

1 ROBERT H. PLATT (Bar No. CA 108533)
MARK S. LEE (Bar No. CA 094103)
2 SETH REAGAN (Bar No. CA 279368)
Manatt, Phelps & Phillips, LLP
3 11355 West Olympic Boulevard
Los Angeles, California 90064-1614
4 Telephone: (310) 312-4000
Facsimile: (310) 312-4224
5 Email: mlee@manatt.com

6 *Attorneys for Plaintiff*
BARRY DILLER

7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10
11 BARRY DILLER, an individual,
12 Plaintiff,

13 vs.

14 BARRYDRILLER CONTENT
SYSTEMS PLC.; BARRY DRILLER,
15 INC.; AEREOKILLER, LLC;
FILMON.COM, INC.; ALKIVIADES
16 DAVID A/K/A ALKI DAVID, an
individual; and DOES 1 through 10,
17 inclusive,

18 Defendants.

Case No.

COMPLAINT FOR:

- (1) FALSE DESIGNATION OF ORIGIN UNDER THE LANHAM ACT (15 U.S.C. § 1125(a), *et seq.*);
(2) VIOLATION OF THE COMMON LAW RIGHT OF PUBLICITY;
(3) VIOLATION OF STATUTORY RIGHT OF PUBLICITY (CALIFORNIA CIVIL CODE § 3344); and
(4) CYBERSQUATTING UNDER THE LANHAM ACT (15 U.S.C. § 1125(e), *et seq.*)

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22 Plaintiff Barry Diller ("Plaintiff"), by his undersigned counsel, hereby alleges
23 as follows:

24 **SUMMARY OF ACTION**

25 1. Plaintiff is one of the most well known business leaders in the United
26 States. Plaintiff is involved with a company, Aereo, Inc. ("Aereo"), that offers
27 consumers the ability to view broadcast television programs on internet-enabled
28

1 devices. Defendants purport to offer a competing service. By way of background,
2 in November 2010, a federal court in New York issued a temporary restraining
3 order prohibiting Defendant FilmOn.com, Inc. from offering its services in the
4 marketplace. It is unclear how, if at all, Defendants' new business differs from the
5 one that was enjoined. In July 2012, the same federal court in New York denied a
6 preliminary injunction brought by certain broadcast companies and allowed Aereo,
7 the company backed by Plaintiff, to continue operating its business.

8 2. Seeking to unfairly capitalize on the success of the new business
9 venture supported by Plaintiff, Defendants devised a scheme to launch what they
10 characterize as a competing business called "BarryDriller.com." Defendants are
11 using Plaintiff's name in their "BarryDriller.com" business to (1) associate their
12 service with Plaintiff, and (2) mislead the public into believing that Defendants'
13 service has been judicially sanctioned. Defendants' actions are designed to divert
14 consumers from the business supported by Plaintiff to Defendants' business, and
15 they have ignored Plaintiff's demand that they stop their misconduct.

16 3. Plaintiff seeks injunctive relief to stop Defendants from engaging in
17 this conduct, and compensatory and punitive damages to compensate him for the
18 harm he has suffered and to punish Defendants for their misconduct.

19 JURISDICTION AND VENUE

20 4. This Court has subject matter jurisdiction over the claims in this
21 action pursuant to 15 U.S.C. § 1121 and 28 U.S.C. § 1331, as well as pendent
22 jurisdiction over the state law claims asserted herein. Venue is proper in this
23 district under 28 U.S.C. § 1391(b) in that, *inter alia*, Defendants are located in and
24 do business in this district, and a substantial portion of the events described in this
25 Complaint occurred in this district.

26 PARTIES

27 5. Plaintiff is an individual who maintains residences in New York and
28 California. Among other positions, Plaintiff currently serves as the Chairman and

1 Senior Executive of internet company IAC/InterActiveCorp.

2 6. On information and belief, Defendant Alki David ("David") is an
3 individual who resides in Beverly Hills, California. David is the founder and
4 owner of various online ventures, including FilmOn.com, Inc., and, Plaintiff is
5 informed and believes, BarryDriller Content Systems Plc., Barry Driller, Inc., and
6 Aereokiller, LLC. Plaintiff is informed and believes that in conjunction with the
7 other Defendants, David operates an internet streaming service called BarryDriller,
8 located at the website BarryDriller.com, and has been personally involved in the
9 infringing activity described herein.

