

conducts business throughout the United States, including in the Commonwealth of Massachusetts.

### III. JURISDICTION AND VENUE

3. This Court has jurisdiction over this cause pursuant to 18 U.S.C. §1030(g), 15 U.S.C. §4, 15 U.S.C. §15 and 28 U.S.C. §1331 (federal question). This Court has jurisdiction over the state law claims alleged in this Complaint pursuant to 28 U.S.C. §1367 (supplemental jurisdiction).

4. Venue is proper in this District pursuant to 28 U.S.C. §1391 because Plaintiff is incorporated and has its principal place of business in this District, Defendant's liability arose in part in this District, a substantial number of the transactions complained of in this Complaint occurred in this District, a substantial number of Class members reside or have their principal places of business in this District, and Defendant's software was advertised, distributed, promoted, installed and used in this District.

### IV. FACTUAL ALLEGATIONS APPLICABLE TO ALL COUNTS

5. The Plaintiff, the proposed Class and Defendant are all competitors in the Internet Service Market. The Internet is an association of thousands of networks of computers, comprised of millions of computers throughout the world which either use or can interact with the TCP/IP protocol. The Internet offers computer users access to data, graphics, sound, software, text, hypertext "web pages" and people through a variety of services and tools for communication and data exchange, including remote login, file

transfer, electronic mail (e-mail), news and "browsing" software.

6. Computer users who wish to access the internet generally have to subscribe to an "internet service provider" or "internet access provider" ("ISP"), which have a network of servers, routers and modems, attached to a permanent, high-speed connection to one of the larger networks in the system. ISPs typically offer dial-up access to the internet, email services and possibly other services, such as web hosting, domain name service and proprietary online services available only to subscribers. There are approximately 7,200 ISPs in the United States, ranging in size from small, local providers with a few thousand subscribers to nationwide providers with millions of subscribers.

7. ISPs charge a fee for the service of providing Internet access. Charges depend on variables such as the type of connection, modem speed and level of service. While some ISPs charge by the hour it has been increasingly popular to allow unlimited connection time for a flat monthly fee. Most ISPs charge monthly fees ranging from \$9.95 to \$50 a month.

8. Computer users may utilize the services of more than one ISP. For instance, approximately 8% of AOL's 22 million subscribers also subscribe to other ISPs. Because the quality of the Internet connection provided and the fees charged vary significantly, the ability to change ISPs at will is important to computer users.

9. AOL, which calls itself the "world's largest interactive services company," is by far the largest ISP, with over 22 million customers. For a monthly fee of \$21.95, AOL provides its customers with the ability to access the internet and to send and receive electronic mail ("e-mail"). AOL also provides customers with news, discussion groups and other exclusive "content". In addition, AOL permits subscribers to other ISPs to access its

proprietary online services for a monthly fee of \$9.95, which does not include its "dial-up" service.

10. In competing with other ISPs to continue to acquire more subscribers, AOL has engaged in a massive multi-media, direct mail, and target marketing, advertising and sales campaign, which includes offering free software for accessing its service and trial subscriptions.

11. AOL solicits consumers who already have access to the internet but are not AOL subscribers to download its software from AOL's website. Additionally, AOL arranges with computer manufacturers to have its software installed on and included with many new computer systems. Accordingly, purchasers of new computers are often solicited to become AOL customers by interactive software when they "log on" to their new computer urging them to "click" on the AOL icon to install AOL's software.

12. In October, 1999, AOL released a new version of its software -- America Online Version 5.0 ("AOL 5.0"). In connection with AOL's release of AOL 5.0, AOL launched a massive advertising blitz including press conferences, news articles and information on AOL's website calculated to induce AOL customers to switch from the software they had been utilizing to AOL 5.0. AOL represented to the consuming public that AOL 5.0 was an "upgrade" and superior to previous versions in that 5.0 provided "better, bolder e-mail! The Internet, and a whole lot more," including improved performance and functionality, ease of use, longer connections and new features such as its "You've Got Pictures" and "My Calendar."

13. In reliance upon AOL's representations that 5.0 was superior to previous

versions of the Software, at least 8 million AOL customers have currently installed or downloaded AOL 5.0.

