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November 6, 2000 **EX PARTE OR LATE FILED**

Ms. Magalie Roman Salas  
Secretary Federal Communications Commission  
445 12<sup>th</sup> Street, S. W. – The Portals  
TW-B204  
Washington, D.C. 20554

00-30

Re: America OnLine, Inc. and Time Warner Inc.  
Ex Parte Presentation  
Applications of America OnLine, Inc. and Time Warner Inc.  
For Transfers of Control

Dear Ms. Salas:

On behalf of a nationwide class of internet service providers (ISPs), submitted herewith are an original and one copy of this notice regarding permitted oral ex parte presentation in the above-referenced proceeding. On November 3, 2000, Kenneth Yates, Esq. and Douglas Brooks, Esq, representing the plaintiff ISPs in a nationwide class action lawsuit, met with members of the Commission's staff, at their request, to discuss aspects of the merger of America OnLine (AOL) with Time Warner Inc.

Attending the meeting on behalf of the ISPs were Kenneth Yates and Douglas Brooks.

The following FCC personnel attended: Michael Kende, Office of Plans & Policy; James Bird, Office of General Counsel; Sherille Ismail, Darryl Cooper, and Royce Dickens, of the Cable Services Bureau.

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The following is a synopsis of the meeting:

**It is openly acknowledged that internet service providers (“ISPs”) future existence, as a viable competitive force in the internet marketplace, depends on access to high-speed “broadband” technology. Cable access is a key component. The problems created by America OnLine (AOL) Version 5.0 software are directly related to this “open access”. AOL guarantees of “open access” to its competitor-ISPs are meaningless if the competitor-ISPs’ software is shutdown by AOL at the user’s computer terminal, before access is ever gained to the cable “superhighway”.**

The Senate Judiciary Committee felt this issue was significant enough to question Steve Case directly regarding the Version 5.0 litigation in opening hearings on the AOL/Time Warner merger.

Kenneth Yates, of the Maryland firm of Yates and Schneider, and Douglas Brooks, of the Boston Massachusetts firm of Gilman and Pastor are the lead counsel in class action litigation between the 8000 nationwide ISPs and AOL regarding AOL’s Version 5.0 software. The lead plaintiffs CapuNet LLC and Galaxy Internet Services are class representatives acting on behalf of ISP’s throughout the country. In addition, more than 50 class actions have been brought nationwide on behalf of the 10 million consumers affected by this Version 5.0.

**The core issue in this litigation is the adverse effect that AOL Version 5.0 internet software has upon competitor ISPs’ internet software already installed on their customer/consumers’ computers. AOL Version 5.0 disables competitor ISPs’ software, denying customer/consumers the use of that software, and further changes the default internet settings on their customer/consumers’ computers, replacing themselves as the default ISP without either the customer/consumers’ knowledge or consent. The new AOL version 6.0, which has just been released by AOL this past week, is being tested to see if it also creates problems such as created by Version 5.0.**

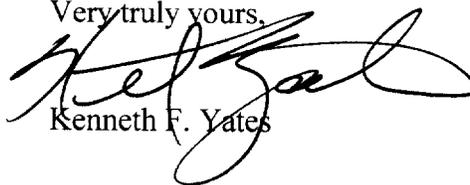
The ISP’s very existence, their ability to compete with AOL as a real market force and their customer’s freedom of choice of the internet are directly threatened as a result of this behavior by AOL. If it is allowed to continue after the merger with Time Warner, it will spell the end of competitive ISP’s.

**Legally enforceable guarantees of “open access” must also include legally enforceable guarantees that AOL will do nothing to interfere with customer/consumers’ operation of competitor ISP connections to the Internet, and further that customer/consumers’ choice of “default internet” settings on their computers will not be changed by AOL without their knowledge and consent.**

AOL has already acknowledged that its Version 5.0 software does replace itself as the default ISP without notice to the consumer. (AOL does give the consumer a choice of a default setting for web-page, e-mail and newsgroups).

