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## UNITED STATES: Opposer's Fraud Allegation Loses Energy at the TTAB

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In a precedential decision, the U.S. Patent and Trademark Office's (USPTO's) Trademark Trial and Appeal Board (TTAB) applied the standard recently set forth in *In re Bose*, 91 USPQ 2d 1938 (Fed. Cir. 2009). In *Enbridge, Inc. v. Excelerate Energy Limited Partnership*, Opposition No. 91170364 (T.T.A.B. Oct. 6, 2009), the opposer, Enbridge, Inc., filed a motion for summary judgment on the ground that the applicant, Excelerate Energy Limited Partnership, had committed a fraud on the USPTO because Excelerate had never used its ENERGY BRIDGE mark for one of the various services identified in the application. The TTAB denied Enbridge's motion.

The ENERGY BRIDGE application covered a number of services, including "transmission of oil." Excelerate admitted that it had never used its mark for these services, but claimed that the inclusion of "transmission of oil" in its application was "an inadvertent, honest mistake" rather than the result of a willful intent to deceive. Nonetheless, citing Excelerate's admission of non-use, Enbridge sought summary judgment on grounds of fraud.

Citing the recent decision of the Federal Circuit in *In re Bose*, the TTAB stated that fraud occurs "when an applicant *knowingly* makes a false, material representation with the intent to deceive the USPTO" (emphasis added), a standard that is stricter than the standards for negligence or gross negligence. Evidence of deceptive intent must be clear and convincing to prove fraud.

Applying the *Bose* standard, the TTAB concluded that Enbridge failed to meet its burden of establishing that it was entitled to judgment as a matter of law. Whether Excelerate knowingly made a representation with the intent to deceive the USPTO remained a genuine issue of fact to be determined at trial. Since Enbridge failed to establish the absence of a genuine issue of material fact as to its fraud claim, the motion for summary judgment was denied.

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