

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

The North Carolina Chamber (“Chamber”) respectfully moves this Honorable Court, pursuant to Rule 28(i) of the North Carolina Rules of Appellate Procedure, for leave to file the attached brief *amicus curiae* in support of Petitioner Butler & Burke, LLP.

NATURE OF THE CHAMBER'S INTEREST

The North Carolina Chamber (“Chamber”) is a nonprofit, nonpartisan business advocacy organization dedicated to improving the lives of all North Carolinians. To achieve this mission, the Chamber serves as the public voice of North Carolina businesses that seek to foster economic development, build an educated and competitive workforce, and create a business climate that will enable our state to continue to attract and retain good jobs for its citizens. Formerly known as NCCBI (North Carolina Citizens for Business and Industry), the Chamber has also served as North Carolina’s official state representative to the U.S. Chamber of Commerce for more than 30 years. With strong interests in creating a healthy business climate and ensuring the efficient functioning of markets that will benefit all North Carolina citizens, the Chamber is especially interested in the law governing the conduct of business within the state.

REASONS WHY THE CHAMBER SHOULD BE HEARD

Amicus participation by the Chamber will permit this Court to hear the voice of North Carolina businesses in how the decision of the Court of Appeals will negatively impact the State. Unless reversed, North Carolina businesses could face difficulty complying with legal requirements, and meeting public and commercial expectations, which require independent audits. Moreover, the effect on the business climate in North Carolina could be even more significant. The ability of

North Carolina citizens, shareholders, and investors interested or potentially interested in North Carolina companies, to rely on audit reports, would be harmed. It appears that under the Court of Appeals' decision, North Carolina would be unique in the nation in requiring that these audit reports be prepared by fiduciaries, and the reports would lose their independent status. It is in the public policy and best interest of the State to safeguard the public's interest in independent audits, and this requires that the Petition for Discretionary Review be granted and the decision of the Court of Appeals be reversed.

ISSUE OF LAW TO BE ADDRESSED
AND THE CHAMBER'S POSITION

The issue the Chamber intends to address is whether an auditor engaged to conduct an independent audit creates a fiduciary relationship simply by virtue of the auditing engagement. The Chamber's position is that an audit engagement is one that requires independence on the part of the auditor, and that the recognition of a fiduciary duty in such an instance would be contrary to state and federal law and the public policy of the State.

WHEREFORE, the Chamber respectfully moves this Honorable Court to grant this motion for leave to file a brief *amicus curiae*.

This the 20th day of January, 2015.

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I hereby certify that the foregoing was served upon the parties to this action by mailing a copy thereof by first class mail to the following counsel:

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**BRIEF OF AMICUS CURIAE ON BEHALF OF
THE NORTH CAROLINA CHAMBER**

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THE NORTH CAROLINA CHAMBER**

INTEREST OF AMICUS

The North Carolina Chamber (“Chamber”) is a nonprofit, nonpartisan business advocacy organization dedicated to improving the lives of all North Carolinians. To achieve this mission, the Chamber serves as the public voice of North Carolina businesses that seek to foster economic development, build an educated and competitive workforce, and create a business climate that will enable

our state to continue to attract and retain good jobs for its citizens. Formerly known as NCCBI (North Carolina Citizens for Business and Industry), the Chamber has served as North Carolina's official state representative to the U.S. Chamber of Commerce for more than 30 years. With strong interests in creating a healthy business climate and ensuring the efficient functioning of markets that will benefit all North Carolina citizens, the Chamber is especially interested in the law governing the conduct of business within the state.

WHY THE CHAMBER SUBMITS THIS AMICUS BRIEF

The Chamber offers this amicus brief because the decision of the Court of Appeals will negatively impact business conducted within the State. Unless reversed, North Carolina businesses could face difficulty complying with legal requirements, and difficulty meeting public and commercial expectations, which require independent audits. Moreover, the effect on the business climate in North Carolina could be even more significant. The ability of North Carolina citizens and shareholders, and investors interested or potentially interested in North Carolina companies, to rely on audit reports, would be harmed. It appears that under the Court of Appeals' decision, North Carolina would be unique in the nation in requiring that audit reports be prepared by fiduciaries, losing their independent status. It is in the public policy and best interest of the State to safeguard the public's interest in independent audits, and this requires that the

Petition for Discretionary Review be granted and the decision of the Court of Appeals be reversed.

