

THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

**IN RE:
SKECHERS TONING SHOE
PRODUCTS LIABILITY LITIGATION**

**THIS DOCUMENT RELATES TO ALL
CASES**

Master File No. No. 3:11-MD-2308-TBR
MDL No. 2308

Honorable Thomas B. Russell
U.S. District Judge

PROTECTIVE ORDER

The plaintiffs to the individual actions included in the above-captioned multi-district litigation proceeding (each a “Plaintiff” and collectively “Plaintiffs”) and Defendants Skechers U.S.A., Inc., Skechers U.S.A., Inc. II, and Skechers Fitness Group (collectively, “Skechers”) shall abide by the following terms and condition of this Protective Order:

1. PURPOSES AND LIMITATIONS

- 1.1. Disclosure and discovery in this action are likely to involve production and disclosure of documents and information pertaining to private and confidential personal information, as well as financial, competitive, personnel, product development, and other kinds of commercially sensitive and/or proprietary information, all of which will require special protection from public disclosure and use for any purpose other than prosecuting this litigation.
- 1.2. This Protective Order does not confer blanket protections on all disclosures or responses to discovery and that the protection it affords extends only to the limited information or items that are entitled under the applicable legal principles to treatment as confidential. As set forth in Section 10, below, that this Protective Order creates no entitlement to file confidential information under seal.

2. DEFINITIONS

- 2.1. Party: for purposes of this Protective Order only, each of the individual Plaintiffs and Skechers (including its officers, directors, employees, House Counsel, corporate parents, subsidiaries, affiliates, and insurers).
- 2.2. Individual Action(s): each of the individual actions included in the above-captioned multi-district litigation proceeding
- 2.3. MDL Proceedings: any and all discovery and pretrial proceedings conducted within case number 3:11-md-02308, the above captioned multidistrict litigation action.
- 2.4. MDL Court: the above captioned court presiding over case number 3:11-md-02308.
- 2.5. District Court: the federal district court in which each of the Individual Actions was originally filed and/or to which the Individual Actions shall be transferred or remanded upon termination of the MDL Proceedings, unless otherwise resolved during the MDL Proceedings.
- 2.6. Disclosure or Discovery Material: all items or information, regardless of the medium or manner generated, stored, or maintained (including, among other things, testimony, transcripts, or tangible things) that are produced or generated in disclosures or responses to discovery in this matter.
- 2.7. “Confidential” Information or Items: information (regardless of how generated, stored or maintained) or tangible things that the Producing Party or Designating Party believes in good faith constitutes proprietary or competitively or commercially sensitive information the disclosure of which without restriction would be a violation of privacy rights or detrimental to that party in the conduct of its business, that is not, or has not: (a) become public knowledge, as shown by publicly available writings, other than through violation of the terms of this Protective Order; (b) is or was acquired lawfully by a non-Designating Party that

has no obligation to the owner of the information; (c) is or was disclosed by a non-Designating Party with the approval of the Designating Party; or (d) is or has been independently developed by the Receiving Party.

- 2.8 Receiving Party: a Party that receives Disclosure or Discovery Material from a Producing Party.
- 2.9 Producing Party: a Party or non-party that produces Disclosure or Discovery Material in this action.
- 2.10 Designating Party: a Party or non-party that designates information or items that it produces in disclosures or in responses to discovery as “Confidential.”
- 2.11 Protected Material: any Disclosure or Discovery Material that is designated as “Confidential.”
- 2.12 Outside Counsel: attorneys who are not employees of a Party but who are retained to represent or advise a Party in this action.
- 2.13 House Counsel: attorneys who are employees of a Party.
- 2.14 Counsel (without qualifier): Outside Counsel and House Counsel (as well as their support staffs).
- 2.15 Professional Vendors: persons or entities that provide litigation support services (e.g., photocopying; videotaping; translating; preparing exhibits or demonstrations; organizing, storing, retrieving data in any form or medium; etc.) and their employees and subcontractors.
- 2.16 Expert: a person with specialized knowledge or experience in a matter pertinent to the litigation who has been or may be retained by a Party or its counsel to serve as an expert witness (as set forth in Federal Rule of Evidence 702), including testifying and non-testifying experts, or as a consultant in this action.

