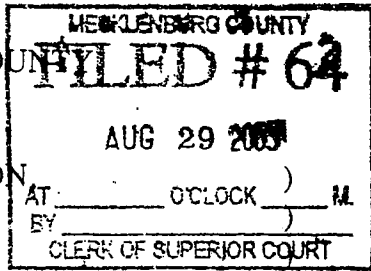


NORTH CAROLINA,

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DISTRICT  
01 Cvs 23419

MECKLENBURG COUNTY



DEER CORPORATION,

Plaintiff,

v.

JEROME E. DONAHUE, HAWEKA  
AUSWUCHTTECHNIK HORST  
WARKOTSCH GMBH doing business as  
HAWEKA WHEEL BALANCING  
TECHNIQUE HORST WARKOTSCH  
LTD., HENNING FLATT, and  
ANDY HANCOCK,

Defendants.

**ORDER GRANTING DEFENDANTS  
HENNING FLATT AND ANDY HANCOCK'S  
MOTION TO DISMISS**

THIS CAUSE COMING ON TO BE HEARD, and being heard on July 7, 2003, before the undersigned Superior Court Judge Presiding at the regularly-scheduled July 7, 2003 Civil Session of Mecklenburg County Superior Court, upon the Motions to Dismiss of Defendants Henning Flatt and Andy Hancock ("Movants") pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure on the basis that this Court lacks personal jurisdiction over the Defendants; the Court having heard and considered the oral argument of counsel for Plaintiff and counsel for the Movants, the Affidavit of Henning Flatt, the Affidavit of Andy Hancock, the Plaintiff's Complaint, Amended Complaint, Amendment to Amended Complaint, Defendants Flatt and Hancock's First Set of Interrogatories and Request for Production of Documents to Plaintiff, and all other matters of record;" the Court having read and considered the written briefs and legal authority submitted to the Court by counsel for the parties; the

Court being of the opinion that Defendants Henning Flatt and Andy Hancock's Motions to Dismiss should be granted and Plaintiff's claims against said Defendants should be dismissed without prejudice on the bases set forth below; the parties, through counsel, agreeing that this Order may be signed out of term and out of session; and the Plaintiffs' counsel having requested, pursuant to Rule 52(a)(2) of the North Carolina Rules of Civil Procedure, that the Court make findings of fact and conclusions of law in connection with its ruling; the Court therefore makes the following findings of fact and conclusions of law, and orders as follows:

**FINDINGS OF FACT**

1. At all times relevant to this action, and since September 23, 1965, Henning Flatt ("Flatt") has been a citizen and resident of Burgewedel, Germany.
2. At all times relevant to this action, and since 1971, Andy Hancock ("Hancock") has been a citizen and resident of Derbyshire, England.
3. On or about March 1, 1999, Haweka Wheel Balancing Technique Horst Warkotsch LTD. ("Haweka"), a German corporation, entered into a Distribution Agreement with Deer Corporation ("Deer"), a North Carolina corporation, pursuant to which Deer obtained the right to distribute Haweka products in the United States, Canada, Mexico, and the Caribbean. Haweka and Deer also entered into a Licensing Agreement which permitted Deer to operate using the "Haweka" name.
4. Since February 1, 1999, and at all times relevant to this action, Flatt has been an employee of Haweka. He is not, and has never been, a shareholder, officer, or director of Haweka. Flatt does not have, and has never had, an ownership interest in Haweka. The only

contact Flatt has ever had with the State of North Carolina was solely in his capacity as an employee of Haweka.

5. Since October of 1997, and at all times relevant to this action, Hancock has held the position of Sales Manager representing Haweka. He is not a shareholder, officer, or director of Haweka. Hancock does not have an ownership interest in Haweka. The only contact Hancock has ever had with the state of North Carolina was solely in his capacity as an agent of Haweka.