Kindly direct any questions regarding this matter to the undersigned.

Very truly yours,

A handwritten signature in black ink, appearing to read 'K. Yates', written over the typed name 'Kenneth F. Yates'.

Kenneth F. Yates

Cc: Michael Kende  
James Bird  
Sherille Ismail  
Darryl Cooper  
Royce Dickens  
Linda Senecal  
Douglas Brooks

Attachments: Handout  
Video

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- 5.) Order in Flo Kelly Consumer Actions v. America OnLine, Inc., admission of problem
- 6.) Quote from Prodigy Chief Technology Officer re: AOL Version 5.0 virus

## INTRODUCTION

Kenneth Yates, of the Maryland firm of Yates and Schneider, and Douglas Brooks, of the Boston Massachusetts firm of Gilman and Pastor are the lead counsel in class action litigation between a nationwide group of Internet Service Providers (ISP's) and America OnLine (AOL) regarding AOL's Version 5.0 software. The lead plaintiffs CapuNet LLC and Galaxy Internet Services are class representatives acting on behalf of ISP's throughout the country.

**The core issue in this litigation is the adverse effect that AOL Version 5.0 internet software has upon our clients' internet software already installed on our customers' computers. AOL Version 5.0 disables that software, denying our customers the use of that software, and further changes the default internet settings on our customers' computers without their knowledge or consent. The new AOL version 6.0, which has just been released by AOL this past week, is being tested to see if it also creates problems such as created by Version 5.0.**

It is openly acknowledged that our client ISPs' future existence as a viable competitive force in the internet marketplace depends on access to high-speed "broadband" technology. Cable access is a key component. The problems of created by Version 5.0 are directly related to this "open access".

**Guarantees by AOL to its competitor ISPs of "open access" to the cable network of Time-Warner are meaningless, if our clients' customers are unable to turn on our clients' internet software, even before they attempt to log on to that high-speed cable network, as the result of AOL disengaging our clients' internet connections.**

**Legally enforceable guarantees of "open access" must also include legally enforceable guarantees that AOL will do nothing to interfere with the customers operation of our clients ISP connections to the Internet, and further that our customers' choice of "default internet" settings on their computers will not be changed by AOL without their knowledge and consent.**

The existence of the ISP's who compete with AOL and their customers' freedom of choice of the internet are directly threatened as a result of this behavior by AOL, which if allowed to continue after the merger with Time Warner will spell the end of competitive ISP's.

**The Senate Judiciary Committee felt this issue was significant enough to question Steve Case directly regarding the Version 5.0 litigation in opening hearings on the AOL/Time Warner merger. We urge the Federal Communications Commission to address as part of its review of the AOL/Time Warner merger.**

## STATUS OF LITIGATION

In October, 1999 AOL released its then latest internet software, Version 5.0. Immediately there were reports of serious adverse effects upon the operating systems of users computers. Among the more serious was the disabling of its competitors internet connections by AOL Version 5.0.

In January of this year, the first litigation regarding AOL Version 5.0, Khazai v. AOL was filed in Federal Court in the Eastern District of Virginia, by Yates and Schneider. This action was filed on behalf of consumers nationwide who had been adversely affected by 5.0. Subsequently more than 50 actions have been filed nationwide on behalf of consumers. All of the federal actions have been consolidated in federal court in Miami, Florida before Judge Gold.

A week after filing the first consumer action, Yates and Schneider filed a second action on behalf of the competitor ISPs in state court in Maryland. (tab 1). The judge in that case overruled AOL's motion to dismiss with respect to Count II of the complaint, but did state that the complaint should be amended to address the specific predatory actions of AOL which are deceptive and unfair and which violate computer crimes acts. (tab 2) The judge granted the motion to dismiss for Count I, with leave to amend. The complaint has now been amended for both counts as requested by the judge, and the litigation is ongoing.