3. SCOPE

The protections conferred by this Protective Order cover not only Protected Material (as defined above), but also any information copied or extracted therefrom, as well as all copies, excerpts, summaries, or compilations thereof, plus testimony, conversations, or presentations by parties or counsel to or in court or in other settings that might reveal Protected Material. This Protective Order is intended to cover all MDL Proceedings and each Individual Action upon transfer or remand to the District Court. Notwithstanding the foregoing, this Protective Order shall not limit the parties' abilities to use Protected Material at trial.

4. DURATION

Following the conclusion or termination of the MDL Proceedings and each of the Individual Actions, the confidentiality obligations imposed by this Protective Order shall remain in effect until a Designating Party agrees otherwise in writing or a court order otherwise directs.

5. DESIGNATING PROTECTED MATERIAL

- 5.1. Exercise of Restraint and Care in Designating Material for Protection: Each Party or non-party that designates information or items for protection under this Protective Order shall limit any such designation to specific material that qualifies under the appropriate standards. A Designating Party shall designate for protection only those parts of material, documents, items, or oral or written communications that qualify as Protected Material. If a Party or a non-party concludes that information or items that it designated for protection do not qualify for protection at all, or do not qualify for the level of protection initially asserted, that Party or non-party must promptly notify all other parties in writing that it is withdrawing the incorrect designation.
- 5.2. Manner and Timing of Designations: Except as otherwise provided in this Protective Order (*see, e.g.*, sections 5.3(b), 5.4, and 5.6, below), or as otherwise stipulated or ordered, material that qualifies for protection under this Protective Order must be clearly so designated before the material is disclosed or produced.
- 5.3. Designation of Information in Documentary Form (apart from transcripts of depositions or other pretrial or trial proceedings):
- (a) The Producing Party shall affix the legend "CONFIDENTIAL" on each page that contains Protected Material.
 - (b) A Party or non-party that makes original documents or materials available for inspection need not designate them for protection until after the inspecting Party has indicated which material it would like copied and produced. During the inspection and before the designation, all of the material made available for inspection shall be deemed "Confidential." After the inspecting Party has identified the documents it wants copied and produced, the Producing Party must determine which documents qualify for protection under this Protective Order, then, before producing the

specified documents, the Producing Party must affix the appropriate legend (“CONFIDENTIAL”) on each page that contains Protected Material.

5.4. Designation of Testimony (whether given in deposition or in other pretrial or trial proceedings):

- (a) The Party or non-party offering or sponsoring the testimony shall identify on the record, before the close of the deposition, hearing, or other proceeding, all protected testimony, and further specify any portions of the testimony that qualify as “Confidential.”
- (b) When it is impractical to identify separately each portion of testimony that is entitled to protection, and when it appears that substantial portions of the testimony may qualify for protection, the Party or non-party that sponsors, offers, or gives the testimony may invoke on the record (before the deposition or proceeding is concluded) a right to have up to 20 days from the date of receipt of the final transcript to identify the specific portions of the testimony which should be protected as "Confidential." When this right has been invoked, the entire transcript shall be treated as “Confidential” until the earliest expiration of: (a) 20 days from the date of receipt of the final transcript; or (b) the date that the specific portions of testimony for which protection is sought have been designated as “Confidential” and such designations have been served. The foregoing applies only if the above-mentioned 20-day period is invoked. Only those portions of the testimony that are appropriately designated for protection within the 20 days shall be covered by the provisions of this Protective Order.

- (c) Transcript pages containing Protected Material must be separately bound by the court reporter, who must affix to the top of each such page the legend “CONFIDENTIAL,” as instructed by the Party or nonparty offering or sponsoring the witness or presenting the testimony.

5.5. Designation of Information Produced in Other Than Documentary Form and for Tangible Items: The Producing Party shall affix in a prominent place on the exterior of the container or containers in which the information or item is stored the legend “CONFIDENTIAL.”

5.6. Inadvertent Production of or Failure to Designate Protected Material:

- (a) An inadvertent failure to designate qualified information or items as “Confidential” does not, standing alone, waive the Designating Party's right to secure protection under this Protective Order for such material.
- (b) In the event that any document or thing qualifying for designation as “Confidential” is inadvertently produced without the proper designation, the Producing Party shall identify such document or thing promptly in writing after its inadvertent production is discovered and provide a copy of such document or thing with the proper designation to counsel for the Receiving Party, upon receipt of which the Receiving Party shall promptly return or verify in writing that it has destroyed all copies of the document or thing in its previously undesignated or misdesignated form.

