

Hey, Batter Batter! – Lizard Skins Goes to Bat over its Grip Tape Designs

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by Tiffany Shimada

It's finally the start of baseball season: you can almost feel the gentle spring breeze, smell the peanuts and popcorn, and hear the crack of the bat. You may also notice something more colorful, dotted, and perhaps camo-patterned wrapped around those bats: nope, it's not an actual lizard, that's Lizard Skins® bat grip tape. Lizard Skins registered several of its Lizard Skins® bat grip tape designs for a one-color camo pattern (U.S. Reg. No. 5249013); a two-color camo pattern (U.S. Reg. No. 5239869); and an embossed pattern featuring six staggered rows of ovals (U.S. Reg. No. 5389215). Lizard Skins asserted exclusive rights in these designs and alleged trademark and trade dress infringement against Hot Glove for selling competing camo and oval patterned bat grip tapes under the Mega Wrap brand. The lawsuit was filed in the U.S. District Court for the District of Utah, Central Division on March 1. Lizard Skins claims in the [complaint](#) that Hot Glove stole home plate by offering knockoff camo patterns and staggered oval indentations on its bat grip tapes. The following side-by-side comparison photographs are featured in the complaint:

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Lizard Skins' registered two-color camo pattern

Hot Glove's Mega Wrap camo pattern

Lizard Skins claims that Hot Glove stole the “look and feel” of its products, though interestingly, it does not allege copyright infringement in the designs. Lizard Skins further alleges that the embossed Mega Wrap name on the tape and the overall product packaging, which features a clear window to show the rolled up tape, also infringes its distinctive trade dress.

Lizard Skins makes clear in its complaint that the protected design elements are for “aesthetic and identifying purposes” and not for functionality. This is an important distinction, as functional elements of trade dress cannot be ruled safe under trademark law. Specifically, 15 U.S.C. § 1052(e)(5) bars registration if the mark “comprises any

matter that, as a whole, is functional.” The overall goal, at least according to some courts, is to avoid granting one party exclusive rights in an aspect of the product’s design that others need to compete effectively in the marketplace.

Lizard Skins claims acquired distinctiveness in its registration for the oval design embossed pattern for bat grip tapes. Its claims to the one and two-color camo patterns are based on inherent distinctiveness of a “random marble camo pattern” as applied to baseball grip tapes. Because Lizard Skins has obtained federal registration protection for its alleged trade dress, the burden will be on Hot Glove to prove that the trade dress is functional if it wants to rely on a functionality defense. Hot Glove is now up at bat to defend itself against Lizard Skins’ claims. We’ll bring you more updates as this case, and our long-awaited baseball season, develops!