

1 LAW OFFICES OF

(SPACE BELOW FOR STAMP ONLY)

2 **GREGORY A. LEE**

3 ATTORNEY AT LAW

A Professional Law Corporation

4 17897 MacArthur Boulevard

Second Floor

5 Irvine, California 92614

(949) 955-2445 - FAX (949) 955-2446

6 CA BAR # 77139

7 Attorney for Defendant, LINK IT SOFTWARE CORPORATION

8
9 SUPERIOR COURT FOR THE STATE OF CALIFORNIA

10 COUNTY OF SAN MATEO

11
12 HYPERTOUCHE, a California
13 Corporation, for themselves and for
all others similarly situated,

14 Plaintiffs,

15 v.

16 LINK IT SOFTWARE
17 CORPORATION, a California
Corporation and DOES 1 through
18 100, inclusive,

19 Defendants.

CASE NO. CIV 426832

NOTICE OF MOTION FOR ORDER
TRANSFERRING ACTION;
DECLARATION OF GREGORY LEE;
POINTS AND AUTHORITIES;
PROPOSED ORDER

DATE : 3/19/03
TIME : 9:00 a.m.
DEPT : 14

DATE ACTION FILED: 10/31/02

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21 TO EACH PARTY AND TO THE ATTORNEY OF RECORD TO EACH PARTY:

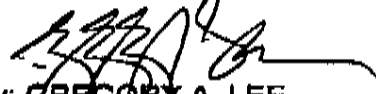
22 YOU ARE HEREBY NOTIFIED THAT on March 19, 2003 at 9:00 a.m. in
23 Department 14 of this Court, located at 400 County Center, Redwood City, California,
24 County of San Mateo, defendant in the above entitled action will move the court for an
25 Order to Transfer the Action to the Superior Court of the State of California, County of
26 Los Angeles, North Valley District located at 900 Third Street, San Fernando,
27 California, 91340, pursuant to Code of Civil Procedure section 397(3). Defendant's
28 motion will be made upon the ground that the convenience of witnesses and the ends

1 of justice would be promoted by such transfer.

2 Said motion will be based upon this Notice, the points and authorities set forth
3 below, the attached declaration of Gregory A. Lee, and the complete files and records
4 of this action.

5 DATED: 1/21/03

LAW OFFICES OF GREGORY A. LEE


By: GREGORY A. LEE
Attorney At Law

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1 **FACTS**

2 LINK IT SOFTWARE CORPORATION, defendant in the above-entitled action, is
3 a California corporation, duly organized and recognized under California law, doing
4 business in Santa Clarita, California. Hypertouch, plaintiff in the above-entitled action,
5 is a California corporation duly organized and recognized under California law, doing
6 business with its principal place of business in Redwood City, California. On October
7 31, 2002, plaintiff initiated a class action lawsuit against defendant; plaintiff alleges that
8 defendant sent unsolicited e-mail to persons in San Mateo County and elsewhere in
9 California. Defendant now moves this court for an Order Transferring the Action
10 pursuant to Code of Civil Procedure section 397(3)

11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 1.

13 **CONVENIENCE OF WITNESSES**

14 "The court may, on motion, change the place of trial in the following cases:
15 (3) When the convenience of the witnesses and the ends of justice would be promoted
16 by the change." Code of Civil Procedure Section 397(3)

17 In the instant case, the listed witnesses are expected to testify at trial. To require
18 the witnesses to travel to this county would prove to costly in travel expenses and loss
19 of work. Additionally, deposition testimony is not sufficient because it will not have the
20 same impact on the jury.

21 2.

22 **CONCLUSION**

23 Based on the above it is respectfully requested that the above-entitled action be
24 transferred to the Superior Court of the State of California, County of Los Angeles, in
25 the North Valley District.

26 DATED: 1/21/03

LAW OFFICES OF GREGORY A. LEE

27 
28 By: GREGORY A. LEE
Attorney At Law

GREGORY A. LEE

ATTORNEY AT LAW

A Professional Law Corporation

17897 MacArthur Boulevard
Second Floor
Irvine, California 92614
(949) 955-2445 - FAX (949) 955-2448
CA BAR # 77139

Attorney for Defendant, LINK IT SOFTWARE CORPORATION

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF SAN MATEO

HYPERTOUCHE, a California Corporation, for themselves and for all others similarly situated,

Plaintiffs,

v.

LINK IT SOFTWARE CORPORATION, a California Corporation and DOES 1 through 100, inclusive,

Defendants.