5.7. Inadvertent Production of Privileged Communications or Work Product:

- (a) In the event that any document or thing containing or constituting privileged attorney-client communications or attorney 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 5.7 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 privileged and/or confidential designation.

5.8. Knowing and Voluntary Disclosure of Privileged Material or Work Product: The knowing and voluntary disclosure of a document, thing, or communication, or of information that would otherwise be protected by the attorney-client privilege or the work-product doctrine, shall constitute a waiver of attorney-client privilege or work-product doctrine only as to the specific topic contained in the document, thing, communication, or information disclosed. In no event will the waiver described in this paragraph include any document, thing, communication, or information communicated to or from, or prepared by or on behalf of, (a) any Outside Counsel representing any Party in this litigation; or (b) any House Counsel in connection with this litigation.

6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

- 6.1. Timing of Challenges: Any challenge to a Designating Party's confidentiality designation shall be made as promptly as the circumstances permit.
- 6.2. Meet and Confer: A Party wishing to challenge a Designating Party's confidentiality designation shall begin the process by conferring with counsel for the Designating Party. The challenging Party must identify each designation it believes to be improper. The Designating Party shall have 5 days in which to review the designated material and either re-designate the material or explain the basis for the chosen designation. A challenging Party may not seek judicial intervention under section 6.3 unless it has first met and conferred, or reasonably attempted to meet and confer, with the Designating Party.

6.3. Judicial Intervention: If the parties are unable to informally resolve a challenge to a particular designation, the Designating Party may file and serve a motion that identifies the challenged material and sets forth in detail the basis its confidentiality designation. Each such motion must be accompanied by a competent declaration affirming that the movant has complied with the meet and confer requirements imposed in the preceding paragraph and setting forth with specificity the justification for the confidentiality designation. Until the MDL or District Court rules on the challenge, all parties shall continue to afford the material in question the level of protection to which it is entitled under the Producing Party's designation. The burden of proving that the challenged material was properly designated as confidential shall remain with the designating party.

7. ACCESS TO AND USE OF PROTECTED MATERIAL

7.1. Basic Principles:

- (a) A Receiving Party may use Protected Material that is disclosed or produced by another Party or by a non-party only for prosecuting, defending, or attempting to settle the MDL Proceedings and/or the Individual Actions.
- (b) Such Protected Material may be disclosed only to the categories of persons and under the conditions described in this Protective Order.
- (c) When the MDL Proceedings and/or the Individual Actions have been terminated, a Receiving Party must comply with the provisions of section 11, below.
- (d) Protected Material must be stored and maintained by a Receiving Party at a location and in a secure manner that ensures that access is limited only to the persons authorized under this Protective Order.

- 7.2. Disclosure of “Confidential” Information or Items: Unless otherwise ordered by the Court or permitted in writing by the Designating Party, a Receiving Party may disclose any information or item designated “Confidential” only to:
- (a) the Receiving Party’s Outside Counsel of record in this action, as well as employees of said Outside Counsel or Professional Vendors to whom it is reasonably necessary to disclose the information for the prosecution or defense of the MDL Proceedings and/or the Individual Actions;
 - (b) the Receiving Party’s House Counsel, as well as employees of said House Counsel to whom it is reasonably necessary to disclose the information for the prosecution or defense of the MDL Proceedings and/or the Individual Actions;
 - (c) the Receiving Party, including officers, directors, employees, or insurers of the Receiving Party to whom disclosure is reasonably necessary for the prosecution or defense of this litigation, provided that each recipient has signed the “Agreement to Be Bound by Protective Order” (Exhibit A);
 - (d) Experts (as defined in this Protective Order) to whom disclosure is reasonably necessary for the prosecution or defense of this litigation, provided that each recipient has signed the “Agreement to Be Bound by Protective Order” (Exhibit A);
 - (e) a mediator, including his or her support staff, provided that each recipient has signed the “Agreement to Be Bound by Protective Order” (Exhibit A);
 - (f) the MDL Court and/or the District Court, and their respective personnel;
 - (g) court reporters, their staffs, and professional vendors to whom disclosure is reasonably necessary for the prosecution or defense of the MDL Proceedings and/or the Individual Actions;
 - (h) during their depositions, witnesses in the action to whom disclosure is reasonably necessary, provided that the witness is instructed and