14. These representations were false. In fact, downloading 5.0 unnecessarily "changes" the host system's communications configuration and settings so as to interfere with any non-AOL communications software and services the customer might be using or might want to use in the future, including the software and services provided by Plaintiff and members of the Class. Thus, after installing AOL 5.0, users were no longer able to connect to other ISPs, including the Plaintiff and the Class, and were no longer able to run non-AOL e-mail programs, including those offered by Plaintiff and the Class. These changes in the settings and configurations on users' computers occur regardless of whether they responded "no" when asked during the installation process for 5.0 if they wanted to make AOL their "default provider."

15. Plaintiff and the Class have received numerous complaints from their subscribers who have reported problems in accessing their services. Plaintiff and the Class have been and will continue to be precluded from entering into contractual relationships with potential new subscribers when they attempt to connect to a non-AOL service.

16. On information and belief AOL purposely designed 5.0 to change the settings and configurations on personal computers in such a way that it would become difficult, if not impossible, for existing and prospective subscribers of Plaintiff and the Class to utilize the internet access services offered by Plaintiff and the Class.

17. AOL knew or should have known that the 5.0 upgrade would and will make changes to the host system which interfere with the user's ability to connect to the networks

of competing ISPs. In fact, upon information and belief, AOL made the aforementioned misrepresentations and material omissions to users concerning the changes that installation of 5.0 would make to their computers in an effort to interfere with their ability to utilize other ISP's that compete with AOL.

18. AOL's aforementioned business practices, misrepresentations and material omissions have injured Plaintiff and the Class by interfering with their relationships with existing and prospective subscribers and by forcing their technical support personnel to spend inordinate amounts of time attempting to undo the changes made by 5.0 to their subscribers' computers. At the same time, AOL has profited through its unfair competition, by among other things, making it difficult for Plaintiff and members of the Class to compete in the marketplace.

#### V. CLASS ALLEGATIONS

19. Plaintiff brings this action as a class action on behalf of itself and all others similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure. The Class is defined and described as follows:

All Internet Service Providers ("ISPs") in the United States of America who have subscribers who have downloaded or installed America Online Version 5.0, or may in the future download or install America Online Version 5.0, onto their personal computers.

20. Excluded from the Class are the Defendant in this action, any entity in which Defendant has a controlling interest, officers, directors of Defendant and the legal representatives, heirs, successors and assigns of Defendant.

21. The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown to Plaintiff at this time, there are approximately seven thousand ISPs in the United States. Of AOL's 22 million subscribers, approximately 8% or 1.8 million also subscribe to other ISPs. Thus, Plaintiff believes that there are at least thousands of ISPs who have been or will be damaged as a result of AOL's actions.

22. Plaintiff's claims are typical of the claims of the members of the Class as Plaintiff sustained damages arising out of AOL's attempted monopolization, unfair competition, unfair or deceptive trade practices, wrongful interference with existing or prospective contractual relations, and violations of 18 U.S.C. §1030 and 18 U.S.C. §2701.

23. Plaintiff will fairly and adequately protect the interests of the members of the Class and has retained counsel competent and experienced in class action litigation.

24. The class action device is superior to other available methods for the fair and efficient adjudication of this controversy since joinder of all members of the Class is impracticable. Furthermore, because the damages suffered by individual Class members may be relatively small, the expense of an individual action makes it impossible for the Class members to individually address the wrongs done to them. There will be no difficulty in the management of this action as a class action.

25. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. Among these questions of law and fact common to the Class are:

- a. Whether AOL attempted to monopolize the Internet Service Market in

violation of 15 U.S.C. §2;

b. Whether AOL attempted to eliminate competition in the Internet Service Market in violation of 15 U.S.C. §14;

c. Whether AOL violated 18 U.S.C. §1030, the Computer Fraud and Abuse Act of 1986, and whether Plaintiff and the Class were damaged by reason of such violations;

d. Whether AOL engaged in unfair competition with the Plaintiff and the Class in violation of common law and various state statutes which prohibit unfair methods of competition;

e. Whether AOL engaged in unfair or deceptive acts or practices in trade or commerce in violation of various state statutes which prohibit such conduct;

f. Whether AOL interfered with Plaintiff's and the Class' existing and prospective contractual relationships with their subscribers;

g. Whether Plaintiff and the members of the Class have sustained damages, and if so, what is the proper remedy for those damages; and

h. Whether the Plaintiff and the Class are entitled to injunctive relief.

