

THOMAS J. MARSHALL
GENERAL COUNSEL
AND EXECUTIVE VICE PRESIDENT



May 6, 2020

VIA E-MAIL

Rahna Epting
Executive Director
MoveOn.Org
2021 L Street NW Suite 400
Washington, DC 20036-4982

Re: Fundraising Campaign Using the United States Postal Service (USPS) Trademarks and Unauthorized Likeness of a USPS Employee

Dear Ms. Epting:

We are writing regarding MoveOn.Org's ("MoveOn") recent fundraising campaign that uses the



USPS, THE POSTAL SERVICE, and USPS Sonic Eagle logo () trademarks (collectively, the "USPS Marks") and the likeness of a USPS employee, Melissa Kittok. On or about April 14, 2020, MoveOn launched a fundraising campaign that prominently features the USPS Marks and our employee and seeks to raise money in connection with a campaign to "Join the fight to Save the Postal Service." A copy of MoveOn's advertisement is enclosed. The United States Postal Service ("Postal Service") is concerned that MoveOn's unauthorized commercial exploitation of its employee's likeness violates her right of publicity, a concern she has vocalized. Additionally, the Postal Service believes that these communications are likely to cause confusion about whether the Postal Service sponsored or approved this campaign. Avoiding any appearance of political partisanship is vital to the achievement of Postal Service's mission of service to the American people. See, e.g., *De Gallo v. Parent*, 557 F.3d 59, 73 (1st Cir. 2009); see also 18 U.S.C. § 1913. A public perception that the Postal Service either supports or endorses MoveOn or its political activities thus raises significant public policy and legal concerns for the Postal Service.

The Postal Service seeks to protect its employees from the unauthorized use of their likeness, particularly in political fundraising campaigns. Ms. Kittok has a right to control the use of her image for a commercial purpose like fundraising. Ms. Kittok did not authorize MoveOn's use of her likeness in connection with this campaign. As a result, the use of her likeness is a commercial exploitation that violates her rights. As addressed below, the Postal Service is sensitive to MoveOn's right to political advocacy, but this right does not extend to using the likeness of Ms. Kittok without her consent.

Moreover, as you surely know, the Postal Service owns the USPS Marks, and it has numerous incontestable trademark registrations for them, including U.S. Registration Nos. 2423574, 2709084, 2709131, 3774838, 3774839, 5124485, 5124486, and 5124487. As a result of the Postal Service's longstanding use of the USPS Marks, the marks are famous, and the public has come to rely on the USPS Marks to identify the Postal Service's products and services, as well as the products and

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services of companies that are sponsored by or affiliated with the Postal Service. As you also know, the Postal Service has not sponsored or approved of MoveOn's fundraising campaign or advertisements, and MoveOn does not have Postal Service's authorization or consent to use the USPS Marks. As a result, any use of the USPS Marks by MoveOn that is likely to cause confusion violates state and federal law.

Of course, the Postal Service recognizes that MoveOn has the right to refer to the Postal Service and use the USPS Marks consistent with free speech principles under the doctrine of nominative trademark fair use. That doctrine only applies, however, when (1) a party's use of another's trademark is necessary to describe the trademark owner's services; (2) the party used only so much of another's trademarks as is reasonably necessary; **and** (3) the party has not done anything to suggest sponsorship or endorsement by the trademark owner or to inaccurately describe the relationship between the parties. See *Century 21 Real Estate Corp. v. Lendingtree, Inc.*, 425 F.3d 211, 222 (3d Cir. 2005); *New Kids on the Block v. News Am. Publ'g, Inc.*, 971 F.2d 302, 308 (9th Cir. 1992).

MoveOn's use is unlikely to meet all three of these requirements. As an initial matter, the inclusion of the USPS Sonic Eagle logo uses more than is necessary to reference the Postal Service. See *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1181 (9th Cir. 2010) (holding use of stylized mark and logo was more use of the mark than necessary). Additionally, the fundraising advertisement (and likely any future advertisements) focus on increasing funding to the Postal Service and this focus, when combined with the use of the Postal Service's trademarks, exacerbates the likelihood of confusion as to whether the Postal Service sponsored or approved of the MoveOn's communications. The likelihood of confusion is further compounded by the absence of any disclaimer of an affiliation or sponsorship by USPS, see *Toyota Motor Sales*, 610 F.3d at 1182, especially when MoveOn disclaims an affiliation with others, such as Facebook. In light of the foregoing, MoveOn is not entitled to use the USPS Marks under the guise of nominative fair use.

Therefore, the Postal Service respectfully requests that MoveOn agree to the following in connection with its fundraising or advertising:

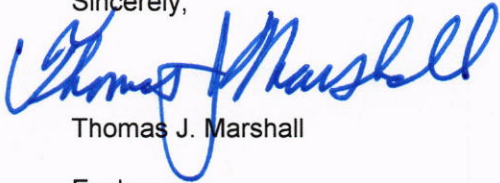
- a. MoveOn will not use the likeness of Ms. Kittok or any Postal Service employee;
- b. MoveOn will not use any Postal Service logos or designs under any circumstance;
- c. MoveOn's use of the USPS Marks will be in plain text (i.e., not in bold or italics) and be in the same size, font, and color as surrounding text;
- d. MoveOn will include the following prominent disclaimer in connection with all uses of USPS Marks: "United States Postal Service is not associated or affiliated with MoveOn.Org and has not sponsored or approved of this communication";¹ and
- e. While the Postal Service believes that (b)-(d) are reasonably calculated to reduce the likelihood of confusion, it is possible that certain uses of the USPS Marks still could be likely to cause confusion, and MoveOn will cooperate with any additional reasonable requests from the Postal Service to address concerns of the Postal Service with any future uses of the USPS Marks.

¹ The disclaimer should appear at the beginning of any communication in a font that is at least as large as the font used for the USPS Marks. See, e.g., *TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820, 828 (9th Cir. 2011) (holding disclaimer in small font at the bottom of the page was ineffective).

As we hope this letter makes clear, the Postal Service is not trying to prevent MoveOn from engaging in fundraising or trying to prevent MoveOn from advocating for its point of view. At the same time, the Postal Service cannot allow its employee's likeness to be exploited or its trademarks to be used in a manner that is likely to cause confusion as to the Postal Service's sponsorship or approval of MoveOn's campaigns and advertisements. Accordingly, we respectfully request that MoveOn confirm in writing that it will comply with the reasonable attempts to prevent confusion detailed above by no later than May 14, 2020.

Thank you for your prompt attention to this important matter. If you have any questions or would like to discuss further, please feel free to reach out to my Senior Intellectual Property Counsel, Rachel Hunnicutt, at (202) 268-7855.

Sincerely,



Thomas J. Marshall

Enclosure



MoveOn



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