

STATE OF NORTH CAROLINA  
COUNTY OF HAYWOOD

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
FILE NO. 16 Cvs 997

HAYWOOD COUNTY, C.S.C.

HAYWOOD COMMUNITY COLLEGE, by and through the Trustees of Haywood Community College,

Plaintiff,

vs.

MILES McCLELLAN CONSTRUCTION COMPANY, INC., a Ohio Corporation; CAROLINA FLOOR SYSTEM, INC., a North Carolina Corporation; MAXXON CORPORATION, a Minnesota Corporation; MAXXON SOUTHEAST, INC., a North Carolina Corporation; INNOVATIVE DESIGN, INC., a North Carolina Corporation; MICHAEL H. NICKLAS, Individually; TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA; and CONTRACTORS BONDING AND INSURANCE COMPANY,

Defendants.

**COMPLAINT**

**NOW COMES** Plaintiff, complaining of the Defendants, and alleges and says:

**PARTIES AND JURISDICTION**

1. That Plaintiff, Haywood Community College, is a North Carolina community college organized and existing pursuant to Chapter 115D of the North Carolina General Statutes. That HCC is governed by the Trustees of Haywood Community College, a corporate body politic, with the authority and power to institute legal actions on behalf of Haywood Community College. That Haywood Community College is located in the County of Haywood, State of North Carolina. That Plaintiff will hereinafter be called HCC.

2. That Defendant Miles-McClellan Construction Company, hereinafter called Defendant Miles, is a foreign corporation, incorporated in the State of Ohio, having its principal office in the State of Ohio; but is licensed to do business in the State of North Carolina and in fact, does a substantial amount of business in the State of North Carolina.

3. That Defendant Carolina Floor Systems, Inc., hereinafter called Defendant Carolina, is a North Carolina corporation organized and existing pursuant to the laws of the State of North Carolina, with its principal office being located in Mecklenburg County, State of North Carolina.

4. That Defendant Maxxon Corporation is a foreign corporation, incorporated in the State of Minnesota, having its principal office in the State of Minnesota; but doing a substantial amount of business in the State of North Carolina. That Defendant Maxxon Southeast, Inc. is a North Carolina corporation with its principal office being located in Mecklenburg County, State of North Carolina. That upon information and belief, Defendant Maxxon Southeast, Inc. is a wholly owned subsidiary of Maxxon Corporation, or has a business relationship whereby it represents Maxxon Corporation's interest, and sells its products in the southeastern United States; and at all times pertinent hereto, was an agent and had authority to represent itself, as well as Defendant Maxxon Corporation in all dealings between Plaintiff, Defendant Miles, and Defendant Carolina. That Defendant Maxxon Corporation and Defendant Maxxon Southeast, Inc., due to their mutually supporting and intertwined business relationship and responsibility of one to the other, will hereinafter be called jointly together as Defendant Maxxon.

5. That Defendant Innovative Design, Inc., hereinafter called Defendant Innovative, is a North Carolina corporation organized and existing pursuant to the laws of the State of North Carolina, with its principal office being located in Wake County, State of North Carolina.

6. That Defendant Michael H. Nicklas, hereinafter called Defendant Nicklas, is a citizen and resident of Wake County, State of North Carolina. That Defendant Nicklas is a licensed professional architect by the State of North Carolina, who at all times pertinent hereto, held himself to possess special training, knowledge, and experience in design and professional architectural services, including issuance of plans and specifications of buildings, which are environmentally friendly, energy saving, with general "green" features, and as designed will obtain the highest LEED certification. That at all times pertinent hereto, Defendant Nicklas was acting not only in his individual professional position as an architect, but also as the employee and duly authorized agent of Defendant Innovative.

7. That Defendant Travelers Casualty and Surety Company of America, hereinafter called Defendant Travelers, is a foreign corporation organized and existing under the laws of the State of Connecticut, but licensed to do business in the State of North Carolina, and engaging in the business of issuing construction bonds.

8. That Defendant Contractors Bonding and Insurance Company, hereinafter called Defendant Contractors, is a foreign corporation organized and existing under the laws of the State of Illinois, but licensed to do business in the State of North Carolina, and engaging in the business of issuing construction and maintenance bonds.

#### **STATEMENT OF THE FACTS**

9. That beginning in 2009, Plaintiff began seeking professional architects to assist in the design, planning, construction, and supervision of a new Creative Arts Building (CAB) on its campus in Haywood County, North Carolina. That in response to requests for proposals,

Defendant Nicklas, on behalf of Defendant Innovative, submitted a response and began negotiations with Plaintiff to prepare necessary designs, costs estimates, and plans for construction of Plaintiff's CAB. That at all times pertinent hereto, Defendant Nicklas, individually, and as the duly authorized and acting employee and agent of Defendant Innovative, held himself out individually and on behalf of Defendant Innovative as being a licensed architect who was specially qualified as an expert in the design, planning, construction and supervision of solar energy systems, including solar power generation, solar thermal heating, and solar chiller cooling systems. That Defendants Nicklas and Innovative promoted and encouraged Plaintiff to adopt and construct a highly energy efficient CAB to promote clean energy, obtain energy costs savings, LEED certification, and represented that said systems would be financially beneficial to Plaintiff, as well as heat and cool said building equal to or better than conventional heating and cooling systems. That in reliance upon the representations of Defendants Nicklas and Innovative, including their special training, experience and ability, Plaintiff entered into a contract with Defendant Innovative on the 11th day of June, 2009, to architecturally design, prepare plans, supervise, and otherwise be the architect in charge for construction of the CAB. Additionally, Plaintiff and Defendant Innovative entered into a second contract on the 30<sup>th</sup> day of July, 2009 specifically for the solar power generation, heating and cooling systems.