6. Flatt has never lived in North Carolina, nor has he ever traveled to North Carolina for any purpose. Flatt has traveled to the United States on only one occasion -- to attend a trade show in Las Vegas, Nevada in November of 2001. At the November 2001 trade show he offered technical support and advice to Deer Corporation ("Deer") and attended a meeting between Deer and Hunter Engineering Company. At all times he acted solely within his capacity as an employee of Haweka.

7. Hancock has never lived in North Carolina. Hancock has only traveled to North Carolina on two occasions, both of which were in his capacity as an agent of Haweka. The first of those occasions was to attend the wedding of Allan Hansen, the then president of Deer. He attended the wedding, along with numerous other Haweka executives, at the request of and pursuant to an invitation that Allan Hansen extended to Haweka. On that occasion, he spent approximately 12 to 18 hours in North Carolina.

8. Hancock was present in North Carolina in or about May of 2001. He informed Allan Hansen that he would be visiting Haweka customers in Arkansas and Missouri. Allan

Hansen requested that Hancock travel to the Deer facility to train a new employee, Bill Berry, with respect to Haweka parts distribution. Pursuant to that request, Hancock spent two days in North Carolina training Mr. Berry. While Haweka was present in North Carolina, one of Deer's customers in Connecticut had technical difficulties with a Haweka product. As a courtesy to Deer and in his capacity as an agent for Haweka, Hancock drove to Connecticut to address the customer's concern. Subsequently, he returned to North Carolina and left the state the next day. During that visit, Hancock was present in North Carolina for approximately two or three days, all of which occurred in his capacity as an agent of Haweka.

9. The only other personal contacts Hancock has had with Deer or any other North Carolina resident, corporation, or business entity occurred in November of 1997, 2000, and 2001 when he attended a trade show in Las Vegas, Nevada. At each of the trade shows, Hancock offered technical support and advice to Deer with regard to the sales of Haweka products. At the 1997 trade show, he conducted a sales meeting with employees of Deer. At the 2001 trade show, Hancock organized and attended a meeting between Deer and Hunter Engineering Company ("Hunter"). At all times, Hancock acted solely in his capacity as an agent of Haweka.

10. Other than in their capacity as an agent or employee of Haweka, Flatt and Hancock have never conducted or transacted business with any company or person located in the state of North Carolina. Flatt and Hancock have never entered into a contract in the state of North Carolina, nor have they ever entered into a contract with any resident of, or company located in, the state of North Carolina.

11. Flatt and Hancock do not own any interest in any corporation or other company located or doing business in the state of North Carolina.

12. Flatt and Hancock have never received income or compensation from any North Carolina resident or entity.

13. Flatt and Hancock, other than in their capacity as agents of Haweka, have never sold any products or purchased any goods from any individual or company located in North Carolina.

14. Flatt and Hancock have never been a plaintiff or witness in any suit or proceeding in state or federal court located in the state of North Carolina, and, before this action was filed, they have never been named as a defendant in any lawsuit in the state of North Carolina.

15. The only contact Flatt and Hancock have had with anyone from the state of North Carolina was exclusively as an agent or employee of Haweka, and that contact was limited to business-related communications. Flatt and Hancock have never engaged in non-business communications with any individual, corporation, or other entity in the state of North Carolina. Flatt and Hancock have never sent nor received non-business-related electronic mail communications with any resident of the state of North Carolina.

16. Flatt was served with Plaintiff's Complaint, Amended Complaint, and Amendment to Amended Complaint on January 20, 2003. Hancock was served with Plaintiff's Complaint, Amended Complaint, and Amendment to Amended Complaint on February 19, 2003.

17. Flatt timely served his Motion to Dismiss for lack of personal jurisdiction on March 21, 2003. Hancock timely served his Motion to Dismiss for lack of personal jurisdiction on April 14, 2003.

18. On June 23, 2003, Flatt and Hancock served a Notice of Hearing for their respective Motions to Dismiss. Accompanying the Notice of Hearing were the affidavits upon which Flatt and Hancock intended to rely in support of their Motions. The Notice of Hearing and the affidavits were timely served, and plaintiff made no objection to the timeliness of the Motions to Dismiss; the Notice of Hearing or the affidavits.