10 7. On information and belief, Defendant FilmOn.com, Inc. is a
11 Delaware corporation with its principal place of business in Beverly Hills,
12 California, that until restrained by a court order in November 2010, operated a
13 service that permitted consumers to view broadcast television programs on
14 internet-enabled devices. Plaintiff is informed and believes that in conjunction
15 with the other Defendants, FilmOn.com, Inc. operates an internet streaming
16 service called BarryDriller, located at the website BarryDriller.com.

17 8. On information and belief, Defendant BarryDriller Content Systems
18 Plc. is a public limited company or other business of unknown type which is doing
19 business in Los Angeles, California. Plaintiff is informed and believes that in
20 conjunction with the other Defendants, BarryDriller Content Systems Plc. operates
21 an internet streaming service called BarryDriller, located at the website
22 BarryDriller.com.

23 9. On information and belief, Defendant Barry Driller, Inc. is a
24 corporation or other business of unknown type, whose place of registration is
25 unknown, and which is doing business in Los Angeles, California. Plaintiff is
26 informed and believes that in conjunction with the other Defendants, Barry Driller,
27 Inc. operates an internet streaming service called BarryDriller, located at the
28 website BarryDriller.com.

1 10. On information and belief, Defendant Aereokiller, LLC is a limited
 2 liability company or other business of unknown type, whose place of registration
 3 is unknown, and which is doing business in Los Angeles, California. Plaintiff is
 4 informed and believes that in conjunction with the other Defendants, Aereokiller,
 5 LLC owns and/or operates an internet streaming service called BarryDriller,
 6 located at the website BarryDriller.com.

7 11. The true names and capacities, whether individual, corporate,
 8 associated, or otherwise, of certain Defendants sued herein as DOES 1-10
 9 inclusive are presently unknown to Plaintiff, who therefore sues these Defendants
 10 by fictitious names. Plaintiff will amend the Complaint to allege their true names
 11 and capacities when ascertained. Plaintiff is informed and believes and thereupon
 12 alleges that all of the named Defendants and DOES 1-10 were or are, in some way
 13 or manner, responsible for and liable to Plaintiff for the events, happenings, and
 14 damages hereinafter set forth below.

15 **GENERAL BACKGROUND**

16 12. Plaintiff began his career in the mailroom of the William Morris
 17 Agency in the 1960's. He later became employed by the American Broadcasting
 18 Company, where he rose to become a senior executive who, among other things,
 19 pioneered the "Movie of the Week" television format.

20 13. Plaintiff went on to become Chairman and CEO of Paramount
 21 Pictures Corporation, where among other things he green-lighted highly
 22 successful motion pictures such as "Grease" and "Raiders of the Lost Ark."

23 14. After approximately ten years with Paramount, Plaintiff became
 24 Chairman and CEO of Fox, Inc. During his tenure at Fox, Plaintiff followed up on
 25 his previous successes by creating the Fox television network and launching a
 26 number of hit shows, including "The Simpsons."

27 15. Plaintiff has also run a number of other companies, including USA
 28 Network, QVC (a telemarketing network), and Home Shopping Network.

1 16. Plaintiff currently serves as the Chairman and Senior Executive of
2 IAC/InterActiveCorp (“IAC”), a leading internet company that owns more than 50
3 websites that attract hundreds of millions of visitors, including for example
4 Match.com, Ask.com, Vimeo.com, Citysearch.com, TheDailyBeast.com, and
5 CollegeHumor.com. Plaintiff also currently serves as Chairman and Senior
6 Executive of both Expedia, Inc. and TripAdvisor, Inc., which operate a number of
7 well known travel-related websites.

8 17. Due to his hard work, diligence, and history of successes during the
9 course of his 40-plus year career, as well as due to media attention focused on his
10 successful business activities, Plaintiff and his name have become well known and
11 widely recognized in the United States.

12 18. In October 2010, certain major broadcasting companies filed suit
13 against Defendant FilmOn for copyright infringement. In November 2010, they
14 obtained a temporary restraining order that prevented FilmOn and its agents from
15 using FilmOn’s technology to enable consumers to access broadcast TV signals.