10. That after contracting with Defendant Innovative, Defendant Innovative began preparing, executing, and designing the CAB, and at all times, continued to encourage the Plaintiff to make the building a "model example" for environmentally friendly systems, and the benefits that would flow to the Plaintiff as a result thereof. That Defendant Nicklas, individually, and on behalf of Defendant Innovative continued to represent they had the expertise, experience, and contacts to make the CAB a model for cutting edge technology and energy savings. That after completion of the architectural design plan, and with supervision of Defendants Nicklas and Innovative, requests for construction bids were prepared and distributed. That Defendant Miles, after input and recommendation from Defendants Nicklas and Innovative, was selected by Plaintiff as the general contractor for construction of the CAB.

11. That at all times pertinent hereto, Defendant Miles, by and through its agents, represented that it had the ability, knowledge, and expertise to construct the CAB, including all matters necessary to complete the solar systems and other environmental designs and plans. That at all times pertinent hereto, Defendant Miles represented that it had the ability, expertise, and knowledge to construct the floor system of the CAB, which included a concrete base, a second layer of Gyp-crete which contained heating coils, and top coat layer composed of a high strength concrete product produced by Defendant Maxxon. That pursuant to the representations of Defendant Miles and submitted bids, a contract was entered into between Plaintiff and Defendant Miles on the 22nd day of November, 2010.

12. That as part of the contract between Plaintiff and Defendant Miles, Defendant Travelers issued a construction performance bond as surety for the principal Defendant Miles' performance of the CAB construction project.

13. That currently the CAB has the following defects, among others, resulting from improper design, construction, and/or materials:

a. The floor system is failing in that the top layer is delaminating and cracking throughout the building;

b. The water reuse and cistern system does not function. The system's variable frequency drives are not communicating with pumps, and the parameters were lost in a power surge. Plaintiff has been informed that the same cannot be repaired due to there being no knowledge of the original parameters;

c. The loading dock gutters leak;

d. Several emergency lights do not function;

e. The PH monitoring system for the chemical disposal system does not function;

f. Water pressure on the domestic hot water system has sudden surges and has resulted in one expansion tank rupturing, the same causing Plaintiff to bypass the domestic gas water heater and only use the solar water heater;

g. When the fire pump is tested, pressure in the sprinkler system drops, placing the building in alarm status for several days; thus preventing the system from being tested monthly. Equalizer and booster pumps have failed, as well as several valves;

h. The drainage retention pond fails to hold water and meet the purposes for which it was designed and constructed;

i. The cistern pumps are excessively noisy beyond industry standards and cause distraction in the adjoining classroom;

j. The floor in the mechanical room is not sloped toward the drain, resulting in the rooms located beneath the mechanical room being flooded with resultant damage to ceiling tiles and personal property of students;

k. Light bulbs for the track lights controlled by the occupancy sensors regularly and excessively burn out;

l. Composite decking on the 2nd level porch is failing structurally and cosmetically;

m. The energy monitoring displays at both the upper and lower entrances, and required for LEED certification have never functioned;

n. There is a water leak in the circulation space foundation wall;

o. The solar absorption chiller system has failed;

p. The solar storage tank fails to operate, causing accompanying problems for the gas boilers, resulting in failure of the system to heat the building. Additionally, the storage tank goes in emergency dump of water on a daily basis when the solar absorption chiller is offline;

q. The thermal system overheats, resulting in system failure;

r. That overall, the solar heating and absorption chiller system has failed to heat and cool the building; and

s. LEED Certification has not been achieved.

**FIRST CLAIM FOR RELIEF AS TO DEFENDANT MILES  
BREACH OF CONTRACT**

14. Plaintiff realleges its preceding allegations and incorporates the same herein by reference.

15. That pursuant to its contract with Plaintiff, Defendant Miles had a duty to perform its work in a workmanlike manner, free of defects and deficiencies, using new and first quality materials, in accordance with the contract documents (to include the plans, specifications, and manufacturers' recommendations), applicable building codes, industry standards, good construction practices, and other standards applicable to a licensed general contractor.

16. That Defendant Miles materially breached its contract with the Plaintiff by failing to perform its work in a workmanlike manner, free of defects and deficiencies, using new and first quality materials, in accordance with the contract documents (to include the plans, specifications, and manufacturers' recommendations), applicable building codes, industry standards, good construction practices, and other standards applicable to a licensed general contractor.

17. That Defendant Miles breached its contract with Plaintiff in that it, among other things:

a. Failed to perform its work in accordance with the applicable plans, designs, and specifications for the building;

b. Failed to meet industry standards;

c. Failed to follow standard construction procedures in its construction of the building;

d. Violated applicable building codes;

e. Failed to adequately and properly supervise its subcontractors;

f. Failed to comply with good construction practices;

g. Failed to maintain the interior of the building in a dry condition necessary for the pouring of the flooring's top coat;

h. Failed to construct a defect free building;

i. Failed to use quality material in the construction of the building so as to have a defect free building;

j. Failed to implement and enforce an effective, quality control procedure for work performed by its employees and subcontractors;

18. That as a direct consequence of the aforesaid material breach of contract of Defendant Miles, the building does not perform or function as intended, it is defective, repairs are required, the Plaintiff has and will lose the use of the building, and the Plaintiff has been damaged in a sum far in excess of \$25,000.00.

