

**This Opinion is Not a  
Precedent of the TTAB**

Mailed: December 1, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Russell Investments Group Inc.*  
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Serial No. 86430210  
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Cindy L. Caditz and Christina Kim of Davis Wright Tremaine LLP,  
for Russell Investments Group Inc.

Maria-Victoria Suarez, Trademark Examining Attorney, Law Office 102, Mitchell  
Front, Managing Attorney.  
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Before Zervas, Masiello and Pologeorgis,  
Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Russell Investments Group Inc. (“Applicant”) seeks registration on the Principal  
Register of the standard character mark AGENCY FX for the following goods and  
services:

“Downloadable electronic financial publications, namely, prospectuses, factsheets, financial reports, financial booklets, financial newsletters, and financial brochures, all in the in the financial and investment field; and audio visual recordings in the financial and investment field; downloadable electronic publications, namely, reports, factsheets, booklets, newsletters, and brochures featuring information and data relating to currency analysis, currency investment, and evaluation of currency risks in

the financial and investment field” in International Class 9;

“Financial consulting services; trust and investment management services; investment portfolio monitoring services; investment portfolio performance analysis services; currency brokerage services; real estate investment consulting services; commodities investment management services; providing financial information by electronic means” in International Class 36; and

“Educational services in the financial and investment field, namely, conducting classes, conferences, teleconferences, seminars, workshops, and tutorial sessions, all in the financial and investment field” in International Class 41.<sup>1</sup>

The Examining Attorney refused registration of Applicant’s mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that, used in connection with Applicant’s goods and services, AGENCY FX would be merely descriptive of them because AGENCY FX would be perceived by consumers as describing the subject matter of the services, that is, foreign exchange trading using the agency model.<sup>2</sup> When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. The appeal is fully briefed. We affirm the refusal to register.

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<sup>1</sup> Application Serial No. 86430210 was filed on October 21, 2014. With regard to the International Class 9 goods and the International Class 36 services, Applicant claims first use and use in commerce in January 2007 pursuant to Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a). As for the International Class 41 services, Applicant claims a *bona fide* intent to use the mark in commerce pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

<sup>2</sup> Examining Attorney’s Brief at unnumbered p. 2, 10 TTABVUE.

## I. Applicable Law and Analysis

A term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978). A term need not immediately convey an idea of each and every specific feature of the applicant's goods or services in order to be considered merely descriptive; it is enough that the term describes one significant attribute, function or property of the goods or services. *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); *In re MBAssociates*, 180 USPQ 338 (TTAB 1973). It is well-established that the determination of mere descriptiveness must be made not in the abstract, but in relation to the goods or services for which registration is sought. *In re Abcor*, 200 USPQ at 218.

The record includes the following:

### ***Definition of FX***

- *www.ahdictionary.com (The American Heritage Dictionary of the English Language)*

FX [:] abbr. foreign exchange

- *www.russell.com/us* (Applicant's webpage)

“inattention to foreign exchange (FX) transactions can detract from investment performance.”

### ***Use of Agency***

- Definitions of “agency” and “agent”:

“Agency” - 1 a: the office or function of an agent.<sup>3</sup>

- Applicant’s specimen of use:

We trade on a pure agency basis, acting exclusively on your behalf. You can feel confident knowing that Russell is your trusted fiduciary, committed to providing you with best execution. ...

We initially adopted the pure agency approach to reduce currency execution costs in our multi-manager funds. We have built a world-class FX capability around the pure agency concept. Which we make available to investors like you. ...

We help keep your costs low because our pure agency approach introduces more choice and oversight into the execution process. We capitalize on a variety of liquidity sources to match your trades and save spread costs. When a match is not available, we transact through competing multi-venue trading platforms on your behalf, monitoring execution quality in real time.

- *www.investopedia.com/articles*

#### Agency Trading

An agency transaction is the other popular method for executing a client's orders. ... Agency transactions are comprised of two distinct parts. First, your brokerage needs to bring your request to the appropriate market in order to find a party wishing to assume the opposite position. So, if you wish to buy at a certain price, the broker needs to find someone wishing to sell at the same price and vice versa. Once both parties are found, the exchange records the transaction on its ticker tape, and an exchange of money ... between the parties occurs on settlement.

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<sup>3</sup> *Merriam Webster Dictionary*, August 18, 2015 response.

