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ATLANTIC COUNTY LAW DIVISION

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NELSON C. JOHNSON, J.S.C.

COURT INITIATED

KARRY LYNN HOMAN PLAINTIFF(S)	SUPERIOR COURT OF NEW JERSEY LAW DIVISION ATLANTIC COUNTY DOCKET NO. ATL-L-7686-11 MT
VS	ACCUTANE LITIGATION
HOFFMANN-LaROCHE, et al. DEFENDANT(S)	**ORDER**

THIS MATTER having come before the Court on the Motion of Defendants Hoffman-LaRoche Inc. and Roche Laboratories, Inc. ("Defendants"), by and through their attorneys, Gibbons, P.C., for the entry of an Order granting Summary Judgment in the above-captioned matter based on lack of proximate cause; and Plaintiff having filed opposition; and the Court having heard oral argument on August 24, 2016, Michael X. Imbroscio, Esquire appearing for the Defendants, and Wendy Elsey, Esquire, appearing for the Plaintiff, Karry Lynn Homan; and for the reasons stated in the Court's Memorandum of Decision of even date herewith; and for good cause shown;

IT IS ON THIS 12th day of OCTOBER, 2016 ORDERED, that Defendants' Motion for Summary Judgment is DENIED without prejudice.

IS FURTHER ORDERED that a copy of this Order shall be served upon all parties within seven (7) days of its receipt.

NELSON C. JOHNSON, J.S.C.

FILED

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SUPERIOR COURT OF NEW JERSEY

NELSON C. JOHNSON, J.S.C.

1201 Bacharach Boulevard
Atlantic City, NJ 08401-4527
(609) 594-3384

MEMORANDUM OF DECISION ON MOTION
Pursuant to Rule 1:6-2(f)

RE: ACCUTANE LITIGATION
CASE NO.: 271

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BASED ON LACK OF PROXIMATE CAUSE IN 16 STATES

CASES: SCHEDULE A

DATE: OCTOBER 12, 2016

APPEARANCES:

PLAINTIFFS:	DEFENDANTS:
DAVID R. BUCHANAN, ESQUIRE	PAUL W. SCHMIDT, ESQUIRE
MICHAEL L. ROSENBERG, ESQUIRE	MICHAEL X. IMBROSCIO, ESQUIRE
MARYJANE BASS, ESQUIRE	RUSSELL L. HEWITT, ESQUIRE
BILL CASH, ESQUIRE	BRANDON E. MINDE, ESQUIRE
STEPHEN M. BOLTON, ESQUIRE	CHRIS MCRAE, ESQUIRE
DANIEL C. LEVIN, ESQUIRE	ERIC SWAN, ESQUIRE
PETER SAMBERG, ESQUIRE	MARK A. DREHER, ESQUIRE
PAUL L. SMITH, ESQUIRE	CORTNEY M. GODIN, ESQUIRE
WENDY ELSEY, ESQUIRE	DIMPLE DESAI SHAH, ESQUIRE
MORRIS DWECK, ESQUIRE	
ROBERT J. EVOLA, ESQUIRE	
RICK M. BARRECA, ESQUIRE	
DIANE M. COFFEY, ESQUIRE	
LON WALTERS, ESQUIRE	
ALLISON E. WHITTEN, ESQUIRE	
SCOTT C. GREENLEE, ESQUIRE	
GREGORY BROWN, ESQUIRE	
ANN RICE ERVIN, ESQUIRE	
JUSTIN JENSON, ESQUIRE	
W. LEE GRESHAM, III, ESQUIRE	
LISA ANN GORSHE, ESQUIRE	

HAVING CAREFULLY REVIEWED THE MOVING PAPERS AND ANY RESPONSE FILED, I HAVE RULED ON THE ABOVE CAPTIONED MOTION(S) AS FOLLOWS:

I. NATURE OF MOTIONS BEFORE THE COURT.

This matter comes before the Court via sixteen Motions filed by the Defendants, Hoffman-LaRoche, et al. (hereinafter "the Defendants") based upon lack of proximate cause in a total of eighty-two (82) cases, wherein Defendants assert that the proper application of the Learned Intermediary Doctrine (hereinafter "LID") requires the dismissal of all the claims subject to their petition. Sixteen separate motions were filed for sixteen different jurisdictions respectively; in each, Defendants make essentially the same arguments, as applied to the testimony of the prescribing physicians.

As a consequence of further review and discussion among counsel, the total number of claims now subject to these sixteen motions is seventy-four (74), the captions and docket numbers for which are attached hereto as "Schedule A." The Court received the benefit of the excellent oral arguments from counsel listed above on August 22-25, 2016, and now makes its ruling. The Court appreciates counsels' patience; the delay in issuing this ruling was unavoidable.

II. COMPETING ARGUMENTS OF COUNSEL

Defendant's Arguments in Support of their Omnibus Motions for Summary Judgment:

The *Gaghan* decision identified certain states that have the same proximate cause standard as New Jersey, and those motions were previously brought before the Court and granted on January 29, 2016. *Gaghan v. Hoffmann-La Roche Inc.*, Nos. A-2717-11, A-3211-11, & A-3217-11, 2014 *N.J. Super.* Unpub. LEXIS 1895 (N.J. Super. Ct. App. Div. Aug. 4, 2014). Defendants' present motions address sixteen additional states which they assert also follow the same standard as New Jersey but that were not specifically identified in *Gaghan.* The standard at issue in *Gaghan* was whether the prescribing physician's decision would have changed given a different warning. Defendants argue that, consistent with the LID, this analysis does not turn on what information ultimately reached the patient nor on the patient-prescriber discussions. *See In re: Vioxx Prods. Liab. Litig.*, MDL No. 1657, 2015 *U.S. Dist.* LEXIS 52756, at *28 (E.D. La. Apr. 21, 2015). A manufacturer's duty to warn runs only to the physician. Under New Jersey law, the key question

for purposes of the proximate cause analysis is whether "the doctor's decision to prescribe the drug" at issue "would be altered by a stronger warning." *Gaghan, supra,* at *38.

According to Defendants, injury-state law applies in these personal injury cases absent some contrary forum-state interest for which there is none on the proximate cause question to compel New Jersey law's application. *See Cornett v. Johnson & Johnson,* 211 *N.J.* 362, 377-79 (2012). According to Defendants, regardless of which state's law is applied, Plaintiffs must demonstrate that a different warning would have altered their physicians' prescribing decisions. Defendants also analyzed this proximate cause issue under each of the sixteen injury-state's laws.

Plaintiffs' General Opposition to Defendants' Motions

Plaintiffs primarily rely upon the recent Appellate Decision in *Rossitto, Wilkinson v. Hoffma[n] La Roche Inc.,* Nos. A-1236T1, A-1237-13T1, slip op., 58-62 (July 22, 2016). According to Plaintiffs, the Court in *Rissotto,* held that the proximate cause inquire encompasses more than a physician's decision to recommend treatment. *Id.* The "prescribing decision" involves both the "physician's recommendation" and "a patient's assent to follow that recommendation after being apprised of the pertinent risks[.]" *Id.* at 62. Plaintiffs argue that, based on the opinion in *Rossitto* and the evidence they presented on proximate cause, Defendants' Motions must be denied.

In their pleadings, Plaintiffs concede there is no true conflict between New Jersey's law on proximate cause and the law of each Plaintiffs' ingestion state, and, accordingly, the Court may apply New Jersey law to these Motions. *See Cornett, supra; P.V. ex rel. T.V. v. Camp Jaycee,* 197 *N.J.* 132 (2008). Plaintiffs argue that the proximate cause inquiry in failure-to-warn cases being heard under New Jersey law begins with the rebuttable heeding presumption. *Coffman v. Keene,* 133 *N.J.* 581, 602-03 (1993). Plaintiffs assert that *Strumph v. Schering Corp.,* 133 *N.J.* 33 (1993), is not applicable because the physicians in that case did not rely upon the manufacturer's warning.

Plaintiffs assert that under the recent *Rossitto* decision, the proximate cause inquiry is not based solely on a physician's decision to prescribe the medication in question. According to Plaintiffs, their evidence shows that a proper warning would, in fact, have made a difference because the analysis turns on the conduct of both the patient and prescribing physician. Here, each and every Plaintiff has testified that a different warning would have made a difference in his/her decision of whether or not to take Accutane. According to Plaintiffs, the decision of whether or not to take a drug is an "inherently collaborative process." "[U]ltimately, the patient, armed with

[information about risks and benefits of a medication from their physician], makes the decision whether to proceed." *In re Diet Drug Litig.*, 384 *N.J. Super.* 525, 540-41 (Law Div. 2005). Plaintiffs further argue that the testimony before this Court is not unequivocal as required for Summary Judgment under *Rossitto.*

Lastly, Plaintiffs argue that where a drug manufacturer fails to adequately warn the physician of risks associated with a drug, the LID is not applicable as a defense. *Gross v. Gynecare,* No. ATL-L-6966-20, 2016 WL 1192556, at *16 (App. Div. Mar. 29, 2016), citing *Perez v. Wyeth,* 161 *N.J.* 1, 19 (1999). Plaintiffs assert that since Defendants' warnings were inadequate, Defendants are not entitled to protection under the LID.

Defendants' Reply to Plaintiffs' General Opposition:

Defendants argue in reply that Plaintiffs' assertions regarding the proximate cause standard are inappropriate in any setting, but especially in the present cases where Defendants indisputably provided an explicit warning. According to Defendants, nearly every prescriber understood to communicate that Accutane use presents some risk of inflammatory bowel disease (hereinafter "IBD"). Additionally, Defendants, in their specific replies, point to testimony of many doctors stating that they understood that the condition warned of, to wit IBD, to be a permanent and serious disease.

Defendants argue that the decision in *Rossitto* does not change or impact the proximate cause standard as previously held by this Court. *First*, Defendants argue that the unpublished decision in *Rossitto* does not alter New Jersey's recognition of the LID or the Supreme Court's binding decision that the proximate cause inquiry focuses only on the prescribing physician's decision. *See N.J.S.A.* 2A:58C-4; *Strumph*, 256 *N.J. Super* at 323. *Second*, even under Plaintiffs' reading of *Rossitto*, Defendants argue that they would still remain entitled to summary judgment in a sizable number of cases where the prescriber testified that they would not have altered their patient warning discussions given a different warning.

Defendants argue that Plaintiffs' reliance on the heeding presumption is misplaced because it cannot apply in the context of the LID and prescription medications. *See. Ackermann v. Wyeth Pharms.,* 526 *F.*3d 203, 212-14 (5th Cir. 2008). The heeding presumption, according to Defendants, stands for the presumption that physicians take a provided warning into account when making a prescribing decision, but not that such warning necessarily causes them not to prescribe the drug. According to Defendants, if the heeding presumption applied, it would presume that a

prescriber would incorporate a stated risk into her risk-benefit analysis when deciding whether to prescribe a medicine to treat a particular patient – not that she would decline to prescribe a medicine merely because a risk warning had been given. *Id.* at 213. Even if the heeding presumption did apply here, Defendants assert that it would be overcome by the physicians' testimony that they would have prescribed Accutane even given the allegedly stronger warning.

III. THE LEARNED INTERMEDIARY DOCTRINE AND ROLE OF PHYSICIAN *vis-à-vis* PATIENT

The Court reiterates, and adopts its interpretation of the LID from its previous ruling of January 29, 2016, in full, and deems it unnecessary to list the six elements recited at Part IV. Stated simply, where the LID applies, the testimony of Plaintiffs or their medical decision makers is not a part of the proximate cause determination. If it were, the LID would be rendered useless because a proximate cause determination would ultimately come down to what the patient would have done in response to a drug manufacturer's warning, the precise situation which the Legislature, *viz.*, *N.J.S.A.* 2A:58C-4, sought to avoid. Though Plaintiffs argue earnestly that the *Rossitto* decision has changed the rules of the game regarding the interplay of the LID and proximate cause in pharmaceutical litigation, this Court cannot embrace that suggestion. Not only is the *Rossitto* decision unpublished, but the language which Plaintiffs rely upon is *dicta.* Counsels' suggestion that the *Rossitto* decision marks a revolutionary change in the proximate cause standard is erroneous.

The court notes that *Rossitto* involved a successful appeal brought by Defendants wherein the jury returned a verdict awarding $9 million each in compensatory damages to Plaintiffs Rossitto and Wilkinson. Those verdicts were vacated by the Appellate Division and the claims remanded to this trial court. [NOTE: There were no cross-appeal(s) by the Two Plaintiffs who were no-caused by the jury.] The primary focus of the reviewing panel's inquiry was errors purportedly made at the time of trial. Various issues were discussed in passing, among them, *briefly*, was the LID. There was nothing about those comments, nor the ruling itself, which indicates that the court was embarking upon a change in the application of the LID different from the standard articulated by the *Gaghan* decision, and more importantly, that as articulated by Judge Skillman in his dissent in *Strumph.*

That said, *Rossitto* seems to suggest that there are two types of cases where physician testimony is applied differently to the issue of proximate causation. There are instances similar to *Strumph*, where the prescribing doctor's testimony is unequivocal that he or she would have still prescribed the drug even if there were a stronger associated warning; and cases where the prescribing doctor's testimony is not unequivocal that a stronger warning would not have altered his or her discussion with the patient regarding the risks of the drug. The dicta in *Rossitto* suggests that even though a doctor may state that he or she would still prescribe the drug, the trial judge must also consider whether the prescribing doctor would have also provided a stronger warning to the patient. This Court acknowledges that perspective. Nonetheless, these (and prior) proceedings Plaintiffs' counsel have done their very best to conflate the LID with the informed consent doctrine. That's simply not the law. When a prescribing physician comprehends the fact that a given medicine is associated with certain potential risks, and exercises his/her medical judgment in deciding whether and how to address those risks with his/her patient, the manufacturer cannot be held responsible for the prescriber's decision.