The firm of Gilman and Pastor filed an action in federal court in the U.S. District Court for the District of Massachusetts on behalf of Galaxy Internet Services, Inc. against AOL for the same problems created by Version 5.0. (tab 3) (The Galaxy lawsuit was recently transferred to the Southern District of Florida, pursuant to an order by the Judicial Panel on MultiDistrict Litigation.)

Both CapuNet and Galaxy are "internet service providers" ("ISP") which provides both internet access service and email service to its customers. There are approximately 8,000 ISPs in this country, most of which are small, privately held businesses like CapuNet and Galaxy, with a few thousand or tens of thousands of subscribers. AOL is the largest ISP in the world, by far, with almost 25 million subscribers.

All of these actions allege the same fundamental facts and claims against AOL: When installed on personal computers, AOL Version 5.0 interferes with the ability of consumers to access ISPs other than AOL and replaces itself as the "default" ISP without the users knowledge or consent. (See tab 4 – testimony of computer expert, Theodore Grossman).

This has had an impact both on consumers who may wish to access other ISPs, and also upon ISPs, whose relationships with current and prospective customers have been damaged. This damage takes the form of both lost subscription revenues from customers who either terminate their subscriptions or do not enter into subscriptions, due to their inability to access the other ISPs, and a tremendous amount of time (and overtime) spent by

technical support personnel in attempting to resolve the problems caused by AOL Version 5.0 (since consumers typically do not know why they are having problems accessing a non-AOL ISP, they generally call the non-AOL ISP and expect that ISP to solve the problem).

**The key claims in the various lawsuit are as follows:**

#### **Attempted Monopolization of the Internet Service Market**

AOL is attempting to monopolize the internet service market, in violation of §2 of the Sherman Act, 15 U.S.C. §2, by designing and distributing software which interferes with consumer's access to other internet service providers. This is predatory conduct, done with the specific intent to monopolize the internet access market and, given AOL's 60% share of the market (10 times the share of its closest competitor), has a dangerous probability of successful monopolization.

**AOL has admitted that it continued to distribute Version 5.0 for 6 months from October, 1999 to May, 2000 after it was alerted by MicroSoft that Version 5.0 was incompatible with earlier version of Windows 95 and on May 10, 2000 agreed to a "stipulated order" in that regard. (See tab 5).**

#### **Computer Fraud and Abuse Act**

AOL violated the Computer Fraud and Abuse Act, 18 U.S.C. §1030, through its development and distribution of AOL Version 5.0. Specifically, it is alleged that AOL violated the following three subsections of this statute:

- \* Section 1030(a)(4), which prohibits both accessing a computer without authorization, or, with particular application to this case, exceeding authorized access with intent to defraud or obtain a thing of value.
- \* Section 1030(a)(5)(A), which prohibits knowingly causing the transmission of a program which damages a protected computer.
- \* Section 1030(a)(5)(B) and (C), which prohibits intentionally accessing a protected computer without authorization and thereby causing damage.

**Prodigy (whose name was invoked by AOL in the stipulated order, tab 5) Chief Technology Officer, William Kirkner has stated that Version 5.0 is a "virus" and that the effect of this software is equivalent to "hacking". See tab 6.**





Virginia. Plaintiff Digizen is an internet service provider serving approximately 3000 customers.

5. The Plaintiff, Millken Communications, Inc., is a Maryland corporation with its principal place of business in Rockville, Maryland. Plaintiff Millken is an internet service provider serving approximately 1800 customers.

6. The Plaintiff, MetroNet Internet Services, Inc., is a Maryland corporation with its principal place of business in Baltimore, Maryland. Plaintiff MetroNet is an internet service provider.

7. The Plaintiff, Chesapeake Internet, is a Maryland corporation with its principal place of business in Baltimore, Maryland. Plaintiff Chesapeake Internet is an internet service provider.

8. The Defendant, AOL, is a Delaware corporation with its principal place of business in Dulles, Virginia. Defendant carries on business throughout the state of Maryland and the United States, providing internet access and services to the general public. Defendant has approximately 20 million customers to whom it provides these services for a monthly fee.

