

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
LOUISVILLE DIVISION**

<b>IN RE:</b>	:	
<b>SKECHERS TONING SHOE</b>	:	<b>CASE: <u>3:11-md-02308-TBR</u></b>
<b>PRODUCT LIABILITY LITIGATION</b>	:	
-----	:	<b>MDL No.: 2308</b>
	:	
<b>This Document Applies to All Actions</b>	:	
-----	:	<b>Judge Thomas B. Russell</b>

**PRACTICE AND PROCEDURE ORDER NO. 5 (Preservation of Records)**

This Practice and Procedure Order No. 5 shall apply to personal injury claims pending before the Court in MDL No. 2308. The preservation of records shall be governed by the terms as follows:

**1. Preservation.**

(a) During the pendency of this litigation, and for 60 days after entry of a final order closing all cases, each of the parties herein and their respective officers, agents, employees and attorneys, and all persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, are restrained and enjoined from altering, interlining, destroying, or permitting the destruction of any “document” (defined below) in the actual or constructive care, custody or control of such person, wherever such document is physically located.

(b) “Preservation” is to be interpreted broadly to accomplish the goal of maintaining the integrity of all documents, data, and tangible things reasonably anticipated to be subject to discovery in this action under Fed. R. Civ. P. 2, 45, and 56(e). Preservation includes taking reasonable steps to prevent partial or full destruction, alteration, testing, deletion, shredding, incineration, wiping, relocation, migration, theft, or mutation of such

material as well as negligent or intentional handling that would make material incomplete or inaccessible.

(c) The parties shall retain all existing “snap shots” of electronic servers and all existing back-up tapes already archived and not used in the ordinary operation of the parties’ electronic document management systems at all of Defendants’ facilities wherein responsive or material documents may exist; and any off-site storage facility housing documents created in these facilities. The parties shall secure the hard drives (or make mirror-image copies of the files on hard drives) of all computers (including laptop or desktop computers) used by the parties or their employees with responsibilities related to this litigation that are not backed up in the ordinary course, before the reformatting, redeployment or disposal of such hard drives.

(d) In addition to the electronic data addressed by this Order, plaintiffs shall preserve:

1. their “Shape Up” shoes, including any materials provided with the shoes (e.g., boxes, hang tags, instructional booklets, and DVDs) and, receipts of purchase;
2. all relevant documents (as defined herein)—including those stored in accounts held by internet service providers (e.g., gmail, AOL) and social media companies (e.g., Facebook); and
3. all relevant medical records and receipts, explanation of benefits statements, and other evidence of relevant health care costs,

(e) If a party’s personal or business practices involve the routine destruction, recycling, relocation, or mutation of such materials, the party must, to the extent practicable

for the pendency of this order, either (1) halt such business processes; (2) sequester or remove such material from the business process; or (3) arrange for the preservation of complete and accurate duplicates or copies of such material, suitable for later discovery if requested. Defendant shall facilitate preserving and collecting electronic documents related to this litigation by properly directing all relevant employees to preserve and not destroy litigation-related documents.

**2. Scope.**

(a) The term “Document” is used in the broadest possible sense meaning anything which may be considered to be a document and includes, without limitations, any written, printed, typed, photostatic, photographic, recorded or otherwise reproduced communication or representation, whether comprised of letters, words, numbers, pictures, sound or symbols, or any combination thereof. This definition includes copies or duplicates of documents contemporaneously or subsequently created that have any nonconforming notes or other markings. Without limiting the generality of the foregoing, the term “Document” includes, but is not limited to, correspondence, memoranda, notes, records, letters, envelopes, telegrams, messages, studies, analyses, contracts, agreements, working papers, summaries, statistical statements, financial statements, work papers, accounts, local records, reports and/or summaries of investigation, trade letters, press releases, comparisons, books, calendars, diaries, articles, magazines, newspapers, booklets, brochures, pamphlets, circulars, bulletins, notices, drawings, diagrams, instructions, notes or minutes of meeting, or other communications of any type, including inter-office and intra office communication, questionnaires, surveys, charts, graph, photographs, recordings, tapes, discs, data cells, printouts, all other data compilations from which information can be obtained (translated, if

necessary, into usable form), and any preliminary versions, drafts or revisions of any of the foregoing and shall also include electronic communications, whether maintained presently in the normal course of business or available in back-up or legacy data formats, wherever found or maintained, including all servers, hard drives, lap tops, and firewalls.

(b) This order pertains to documents containing information that may be relevant to, or may lead to the discovery of information relevant to, this litigation. Any litigation-related document described or referred to in any discovery request or response made during this litigation shall, from the time of the request or response, be treated for purposes of this Order as containing such information unless and until the court rules such information to be irrelevant.

(c) Counsel are directed to confer to resolve questions as to what documents are outside the scope of this Order or otherwise need not be preserved and as to an earlier date for permissible destruction of particular categories of documents. If counsel are unable to agree, any party may apply to the court for clarification or relief from this Order upon reasonable notice. A party failing, within 60 days after receiving written notice from another party that specified documents will be destroyed, lost, or otherwise altered pursuant to routine policies and programs, to indicate in writing its objection shall be determined to have agreed to such destruction.

**IT IS SO ORDERED.**