#### **SECOND CLAIM FOR RELIEF AS TO DEFENDANT MILES BREACH OF EXPRESS AND IMPLIED WARRANTIES**

19. Plaintiff realleges its preceding allegations and incorporates the same herein by reference.

20. That Defendant Miles expressly and impliedly warranted to Plaintiff that the CAB would be constructed in a workmanlike manner, free of defects and deficiencies, and perform as designed, specified and intended, including, without limitation, the solar system and the flooring system.

21. That as to the flooring system, Defendants Miles, Carolina, and Maxxum specifically warranted that the top coat manufactured by Defendant Maxxon and installed by Defendant Carolina was of good quality, free of defects, and would perform as designed, specified and intended.

22. That by reason of the foregoing acts and omissions, Defendant Miles materially breached the terms of its express and implied warranties.

23. That as a direct consequence of the aforesaid material breach of the express and implied warranties of Defendant Miles, the building does not perform or function as intended, it is defective, repairs are required, the Plaintiff has and will lose the use of the building, and the Plaintiff has been damaged in a sum far in excess of \$25,000.00.

**THIRD CLAIM FOR RELIEF AS TO DEFENDANT MILES  
BREACH OF EXPRESS AND IMPLIED FIVE-YEAR WARRANTY FOR FLOOR  
REPAIR**

24. Plaintiff realleges its preceding allegations and incorporates the same herein by reference.

25. That during the construction of CAB, it became known to the Defendants that the Maxxon top coat was cracking in a portion of the building. That due to the then observable cracks, Defendant Miles agreed to extend by five years their warranty to repair and replace the floor system, including any then existing defects and any that may occur in the future. That Defendant Miles, both expressly and impliedly, warranted that all construction, repairs and replacement would be performed in a workmanlike manner, that the flooring system would be free of all defects and deficiencies, and that it would perform as intended and in accordance with the contract documents. That Defendant Miles has made attempts to repair the initially cracked portion, but the repairs have not been successful. Additionally, the floor is delaminating throughout the building with cracks, crevices, pit holes, and other similar type damage. That Defendant Miles has since refused to repair and/or replace the damaged portions.

26. That Defendant Miles has materially breach its express and implied five-year warranty to repair and replace the defective floor system.

27. That as a direct consequence of the aforesaid material breach of the express and implied warranties of Defendant Miles, the building does not perform or function as intended, it is defective, repairs are required, and Plaintiff will lose the use of the building, and the Plaintiff has been damaged in a sum far in excess of \$25,000.00.

**FOURTH CLAIM FOR RELIEF AS TO DEFENDANT MILES  
SPECIFIC PERFORMANCE**

28. Plaintiff realleges its preceding allegations and incorporates the same herein by reference.

29. That due to the nature, purpose of construction, and circumstances, Plaintiff is in need of Defendant Miles to specifically perform the terms of the contract to repair and replace the flooring as originally contracted and/or pursuant to the extended five-year warranty. That Plaintiff does not have an adequate remedy at law as it will effect student classes, including cancellations, relocations, and Plaintiff will have an unsafe building for students, faculty, other invitees unless said floor is repaired.

**FIFTH CLAIM FOR RELIEF AS TO DEFENDANT MILES  
MISREPRESENTATION, OBTAINING PROPERTY BY FALSE PRETENSES, AND  
FRAUD**

30. Plaintiff realleges its preceding allegations and incorporates the same herein by reference.

31. That prior to complete and full payment to Defendant Miles pursuant to its contract with Plaintiff, Defendants Miles, Carolina and Maxxon became aware of the CAB's defective floor construction. That at said time, said three Defendants knew or should have known that significant work at their expense would have to be performed to correct the problems with the floor, said problems being latent. That Defendants knew or should have known that it was a major defect, but intentionally informed Plaintiff that it was a minimal problem, minor in scope and area, and otherwise intentionally misrepresented to Plaintiff the true condition of the floor. That Defendants knew or should have known of the substantial defect due to their experience, knowledge, expertise, and having constructed the floor system. Defendants also knew that final and full payment for work on the flooring system, including retainage, had not been paid to the Defendants; and further knew that if the full and true scope and condition of the flooring system had been made known to the Plaintiff, that further payment would have been withheld and Defendants would have then incurred significant costs to correct the defect which they intentionally and purposely kept secret from Plaintiff. That to obtain additional payment, said three Defendants devised a plan and scheme to avoid their obligation to repair the floor by representing to the Plaintiff that the problem was minor in effect, and they would extend the warranty and made representations to the Plaintiff and its agents that they would make all necessary floor repairs and/or replacement. That in reasonable reliance upon the extended warranty and the Defendants' false representations, Plaintiff continued to make full payment to the Defendants. That though Defendant Miles has been notified of the floor delaminating throughout the building with resultant cracking, crevicing, and pit holes, it has intentionally failed to repair the floor, and upon information and belief, has no intention to repair or replace the floor as required by its extended warranty, agreement and representations. That at the time of issuing the five-year warranty, Defendant Miles acted in conspiracy with Defendants Carolina and Maxxon for the purpose of obtaining continual payment from Plaintiff, which also benefited Defendants Carolina and Maxxon.