We also take judicial notice of the definition of the term “agent,” “one who is authorized to act for or in the place of another.” [www.merriam-webster.com/dictionary/agent](http://www.merriam-webster.com/dictionary/agent). The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

The second portion of the agency transaction occurs after the trade is completed and has been properly documented on the exchange. This portion is commonly referred to as clearing. While all brokers maintain individual books recording the entire amount of buy and sell orders transacted by clients, the actual act of clearing these transactions is handled by a larger institution.

- [www.binaryoptionswire.com/forex\\_trading\\_agency\\_model](http://www.binaryoptionswire.com/forex_trading_agency_model)

### Forex Trading and the Agency Model

With so many Forex brokers now touting the virtues of a No Dealing Desk environment, or agency model as it's coming to be known, it's high time we looked into just what these developments in the industry mean for you the trader.

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### No Dealing Desk (NDD)

No Dealing Desk (or NDD for short), as the name implies, indicates that the broker in question does not operate a dealing desk. Dealing desks are operated by brokers who act as Market Makers (described below), which basically means that there is some human intervention between a client's trade and the market they are trying to enter. ... No Dealing Desk means that a trader's orders are automatically routed to liquidity providers with no intervention from a dealing desk. ... NDD brokers provide their traders with access to the interbank market, they work with liquidity providers to secure the best possible bid and ask prices for their clients whose orders are put straight through without being managed in any way.

- <http://forexmagnates.com>

FxPro here chooses to start operating an agency model – a concept pioneered by FXCM [a] few year[s] back.

- [www.elysiumtechgroup.com](http://www.elysiumtechgroup.com)

ETG's MPT Agency will help you run an effective FX Agency operation that is flexible enough to handle the rapid evolution of the FX industry.

- *www.moltenmarkets.com*

Projects completed

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Tier 2 FX Bank

Agency FX. Produced a white paper identifying the pros and cons of creating full Agency and/or Matched Principal services for institutional investor client base.

- *www.marexspectron.com*

Peter, Keith and Paul will lead Marex Spectron's new agency broking [sic] desk, working alongside the existing team that offers FX services to the broker's core commodities clients

- *www.leaprate.com*

"We are delighted to have David and Katie join BTIG. These additions illustrate our commitment to furthering our ability to serve our clients as the premier global agency FX provider," said Anton LeRoy, Head of FICC at BTIG.

- *www.fxcm.com*

FXCM Inc. (NYSE: FXCM), a leading online provider of foreign exchange, or FX ... .

- *www.russell.com* (Applicant's website)

- "Foreign exchange trading is changing, and we're proud that Russell Investments is at the forefront of that change," said Hoffman. "In addition to our fiduciary role in agency foreign exchange – thanks to our work with Integral to develop RFX Network – we're able to provide institutional investors with leading edge currency trading technology and buy side liquidity that makes it easier to trade and less expensive to transact."

- "Whether you are a plan sponsor or asset manager, our agency-only approach ensures our executions are completed without the conflict associated with proprietary crossing networks or liquidity pools."

- “The model that is perfectly aligned with a client’s interests is the pure agency model ... .”

- <http://marketsmedia.com>

FastMatch provides the linkage to local banks through Agency FX, its buy side crossing system. “We cross orders from the buy-side directly with each other, as well as offer crossing services between by side and retail and buy side and sell side,” Galinov said.

With Agency FX, a buy-side firm can get a credit line from a major Top Ten euro money bank and trade on the system. While the other counterparty of the trading can be a local bank providing local liquidity.<sup>4</sup>

The Examining Attorney concludes:

[B]oth the individual components and the composite result are descriptive of applicant’s goods and services and do not create a unique, incongruous, or nondescriptive meaning in relation to the goods and services. Specifically, the record evidence conclusively demonstrates that the term “agency,” in the context of the financial and investment field, refers to a model or approach to trading, and the acronym “FX” stands for “foreign exchange.” The applied-for mark AGENCY FX merely refers to downloadable publications, recordings and educational services in the field of foreign exchange trading using the agency model and foreign exchange financial services using the agency model. There is nothing mysterious or incongruous about the mark. The applicant’s own specimen and website show that it is associated with an “agency-only approach” to foreign exchange.<sup>5</sup>

Applicant makes several arguments against the refusal, all of which have shortcomings. Specifically, Applicant argues:

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<sup>4</sup> September 9, 2015 Office Action.

<sup>5</sup> 10 TTABVUE 7.