CASE NO. CIV 426832

DECLARATION OF GREGORY A. LEE
IN SUPPORT OF MOTION TO
TRANSFER ACTION

DATE : 3/19/03
TIME : 9:00 a.m.
DEPT : 14

DATE ACTION FILED: 10/31/02

I am the attorney for the defendant in the above entitled action.

1. The following is the name of each witness who is expected to testify at the trial of this action, and the substance of his testimony:

(A) Matt Marshall is the e-mail coordinator and as such he directly handles all e-mail. His testimony will relate to the handling of e-mail at LINK IT SOFTWARE CORPORATION.

(B) Dave Stromberg is the co-writer of the software and is responsible for making sure that the e-mails comply with the law. Mr. Stromberg's testimony relates to the e-mail software.

1 The above-mentioned witnesses would have to travel over 330 miles to appear
2 in court. This would be inconvenient for the witnesses because of the costs of travel
3 and the costs as a result of loss of work. Also, because of the great distance
4 defendants could be deprived of their witnesses in court.

5 The ends of justice would be promoted by transferring this action for trial to the
6 Superior Court of the State of California, County of Los Angeles, North Valley District
7 for the reason that the above mentioned witnesses are expected to testify at trial and
8 deposition testimony would not have a sufficient impact on the jury.

9 2. Concurrently with filing the Notice to which this Declaration is attached, I
10 paid or caused to be paid to the clerk of this court, the costs and fees demanded by
11 said clerk for transferring this action to the Superior Court of the State of California,
12 County of Los Angeles, North Valley District, and of filing papers in the said court to
13 which transfer is sought, in compliance with Code of Civil Procedure Section 399.

14 I declare under penalty of perjury under the laws of the State of California that
15 the foregoing is true and correct.

16
17 DATED: 4/21/03


18 GREGORY A. LEE, Esquire
Declarant

LAW OFFICES OF

(SPACE BELOW FOR STAMP ONLY)

GREGORY A. LEE

ATTORNEY AT LAW

A Professional Law Corporation

17897 MacArthur Boulevard

Second Floor

Irvine, California 92614

(949) 955-2445 - FAX (949) 955-2446

CA BAR # 77139

Attorney for Defendant, LINK IT SOFTWARE CORPORATION

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

HYPER TOUCH, a California
Corporation, for themselves and for
all others similarly situated,

Plaintiffs,

v.

LINK IT SOFTWARE
CORPORATION, a California
Corporation and DOES 1 through
100, inclusive,

Defendants.

CASE NO.: CIV 426832

ORDER TRANSFERRING ACTION

DATE : 3/19/03
TIME : 9:00 a.m.
DEPT : 14

DATE ACTION FILED: 10/31/02

Defendant, LINK IT SOFTWARE CORPORATION's, Motion to Transfer Action in
the above-entitled action came on for hearing before me on this 19th day of March,
2003.

The Court being fully advised and good cause appearing hereby orders that
Defendant's Motion to Transfer Action is granted and the above entitled action is
transferred to the Superior Court of the State of California, County of Los Angeles,
North Valley District located at 900 Third Street, San Fernando, California.

DATED:

JUDGE OF THE SUPERIOR COURT

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PROOF OF SERVICE
(1013a, 2015.5 C.C.P)

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STATE OF CALIFORNIA
COUNTY OF ORANGE

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I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 17897 Mac Arthur Boulevard, Second Floor, Irvine, CA 92614

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On January 21, 2003, I served the foregoing document described as,
NOTICE OF MOTION FOR ORDER TRANSFERRING ACTION AND DECLARATION OF GREGORY A. LEE on the interested parties in this action.

by placing true copies thereof enclosed in sealed envelopes as stated on the attached mailing list

by placing the original a true copy thereof enclosed in sealed envelopes addressed as follows:

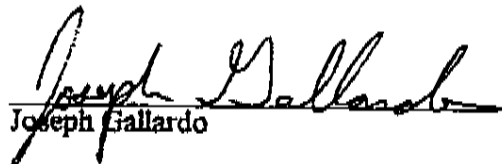
by faxing a true copy to:

by personal delivery to:

by mail as follows: I am "readily familiar" with the firm's practice of collecting and processing correspondence for mailing. Under that practice it would be deposited with The U.S. Postal Service on that same day with postage thereon fully prepaid at Santa Ana, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

LAW OFFICES OF JOHN FALLAT
John L. Fallat, Esq. (SBN#11442)
907 Sir Drake Boulevard
Suite 100
Kentfield, CA 94904

Executed on January 21, 2003, Santa Ana, California, and declared under penalty of perjury under the laws of the State of California that the above is true and correct.


Joseph Gallardo

1 LAW OFFICES OF JOHN L. FALLAT
John L. Fallat, Esq. (State Bar No. 114842)
2 Rebecca Y. Linkous, Esq. (State Bar No. 222980)
907 Sir Francis Drake Blvd., Suite 100
3 Kentfield, CA 94049-1502
Telephone: (415) 457-3773
4 Facsimile: (415) 457-2667

5 Attorney for Plaintiff
Hypertouch
6

ENDORSED FILED
SAN MATEO COUNTY

FEB 27 2003

Clerk of the Superior Court
By SIOLO SALA
DEPUTY CLERK

7
8 SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN MATEO
9

10 HYPERTOUCHE, a California corporation,
11 for themselves and for all others similarly
12 situated,

13 Plaintiffs,

14 vs.

15 LINK IT SOFTWARE CORPORATION, a
California corporation, and DOES 1 through
16 100, inclusive,

17 Defendants.

Case No. CIV426832

CLASS ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION TO
CHANGE VENUE**

Date: March 19, 2003
Time: 9:00a.m.
Dept: 14

18 **1. Introduction**

19 Hypertouch filed suit on October 31, 2002 seeking remedies on behalf of a proposed class of
20 individuals. Representative plaintiff, Hypertouch, is a California corporation doing business with its
21 principal place of business in Redwood City, California. The class action named LINK IT SOFTWARE
22 CORPORATION, a California corporation, and DOES 1 through 100, inclusive, (hereinafter referred to as
23 "Defendant"). In sum, the class action was brought because the Defendants repeatedly sent unsolicited e-
24 mail advertisements to plaintiffs in San Mateo County and elsewhere in California in violation of Business
25 and Professions Code §17538.5.

26 On February 11, 2003, plaintiffs received defendant's Notice of Motion to Transfer Venue.
27 Defendant's grounds for changing venue is that defendant's employees would be inconvenienced by
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1 traveling from Los Angeles to San Mateo County to testify as witnesses in the trial. Plaintiff opposes
2 defendant's motion as without merit and untimely and requests the court deny said Motion.

3
4 **2. ARGUMENT**

5 **A. Absent extraordinary circumstances, convenience of party witnesses is not a**
6 **permissible consideration for change of venue.**

7 Pursuant to C.C.P. § 397(c), a court may grant a motion to change venue if a non-party witness
8 would be seriously inconvenienced (emphasis added). A party's inconvenience is not considered absent
9 extraordinary circumstances. *Union Trust Life Insurance Co. v. Superior Court* (1968) 259 Cal.App.2d 23;
10 *Wrin v. Ohlandt* (1931) 231 Cal. 158. Generally, extraordinary circumstances are limited to cases where a
11 party is so ill or feeble that travel to another county would endanger his or her health. *Simonian v. Simonian*
12 (1950) 97 Cal.App.2d 68, 69.

13 This applies to witnesses that are employees of a party. *Stute v. Burinda* (1981) 123 Cal.App.3d
14 Supp. 11,17. This also applies to expert witnesses who may be called to testify, but have no personal
15 knowledge of the facts of the case. See *Wrin v. Ohlandt, supra*. In the case at bar, the defendant's motion
16 states that the defendant's e-mail coordinator, Matt Marshall, and software co-writer, Dave Stromberg, are
17 expected to testify at trial, and that travel to San Mateo County from Los Angeles would be such a great
18 inconvenience that the venue should be changed. However, as noted above, this is not sufficient grounds
19 for granting a motion to change venue.

20 **B. Defendant has failed to meet their burden of proof.**

21 In a Motion for Change of Venue based on inconvenience of witnesses and in the interests of
22 justice, defendant must show, through affidavits or declarations, 1) the names of the witnesses expected to
23 testify for both parties; 2) the substance of their testimony; 3) whether the witness(es) has been deposed or
24 given a statement; 4) the reasons it would be inconvenient; and 5) the reasons why the ends of justice
25 would be promoted by the change of venue. *Juneau v. Juneau* (1941) 45 Cal.App.2d 14.

26 In the case at bar, the defendant's counsel submits a declaration wherein he merely states that travel
27 from Los Angeles to San Mateo would be inconvenient for the defendant's employees due to travel
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1 expenses and lost work. Clearly this fails to meet the criteria outlined in *Juneau v. Juneau, supra*, nor does
2 it show any extraordinary circumstances as required by *Simonian v. Simonian, supra*. Counsel Lee's
3 Declaration is conclusory hearsay and insufficient to prove that the venue should be changed for reasons of
4 extreme inconvenience and the furtherance of justice.