32. That upon information and belief, the representations of Defendants Miles, Carolina and Maxxon were false when made, were made with the intent to deceive, and did in fact deceive the Plaintiff, that Plaintiff reasonably relied upon Defendant Miles' warranties and representations to its material detriment by providing Defendant Miles with full and final payment for construction of the CAB, including the flooring system.

33. That by and through Defendant Miles' aforesaid conduct, it obtained property by false pretenses and defrauded the Plaintiff, and by reason thereof, the Plaintiff has been damaged in a sum far in excess of \$25,000.00 and is further entitled to recover punitive damages, and attorney's fees.



**SIXTH CLAIM FOR RELIEF AS TO DEFENDANT MILES  
UNFAIR AND DECEPTIVE TRADE PRACTICES**

34. Plaintiff realleges its preceding allegations and incorporates the same herein by reference.

35. That Defendant Miles, acting in consort with Defendants Carolina and Maxxon in issuing a five-year warranty in bad faith and fraudulently as heretofore alleged, and with knowledge of the defective flooring, knowing that the floor throughout the building would delaminate and cause significant cracks, crevices, and pit holes, has committed unfair and deceptive trade practices in violation of Chapter 75 of the North Carolina General Statutes.

36. That Defendant Miles' aforesaid unfair and deceptive acts were in and affecting intrastate commerce.

37. That Plaintiff has been damaged as a direct and proximate result of the aforesaid unfair and deceptive trade practices of Defendant Miles, and is entitled to recover actual damages far in excess of \$25,000.00, treble damages, and attorney's fees.

**FIRST CLAIM FOR RELIEF AS TO CAROLINA FLOORING  
BREACH OF CONTRACT AND WARRANTIES**

38. Plaintiff realleges its preceding allegations and incorporates the same herein by reference.

39. That Defendant Carolina was a subcontractor to Defendant Miles for construction of the CAB's floor system.

40. That at all times pertinent hereto as a subcontractor, Defendant Carolina had a duty to perform its work in a workmanlike manner, free of defects and deficiencies, using new and first quality materials, in accordance with the contract documents (to include the plans, specifications, and manufacturers' recommendations), applicable building codes, industry standards, good construction practices, and other standards applicable to a licensed general contractor.

41. That upon information and belief, Defendant Carolina warranted to Defendant Miles for the benefit of Plaintiff that its work would be constructed in a workmanlike manner, free of defects and deficiencies, and perform as designed, specified and intended. That in addition to its express warranty work, Defendant Carolina impliedly warranted its work to Defendant Miles for the benefit of Plaintiff.

42. That at all pertinent times hereto, Defendant Carolina knew Plaintiff was the intended beneficiary of the contract between Defendants Miles and Carolina and any warranties, both express and implied.

43. That contrary to Defendant Carolina's contract and warranties, the flooring system has delaminated, is cracking and has failed by reason of Defendant Carolina's failure to construct the flooring system in a workmanlike manner, free of defects and deficiencies, and as it was designed, specified and intended.

44. That by reason of the foregoing acts and omissions, Defendant Carolina has materially breached the terms of its express and implied warranties to Plaintiff.

45. That as a direct consequence of the aforesaid material breach of the express and implied warranties of Defendant Carolina, the flooring system does not perform or function as intended, it is defective, repairs are required, the Plaintiff has and will lose the use of the building, and the Plaintiff has been damaged in a sum far in excess of \$25,000.00.

### **SECOND CLAIM FOR RELIEF AS TO CAROLINA FLOORING BREACH OF FIVE-YEAR WARRANTY**

46. Plaintiff realleges its preceding allegations and incorporates the same herein by reference.

47. That as to the flooring system, Defendants Carolina, Miles and Maxxon specifically extended a five year warranty that the top coat manufactured by Defendant Maxxon and installed by Defendant Carolina was of good quality, free of defects, and would perform as designed and specified. That Defendant Carolina agreed to repair and/or replace any defective flooring during the extended five-year warranty period. That Defendant Carolina has been notified of the defective flooring as heretofore alleged, but has failed and refused to repair and/or replace the floor.

48. That by reason of the foregoing acts and omissions, Defendant Carolina has materially breached the terms of its express and implied five-year warranty.

49. That as a direct consequence of the aforesaid material breach of the express and implied five-year warranty of Defendant Carolina, the flooring system does not perform or function as intended, it is defective, repairs are required, the Plaintiff has and will lose the use of the building, and the Plaintiff has been damaged in a sum far in excess of \$25,000.00.

### **THIRD CLAIM FOR RELIEF AS TO CAROLINA FLOORING NEGLIGENCE**

50. Plaintiff realleges its preceding allegations and incorporates the same herein by reference.

51. That Defendant Carolina had a duty to the Plaintiff to perform its work in a workmanlike manner, free of defects and deficiencies, using new and first quality materials, in accordance with the contract documents (to include the plans, specifications, manufacturers'

recommendations), applicable building codes, industry standards, good construction practices, and other standards applicable to a flooring contractor.

52. That Defendant Carolina knew or should have known that a failure to perform its work and perform related repairs and modifications in accordance with its duties would cause the Plaintiff to suffer damages.