16 19. In February 2012, Plaintiff and IAC backed the launch of Aereo, Inc.
17 (“Aereo”), a technology company that provides consumers access to a technology
18 platform that can be used to view over-the-air broadcast television on internet-
19 connected devices. Aereo has received high praise from reviewers at multiple
20 media outlets. Aereo currently operates only in the New York metropolitan area.

21 20. In March 2012, certain major broadcasting companies sued Aereo for
22 copyright infringement and sought to enjoin the operation of its business. In
23 July 2012, Aereo prevailed on the broadcasters’ motion for a preliminary
24 injunction, which was denied as described in *American Broadcasting Companies,*
25 *Inc., et al. v. Aereo, Inc.*, ___ F.Supp.2d ___, 2012 WL 2848158 (S.D.N.Y.
26 July 11, 2012).

27 21. Plaintiff’s name has been prominently featured in news reports about
28 Aereo, including reports about Aereo’s successful defense against the preliminary

1 injunction motion with respect to the copyright infringement claims brought
2 against it. The case, and Plaintiff's association with Aereo, have been widely
3 publicized by the media.

4 DEFENDANTS' WRONGFUL CONDUCT

5 22. Plaintiff is informed and believes that within 30 days of the Aereo
6 court ruling, Defendants launched their internet streaming service,
7 "BarryDriller.com". Defendants claim that "BarryDriller.com" offers a service
8 that is similar to Aereo's platform. They claim that their service enables its
9 subscribers to watch and/or record live television broadcasts through internet-
10 connected devices. Defendants also claim to offer this service in four geographic
11 markets, including New York, where Aereo operates.

12 23. The name "BarryDriller" (and/or "Barry Driller") is prominently
13 displayed in multiple locations on Defendants' "BarryDriller.com" website,
14 including at the top and the bottom of every webpage.

15 24. The terms "BarryDriller.com," "BarryDriller" and "Barry Driller" are
16 substantially similar to Plaintiff's name, "Barry Diller," and are therefore likely to
17 mislead consumers into believing that there is an association between Plaintiff and
18 "Barry Driller.com" when in fact there is not.

19 25. The confusing similarity between the two names reflects an
20 intentional and calculated decision by Defendants to trade on Plaintiff's name to
21 attract consumers to Defendants' business and try to divert consumers from the
22 Aereo business supported by Plaintiff to Defendant's business. In fact, David
23 himself has admitted that the name "BarryDriller" was derived from Plaintiff's
24 name. In a recent Wall Street Journal article published on August 9, 2012, David
25 admitted that the name "BarryDriller" is an "homage to a great guy..."

26 26. By intentionally selecting a name that is confusingly similar to
27 Plaintiff's name, Defendants are likely to confuse and divert consumers, inducing
28 them to use Defendants' service rather than the business backed by Plaintiff.

1 27. Defendants' conduct as described above is completely unauthorized.
2 At no point has Plaintiff ever approved, authorized, or acquiesced in Defendants'
3 use of his name in relation to "BarryDriller.com" or in any other context. To the
4 contrary, Plaintiff has demanded that Defendants immediately cease and desist
5 from all uses of his name, or confusingly similar renditions of his name, which
6 could lead to consumer confusion and/or the misappropriation of Plaintiff's
7 goodwill. Defendants have ignored Plaintiff's demands.

8 28. Defendants' infringing and unlawful conduct is causing and will
9 continue to cause Plaintiff substantial and irreparable injury by, among other
10 things, misleading consumers into believing that Plaintiff sponsors or endorses the
11 BarryDriller website and/or internet streaming service. Plaintiff believes that
12 Defendants' products and services do not meet the high standards for quality that
13 Plaintiff demands of all products and services with which his name is associated,
14 and in any event Plaintiff has no desire to be associated with Defendants or their
15 business. Defendants' conduct is causing and will continue to cause Plaintiff
16 substantial and irreparable injury by misappropriating his rights in his name and
17 identity. Defendants have also arrogated wholly to themselves any income they
18 have wrongfully received from their misuse of Plaintiff's name and identity.
19 Furthermore, by intentionally selecting a name which is confusingly similar to
20 Plaintiff's name, Defendants are unlawfully attempting to confuse and divert
21 consumers, tricking them into using Defendants' service instead of the business
22 backed by Plaintiff. In short, Defendants' unlawful conduct constitutes an
23 unauthorized and intentional attempt to free-ride off the valuable goodwill
24 developed by Plaintiff over the course of his long and successful business career.
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1 **FIRST CLAIM FOR RELIEF**

2 **(False Designation of Origin and False Endorsement**

3 **Under the Lanham Act, 15 U.S.C. § 1125(a))**

4 **(Against All Defendants)**

5 29. Plaintiff repeats and incorporates by reference each and every
6 allegation contained in paragraphs 1 through 28 above.