ARGUMENT

I. INDEPENDENT AUDITS ARE REQUIRED BY LAW AND DO NOT CREATE A FIDUCIARY RELATIONSHIP

Independent audits of company financial statements are in the public interest because they provide assurance that financial statements are accurate to shareholders, investors, potential investors, and the public at large. Moreover, independent audits are required by law. North Carolina rules require CPAs to be independent from the audit client in order to comply with generally accepting auditing standards. AICPA Auditing Standard AU Section 220. Those standards recognize the fundamental importance of independence, as “public confidence [in audits] would be impaired by evidence that independence was actually lacking,” or even when reasonable people “might believe” independence would be affected. *Id.*; 21 NCAC 08N.0402; 21 NCAC 08N.0403.

Federal law also requires independent audits and makes it unlawful for an auditor not to act independently. *See* 17 C.F.R. § 240.10A-2; 210.2-02(b). And as a matter of commercial expectations, many companies are required to obtain independent audits by financial institutions and other lenders and investors seeking to prudently monitor their investments. In short, the independent audit is a fundamental component of modern commerce and efficient markets.

When certifying that the financial statements of a corporate entity are prepared appropriately, an auditor is not “advocating” a position on behalf of the audit client. Instead, the auditor is assuming “a *public* responsibility transcending any employment relationship with the client.” *U.S. v. Arthur Young & Co.*, 465 U.S. 805, 817-18 (1984). The auditor “performing this special function owes ultimate allegiance to the corporation's creditors and stockholders, as well as to investing public,” not the audit client. *Id.*

Rather than acting in an independent manner and in support of the *public* interest, the new standard created by the Court of Appeals’ decision appears ready to convert independent auditors into client fiduciaries, who must act in the best interests of their *audit client*. The definition of a fiduciary in the North Carolina pattern jury instructions is as follows:

A fiduciary is a person in whom another person has placed special faith, confidence, and trust. Because of the trust and confidence placed in him by another person, a fiduciary is required to act honestly, in good faith and *in the best interests of that person*.

N.C.P.I—Civil 900.10 ((emphasis added) (citing *Moore v. Bryson*, 11 N.C. App. 260 (1971); *Vail v. Vail*, 233 N.C. 109 (1950); *Abbitt v. Gregory*, 201 N.C. 577 (1931))). The standards of independence and a fiduciary are utterly incompatible.

Though no North Carolina opinion has directly decided the question of whether an auditor is in a fiduciary relationship with the subject of an audit, other courts have correctly rejected such claims. *See, e.g., Resolution Trust Corp. v.*

KPMG Peat Marwick, 844 F. Supp. 431 (N.D. Ill. 1994) (collecting cases); *see also* Petition for Discretionary Review, *Amici Curiae* brief of NCACPA and AICPA (discussing precedent). The Chamber agrees with Petitioner and *Amici* NCACPA and AICPA that the nature of the auditing relationship is fundamentally at odds with a fiduciary relationship. The law requires that audits are independent, commercial expectations are long-settled that audits are independent, and it is in the public interest that audits are independent. The public interest would be harmed if the Court of Appeals' misapprehension of the auditor-client relationship is permitted to stand; the decision should be reversed.

II. THE DECISION OF THE COURT OF APPEALS WILL NEGATIVELY AFFECT THE BUSINESS CLIMATE OF THE STATE.

It appears that if the decision of the Court of Appeals is not overturned, North Carolina will be unique among states in holding that an auditor is or may be a fiduciary of the subject of an audit. In addition to the negative effects this would have on North Carolina CPAs attempting to comply with independence requirements (a conflict which appears irreconcilable), and the difficulty that North Carolina companies could face in obtaining independent audits, the Chamber submits that the effect on the business climate in North Carolina could be even more significant.

The Court of Appeals' decision threatens a fundamental alteration to the structural foundation of the business market in North Carolina. No one can know the potential long-term consequences of the holding, but for an investor presented with the choice between relying upon the audit of a North Carolina corporation prepared by a fiduciary, versus the independently audited financials of a company in another state, it is obvious which set of financial statements the investor will trust. Multiply this choice across an entire state and the impact is sure to be profound, and certainly not good for investment and investor confidence in North Carolina.

Independent audits are in the public interest. The Court of Appeals' decision abandons that settled principle. Independent audits protect market integrity. Investors, creditors, shareholders, and the citizens of our State need stable and efficient markets. The Court of Appeals' decision places the interest of the audit client above the public interest, by requiring that "independent" auditors serve the interests of the audit clients and not the public interest. "Independent" in the phrase "independent audit" will lose its meaning, and this will harm the State.

CONCLUSION

For the reasons set forth above, therefore, the Chamber urges the Court to grant the Petition for Discretionary Review and reverse the Court of Appeals.

This the 20th day of January, 2015.

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