53. That Defendant Carolina was negligent and breached its duties, including but not limited to the following:

- a. Failed to construct the flooring system in accordance with requirements of the contract documents, plans, designs, and specifications;
- b. Failed to meet industry standards;
- c. Failed to follow standard construction procedures in its construction of the building;
- d. Violated applicable building codes;
- e. Failed to comply with good construction practices;
- f. Installed components of the flooring system when the interior of the building was not dry or otherwise in the proper condition necessary for the pouring of the flooring's top coat;
- g. Failed to construct a defect free flooring system;
- h. Failed to use quality material in the construction of the building so as to have a defect free building;
- i. Failed to implement and enforce an effective, quality control procedure for work performed by its employees and subcontractors;
- j. Using substandard and inappropriate materials which resulted in the flooring system not being structurally sound and fit for intended use and purposes
- k. Failed to follow the instructions and manufacturer's instructions and recommendations for applying and installing the Maxxon top layer product;
- l. Overwatered the Maxxon product to such extent that it created excessive moisture in the mix, thereby preventing the Maxxon product from bonding to the Gyp-Crete layer; and
- m. Otherwise failed to perform its work as a flooring contractor in Western North Carolina would and should have done under like and similar circumstances.

54. That as a direct and proximate result of the aforesaid negligence of Defendant Carolina, the flooring system has delaminated, cracked and is structurally unsound, and by reason thereof it does not perform or function as intended; it is defective, repairs are required, and Plaintiff has and will lose the use of the building, and has been damaged in a sum far in excess of \$25,000.00.

**FOURTH CLAIM FOR RELIEF AS TO CAROLINA FLOORING  
SPECIFIC PERFORMANCE**

55. Plaintiff realleges its preceding allegations and incorporates the same herein by reference.

56. That the extended five-year warranty is still in effect. Plaintiff has made demand that Defendant Carolina complying with the terms and conditions of the warranty by repairing and/or replacing the floor, but has failed to do so.

57. That due to the nature, purpose of construction, and circumstances, Plaintiff is in need of Defendant Miles to specifically perform the terms of the contract to repair and replace the flooring as originally contracted and/or pursuant to the extended five-year warranty. That Plaintiff does not have an adequate remedy at law as it will effect student classes, including cancellations, relocations, and Plaintiff will have an unsafe building for students, faculty, other invitees unless said floor is repaired.

**FIFTH CLAIM FOR RELIEF AS TO CAROLINA FLOORING  
MISREPRESENTATION, OBTAINING PROPERTY BY FALSE PRETENSES, AND  
FRAUD**

58. Plaintiff realleges its preceding allegations and incorporates the same herein by reference.

59. That prior to complete and full payment to Defendant Miles pursuant to its contract with Plaintiff, Defendants Miles, Carolina and Maxxon became aware of the CAB's defective floor construction. That at said time, said three Defendants knew or should have known that significant work at their expense would have to be performed to correct the problems with the floor, said problems being latent. That Defendants knew or should have known that it was a major defect, but intentionally informed Plaintiff that it was a minimal problem, minor in scope and area, and otherwise intentionally misrepresented to Plaintiff the true condition of the floor. That Defendants knew or should have known of the substantial defect due to their experience, knowledge, expertise, and having constructed the floor system. Defendants also knew that final and full payment for work on the flooring system, including retainage, had not been paid to the Defendants; and further knew that if the full and true scope and condition of the flooring system had been made known to the Plaintiff, that further payment would have been withheld and Defendants would have then incurred significant costs to correct the defect which they intentionally and purposely kept secret from Plaintiff. That to obtain additional payment, said

three Defendants devised a plan and scheme to avoid their obligation to repair the floor by representing to the Plaintiff that the problem was minor in effect, and they would extend the warranty and made representations to the Plaintiff and its agents that they would make all necessary floor repairs and/or replacement. That in reasonable reliance upon the extended warranty and the Defendants' false representations, Plaintiff continued to make full payment to the Defendants. That though Defendant Carolina has been notified of the floor delaminating throughout the building with resultant cracking, crevicing, and pit holes, it has intentionally failed to repair the floor, and upon information and belief, has no intention to repair or replace the floor as required by its extended warranty, agreement and representations. That at the time of issuing the five-year warranty, Defendant Carolina acted in conspiracy with Defendants Miles and Maxxon for the purpose of obtaining continual payment from Plaintiff, which also benefited Defendants Miles and Maxxon.

60. That upon information and belief, the representations of Defendants Miles, Carolina and Maxxon were false when made, were made with the intent to deceive, and did in fact deceive the Plaintiff, that Plaintiff reasonably relied upon Defendant Carolinas' warranties and representations to its material detriment by providing Defendants Miles and Carolina's with full and final payment for construction of the CAB, including the flooring system.

61. That by and through Defendant Carolinas' aforesaid conduct, it obtained property by false pretenses and defrauded the Plaintiff, and by reason thereof, the Plaintiff has been damaged in a sum far in excess of \$25,000.00 and is further entitled to recover punitive damages, and attorney's fees.

#### **SIXTH CLAIM FOR RELIEF AS TO DEFENDANT CAROLINA FLOORING UNFAIR AND DECEPTIVE TRADE PRACTICES**

62. Plaintiff realleges its preceding allegations and incorporates the same herein by reference.

63. That Defendant Carolina, acting in consort with Defendants Miles and Maxxon in issuing a five-year warranty in bad faith and fraudulently as heretofore alleged, and with knowledge of the defective flooring, knowing that the floor throughout the building would delaminate and cause significant cracks, crevices, and pit holes, has committed unfair and deceptive trade practices in violation of Chapter 75 of the North Carolina General Statutes.

