

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION**

**EMMERICH NEWSPAPERS,
INCORPORATED**

PLAINTIFF

V.

CIVIL ACTION NO. 3:21-CV-32 KHJ-MTP

**PARTICLE MEDIA, INC. D/B/A NEWS
BREAK and JOHN DOES 1-10**

DEFENDANT

PARTICLE MEDIA, INC.'S ANSWER and AFFIRMATIVE

Defendant Particle Media, Inc. ("Particle Media") files this Answer and Affirmative Defenses to the Complaint filed by Emmerich Newspapers, Incorporated ("Emmerich Newspapers"), and in support states the following:

ANSWER

All allegations not expressly admitted in this Answer are denied. Particle Media's admissions are confined to the exact language in this Answer, and to the extent that any response varies from the wording of the allegations of the Complaint, those allegations are denied. Any factual allegation below is admitted only as to the specific admitted facts, not as to any purported conclusions, characterizations, implications or speculations that arguably follow from the admitted facts. Particle Media hereby denies all allegations and inferences contained in the headings and subheadings used in the Complaint. Particle Media denies Emmerich Newspapers is entitled to the relief requested or any other relief. Subject to and without waiving any of the affirmative defenses stated herein, Particle Media answers the specific allegations of Emmerich Newspapers' Complaint, paragraph by paragraph, and states as follows:

NATURE OF THE ACTION

1. Particle Media admits Emmerich Newspapers seeks to recover damages. Particle Media denies Emmerich Newspapers is entitled to the relief requested or any other relief.

Particle Media is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in footnote 1 of the Complaint, and therefore, denies the same. Particle Media denies the remaining allegations contained in paragraph 1 of the Complaint.

2. Particle Media denies the allegations contained in paragraph 2 of the Complaint.

3. Particle Media denies the allegations contained in paragraph 3 of the Complaint.

4. Particle Media denies the allegations contained in paragraph 4 of the Complaint.

PARTIES

5. Upon information and belief, Particle Media admits the allegations contained in paragraph 5 of the Complaint.

6. Particle Media is a Delaware corporation with its headquarters at 800 W. El Camino Real Suite 100, Mountain View, California 94040. Particle Media admits the remaining allegations contained in paragraph 6 of the Complaint.

7. Particle Media denies the allegations contained in paragraph 7 of the Complaint.

JURISDICTION AND VENUE

8. The allegations contained in paragraph 8 of the Complaint call for a legal conclusion, and, therefore, no response is required. To the extent the allegations contained in paragraph 8 of the Complaint give rise to any inference that Particle Media has violated applicable law or that Emmerich Newspapers is entitled to any relief or remedy, such inference is denied.

9. The allegations contained in paragraph 9 of the Complaint call for a legal conclusion, and, therefore, no response is required. To the extent the allegations contained in paragraph 9 of the Complaint give rise to any inference that Particle Media has violated applicable law or that Emmerich Newspapers is entitled to any relief or remedy, such inference is denied.

10. The allegations contained in paragraph 10 of the Complaint call for a legal conclusion, and, therefore, no response is required. To the extent the allegations contained in paragraph 10 of the Complaint give rise to any inference that Particle Media has violated applicable law or that Emmerich Newspapers is entitled to any relief or remedy, such inference is denied. Particle Media denies that it has committed a tort, in whole or in part, in this district and state.

FACTUAL BACKGROUND

Emmerich Newspapers, Incorporated

11. Particle Media is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11 of the Complaint, and therefore, denies the same.

12. Particle Media is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 12 of the Complaint, and therefore, denies the same.

13. Particle Media is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13 of the Complaint, and therefore, denies the same.

14. Particle Media is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 14 of the Complaint, and therefore, denies the same.

Particle Media, Inc. d/b/a News Break

15. Particle Media admits that it designed and developed the News Break application, that the application provides American users with a personalized news feed and curated daily briefing of local breaking news and trending national and international news, and that the application is profitable. Particle Media avers that the Bloomberg article cited by Emmerich Newspapers speaks for itself as to its contents. Defendants deny all allegations in paragraph 16 not expressly admitted.