#### **CLASS ACTION AVERMENTS**

9. Plaintiffs bring this action individually and as the representatives of all members of a plaintiff class pursuant to Maryland Rule 2-231(b)(3). The class consists of all entities that provide internet access to customers through a computer on which Version 5.0 was installed after October 1, 1999, to the present. Included in said class is a subclass of entities that provide internet access to customers pursuant to existing, term specific contracts through a computer on which version 5.0 was installed after October 1, 1999, to the present.

10. Excluded from the class are the Defendant in this action and any of Defendant's

subsidiaries, affiliated entities, legal representatives, heirs, successors and assigns.

11. Plaintiffs aver that the class is so numerous that joinder of all members is impracticable. It is Plaintiffs' information and belief that there are more than 6,000 companies that provided internet service to customers throughout the United States.

12. Plaintiffs aver that there are common questions of law and fact common to the class as set out in the various counts of the amended complaint herein stated.

13. Questions of law and fact which are common to the Plaintiffs and members of the plaintiff class include:

a. Whether, when installed, Version 5.0 interferes with, interrupts, alters and/or disables the operation of non-AOL internet software preventing customers from utilizing non-AOL internet access providers and preventing Plaintiffs and members of the plaintiff class from providing internet access to customers as they are contractually obligated to do?

b. Whether Defendant intentionally and/or willfully designed and developed the Version 5.0 to interfere with, interrupt, alter and/or disable the operation of non-AOL internet software for the unlawful purpose of causing damage to Plaintiffs and members of the plaintiff class?

c. Whether Defendant employed unlawful means to interfere with the business relations of Plaintiffs and members of plaintiffs class?

d. Whether Defendant engaged in unfair and deceptive acts or practices in trade or commerce in violation of Maryland's Deceptive Trade Practices Act?

e. Whether Defendant fraudulently induced individual customers to install Version 5.0 on their individual computers?

f. Whether Defendant created or continued an unlawful restraint of trade?

g. Whether Defendant knew that installers of Version 5.0 had relationships with non-AOL internet access providers?

h. Whether Defendant intentionally designed, developed and distributed Version 5.0 in such a manner as to tortiously interfere with the contractual and/or business relationships between Plaintiffs and members of the plaintiff class and their customers?

i. Whether to deceive and/or induce users to install Version 5.0, Defendant misrepresented the character and quality of Version 5.0?

j. Whether to deceive and/or induce users to install Version 5.0, Defendant misrepresented to installers that Version 5.0 would not become their default browser unless the installer made an affirmative choice by clicking on the "yes" prompt?

k. Whether Plaintiffs and the plaintiff class are entitled to injunctive relief, damages, costs and attorneys' fees as a result of the tortious conduct of Defendant?

14. Plaintiffs aver that the questions of law or fact common to the members of the

class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

15. Plaintiffs' claims are typical of the claims of the members of the class. Plaintiffs and each of the class members have sustained monetary damages resulting from Defendant's actions.

16. Plaintiffs will fairly and adequately represent the interest of the class in that Plaintiffs have no conflict with other class members. Plaintiffs have retained competent counsel, experienced in complex class action litigation. Plaintiffs intend to prosecute this action vigorously. The interests of the members of the class will be fairly and adequately protected by Plaintiffs and their counsel.

### **FACTUAL ALLEGATIONS**

17. This action is brought by the Plaintiffs, individually and on behalf of those similarly situated entities in the United States, to seek redress for harm caused by the unlawful conduct engaged in by the Defendant, AOL.

18. Defendant is the world's largest internet access market provider.

19. On or about October 1999, Defendant unveiled their new software, Version 5.0, and began a campaign to cause non-AOL internet access providers' users, the general public and existing AOL customers to install Version 5.0.

20. In reliance upon AOL's representations that Version 5.0 was superior to previous versions of AOL software, at least 8 million customers have currently installed or downloaded Version 5.0.