19. On July 2, 2003, Flatt and Hancock, through counsel, served a memorandum of law in support of their Motions. In the memorandum, Flatt and Hancock objected for the first time to any attempt by Plaintiff to rest on any allegations in unverified pleadings as part of its *prima facie* basis for the establishment of personal jurisdiction, which objection was reiterated at the hearing on the Motions to Dismiss.

20. At no time during or before the hearing on Defendants Flatt and Hancock's Motions to Dismiss, did Plaintiff file or submit affidavit testimony or otherwise offer any other admissible evidence or facts to provide a *prima facie* basis that jurisdiction existed over Defendants Flatt and Hancock. At the hearing on Flatt and Hancock's Motion to Dismiss and in Deer's memorandum of law presented to the Court, Plaintiff's counsel stated its intent to rely on, among other things, Deer's unverified Amendment to Amended Complaint and other pleadings of record to provide a *prima facie* basis for the Court's exercise of personal jurisdiction. Plaintiff's counsel also contended, for the first time in its memorandum of law,

that the allegations in such pleadings were uncontradicted by the Affidavits of Flatt and Hancock, and, therefore, the facts alleged in such pleadings were to be taken as true for the purposes of Defendants' Motions. Defendants' counsel timely objected to the consideration of the unverified Amendment to Amended Complaint, asserting that such document was not authenticated, that Plaintiff provided no foundation for such document, that such document could not satisfy Plaintiff's burden on the personal jurisdiction issue, and the document was otherwise inadmissible evidence.

21. Without making any factual or evidentiary determinations concerning the merits of any claims or defenses of the parties, and without prejudice to the parties' ability to later present any and all evidence to establish or refute any or all elements of such claims or defenses, for purposes of Defendants' Rule 12(b)(2) motion and the Court's ruling herein, the Court notes the existence of the following unverified allegations in Deer's Amendment to Amended Complaint which Deer contends supports the exercise of jurisdiction over Flatt and Hancock:

- (a) Deer is a North Carolina corporation, and has been for many years.
- (b) Deer contends that prior to the resignation of a Deer employee (Jerome Donahue), Flatt and Hancock contacted Mr. Donahue to encourage Mr. Donahue to misappropriate confidential information belonging to Deer. Deer contends that Flatt and Hancock encouraged Mr. Donahue to remain with Deer until such time as these confidential documents could be obtained. Deer does not allege nor identify the form or nature of this

communication, the origin of any such communication, or the date or time in which the communication took place.

(c) Deer contends that Flatt and Hancock promised Mr. Donahue employment with Haweka in return for the misappropriation of the confidential information. Deer does not allege nor identify the form or nature of this communication, the origin of any such communication, or the date or time in which the communication took place.

(d) Deer contends that Mr. Donahue copied documents and computer information from Safari Guide, documents and information which he unlawfully obtained, and provided these documents and information to Flatt and Hancock. Deer contends that Mr. Donahue also provided Flatt and Hancock with information about Deer's customers. Deer does not allege nor identify the form or nature of this communication, the origin of any such communication, or the date or time in which the communication took place.

(e) Deer contends that Flatt and Hancock knowingly received confidential documents and information from Mr. Donahue and used those documents to the detriment of Deer, in violation of North Carolina laws governing trade secrets and proprietary information. Deer does not allege nor identify the form or nature of this communication, the origin of any such communication, or the date or time in which the communication took place.

(f) Deer contends that Flatt and Hancock, acting on behalf of Haweka, then sought to terminate Deer as its exclusive North American distributor.



(g) Deer contends that as a result of Flatt and Hancock's actual misappropriation, disclosure, or use of Deer's confidential and proprietary information Deer has suffered financial loss and irreparable harm.

22. Deer's unverified allegations in the Amendment to Amended Complaint and other pleadings of record do not constitute competent evidence in support of the exercise of personal jurisdiction over Flatt and Hancock. Even if the Court could properly consider such allegations, the Court nonetheless finds no statutory basis for the exercise of personal jurisdiction over Movants exists, and that the Court would violate due process of law in exercising personal jurisdiction over Movants.

23. In its Amendment to Amended Complaint, Plaintiff asserts three claims for relief against Defendants Flatt and Hancock. The first claim for relief against Defendants Flatt and Hancock is entitled "Misappropriation of Trade Secrets" and Plaintiff alleges, among other things, that Defendants Flatt and Hancock misappropriated, disclosed or used Deer's confidential and proprietary information.

24. Plaintiff's second claim for relief asserted in the Amendment to the Amended Complaint is entitled "Punitive Damages." Plaintiff claims that Defendants Flatt and Hancock engaged in willful and malicious action toward Deer.

25. Plaintiff's third claim for relief is entitled "Unfair and Deceptive Trade Practices" and Plaintiff claims that Defendants Flatt and Hancock's actions were in and effecting commerce and that those acts constitute unfair and deceptive trade practices, as defined by N.C.G.S. §75-1.1.

26. Through their motions to dismiss, Defendants Flatt and Hancock properly and timely lodged their objection to this Court's exercise of personal jurisdiction over them and Defendants Flatt and Hancock's motions and affidavits in opposition to this Court's exercise of personal jurisdiction over such Defendants were timely filed and served.

27. In attempting to establish a statutory basis for the exercise of personal jurisdiction over Defendants Flatt and Hancock, pursuant to the North Carolina long-arm statute, N.C.G.S. §1-75.4, Plaintiff alleges generally that Defendants Flatt and Hancock are subject to jurisdiction pursuant to N.C.G.S. §1-75.4. However, Plaintiff has failed to state which provision of the North Carolina long-arm statute it contends provides a statutory basis for its three claims for relief. The court, therefore, assumes that Plaintiff contends that any or all of the provisions of N.C.G.S. §1-75.4 provide a statutory basis for each of the Plaintiff's three claims for relief.

28. After consideration of the evidence presented to this Court and each of the North Carolina statutory bases for the exercise of personal jurisdiction, there is no evidence establishing any statutory basis, under N.C.G.S. §1-75.4 or otherwise, upon which this Court may exercise jurisdiction over either of the Movants.

29. Plaintiff has submitted no evidence, and there is no evidence of record, establishing, supporting or indicating that any of the acts, conduct or activities of Defendant Haweka or any other third party are or should be attributable to either of the Defendants Flatt and Hancock for purposes of determining whether or not this Court may exercise personal jurisdiction over Defendants Flatt and Hancock.

30. After considering the quantity of the contacts between the Defendants Flatt and Hancock and the State of North Carolina, the nature and quality of the contacts between the Defendants Flatt and Hancock and the State of North Carolina, the source and connection of the causes of action to any contacts between the Defendants Flatt and Hancock and the State of North Carolina, the interest of the State of North Carolina with respect to Plaintiff's claims for relief, and the convenience to the parties, the Court finds that any attempt by this Court to exercise personal jurisdiction over the Defendants Flatt and Hancock with respect to Plaintiff's claims for relief would violate due process of law as required by the United States Constitution. The Court further finds that neither of the Defendants Flatt and Hancock engaged in any act or conduct by which they purposefully availed themselves of the privilege of conducting activities within the State of North Carolina.

31. Plaintiff's counsel also contended, for the first time at the hearing and without citing any specific supporting legal authority, that Defendants Flatt and Hancock made a general appearance in the case by submitting discovery requests to Plaintiff, petitioning the Court to be excused from the mediated settlement conference, and petitioning the Court to modify its scheduling order and set a peremptory trial date.