acknowledges an understanding on the record and under oath that: (i) any Confidential Information shown to the witness is protected by this Protective Order; (ii) the witness is not permitted to disclose or discuss the Confidential Information outside of the deposition proceeding; (iii) the MDL Court or District Court may impose on the witness sanctions and punishment in the nature of contempt for any disclosure of Confidential Information in violation of the terms of this Protective Order; and (iv) the witness has been provided a copy of this Protective Order. Pages of transcribed deposition testimony or exhibits to depositions that reveal Protected Material must be separately bound by the court reporter and may not be disclosed to anyone except as permitted under this Protective Order.

- (i) the author of the document or the original source of the information, and the persons who originally received the document in the ordinary course of business.

7.3 Retention of Executed Copies of “Agreement to Be Bound by Protective Order” (Exhibit A): Prior to disclosure of Protected Material to a person who must execute an “Agreement to Be Bound by Protective Order” (Exhibit A) in order to be authorized to receive such material, Outside Counsel shall provide a copy of this Protective Order to such person and obtain from him or her a fully executed copy of Exhibit A. Outside Counsel shall maintain in its files all such executed copies of the “Agreement to Be Bound by Protective Order” (Exhibit A) until at least sixty (60) days after the final termination of each respective Individual Action. In the event of a dispute, the MDL Court or District Court may require Outside Counsel to produce for *in camera* inspection the original executed “Agreement to Be Bound by Protective Order” (Exhibit A) for any person.

8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER LITIGATION

- 8.1. If a Receiving Party is served by a non-party with a subpoena or an order issued in other litigation that would compel disclosure of any information or items designated in this action as “Confidential,” the Receiving Party must so notify the Designating Party in writing (by email or fax, if possible) no more than ten court days after receiving the subpoena or order. Such notification must include a copy of the subpoena or court order.
- 8.2. The Receiving Party also must immediately inform in writing the non-party who caused the subpoena or order to issue in the other litigation that some or all the material covered by the subpoena or order is the subject of this Protective Order. In addition, the Receiving Party must deliver a copy of this Protective Order promptly to the non-party in the other action that caused the subpoena or order to issue.
- 8.3. The purpose of imposing these duties is to alert the interested parties to the existence of this Protective Order and to afford the Designating Party in this case an opportunity to try to protect its confidentiality interests in the court or other forum to which the subpoena or order relates. The Designating Party shall bear the burden and expense of seeking protection in that court or other forum of its confidential material. Nothing in these provisions should be construed as authorizing or encouraging a Receiving Party in this action to disobey a lawful directive from another court.

9. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL.

If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected Material to any person or in any circumstance not authorized under this Protective Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the unauthorized

disclosures, (b) use its best efforts to retrieve all copies of the Protected Material, (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of this Protective Order, and (d) request such person or persons to execute the “Acknowledgment and Agreement to Be Bound” that is attached hereto as Exhibit A.

10. FILING PROTECTED MATERIAL

10.1. Information designated as “Confidential” that is included in any legal document (*i.e.*, any document intended to be filed with the Court) served in this action, whether appended as an exhibit or incorporated into a pleading, affidavit, declaration, memorandum of law or other filing, shall be filed under seal subject to terms and procedures agreed to by the parties or ordered by the MDL Court or District Court, and such information may be disclosed by the Receiving Party only to those persons identified in paragraph 7.2 above (with respect to information designated as “Confidential”).

10.2. Notwithstanding the foregoing, where a party wishes to include in a legal document a writing containing information that has been designated “Confidential,” but the confidential information contained in such writing is not relevant to the purpose for which the writing is being offered to the MDL Court or District Court, the party including such writing in a legal document may, in lieu of filing the document under seal, submit a redacted copy of the writing. In such event, the redaction must be indicated by placing the designation “**REDACTED - CONFIDENTIAL INFORMATION**” in the place(s) on the writing in close proximity to where the confidential information would have appeared.