21. At all times, Defendant had control over the design, development, manufacturing,

marketing, labeling, testing, sale and/or distribution of Version 5.0.

22. As part of its normal and intended function, Version 5.0 interferes with, interrupts, alters and/or disables the operation of non-AOL internet software installed on individual computers, preventing customers from utilizing non-AOL internet access providers and interfering with Plaintiffs' and the class' ability to provide internet access to customers through affected computers.

23. Without warning or authorization, Version 5.0 adds or alters hundreds of files on the users computer system, including many essential operating system components and communications settings. Said additions and alterations prevent customers from utilizing non-AOL internet software and providers and, in some instances, causes the entire computer operating system to become unstable.

24. Defendant was warned by beta testers about the effects of Version 5.0 on non-AOL internet software and host computer systems.

25. Defendant chose not to alter Version 5.0 software or to warn the public that Version 5.0 would alter the host computer's communications configurations, settings and system files thereby interfering with, disrupting and/or terminating their use of other internet software and providers.

26. Despite the fact that users are asked during the installation of Version 5.0 whether they wish Version 5.0 to become their default internet browser, Version 5.0 alters the computer's communications configurations, settings and system files and interferes with, interrupts, alters and/or disables the operation of non-AOL internet software installed on the computers even if the user selects the "no" option.

27. To date, over 50 actions have been filed against Defendant by individual, consumer

installers of Version 5.0 based on its unlawful, fraudulent and/or monopolistic conduct. These consumer actions have now been transferred and consolidated for pretrial proceedings in the United States District Court for the Southern District of Miami by the Judicial Panel on Multidistrict Litigation.

28. Due to the surreptitious nature of the Version 5.0 installation, the user does not initially associate the loss of ability to access non-AOL internet services with the installation of Version 5.0.

29. Plaintiffs, have been inundated with technical support calls relating to their customers' inability to connect with the services contracted for with their companies. Plaintiff and members of the plaintiff class have been and will continue to be precluded from entering into contractual relationships with potential new subscribers who are unable to connect to a non-AOL service due to the effects of Version 5.0.

30. As a direct result of the disabling effect of Version 5.0, Plaintiffs and other class members have had to expend many hours of technical support time to explain the problem to customers, which is costly and diverts resources from other technical matters.

31. As a direct result of the disabling effect of Version 5.0, customers have expressed frustration and dissatisfaction with what appears to be problems with the Plaintiffs' systems and Plaintiffs' inability to provide the internet services they contracted to receive. The resultant loss of good will has been to the harm and detriment of Plaintiffs and other class members as customers terminate services and/or speak poorly about Plaintiffs' services to others potential customers.

**COUNT I: INTERFERENCE WITH BUSINESS RELATIONS**

32. Plaintiffs reallege paragraphs 1-31 of the amended complaint and incorporates same by reference in Count I as if fully set forth herein

33. Plaintiffs and members of the plaintiff class are internet access providers that provide internet service to customers pursuant to internet service contracts with those customers. Although customers purchase internet services on a monthly, at-will basis, Plaintiffs and members of the plaintiff class are contractually responsible for providing said services to their customers.

34. Defendant intentionally designed, developed and distributed Version 5.0 to interfere with, interrupt, alter and/or disable the operation of non-AOL internet software installed on individual computers, thereby preventing customers from utilizing and/or continuing their relationships with non-AOL internet access providers and interfering with Plaintiffs's and the plaintiff class's ability to provide internet access to their customers through affected computers.

35. Defendant intentionally and/or willfully designed and developed the Version 5.0 to interfere with, interrupt, alter and/or disable the operation of non-AOL internet software for the unlawful purpose of causing damage to Plaintiffs and members of the plaintiff class in their lawful business.

36. Defendant employed unlawful means to encourage the installation and use of Version 5.0 by consumers including the following:

- a.(i). Defendant intentionally and/or fraudulently concealed from installers that Version 5.0 makes significant, unnecessary additions and alterations to a computer's operating system, communications configurations and settings.
- (ii). Defendant intentionally and/or fraudulently concealed from installers that Version 5.0 would alter the host computer's communications configurations, settings and system files, thereby interfering with the operation of their computers and disrupting and/or terminating their use of non-AOL internet software and providers.
- (iii). Defendant intentionally and/or fraudulently misrepresented to installers that Version 5.0 would not become their default browser unless the installer made an affirmative choice by clicking on the "yes" prompt and misrepresented the effect that installing Version 5.0 would have on the computer and the user of the software. Defendant had been warned about the

effects of Version 5.0 on non-AOL internet software and knew or should have known that these misrepresentations were false.

(iv). Defendants intentionally represented that Version 5.0 was of a particular standard and quality which it was not. Defendants concealed the fact that Version 5.0 was defective and would alter the host computer's communications configurations, settings and system files, thereby interfering with the operation of their computers and disrupting and/or terminating their use of non-AOL internet software and providers.

(v). Defendant made these representations and/or actively concealed this material information with the intention of deceiving customers and/or fraudulently inducing customers to install Version 5.0.

(vi). Defendant's conduct was fraudulent and/or amounted to unfair or deceptive trade practices, as prohibited by Md. Code Ann., Commercial Law, §§13-301 et seq.

b. Through Version 5.0, Defendant intentionally accessed customer computers and altered system settings, computer programs, files and code, interrupting the operation of non-AOL internet software and/or other operating system programs. Said access, alteration and damage was unauthorized and unlawful pursuant to Md. Code Ann., Art. 27, § 146.

37. Defendant further created or continued an unlawful restraint of trade. Through its unfair and deceptive practices, Defendant has, or has attempted to, monopolize the trade and/or commerce in the internet service market in violation of Md. Code Ann., Commercial Law, § 11-204. The purpose of Defendant's conduct was to exclude competition and/or to unlawfully control or affect prices.

38. Defendants unlawful conduct constitutes direct and tortious interference with the business relations of the Plaintiffs and members of the plaintiff class.

39. As a proximate result of Defendants' actions, Plaintiffs and members of the plaintiff class have been prevented from providing the internet services required by their contracts and customers have been unable to utilize and/or have terminated their internet service contracts with Plaintiffs and members of the plaintiff class.

40. As a direct result of Defendants' actions, Plaintiffs and members of the Plaintiff class suffered a substantial loss of revenue in the form of canceled contracts, underutilization of services and the costly expense of many hours of technical support hours in an attempt to repair

the problems caused by Version 5.0.

WHEREFORE, Plaintiffs, individually and on behalf of the plaintiff class, demand judgment against Defendant for compensatory and punitive damages, litigation expenses, attorneys' fees, injunctive relief, and such other further relief as the Court may deem necessary and appropriate.

**COUNT II: INTERFERENCE WITH CONTRACTUAL RELATIONS**

41. Plaintiffs reallege paragraphs 1-31 of the amended complaint and incorporates same by reference in Count I as if fully set forth herein

42. Plaintiffs and members of the plaintiff subclass are internet access providers that provide internet service to certain customers pursuant to existing, term-certain, internet service contracts with those customers.

43. Defendant knew that Plaintiffs and members of the plaintiff subclass had internet service contracts with individuals who would install Version 5.0. This is directly evidenced by the fact that Defendant asks installers of Version 5.0 whether they would like to use Version 5.0 as their default browser. The term "default" presupposes and recognizes the existence of agreements with other, non-AOL internet providers.

44. Defendant intentionally designed, developed and distributed Version 5.0 to interfere with, interrupt, alter and/or disable the operation of non-AOL internet software installed on individual computers, thereby preventing customers from utilizing and/or continuing their relationships with non-AOL internet access providers and interfering with Plaintiffs' and the plaintiff subclass's ability to provide internet access to their customers through affected computers.

45. Defendant intentionally and/or willfully designed and developed the Version 5.0 to interfere with, interrupt, alter and/or disable the operation of non-AOL internet software for the unlawful purpose of causing damage to Plaintiffs and members of the plaintiff subclass in their lawful business.

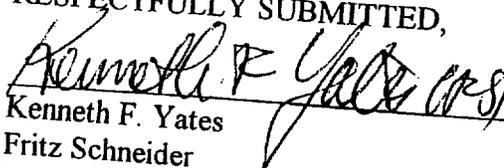
46. Defendants unlawful conduct constitutes direct and tortious interference with the business relations of the Plaintiffs and members of the plaintiff subclass.

47. As a proximate result of Defendants' actions, Plaintiffs and members of the plaintiff subclass have been prevented from providing the internet services required by their contracts and customers have been unable to utilize and/or have terminated their internet service contracts with Plaintiffs and members of the plaintiff class.

48. As a direct result of Defendants' actions, Plaintiffs and members of the plaintiff subclass suffered a substantial loss of revenue in the form of underutilization of services and the costly expense of many hours of technical support hours in an attempt to repair the problems caused by Version 5.0.

WHEREFORE, Plaintiffs, individually and on behalf of the plaintiff class, demand judgment against Defendant for compensatory and punitive damages, litigation expenses, attorneys' fees, injunctive relief, and such other further relief as the Court may deem necessary and appropriate.

RESPECTFULLY SUBMITTED,

  
Kenneth F. Yates

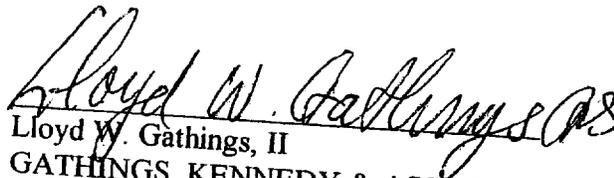
Fritz Schneider

YATES & SCHNEIDER

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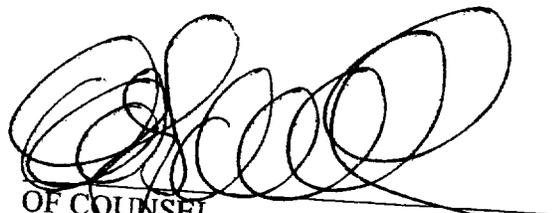
Lloyd W. Gathings, II  
GATHINGS, KENNEDY & ASSOCIATES  
2700 Highway 280 East  
Suite 380  
Birmingham, Alabama 35223  
(205) 803-3006

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing was sent via United States mail to the following on this 28<sup>th</sup> day of August, 2000.

James P. Ulwick, Esquire  
KRAMON & GRAHAM  
One South Street, Suite 2600  
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Eugene F. Assaf  
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Randall J. Boe  
Laura E. Jehl  
AMERICA ONLINE, INC.  
22000 AOL Way  
Dulles, Virginia 20166

  
OF COUNSEL



IN THE  
CIRCUIT COURT FOR  
BALTIMORE CITY

CAPUNET, L.L.C., et al.,

Plaintiffs,

v.

AMERICA ONLINE, INC.,

Defendant.

Case No. 24-C-00-000549 OC

Hon. John C. Themelis

**ORDER**

Upon consideration of Defendant America Online's Motion to Dismiss First Amended Complaint or Transfer Case, and the Court having heard and considered the arguments of counsel, as presented in the briefs and at oral argument, it is, this 17<sup>th</sup> day of July, 2000, by the Circuit Court for Baltimore City,

HEREBY ORDERED AS FOLLOWS:

1. Count I of Plaintiffs' First Amended Complaint (interference with contractual relations) is hereby dismissed. Pursuant to Maryland Rule 2-322(c), the Court grants Plaintiffs leave to amend this Count I.
2. With respect to Count II of the First Amended Complaint (interference with prospective economic relations), Plaintiffs shall file an amended complaint clarifying the "wrongful" or "unlawful" acts that Defendant is alleged to have committed, and whether the contracts between Plaintiffs and their customers that are implicated in this Count are at-will.

3. Plaintiffs shall have 30 days from the date of entry of this Order to file such an amended complaint as set forth in paragraphs 1 and 2 above.

4. In addition, the Court finds -- in view of the unique facts, circumstances and procedural history of this litigation to date -- that the interests of justice and the convenience of the parties require that this case be transferred to the Circuit Court for Montgomery County. Accordingly, pursuant to Maryland Rule 2-327(c), the Court orders that this action be, and hereby is, transferred to the Circuit Court for Montgomery County.

Dated: July 17, 2000

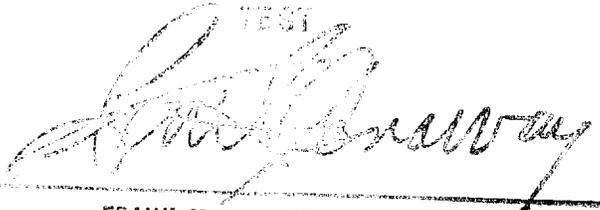
JUDGE:  
JOHN C. THEMELIS

JUDGES SIGNATURE APPEARS  
ON ORIGINAL COPY

Judge

TRUE COPY

TEST



FRANK M. CONAWAY, CLERK



UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

COPY

GALAXY INTERNET SERVICES, INC.,  
On Behalf Of Itself And All Others  
Similarly Situated,

Plaintiff,

v.

AMERICA ONLINE, INC.,

Defendant.

Civil Action No. 00cv10651 GAO

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

FILED IN CLERK'S  
OFFICE  
APR 3 4 33 PM '00

Individual and Representative Plaintiff Galaxy Internet Services, Inc., on behalf of  
itself and all others similarly situated, alleges as follows:

I. NATURE OF THIS ACTION

Plaintiff brings this action on behalf of itself and all other Internet Service Providers ("ISPs") who have subscribers who have downloaded or installed software developed and distributed by Defendant America Online, Inc. ("AOL"), known as Version 5.0 (Version 5.0 and any incremental versions are collectively referred to herein as "AOL 5.0"), or may in the future download or install AOL 5.0, onto their personal computers. Defendant conceived, developed and distributed AOL 5.0 pursuant to an unlawful scheme to injure and destroy its competitors in the Internet Service Market. Plaintiff and class members, who are competitors of the Defendant in the Internet Service Market, have suffered economic losses because the computer configurations of their subscribers were changed by America Online Version 5.0 in a manner which disrupted and interfered with existing and potential

subscribers' ability to access the services provided by Plaintiff and class members. Plaintiff and the Class have suffered irreparable harm to their relationships with existing subscribers and have been precluded from entering into relationships with potential subscribers, as a direct result of the problems caused by America Online Version 5.0. In addition, Plaintiff and class members have been forced to incur substantial expenses as a direct result of the installation of America Online Version 5.0 on their subscribers' personal computers, including but not limited to additional technical support costs and related expenses incurred to diagnose, analyze and resolve the problems caused by America Online Version 5.0. Plaintiff seeks relief from Defendant for attempted monopolization of the Internet Service Market, in violation of 15 U.S.C. §2, attempted elimination of competition in the Internet Service market, in violation of 15 U.S.C. §14, unfair competition, unfair and deceptive trade practices, wrongful interference with existing and prospective contractual relations, violation of 18 U.S.C. §1030, concerning fraud and related activity in connection with computers, and violation of 18 U.S.C. §2701, concerning unauthorized access or prevention of access to electronic communications.

## II. PARTIES

1. Plaintiff, Galaxy Internet Services, Inc., is corporation duly organized under the laws of the Commonwealth of Massachusetts, with its principal place of business in Newton, Massachusetts.
2. Defendant, America Online, Inc., ("AOL") is an internet service provider and a Delaware corporation. AOL's executive offices are located in Dulles, Virginia. AOL