32. Counsel for Flatt and Hancock contended that neither defendant had made a general appearance in the case. The Order which set this case for trial and established the discovery schedule (entered on September 30, 2002) was entered well before Flatt and Hancock had been named as parties to the litigation or been served. Further, defendants preserved their right to contest personal jurisdiction by timely filing a Rule 12(b)(2) Motion to

Dismiss in the action. Counsel for defendants further contended that Movants had no choice but to comply with the discovery scheduling order, as their deadline for serving discovery to plaintiff was to expire prior to the date obtained for the hearing on Movants' Motions to Dismiss. As to the Motion for Relief From Mediation, the entry of the Order setting the trial date and establishing the mediation deadline was entered at a time prior to Movants being named or served as parties to the litigation. Therefore, Movants contended that they were presented with no choice but to seek to be excused from the mediation or face potential sanctions for non-attendance. Further, the Relief From Mediation Motion specifically provided that such motion was made "without waiving the defense of personal jurisdiction previously asserted in this action, which is scheduled for hearing on July 7, 2003." Movants' counsel further contended that Plaintiff suffered no prejudice as a result of any of Movants' limited actions because Movants had at all times maintained that the Court lacked personal jurisdiction over them, pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure.

33. This Court is of the opinion that such actions by Defendants Flatt and Hancock do not constitute a general appearance in this case.

34. At the hearing, for the first time Plaintiff's counsel also informed that Court that it attempted, in response to Defendants' Affidavits and memorandum, to obtain an affidavit of Defendant Jerome Donahue, but Donahue refused. Toward the end of the hearing, Plaintiff's counsel also requested, for the first time and without written motion, that the Court refrain

from ruling on Defendants' Motions until such time as the parties could conduct discovery on the issue of jurisdiction.

35. Counsel for Movants objected to this request for continuance.

36. The Court is of the opinion that such a continuance is not appropriate.

BASED ON the foregoing FINDINGS OF FACT, the court makes the following:

**CONCLUSIONS OF LAW**

1. The foregoing Findings of Fact are denominated Conclusions of Law to the extent that they constitute the same, and the following Conclusions of Law are denominated Findings of Fact to the extent that they constitute the same.

2. Defendants Henning Flatt and Andy Hancock have properly preserved their exceptions to the Court's consideration of Deer Corporation's unverified Amendment to Amended Complaint. The unverified allegations contained within the Amendment to Amended Complaint are inadmissible and are not otherwise competent evidence. However, even if such allegations were proper to consider, the Court concludes that the allegations contained within the Amendment to Amended Complaint do not provide sufficient basis for the exercise of personal jurisdiction over the Defendants Henning Flatt and Andy Hancock.

3. There is no statutory basis contained in §N.C.G.S. 1-75.4 or elsewhere in the North Carolina General Statutes upon which the Court may exercise personal jurisdiction over the Defendants Henning Flatt or Andy Hancock as to any of the claims asserted against them.

4. Any attempt by this Court or any court of the State of North Carolina to exercise personal jurisdiction over Defendants Henning Flatt and Andy Hancock in this action

violates, and would violate, the United States Constitution, in that such attempt to exercise personal jurisdiction would violate due process of law.


5. Defendants Flatt and Hancock have not made a general appearance in this action.

6. Based upon the Findings of Fact and Conclusions of Law contained herein, this Court has not considered Defendants Henning Flatt and Andy Hancock's Motions to Dismiss to the extent that they are based upon any ground other than this Court's lack of personal jurisdiction over such Defendants.

7. Plaintiff's oral request for a continuance of the hearing on Movants' Motions, first made at the end of the hearing on the Motions to Dismiss, is denied.

BASED ON the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, the Court ORDERS, ADJUDGES, and DECREES that Defendants Henning Flatt's and Andy Hancock's Motions to Dismiss are granted and Plaintiff's Amendment to Amended Complaint and, to the extent applicable, the Amended Complaint, and Motion for Temporary Restraining Order, Motion for Preliminary Injunction, and Motion for Permanent Injunction and all claims for relief contained therein are and hereby shall be dismissed for lack of jurisdiction over the persons of Henning Flatt and Andy Hancock pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure, without prejudice to Plaintiff's ability to assert its claims in a jurisdiction in which the Courts thereof may properly exercise personal jurisdiction over Henning Flatt and Andy Hancock.

So ordered, this 24 day of August, 2003.

  
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The Honorable Albert Diaz  
Superior Court Judge Presiding