The Legislature knew full well what it was doing when it adopted *N.J.S.A.* 2A-58C-4. The court is bound by this state's public policy as enunciated by the Legislature and our Supreme Court, not by Plaintiffs' interpretation of an unpublished decision. For the reasons stated in the January 29, 2016, decision, this Court stands by its previous interpretation of the LID and proximate cause in the Accutane litigation.

The testimony submitted to support each Parties' contentions was voluminous, but counsel may be assured that all deposition testimony was reviewed and considered carefully. However, only such testimony that the Court found unequivocal and relevant to the proximate cause standard was considered. Citations from deposition transcripts of the prescribing physicians for each of Plaintiff's claim are provided below. Finally, in reviewing the extensive pleadings in these matters, the Court notes that once again, counsel have a proclivity to cite deposition testimony out of context.

In support of their Omnibus Motions for Summary Judgment, Defendants rely upon questions and answers from the depositions of the prescribing physician which purportedly provide the following evidence: The prescribing physicians would have (a) prescribed Accutane to Plaintiff even if the word "temporally" had not been included in the label; (b) prescribed Accutane even if the label had said that it "can induce" IBD; (c) prescribed Accutane even if the label had

said that it was "associated" with IBD; (d) prescribed Accutane even if the label had said it "can cause" IBD; and (e) notwithstanding what they know about Accutane now, they would still prescribe Accutane to Plaintiff today if presented in the same manner.

In opposition to Defendants' Motions, Plaintiffs have relied upon questions and answers from the depositions of the prescribing physician which purportedly produce the following evidence: (a) some of the physicians understood "temporally" to mean "temporary;" (b) if information regarding prevalence and causation were included in the Accutane warning, the doctors would have "altered" their prescribing discussion with patients by sharing such information and conveying the risk of IBD; (c) they would want to know if a cause-and-effect relationship existed between Accutane and a permanent and serious side effect such as IBD; (d) if they knew Accutane "would cause" or was "scientifically proven" to cause IBD, they would not have prescribed it; and (e) they would not have prescribed Accutane to a patient that refused the drug.

What's more, some of the testimony cited by Plaintiff strains credulity to the breaking point. By way of example, in several cases Plaintiffs testified that had they known there was a 1% (or less) chance of being afflicted with IBD that they would never have taken Accutane. This from people all suffering from severe acne, including recalcitrant nodular acne. See Fortenberry (Alabama), Huckabee (Alabama), Stransky (Colorado) and Swanson (Nebraska).

Finally, the Court makes an observation. Coursing through the deposition testimony are facts and instances revealing the "condition" in which many Plaintiffs' found themselves prior to being prescribed Accutane. Nearly every Plaintiff suffered for years from severe acne, and had gone through the protocol(s) of antibiotics, without success; some also suffered severe depression. In truth, Accutane was their only hope for relief. The "stepladder approach" of Dr. Guill in the *Snelling* case (South Carolina) exemplifies the approach of many of the dermatologists in these Accutane proceedings. It was prescribed as the last measure of treatment; many Plaintiffs were impatient to receive it.

IV. SUMMARY JUDGMENT STANDARD

In conducting its choice-of-law analyses for each of the sixteen (16) jurisdictions and deciding whether or not Summary Judgment is warranted, the court applies the procedural law of New Jersey. Admittedly, Summary Judgment is the ultimate procedural ruling, but the court

applies New Jersey law because it saw/read nothing to demonstrate that Rule 4:46-2 is inconsistent with the standards of the states under review.

Summary Judgment is appropriate where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." *R.* 4:46-2. A "determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the nonmoving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." *Brill v. Guardian Life Ins. Co.*, 142 *N.J.* 520, 540 (1985). If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a genuine issue of material fact for purposes of *R.* 4:46-2, *Ibid.* The thrust of *Brill* is that "when the evidence 'is so one-sided that one party must prevail as a matter of law,' ... the trial court should not hesitate to grant summary judgment." *Ibid.*

Further, in order to defeat a motion for summary judgment, a party must show that there are genuine issues of material fact. *Ibid* at 540. "Bare conclusions in the pleadings, without factual support in tendered affidavits, will not defeat a meritorious application for summary judgment." *United States Pipe and Foundry Co. v. American Arbitration Ass'n.*, 67 *N.J. Super.* 384, 399-400 (App. Div. 1961); See also *Brae Asset Fund v. Newman*, 327 *N.J. Super.* 129, 134 (App. Div. 1999) and *Baran v. Clouse Trucking, Inc.* 225 *N.J. Super.* 230, 234 (App. Div. 1988).

In addition to *Brill*, the court receives guidance from *Anderson v. Liberty Lobby, Inc.*, 477 *U.S.* 242 (1986) which cites *Improvement Co. v. Munson*, 14 *Wall* 442, 448 (1872). In *Anderson*, *supra*, 477 *U.S.* at 251, our Supreme Court quoted *Munson* and admonished trial judges that,

> ...before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon which the onus of proof is imposed.

The Court in *Anderson* also stated,

> In sum, we conclude that the determination whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case ... The trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant. *Id.* at 255.

V. CHOICE OF LAW

In this Court's decision of July 24, 2015, PART ONE, A thru C of that decision, entitled "RULING BASED UPON PLAINTIFFS' PETITION FOR MCL DESIGNATION" concluded, in pertinent part that:

> Given the language of the representations relied upon by the Supreme Court at the time the Order of May 2, 2005 was entered, this court believes it is required to consider all of the remaining claims and issues – in this instance, label adequacy – under New Jersey law. This is so because it was the Plaintiffs who framed the limits of the MCL jurisdiction by asking the court to consolidate all claims on the question of *whether defendant violated the New Jersey Products Liability Act in its marketing and sale of Accutane.* By invoking New Jersey law, Mr. Seeger's letter highlights why New Jersey law should control this MCL. Plaintiffs wanted the benefit of having their claims heard under the NJPLA. How this court's predecessor handled this issue, or the fact that cases were tried under California and Florida law is of no moment. The representations of Plaintiffs' petition for MCL designation are unambiguous, and request a determination(s) under the NJPLA.
>
> Additionally, the court is guided by the wisdom of Justice Long in *P.V. ex rel. T.V. v. Camp Jaycee,* 197 *N.J.* 132, 154 (2008) wherein she stated: "The interests of judicial administration require courts to consider issues such as practicality and ease of application, factors that in turn further the values of uniformity and predictability." Resolving the remaining 4,600 (+) cases via the application of the law of each state is neither practical nor without complication for our court system to administer, nor would it promote "the values of uniformity and predictability." Rather, such a process would: (a) place Atlantic County jurors in the incongruous position of hearing claims under another state's law; (b) likely generate inconsistent rulings; (c) as illustrated by the decision in *Sager v. Hoffman-LaRoche, Inc.,* 2012 *N.J. Super,* Unpub. LEXIS 1885 (App. Div. 2012), likely generate a multiplicity of appeals for which there are no binding precedents; and (d) impose an unreasonable burden upon the resources of the judiciary.

It was the Plaintiffs who requested the MCL designation to determine whether defendant had violated the NJPLA and this court will apply the case law arising out of *N.J.S.A.* 2A-58C-4 which codified the LID. Further at page 6 of counsels' brief in General Opposition, Plaintiffs now concede that New Jersey law should apply to the Motions before the court. "Applying New Jersey law to the proximate cause issue in the Accutane MCL cases at issue thus meets the Court's objectives and is appropriate under New Jersey's principles on conflicts and choice of law."

Notwithstanding the aforesaid, the Court has reviewed the law on proximate cause in each of the sixteen injury-states. Summaries of each injury-state's law, as understood by the court, with the benefit of the briefing of the parties' and the Court's review, are set forth below. As in the past, an effort has been made to analyze each of the seventy-four cases before the court under both New Jersey law and the injury-state's law. As in the past, there are instances where this court is not wise enough to divine how the high court of a particular jurisdiction would apply the LID to a given set of facts.

VI. RULING AS TO EACH MOTION.

Alabama Law. In a failure-to-warn case, the Alabama Courts follow the learned intermediary doctrine. *Wyeth v. Weeks*, 159 *So. 3d* 649, 673-74 (Ala. 2014). "[T]he patient must show that, but for the false representations made in the warning, the prescribing physician would not have prescribed the medication to his patient." *Id.* Alabama law is consistent with New Jersey law on the issues raised by counsels' pleadings.

1. Rachel Bostic [Alabama]

Defendants' Contentions: Treating physician, Dr. Vickie Parrish-Boggs, testified that she did not think a change in the label between "can induce" versus "associated" with would alter her prescribing habits. *Bufano* AL Ex. 2, P28:9-29:7. Dr. Parrish-Boggs testified that she was aware of the risk of IBD in 1998 when she prescribed Accutane to Plaintiff. *Id.* at P25:16-16:1. Dr. Parrish-Boggs testified that given Plaintiff's condition at the time of presentation for treatment, she would still prescribe Accutane to Plaintiff if she were presented in the same manner today, despite what she now knows about Accutane and its risks and side effects. *Id.* at P45:19-46:15. Plaintiff testified that if she had read the patient warnings that were provided she would not have

taken Accutane; Defendants argue that this breaks any causal chain between Defendants' allegedly inadequate warning to her physician and her use of the drug. *Mantell* AL Ex. A; P183:17-184:8.

Plaintiff's Contentions: Dr. Parrish-Boggs testified that she did not remember which risks she discussed with Plaintiff, but her habit was to go through risks that were frequently reported. *Bufano* AL Ex. 2; P42:12-18. Plaintiff testified that had she been made aware of the risk of IBD, she would not have taken Accutane. *Buchanan* Ex. AL Bostic 1; P179:1-24.

Court's Analysis: Plaintiff has failed to prove, under either New Jersey or Alabama law, that a different warning would have changed Dr. Parrish-Boggs' decision to prescribe Accutane. The Court relies upon Dr. Parrish-Boggs' testimony at PP28-29 wherein she made it clear that a stronger label "wouldn't change my prescribing habits." When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

2. Landon T. Carter [Alabama]

Defendants' Contentions: Dr. William Ward testified that he would have prescribed Accutane to Plaintiff if the word temporally were removed from the label, leaving "associated" unmodified. *Bufano* AL Ex. 3; P55:21-56:3. Dr. Ward testified that he would still prescribe Accutane to Plaintiff if he were presented in the same manner today despite what he now knows about Accutane and its risks and side effects. *Id.* P55:21-56:3.

Plaintiff's Contentions: Dr. Ward testified that he understood "temporally" to communicate that IBD could occur while a patient was taking Accutane or shortly thereafter. *Id.* at P77:24-78:11. Dr. Ward testified that he believes IBD is treatable and "[t]here have been cases that are curable." *Id.* at P36:24-37:8, P78:23-79:1. Dr. Ward stated that where there is emphasis on a side effect within the drug's warnings it will increase the likelihood that he will discuss those side effects with his patient. *Id.* at P85:18-21. Plaintiff was a minor at the time he took Accutane, but his mother testified that had they been warned of IBD she would not have let her son take Accutane. *Buchanan* Ex. AL Carter 3; P102:13-104:7.

Court's Analysis: Plaintiff has failed to prove, under either New Jersey or Alabama law, that a different warning would have changed Dr. Ward's prescribing decision. The Court relies upon Dr. Ward's testimony at PP55-56 wherein he acknowledged that although he no longer practices medicine, were he to see Plaintiff today, "with the same acne condition and the same history," he would still prescribe Accutane. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

3. Aaron J. Fortenberry [Alabama]

Defendants' Contentions: Dr. Eric Baum testified that he would have prescribed Accutane to Plaintiff even if the label had said it was "possibly related" to IBD or "can induce" IBD. *Bufano* AL Ex. 6; P55:25-56:5. Dr. Baum also testified that if Plaintiff were presented in the same manner today he would still prescribe Accutane to him knowing everything he now knows about the drug and its side effects. *Id.* at P74:9-75:10, P81:10-15.

Plaintiff's Contentions: Dr. Baum testified that he did not understand the Accutane warnings to mean that the drug could initiate the disease, but rather only exacerbate it. *Id.* at P51:7-18, P82:5-14. Dr. Baum understood temporally to mean that IBD could occur close in time to a patient's taking Accutane. *Id.* at P52:5-11. Dr. Baum also testified that both the seriousness of a side effect and the drug company's emphasis on a particular side effect would increase the likelihood that would discuss such disease or side effect with the patient. *Id.* at P89:23-90:2, 91:23-92:2. Plaintiff was a minor at the time he took Accutane, he and his mother both testified that he would not have taken Accutane if they knew it may cause ulcerative colitis, even if the risk was less than one percent. *Buchanan* Ex. AL Fortenberry 1; P73:4-8.

Court's Analysis: Plaintiff has failed to prove, under either New Jersey or Alabama law, that a different warning would have changed Dr. Baum's prescribing decision. The Court relies upon Dr. Baum's testimony at PP55-57 wherein he confirmed that had the warning stated "could induce IBD," he would still have prescribed Acutane and that "nothing works better in my opinion." When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

4. Melissa C. Huckabee [Alabama]

Defendants' Contentions: Dr. Neal Capper testified that he would have prescribed Accutane to Plaintiff if the label had stated that Accutane is "possibly or probably related to" IBD, "can induce" IBD, or "may cause" IBD. *Bufano* AL Ex. 10; P44:4-20, P45:16-21. Dr. Capper testified that he was aware of the risk of IBD when prescribing Accutane. *Id.* at P42:20-43:16, P37:6-39:7. Dr. Capper testified that he would not have changed his practice given a different warning. *Id.* at P45:5-14. Defendants argue that, regardless, any causal chain is broken because Plaintiff's decision maker failed to read warnings that she admits were sufficient to induce her not to permit her daughter to take Accutane. *Mantell* AL Ex. B; P69:4-18.

Plaintiff's Contentions: Dr. Capper testified that the warning conveyed to him only that there was a risk of experiencing IBD while Plaintiff was on Accutane. *Bufano* AL Ex. 10; at 42:20-43:4. If a patient refuses a certain drug, Dr. Capper testified that he will prescribe something else or recommend another course of treatment "[o]nly if they have a full understanding of why they are reluctant to follow [his] original suggestions." *Id.* at P98:7-20. Plaintiff testified that it was her impression that the symptoms listed would go away once she stopped taking Accutane. *Buchanan* Ex. AL Huckabee 1; P159:2-11. Plaintiff's mother testified that had she known that Accutane carried the risk of IBD, even if it were less than one percent, she would not have allowed her daughter to take it. *Buchanan* Ex. AL Huckabee 3; P70:15-71:16.

Court's Analysis: Plaintiff has failed to prove, under either New Jersey or Alabama law, that a different warning would have changed Dr. Capper's prescribing decision. The Court relies upon Dr. Capper's testimony at PP44-45 wherein – despite Plaintiff's counsel's objections – the doctor, *thrice* confirmed that even with a different label, he would have prescribed Accutane to Plaintiff and to "anybody" with Plaintiff's condition, and still does. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

5. Melissa D. Lemay [Alabama]

Defendants' Contentions: Dr. Alan Stanford testified that he was aware of the IBD warning but he never found that to be true of his patients. *Bufano* AL Ex. 12; P53:18-55:21. Dr. Stanford also testified that he would prescribe Accutane to Plaintiff if she were presented in the same manner today despite what he now knows about Accutane and its risks and side effects. *Id.* at P88:17-89:6. Defendants argue that, regardless, Plaintiff's own failure to read warnings that she admits were sufficient to induce her not to take Accutane breaks any causal chain. *Mantell* AL Ex. D; P193:18-24.

Plaintiff's Contentions: Dr. Stanford testified that if a side effect is more strongly emphasized by the drug company, it increases the likelihood that he will discuss it with his patients. *Bufano* AL Ex. 12; P105:7-11. According to Dr. Standford, if the label had stated that Accutane is "possibly or probably related" to IBD or that it "can induce" IBD, it would "have had to be brought up with the patient." *Id.* at P56:12-57:4.

Court's Analysis: Plaintiff has failed to prove, under either New Jersey or Alabama law, that a different warning would have changed Dr. Stanford's prescribing decision. The Court relies upon Dr. Stanford's testimony at PP56-57 wherein he confirmed that "you mean if I had to do it

all over again?" he would have still prescribed Accutane to Plaintiff. A change in the prescribing physician's discussion, but not ultimate decision of whether he would prescribe the drug, does not satisfy proximate cause when the LID is applied. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

6. Amy Danielle Martin [Alabama]

Defendants' Contentions: Dr. Eric Baum testified that he would have prescribed Accutane to Plaintiff even if the label had stated that Accutane is "possibly or probably related to" IBD. *Bufano* AL Ex. 14; P55:15-25.

Plaintiff's Contentions: Dr. Baum testified that if Roche's warning had advised that Accutane can initiate IBD he would have included that information in his warning to patients. *Id.* at P63:3-14. If Defendants had placed more emphasis on the risk of IBD, Dr. Baum testified that he might have spent a little bit more time discussing IBD with patients. *Id.* at P68:8-15. Plaintiff testified that had she been warned of the risk of IBD she would not have taken Accutane, even if it was less than one in one thousand. *Buchanan* Ex. AL Martin 1; P138:3-6.

Court's Analysis: Plaintiff has failed to prove, under either New Jersey or Alabama law, that a different warning would have changed Dr. Baum's prescribing decision. The Court relies upon Dr. Baum's testimony at P55 at which time he noted a stronger label would have made no difference in his decision, "Because it says it now, and I do it now". When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

Arizona Law. A plaintiff who cannot show that his or her physician's prescribing decision would have changed given a different warning fails to prove proximate cause. *See D'Agnese v. Novartis Pharmaceuticals Corp.*, 952 *F.Supp.*2d 880, 892 (D. Ariz. 2013). "Regarding causation, a learned intermediary (the prescribing physician) who received an adequate warning regarding a drug's side effects or proper use but unforeseeably disregarded the warning constituted an intervening, superseding event that broke the chain of causation between the manufacturer and the patient." *Watts v. Medicis Pharm. Corp.*, 365 *P.*3d 944, 948 (Ariz. 2016). In Arizona, the LID is based on principles of duty, not

causation. *Id.* (citations omitted). Arizona law is consistent with New Jersey law on the issues raised by counsels' pleadings.

7. Troy T. Dinbokowitz, Sr. [Arizona]

Defendants' Contentions: Dr. Evan Bauer testified that he would have prescribed Accutane to patients like Plaintiff if the label had stated that Accutane is "possibly or probably related to" or "can induce" IBD. *Bufano* AZ Ex. 2; P99:16-102:2. According to Dr. Bauer, such a change in the language would not have changed his choice to prescribe Accutane so long as the patient did not have a history of IBD. *Id.* Dr. Bauer testified that he gleaned from the insert that IBD had been observed as a risk within the medical literature. *Id.* at P91:8-92:10. Dr. Bauer testified that a different warning would not have affected his discussion with patients. *Mantell* AZ Ex. A; P100:9-16, P101:20-102:2.

Plaintiff's Contentions: Dr. Bauer testified that had the label stated that "Accutane has been possibly or probably related to [IBD] or can induce [IBD]," it would have reinforced his mentioning of the "claims" of IBD. *Samberg* AZ Ex. D; P99:16-100:16. Additionally Dr. Bauer testified that had Defendants advised him that patients taking Accutane could develop permanent injuries, he would have counseled the patient accordingly. *Id.* At P139:21-140:2. Plaintiff's father testified that had he been told that Accutane could cause a permanent injury, he would not have allowed his minor son to take it. *Samberg* Ex. B; P55:14-19, P69:18-21.

Court's Analysis: Plaintiff has failed to prove, under either New Jersey or Arizona law, that a different warning would have changed Dr. Bauer's prescribing decision. The Court relies upon Dr. Bauer's testimony at PP99-102 wherein he acknowledged that "I don't recall the patient ..." but that it would have taken a much stronger warning for him to change his prescribing practices. It's clear that the doctor would not have altered his prescribing practice. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

8. Anjali Gupta [Arizona]

Defendants' Contentions: Dr. Rosemary Geary testified that she would have prescribed Accutane to Plaintiff even if the label had stated that Accutane "may cause" or "may induce" IBD. *Bufano* Ex. 4; P97:23-98:22. Dr. Geary testified that she understood that Accutane carried a risk of IBD from the time she began prescribing it. *Id.* at P68:10-22. If Plaintiff were presented in the same manner today, Dr. Geary testified that she would still prescribe her Accutane despite what she now knows about the drug and its side effects. *Id.* at P102:4-25. Dr. Geary testified that she

rarely prescribes Accutane anymore because her practice focuses on skin cancer, but she will prescribe it in rare cases, such as to her own children. *Id.* at P25:2-10, P53:3-25.

Plaintiff's Contentions: Dr. Geary testified that had Defendants highlighted the IBD warning or specified latency risks, she would have discussed it with her patients. *Samberg* AZ Ex. E; P126:4-9, P133:25-134:21. Plaintiff was a minor at the time she ingested Accutane, but her father testified that had he received additional IBD warnings, he would not have allowed Plaintiff to take Accutane. *Samberg* AZ Ex. F; P58:22-59:18. Plaintiff's father testified that he would not have allowed his daughter to take a drug that carried a risk of permanent side effects. *Id.* at P93:23-94:2.

Court's Analysis: Plaintiff has failed to prove, under either New Jersey or Arizona law, that a different warning would have changed Dr. Geary's prescribing decision. The Court relies upon Dr. Geary's testimony at PP97-98 wherein she confirmed that a stronger warning would not have altered his decision to prescribe Accutane, nor the means of "communicating the potential risk." It is hard to believe that a change in the warning language would change Dr. Geary's prescribing decision when she continues to prescribe isotrentinoin to her own children. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

9. Adriana Elizabeth Lopez [Arizona]

Defendants' Contentions: Dr. Brad Baack testified that he understood the Accutane warning to communicate a possible risk of IBD. *Bufano* AZ Ex. 10; 83:22-84:3. Dr. Baack also testified that he would still consider Plaintiff a candidate for Accutane today if she were presented in the same manner despite what he now knows about the drug and its side effects. *Id.* at P14:15-17. Dr. Russell Hunter also prescribed Accutane to Plaintiff and testified that even if the label had said that Accutane "may cause" IBD it would have made "very little" difference to him. *Bufano* AZ Ex. 11; P63:21-64:6. Dr. Hunter testified that if Plaintiff were presented in the same manner today he would still prescribe Accutane to her despite what he now knows about the drug and its side effects. *Id.* at P63:11-18. Plaintiff testified that she would have read a patient brochure if she had been given one, and that a gastrointestinal problem warning would have given her pause; such testimony defeats the causal link. *Barreca* AZ Ex. 4; P171:3-6; P172:18-173:6.

Plaintiff's Contentions: Dr. Hunter testified that if his patient expressed an unwillingness to accept the risks of a medication after they had a discussion, he would not prescribe the medication anyway. *Barreca* AZ Ex. 4; P96:19-23. Dr. Baack testified that he would expect

information about a causal relationship or latent risk to be within the patient brochure so that he could provide his patients with the information. *Barreca* AZ Ex. 6; P85:22-25, P112:3-10, P125:23-126:2.

Court's Analysis: Upon reviewing the record for additional context, when asked whether she would have taken Accutane had she been informed of additional gastrointestinal risks, Plaintiff said "I don't know." *Barreca* AZ Ex. 5; P172:18-173:6.

Plaintiff has failed to prove, under either New Jersey or Arizona law, that a different warning would have changed Dr. Baack or Dr. Hunter's prescribing decision. The Court relies upon Dr. Baack's testimony that he understood the warning to communicate a risk of IBD and would still prescribe Accutane to Plaintiff today at PP14 and 83-84. The Court relies upon Dr. Hunter's testimony at PP63-64 wherein she testified that "knowing everything ... including the side effects and the risks ..." she would still have prescribed Accutane to Plaintiff. Plaintiff has failed to provide evidence, by affidavits or otherwise, that Dr. Baack would not have prescribed Accutane to Plaintiff if faced with an allegedly stronger warning. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

10. Kathryn J. Rice [Arizona]

Defendants' Contentions: Dr. Frances Segal testified that she would have prescribed Accutane to Plaintiff even if the label had stated that Accutane is "possibly or probably related to," "can induce," or "may cause" IBD. *Bufano* AZ Ex. 13; P55:19-25, P56:20-57:4. Dr. Segal testified that she believed that the Accutane warning communicated a possibility of causation. *Id.* at P54:18-55:6. Dr. Segal also testified that if Plaintiff were presented to her in the same manner today she would still prescribe her Accutane despite what she now knows about the drug and its side effects. *Id.* at P71:20-72:2.

Plaintiff's Contentions: Plaintiff's counsel argues that Defendants did not properly warn Dr. Segal of the association between IBD and Accutane, and that had they Dr. Segal would have discussed it with Plaintiff. Plaintiff testified that if Dr. Segal had informed her that Accutane may cause permanent gastrointestinal side effects, she does not think she would have taken it. *Buchanan* AZ Rice 1; P227:9-228:24. When asked why rectal bleeding and severe abdominal pain possibly would have changed her decision Plaintiff answered, "[a]fter experiencing those two things on a disease level, I would not want to go through that again." *Id.*

Court's Analysis: Even under Plaintiff's standards Defendants' Motion must be granted. Plaintiff's testimony that she "would not want to go through that again," cannot be relied upon for proximate cause. Plaintiff is not testifying as to what she would have done back when Accutane was prescribed to her and before she developed IBD, Plaintiff is testifying as to what she would do now given health issues she experienced later.

Plaintiff has failed to prove, under either New Jersey or Arizona law, that a different warning would have changed Dr. Segal's prescribing decision. The Court relies upon Dr. Segal's testimony at PP55-57 wherein she acknowledged that even if the warning language stated "Accutane can induce IBD," she would still have prescribed Accutane to Plaintiff because of the condition presented. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

Colorado Law. Colorado Courts follow the learned intermediary doctrine in prescription failure to warn cases. *O'Connell v. Biomet, Inc.*, 250 *P.3d* 1278, 1281-82 (Colo. App. 2010). Prior to *O'Connell*, no Colorado Appellate Division opinion had addressed the learned intermediary doctrine directly. The Appellate Division did; however, previously note that "the warnings contained in a prescription drug manufacturer's package insert were addressed to the physician." *Peterson v. Parke Davis & Co.*, 705 *P.2d* 1001, 1003 (Colo. Ct. App. 1985). The Court in *O'Connell* was ultimately persuaded that "the learned intermediary doctrine should apply to failure to warn claims in the context of a medical device installed operatively when it is available only to physicians and obtained by prescription, and the doctor is in a position to reduce the risks of harm in accordance with the instructions or warning." *Id.* at 1281-82. Colorado law is consistent with New Jersey law on the issues raised by counsels' pleadings.

11. Chandler J. Crespin [Colorado]

Defendants' Contentions: Dr. Leslie Capin testified that that she would prescribe Accutane to Plaintiff even if the label had stated that Accutane is "possibly or probably related to" or "may cause" IBD. *Bufano* CO Ex. 2; P22:3-5, P32:1-3, P78:5-8. Defendants assert that because there is no evidence that Dr. Capin read the warnings, Plaintiff cannot prove that a different warning would have changed her prescribing decision. *Id.* at P36:13-37:3. Dr. Capin also testified that she stood by her decision to prescribe Accutane to Plaintiff in 1998, and all subsequent decisions. *Id.* at P59:23-60:9.

Plaintiff's Opposition: Dr. Capin testified that the package insert did not warn of an increased risk of IBD. *Sugarman* CO Ex. 3; P109:25-110:3, P110:23-115:1, P118:7-13, P119:7-18. Dr. Capin testified that had she been aware that Accutane "did in fact" cause IBD, she would have informed Plaintiff and incorporated that information into her risk-benefit analysis. *Id.* at P115:9-12, P115:25-116:3, P126:11-16, P126:23-127:4. Plaintiff was a minor at the time he took Accutane, but his father testified that he would not have let his son take Accutane if they had known that it may cause diarrhea, rectal bleeding, and abdominal pain. *Sugarman* CO Ex. 2; P95:8-15, P99:8-24.

Court's Analysis: Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Capin's prescribing decision. The Court relies upon Dr. Capin's testimony at P22, P32, acknowledging that she continues to prescribe Accutane today, and P78 wherein she agreed that Accutane is a "miracle drug," which speaks for itself. There is nothing to support that this physician would have done anything different but to prescribe Accutane. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

12. Karry Lynn Homan [Colorado]

Defendants' Contentions: Dr. Charles Gene Hughes testified that he was familiar with the package insert when he prescribed Accutane to Plaintiff in 1998, and he knew there was a controversial issue between Accutane and IBD. *Bufano* CO Ex. 4; P88:1-5, P93:20-25. Dr. Hughes testified that he would have prescribed Accutane to Plaintiff even if the label had stated that Accutane was "possibly related," "can cause," or is "associated with" IBD. *Id.* at P94:15-21, P112:18-24, P113:11-17.

Plaintiff's Opposition: In response to hypothetical and allegedly stronger warning language, Plaintiff asserts that Dr. Hughes did not unequivocally testify that he would still have

prescribed Accutane to Plaintiff. Dr. Hughes, according to Plaintiff, testified that he would "have had to consider how strong the association was." *Eisbrouch* CO Ex. 2; P95:6-16. Dr. Hughes also testified, when asked what he would do if the label said Accutane "may cause" IBD, he "would have to have that qualified on what degree of risk there was." *Id.* at P112:11-17. When asked about "can cause", Dr. Hughes testified that he would "[a]s long as he didn't think there was a significant risk." *Id.* at P112:18-24. In response to "can induce," he testified that "[i]t might have" changed his decision to prescribe Accutane to Plaintiff. *Id.* at P113:18-114:1. Plaintiff testified that she would not have taken Accutane if she had been informed that it might cause a permanent gastrointestinal disease, while on the medication or after completing the medication. *Eisbrouch* CO Ex. 3; P365:23-367:11.

Court's Analysis: Defendant has failed to prove, under New Jersey law, that Dr. Hughes would have still prescribed Accutane to Plaintiff. The Court relies upon Dr. Hughes' testimony at PP94 and 112-114, which demonstrates substantial uncertainty as to what he would have advised Plaintiff had the label been changed in only minor ways, e.g., "possibly related." Accordingly, Defendants' Motion must be DENIED.

13. Ben M. Mayhew [Colorado]

Defendants' Contentions: Dr. Ronald A. Johnson testified that it was his policy to read the PDR, and upon reviewing the PDR language, it indicated to him that there was a possibility of a relationship between Accutane and IBD. *Bufano* CO Ex. 6; P33:11-15, P36:23-27:5. Dr. Johnson testified that he would have prescribed Accutane to Plaintiff even if the label stated that it was "possibly or probably related to" IBD. *Id.* at P37:15-23. Dr. Johnson testified that, to him, possibly or probably associated v. temporally associated was just a choice of words and would not have changed his prescribing decision in 1996. *Id.* at P37:6-23. Dr. Johnson also testified that it would not have changed his patient discussion. *Id.* at P38. Dr. Johnson testified that he would still prescribe Accutane to Plaintiff if he were presented in the same manner today knowing what he now knows about Accutane and its risks and side effects. *Id.* at P50:13-51:7.

Plaintiff's Opposition: Plaintiff was a minor at the time he took Accutane, but his father testified that he would not have allowed his son to take Accutane if he had been informed that it was associated with IBD. *Buchanan* CO Ex. Mayhew 1; P21:2-9.

Court's Analysis: Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Johnson's prescribing decision. The Court relies upon Dr.

Johnson's testimony at PP36-38 wherein he made it quite clear that the "wording in the PDR" would not have altered his advice. He was more concerned with "the condition of the patient." When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

14. Holly Ann Morphew [Colorado]

Defendants' Contentions: Dr. Johnson R. Steinbaugh testified that he thought he reviewed the PDR at the time he prescribed Accutane to Plaintiff, but upon reviewing the language he testified that it represented a temporal association between Accutane and IBD. *Bufano* CO Ex. 8; P79:21-80:6, P84:25-85:20, P87:2-8, P91:19-25. Dr. Steinbaugh also testified that if he saw a patient today with acne like Plaintiff's, he would consider them a candidate for isotrentinoin. *Id.* at P92:15-93:3.

Plaintiff's Opposition: Dr. Steinbaugh testified that the Accutane warnings did not fairly apprise him of a "risk" of IBD. *Id.* P87:18-88:5.

Defendants' Reply: As discussed above, Plaintiff has failed to provide affidavits where proofs are lacking. *R.* 4:46:-5(a).

Court's Analysis: Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Steinbaugh's prescribing decision. The Court relies upon Dr. Steinbaugh's testimony that the warning communicated a temporal association between Accutane and IBD, and that he would still consider isotrentinoin for the Plaintiff today at PP79-80, 84-85, 87, and 91-93 wherein the witness displays sophisticated knowledge regarding "studies" and statement(s) by the American Academy of Dermatology which run counter to Plaintiff's contentions. Plaintiffs have failed to provide, by affidavits or otherwise, evidence that Dr. Steinbaugh would not have prescribed Accutane to Plaintiff in the face of an allegedly stronger warning. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

15. Lindsey Sackett [Colorado]

Defendants' Contentions: Dr. Timothy Anders testified that he was aware that IBD was a risk within the package insert at the time he prescribed Accutane to Plaintiff. *Bufano* CO Ex. 12; P74:2-13.

Plaintiff's Opposition: Plaintiff asserts that Dr. Anders served as a sales representative for Roche and the Court should be aware of his self-serving testimony. Plaintiff argues that Defendants are not entitled to Summary Judgment because they concede that the record is silent

as to whether Dr. Anders would have prescribed Accutane had the warning been stronger or different.

Defendants' Reply: As discussed above, Plaintiff has failed to provide affidavits where proofs are lacking. *R.* 4:46:-5(a).

Court's Analysis: Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Anders' prescribing decision. The Court relies upon Dr. Anders' testimony that he was aware of the risk of IBD at the time he prescribed Accutane to Plaintiff at PP74-77 which reveals that he did his own research into Accutane and was confident of the advice he gave Plaintiff. Plaintiff has failed to provide, by affidavits or otherwise, evidence that Dr. Anders would not have prescribed Accutane to Plaintiff in the face of an allegedly stronger warning. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

16. Josh P. Stransky [Colorado]

Defendants' Contentions: Dr. Leslie Capin testified that she would have prescribed Accutane to Plaintiff even if the label had stated that Accutane is "possibly or probably related to," "can induce," or "may cause" IBD. *Bufano* CO Ex. 14; P70:24-71:8, P71:17-22. Dr. Capin could not remember reading the label at the time she prescribed Accutane to Plaintiff in 2002, and Defendants argue that without evidence that Dr. Capin read the label, Plaintiff cannot prove that a different warning would have affected her prescribing decision. *Id.* at P34:23-35:3, P64:6-25, P65:7-20.

Plaintiff's Opposition: While Dr. Capin did not remember reviewing the package insert for Accutane, she testified that she was familiar with the Accutane labeling as of February 2002. *Id.* at P61:13-17. Dr. Capin testified that if she knew Accutane was causally related to IBD, she would have shared that information with her patients. *Id.* at P134:25-135:17. Plaintiff testified that had he received warnings regarding the risk of IBD with Accutane use, he would not have taken the drug, even if the risk was as low as one percent. *Buchanan* CO Ex. Stransky 1; P197:23-202:20.

Plaintiff asserts that Defendants' argument that there is no evidence Dr. Capin read the warnings fails because, according to Dr. Capin's own testimony, her physician's assistant Leslie McCauliffe was the actual prescriber. *Bufano* CO Ex. 14; P12:3-14, P14:16-20.

Defendants' Reply: Plaintiffs have known the identity of Dr. Capin's PA since receipt of dermatology records in 2011, but chose not to depose her and to date have not requested a

deposition. Plaintiff's decision maker testified that she would not have allowed Plaintiff to take Accutane had she known about the warnings in the Medication Guide she received, thus breaking any causal chain. *Mantell* CO Ex. B; P131:6-10.

Court's Analysis: Dr. Capin did not testify to being familiar with the labeling as of February 2002 at the cited record testimony. As to his testimony about risk, Plaintiff testified "probably not" and "I don't think so" when asked what he would do if the IBD risk was either five or ten percent, not an unequivocal "no". *Buchanan* CO Ex. Stransky 1; P203. Plaintiff testified that there was a possibility, given a lengthier discussion and uncertain numerical risk of IBD, that he would have taken Accutane regardless of his receiving IBD warnings. *Id.* at P235:13-22. Thus, even under Plaintiffs' own standard Defendants' Motion for Summary Judgment must be granted.

Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Capin's prescribing decision. The Court relies upon Dr. Capin's testimony at PP70-71 wherein she confirms that a different warning would not have altered her advice to prescribe Accutane. Plaintiff has not requested to take PA McCauliffe's deposition, but regardless, Defendants' Motion must be granted even under Plaintiff's standard, and so the deposition would be fruitless. The Court relies on Plaintiff's testimony at P235. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

17. John Charles Williams [Colorado]

Defendants' Contentions: Dr. Sharon Kessler testified that she read the package inserts and was aware that there was a question of an association between IBD and Accutane at the time she prescribed it to Plaintiff. *Bufano* CO Ex. 16; P78:19-79:14, P86:6-87:5, P95:22-96:2. Dr. Kessler testified that if the label had said that Accutane is "associated with" IBD she would have understood that, at a minimum, there was a risk that Plaintiff would develop IBD. *Id.* at P96:4-19. Dr. Kessler testified that she still would have prescribed Accutane to Plaintiff regardless of whether the risk of IBD was latent or not. *Id.* at P96:15-19.

Plaintiff's Opposition: Dr. Kessler testified that if Defendants had advised that there was a definitive risk of IBD with Accutane use, she would have communicated that risk to Plaintiff. *Samberg* CO Ex. A; P133:7-134:13. Plaintiff testified that had he received additional warnings regarding the risk of IBD with Accutane use, he would not have taken Accutane. *Samberg* CO Ex. B; P91:1-93:21. Plaintiff testified that if his doctor told him that Accutane may cause IBD,

but that the risk is less than one-tenth of one percent, he would not have taken Accutane. *Id.* at P121:10-13, P122:22-123:17.

Court's Analysis: Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Kessler's prescribing decision. The Court relies upon Dr. Kessler's testimony at P96, wherein she confirmed that she would have prescribed Accutane whether the warning indicated the risk was "while taking" or "after taking." When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

Georgia Law. The Georgia Court of Appeals adopted the "learned intermediary" rule in *Walker v. Jack Eckerd Corp.*, 209 *Ga. App.* 517 (1993). The Court of Appeals held, "it is the duty of the drug manufacturer to notify the physician of any adverse effects or other precautions that must be taken in administering the drug." *Id.* at 522. The Court of Appeals continued to follow the learned intermediary doctrine in a subsequent prescription drug failure to warn claim. *Chamblin v. K-Mart Corp.*, 272 *Ga. App.* 240 (Ga. Ct. App. 2005). In a failure-to-warn case brought against a prescription drug manufacturer, a plaintiff must show that the manufacturer failed to warn the physician of a potential risk of taking the drug, and that such failure was the proximate cause of injury. *Dietz v. Smithkline Beecham Corp.*, 598 *F.*3d 812, 815 (11th Cir. 2010) (citations omitted). The manufacturer does not have a duty to warn the patient of any dangers associated with the drug's use. *Id.* Georgia law is consistent with New Jersey law on the issues raised by counsels' pleadings.

18. Margaret Beall Cohen [Georgia]

Defendants' Contentions: Dr. Martin L. Weil testified that he would have prescribed Accutane to Plaintiff even if the label had stated that Accutane is "possibly" related to, "can induce," or "may cause" IBD. *Bufano* GA Ex. 2; P80:16-81:3. Dr. Weil testified that the Accutane label indicated to him that IBD was a possible risk of Accutane. *Id.* at P46:22-47:10.

Plaintiffs' Contentions: Plaintiff's counsel asserts that Dr. Weil was not directly questioned about what he would have done had he been expressly warned of the possible causation between Accutane and IBD. However, the testimony as quoted above by Defendants is accurate. Plaintiff testified that she read the warnings as indicating only temporary side effects and not permanent symptoms. *Buchanan* Ex. GA Cohen 1; P161:7-18.

Court's Analysis: Plaintiff has failed to prove, under either New Jersey or Georgia law, that a different warning would have changed Dr. Weil's prescribing decision. The Court relies upon Dr. Weil's testimony at PP80-81 which makes it apparent that but for "pregnancy" concerns, he seems to have no hesitancy whatsoever in prescribing Accutane. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

19. Meredith L. Hughes [Georgia]

Defendants' Contentions: Dr. Fred J. Kight testified that he would have prescribed Accutane to Plaintiff if the label had stated that Accutane is "associated with," "possibly related" to, or "can induce" IBD. *Bufano* GA Ex. 4; P71:3-20, P72:7-73:3. Dr. Kight testified that he read the package insert most years when a new one came out and that he understood the label to indicate a risk of IBD. *Id.* at P38:9-39:2, P59:1-12; P66:4-7; P70:4-23. It was Dr. Kight's testimony that he would prescribe Accutane to Plaintiff today if she were presented in the same manner despite what he now knows about Accutane. *Id.* at P114:1-10.

Plaintiff's Contentions: Additionally, he testified that had he known that Accutane could cause IBD symptoms after a patient stops taking it, he would have informed Plaintiff and her mother. *Samberg* GA Ex. A; P125:13-126:6. Plaintiff's mother testified that had she received additional warnings regarding lifelong disease she would not have let her daughter take Accutane. *Samberg* GA Ex. B; P120:11-21.

Court's Analysis: Plaintiff has failed to prove, under either New Jersey or Georgia law, that a different warning would have changed Dr. Kight's prescribing decision. The Court relies upon Dr. Kight's testimony at PP71-73 wherein he reiterated that a stronger label would not have changed his "prescribing practices." When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

20. Meghan M. Jackson [Georgia]

Defendants' Contentions: Dr. Judith Silverstein testified that if the Accutane label stated that Accutane is "associated with," "possibly or probably related to," or "can induce" IBD she

would have likely prescribed it to Plaintiff. *Bufano* GA Ex. 6; P44:23-46:11, P46:19-47:16. According to Dr. Silverstein, she would have discussed the decision with Plaintiff's mother and informed her of the risk, but if the acne was bad enough she "would have done it"; i.e. prescribed Accutane to Plaintiff. *Id.* Dr. Silverstein testified that she was aware of the risk of IBD during the time she was prescribing Accutane to Plaintiff. *Id.* at P99:25-100:11. Defendants argue that, regardless, the causal link is broken because Plaintiff's decision maker testified that she would not have taken Accutane had she read the warnings that were actually provided by Defendants. *Mantell* GA Ex. C; P93:16-23, P95:24-96:12.

Plaintiff's Contentions: Dr. Silverstein testified that had she been warned of a stronger correlation between Accutane and IBD she would have had a lengthier discussion about it with Plaintiff. *Bufano* GA Ex. 6; P47:24-48:6. Plaintiff's mother testified that had she been warned of any link between Accutane and IBD, she would not have allowed her daughter to take Accutane. *Buchanan* Ex. GA Jackson 2; P83:1-84:3.

Court's Analysis: Plaintiff has failed to prove, under either New Jersey or Georgia law, that a different warning would have changed Dr. Silverstein's prescribing decision. The Court relies upon Dr. Silverstein's testimony at PP41-48 wherein she demonstrates her knowledge of the warning and leaves little doubt she would still have prescribed Accutane to Plaintiff. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

21. Travis M. Parker [Georgia]

Defendants' Contentions: Dr. Perry J. Scallan testified that even if the Accutane label had stated that Accutane is "possibly or probably related to," "may cause," or "can induce" IBD he would still prescribe it to patients so long as they did not have IBD at the time of prescription. *Bufano* GA Ex. 8; P34:14-35:19. Dr. Scallan testified that he understood the Accutane warnings to mean that there was a possible risk of IBD. *Id.* at P33:10-20, P36:1-12. Dr. Scallan also testified that he would still prescribe Accutane to Plaintiff if he were presented in the same manner today despite what he now knows about the drug and its side effects. *Id.* at P63:4-16. Dr. Scallan stated that today he would mention IBD to the patient before prescribing, but he would do so because of the legalities and not because of the science. *Id.* Defendants argue that, regardless, any causal link is broken because Plaintiff's mother testified that had she been aware of the side effects within the provided warnings, she would probably not have let her son take Accutane. *Mantell* GA Ex. D; P75:23-76:1, P76:21-77:7.

A colleague of Dr. Scallan's, Dr. Miles Jordan, once refilled Plaintiff's prescription, but he has not been deposed in this litigation.

Plaintiff's Contention: Plaintiff's mother testified that had she been warned of the linkage between Accutane and IBD, she would "probably not" have allowed her son to take the drug, although Plaintiff's counsel asserted the testimony was that she "certainly would not have allowed her son to take the drug." *Buchanan* Ex. GA Parker 2; P95:20-25.

Court's Analysis: The Court found Plaintiff's counsel's recitation of Dr. Scallan's testimony, including citations to record testimony, are wholly inaccurate. Plaintiff has failed to prove, under either New Jersey or Georgia law, that a different warning would have changed Dr. Scallan's prescribing decision. The Court relies upon Dr. Scallan's testimony at PP34-36 wherein he confirmed that "with knowledge of ... all the risks and side effects" he would still prescribe Accutane, noting that "we all take drugs, and they all have risks." When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

22. Kristie G. Williams [Georgia]

Defendants' Contentions: Dr. Tonya L. McCullough testified that even if the Accutane label had stated that Accutane is "associated with," "possibly or probably related to," or "can induce" IBD she would still prescribe it to a patient like Plaintiff, with scarring, so long as the patient and family understood and accepted the risks. *Bufano* GA Ex. 10; P58:9-22, P59:22-60:13. Dr. McCullough also testified that if Plaintiff were presented to her in the same manner today she would probably still prescribe her Accutane because she does not think that isotrentinoin causes IBD. *Id.* at P104:24-105:11. Dr. McCullough testified that she herself would take Accutane. *Id.* at P59:10-21, 62:14-63:9. Defendants argue that, regardless, any causal link is broken because Plaintiff's mother testified that had she been aware of the warnings provided by Defendants, she would not have allowed her daughter to take Accutane. *Mantell* GA Ex. E; P86:13-16, P86:17-87:4.

Plaintiff's Contentions: Dr. McCullough testified that if the word temporally were removed, the warning would have been more serious. *Bufano* Ex. 10; P56:1-58:16. Plaintiff's mother testified that had she been warned of the linkage between Accutane and IBD, she would not have allowed her daughter to take the drug. *Buchanan* Ex. GA Williams 2; P87:1-4.

Court's Analysis: Plaintiff has failed to prove, under either New Jersey or Georgia law, that a different warning would have changed Dr. McCullough's prescribing decision. The Court

relies upon Dr. McCullough's testimony at PP58-60 which shows that because of Plaintiff's "scarring" and "cysts" that she would still have prescribed Accutane, noting that "we all take drugs, and they all have risks." When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

23. Sherry Wilson [Georgia]

Defendants' Contentions: Dr. John Fountain testified that he would have prescribed Accutane to Plaintiff even if the label had stated that it is "possibly or probably related" to, "can induce," or "may cause" IBD. *Bufano* GA Ex. 13; 95:3-23. Dr. Fountain testified that it would be fair to say that he was aware of the risk of IBD when he had prescribed Accutane to Plaintiff. *Id.* at P88:25-90:2, 92:22-93:1. Dr. John Overton also prescribed Accutane to Plaintiff and testified that he also would have prescribed Accutane to Plaintiff if the label had stated that Accutane is "possibly or probably related to" or "can induce" IBD. *Bufano* GA Ex. 14; P70:3-15. Dr. Overton was aware of and considered the risk that Plaintiff could develop IBD when he prescribed Accutane to Plaintiff. *Id.* at P61:1-22, 69:8-12.

Additionally, the Physician's Assistant working with Dr. Overton, Shaira Vassian, also testified that the above change in language would not have affected her decision to prescribe Accutane to Plaintiff. *Bufano* GA Ex. 12; P108:13-109:6. PA Vassian believed that Plaintiff could develop IBD when she prescribed Accutane to Plaintiff. *Id.* at P97:14-99:6. It was Vassian's testimony that if Plaintiff were presented to her in the same manner today, she would still prescribe her Accutane despite what she now knows about the drug and its side effects. *Id.* at P9714-99:6.

Plaintiff's Contentions: Dr. Fountain testified that it was his "general. . . expectation" that any side effects that might occur during the use of Accutane would resolve when the patient stopped taking Accutane. *Orlando* GA Ex. B; P125-126. Dr. Overton testified that most people would think that symptoms they experience while taking a drug will resolve if they stop taking the drug. *Orlando* GA Ex. C; P86. Dr. Overton also testified that if he had knowledge of IBD being a latent side effect to Accutane use he would have conveyed that to his patients. *Id.* at P99-100. PA Vassian testified that had she known that Accutane posed a latent IBD risk, she would have communicated that to her patients before prescribing the drug. *Orlando* GA Ex. D; P131-132. Plaintiff's testimony is that if stronger warnings were given to her, she would have asked her doctor more questions, and she would not have taken Accutane if she had known that it would cause permanent IBD. *Orlando* GA Ex. A; P157-161.

Court's Analysis: Plaintiff has failed to prove, under either New Jersey or Georgia law, that a different warning would have changed Dr. Fountain's prescribing decision. The Court relies upon Dr. Fountain's testimony at PP92-95 wherein he made it clear that "It [a different warning] would not have changed my prescribing practice." When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

Illinois Law. Illinois recognizes the learned intermediary doctrine. *Kirk v. Michael Reese Hospital & Medical Center*, 117 *Ill. 2d* 507 (Ill. 1987). In *Kirk*, the Illinois Supreme Court noted that the Illinois Appellate Court had already adopted the learned intermediary doctrine through the application of other states' laws. (*Mahr v. G. D. Searle & Co.*, 72 *Ill. App. 3d* 540 (1979). *Kirk* involved a claim for strict liability failure to warn in regard to a prescription drug. The Court formally adopted the learned intermediary doctrine and held that, "the learned intermediary doctrine is applicable here and that there is no duty on the part of the manufacturers of prescription drugs to directly warn patients. *Kirk*, at 519. Furthermore, the court articulated that, "the learned intermediary doctrine requires that the pharmaceutical *warn the physician* of the known adverse effects of a particular prescription drug. The doctor, exercising [his or her] judgment, decides which drugs will best suit [his or her] patient's needs. *Id.* at 522-23. Illinois law is consistent with New Jersey law on the issues raised by counsels' pleadings.

24. Derrick N. Foster [Illinois]

Defendants' Contentions: Dr. Benjamin Dubin testified that he would have prescribed Accutane to Plaintiff if the label had stated that Accutane is "associated with" IBD and regardless of whether the risk of IBD was one that could develop during ingestion or months or years later. *Bufano* IL Ex. 2; P97:24-99:17. Defendants allege that Dr. Dubin was both aware of and considered the risk that Plaintiff could develop IBD when he prescribed Accutane to Plaintiff. *Id.* at P89:10-21; P91:23-92:15, P97:25-98:5, P183:21-184:2. Dr. Dubin testified that Defendants'

warning as to IBD was accurate. *Id.* at P186:4-18. Dr. Dubin testified that he understood temporally to mean "over a period of time." *Id.* at P186:23-P187:6. Defendants argue that, regardless, any causal link is broken because Plaintiff's mother testified that had she been warned of the language within the patient brochure, she is not sure whether she would have allowed her son to take Accutane. *Mantell* IL Ex. A; P141:13-17, P172:6-173:19, P174:16-21, P182:16-21.

Plaintiff's Contentions: Dr. Dubin testified that if he had information that Accutane was casually related to a latent risk of IBD he would have wanted to know and "definitely" would have spoken to his patient about that risk. *Eisbrouch* IL Ex. 2; P160:6-161:1. Plaintiff disputes Defendants' contention that Dr. Dubin testified that he would have prescribed Accutane to Plaintiff even if the label had stated that Accutane is "associated with" IBD. According to Plaintiff, Dr. Dubin responded to the inquiry by stating that Plaintiff was a "good, appropriate candidate for that medication based on his condition." *Id.* at P98:7-24. Plaintiff's mother and current legal guardian was Plaintiff's medical decision maker at the time he was prescribed Accutane, and she testified that had she been provided with additional information about Accutane and the risk of ulcerative colitis, she would not have allowed Plaintiff to take Accutane. *Eisbrouch* IL Ex. 3; P104:11-25, P237:10-238:16, P142:22-145:24.

Court's Analysis: Dr. Dubin testified that he knew there was at least a risk that Plaintiff could develop IBD when he prescribed it, and that Plaintiff had been a good candidate for Accutane. *Bufano* IL Ex. 2; P97:24-98:5, P98:14-24.

Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Dubin's prescribing decision. The Court relies upon Dr. Dubin's testimony at PP97-99 wherein he opined that he felt Plaintiff was "a good, appropriate candidate" and that regardless of the label would still have prescribed Accutane to Plaintiff. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

25. Ryan G. Koher [Illinois]

Defendants' Contentions: Dr. Ruth J. Nesavas-Barsky testified that she would have prescribed Accutane to Plaintiff even if the label had stated that Accutane is "possibly or probably related to" or "can induce" IBD. *Bufano* IL Ex. 7; P57:21-58:20. Dr. Nesavas-Barsky testified that she was aware that Plaintiff could develop IBD when she prescribed Accutane to her. *Id.* at P36:12-37:6, P52:3-5, P53:17-19, P56:2-21. Dr. Nesavas-Barsky also testified that she would still prescribe Accutane to Plaintiff if he were presented in the same manner today despite what she

now knows about Accutane. *Id.* at P58:23-59:17, P115:14-P116:4. Regardless, Defendants argue that any causal link is broken because Plaintiff's mother testified that she would not have allowed her son to take Accutane if she read the warnings in the patient brochure; including severe stomach pain, diarrhea, and rectal bleeding, or if she had been told that Accutane had been associated with IBD. *Mantell* IL Ex. B; P172:5-11, P173:14-17, P178:23-180:5, P194:9-14, P195:15-201:13, P205:2-11, P209:11-21.

Plaintiff's Opposition: Dr. Barsky testified that she was familiar with the Accutane label when she prescribed it to Plaintiff, and that she did not know how permanent IBD was. *Dweck* IL Ex. 5; P52:3-5, P36:1-11. Dr. Barsky testified that if the label had stated "possibly or probably related to IBD" she would have told her patients to watch out for rectal bleeding. *Id.* at P60:1-11. Plaintiff was seventeen when he took Accutane, but his mother testified that she would not have allowed him to take Accutane if she knew it could cause IBD. *Dweck* IL Ex. 7; P201:1-10.

Court's Analysis: Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Barsky's prescribing decision. The Court relies upon Dr. Barsky's testimony at PP57-58 wherein Dr. Barsky repeatedly testified, "Yes I would" when asked whether she would continue prescribing Accutane. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

26. Thomas Robert Meersman [Illinois]

Defendants' Contentions: Dr. Rhonda Ganasky testified that she believes she was adequately warned about the risk of IBD and that she understood from warnings that Accutane may cause or induce a patient to develop IBD. *Bufano* IL Ex. 9; P38:13-39:9, P69:19-24. Dr. Ganasky testified that she stands by her decision to prescribe Accutane to Plaintiff. *Id.* at P36:2-14. Defendants argue that, regardless, any causal link is broken because Plaintiff's mother testified that had she been warned of Accutane's association with IBD or other warned of risks she would not have allowed her son to take it. *Mantell* IL Ex. C; P43:15-18, P44:2-45:15.

Plaintiff's Opposition: Plaintiff's counsel asserts that although Dr. Ganasky testified that she would still prescribe Accutane, she also testified that she did not know if she was adequately warned about the risk of the possibility of IBD in connection to its use. Plaintiff was a minor at the time he ingested Accutane and his mother testified if she had been warned of the linkage between Accutane and IBD, she would not have allowed her son to take it. *Buchanan* IL Meersman 1; P43:11-21.

Court's Analysis: Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Ganasky's prescribing decision. The Court relies upon Dr. Ganasky's testimony that she understood the risk and stood by her prescribing decision at PP36, 38-39, and 69 wherein she confirmed that as a treating physician, she believed she had been "adequately warned." Plaintiff has failed to offer proofs, pursuant to *R.* 4:46:-5(a), in the form of an affidavit or otherwise, showing that a different warning would have changed Dr. Ganasky's prescribing decision. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

Indiana Law. Indiana courts have fully adopted the learned intermediary doctrine. *Tucker v. SmithKline Beecham,* 701 *F.Supp.*2d 1040, 1067 (S.D. Ind. 2010). Indiana's proximate cause standard in failure to warn pharmaceutical claims appear similar to New Jersey. *Ortho Pharmaceutical Corp. v. Chapman,* 388 *N.E.*2d 541 (Ind. Ct. App. 1979). In *Chapman,* the court found that the "independent actions of a doctor are necessarily a part of causation in fact … an adequate warning with respect to unavoidably unsafe products would not in any way reduce or avoid the risk of harm involved. It would only serve to inform the person to whom the duty to warn extends, in this case the doctor, so that he may choose whether the risk should be incurred, or cease use of the product if the risk materializes." *Id.* at 555. Indiana law is consistent with New Jersey law on the issues raised by counsels' pleadings.

27. Matthew Porter [Indiana]

Defendants' Contentions: Dr. Loris Tisocco testified that he would have prescribed Accutane to Plaintiff even if the label had stated that Accutane is "associated with" IBD. *Bufano* IN Ex. 2; P84:5-85:25. Dr. Tisocco testified that he was aware of the risk of IBD when prescribing Accutane to Plaintiff. *Id.* at P71:21-72:12, P76:14-16, P83:8-21. Dr. Tisocco testified that he would prescribe Accutane to Plaintiff today if he were presented in the same manner despite what he now knows about the drug and its risks and side effects. *Id.* at P86:10-20. While the Plaintiff

did testify to taking an earlier course of Accutane while serving in the military, he could not identify his prescribing physician. *Bufano* IN Ex. 3; P115:24-116:18.

Plaintiff's Opposition: Dr. Tisocco testified that he would "probably not" have prescribed Accutane to Plaintiff if the warning had said, "Accutane has been associated with IBD." *Evola* IN Ex. A; P83:25-84:10. Additionally Plaintiff argues that, to this day, Dr. Tisocco does not understand the nature of the side effects warned against. Dr. Tisocco denied knowing whether IBD is a permanent condition, though he agrees that patients have a right to know about permanent side effects. *Id.* at P107:1-24. Plaintiff asserts that this testimony falls short of any indication that Dr. Tisocco "was aware of and considered the risk that Plaintiff could develop IBD," as alleged by Defendants.

When questioned about whether IBD is permanent, Dr. Tisocco responded, "[i]t has fluctuations. Some people may have a lot of remissions and a few exacerbations; other people, it's the other way around." *Evola* IN Ex. A; P107:4-7. Dr. Tisocco was unclear in his testimony as to whether IBD is a permanent condition. *Evola* IN Ex. A; P107.

Court's Analysis: Defendants has failed to meet their burden of proof. Dr. Tisocco said repeatedly, "I'm not sure" when asked if he would have prescribed Accutane, given a different warning or different understanding. He seemed confused. Accordingly, Defendants' Motion must be DENIED.

Mississippi Law. Mississippi Courts follow the learned intermediary doctrine in prescription drug failure-to-warn cases. *Janssen Pharmaceutical, Inc. v. Bailey,* 878 *So.2d* 31, 58 (Miss. 2004). "The plaintiff must show that an adequate warning would have convinced the prescribing physician not to prescribe the drug for the plaintiff." *Thomas v. Hoffman-La Roch Inc.,* 949 *F.*2d 806, 818 (5th Cir. 1992). A plaintiff who cannot show that a different warning would have changed his or her physician's prescribing decision cannot prove proximate cause. *Windham v. Wyeth Labs., Inc.,* 786 *F.Supp.* 607, 612 (S.D. Miss. 1992). *See also Wyeth Labs. v. Fortenberry,* 530 *So.*2d 688, 691 (Miss. 1988) ("Assuming arguendo that the warning was inadequate, [Plaintiff] still had the burden

of showing that an adequate warning would have altered Dr. Moore's conduct . . . The record contains no testimony showing that Dr. Moore would not have administered the flu shot if adequate warning had been given. His testimony unequivocally established that he read the warning on the package insert and decided not to warn the [plaintiffs].") Mississippi law is consistent with New Jersey law on the issues raised by counsels' pleadings.

28. Calvin P. Brunson, Jr. [Mississippi]

Defendants' Contentions: Defendants allege that Dr. Stephen Conerly was aware of and considered the risk that Plaintiff could develop IBD when he prescribed Accutane to Plaintiff. *Bufano* MS Ex. 2, P62:9-63:9, P55:4-23.

Plaintiff's Opposition: Plaintiff testified that he would not have taken Accutane if he had known that it could cause IBD. *D'Arcy* MS Ex. 2; P114:1-115:14.

Defendants' Reply: As discussed above, Plaintiff has failed to provide affidavits where proofs are lacking. *R.* 4:46:-5(a).

Court's Analysis: Plaintiff has failed to prove, under either New Jersey or Mississippi law, that a different warning would have changed Dr. Conerly's prescribing decision. The Court relies upon Dr. Conerly's testimony that he was aware that Plaintiff could develop IBD at the time he prescribed him Accutane at P62:9-63:9, P55:4-23 wherein he confirms that he continues to prescribe Accutane. Plaintiff has failed to provide proof, in the form of affidavits or otherwise, that an allegedly stronger warning would have changed Dr. Conerly's prescribing decision. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

29. Ryan Hunter Coombes [Mississippi]

Defendants' Contentions: Dr. Joseph Roy Terracina testified that he would have prescribed Accutane to Plaintiff even if the label had stated that Accutane is "associated with" or "may cause" IBD. *Bufano* MS Ex. 4; P56:22-57:23, P68:15-69:1.

Plaintiff's Opposition: Dr. Terracina testified that IBD is not a common risk or side effect of Accutane. *Samberg* MS Ex. A; P51:12-52:15, P53:6-8. Dr. Terracina also testified that had Defendants advised that Accutane could induce IBD, he would have shared that information with Plaintiff. *Id.* at P80:12-81:23. Plaintiff was a minor at the time he took Accutane, but his mother

testified that had she been told there was a small risk of IBD, she would have talked to Dr. Terracina about it. *Samberg* MS Ex. E; P74:24-75:4.

Court's Analysis: Dr. Terracina acknowledged that IBD was within the warning and said "it wouldn't even be a consideration" of his when prescribing Accutane. *Bufano* MS Ex. 4; P56:22-57:23, P68:15-69:1. When Dr. Terracina was asked about whether Defendants advised of a risk of IBD, he specifically testified that just because he would have been given additional information on IBD risks does not mean that he would not prescribe the drug, it would just be additional information to discuss with the patient. *Samberg* MS Ex. A; P80:24-81:12.

Plaintiff has failed to prove, under either New Jersey or Mississippi law, that a different warning would have changed Dr. Terracina's prescribing decision. The Court relies upon Dr. Terracina's testimony at PP56-57 wherein he reveals his thought processes in prescribing Accutane to Plaintiff, and 68-69 where, in considering his "treatment paradigm" for Plaintiff, that Accutane was right for him. In each extract, the witness confirms he would have prescribed Accutane again to the Plaintiff. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

30. John P. Johnson [Mississippi]

Defendants' Contentions: Defendants allege that Dr. William Henry Gullung, III, was aware of and considered the risk that Plaintiff could develop IBD when he prescribed Accutane to Plaintiff. *Bufano* MS Ex. 6; P53:14-54:20, P58:21-59:3, P60:19-63:3. Dr. Gullung also testified that he would have prescribed Accutane to Plaintiff even if the label had stated that Accutane is "associated with" IBD. *Id.* at P63:11-19. Dr. Gullung testified that he would prescribe Accutane to Plaintiff if Plaintiff were presented in the same manner today despite what he now knows about the drug, its risks, and its side effects. *Id.* at P98:18-99:21.

Plaintiff's Opposition: Plaintiff asserts that Dr. Gullung is a former Roche expert witness and his potential bias should be noted. Dr. Gullung disputed that Defendants advised whether IBD could be an outcome of Accutane. *Bufano* MS Ex. 6; P60:19-61:18. Dr. Gullung testified that if he prescribed isotrentinoin to Plaintiff today IBD would be a part of the discussion. *Id.* at P98:18-99:15.

Defendants' Reply: Defendants assert that Dr. Gullung was an expert witness for Defendants in another litigation that did not involve IBD. Additionally, though Plaintiff raised Dr.

Gulung's past (non-Accutane) work for Defendant, he does not assert that he is biased. Rather, counsel urges that Dr. Gullung's "testimony should be even more carefully scrutinized."

Court's Analysis: Dr. Gullung testified that information about IBD was in the warning, but that he read the warning only to associate a risk in individuals with a history of intestinal disorders. What Dr. Gullung actually testified in regards to Defendants advising of the outcome of IBD was that the warning communicated an association but did not communicate causation. *Bufano* Ex. 6; P60:19-61:18.

Plaintiff has failed to prove, under either New Jersey or Mississippi law, that a different warning would have changed Dr. Gullung's prescribing decision. The Court relies upon Dr. Gullung's testimony at PP60-63 wherein there is an extensive colloquy with counsel and he confirms that with all he has learned about the risks of Accutane, he continues to prescribe and would have to Plaintiff. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

Missouri Law. Missouri is a difficult state to scrutinize. While this Court can envision a scenario in which Missouri may embrace New Jersey's approach to the LID and proximate cause, that is not the end of the discussion. I am loathe to predict just how the Missouri Supreme Court would weigh in on this issue. Existing case law is not helpful, thus, I am hesitate to "predict." That said, New Jersey's approach is rational and fair and must control. Accordingly, the claims of the Plaintiffs residing in Missouri must be addressed under New Jersey law.

31. Aaron K. Boothe [Missouri]

Defendants' Contentions: It was Dr. Michael Porvaznik's testimony that he thought the 2001 and 2002 insert and PDR included an IBD warning that he thought was "reasonable." *Bufano* MO Ex. 2; P63:11-17, P64:12-19. Dr. Porvaznik testified that a difference in the warning language would probably not have made a difference to him. *Id.* at P63:18-64:1. When asked if Defendants' proposed warning would have made a difference to him, Dr. Porvaznik testified "I don't think so." *Id.* Dr. Porvaznik testified that he believed the warning Defendants provided was reasonable. *Id.* at P64:12-19. Defendants argue that, regardless, any causal link is broken by Plaintiff's mother's

testimony that she would not have allowed Plaintiff to take Accutane had she "been aware at the time in 2002 that Accutane may cause diarrhea or rectal bleeding[,]" because those risks were provided within the patient brochure. *Mantell* MO Ex. B; P97:24-98:3.

Plaintiff's Opposition: Plaintiff argues that Dr. Provaznik could not have considered the risk of IBD or communicated it to Plaintiff. Plaintiff testified that he may not have taken Accutane when asked whether he would have taken Accutane had various hypothetical Accutane warnings been provided to him. *Brahmbhatt* MO Ex. C; P209:15-19, P210:2-6, P210:16-19, P213:3-7, P214:6-12.

Court's Analysis: While Plaintiff's counsel has represented that Dr. Porvaznik's testimony was that he was not warned that symptoms could continue after his patients finished their course of Accutane, it is an inaccurate reflection of the record testimony. Dr. Porvaznik specifically testified, when asked whether the warning advised of side effects past the course of Accutane, that, "yes, this warning does say even after the course of medication, yes." *Brahmbhatt* MO Ex. B; P106:2-25. What Plaintiff actually testified in response to the five hypothetical Accutane warnings cited above, each and every time, was "I don't know" not an unequivocal "no." *Brahmbhatt* MO Ex. C; P209:15-19, P210:2-6, P210:16-19, P213:3-7, P214:6-12. Defendants' Motion for Summary Judgment must be granted even under Plaintiff's own standard because the testimony cited and relied upon by Plaintiff is an inaccurate reflection of the record testimony.

Plaintiff has failed to prove, under either New Jersey or Missouri law, that a different warning would have changed Dr. Porvaznik's prescribing decision. The Court relies upon Dr. Porvaznik's testimony at PP63-64 wherein he confirmed that based upon the warning(s) in the PDR, he would have still prescribed Accutane to Plaintiff. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

32. Christopher Martin Dralle [Missouri]

Defendants' Contentions: Defendants allege that Dr. Jamie A. Scott was aware of and considered the risk that Plaintiff could develop IBD when he prescribed Accutane to Plaintiff. *Bufano* MO Ex. 4; P49:21-50:6, P50:24-51:5, P52:5-53:3, P54:1-5, P56:11-57:1, P77:4-7. Dr. Scott also testified that she would have prescribed Accutane to Plaintiff even if the label had stated that Accutane is "possibly or probably related to," "can induce," "may cause," or is "associated with" IBD. *Id.* at P58:12-59:2, P60:1-16, P62:14-18. Dr. Scott testified that she would prescribe

Accutane to a patient presented exactly as Plaintiff was at the time Accutane was prescribed, with the same circumstances, if they were presented today. *Id.* at P88:4-19.

Plaintiff's opposition: Dr. Scott testified that information regarding causation and the prevalence of IBD in the label would have altered her prescribing practice as she would have conveyed the information to Mr. Dralle. *Sklarsky* MO Ex. B; P131:7-14, P135:7-14. Plaintiff was a minor at the time he was prescribed Accutane, but his mother testified that had she been told that Accutane may cause IBD, even if the risk was less than ten percent or one in 1,000, she would not have allowed her son to take it. *Sklarksy* MO Ex. D; P54, P56:4-24.

Court's Analysis: Dr. Scott testified that it was her custom to warn patients of IBD. *Bufano* MO Ex. 4; P54:1-5. Therefore, Defendants' Motion for Summary Judgment must be granted even under their own standard. Plaintiff has failed to prove, under either New Jersey or Missouri law, that a different warning would have changed Dr. Scott's prescribing decision. The Court relies upon Dr. Scott's testimony at PP58-62 wherein he confirmed that he continued to prescribe Accutane until he retired and prescribed it to one of his own children. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

33. Jason Patrick Lindsey [Missouri]

Defendants' Contentions: Defendants assert that Dr. Joseph Duvall was aware of and considered the risk that Plaintiff could develop IBD when he prescribed Accutane to Plaintiff. *Bufano* MO Ex. 6; P38:13-39:7, P44:2-9, P45:2-24, P49:5-50:23, P69:20-70:6, P88:25-89:7. According to Dr. Duvall, he would have prescribed Accutane to Plaintiff even if the label had stated that Accutane is "possibly or probably related to," "can induce," "may cause," or is "associated with" IBD. *Id.* at P50:24-51:19, P52:6-15, P54:17-21. Dr. Duvall also testified that he would prescribe Accutane to Plaintiff if he were presented in the same manner today despite what he now knows about Accutane and its side effects. *Id.* at P98:12-99:2. Defendants argue that, regardless, any causal link is broken because Plaintiff testified that had he "been aware that IBD had been reported in patients taking Accutane" or that "IBD had been associated with Accutane," he would not have taken it, and that was the exact language in the physician warning. *Buchanan* MO Ex. Lindsey 1; P149:14-25.

Plaintiff's Opposition: Dr. Duvall testified that he is "absolutely not an expert" on IBD. *Bufano* MO Ex. 6; P104:2-7. Dr. Duvall also testified that he understood "temporally" to mean related in time. *Id.* at P50:15-17.

Court's Analysis: Plaintiff has failed to prove, under either New Jersey or Missouri law, that a different warning would have changed Dr. Duvall's prescribing decision. The Court relies upon Dr. Duvall's testimony at PP98:12-21 wherein he confirms that "knowing everything you currently know about Accutane ..." he would still recommend it to Plaintiff. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

34. Erica Lynn Rose [Missouri]

Defendants' Contentions: Defendants allege that Dr. Frederick Bauschard was aware of and considered the risk that Plaintiff could develop IBD when he prescribed Accutane to Plaintiff. *Bufano* MO Ex. 9; P79:4-25, P80:11-20, P82:6-15, P86:15-87:3, P118:13-20.

Plaintiff's Opposition: Dr. Bauschard testified that he did not warn Plaintiff of every risk or side effect within the package insert, and that IBD is not a common risk or side effect of Accutane use. *Samberg* MO Ex. D, P81:3-83:6, P84:25-85:3. Plaintiff was a minor at the time she was prescribed Accutane, but her mother testified that had she received additional warnings regarding the risk of IBD with Accutane use, she would not have allowed Plaintiff to take Accutane. *Samberg* MO Ex. B; P97:8-98:22.

Court's Analysis: Dr. Bauschard testified that after looking at the insert, it was clear that the manufacturer was warning of IBD, but he did not know that to be a possibility because he had not seen it. Dr. Bauschard recognized that the risk of such a possibility was communicated by Defendants and testified that he would have been familiar with the inserts at the time he prescribed Accutane to Plaintiff. *Bufano* MO Ex. 9; P79:4-25, P80:11-20, P82:6-15, P86:15-87:3, P118:13-20. The record is silent as to what Dr. Bauschard would have done with an allegedly stronger warning.

When asked if she was aware or had been told that Accutane may or may not cause IBD but probably won't, and would she then allow her daughter to take Accutane, Plaintiff's mother responded, "I don't know. I'd have – I would have to ask the doctor more questions about it." *Samberg* MO Ex. B; 98:8-17.

Plaintiff has failed to prove, under either New Jersey or Missouri law, that a different warning would have changed Dr. Bauschard's prescribing decision. The Court relies upon Dr. Bauschard's testimony that he was aware that Plaintiff could develop IBD at the time he prescribed her Accutane at PP87-89 and 118-119 wherein he confirmed that he felt the drug was "appropriate" for Plaintiff because "she was resistant to other treatments.". Plaintiff has failed to prove, by an

affidavit or otherwise, what Dr. Bauschard would have done in the face of an allegedly stronger warning. Additionally, testimony here clearly shows that Dr. Bauschard made a conscious decision not to warn of IBD with no indication that the proposed warning would have changed that decision. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

35. Kacy Jo White [Missouri]

Defendants' Contentions: According to Defendants, Dr. Mark S. Matlock was aware of and considered the risk that Plaintiff could develop IBD when he prescribed Accutane to Plaintiff. *Bufano* MO Ex. 11; P108:4-109:1, P109:21-110:2. Dr. Matlock testified that he would have prescribed Accutane to Plaintiff even if the label had stated that Accutane is "possibly or probably related to" or "can induce" IBD. *Id.* at P197:11-198:6, P199:1-5, P199:12-200:13. Dr. Matlock also testified that he would prescribe Accutane to Plaintiff if presented in the same manner today despite what he now knows about the drug and its risks and side effects. *Id.* at P198:7-18. Defendants argue that, regardless, any causal link is broken because Plaintiff's mother testified that she would not have let her daughter take Accutane if she had been aware of the information contained in the warnings. *Mantell* MO Ex. D; P170:22-171:18.

Plaintiff's Opposition: Dr. Matlock testified that had the warning indicated that Accutane can cause IBD, he would have told the patients that it was a side effect if they had asked him about IBD. *Samberg* MO Ex. F; P252:19-21, P258:14-259:3. Plaintiff was a minor at the time she ingested Accutane, but her mother testified that had Dr. Matlock described any symptoms which she thought to be permanent she would not have allowed her daughter to take Accutane. *Samberg* MO Ex. H; P199:10-15.

Dr. Matlock testified that, given the allegedly stronger warning, while he would still prescribe Accutane, he would go through the risk-benefit analysis carefully with the patient. *Bufano* MO Ex. 11; P197:11-198:6, P199:1-5, P199:12-200:13.

Court's Analysis: Plaintiff has failed to prove, under either New Jersey or Missouri law, that a different warning would have changed Dr. Matlock's prescribing decision. The Court relies upon Dr. Matlock's testimony at PP197-200 wherein he confirms that "I would have been very diligent about informing the patient about the reported possibility but I still would have used it." When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

36. Brent R. Whittlesey [Missouri]

Defendants' Contentions: Defendants allege that Dr. Paul Vescovo was aware of and considered the risk that Plaintiff could develop IBD when he prescribed Accutane to Plaintiff. *Bufano* MO Ex. 13; P21:10-16, P35:1-6, P37:14-25. Dr. Vescovo also testified that he would have prescribed Accutane to Plaintiff even if the label had stated that Accutane is "possibly or probably related to," "can induce," or is "associated with" IBD. *Id.* at P37:14-39:17. While Dr. Vescovo is not a dermatologist, he testified that he would prescribe IT today if he saw a patient whose severity of acne warranted isotrentinoin after first referring the patient to a dermatologist for a recommendation. *Id.* at 29:10-31:2, P42:12-19.

Plaintiff's Opposition: Dr. Vescovo testified that he would expect reactions to the drug "to occur within a reasonable period, a few days, even from immediate to a few days, and I would think the farther away, the less of a problem would occur. . . ." *Id.* at P85:18-86:9. Plaintiff argues that Dr. Vescovo did not understand that IBD, with its latent and permanent characteristics, could manifest from Accutane use months or years later. Dr. Vescovo testified that the more strongly a drug company emphasized a side effect, the more likely he would be to discuss the risk with his patient. *Id.* at P93:18-24. Plaintiff testified that had he been warned that one in 1,000 people who take Accutane may develop IBD, he would have considered that a serious concern. *Buchanan* MO Ex. Whittlesey 1; P176:14-21.

Court's Analysis: Plaintiff has failed to prove, under either New Jersey or Missouri law, that a different warning would have changed Dr. Vescovo's prescribing decision. Though the number of patients he prescribed Accutane was quite limited, he didn't hesitate to prescribe to Plaintiff because his condition was "severe". The Court relies upon Dr. Vescovo's testimony at PP35-39 wherein he confirms that he read and understood the PDR entry on Accutane and, moreover, that when confronted with various warning scenarios, he confirmed he would have still prescribed Accutane. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

Nebraska Law. Nebraska is a difficult state to scrutinize. While this Court can envision a scenario in which Nebraska may embrace New Jersey's approach to the LID and proximate cause, that is not the end of the discussion. I am loathe to predict just how

the Nebraska Supreme Court would weigh in on this issue. Existing case law is not helpful, thus, I am hesitate to "predict." That said, New Jersey's approach is rational and fair and must control. Accordingly, the claims of the Plaintiffs residing in Nebraska must be addressed under New Jersey law.

37. Matthew Hagert [Nebraska]

Defendants' Contentions: Dr. James Bunker testified that he would have prescribed Accutane to Plaintiff if the label had stated that Accutane is "possibly or probably related" to IBD, "can induce" IBD, or "may cause" IBD. *Bufano* NE Ex. 2; P72:3-73:3. Dr. Bunker was aware of and considered the risk that Plaintiff could develop IBD when he prescribed Accutane to Plaintiff. *Id.* at P69:20-70:6. Dr. Bunker also testified that he would prescribe Accutane to Plaintiff if he were presented in the same manner today despite what he now knows about the drug and its side effect. *Id.* at P71:7-72:2.

Plaintiff's Opposition: Dr. Bunker now warns his patients of the risk of IBD when he prescribes them isotrentinoin. *Id.* at P113:21-25. Plaintiff was a minor at the time he was prescribed Accutane, but his mother testified that she would not have allowed him to take Accutane had she been informed of an association, even a minimum association, between Accutane and IBD. *Buchanan* NE Ex. Hagert 1; P130:19-131:11.

Court's Analysis: Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Bunker's prescribing decision. The Court relies upon Dr. Bunker's testimony at PP63-73 wherein he revealed himself as a physician who studies available scientific literature; he left no doubt that he would have still recommended Accutane to Plaintiff. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

38. Kaine Kenneth McClelland [Nebraska]

Defendants' Contentions: Dr. David Kingsley testified that he would have prescribed Accutane to Plaintiff even if the label had stated that Accutane "may cause" IBD. *Bufano* NE Ex. 6; P149:9-13. Defendants allege that Dr. Kingsley was aware of and considered the risk that Plaintiff could develop IBD when he prescribed Accutane to Plaintiff. *Id.* at P91:21-25, P99:23-100:5. Dr. Kingsley also testified that he would prescribe Accutane to Plaintiff if he were presented in the same manner today despite what he now knows about Accutane and its risks and side effects. *Id.* at P149:14-19.

Plaintiff's Opposition: Dr. Kingsley testified that he did not warn his patients of IBD because; (1) in his experience, he had never encountered any patient with IBD side effects' (2) he relied on Dr. Dan Hruza, an esteemed gastroenterologist in Colorado, who never had a case of IBD associated with Accutane; (3) he believed that many side effects proved to be non-existent and were only intended to shield Defendants from liability; and (4) he read "temporal association" to mean that Defendants were not "100 percent sure" if an association existed. *Bufano* NE Ex. 6; P60:3-5; P66:9-16, P93:24-94:7, P100:16-101:16.

Court's Analysis: Dr. Kingsley testified that many side effects proved to be non-existent and that removing the word temporal would lead him to believe that Defendants were 100 percent sure of an association. *Id.* at P93:24-94:7, P100:16-101:16.

Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Kingsley's prescribing decision. The Court relies upon Dr. Kingsley's testimony at P149-152 wherein the colloquy between Dr. Kingsley and Ms. Gettman make clear the witness' understanding and intent. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

39. William John Kurzenberger [Nebraska]

Defendants' Contentions: Dr. David Kingsley testified that he would have prescribed Accutane to Plaintiff if the label had stated that Accutane "may cause" IBD. *Bufano* NE Ex. 4; P79:18-80:5. Defendants allege that Dr. Kingsley was aware of and considered the risk that Plaintiff could develop IBD when he prescribed Accutane to Plaintiff. *Id.* at P77:18-78:12. Dr. Kingsley also testified that after evaluating Plaintiff he would still prescribe Accutane today if Plaintiff were presented in the same manner even knowing what he now knows about Accutane and its risks and side effects. *Id.* at P90:18-91:19.

Plaintiff's Opposition: If a medication is known to cause a permanent, irreversible disease, such as IBD, Dr. Kingsley wants to know that so that it can be considered in his risk-benefit analysis because it could have an impact on his decision whether to prescribe such a medication. *Sugarman* NE Ex. 2; P108:6-15. Dr. Kingsley testified that he did not know that Defendants had concluded one of the serious side effects of Accutane is inflammation of the intestines, nor that Defendants' scientists concluded Accutane may induce or aggravate a preexisting colitis. *Id.* at P121:8-122:4. Plaintiff asserts that Dr. Kingsley did not testify that he would prescribe Accutane to Plaintiff if presented in the same manner today. *Id.* at P90:25-91:10. Dr. Kingsley testified that

he would "[v]ery possibly," prescribe Accutane to Plaintiff if he were presented the same today, but that he would need to reevaluate him and would not rule out isotrentinoin treatment. *Sugarman* NE Ex. 2; P90:18-91:22.