16. Particle Media avers that the LinkedIn page for News Break speaks for itself as to its contents, and Particle Media denies Emmerich Newspapers' allegations to the extent they mischaracterize the contents of the LinkedIn page. Defendants deny all allegations in paragraph 16 not expressly admitted.

17. Particle Media avers that the News Break website speaks for itself as to its contents, and Particle Media denies Emmerich Newspapers' allegations to the extent they mischaracterize the contents of the News Break website. Particle Media admits there is not and has not been a partnership between Particle Media and Emmerich Newspapers. Particle Media denies the remaining allegations in paragraph 17. Particle Media denies all allegations in paragraph 17 not expressly admitted.

18. Particle Media avers that the News Break app asks users for permission to access their current location and allows users to manage their location information to include additional areas. The location information is used to provide users with links to locally published content

and information. Users of the app can elect whether to receive alert notifications. Particle Media denies the remaining allegations in paragraph 18. Particle Media denies all allegations in paragraph 18 not expressly admitted

19. Particle Media avers that when a user of the News Break app clicks on an alert, the user is taken to the app. Particle Media avers that when a user clicks on a story listed on the app – a headline sometimes accompanied by a picture and or limited amounts of the article in issue – he or she is taken to the website of the source of the article. Particle Media avers that there were limited instances in which, in error, copies of certain articles were available on the News Break app. The error was corrected as soon as it was known. Particle Media avers that ads and sponsored content appear on the News Break app and that this is a source of revenue for Particle Media. Particle Media denies the remaining allegations in paragraph 19. Particle Media denies all allegations in paragraph 19 not expressly admitted.

20. Particle Media avers that when a user clicks on a story listed on the News Break app – a headline sometimes accompanied by a picture and or limited amounts of the article in issue – he or she is taken to the website of the source of the article. Particle Media avers that there were limited instances in which, in error, copies of certain articles were available on the News Break app. The error was corrected as soon as it was known. Particle Media denies the remaining allegations in paragraph 20. Particle Media denies all allegations in paragraph 20 not expressly admitted.

21. Particle Media avers that when a user clicks on a story listed on the News Break app – a headline sometimes accompanied by a picture and or limited amounts of the article in issue – he or she is taken to the website of the source of the article. Particle Media avers that there were limited instances in which, in error, copies of certain articles were available on the

News Break app. The error was corrected as soon as it was known. Particle Media denies the remaining allegations in paragraph 21. Particle Media denies all allegations in paragraph 21 not expressly admitted.

22. Particle Media avers that when a user clicks on a story listed on the News Break app – a headline sometimes accompanied by a picture and or limited amounts of the article in issue – he or she is taken to the website of the source of the article. Particle Media avers that there were limited instances in which, in error, copies of certain articles were available on the News Break app. The error was corrected as soon as it was known. Particle Media denies the remaining allegations in paragraph 22. Particle Media denies all allegations in paragraph 22 not expressly admitted

23. Particle Media avers that when a user clicks on a story listed on the News Break app – a headline sometimes accompanied by a picture and or limited amounts of the article in issue – he or she is taken to the website of the source of the article. Particle Media avers that there were limited instances in which, in error, copies of certain articles were available on the News Break app. The error was corrected as soon as it was known. Particle Media denies the remaining allegations in paragraph 23. Particle Media denies all allegations in paragraph 23 not expressly admitted.

24. Particle Media is without knowledge or information sufficient to form a belief as to the truth as to whether “ads for a number of Emmerich Newspapers’ advertising clients can be found on the News Break app,” and therefore, denies the same. Particle Media denies the remaining allegations in paragraph 24. Particle Media denies all allegations in paragraph 24 not expressly admitted.

Particle Media's Infringement of Emmerich Newspapers' Copyrights

This heading appears to be included for organizational purposes only and not as an averment of fact to which a response is required. To the extent a response is required, denied.

25. Particle Media is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 25 of the Complaint, and therefore, denies the same.

26. Particle Media is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 26 of the Complaint, and therefore, denies the same. Exhibit A speaks for itself as to its contents.

26. [sic] Particle Media denies the allegations contained in the misnumbered paragraph 26 of the Complaint.

