

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

**IN RE:**

**SKECHERS TONING SHOE  
PRODUCT LIABILITY LITIGATION**

**CASE: 3:11-md-02308-TBR**

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**MDL No.: 2308**

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**This Document Applies to All Actions**

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**Judge Thomas B. Russell**

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**DISCOVERY ORDER NO. 1**

**I. SCOPE OF THIS ORDER**

This order applies to all personal injury claims which became part of the program of coordinated pretrial proceedings relating to Skechers Toning Shoes MDL 2308.

**II. WRITTEN DISCOVERY PROVIDED BY PLAINTIFFS**

**A. PLAINTIFF'S FACT SHEET**

1. Within sixty (60) days of the date of this Order or of the date on which an action is commenced, each plaintiff shall serve all defendants in that plaintiff's case with:

a. A completed Plaintiff's Fact Sheet, which has been approved by the Court with a completed verification attesting that the information contained therein is true and correct to the best of the plaintiff's knowledge, information and belief.

- b. Authorizations for the release of those categories of records set forth in Section XVII of the Fact Sheet, together with copies of such records, to the extent that those records or copies thereof are in the possession of plaintiff or plaintiff's counsel. The parties will seek Court approval of a HIPAA-compliant medical authorization. In the event that the defendants use a record copy service to obtain any plaintiff's medical or pharmacy records, the plaintiff shall be so notified by defendants at the time plaintiff's authorizations are forwarded to the record copy service by the requesting defendant. The parties shall confer regarding the selection and utilization of a uniform record copy service to be used for obtaining plaintiffs' official medical and pharmacy records. The parties will agree that notice to the plaintiff may be affected by the chosen record copy service. The designation of an official record copy service vendor will be the subject of a subsequent discovery order.
- c. Copies of all documents subject to the Requests for Production in the Fact Sheet.

2. The Fact Sheets shall be considered Interrogatories under FRCP 33 and the completed Fact Sheets shall be considered answers under that rule. The list of documents that are required to be provided with the Fact Sheets shall be considered a Document Request under FRCP 34. The parties shall comply with their obligation to supplement their document production by making regular additional productions within reasonable timeframes.

**III. DISCOVERY TO DEFENDANTS**

**A. INTERROGATORIES AND DOCUMENT REQUESTS**

1. The Document Production Requests and Interrogatories (“Plaintiffs’ Written Discovery Requests”) shall be deemed to have been served by all Plaintiffs upon all properly served Defendants in MDL No. 2308.

2. Defendants’ Responses and Objections to Plaintiffs’ Document Requests shall be served on Plaintiffs’ Liaison Counsel by all Defendants within sixty (60) days after the service of the same on Defendants’ Liaison Counsel. Defendants’ Responses to Plaintiffs’ Interrogatories shall be served on Plaintiffs’ Liaison Counsel within sixty (60) days after service of the same on Defendants’ Liaison Counsel.

3. To the extent that the Plaintiffs dispute any response, they shall meet and confer with the answering Defendants’ counsel in a good faith attempt to resolve that dispute. If no agreement is reached, Plaintiffs may file a motion to compel discovery pursuant to the applicable Federal Rules of Civil Procedure and JPML Rules.

**B. DEFENDANT'S DOCUMENT PRODUCTION**

**1. Protocol for Production**

a) Defendants must produce documents in accordance with Discovery Order No. 2 (Document and Electronic Discovery).

b) The cost of the production of documents shall be borne by the Defendants, however, the Court may award permissible costs associated with discovery pursuant to Rule 26(b)(2)(B) and at the conclusion of the matter pursuant to 28 U.S.C. 1920(4).

**2. Authenticity of Documents**

The parties agree that all documents produced by defendants in electronic format, or attached to a deposition, are presumed to be authentic documents, unless either party notifies the other and, absent agreement, raise timely objections with the Court.

**C. DISCLOSURE BY PLAINTIFFS' LIAISON COUNSEL**

Plaintiffs' Liaison Counsel shall make copies of any documents, interrogatories, and other items produced by defendants pursuant to this order available to any attorney representing any plaintiff in MDL No. 2308 upon written request and payment of all reasonable costs to provide such copies. No such disclosure shall be made to any person

not subject to the Confidentiality Order governing these cases. Disclosure may be made by uploading the documents to a secure server through which any Plaintiff's attorney who has signed the requisite protective orders may have access. The PSC may charge a reasonable fee for access to the PSC's server.

All generic (non-case-specific) discovery served in this litigation, including deposition notices, shall be served on defendants by Plaintiffs' Liaison Counsel and Co-Lead counsel.