**COUNT I**

**(Attempted Monopolization of Internet Service Market  
in Violation of 15 U.S.C. §2)**

26. Individual and Representative Plaintiff, on behalf of itself and the Class, realleges, as if fully set forth, each and every prior allegation contained herein and further

alleges, as follows, against Defendant:

27. Through its unfair and deceptive marketing practices AOL has attempted to monopolize the Internet Service Market in violation of 15 U.S.C. §2 (the Sherman Act). There is no legitimate business justification or purpose for AOL's conduct. AOL failed to use the least restrictive means for achieving its business objections.

28. On information and belief, AOL intended to achieve monopoly power in the Internet Service Market.

29. Plaintiff and the Class have been damaged as a direct and proximate result of AOL's attempted monopolization of the Internet Service Market and other predatory acts and practices as alleged above, in an amount to be determined at trial.

## COUNT II

### (Attempt to Eliminate Competition in Violation of 15 U.S.C. §14)

30. Individual and Representative Plaintiff, on behalf of itself and the Class, realleges, as if fully set forth, each and every prior allegation contained herein and further alleges, as follows, against Defendant:

31. Through the conduct alleged above, AOL has attempted to eliminate competition in the Internet Service Market. There is no legitimate business justification for the features of AOL 5.0 which cause it to interfere with subscribers' ability to access other ISPs' services, including those offered by Plaintiff and the Class. AOL failed to use the least restrictive means for achieving its business objectives.



32. AOL's distribution of its version 5.0 results in (1) modifications to the system's communications configuration and settings such as to interfere with Plaintiff's and the Class' subscribers' ability to use or access their software and services; (2) the inability of subscribers to connect to Plaintiff's or the Class' services; (3) the inability to run non-AOL e-mail programs, or connect to local networks offered by Plaintiff and the Class; and (4) the inability of subscribers who install or download AOL 5.0 to restore their computers' communications configurations, so that Plaintiff's and the Class' internet access services could be used.

33. The above conduct of Defendant resulted in and was designed to substantially lessen competition in the Internet Service Market.

34. As a direct and proximate result of the anti-competitive acts and practices alleged above, competition in the Internet Service Market was substantially lessened and was put at significant risk of being substantially lessened, and Plaintiff and the Class have been damaged in their businesses, in an amount to be determined at trial.

### COUNT III

(Violation of 18 U.S.C. §1030)

35. Individual and Representative Plaintiff, on behalf of itself and the Class, realleges, as if fully set forth, each and every prior allegation contained herein and further alleges, as follows, against Defendant:

36. The personal computers operated by the subscribers of Plaintiff and the Class are "protected computers" within the meaning of 18 U.S.C. §1030(e)(2) in that they are used

in interstate or foreign commerce or communication. Subscribers use their computers to access internet and web sites in other states or countries and to send and receive email to and from other states and countries.

37. Defendant has knowingly and with intent to defraud the Plaintiff's and Class' subscribers, accessed their personal computers without authorization, or exceeded authorized access, and obtained a thing of value, to wit, the subscribers' custom and trade, in violation of 18 U.S.C. §1030(a)(4).

38. Defendant has knowingly caused the transmission of a program, information, code, or command, and as a result of such conduct, intentionally caused damage without authorization, to the computers of Plaintiff's and the Class' subscribers, in violation of 18 U.S.C. §1030(a)(5)(A).

39. Defendant has intentionally accessed the computers of Plaintiffs' and the Class' subscribers, without authorization, and as a result of such conduct, caused damage, in violation of 18 U.S.C. §1030(a)(5)(B) and (C).

40. Such damage included the unnecessary and injurious deletion and modification of essential system files and modification of communications configurations and settings, such that the operating systems were rendered unstable and prone to systems failure impairing and/or completely blocking the ability to run Plaintiff's and the Class' software and connect to Plaintiff's and the Class' internet services.

41. Plaintiff and the Class have suffered damages and losses by reason of Defendant's violations of 18 U.S.C. §1030, as set forth above, in an amount to be determined at trial.

**COUNT IV****(Violation of 18 U.S.C. §2701)**

42. Individual and Representative Plaintiff, on behalf of itself and the Class, realleges, as if fully set forth, each and every prior allegation contained herein and further alleges, as follows, against Defendant:

43. Through the distribution of AOL 5.0 Defendant has intentionally accessed without authorization or in excess of its authorization the computer systems of Plaintiff's and the Class' subscribers and thereby prevented authorized access to their electronic communications in violation of 18 U.S.C. §2701.