- the “claimed goods and services are not specific to foreign exchange trading.”<sup>6</sup>

However, some of Applicant’s goods and services, as identified, concern currency exchange. Specifically, Applicant’s booklets, newsletters, and brochures featuring information and data relating to currency analysis, currency investment, and evaluation of currency risks in the financial and investment field are in International Class 9, and Applicant’s currency brokerage services are in International Class 36. Applicant’s International Class 41 services, which concern services in the financial and investment field, are broad enough to include currency investment.

- in view of the multiple definitions of “agency,” there is “no explanation or evidence as to why an average consumer who encounters ‘AGENCY’ could only possibly assume that the term refers to a trading model, which is a far more specialized and esoteric term compared to the other possible meanings of ‘agency.’”<sup>7</sup> Applicant offers other meanings for the proposed mark, such as “government agency” and “a cinematic studio or agency that produces multimedia special effects”<sup>8</sup>; and argues that a consumer who encounters AGENCY FX will have to exercise thought and imagination to derive information from AGENCY FX.<sup>9</sup> The determination of mere descriptiveness must be made in relation to the goods or services for which registration is sought, and “is to be determined from the standpoint of the average prospective purchaser,” *In re Abcor*, 200 USPQ at 218, in this case, including

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<sup>6</sup> 8 TTABVUE 18.

<sup>7</sup> 8 TTABVUE 14.

<sup>8</sup> 8 TTABVUE 20.

<sup>9</sup> 8 TTABVUE 21.

individuals and institutions requiring foreign currency. “The perception of the mark to nonprospective purchasers would be irrelevant, because a mark primarily functions to indicate a single quality control source of the goods or services involved, and this is meaningful only to prospective purchasers or patrons.” *Id.* Thus, we consider those definitions that have relevance in the context of Applicant’s recited goods or services. Further, it is unlikely that AGENCY is “esoteric” to prospective purchasers, who include foreign exchange purchasers and would have specialized knowledge of currency exchange methods. Also, the record does not support Applicant’s contention that “agency” is esoteric; the webpage from [www.investopedia.com](http://www.investopedia.com) states “[a]n agency transaction is the other *popular* method for executing a client's orders.”<sup>10</sup> (emphasis added.)

- the mark must be considered as a whole for descriptiveness, and the Examining Attorney improperly dissected Applicant’s mark and considered only the individual components of the mark.<sup>11</sup> It is not improper to consider each term separately, provided that the ultimate determination of mere descriptiveness is made as to the mark as a whole. When two or more descriptive terms are combined, the determination of whether the composite mark also has a descriptive significance depends on whether the combination of terms evokes a new, nondescriptive commercial impression. If each component retains its merely descriptive significance

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<sup>10</sup> February 18, 2015 Office Action.

<sup>11</sup> Applicant relies on a number of cases in support of its argument on pp. 5-6 of its brief, 8 TTABVUE 11-12. To the extent that these cases pertain to genericness, they are not relevant. The refusal before us is mere descriptiveness, not genericness.

in relation to the goods and/or services, the combination results in a composite that is itself merely descriptive. *See DuoProSS Meditech Corp. v. Inviro Medical Devices Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753 (Fed. Cir. 2012); *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370 (Fed. Cir. 2004); *In re IP Carrier Consulting Group*, 84 USPQ2d 1028, 1034 (TTAB 2007).<sup>12</sup>

- the examples from Applicant’s website are not descriptive uses of AGENCY FX, contending that “agency foreign exchange” is “not Applicant’s mark,” and that uses of “foreign exchange” or “agency,” separately, do not prove that the composite mark, considered in its entirety, is merely descriptive of Applicant’s goods and services. As noted above, a mark may be found to be merely descriptive if it is a combination of two or more merely descriptive terms which, when combined, do not create a composite which is unique, incongruous or otherwise inherently distinctive as applied to the goods and/or services. Thus, the evidence from Applicant’s website is probative, not only because it exhibits use of each individual term, but also because the terms “foreign exchange,” “agency” and “fx” are used in a manner consistent with other uses of these terms in the record.<sup>13</sup>

- the third-party webpages are not sufficient in number to establish that they are “commonly used,” and that several of these webpages suffer for various reasons, such as exhibiting infringing use as a mark, being directed to British consumers

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<sup>12</sup> Additionally, the Examining Attorney clearly considered the mark in its entirety, as she states in her brief that the composite result is descriptive of Applicant’s goods and services. 10 TTABVUE 7.