7 30. Defendants' wrongful conduct as described above has damaged and is
8 continuing to damage Plaintiff's rights in his name and identity by, among other
9 things, distorting and exploiting those rights without Plaintiff's permission, thus
10 diminishing their value, including without limitation their value for any future
11 licensing.

12 31. Further, Defendants have injured and continue to injure Plaintiff by
13 attempting to draw an association between him and their own service, even though
14 Plaintiff has not chosen to associate himself with their service and has no desire to
15 be associated with it, and even though a business backed by Plaintiff, Aereo, is in
16 competition with Defendants' purported service.

17 32. Defendants have also injured Plaintiff by commercially exploiting
18 Plaintiff's name and identity without Plaintiff's retaining control thereof or
19 receiving any income properly owing to him as the sole owner of commercial
20 endorsement rights in his name and identity.

21 33. By reason of the foregoing, Plaintiff asserts a claim against
22 Defendants for injunctive relief, damages, costs and attorneys' fees pursuant to 15
23 U.S.C. §§ 1125, 1116, and 1117.

24 **SECOND CLAIM FOR RELIEF**

25 **(Violation of Common Law Right of Publicity)**

26 **(Against All Defendants)**

27 34. Plaintiff repeats and incorporates by reference each and every
28 allegation contained in paragraphs 1 through 33 above.

1 35. Through Defendants' use of a term which is substantially and
2 confusingly similar to Plaintiff's name, Defendants have misappropriated
3 Plaintiff's rights in his name and identity as provided under the common law right
4 of publicity.

5 36. In exploiting Plaintiff's exclusive publicity rights as described above,
6 Defendants have damaged and are continuing to damage those rights by, among
7 other things, tarnishing and exploiting those rights without Plaintiff's permission,
8 thus diminishing their value, including without limitation their value for future
9 licensing. Further, Defendants have injured and continue to injure Plaintiff by
10 exploiting his publicity rights without Plaintiff's retaining control thereof or
11 receiving any income properly owing to him as the sole owner of his rights of
12 publicity.

13 37. Defendants' wrongful actions as described above are causing Plaintiff
14 irreparable harm, and have damaged and continue to damage Plaintiff in an
15 amount yet to be determined.

16 38. Defendants did not engage in the above-described wrongful actions
17 out of any sincere or proper motive, but did so knowingly, willfully, oppressively,
18 and maliciously, intending to appropriate to themselves without compensation
19 what they knew to be Plaintiff's valuable rights. Said misconduct was also
20 fraudulent, in that the public has been misled and will continue to be misled to
21 believe, incorrectly, that Plaintiff consented to such commercial use of his name
22 and identity, when in fact he did not, and that Plaintiff is somehow associated with
23 Defendants' website and streaming service, when in fact he is not.

24 39. In engaging in the conduct alleged herein, Defendants acted with
25 oppression, fraud, and/or malice, and Plaintiff is therefore entitled to an award of
26 punitive damages according to proof.

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THIRD CLAIM FOR RELIEF
(Violation of Statutory Right of Publicity
Under California Civil Code § 3344)
(Against All Defendants)

40. Plaintiff repeats and incorporates by reference each and every allegation contained in paragraphs 1 through 39 above.

41. Defendants have misappropriated Plaintiff's rights in his name as provided under California Civil Code § 3344.

42. In knowingly exploiting Plaintiff's name as described above, Defendants have damaged and are continuing to damage Plaintiff's publicity rights by, among other things, tarnishing and trivializing those rights, thus diminishing their value, including without limitation their value for future licensing. Further, Defendants have injured and continue to injure Plaintiff by purporting to exercise Plaintiff's publicity rights without Plaintiff's retaining control thereof or receiving any income properly owing to him as the sole owner of his right to publicity.

43. Defendants' wrongful actions as described above are causing Plaintiff irreparable harm, and have damaged and continue to damage Plaintiff in an amount yet to be determined.

44. Defendants did not engage in the above-described wrongful actions out of any sincere or proper motive, but did so knowingly, willfully and oppressively, intending to appropriate to themselves without compensation what they knew to be Plaintiff's valuable rights. Said misconduct was also fraudulent, in that the public has been misled and will continue to be misled to believe, incorrectly, that Plaintiff consented to such commercial use of his name and identity, when in fact he did not, and that Plaintiff is somehow associated with Defendants' website and streaming service, when in fact he is not.

45. In engaging in the conduct alleged herein, Defendants acted with oppression, fraud, and/or malice, and Plaintiff is therefore entitled to an award of

1 punitive damages according to proof.

2 **FOURTH CLAIM FOR RELIEF**

3 **(Cyberpiracy Under the Lanham Act, 15 U.S.C. §1125(d))**

4 (Against All Defendants)

5 46. Plaintiff repeats and incorporates by reference each and every
6 allegation contained in paragraphs 1 through 45 above.

7 47. On information and belief, Defendants registered the domain name
8 BarryDriller.com for purposes of hosting a website to promote, market, and sell
9 their BarryDriller service.

10 48. Plaintiff's name was famous and distinctive at the time Defendants
11 registered the BarryDriller.com domain name. Defendants' domain name is nearly
12 identical and confusingly similar to Plaintiff's name, "Barry Diller." The only
13 difference between the two is a single "r" that Defendants inserted after the "D" in
14 Plaintiff's surname.

15 49. Defendants registered and are now using the BarryDriller.com
16 domain name with a bad-faith intention to profit from that domain name and its
17 confusing similarity to Plaintiff's name. Defendants have no intellectual property
18 rights in Plaintiff's name or in the BarryDriller.com domain name. Prior to
19 registering the domain name, Defendants never made any bona fide offering of
20 goods or services with the "BarryDriller" mark or BarryDriller.com domain name.

21 50. By selecting a domain name which is confusingly similar to
22 Plaintiff's name, Defendants are unfairly attempting to divert consumers and
23 potential business, so that consumers will unwittingly use Defendants' service
24 instead of the Aereo business actually supported by Plaintiff.

25 51. Defendant's cyberpiracy has caused and, unless and until enjoined
26 and restrained by order of this Court, threatens to and will continue to cause great
27 and irreparable harm to Plaintiff.

28 52. By reason of the foregoing, Plaintiff asserts a claim against

1 Defendants for injunctive relief, damages, costs and attorneys' fees pursuant to 15
2 U.S.C. §§ 1125, 1116, and 1117.

3 **PRAYER FOR RELIEF**

4 WHEREFORE, Plaintiff demands judgment in his favor and against
5 Defendants as follows:

6 1. For a preliminary and a permanent injunction prohibiting Defendants
7 from using "Barry Diller," "Barry Driller," "Barrydriller.com," "Barry Driller,
8 Inc.," "BarryDriller Content Systems Plc.," any confusingly similar variant of the
9 foregoing, or any other aspect of the name, voice, likeness, or other indicia of
10 identity of Plaintiff Barry Diller to operate Defendants' commercial websites,
11 promote Defendants' business, or in any other manner infringe Plaintiff's
12 trademarks, rights of publicity and other rights;

13 2. For an order requiring transfer of the BarryDriller.com domain name
14 to Plaintiff;

15 3. For compensatory and general damages in an amount to be proven at
16 trial, or in the alternative, statutory damages;

17 4. For punitive and exemplary damages;

18 5. For prejudgment interest on any recovery by Plaintiff;

19 6. For costs of suit incurred herein, including reasonable attorneys' fees
20 and expenses; and

21 7. For such other and further relief as the Court deems just and proper.

22 Dated: August 21, 2012

23 Robert H. Platt
24 Mark S. Lee
25 Seth Reagan
26 Manatt, Phelps & Phillips, LLP

27 By: 
28 Robert H. Platt
Attorneys for Plaintiff
BARRY DILLER