27. Particle Media denies the allegations contained in paragraph 27 of the Complaint.

28. Particle Media denies the allegations contained in paragraph 28 of the Complaint.

CLAIMS FOR RELIEF

Count I – Copyright Infringement (17 U.S.C. §101 et seq.)

29. Particle Media incorporates by reference all responses set forth above to the allegations of the Complaint.

30. Particle Media is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 30 of the Complaint, and therefore, denies the same.

31. Particle Media is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 31 of the Complaint, and therefore, denies the same. Exhibit A speaks for itself as to its contents.

32. Particle Media is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 32 of the Complaint, and therefore, denies the same.

33. Particle Media denies the allegations contained in paragraph 33 of the Complaint.

34. Particle Media denies the allegations contained in paragraph 34 of the Complaint.

35. Particle Media denies the allegations contained in paragraph 35 of the Complaint.

36. Particle Media denies the allegations contained in paragraph 36 of the Complaint.

37. Particle Media denies the allegations contained in paragraph 37 of the Complaint.

Particle Media denies Emmerich Newspapers is entitled to the relief requested or any other relief.

38. Particle Media denies the allegations contained in paragraph 38 of the Complaint.

Particle Media denies Emmerich Newspapers is entitled to the relief requested or any other relief.

39. Particle Media denies the allegations contained in paragraph 39 of the Complaint.

Particle Media denies Emmerich Newspapers is entitled to the relief requested or any other relief.

Count II – State Law Claim – Tortious Interference with Business Relationship

40. Particle Media incorporates by reference all responses set forth above to the allegations of the Complaint.

41. Particle Media denies the allegations contained in paragraph 41 of the Complaint.

42. Particle Media denies the allegations contained in paragraph 42 of the Complaint.

43. Particle Media denies the allegations contained in paragraph 43 of the Complaint.

44. Particle Media denies the allegations contained in paragraph 44 of the Complaint.

45. Particle Media denies the allegations contained in paragraph 45 of the Complaint.

46. Particle Media denies the allegations contained in paragraph 46 of the Complaint.

Particle Media denies Emmerich Newspapers is entitled to the relief requested or any other relief.

Count III – State Law Claim – Civil Conspiracy

47. Particle Media incorporates by reference all responses set forth above to the allegations of the Complaint.

48. Particle Media denies the allegations contained in paragraph 48 of the Complaint.

49. Particle Media denies the allegations contained in paragraph 49 of the Complaint.

50. Particle Media denies the allegations contained in paragraph 50 of the Complaint.

Particle Media denies Emmerich Newspapers is entitled to the relief requested or any other relief.

Count IV – State Law Claim – Unjust Enrichment

51. Particle Media incorporates by reference all responses set forth above to the allegations of the Complaint.

52. Particle Media is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 52 of the Complaint, and therefore, denies the same.

53. Particle Media is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence of paragraph 53 of the Complaint, and therefore, denies the same. Particle Media denies the allegations contained in the second sentence of paragraph 53 of the Complaint.

54. Particle Media denies the allegations contained in paragraph 54 of the Complaint.

55. Particle Media denies the allegations contained in paragraph 55 of the Complaint.

56. Particle Media denies the allegations contained in paragraph 56 of the Complaint.

57. Particle Media denies the allegations contained in paragraph 57 of the Complaint.

Particle Media denies Emmerich Newspapers is entitled to the relief requested or any other relief.

Count VI [sic] – State Law Claim – Punitive Damages

58. Particle Media incorporates by reference all responses set forth above to the allegations of the Complaint.

59. Particle Media denies the allegations contained in paragraph 59 of the Complaint.

Particle Media denies Emmerich Newspapers is entitled to the relief requested or any other relief.

PRAYER FOR RELIEF

Particle Media denies that Emmerich Newspapers is entitled to the requested relief in the unnumbered paragraph following paragraph 59, or any relief whatsoever.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Particle Media reserves the right to rely on any and all judicially recognized defenses under the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.*, and all amendments and revisions thereto, including that the purported copyrights are invalid, void or unenforceable or that there is a defect in the registration(s).

THIRD AFFIRMATIVE DEFENSE

Particle Media's alleged infringement, if any, was not willful, deliberate, or malicious.

FOURTH AFFIRMATIVE DEFENSE

Emmerich Newspapers' claims are barred, in whole or in part, by the doctrine of fair use, 17 U.S.C. § 107

FIFTH AFFIRMATIVE DEFENSE

Emmerich Newspapers' prayer for statutory damages and attorney's fees under the Copyright Act is barred to the extent the copyright in issue does not meet the registration requirements of the Copyright Act, including 17 U.S.C. § 412.

SIXTH AFFIRMATIVE DEFENSE

Particle Media asserts the innocent infringer defense concerning Emmerich Newspapers' allegations of copyright infringement, pursuant to 17 U.S.C. § 504(c)(2). If Particle Media's actions constituted infringement, which is denied, such actions were undertaken without knowledge of any such infringement, with lack of any intent to commit infringement, and were wholly innocent.

SEVENTH AFFIRMATIVE DEFENSE

Emmerich Newspapers has not suffered any cognizable damages or harm.

EIGHTH AFFIRMATIVE DEFENSE

Emmerich Newspapers' claims are barred by the doctrines of unclean hands, ratification, waiver, laches, acquiescence, and/or estoppel.

NINTH AFFIRMATIVE DEFENSE

Some or all of Emmerich Newspapers' claims are barred by the statute of limitations, laches and/or waiver.

TENTH AFFIRMATIVE DEFENSE

If Emmerich Newspapers suffered any damages, which is denied, Emmerich Newspapers failed to mitigate its alleged damages and therefore is precluded from recovering those alleged damages.

ELEVENTH AFFIRMATIVE DEFENSE

Particle Media and its agents, if any, acted reasonably and in good faith at all times material herein, based on all relevant facts, law, and circumstances known by them at the time that they acted. Accordingly, Emmerich Newspapers is barred, in whole or in part, from any recovery in this action.

TWELFTH AFFIRMATIVE DEFENSE

Emmerich Newspapers' claims are barred, in whole or in part, due to *de minimis* use and nominal use.

THIRTEENTH AFFIRMATIVE DEFENSE

Emmerich Newspapers has no cause of action for and is not entitled to recover attorneys' fees or costs.

FOURTEENTH AFFIRMATIVE DEFENSE

If Emmerich Newspapers is entitled to statutory damages pursuant to 17 U.S.C. Section 504 (c), which is denied, Emmerich Newspapers is only entitled to an award of \$200.00 pursuant to 17 U.S.C. Section 504 (c) (2), because any allegedly infringing conduct by Particle Media, which is denied, was innocent.

FIFTEENTH AFFIRMATIVE DEFENSE

Emmerich Newspapers' copyright infringement claims are barred in whole or in part based on the doctrine of substantial non-infringing use.

SIXTEENTH AFFIRMATIVE DEFENSE

Emmerich Newspapers' claims are barred in whole or in part by implied licenses granted or authorized to be granted by Emmerich Newspapers.

SEVENTEENTH AFFIRMATIVE DEFENSE

Emmerich Newspapers' claims are barred in whole or in part by the First Amendment of the U.S. Constitution.

EIGHTEENTH AFFIRMATIVE DEFENSE

Particle Media reserves all separate defenses under Rule 8(c) of the Federal Rules of Civil Procedure, the Copyright Laws of the United States and any other defenses, at law or in equity, that may now exist or in the future be available based on discovery and further factual investigation in this case.

AND NOW, having fully answered each and every allegation of the Complaint exhibited against it, Particle Media requests that the Court dismiss Emmerich Newspapers' Complaint with prejudice, taxing all costs against Emmerich Newspapers and awarding Particle Media its reasonable attorneys' fees and expenses incurred in this action. Particle Media requests such other relief as this Court deems just and proper.

Respectfully submitted, this the 3rd day of May, 2021.

Respectfully submitted,
PARTICLE MEDIA, INC.

By: s/ Stephen J. Carmody
One of its Attorneys

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CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed the foregoing with the Clerk of this Court using the ECF system, which sent notification of such filing to all registered users.

Dated: May 3, 2021.

s/ Stephen J. Carmody
Stephen J. Carmody