**D. DISCOVERY OF NON-PARTIES**

Except as provided herein, discovery of non-parties may proceed under the Federal Rules of Civil Procedure. Defendants may request plaintiffs' medical records (not inclusive of mental health records) for the ten (10) years preceding their injury date, employment records, workers compensation records, school records and/or tax records through a record copy service. When they do so, copies of such requests must be simultaneously provided to plaintiffs' counsel, who will have twenty (20) days from the date of receipt of such requests during which to file a motion for a protective order to preclude the discovery of all or part of the requested records. If such a motion is filed, the record copy service will not produce to defense counsel a copy of the records to which an objection has been made until such time as the motion is resolved. If no such motion is filed within twenty (20) days, the record copy service will produce a complete copy of all responsive records to defense counsel who have requested a copy. A complete copy of all records obtained will be provided to Plaintiff's counsel.

Requests for all other documents must be made directly to Plaintiffs' counsel and are not subject to retrieval without plaintiff's provided medical authorization.

Defendants may not use authorizations except in accordance with this Order.

The parties may also subpoena records from any non-party. Those subpoenas will be governed by the applicable Federal Rules of Civil Procedure but shall not be inconsistent with any limitations on discovery provided herein.

**E. ADDITIONAL WRITTEN DISCOVERY**

Additional written discovery shall only be permitted (1) with the consent of the answering party or (2) by order of the Court.

**F. PRIVILEGED DOCUMENTS AND INFORMATION**

**1. Inadvertent Disclosure**

- (a) In the event that any document or thing containing or constituting privileged attorney-client communications or attorney client work product is inadvertently produced, the Producing Party shall promptly notify the Receiving Party in writing after it is discovered that the privileged material was inadvertently provided for inspection or review and, upon receipt of such notification the Receiving Party shall promptly return to counsel for the Producing Party any and all copies of such document or thing and thereafter refrain from any use whatsoever, in this case or otherwise, of such document or thing.

- (b) In the event that a Receiving Party receives a document or thing that obviously appears to contain privileged attorney-client communications or attorney work product, and it is reasonably apparent to the Receiving Party that the document or thing was made available inadvertently, the Receiving Party shall promptly notify the Producing Party in writing. If the Producing Party confirms the inadvertent production, the Receiving Party shall promptly return to counsel for the Producing Party any and all copies of such document or thing and thereafter refrain from any use whatsoever, in this case or otherwise, of such document or thing.
- (c) The inadvertent production of any document or thing for which a claim of privilege or work-product doctrine is subsequently asserted by the Producing Party shall not constitute a subject matter waiver of a valid claim of privilege or the work-product doctrine as to any other document or thing in the possession of the Producing Party, or as to any communication or information within the knowledge of the Producing Party.
- (d) The Producing Party shall retain a copy of any document identified and returned pursuant to the provisions of this paragraph and, upon request, provide said document to the MDL Court, or, upon transfer or remand, the District Court for review under seal if the Receiving Party challenges the privilege and/or confidential designation.

**2. Privilege Log**

Subject to the exceptions below and without affecting the parties' obligations or court rulings regarding privilege logs produced in any action outside MDL 2308, any documents withheld from production or redacted in part on the grounds of attorney-client privilege, the work product doctrine, or any other privilege or protection from disclosure, shall be listed on a privilege log providing sufficient information to allow the receiving party to determine the basis of the privilege asserted, including: identification of the document; the date; author(s) and recipient(s), and their business positions; a brief description of the document (e.g., correspondence, memo, etc.); and the basis for withholding the document (e.g. attorney-client privilege, attorney work product, etc.). The privilege log shall be provided within fifteen (15) days of the production to which it applies. Privilege logs shall promptly be supplemented every thirty (30) days as to any document that becomes producible thereafter. The following categories of documents protected from disclosure on grounds of privilege or work product need not be included on any such privilege log: (i) communications between a party and its outside counsel that have not been disclosed in a manner that would destroy privilege; (ii) outside counsel communications, work product and materials generated by or for outside counsel, including communications with and materials prepared by consulting experts regarding Skechers toning shoes-related litigation or claims; (iii) communications between a party's employees and the party's in-house counsel related to or regarding one or more Skechers-related actions or claims; and (iv) communications based upon a common interest privilege among Plaintiffs' counsel or among Defendants' counsel. Upon a showing of good cause, a party may later move



the Court to modify this provision to require that some specified portion of the communications referred to above be added to another party's privilege logs or that additional categories of documents be exempted from privilege logs.

**IV. EXPERT DISCOVERY**

Expert discovery shall be governed by a separate Practice and Procedure Order that will be entered after the entry of a case management schedule with deadlines for expert disclosures and discovery.

**IT IS SO ORDERED.**