44. Plaintiff and the Class are entitled to equitable relief and actual damages of no less than \$1000 for each class member, plus punitive damages, costs and reasonable attorneys fees pursuant to 18 U.S.C. §2707.

**COUNT V****(Unfair Methods of Competition and Unfair or Deceptive Business Practices  
in violation of M.G.L. c.93A §11 and Other Deceptive Trade Statutes)**

45. Individual and Representative Plaintiff, on behalf of itself and the Class, realleges, as if fully set forth, each and every prior allegation contained herein and further alleges, as follows, against Defendant:

46. Plaintiff, the Class and Defendant are all engaged in trade or commerce.

47. AOL's conduct, misrepresentations and omissions constitute unfair methods of competition and unfair or deceptive acts or practices in trade or commerce in violation of

Massachusetts General Laws, Chapter 93A, §2, and the similar unfair or deceptive trade practices statutes of other states.

48. Plaintiff and the Class have suffered a loss of money or property as a result of AOL's use or employment of unfair methods of competition and unfair or deceptive acts or practices in trade or commerce and are therefore entitled to treble their actual damages and reasonable attorneys fees and costs pursuant to Massachusetts General Laws, Chapter 93A, §11, and similar relief including multiple or exemplary damages under the unfair or deceptive trade practices statutes of other states.

#### COUNT VI

##### (Tortious Interference With Existing and Prospective Contractual Relationships)

49. Individual and Representative Plaintiff, on behalf of itself and the Class, realleges, as if fully set forth, each and every prior allegation contained herein and further alleges, as follows, against Defendant:

50. AOL tortiously interfered with the existing and prospective contractual relationships of Plaintiff and the Class in making it virtually impossible for their existing and prospective subscribers to access and utilize their services.

51. As a result, Plaintiff and the Class have been damaged.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays that:

1. The Court adjudge and decree that the Plaintiff is a fair and adequate representative of the Class, as defined above, and that notice of this action be given to the class in the most effective practicable manner;
2. The Court enter judgement for the Plaintiff and the Class;
3. Plaintiff and the Class recover for compensatory damages, multiple damages, exemplary damages and punitive damages, together with the costs of suit, including reasonable attorneys' fees;
4. The Defendant be perpetually enjoined and restrained from in any manner, directly or indirectly, marketing and distributing Version 5.0;
5. The Defendant be perpetually enjoined and restrained from in any manner, directly or indirectly, marketing and distributing any software which interferes with Plaintiff's and the Class's relationships with their subscribers;
6. The Court grant such other, further and different relief as the Court deems just and proper.

**JURY DEMAND**

Plaintiff, on behalf of itself and all others similarly situated, hereby demands a trial by jury on all issues so triable as a matter of right.

DATED: April 3, 2000



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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

FLO KELLY )  
on behalf of herself and all others similarly )  
situated, )  
 )  
Plaintiffs, )  
v. )  
 )  
AMERICA ONLINE, INC. )  
 )  
Defendant. )  
 )  
 )  
 )  
 )

DECLARATION OF THEODORE  
GROSSMAN IN SUPPORT OF  
PLAINTIFF'S MOTION

No. 00-544

I, THEODORE GROSSMAN, declare as follows:

1. I make this declaration based on personal knowledge. If called to do so, I could and would testify truthfully about the matters set forth herein.
2. I am currently a Senior Lecturer of Information Systems and Accounting at Babson College in Wellesley, Massachusetts. I am a computer professional, with extensive experience in both hardware and software, including the development and forensic analysis of systems and applications software. Attached as Exhibit A is my resume. I am President of Applied Solutions, Inc. a consulting company.
3. I was asked to review the extensive literature and reports describing the problems reported by users of American Online version 5.0 ("AOL 5.0") and to determine whether they were caused by AOL 5.0. I was also asked to determine whether any of the problems reported by current users of AOL 5.0 could be avoided for future consumers through further disclosure by AOL.

DECLARATION OF THEODORE GROSSMAN IN SUPPORT OF PLAINTIFF'S MOTION



4. Prior to forming my opinion, I obtained a copy of AOL 5.0 and analyzed the changes it makes to the internal operating software of the users' computers. I conducted extensive testing of the impact that installing AOL has on the functionality of other software and, in particular, its impact on the user's ability to connect to other Internet Service Providers ("ISPs"). I also reviewed the affidavits of several consumers who downloaded AOL 5.0 and then reported problems using their systems. I also conducted extensive documentary and computer research to obtain information about the effects of the AOL 5.0 program. This research included a review of AOL's web site, the Prodigy web site, discussions with technical support personnel of other ISP's, and other publicly available information about the effects of AOL's 5.0 program.

5. It is my opinion that many of the problems reported by users of AOL 5.0 are directly caused by the loading of the AOL 5.0 program. Also, the problems which many consumers would otherwise suffer as a result of loading AOL 5.0 could be prevented by, at a minimum, warning users of the potential problems and, in any event, by AOL modifying their software to conform to the practices of other Internet Service Providers (ISPs).

6. It is further my opinion that AOL 5.0 is designed in such a way as to obstruct and prevent users from successfully accessing other ISP's which are competitors of AOL. Also, AOL could modify their software to offer the benefits and functions of AOL 5.0 without interfering with consumers' use of competitor ISP's.

7. AOL 5.0 is a software program that allows AOL users to access AOL's communication network. Once connected to AOL's network, users may access a plethora of AOL supplied and sponsored products and services, as well as being able to access the Internet. Unlike most other ISP's, which use standard Microsoft products for accessing their network and, subsequently, the Internet, AOL uses its own proprietary software program for consumers to

access their network. Also, while most ISP's allow consumers to use the two industry standard software programs, called browsers, to surf the Internet, AOL copies onto its user's disk a specially modified version of Internet Explorer. While most other ISP's and Internet sites (web sites) have conformed to a set of open standards, AOL has pursued a closed architecture that does not conform to the rest of the Internet community. Until AOL released AOL 5.0, the prior versions of their software peacefully coexisted with most other ISP's software.

#### **AOL 5.0 IS MASS MARKETED**

8. AOL has an extensive marketing program to attract both existing users of older versions of AOL software, as well as new users to their AOL 5.0 product. AOL mailers containing a CD with the AOL 5.0 installation software have inundated consumers. I have received several in the mail. There are also point of sale displays in many retailers offering AOL 5.0 for free in the same or similar packaging. See Exhibit B. Each of the brightly colored packages offers a special opportunity to enjoy 250 to 500 hours of AOL free of charge. Id. The 500 hours must be used in one month, thereafter, there is a monthly charge of approximately \$20. Consumers are also presented with the opportunity to avail themselves of AOL's services when they buy new computers with AOL software preloaded on many new computers as well as the ubiquitous point of sale displays. Lastly, should the consumer miss any of those opportunities, they can also download free copies from AOL's web site on the Internet. See Exhibit C.

#### **AOL 5.0 UNNECESSARILY INTERFERES WITH CONSUMERS' ACCESS TO AOL'S COMPETITORS**

9. I investigated the changes which AOL 5.0 makes to the components of the user's Windows 95/98 operating system during installation, in particular the manner in which it modifies the network and communications configuration of the user's system. I have found that

AOL 5.0 proprietary software modifies the operating system in a manner likely to impair many user's ability to access the Internet using the services of ISP's other than AOL.

10. Key communications components of the Microsoft Windows 95/98 operating system include the Microsoft Dial Up Networking Adapter ("DUN"), also referred to as the "PPP adapter" which is used to connect the computer by modem with ISP's such as Earthlink and Mindspring. Another is the TCP/IP protocol, which binds to the dial up adapter to allow Windows programs such as the Netscape browser to send and receive packets of data over the Internet using the modem connection.

11. When an ISP provides customers with an installation package designed to connect that customer's computer by modem to that ISP, the installation software typically installs a DUN profile on the user's machine which utilizes the Microsoft DUN Adapter to dial the ISP's modem pool and establish the necessary connection. As any number of DUN profiles may coexist on the same machine, a user who subscribes to the services of a particular ISP retains the ability to access the Internet through another ISP. Users are accustomed to being able to switch ISP's at will or use multiple ISP's, either in search of superior service or in order to take advantage of favorable offers.

12. Using AOL's free software obtained through normal channels, I installed AOL 5.0 on several different Windows 95/98 systems. I discovered that during installation, AOL 5.0 altered the Network configuration of the tested personal computers. In particular, I found that, unlike most software designed to connect the personal computer to an ISP using a modem, AOL 5.0 does not utilize the standard Microsoft DUN Adapter. Instead, it installs its own unique dial up adapter, which is similar in function to the Microsoft DUN, but incompatible with non-AOL

communications software using Version 1.2 or earlier of the Microsoft DUN. In those cases, with AOL 5.0 installed, the user will not be able to connect to an ISP other than AOL.

13. During the installation process, the user logs onto AOL's network to obtain account information. Upon exiting AOL's network, AOL downloads further files to the personal computer. At that point, the AOL software merely indicates that it is downloading additional software. It never gives the user an explanation of the changes included within that software, nor the opportunity to accept or decline those changes. In fact, this is the process that occurs each and every time that a user logs onto the AOL network.

14. The AOL adapter renders the version of Microsoft DUN present on many Windows systems inoperable. The effect is that once the AOL adapter is installed, the user will no longer be able to access the Internet through any ISP but AOL. In fact, without AOL 5.0 installed on a computer, the typical ISP connection successfully uses the Microsoft DUN Adapter of the computer. When AOL 5.0 is installed on the computer, it creates a conflict with the Microsoft DUN Adapter. The result is that packets of data cannot be sent successfully over the connection using the TCP/IP protocol, rendering the user incapable of accessing any web sites on the Internet through their alternate ISP's.

15. I further tested a system installed with only AOL 5.0 to determine the effect on that system of installing another ISP after the fact. I concluded from the testing that those users who have an existing AOL 5.0 system, without an additional ISP, and who subsequently install another ISP will have their access to that alternate ISP prevented. Therefore, a consumer who only uses AOL 5.0 to access the internet now, and some time in the future chooses to utilize an alternate ISP, will not be able to access the ISP successfully, unless they download and install Microsoft DUN version 1.3 or successfully uninstall AOL 5.0.

### AOL 5.0 CAUSES EXTENSIVE DAMAGE TO CONSUMERS

16. Because AOL 5.0 crippled their computer systems, many AOL 5.0 customers who utilize other ISPs for personal and business e-mail and other Internet services have suddenly lost their ability to send and receive e-mail and access necessary communications services. Many users were also forced to reinstall Windows in an effort to restore connectivity. Because AOL 5.0 adds components to the Windows operating system which Windows incorporates during the installation process, some users were forced to reformat their hard drive before reinstalling Windows operating system, in order to insure that all components added by AOL 5.0 had been removed. After reinstalling Windows, users then needed to reinstall all of their applications software, a feat which could take hours, even if the user still has the necessary installation media. In this process, which destroys all files and data on the hard drive, many users inevitably lost irreplaceable data, such as key configuration data, documents the user has created, financial information, e-mail, names, addresses and telephone numbers of correspondents, spreadsheet data and other personal and business records.

### AOL ADMITS THAT AOL 5.0 CAUSES DAMAGE TO COMPUTERS

17. AOL admits that loading AOL 5.0 onto individual consumers' computers can cause damage. For example, AOL supplies instructions in the frequently asked questions (FAQs) section of their web site regarding solving the problem with the AOL 5.0 software. See Exhibit D. After replicating the problem, I attempted to use AOL's instructions. The instructions did not resolve the problem. It was impossible using their instructions to restore my computer to its state immediately prior to the installation of AOL 5.0.

18. During the installation process for AOL 5.0, a question comes up on the screen asking the user whether they want "AOL 5.0 to be their default for e-mail, newsgroups, etc." The user has the ability to reply "yes" or "no." In fact, AOL's default for the question is "no." AOL has publicly stated that the problem only manifests itself when the user overrides the default and responds "yes." When I tested the system I found that regardless of how I responded to the question, the system malfunctioned and I was incapable of accessing my alternate ISP. In any event, AOL never warns the user of the possible ramifications of answering in the affirmative or negative.

**THE DAMAGE CAUSED BY AOL 5.0 COULD EASILY BE AVOIDED**

19. It is my opinion that AOL 5.0 could have been designed to utilize the standard Microsoft Windows components, eliminating the problems users experience connecting to non-AOL ISP's.

20. AOL could avoid much of the extensive injury to consumers if it would simply warn customers that AOL 5.0 might cause loss in connectivity to third party ISP's. However, at no time during the installation process does AOL 5.0 warn the user that it is modifying key Windows system components, and changing communications and configuration settings, such that the user's ability to use non-AOL services is likely to be impaired.

21. Other ISP's have also become aware that the AOL DUN Adapter prevents their customers from using their service. As reported on the Prodigy web site, "This problem occurs when there is a conflict between AOL 5.0 and an older version of the Dial-Up Networking (DUN) component in Windows 95. This conflict disables Prodigy Internet or any other ISP so that only AOL works." See Exhibit E.

22. Microsoft has published a number of technical support bulletins describing the AOL 5.0 problem. See Exhibit F. They indicate that the problem can be solved by either downloading the latest version of DUN 1.3, or uninstalling AOL 5.0. However, the process of uninstalling the AOL product is difficult and, even when complete, leaves many orphan software files on the user's hard disk. For example, a so-called "solution" attributed to AOL Technical Support on the About.Com web site includes three pages of single spaced instructions such as:

Make sure that the ONLY binding listed in this control panel with a check mark next to it is the TCP/IP -> AOL Adapter.

See Exhibit G.

23. In many cases, downloading and installing a DUN upgrade from Microsoft will solve the problem, restoring the user's system's ability to access the Internet through an ISP other than AOL. However, most users would not know that AOL 5.0 is incompatible with the Microsoft DUN on their system, and would not know where to obtain the DUN upgrade. Even if the user does discover that installing a DUN upgrade may restore connectivity with non-AOL services, downloading the needed DUN upgrade by modem will itself take more than one hour, as the file is some 2.4 megabytes in size. The vast majority of AOL users are technical novices and would also not possess the technical expertise required to install the DUN upgrade.

24. It is also possible for a technically knowledgeable user to manually remove the AOL Dial-Up Adapter from Windows, and restore the functionality of the Microsoft DUN Adapter. However, again, most AOL users lack the technical knowledge, sophistication, or expertise to undertake such an operation. Also, most AOL users, finding that they could access AOL, but not their other ISP, probably would conclude that the problem was the fault of the other ISP. They would therefore blame the other ISP, while continuing to use AOL. In fact, based on conversations with other ISP's technical support personnel, AOL has offered almost no

assistance to consumers suffering the problems of AOL 5.0. It usually falls on the other ISP's to provide the technical help to resolve the problem, even though it was caused not by them, but by AOL's software. One ISP indicated that AOL supplied them with the instructions to help resolve the problem. The ISP related that they are receiving many calls a day complaining of the problem.

25. It would also be a simple matter for the AOL 5.0 installation software to contain computer code, which checks the personal computer, to determine the compatibility of AOL 5.0 with the version of the Microsoft DUN Adapter present on that system. Where appropriate, the installation process could load an appropriate version of DUN, or at a minimum, warn the user to obtain a DUN upgrade before proceeding further. However, the AOL 5.0 installation software performs no such checks.

26. The extent of the changes which AOL 5.0 makes to the internal operating system of the computer is unknown to most users of the product. AOL provides no disclosures at the point of sale. Furthermore, because the changes go beyond those which are common in the industry and include changes which impact other computer programs and functions, the changes are not authorized by consumers who load AOL 5.0. In some cases these changes are downloaded from the Internet when the user logs off of the AOL network.

Executed this 7th day of March, 2000 at Wellesley, Massachusetts. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

  
Theodore Grossman



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

FILED BY [Signature]  
09 APR 10 PM 4:00  
CLERK OF DISTRICT COURT  
S.D. OF FLA - MIA

CLASS ACTION NO. 00-544-Civ-GOLD/SIMONTON

FLO KELLY, on behalf of herself and all  
others similarly situated, )  
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 Plaintiffs, )  
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 )  
 vs. )  
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 America Online, Inc. )  
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 Defendant. )  
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**SUPPLEMENTAL DECLARATION OF THEODORE GROSSMAN IN SUPPORT OF  
MOTION FOR PRELIMINARY INJUNCTION**

I, **THEODORE GROSSMAN**, declare as follows:

1. I make this declaration based on personal knowledge.
2. I am currently a Senior Lecturer of Information Systems and Accounting at Babson College in Wellesley, Massachusetts. I am a computer professional, with extensive experience in both hardware and software, including the development and forensic analysis of systems and applications software. I am also President of Applied Solutions, Inc. a consulting company.
3. I make this declaration to supplement my declarations dated March 7<sup>th</sup>, 2000 and March 21<sup>st</sup>, 2000 in support of Plaintiff Flo Kelly's Emergency Motion For An Order Directing Defendant American Online, Inc. to Show Cause Why A Temporary Restraining Order Should Not Issue And For A Preliminary Injunction filed against the defendant America Online, Inc.

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