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DISTRICT OF UTAH
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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

NORTHERN DIVISION

ROBERT G. WING, Receiver for 4NEXCHANGE, L.L.C., **Plaintiff,** **vs.** **DONALD STORMS,** **Defendants.**	**MEMORANDUM DECISION AND ORDER** **Case No. 1:02CV127DAK**

This matter is before the court on Defendant's Rule 12(b)(2) Motion to Dismiss. A hearing on the motion was held on February 4, 2004. At the hearing, Defendant was represented by John W. Mackay and Samuel C. Straight, and Plaintiff was represented by Roger J. McConkie. The court took the matter under advisement. The court has considered carefully the memoranda submitted by the parties as well as the law and facts relating to the motion. Now being fully advised, the court renders the following Memorandum Decision and Order.

BACKGROUND

In this action, Plaintiff Robert G. Wing, as receiver for 4NExchange LLC, seeks to recover funds from Defendant Donald Storms, an investor in 4NExchange. Defendant is a resident of North Carolina who sent checks to 4NExchange in Utah. Defendant claims that he lost more money than he invested in 4NExchange. However, the Receiver claims that Defendant received $1 million from 4NExchange in the form of several checks sent from Utah to Defendant

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in North Carolina. The Receiver also alleges that Defendant directed 4NExchange to send $1.7 million to his alma mater, Valley Forge Christian College. Therefore, the Receiver contends that Defendant received more money from 4NExchange than he invested.

Defendant is also a fifty percent owner of Eagle Financial Management, L.L.C., which has its principal place of business in Utah. Defendant had a meeting with the directors of Eagle Financial Management LLC, in Orem, Utah on October 23, 2000. Defendant deposited $1 million into Eagle Financial Management's account with America First Credit Union in Orem, Utah and was appointed Managing Director of the company. On November 1, 2000, 4NExchange transferred $368,000 from its account at America First Credit Union in Orem, Utah into Eagle Financial's checking account with the same institution.

Although he is a resident of North Carolina, Defendant knew Paul Grant and his parents Amy and Leo Grant, through Quixtar/Amway. Defendant is in the Crown level of the Quixtar/Amway operation, a level that includes only 25 individuals. Paul Grant and his parents are part of Defendant's line of sponsorship. Defendant stated that he learned of 4NExchange from Paul Grant and that he has done strategizing and counseling with Grant. Defendant acknowledges that he has traveled to Utah to speak to Quixtar/Amway representatives here.

The Receiver's Complaint alleges that Defendant induced others to invest in 4NExchange, including people in his Quixtar downline, and that Defendant "had reason to know that 4NExchange may have been a Ponzi scheme."

DISCUSSION

"[I]n a federal question case where jurisdiction is invoked based on nationwide service of process, the Fifth Amendment requires the plaintiff's choice of forum to be fair and reasonable to the defendant." *Peay v. Bellsouth Medical Assistance Plan*, 205 F.3d 1206, 1212 (10th Cir. 2000). Both the federal statute governing receiverships and the federal securities laws provide for nationwide service of process. 28 U.S.C. § 754 provides: "A receiver appointed in any civil action or proceeding involving property, real personal or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof." This statute has been interpreted as a nationwide service of process statute. *Haile v. Henderson Nat'l Bank*, 657 F.2d 816 (6th Cir. 1981). Also, 15 U.S.C. § 78aa and 15 U.S.C. § 77v give the federal district courts jurisdiction to enforce liability or duty created by the Securities Exchange Act of 1934 and the Securities Act of 1933 and authorize nationwide service of process.

In *Peay*, the Tenth Circuit set out the standard for determining whether due process is met in a nationwide service of process case:

> [I]n evaluating whether the defendant has met his burden of establishing constitutionally significant inconvenience, courts should consider the following factors: (1) the extent of the defendant's contacts with the place where the action was filed; (2) the inconvenience to the defendant of having to defend in a jurisdiction other than that of his residence or place of business; (3) judicial economy; (4) the probable situs of the discovery proceedings and the extent to which the discovery proceedings will take place outside the state of the defendant's residence or place of business; and (5) the nature of the regulated activity in question and the extent of impact that the defendant's activities have beyond the borders of his state of residence or business.

205 F.3d at 1212-13 (citations omitted). The court also emphasized that "it is only in highly *unusual cases that inconvenience will rise to a level of constitutional concern.*" *Id. at 1213.*

This standard varies significantly from the usual requirements of personal jurisdiction under Utah law. The burden is on Defendant to show that the exercise of jurisdiction in the chosen forum will make litigation so gravely difficult and inconvenient that he is unfairly at a severe disadvantage in comparison to his opponent.

The court concludes that Defendant has not met his burden of demonstrating that the inconvenience of defending a lawsuit in Utah rises to a level of constitutional concern. Defendant has several contacts with Utah. He made payments directly to 4NExchange in Utah and received payments directly from Utah. Defendant also set up a system with 4NExchange for money to be paid to his alma mater, Valley Forge Christian College. 4NExchange calculated how much money to send each month to Valley Forge Christian College based on the number of investors Defendant brought into the organization.

Furthermore, Defendant is a 50 percent owner of Eagle Financial Management, which has its principal place of business in Utah. Even if his ownership or management of Eagle Financial Management is not at issue in the present case, there were business dealings between Eagle Financial and 4NExchange. Defendant also had several business contacts in Utah because of his Quixtar/Amway business and acknowledges that he traveled to Utah to speak to Quixtar/Amway representatives. In addition, Defendant encouraged members of his downline to invest in 4NExchange, which resulted in significant investments that were directed to 4NExchange in Utah. Therefore, Defendant has had a significant influence on activities in this state.

These contacts demonstrate that Defendant will not be unduly inconvenienced by this litigation in Utah. He has conducted business here in the past. With respect to discovery,

Defendant has already been deposed by the SEC and CFTC in North Carolina. To the extent that further discovery relating to the interactions between Defendant, Eagle Financial, and 4NExchange occurs in Utah, it cannot be considered overly burdensome.

Even if Defendant had demonstrated that litigation in Utah is unduly inconvenient, the federal interest in litigating this dispute in Utah outweighs the burden imposed on Defendant. "If a defendant successfully demonstrates that litigation in the plaintiff's chosen forum is unduly inconvenient, then 'jurisdiction will comport with due process only if the federal interest in litigating the dispute in the chosen forum outweighs the burden imposed on the defendant.'" *Peay*, 205 F.3d 1213 (citation omitted). Judicial economy would be promoted by maintaining this litigation in Utah because it is an ancillary proceeding to the SEC's action against 4NExchange. There is a strong federal interest in having this court, which created the receivership, maintain litigation related to the receivership.

Based on these reasons, the court finds that personal jurisdiction over Defendant in the State of Utah is proper. Accordingly, Defendant's motion to dismiss is denied.

CONCLUSION

For the reasons stated above, Defendant's Motion to Dismiss is DENIED

DATED this 5th day of February, 2004.

BY THE COURT:

DALE A. KIMBALL,
United States District Judge

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United States District Court
for the
District of Utah
February 6, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 1:02-cv-00127

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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