- 10.3. Except for material delivered to the MDL Court or Transfer or Court or filed with the respective clerks for the same as provided above, all materials containing information that has been designated as “Confidential” shall be stored under the direct control of counsel for the receiving party, who shall be responsible for preventing any disclosure thereof except in accordance with the terms of this Protective Order.
- 10.4. Nothing contained in this Protective Order shall preclude any party from using its own Protected Material in any manner it sees fit, without prior consent of any other Party, the MDL Court, or District Court. Nothing herein shall operate as any admission by any of the parties hereto that any particular materials contains or reflects trade secrets, or other confidential or proprietary information.

11. FINAL DISPOSITION

- 11.1. Unless otherwise ordered or agreed in writing by the Producing Party, within sixty (60) days after the final termination of each Individual Action, each Receiving Party must destroy all Protected Material of the Producing Party. As used in this subdivision, “all Protected Material” includes all copies, abstracts, electronic files, compilations, summaries or any other form of reproducing or capturing any of the Protected Material of the Producing Party.
- 11.2. Upon request, the Receiving Party must submit a written certification to the Producing Party (and, if not the same person or entity, to the Designating Party) within sixty (60) days identifies (by category, where appropriate) all the Protected Material that was destroyed and that affirms that the Receiving Party has not retained any copies, abstracts, compilations, summaries or other forms of reproducing or capturing any of the Protected Material of the Producing Party.
- 11.3. Notwithstanding this provision, Counsel are entitled to retain an archival copy of all pleadings, motion papers, transcripts, legal memoranda, and the exhibits

thereto, as well as correspondence and attorney work product, even if such materials contain Protected Material.

- 11.4. Any such archival copies that contain or constitute Protected Material remain subject to this Protective Order as set forth in section 4, above.

12. DISCLOSURE OF PROTECTED MATERIAL BY NON-PARTIES

- 12.1. Non-parties who provide information in response to a subpoena or discovery request may invoke the protection of this Order by (a) designating that information “Confidential” in accordance with this Protective Order; and (b) signing a copy of this Protective Order.
- 12.2. Any non-party who invokes the protection of this Protective Order shall also be bound by its obligations.

13. MISCELLANEOUS

- 13.1. Right to Further Relief: Nothing in this Protective Order abridges the right of any person to seek its modification by the Court in the future.
- 13.2. Right to Assert Other Objections: By stipulating to the entry of this Protective Order no Party waives any right it otherwise would have to object to disclosing or producing any information or item on any ground not addressed in this Protective Order. Similarly, no Party waives any right to object on any ground to use in evidence of any of the material covered by this Protective Order.
- 13.3. Exclusive Jurisdiction: The MDL Court shall have the exclusive jurisdiction to enforce any disputes arising out of this Protective Order.
- 13.4. Signing Disclosures and Discovery Requests, Responses, and Objections: The parties shall be bound by Federal Rule of Civil Procedure 26(g).

IT IS SO ORDERED.

EXHIBIT A

THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

**IN RE:
SKECHERS TONING SHOE
PRODUCTS LIABILITY LITIGATION**

**THIS DOCUMENT RELATES TO ALL
CASES**

Master File No. No. 3:11-MD-2308-TBR
MDL No. 2308

Honorable Thomas B. Russell
U.S. District Judge

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [*print or type full name*], of
_____ [*print or type full address*], declare
under penalty of perjury that I have read in its entirety and understand the Protective Order that
was issued by the United States District Court for the Western District of Kentucky on
_____ in the above-captioned multi-district litigation proceeding.

I agree to comply with and to be bound by all the terms of this Protective Order and I
understand and acknowledge that failure to so comply could expose me to sanctions and
punishment in the nature of contempt. I solemnly promise that I will not disclose in any manner
any information or item that is subject to this Protective Order to any person or entity except in
strict compliance with the provisions of this Order.

I further agree to submit to the jurisdiction and venue of the United States District Court
for the Western District of Kentucky for the purpose of enforcing the terms of this Protective
Order, even if such enforcement proceedings occur after termination of this action, and

understand that the Court may impose sanctions for any violation of the attached Protective Order.

Date: _____

Printed name:

Signature:
