

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Ekwan E. Rhow, SBN 174604 Mary H. Hansel, SBN 223515 BIRD MARELLA BOXER WOLPERT NESSIM DROOKS & LINCENBERG P.C. 1875 Century Park East, 23rd Floor, Los Angeles, CA 90067 TELEPHONE NO.: (310) 201-2100 FAX NO.: (310) 201-2110		FOR COURT USE ONLY	
ATTORNEY FOR (Name): Plaintiff NETGEAR, INC.		<div style="font-size: 2em; font-weight: bold; opacity: 0.5;">FILED</div> <div style="font-size: 1.5em; font-weight: bold; opacity: 0.5;">JAN 23 2014</div> <div style="font-size: 1.2em; font-weight: bold; opacity: 0.5;">DAVID H. YAMASAKI Chief Executive Officer Superior Court of CA, County of Santa Clara</div>	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA STREET ADDRESS: 191 North First Street MAILING ADDRESS: 191 North First Street CITY AND ZIP CODE: San Jose, CA 95113 BRANCH NAME: Downtown Superior Court			
CASE NAME: NETGEAR, INC., a corporation v. PHOENIX NETWORK SOLUTIONS, an entity; and DOES 1 through 50, inclusive			
CIVIL CASE COVER SHEET <input checked="" type="checkbox"/> Unlimited (Amount demanded exceeds \$25,000)		Complex Case Designation <input type="checkbox"/> Counter <input type="checkbox"/> Joinder Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)	
<input type="checkbox"/> Limited (Amount demanded is \$25,000 or less)		CASE NUMBER: 114CV259508 JUDGE: DEPT:	

Items 1-6 below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:

<p>Auto Tort</p> <input type="checkbox"/> Auto (22) <input type="checkbox"/> Uninsured motorist (46) Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort <input type="checkbox"/> Asbestos (04) <input type="checkbox"/> Product liability (24) <input type="checkbox"/> Medical malpractice (45) <input type="checkbox"/> Other PI/PD/WD (23) Non-PI/PD/WD (Other) Tort <input checked="" type="checkbox"/> Business tort/unfair business practice (07) <input type="checkbox"/> Civil rights (08) <input type="checkbox"/> Defamation (13) <input type="checkbox"/> Fraud (16) <input type="checkbox"/> Intellectual property (19) <input type="checkbox"/> Professional negligence (25) <input type="checkbox"/> Other non-PI/PD/WD tort (35) Employment <input type="checkbox"/> Wrongful termination (36) <input type="checkbox"/> Other employment (15)	<p>Contract</p> <input type="checkbox"/> Breach of contract/warranty (06) <input type="checkbox"/> Rule 3.740 collections (09) <input type="checkbox"/> Other collections (09) <input type="checkbox"/> Insurance coverage (18) <input type="checkbox"/> Other contract (37) Real Property <input type="checkbox"/> Eminent domain/Inverse condemnation (14) <input type="checkbox"/> Wrongful eviction (33) <input type="checkbox"/> Other real property (26) Unlawful Detainer <input type="checkbox"/> Commercial (31) <input type="checkbox"/> Residential (32) <input type="checkbox"/> Drugs (38) Judicial Review <input type="checkbox"/> Asset forfeiture (05) <input type="checkbox"/> Petition re: arbitration award (11) <input type="checkbox"/> Writ of mandate (02) <input type="checkbox"/> Other judicial review (39)	<p>Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400-3.403)</p> <input type="checkbox"/> Antitrust/Trade regulation (03) <input type="checkbox"/> Construction defect (10) <input type="checkbox"/> Mass tort (40) <input type="checkbox"/> Securities litigation (28) <input type="checkbox"/> Environmental/Toxic tort (30) <input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41) Enforcement of Judgment <input type="checkbox"/> Enforcement of judgment (20) Miscellaneous Civil Complaint <input type="checkbox"/> RICO (27) <input type="checkbox"/> Other complaint (not specified above) (42) Miscellaneous Civil Petition <input type="checkbox"/> Partnership and corporate governance (21) <input type="checkbox"/> Other petition (not specified above) (43)
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2. This case is is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:
- | | |
|--|--|
| a. <input type="checkbox"/> Large number of separately represented parties | d. <input type="checkbox"/> Large number of witnesses |
| b. <input type="checkbox"/> Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve | e. <input type="checkbox"/> Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court |
| c. <input type="checkbox"/> Substantial amount of documentary evidence | f. <input type="checkbox"/> Substantial postjudgment judicial supervision |
3. Remedies sought (check all that apply): a. monetary b. nonmonetary; declaratory or injunctive relief c. punitive
4. Number of causes of action (specify): 3
5. This case is is not a class action suit.
6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)
- Date: January 23, 2014

Mary H. Hansel
(TYPE OR PRINT NAME)

Mary H. Hansel
(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

FILED

COPY

INSTRUCTIONS ON HOW TO COMPLETE THE COVER SHEET

To Plaintiffs and Others Filing First Papers. If you are filing a first paper (for example, a complaint) in a civil case, you **must** complete and file, along with your first paper, the *Civil Case Cover Sheet* contained on page 1. This information will be used to compile statistics about the types and numbers of cases filed. You must complete items 1 through 6 on the sheet. In item 1, you must check **one** box for the case type that best describes the case. If the case fits both a general and a more specific type of case listed in item 1, check the more specific one. If the case has multiple causes of action, check the box that best indicates the **primary** cause of action. To assist you in completing the sheet, examples of the cases that belong under each case type in item 1 are provided below. A cover sheet must be filed only with your initial paper. Failure to file a cover sheet with the first paper filed in a civil case may subject a party, its counsel, or both to sanctions under rules 2.30 and 3.220 of the California Rules of Court.

To Parties in Rule 3.740 Collections Cases. A "collections case" under rule 3.740 is defined as an action for recovery of money owed in a sum stated to be certain that is not more than \$25,000, exclusive of interest and attorney's fees, arising from a transaction in which property, services, or money was acquired on credit. A collections case does not include an action seeking the following: (1) tort damages, (2) punitive damages, (3) recovery of real property, (4) recovery of personal property, or (5) a prejudgment writ of attachment. The identification of a case as a rule 3.740 collections case on this form means that it will be exempt from the general time-for-service requirements and case management rules, unless a defendant files a responsive pleading. A rule 3.740 collections case will be subject to the requirements for service and obtaining a judgment in rule 3.740.

To Parties in Complex Cases. In complex cases only, parties must also use the *Civil Case Cover Sheet* to designate whether the case is complex. If a plaintiff believes the case is complex under rule 3.400 of the California Rules of Court, this must be indicated by completing the appropriate boxes in items 1 and 2. If a plaintiff designates a case as complex, the cover sheet must be served with the complaint on all parties to the action. A defendant may file and serve no later than the time of its first appearance a joinder in the plaintiff's designation, a counter-designation that the case is not complex, or, if the plaintiff has made no designation, a designation that the case is complex.

CASE TYPES AND EXAMPLES

<p>Auto Tort</p> <ul style="list-style-type: none"> Auto (22)—Personal Injury/Property Damage/Wrongful Death Uninsured Motorist (46) (<i>if the case involves an uninsured motorist claim subject to arbitration, check this item instead of Auto</i>) <p>Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort</p> <ul style="list-style-type: none"> Asbestos (04) <ul style="list-style-type: none"> Asbestos Property Damage Asbestos Personal Injury/Wrongful Death Product Liability (<i>not asbestos or toxic/environmental</i>) (24) Medical Malpractice (45) <ul style="list-style-type: none"> Medical Malpractice—Physicians & Surgeons Other Professional Health Care Malpractice Other PI/PD/WD (23) <ul style="list-style-type: none"> Premises Liability (e.g., slip and fall) Intentional Bodily Injury/PD/WD (e.g., assault, vandalism) Intentional Infliction of Emotional Distress Negligent Infliction of Emotional Distress Other PI/PD/WD <p>Non-PI/PD/WD (Other) Tort</p> <ul style="list-style-type: none"> Business Tort/Unfair Business Practice (07) Civil Rights (e.g., discrimination, false arrest) (<i>not civil harassment</i>) (08) Defamation (e.g., slander, libel) (13) Fraud (16) Intellectual Property (19) Professional Negligence (25) <ul style="list-style-type: none"> Legal Malpractice Other Professional Malpractice (<i>not medical or legal</i>) Other Non-PI/PD/WD Tort (35) <p>Employment</p> <ul style="list-style-type: none"> Wrongful Termination (36) Other Employment (15) 	<p>Contract</p> <ul style="list-style-type: none"> Breach of Contract/Warranty (06) <ul style="list-style-type: none"> Breach of Rental/Lease Contract (<i>not unlawful detainer or wrongful eviction</i>) Contract/Warranty Breach—Seller Plaintiff (<i>not fraud or negligence</i>) Negligent Breach of Contract/Warranty Other Breach of Contract/Warranty <p>Collections (e.g., money owed, open book accounts) (09)</p> <p>Collection Case—Seller Plaintiff</p> <p>Other Promissory Note/Collections Case</p> <p>Insurance Coverage (<i>not provisionally complex</i>) (18)</p> <ul style="list-style-type: none"> Auto Subrogation Other Coverage <p>Other Contract (37)</p> <ul style="list-style-type: none"> Contractual Fraud Other Contract Dispute <p>Real Property</p> <ul style="list-style-type: none"> Eminent Domain/Inverse Condemnation (14) Wrongful Eviction (33) Other Real Property (e.g., quiet title) (26) <ul style="list-style-type: none"> Writ of Possession of Real Property Mortgage Foreclosure Quiet Title Other Real Property (<i>not eminent domain, landlord/tenant, or foreclosure</i>) <p>Unlawful Detainer</p> <ul style="list-style-type: none"> Commercial (31) Residential (32) Drugs (38) (<i>if the case involves illegal drugs, check this item; otherwise, report as Commercial or Residential</i>) <p>Judicial Review</p> <ul style="list-style-type: none"> Asset Forfeiture (05) Petition Re: Arbitration Award (11) Writ of Mandate (02) <ul style="list-style-type: none"> Writ—Administrative Mandamus Writ—Mandamus on Limited Court Case Matter Writ—Other Limited Court Case Review Other Judicial Review (39) <ul style="list-style-type: none"> Review of Health Officer Order Notice of Appeal—Labor Commissioner Appeals 	<p>Provisionally Complex Civil Litigation (Cal. Rules of Court Rules 3.400–3.403)</p> <ul style="list-style-type: none"> Antitrust/Trade Regulation (03) Construction Defect (10) Claims Involving Mass Tort (40) Securities Litigation (28) Environmental/Toxic Tort (30) Insurance Coverage Claims (<i>arising from provisionally complex case type listed above</i>) (41) <p>Enforcement of Judgment</p> <ul style="list-style-type: none"> Enforcement of Judgment (20) <ul style="list-style-type: none"> Abstract of Judgment (Out of County) Confession of Judgment (<i>non-domestic relations</i>) Sister State Judgment Administrative Agency Award (<i>not unpaid taxes</i>) Petition/Certification of Entry of Judgment on Unpaid Taxes Other Enforcement of Judgment Case <p>Miscellaneous Civil Complaint</p> <ul style="list-style-type: none"> RICO (27) Other Complaint (<i>not specified above</i>) (42) Declaratory Relief Only Injunctive Relief Only (<i>non-harassment</i>) Mechanics Lien Other Commercial Complaint Case (<i>non-tort/non-complex</i>) Other Civil Complaint (<i>non-tort/non-complex</i>) <p>Miscellaneous Civil Petition</p> <ul style="list-style-type: none"> Partnership and Corporate Governance (21) Other Petition (<i>not specified above</i>) (43) <ul style="list-style-type: none"> Civil Harassment Workplace Violence Elder/Dependent Adult Abuse Election Contest Petition for Name Change Petition for Relief From Late Claim Other Civil Petition
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SUMMONS
(CITACION JUDICIAL)

NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):
PHOENIX NETWORK SOLUTIONS, an entity; and DOES 1 through 50,
inclusive

YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTÁ DEMANDANDO EL DEMANDANTE):
NETGEAR, INC., a corporation

SUM-100
FOR COURT USE ONLY
SOLO PARA USO DE LA
JAN 23 2014
DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of CA, County of Santa Clara
By T. Gagliardi Deputy

COPY

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association. NOTE: The court has a statutory lien for waived fees and costs on any settlement or arbitration award of \$10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case. ¡AVISO! Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.sucorte.ca.gov), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.sucorte.ca.gov) o poniéndose en contacto con la corte o el colegio de abogados locales. AVISO: Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de \$10,000 ó más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.

The name and address of the court is:
(El nombre y dirección de la corte es):
Superior Court of the State of California
County of Santa Clara
191 North First Street, San Jose, CA 95113

CASE NUMBER 114CV259508
(Número del Caso):

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):
Ekwan E. Rhow-SBN 174604; Mary H. Hansel-SBN 223515
BIRD MARELLA BOXER WOLPERT NESSIM DROOKS & LINCENBERG P.C.
1875 Century Park East, 23rd Floor, Los Angeles, CA 90067
Telephone: (310) 201-2100/Facsimile: (310) 201-2100

DATE: JAN 23 2014
(Fecha) Clerk, by T. Gagliardi Deputy (Secretario) (Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)
(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

[SEAL]

NOTICE TO THE PERSON SERVED: You are served

- 1. as an individual defendant.
- 2. as the person sued under the fictitious name of (specify):
- 3. on behalf of (specify):
undér: CCP 416.10 (corporation) CCP 416.60 (minor)
 CCP 416.20 (defunct corporation) CCP 416.70 (conservatee)
 CCP 416.40 (association or partnership) CCP 416.90 (authorized person)
 other (specify):
- 4. by personal delivery on (date):

Form Adopted for Mandatory Use
Judicial Council of California
SUM-100 (Rev. July 1, 2009)
FAXED

SUMMONS

American LegalNet, Inc.
www.FormsWorkflow.com

Page 1 of 1
Code of Civil Procedure §§ 412.20, 465
www.courtinfo.ca.gov

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5 Telephone: (310) 201-2100
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6 Attorneys for Plaintiff
7 NETGEAR, INC.

FILED (ENDORSED)
JAN 23 2014
DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of CA, County of Santa Clara
By: **T. Gagliardi** Deputy

8 SUPERIOR COURT OF CALIFORNIA
9 FOR THE COUNTY OF SANTA CLARA

10
11 NETGEAR, INC., a corporation,
12 Plaintiff,
13 vs.
14 PHOENIX NETWORK SOLUTIONS, an
15 entity; and DOES 1 through 50, inclusive,
16 Defendants.

CASE NO. 114CV259508

COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF

DEMAND FOR JURY TRIAL

17
18 COMPLAINT

19 Plaintiff NETGEAR, INC. ("NETGEAR"), by undersigned counsel, complains
20 against Phoenix Network Solutions ("Phoenix") and DOES 1 through 50, inclusive, as
21 follows:

22 SUMMARY OF CLAIMS

23 1. This action seeks permanent injunctive relief and damages for false
24 advertising in violation of Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a),
25 injunctive relief for unfair competition in violation of California Business & Professions
26 Code § 17200, *et seq.*, and injunctive relief for false advertising pursuant to California
27 Business & Professions Code § 17500, *et seq.*
28

FAXED

1 **PARTIES**

2 2. Plaintiff NETGEAR is a corporation organized and existing pursuant to
3 the laws of Delaware with its headquarters and principal place of business in San Jose,
4 California. NETGEAR is an established manufacturer of computer networking
5 equipment and other hardware, including wireless internet routers. NETGEAR is, and
6 has been for years, the preeminent domestic manufacturer and distributor of wireless
7 routers, accounting for approximately 40% of domestic home wireless router sales in
8 2012. NETGEAR’s wireless networking equipment was and is marketed, promoted and
9 sold in interstate commerce throughout the United States, through a network of
10 Authorized Resellers as further alleged and defined hereinbelow.

11 3. Defendant Phoenix is a retail seller of computer networking hardware
12 including, among other products, wireless routers.

13 4. Phoenix markets, promotes and sells at retail computer networking
14 equipment, including products manufactured by NETGEAR, in interstate commerce
15 throughout the United States, including in Santa Clara County, California. Because
16 Phoenix’s conduct caused injury to NETGEAR in this County, jurisdiction and venue
17 are proper here.

18 5. NETGEAR is ignorant of the true names or capacities of the defendants
19 sued herein under the fictitious names Does 1 through 50. At such time as these
20 defendants’ true names become known to NETGEAR, it will seek leave from this Court
21 to amend this Complaint to insert their true names and capacities.

22 **STATEMENT OF FACTS**

23 **NETGEAR’s Authorized Distribution Channel.**

24 6. To ensure the quality of NETGEAR products that end users purchase,
25 NETGEAR has established networks of distributors and retailers authorized to sell at
26 retail NETGEAR products (“Authorized Resellers”). Authorized Resellers must meet
27 certain requirements NETGEAR prescribes, such as holding proper business licensure
28 for the jurisdiction or jurisdictions in which they operate. Only NETGEAR products

1 sold through Authorized Resellers are covered by NETGEAR's warranty and
2 NETGEAR's customer service program.

3 7. Authorized Resellers are required to purchase NETGEAR products
4 directly from NETGEAR (or from authorized wholesalers or distributors) at wholesale
5 prices.

6 8. Phoenix is not an Authorized Reseller of NETGEAR products. On
7 information and belief, NETGEAR alleges Phoenix did not acquire the NETGEAR
8 products it sells at retail from a NETGEAR authorized distributor.

9 **Phoenix's Unauthorized And Deceptive Sale Of NETGEAR Products.**

10 9. Phoenix offers products for retail sale to the public through the Amazon
11 Marketplace, an online platform that permits sellers to create listings for their products
12 that Amazon users can search for, browse, and purchase. Phoenix's Amazon
13 Marketplace listings include items that are falsely advertised as being offered "by
14 Netgear." The products Phoenix has offered for sale as "by Netgear" (collectively
15 "Unauthorized Products") include (but on information and belief are not limited to):

- 16 a. NETGEAR Nighthawk AC1900 Dual Band Wifi Gigabit Router
17 (R7000).

18 10. On information and belief, Phoenix did not purchase the Unauthorized
19 Products from Authorized wholesalers, or distributors. Phoenix often offers the
20 Unauthorized Products for sale at prices below NETGEAR's authorized wholesalers'
21 and distributors' acquisition cost. This means Phoenix would lose money from every
22 such sale of the Unauthorized Products at the prices it offers if it were selling new
23 products acquired from NETGEAR or NETGEAR's authorized distributors. This also
24 makes it practically impossible for NETGEAR Authorized Resellers to compete with
25 Phoenix and remain in business.

26 11. NETGEAR has not authorized Phoenix to advertise products as being
27 offered "by Netgear."

28

1 12. Phoenix's Amazon Marketplace listings do not disclose that NETGEAR
2 has not authorized Phoenix to sell the Unauthorized Products, that the Unauthorized
3 Products it offers carry no manufacturer's warranty, or that they are not covered by
4 NETGEAR's technical support program. Rather, Phoenix misrepresents that each of the
5 Unauthorized Products is offered "by Netgear."

6 13. Phoenix's misrepresentations and omissions are likely to deceive
7 consumers into believing (1) that NETGEAR itself is selling, or has authorized the sale
8 of, the Unauthorized Products, (2) that NETGEAR's manufacturer's warranty covers
9 the Unauthorized Products, and (3) that NETGEAR's technical support program covers
10 the Unauthorized Products. Phoenix's deception is material and likely to influence
11 reasonable consumers' decisions whether to purchase the Unauthorized Products from
12 Phoenix or purchase new NETGEAR products from an Authorized Reseller instead.

13 **NETGEAR is Harmed By Phoenix's Unfair Competition, False Representations and**
14 **Other Unlawful Activity.**

15 14. NETGEAR (through a combination of advertising, business planning,
16 quality design and reliable manufacturing) has obtained a significant domestic share of
17 the wireless networking market, accounting for approximately 40% of domestic home
18 wireless router sales in 2012. A sizeable portion of NETGEAR's market share is
19 comprised of brand-loyal, tech-savvy consumers familiar with NETGEAR's reputation
20 for wireless network equipment of the highest available quality.

21 15. As a result of Phoenix's unlawful, unfair, and deceptive conduct as
22 alleged above, NETGEAR has lost expected sales of its premium wireless networking
23 equipment. Specifically, Phoenix's conduct has caused consumers to purchase
24 Unauthorized Products from Phoenix, rather than purchasing NETGEAR products from
25 NETGEAR or its Authorized Resellers, depriving NETGEAR of revenue it would have
26 earned from direct sales or sales to Authorized Resellers.

27 16. Additionally, Phoenix's unauthorized sales of the Unauthorized Products
28 at prices below what Authorized Resellers charge creates downward pressure on the

1 retail prices of NETGEAR's products, reducing the prices at which consumers are
2 willing to purchase NETGEAR's products from NETGEAR and its Authorized
3 Resellers.

4 17. Phoenix's unauthorized sales of NETGEAR's products also injure
5 NETGEAR by harming its channels of distribution of its products. NETGEAR's
6 business depends on maintaining and growing a network of loyal Authorized Resellers
7 that can profitably resell NETGEAR products at retail prices. Unauthorized sellers, like
8 Phoenix, have captured a share of NETGEAR's wireless market by deceptively,
9 unfairly, and unlawfully marketing and selling the Unauthorized Products in
10 competition with NETGEAR's Authorized Resellers. Phoenix's deceptive, unfair, and
11 unlawful activities thus injure NETGEAR by discouraging current and potential
12 Authorized Resellers from carrying NETGEAR products.

13 **FIRST CAUSE OF ACTION**

14 **False Advertising Under §43(a) of the Lanham Act**

15 18. NETGEAR hereby repeats, repleads, and incorporates herein by reference
16 as though fully set forth each and every allegation contained in paragraphs 1 through 17
17 above.

18 19. As alleged herein, Phoenix has falsely stated in Amazon Marketplace
19 listings that it offers wireless networking equipment "by Netgear," namely the
20 Unauthorized Products, without disclosing that NETGEAR has not authorized it to sell
21 the Unauthorized Products, that the Unauthorized Products carry no manufacturer's
22 warranty, and that the Unauthorized Products are not covered by NETGEAR's technical
23 support program.

24 20. Phoenix made such false and misleading statements and omissions
25 willfully, intentionally, with full knowledge of the falsity thereof, and with the intent to
26 deceive and mislead potential purchasers.

27 21. Phoenix's acts constitute material false and misleading omissions and
28 representations of fact in a commercial advertisement or promotion which have

1 deceived or are likely to deceive a substantial segment of the present or potential
2 purchasers of the Unauthorized Products, in violation of Section 43(a) of the Lanham
3 Act.

4 22. Phoenix has used and, on information and belief, intends to continue to
5 use, these false statements of fact in advertising and promotion in connection with the
6 sale of the Unauthorized Products to deceive potential purchasers of these Unauthorized
7 Products and to improperly divert sales of Unauthorized Products away from new
8 products sold by NETGEAR or by NETGEAR's Authorized Resellers.

9 23. Phoenix's false statements in advertising and promotion have caused
10 irreparable harm to NETGEAR and, absent the issuance of an injunction, will continue
11 to cause irreparable harm to NETGEAR. As such, NETGEAR has no adequate remedy
12 at law.

13 24. NETGEAR is informed and believes and on that basis alleges that, had the
14 purchasers of the Unauthorized Products known that NETGEAR has not authorized
15 Phoenix to sell the Unauthorized Products, that the Unauthorized Products carry no
16 manufacturer's warranty, and that the Unauthorized Products are not covered by
17 NETGEAR's technical support program, a substantial portion of these consumers would
18 have purchased comparable NETGEAR products from Authorized Resellers instead.
19 Phoenix's false and misleading advertising and promotion of the Unauthorized Products
20 at prices below what Authorized Resellers charge also injures NETGEAR by reducing
21 the prices consumers are willing to pay for products from NETGEAR and its
22 Authorized Resellers. Additionally, Phoenix's false and misleading advertising and
23 promotion of the Unauthorized Products also injures NETGEAR by discouraging
24 current and potential Authorized Resellers from offering NETGEAR products. As such,
25 Phoenix's false statements have caused economic harm to NETGEAR in an amount to
26 be determined at trial.

1 **SECOND CAUSE OF ACTION**

2 **Unfair Competition Pursuant to California Business & Professions**

3 **Code § 17200, et seq.**

4 25. NETGEAR hereby repeats, repleads, and incorporates herein by reference
5 as though fully set forth each and every allegation contained in paragraphs 1 through 24
6 above.

7 26. Phoenix has engaged in unlawful, unfair and fraudulent activities in a
8 deliberate scheme to unfairly compete with NETGEAR in the sale of wireless
9 networking products. Such activities include, but are not limited to, knowingly offering
10 NETGEAR products for sale, falsely representing that the products are offered “by
11 Netgear,” without disclosing that NETGEAR has not authorized it to sell the product,
12 that the products carry no manufacturer’s warranty, and that the products are not
13 covered by NETGEAR’s technical support program.

14 27. Phoenix’s actions are forbidden by law, offend established public policy,
15 are unethical, oppressive, unscrupulous, substantially injurious to consumers, constitute
16 false advertising, and are likely to deceive the public. As such, Phoenix’s actions
17 constitute unfair, unlawful, and fraudulent business practices within the meaning of
18 California Business & Professions Code § 17200, et seq.

19 28. As a proximate result of Phoenix’s actions constituting unfair competition,
20 NETGEAR has suffered injury in fact and economic harm in the form of diverted sales
21 and lost market share.

22 29. Phoenix’s wrongful conduct has caused and will continue to cause great
23 and irreparable injury to NETGEAR’s business in that NETGEAR has lost considerable
24 sales, and will continue to lose considerable sales, unless Phoenix is enjoined from its
25 unlawful, unfair, and fraudulent business practices. NETGEAR has no adequate remedy
26 at law for the injuries it is currently suffering in that Phoenix will continue to
27 wrongfully offer for sale, in California and the rest of the United States, NETGEAR
28 products, falsely representing that they are offered “by Netgear,” without disclosing that

1 NETGEAR has not authorized it to sell the products, that they carry no manufacturer's
2 warranty, and that they are not covered by NETGEAR's technical support program.
3 Accordingly, NETGEAR is entitled to a permanent injunction against Phoenix to enjoin
4 it from such unfair, unlawful and fraudulent business practices.

5 **THIRD CAUSE OF ACTION**

6 **False Advertising Pursuant to California Business & Professions**

7 **Code § 17500, et seq.**

8 30. NETGEAR hereby repeats, repleads, and incorporates herein by reference
9 as though fully set forth each and every allegation contained in paragraphs 1 through 29
10 above.

11 31. Phoenix has falsely stated in its Amazon Marketplace listings that it offers
12 wireless networking equipment "by Netgear," namely the Unauthorized Products,
13 without disclosing that NETGEAR has not authorized it to sell the Unauthorized
14 Products, that the Unauthorized Products it offers carry no manufacturer's warranty, and
15 that they are not covered by NETGEAR's technical support program.

16 32. Phoenix made such statements willfully, intentionally, with full
17 knowledge of the falsity of such statements, and with the intent to deceive and mislead
18 the potential purchasers of the Unauthorized Products.

19 33. Phoenix's acts constitute material false and misleading omissions and
20 representations of fact in a commercial advertisement or promotion which have
21 deceived or are likely to deceive a substantial segment of the present or potential
22 purchasers of wireless networking equipment in violation of California Business &
23 Professions Code § 17500, et seq.

24 34. Phoenix has used and, on information and belief, intends to continue to
25 use, these false statements of fact in connection with the sale of the Unauthorized
26 Products to deceive potential purchasers about the quality of the Unauthorized Products
27 it offers and to conceal its status as an unauthorized seller of NETGEAR products in
28

1 order to improperly divert sales away from NETGEAR's Authorized Resellers and
2 towards Phoenix.

3 35. Phoenix's false statements have caused irreparable harm to NETGEAR
4 and, absent the issuance of an injunction, will continue to cause irreparable harm to
5 NETGEAR. As such, NETGEAR has no adequate remedy at law.

6 **PRAYER**

7 **WHEREFORE**, NETGEAR prays for judgment as follows:

8 A. That Phoenix, its agents, servants, employees, successors, assigns, and all
9 those controlled by them or in active concert or participation with them, be permanently
10 enjoined, to the fullest extent of this Court's jurisdiction:

11 1. From making false claims in advertising or promotion of wireless
12 networking equipment, including but not limited to claiming that the Unauthorized
13 Products are being offered by NETGEAR.

14 2. From advertising or promoting NETGEAR wireless networking
15 equipment or equipment it is not authorized to sell, without disclosing that such
16 products carry no NETGEAR manufacturer's warranty and that such products are not
17 covered by NETGEAR's technical support program.

18 B. That Phoenix be ordered to pay NETGEAR restitution and damages equal
19 to all gains, profits, and advantages derived from its unlawful and unfair activity.

20 C. That Phoenix be ordered to pay to NETGEAR treble damages pursuant to
21 15 U.S.C. § 1117 for willful false advertising in violation of the Lanham Act.

22 D. That Phoenix be ordered to pay NETGEAR prejudgment interest.

23 E. That Phoenix be ordered to pay NETGEAR's costs of suit and fees and
24 expenses of NETGEAR's attorneys and other professionals pursuant to applicable law,
25 including, without limitation, Section 43(a) of the Lanham Act.

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F. That the Court grant NETGEAR such other relief as the Court deems just.

DATED: January 23, 2014

Ekwan E. Rhow
Mary H. Hansel
BIRD, MARELLA, BOXER, WOLPERT,
NESSIM, DROOKS & LINCENBERG, P.C.

By: Mary H. Hansel
Mary Hansel
Attorneys for Plaintiff
NETGEAR, INC.

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DEMAND FOR JURY TRIAL

NETGEAR requests a trial by jury for each and every one of the above allegations,
counts, claims and causes of action so triable.

DATED: January 23, 2014

Ekwan E. Rhow
Mary H. Hansel
BIRD, MARELLA, BOXER, WOLPERT,
NESSIM, DROOKS & LINCENBERG, P.C.

By: Mary H. Hansel
Mary Hansel
Attorneys for Plaintiff
NETGEAR, INC.

CIVIL LAWSUIT NOTICE

Superior Court of California, County of Santa Clara
191 N. First St., San Jose, CA 95113

ATTACHMENT CV-5012
114 CV 259508

CASE NUMBER: _____

PLEASE READ THIS ENTIRE FORM

PLAINTIFF (the person suing): Within 60 days after filing the lawsuit, you must serve each Defendant with the *Complaint*, *Summons*, an *Alternative Dispute Resolution (ADR) Information Sheet*, and a copy of this *Civil Lawsuit Notice*, and you must file written proof of such service.

DEFENDANT (The person sued): You must do each of the following to protect your rights:

1. You must file a **written response** to the *Complaint*, using the proper legal form or format, in the Clerk's Office of the Court, within **30 days** of the date you were served with the *Summons* and *Complaint*;
2. You must serve by mail a copy of your written response on the Plaintiff's attorney or on the Plaintiff if Plaintiff has no attorney (to "serve by mail" means to have an adult other than yourself mail a copy); and
3. You must attend the first Case Management Conference.

Warning: If you, as the Defendant, do not follow these instructions, you may automatically lose this case.

RULES AND FORMS: You must follow the California Rules of Court and the Superior Court of California, County of Santa Clara Local Civil Rules and use proper forms. You can obtain legal information, view the rules and receive forms, free of charge, from the Self-Help Center at 99 Notre Dame Avenue, San Jose (408-882-2900 x-2926), www.sccselfservice.org (Select "Civil") or from:

- State Rules and Judicial Council Forms: www.courtinfo.ca.gov/forms and www.courtinfo.ca.gov/rules
- Local Rules and Forms: <http://www.sccsuperiorcourt.org/civil/rule1toc.htm>

CASE MANAGEMENT CONFERENCE (CMC): You must meet with the other parties and discuss the case, in person or by telephone, at least 30 calendar days before the CMC. You must also fill out, file and serve a *Case Management Statement* (Judicial Council form CM-110) at least 15 calendar days before the CMC.

You or your attorney must appear at the CMC. You may ask to appear by telephone – see Local Civil Rule 8.

Your Case Management Judge is: Patricia Lucas Department: 2

The 1st CMC is scheduled for: (Completed by Clerk of Court)
 Date: MAY 27 2014 Time: 3:00pm in Department: 2

The next CMC is scheduled for: (Completed by party if the 1st CMC was continued or has passed)
 Date: _____ Time: _____ in Department: _____

ALTERNATIVE DISPUTE RESOLUTION (ADR): If all parties have appeared and filed a completed *ADR Stipulation Form* (local form CV-5008) at least 15 days before the CMC, the Court will cancel the CMC and mail notice of an ADR Status Conference. Visit the Court's website at www.sccsuperiorcourt.org/civil/ADR/ or call the ADR Administrator (408-882-2100 x-2530) for a list of ADR providers and their qualifications, services, and fees.

WARNING: Sanctions may be imposed if you do not follow the California Rules of Court or the Local Rules of Court.

**SANTA CLARA COUNTY SUPERIOR COURT
ALTERNATIVE DISPUTE RESOLUTION
INFORMATION SHEET**

Many cases can be resolved to the satisfaction of all parties without the necessity of traditional litigation, which can be expensive, time consuming, and stressful. The Court finds that it is in the best interests of the parties that they participate in alternatives to traditional litigation, including arbitration, mediation, neutral evaluation, special masters and referees, and settlement conferences. Therefore, all matters shall be referred to an appropriate form of Alternative Dispute Resolution (ADR) before they are set for trial, unless there is good cause to dispense with the ADR requirement.

What is ADR?

ADR is the general term for a wide variety of dispute resolution processes that are alternatives to litigation. Types of ADR processes include mediation, arbitration, neutral evaluation, special masters and referees, and settlement conferences, among others forms.

What are the advantages of choosing ADR instead of litigation?

ADR can have a number of advantages over litigation:

- **ADR can save time.** A dispute can be resolved in a matter of months, or even weeks, while litigation can take years.
- **ADR can save money.** Attorney's fees, court costs, and expert fees can be reduced or avoided altogether.
- **ADR provides more participation.** Parties have more opportunities with ADR to express their interests and concerns, instead of focusing exclusively on legal rights.
- **ADR provides more control and flexibility.** Parties can choose the ADR process that is most likely to bring a satisfactory resolution to their dispute.
- **ADR can reduce stress.** ADR encourages cooperation and communication, while discouraging the adversarial atmosphere of litigation. Surveys of parties who have participated in an ADR process have found much greater satisfaction than with parties who have gone through litigation.

What are the main forms of ADR offered by the Court?

Mediation is an informal, confidential, flexible and non-binding process in the mediator helps the parties to understand the interests of everyone involved, and their practical and legal choices. The mediator helps the parties to communicate better, explore legal and practical settlement options, and reach an acceptable solution of the problem. The mediator does not decide the solution to the dispute; the parties do.

Mediation may be appropriate when:

- The parties want a non-adversary procedure
- The parties have a continuing business or personal relationship
- Communication problems are interfering with a resolution
- There is an emotional element involved
- The parties are interested in an injunction, consent decree, or other form of equitable relief

Neutral evaluation, sometimes called "Early Neutral Evaluation" or "ENE", is an informal process in which the evaluator, an experienced neutral lawyer, hears a compact presentation of both sides of the case, gives a non-binding assessment of the strengths and weaknesses on each side, and predicts the likely outcome. The evaluator can help parties to identify issues, prepare stipulations, and draft discovery plans. The parties may use the neutral's evaluation to discuss settlement.

Neutral evaluation may be appropriate when:

- The parties are far apart in their view of the law or value of the case
- The case involves a technical issue in which the evaluator has expertise
- Case planning assistance would be helpful and would save legal fees and costs
- The parties are interested in an injunction, consent decree, or other form of equitable relief

-over-

Arbitration is a less formal process than a trial, with no jury. The arbitrator hears the evidence and arguments of the parties and then makes a written decision. The parties can agree to binding or non-binding arbitration. In binding arbitration, the arbitrator's decision is final and completely resolves the case, without the opportunity for appeal. In non-binding arbitration, the arbitrator's decision could resolve the case, without the opportunity for appeal, unless a party timely rejects the arbitrator's decision within 30 days and requests a trial. Private arbitrators are allowed to charge for their time.

Arbitration may be appropriate when:

- The action is for personal injury, property damage, or breach of contract
- Only monetary damages are sought
- Witness testimony, under oath, needs to be evaluated
- An advisory opinion is sought from an experienced litigator (if a non-binding arbitration)

Civil Judge ADR allows parties to have a mediation or settlement conference with an experienced judge of the Superior Court. Mediation is an informal, confidential, flexible and non-binding process in which the judge helps the parties to understand the interests of everyone involved, and their practical and legal choices. A settlement conference is an informal process in which the judge meets with the parties or their attorneys, hears the facts of the dispute, helps identify issues to be resolved, and normally suggests a resolution that the parties may accept or use as a basis for further negotiations. The request for mediation or settlement conference may be made promptly by stipulation (agreement) upon the filing of the Civil complaint and the answer. There is no charge for this service.

Civil Judge ADR may be appropriate when:

- The parties have complex facts to review
- The case involves multiple parties and problems
- The courthouse surroundings would be helpful to the settlement process

Special masters and referees are neutral parties who may be appointed by the court to obtain information or to make specific fact findings that may lead to a resolution of a dispute.

Special masters and referees can be particularly effective in complex cases with a number of parties, like construction disputes.

Settlement conferences are informal processes in which the neutral (a judge or an experienced attorney) meets with the parties or their attorneys, hears the facts of the dispute, helps identify issues to be resolved, and normally suggests a resolution that the parties may accept or use as a basis for further negotiations.

Settlement conferences can be effective when the authority or expertise of the judge or experienced attorney may help the parties reach a resolution.

What kind of disputes can be resolved by ADR?

Although some disputes must go to court, almost any dispute can be resolved through ADR. This includes disputes involving business matters; civil rights; collections; corporations; construction; consumer protection; contracts; copyrights; defamation; disabilities; discrimination; employment; environmental problems; fraud; harassment; health care; housing; insurance; intellectual property; labor; landlord/tenant; media; medical malpractice and other professional negligence; neighborhood problems; partnerships; patents; personal injury; probate; product liability; property damage; real estate; securities; sports; trade secret; and wrongful death, among other matters.

Where can you get assistance with selecting an appropriate form of ADR and a neutral for your case, information about ADR procedures, or answers to other questions about ADR?

Contact:

Santa Clara County Superior Court
ADR Administrator
408-882-2530

Santa Clara County DRPA Coordinator
408-792-2784