64. That Defendant Carolina's aforesaid unfair and deceptive acts were in and affecting intrastate commerce.

65. That Plaintiff has been damaged as a direct and proximate result of the aforesaid unfair and deceptive trade practices of Defendant Carolina, and is entitled to recover actual damages far in excess of \$25,000.00, treble damages, and attorney's fees.

**FIRST CLAIM FOR RELIEF AS TO MAXXON  
BREACH OF WARRANTIES**

66. Plaintiff realleges its preceding allegations and incorporates the same herein by reference.

67. That Plaintiff was the manufacturer of the top layer used in constructing the floor system for the CAB as installed by Defendants Carolina and Miles.

68. That at the time of manufacturing and selling the product for the CAB, Defendant Maxxon knew or should have known that the product was a specialty product, and would be used in the construction of the CAB or similar buildings.

69. That Defendant Maxxon had an implied warranty that its product would be of good quality and merchantable, that it would perform in accordance with its intended purpose, that it would meet the specifications for which it was purchased. That as a specialty product, Defendant Maxxon had a duty to completely inform purchasers of the product in the proper manner and process to apply and utilize its product. That upon information and belief, Defendant Maxxon did participate in the supervision and application of the top coat during construction of the CAB's floor.

70. That Defendant Maxxon, upon information and belief, knew at the time of its sale and delivery of its product for installation in the CAB of the purposes for which it would be used, and expressly warranted that product would meet the requirements and specifications for the flooring as designed for the CAB. That Plaintiff is the beneficiary of the warranted product.

71. That contrary to Defendant Maxxon's warranties and duties, Defendant Maxxon's product has not bonded to the second layer or middle layer and is delaminating, resulting in the floor cracking throughout the CAB as heretofore alleged.

72. That by reason of the foregoing acts and omissions, Defendant Maxxon has materially breached the terms of its express and implied warranties to Plaintiff.

73. That as a direct consequence of the aforesaid material breach of the express and implied warranties of Defendant Maxxon, the top coat does not perform or function as intended, it is defective, repairs are required, the Plaintiff has and will lose the use of the building, and the Plaintiff has been damaged in a sum far in excess of \$25,000.00.

**SECOND CLAIM FOR RELIEF AS TO DEFENDANT MAXXON  
BREACH OF EXTENDED FIVE YEAR WARRANTY**

74. Plaintiff realleges its preceding allegations and incorporates the same herein by reference.

75. Defendant Maxxon, both expressly and impliedly, extended to Plaintiff a five-year warranty that the top coat it manufactured was of good quality, free of defects, and would perform as designed and specified, and that it would participate in the repair and/or replacement of the top coat used in the flooring system. That said warranties were made to Defendants Miles and Carolina for the benefit of Plaintiff.

76. That Defendant Maxxon has been notified of the defects as heretofore alleged.

77. That Defendant Maxxon, after being notified of the defects in the floor, has failed to participate in the repair and replacement of its product pursuant to the five-year extended warranty.

78. That as a direct consequence of the aforesaid material breach of the express and implied warranties of Defendant Maxxon, the top coat does not perform or function as intended, it is defective, repairs are required, the Plaintiff has and will lose the use of the building, and the Plaintiff has been damaged in a sum far in excess of \$25,000.00.

### **THIRD CLAIM FOR RELIEF AS TO DEFENDANT MAXXON SPECIFIC PERFORMANCE**

79. Plaintiff realleges its preceding allegations and incorporates the same herein by reference.

80. That the extended five-year warranty is still in effect. Plaintiff has made demand upon Defendant Maxxon to comply with the terms and conditions of the warranty by participating in the repairing and replacing the floor, but it has failed to do so.

81. That due to the nature, purpose of construction, and circumstances, Plaintiff is in need of Defendant Maxxon to specifically perform the terms of the contract to repair and replace the flooring as originally contracted and/or pursuant to the extended five-year warranty. That Plaintiff does not have an adequate remedy at law as it will effect student classes, including cancellations, relocations, and Plaintiff will have an unsafe building for students, faculty, other invitees unless said floor is repaired.

### **FOURTH CLAIM FOR RELIEF AS TO DEFENDANT MAXXON MISREPRESENTATION, OBTAINING MONEY BY FALSE PRETENSES, AND FRAUD**

82. Plaintiff realleges its preceding allegations and incorporates the same herein by reference.

83. That prior to complete and full payment to Defendant Miles pursuant to its contract with Plaintiff, Defendants Miles, Carolina and Maxxon became aware of the CAB's defective floor construction. That at said time, said three Defendants knew or should have known that significant work at their expense would have to be performed to correct the problems with the

floor, said problems being latent. That Defendants knew or should have known that it was a major defect, but intentionally informed Plaintiff that it was a minimal problem, minor in scope and area, and otherwise intentionally misrepresented to Plaintiff the true condition of the floor. That Defendants knew or should have known of the substantial defect due to their experience, knowledge, expertise, and having constructed the floor system. Defendants also knew that final and full payment for work on the flooring system, including retainage, had not been paid to the Defendants; and further knew that if the full and true scope and condition of the flooring system had been made known to the Plaintiff, that further payment would have been withheld and Defendants would have then incurred significant costs to correct the defect which they intentionally and purposely kept secret from Plaintiff. That to obtain additional payment, said three Defendants devised a plan and scheme to avoid their obligation to repair the floor by representing to the Plaintiff that the problem was minor in effect, and they would extend the warranty and made representations to the Plaintiff and its agents that they would make all necessary floor repairs and/or replacement. That in reasonable reliance upon the extended warranty and the Defendants' false representations, Plaintiff continued to make full payment to the Defendants. That though Defendant Maxxon has been notified of the floor delaminating throughout the building with resultant cracks, crevices, and pit holes, it has intentionally failed to repair the floor, and upon information and belief, has no intention to repair or replace the floor as required by its extended warranty, agreement and representations. That at the time of issuing the five-year warranty, Defendant Maxxon acted in conspiracy with Defendants Miles and Carolina for the purpose of obtaining continual payment from Plaintiff, which also benefited Defendants Miles and Carolina.

84. That upon information and belief, the representations of Defendants Miles, Carolina and Maxxon were false when made, were made with the intent to deceive, and did in fact deceive the Plaintiff, that Plaintiff reasonably relied upon Defendant Maxxon' warranties and representations to its material detriment by providing Defendants Miles, Carolina and Maxxon with full and final payment for construction of the CAB, including the flooring system.

85. That by and through Defendant Maxxon's aforesaid conduct, it obtained property by false pretenses and defrauded the Plaintiff, and by reason thereof, the Plaintiff has been damaged in a sum far in excess of \$25,000.00 and is further entitled to recover punitive damages, and attorney's fees.

**SIXTH CLAIM FOR RELIEF AS TO DEFENDANT MAXXON  
UNFAIR AND DECEPTIVE TRADE PRACTICES**

86. Plaintiff realleges its preceding allegations and incorporates the same herein by reference.

87. That Defendant Maxxon, acting in consort with Defendants Miles and Carolina in issuing a five-year warranty in bad faith and fraudulently as heretofore alleged, and with knowledge of the defective flooring, knowing that the floor throughout the building would delaminate and cause significant cracks, crevices, and pit holes, has committed unfair and deceptive trade practices in violation of Chapter 75 of the North Carolina General Statutes.



88. That Defendant Maxxon's aforesaid unfair and deceptive acts were in and affecting intrastate commerce.

89. That Plaintiff has been damaged as a direct and proximate result of the aforesaid unfair and deceptive trade practices of Defendant Maxxon, and is entitled to recover actual damages far in excess of \$25,000.00, treble damages, and attorney's fees.

**FIRST CLAIM FOR RELIEF AS TO DEFENDANTS INNOVATIVE  
BREACH OF CONTRACT**

90. Plaintiff realleges its preceding allegations and incorporates the same herein by reference.

91. That Defendant Innovative had a contractual duty of reasonable care to prepare the architectural plans and specifications and to perform contract administration services in accordance with the contract documents and the applicable standard of care applicable to an architectural company and licensed architect, including proper design and construction of the three phases of the solar system (to-wit: photo voltaic, solar thermal, and solar chiller systems), and the design and specifications of the flooring system.

92. Defendants Innovative materially breached its contractual duty with the Plaintiff in that it failed to meet that degree of care as an architectural company of ordinary skill and prudence would exercise under similar circumstance in that they, among other things:

a. Failed to prepare architectural plans and specifications free from errors and omissions;

b. Failed to design a sound, effective and workable solar energy system to meet the needs of heating and cooling the CAB;

c. Failed to properly administer the construction contract to ensure that the as-built conditions conformed with the design, intent, specifications, and functionality as represented by Defendants;

d. Failed to properly carryout specifications and contract specifications;

e. Failed to specify products that would function in the solar energy system which would work and meet the needs of the heating and cooling systems designed by Defendant Innovative;

f. Specified a system that that was not appropriate for the building and its location;

g. Failed to detect defects and subpar work by Defendant Miles and its subcontractors;

and

h. Otherwise failed to perform its duties as a reasonable and prudent architectural company and licensed architect would and should have done under like and similar circumstances.

93. That as a direct consequence of the aforesaid material breach Defendant Innovative, the solar system, flooring system and building do not perform or function as intended, they are defective, repairs are required, the Plaintiff has and will lose the use of the building, and the Plaintiff has been damaged in a sum far in excess of \$25,000.00.

## **SECOND CLAIM FOR RELIEF AS TO DEFENDANTS INNOVATIVE AND NICKLAS NEGLIGENCE**

94. Plaintiff realleges its preceding allegations and incorporates the same herein by reference.

95. That Defendants Nicklas and Innovative had common law duties of reasonable care to prepare the architectural plans and specifications and to perform contract administration services in accordance with the contract documents and the applicable standard of care applicable to an architectural company and licensed architect, including proper design and construction of the three phases of the solar system (to-wit: photo voltaic, solar thermal, and solar chiller systems), and the design and specifications of the flooring system.

96. Defendants Nicklas and Innovative were negligent in that they failed to meet that degree of care as an architectural company and a licensed architect of ordinary skill and prudence would exercise under similar circumstance in that they, among other things:

a. Failed to prepare architectural plans and specifications free from errors and omissions;

b. Failed to design a sound, effective and workable solar energy system to meet the needs of heating and cooling the CAB;

c. Failed to properly administer the construction contract to ensure that the as-built conditions conformed with the design, intent, specifications, and functionality as represented by Defendants;

d. Failed to properly carryout specifications and contract specifications;

e. Failed to specify products that would function in the solar energy system which would work and meet the needs of the heating and cooling systems designed by Defendants Innovative and Nicklas;

f. Specified a system that that was not appropriate for the building and its location;

g. Failed to detect defects and subpar work by Defendant Miles and its subcontractors; and

h. Otherwise failed to perform its duties as a reasonable and prudent architectural company and licensed architect would and should have done under like and similar circumstances.