<sup>13</sup> 8 TTABVUE 16.

(marexspectron.com),<sup>14</sup> or showing “coincidental placement of ‘agency’ next to ‘FX’” (fxcm.com and leaprate.com).<sup>15</sup> Even if the two or three alleged third-party uses are trademark uses, that is not enough for us to discount such uses as infringing uses; many trademarks include merely descriptive components. Also, the moltenmarkets.com webpage does not use Agency FX as a trademark and its meaning is not indefinite; the next sentence states, “[p]roduced a white paper identifying the pros and cons of creating full Agency and/or Matched Principal services for institutional investor client base.” This is a reference to the Agency model discussed above. As for the marexspectron.com webpage alleged to be British, it does have some probative value; it references company offices in North America (indicating that it does business in North America) and the service discussed therein, currency exchange, is inherently international in nature. We see no reason why consumers in the United States would not consider marexspectron.com in exchanging currency, such as dollars to British pounds.<sup>16</sup> In the leaprate.com website, the placement of “agency” next to “fx” does not seem coincidental to us. In context, the terms have a clear meaning.

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<sup>14</sup> According to Applicant, the marexspectron.com webpage includes a British phone number.

<sup>15</sup> 8 TTABVUE 17.

<sup>16</sup> The result in this appeal would not be any different if we had not considered the marexspectron.com webpage.

• the following registrations in the record demonstrate that the Office has previously found that the addition of other matter to the word AGENCY creates a distinctive mark:<sup>17</sup>

- AgencyONE (Reg. 4751091) for services including “Financial services, namely, providing an investment option available for variable annuity and variable life insurance products” in International Class 36;
- AGENCYPOINT (Reg. 3914896) for services including “financial information services” in International Class 36;
- AgencyThrive (Reg. 4361250) for services including “Promotion of financial and insurance services, on behalf of third parties” in International Class 35.

It is well settled that each case must be decided on its own facts and the Board is not bound by prior decisions involving different records. *See In re Cordua Rests., Inc.*, 823 F.3d 954, 118 USPQ2d 1632, 1635 (Fed. Cir. 2016); *In re Nett Designs, Inc.*, 236 F. 3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). The fact that third-party registrations exist for marks allegedly similar to the applicant’s mark is not conclusive on the issue of descriptiveness. *See In re Scholastic Testing Serv., Inc.*, 196 USPQ 517, 519 (TTAB 1977).

Based on the evidence in the record, we find (i) that FX is a recognized abbreviation for “foreign exchange”; and (ii) that AGENCY is a reference to a model of trading, including foreign exchange trading. As described in the binaryoptionswire.com excerpt, agency trading involves currency traders working

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<sup>17</sup> Applicant submitted Supplemental Registration No. 4239438 for THE CONTENT AGENCY. This registration does not assist Applicant’s argument because it is a Supplemental Register registration, and merely descriptive marks may be placed on the Supplemental Register.

with liquidity providers to secure the best possible bid and ask prices for their clients. This meaning comports with the definition of “agency,” i.e. “the office or function of an agent.” It also is consistent with Applicant’s characterization of its services in its specimen of use; “we transact through competing multi-venue trading platforms on your behalf ... .” We also find that the combination of the terms does not result in a new, incongruous or otherwise nondescriptive meaning as applied to the goods and/or services. (Applicant does not suggest any special meaning for the combination of terms.) Applicant’s statement in its website exhibiting non-trademark use of the phrase “agency foreign exchange” is particularly probative in determining the meaning of the proposed mark as a whole; “In addition to our fiduciary role in agency foreign exchange ... we’re able to provide institutional investors with leading edge currency trading technology and buy side liquidity that makes it easier to trade and less expensive to transact.”<sup>18</sup> Further, the proposed mark in this case is not similar to the mark in *In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382, 385 (CCPA 1968), cited by Applicant. In *Colonial Stores*, the mark SUGAR & SPICE, was found to have a “reminiscent, suggestive or associative connotation,” which is not the case with Applicant’s proposed mark. We therefore find that the proposed mark is merely descriptive of a feature or characteristic of Applicant’s goods and identified services.

**Decision:** The refusal to register the mark on the ground that Applicant’s proposed mark AGENCY FX is merely descriptive is affirmed for all three International Classes, i.e., International Classes 9, 36 and 41.

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<sup>18</sup> www.russell.com, Final Office Action.