5
6 **3. Conclusion**

7 Based on the above, Plaintiff respectfully requests that the defendant's Motion for Change of Venue
8 be denied, and the defendant be ordered to file a responsive pleading no later than March 31, 2003.

9
10 DATE: February 25, 2003


REBECCA Y. LINKOUS
Attorney for Plaintiffs

1 LAW OFFICES OF JOHN L. FALLAT
2 JOHN L. FALLAT (State Bar No. 114842)
3 REBECCA Y. LINKOUS (State Bar No. 222980)
4 P.O. Box 354
5 Kentfield CA 94904-0354
6 Telephone: (415) 457-3773
7 Facsimile: (415) 457-2667

8 Attorneys for Plaintiff
9 and Class

ENDORSED FILED
SAN MATEO COUNTY

FEB 27 2003

Clerk of the Superior Court
By SILO SALA
DEPUTY CLERK

10 SUPERIOR COURT OF CALIFORNIA
11 COUNTY OF SAN MATEO

12 HYPERTOUCHE, a California corporation,
13 for themselves and for all others similarly
14 situated,

15 Plaintiffs,

16 vs.

17 LINK IT SOFTWARE CORPORATION, a
18 California corporation, and DOES 1 through
19 100, inclusive,

20 Defendants.

Case No. CIV426832

CLASS ACTION

**DECLARATION OF REBECCA
LINKOUS IN SUPPORT OF
PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION TO
CHANGE VENUE**

Date: March 19, 2003

Time: 9:00 a.m.

Dept: 14

21 I, Rebecca Y. Linkous, declare:

22 1. I am an attorney at law, licensed to practice before all courts of the State of California, and
23 am associated with the Law Offices of John L. Fallat counsel of record for Plaintiffs and the Class. I make
24 this Declaration from my own personal knowledge, except as to matters stated on information and belief,
25 and as to those matters I believe them to be true. If called upon as a witness, I would competently testify as
26 to the truth of the matters herein stated.

27 2. I am informed and believe, based on the Declaration of Gregory Lee, that Matt Marshall is
28 employed by the defendant as their e-mail coordinator.

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PROOF OF SERVICE BY MAIL

[CCP §1013(a)]

I, JENNIFER M. BEARD, declare that I am not a party to this action, am over the age of 18 years, maintain a business address at 907 Sir Francis Drake Blvd., Suite 100, Kentfield, California 94904-1502, and that on the date shown below, I served the documents listed herein on the persons listed herein by placing true copies of said documents in sealed envelopes and depositing said envelopes in the United States mail at Kentfield, California, with postage prepaid, directed to said persons at the addresses below.

DOCUMENTS SERVED:

DECLARATION OF REBECCA Y. LINKOUS IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO CHANGE VENUE

SERVED UPON:

Gregory A. Lee, Esq.
Law Offices of Gregory A. Lee
17897 MacArthur Blvd., Second Floor
Irvine, CA 92614

I declare under penalty of perjury that the foregoing is true and correct and that this proof of service was executed on the date stated below, at Kentfield, California.

DATED: 2/25/03


JENNIFER M. BEARD

1 LAW OFFICES OF JOHN L. FALLAT
2 John L. Fallat, Esq. (State Bar No. 114842)
3 Rebecca Y. Linkous, Esq. (State Bar No. 222980)
4 907 Sir Francis Drake Blvd., Suite 100
5 Kentfield, CA 94049-1502
6 Telephone: (415) 457-3773
7 Facsimile: (415) 457-2667

8 Attorney for Plaintiff
9 Hypertouch

10 SUPERIOR COURT OF CALIFORNIA
11 COUNTY OF SAN MATEO

12 HYPERTOUCHE, a California corporation,
13 for themselves and for all others similarly
14 situated,

15 Plaintiffs,

16 vs.

17 LINK IT SOFTWARE CORPORATION, a
18 California corporation, and DOES 1 through
19 100, inclusive,

20 Defendants.

Case No. CIV426832

CLASS ACTION

**ORDER DENYING CHANGE OF
VENUE**

Date: March 19, 2003
Time: 9:00a.m.
Dept: 14

21 Defendant LINK IT SOFTWARE CORPORATION'S Motion for Change of Venue having come
22 on regularly for hearing at the above-referenced time and place. The Honorable Rosemary P. Pfeiffer
23 presiding. The tentative ruling was to deny the Motion and there being no request for oral argument and no
24 appearances being made:

25 **IT IS HEREBY ORDERED:**

26 Defendant's Motion for Change of Venue is Denied.

27 Dated: _____, 2002

JUDGE OF THE SUPERIOR COURT