97. That the negligence of Defendants Nicklas and Innovative are a proximate cause of the damages incurred by the Plaintiff as hereinafter set forth.

98. That as a direct and proximate result of the aforesaid negligence, Defendants Nicklas and Innovative, the solar system, flooring system and building do not perform or function as intended, they are defective, repairs are required, the Plaintiff has and will lose the use of the building, and the Plaintiff has been damaged in a sum far in excess of \$25,000.00.

**FIRST CLAIM FOR RELIEF AS TO DEFENDANT TRAVELERS  
BREACH OF CONTRACT/BOND**

99. Plaintiff realleges its preceding allegations and incorporates the same herein by reference.

100. That on the 14th day of January, 2011, Defendant Travelers executed and provided a performance bond to Plaintiff on behalf of Defendant Miles. That said bond provides that Defendant Travelers would ensure that Defendant Miles fully, completely, and faithfully construct the CAB pursuant to the contract between Plaintiff and Defendant Miles. That Defendant Miles has breached the terms of their contract by failing and completely complying with the terms of the contract.

101. That Defendant Travelers has been notified of the Defendant Miles' failure to perform as contracted for the benefit of Plaintiff.

102. That Defendant Travelers is obligated to Plaintiff to repair or replace the defective or nonconforming components and systems of the CAB as is its obligation under its bond, and it has failed to do so.

103. That by reason of the foregoing acts and omissions, Defendant Travelers has materially breached the terms of its bond.

104. That as a direct consequence of the aforesaid material breach of the bond, the Plaintiff has been damaged in a sum far in excess of \$25,000.00 and is entitled to recover the full amount of the bond.

**SECOND CLAIM FOR RELIEF AS TO DEFENDANT TRAVELERS  
SPECIFIC PERFORMANCE**

105. Plaintiff realleges its preceding allegations and incorporates the same herein by reference.

106. That Defendant Travelers has a duty to complete construction of the CAB pursuant to the bond by correcting the defects and deficiencies of Defendant Miles' construction as heretofore alleged.

107. That the Plaintiff is in need to Defendant Travelers specifically performing the terms of said bond and completing construction of the CAB and all necessary repairs pursuant to said bond.

**FIRST CLAIM FOR RELIEF AS TO DEFENDANT CONTRACTORS BONDING AND  
INSURANCE COMPANY - BREACH OF CONTRACT/BOND**

108. Plaintiff realleges its preceding allegations and incorporates the same herein by reference.

109. That on the 22<sup>nd</sup> day of July, 2013, Defendant Contractors issued a bond on behalf Defendant Carolina as principal unto Defendant Miles in the amount of FIFTY THOUSAND AND NO/100 DOLLARS (\$50,000.00), for the benefit of Plaintiff.

110. That Defendants Miles, Carolina and Maxxon have failed and refused to replace and/or repair the flooring as heretofore alleged.

111. That notice has been given to Defendant Contractors of Defendants Miles and Carolina's failure to repair the floor.

112. That Defendant Contractors is obligated to pay Plaintiff the amount of the bond, but has failed to do so.

113. That by reason of the foregoing acts and omissions, Defendant Contractors has materially breached the terms of its bond.

114. That pursuant to the bond, Plaintiff is entitled to recover from Defendant Contractors the amount of the bond in the amount of FIFTY THOUSAND AND NO/100 DOLLARS (\$50,000.00) for failure of Defendants Carolina and Miles to repair the floor.

**DAMAGES**

115. Plaintiff realleges its preceding allegations and incorporates the same herein by reference.

116. That as a result of the foregoing, Plaintiff has been damaged in an amount in excess of TWENTY-FIVE THOUSAND AND NO/100 DOLLARS (\$25,000.00), in compensatory damages in an amount to be proven at trial.

117. That Defendants are individually and jointly liable to the Plaintiff for damages resulting from the following:

- a. Defendant Miles for all defects of all items herein identified;
- b. Defendants Nicklas and Innovative for all items herein identified;
- c. Defendant Carolina for defects in the flooring system;
- d. Defendant Maxxon for defects in the flooring system;
- e. Defendant Travelers for damages and relief pursuant to its bond;
- f. Defendant Contractors for damages and relief pursuant to its bond;

118. Plaintiff is entitled to the remedy of specific performance for all parties to comply with their respective contracts and warranties for the benefit of Plaintiff.

119. For treble damages and/or punitive damages as to Defendants Miles, Carolina and Maxxon.

120. That Plaintiff is entitled to reasonable attorney's fees.

121. That Plaintiff is entitled to consequential damages due to loss of income for class cancellations to be incurred during any repair or replacement of the floor system, lost energy savings and costs, relocation and moving expense of equipment incurred during any floor repair or replacement, and such other losses as may be proven at trial.

**WHEREFORE**, Plaintiff prays the Court:

1. That Plaintiff have and recover from the Defendants, jointly and severally a sum in excess of TWENTY-FIVE THOUSAND AND NO/100 DOLLARS (\$25,000.00) for compensatory damages.

2. For consequential damages.

3. That Plaintiff be entitled to the remedy of specific performance.

4. For treble damages.

5. For punitive damages.

6. For trial by jury.
7. For reasonable attorney's fees.
8. That the costs of this action be taxed to the Defendants.
9. For such other and further relief as may be just and proper.

This the 27 day of October, 2016.

SMATHERS & SMATHERS  
Attorneys at Law

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