Court's Analaysis: Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Kingsley's prescribing decision. The Court relies upon Dr. Kingsley's testimony at PP77-80 wherein his testimony is consistent with what he said in the McClelland deposition.. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

40. Michael Angelo Nocita [Nebraska]

Defendants' Contentions: Dr. Douglas Robey is now deceased, but his physician's assistant, Theresa Abbot, was responsible for initially prescribing Accutane to Plaintiff. *Bufano* NE Ex. 8; P16:14-20, P50:6-13. Abbot testified that she would have prescribed Accutane to Plaintiff even if the label had stated that Accutane "may induce," "may cause," or "may trigger" IBD. *Id.* at P93:19-94:4. Defendants allege that Abbot was aware of and considered the risk that Plaintiff could develop IBD when she prescribed Accutane to Plaintiff. *Id.* at P91:1-12, P100:3-7.

Plaintiff's Opposition: Abbot testified that she would have wanted to know if Accutane caused or induced IBD and whether the risks were latent so that she could share that information with her patients. *Id.* at P129:19-130:13, P131:19-132:7. Plaintiff was a minor at the time he was prescribed Accutane, but his mother testified that she would not have allowed her son to take Accutane if she was expressly told that it was causing bowel disease. *Buchanan* NE Ex. Nocita 1; P118:24-119:18.

Court's Analysis: As to Plaintiff's mother being asked whether she would have allowed her son to take Accutane if she were warned that Accutane may cause IBD but physicians did not know for sure, she answered, "if the doctor felt that the benefits outweighed the risks, I would have allowed Michael." *Buchanan* NE Ex. Nocita 1; P119:20-120:4. Therefore, Defendants' Motion for Summary Judgment must be granted even under their own standard where the Plaintiff's decision maker testified that she would still have allowed Plaintiff to take Accutane if it were recommended by his doctor.

Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed PA Abbot's prescribing decision. The Court relies upon PA Abbot's testimony at

PP93-94 wherein she confirmed her practices while working with Dr. Robey, now deceased. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

41. Dennis G. Scoggins, Jr. [Nebraska]

Defendants' Contentions: Dr. Rex F. Largen testified that he would have prescribed Accutane to Plaintiff even if the label had stated that Accutane "has been associated with" IBD, "has been possibly or probably related to" IBD, "can induce" IBD, or "may cause" IBD. *Bufano* NE Ex. 10; P82:12-21, P83:23-84:6, P86:11-20. Defendants allege that Dr. Largen was aware of and considered the risk that Plaintiff could develop IBD when he prescribed Accutane to Plaintiff. *Id.* at P70:19-71:9, P80:12-82:11. Dr. Largen also testified that he would prescribe Accutane to Plaintiff today if he were presented in the same manner despite what he now knows about Accutane and its risks and side effects. *Id.* at P86:21-87:1, P140:19-141:3.

Plaintiff's Opposition: Dr. Largen testified that if the label stated that "there is a significant risk of Accutane causing inflammatory bowel disease" he would have shared that information with Plaintiff. *Samberg* NE Ex. A; P123:11-124:8. Plaintiff was a minor at the time he used Accutane, but his mother testified that had she been made aware of a severe life-threatening reaction from Accutane, she would not have allowed her son to take it. *Samberg* NE Ex. B; P103:4-21.

Court's Analysis: Plaintiff's counsel has not accurately characterized Dr. Largen's testimony; Dr. Largen testified that he was aware IBD was a potential outcome of Accutane and that patient's also had a responsibility to read the brochure and ask him any questions. *Samberg* NE Ex. A; P123:11-124:8. Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Largen's prescribing decision. The Court relies upon Dr. Largen's testimony at PP82-87 wherein he confirmed that given what he knows of the warning(s) and Plaintiff's "severe recalcitrant nodular acne" he would still have prescribed Accutane. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

42. Deric H. Swanson [Nebraska]

Defendants' Contentions: Dr. Rex F. Largen testified that he would have prescribed Accutane to Plaintiff even if the label had stated that Accutane has been "possibly or probably related to" IBD, "can induce" IBD or "may cause" IBD. *Bufano* NE Ex. 12; P109:3-20. Defendants allege that Dr. Largen was aware of and considered the risk that Plaintiff could develop IBD when he prescribed Accutane to Plaintiff. *Id.* at P63:12-64:13. Dr. Largen also testified that

he would prescribe Accutane to Plaintiff if he were presented in the same manner today despite what he now knows about Accutane and its risks and side effects. *Id.* at P109:21-110:1.

Plaintiff's Opposition: Dr. Largen testified that if Defendants had provided him with information establishing a causal link between Accutane and IBD, he would have discussed it with his patient. *Id.* at P115:13-19. Dr. Largen testified that he was not aware that in 1994 Roche scientists concluded that Accutane induces ulcerative colitis. *Id.* at P115:21-24. Plaintiff testified that if he had been warned that IBD had been reported in patients taking Accutane, he would not have taken it, even if the risk was less than one-tenth of one percent. Shaffer NE *Plaintiff's Dep.;* P 254:15-266:22.

Court's Analysis: Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Largen's prescribing decision. The Court relies upon Dr. Largen's testimony at P108-110 wherein he confirms that given what he knows of the warning(s) and given "the same acne condition, the same history, and lack of response to topical antibiotic treatment" he would still prescribe Accutane to Plaintiff. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

New York Law. New York Courts follow the LID. *Martin v. Hacker*, 83 *N.Y.*2d 1, 9 (1993). In a failure-to-warn case brought under New York law against a drug manufacturer, a plaintiff must show that the manufacturer failed to warn the physician of a potential risk of taking the drug and, second, that this failure to warn the doctor was the proximate cause of his or her injury. *Glucksman v. Halsey Drug Co.*, 160 *A.D.*2d 305, 307 (N.Y. App. Div. 1st Dep't 1990) (the doctor in this case testified that he was independently aware of the dangers involved and so the manufacturer's alleged failure to warn was not the proximate cause of the plaintiff's injury. To prove proximate cause, plaintiffs must show that "the physicians. . . would not have prescribed the drug had the risks been fully disclosed." *In re Rezulin Prods. Liab. Litig.*, 331 *F. Supp.* 2d 196, 201 (S.D.N.Y. 2004).

If a plaintiff established that an inadequate warning was provided by the manufacturer, a presumption arises that the inadequacy was a proximate cause of the item being prescribed or continued. *Hoffman-Rattet v. Ortho Pharmaceutical Corp.*, 516 *N.Y.S.*2d 856, 861-62 (N.Y. Sup. Ct. 1987) (citations omitted). A defendant may overcome such a presumption by producing affirmative evidence that the physician would still have prescribed the item even if adequately informed, and thus breaking the causal chain. *Id.* (citations omitted). In meeting this burden, unless the physician's statement is self-disserving, the credibility of the physician's affidavit should ordinarily be left for the jury. *Id.* New York law is consistent with New Jersey law on the issues raised by counsels' pleadings.

43. Gregory S. Alexandrowicz, Jr. [New York]

Defendants' Contentions: Dr. Brummittee N. Wilson stated that he could not speculate as to what he would do have done in the past given a different warning, but that he would still prescribe Accutane in the future without the word "temporally" appearing in the warning. *Bufano* NY Ex. 2; P68:15-69:7. Dr. Wilson testified that removing "temporally" from the warning would not affect his decision to prescribe. *Id.* Defendants argue that, regardless, any causal link is broken because Plaintiff's mother testified that she would not have allowed her son to take Accutane if she had been aware of the existing warnings. *Mantell* NY Ex. C; P126:9-20, P127:25-128:11, P135:5-22.

Plaintiff's Opposition: Plaintiff asserts that prior to prescribing Plaintiff Accutane, Dr. Wilson was unsure of whether he read the original package insert for Accutane, he was unsure whether he knew of IBD as a side effect, he was unsure when the inserts changed over the years, and he was unsure whether he warned Plaintiff of IBD. Dr. Wilson did testify that at the time of his deposition in 2013, it is common practice to mention IBD when prescribing Accutane. *D'Onofrio* NY Ex. A; P69:8-11.

Court's Analysis: Plaintiff has failed to prove, under either New Jersey or New York law, that a different warning would have changed Dr. Wilson's prescribing decision. The Court relies upon Dr. Wilson's testimony at PP67-69 wherein the witness spoke of how the deposition involved

"speculating" and that "the decision made at the time was based on the facts at the time." When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

44. David J. Beshara [New York]

Defendants' Contentions: Dr. Ivan Paul Rappaport testified that if the label had stated that Accutane is "possibly or probably" related to IBD or "can induce" IBD, it would not have made a difference to his prescribing decision or his discussions with patients. *Bufano* NY Ex. 4; P25:5-26:6. Dr. Rappaport testified that he would still prescribe Accutane to Plaintiff if he were presented in the same manner today despite what he now knows about Accutane and its risks and side effects. *Id.* at P30:3-9, P41:11-42:1.

Plaintiff's Opposition: Dr. Rappaport testified that had he been aware that IBD was a more common side effect, he would have shared that information with the patient. *Samberg* Ex. C; P38:12-39:20. Dr. Rappaport understood temporal association to mean that symptoms develop while the patient is taking the drug. *Id.* at P24:21-24. Plaintiff testified that had he known that Accutane had been temporally associated with IBD in patients without a prior history, he would not have taken the drug. *Samberg* NY Ex. A; P155:10-17.

Court's Analysis: Plaintiff has failed to prove, under either New Jersey or New York law, that a different warning would have changed Dr. Rappaport's prescribing decision. The Court relies upon Dr. Rappaport's testimony at PP25-26 wherein he confirmed that a change in the label as discussed by counsel would not "have made a bit of difference" in how he prescribed Accutane to his patients. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

45. Christopher T. Brady [New York]

Defendants' Contentions: Dr. Joseph Cavallo testified that had the Accutane label stated that Accutane "is associated with" IBD, he would have understood there to be at least a minimum of a possible risk of developing IBD. *Bufano* NY Ex. 6; P135:19-136:2. While Defendants assert that Dr. Cavallo testified that he would have prescribed Accutane to Plaintiff regardless of such a change in the label language, he did not directly answer that question. Defendants allege that Dr. Cavallo was aware of and considered the risk that Plaintiff could develop IBD when he prescribed Accutane. *Id.* at P134:7-15. Defendants argue that, regardless, any causal link is broken because Plaintiff's mother testified that had Dr. Cavallo mentioned the information included within the

patient brochure, she would not have allowed her son to take Accutane. *Mantell* NY Ex. E; P178:4-9.

Plaintiff's Opposition: Dr. Cavallo testified that if Defendants had advised him that Accutane had a "clear-cut causal effect" of causing IBD, he would have shared that information with Plaintiff. *Samberg* NY Ex. F; P172:4-173:21. Dr. Cavallo testified that had Defendants advised him of numerous internal causality assessments concluding a connection between Accutane and IBD, he would have shared that information with Plaintiff. *Id.* at P173:22-175:6. Dr. Cavallo also would have discussed a latency risk with Plaintiff had he been made aware of one. *Id.* at P178:21-181:7. Plaintiff was a minor at the time he took Accutane, but his mother testified that if she had received additional warnings regarding the risk of permanent IBD with Accutane use, she would not have allowed her son to take it, even if the risk was less than five percent. *Samberg* NY Ex. E; P145:4-149:7, P152:2-7, P150:15-20.

Court's Analysis: Plaintiff has failed to prove, under either New Jersey or New York law, that a different warning would have changed Dr. Cavallo's prescribing decision. The Court relies upon Dr. Cavallo's testimony that he understood Accutane to carry a risk of IBD at P134; additionally, his use of the word "hubbub" at P124 speaks much as to the witness' thoughts on Accutane and the public. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

46. Kelli DeIaco [New York]

Defendants' Contentions: Defendants allege that Dr. Donald Savitz was aware of and considered the risk that Plaintiff could develop IBD when he prescribed her Accutane. *Bufano* NY Ex. 8; P25:3-26:20, P31:24-33:5, P34:8-35:11.

Plaintiff's Opposition: Plaintiff testified that she would not have taken Accutane if she understood that there was a risk of developing IBD. *Buchanan* NY Ex. DeIaco 1; P116:25-117:3. Dr. Savitz testified that when he prescribed Accutane to Plaintiff he did not know that it could cause IBD, but had he been warned he would have passed that information along to Plaintiff. *Bufano* NY Ex. 8; P73:14-19, P76:7-21.

Court's Analysis: Plaintiff's counsel has mischaracterized deposition testimony, however it has brought the Court's attention to other pertinent testimony. Dr. Donald Savitz testified that he was aware that IBD was listed among the risks of Accutane, he was aware that the manufacturer was conveying an association between Accutane and IBD, and he was familiar with the package

insert. *Bufano* NY Ex. 8; P25:3-26:20, P31:24-33:5, P34:8-35:11. Additionally, Dr. Savitz testified that had he been warned of IBD he would pass that information along in the form of an informational brochure and would "most likely not" discuss it with his patient because he only discussed common risks. *Id.* at P14:7-12, P33:6-16, P73:20-23, P77:14-24, P79:18-21, P76:7-77:2. Given this testimony, Defendants' Motion must be granted even under Plaintiff's own standard.

Plaintiff testified that she did not recall having discussions about IBD with Dr. Savitz, and that if she had read such information but Dr. Savitz told her the potential benefit outweighed that risk she said, "[y]eah, I think I would have taken his recommendation." *Buchanan* NY Ex. DeIaco 1; P116:24-117:23. Again, Defendants' Motion for Summary Judgment must be granted even under Plaintiff's own standard.

Plaintiff has failed to prove, under either New Jersey or New York law, that a different warning would have changed Dr. Savitz's prescribing decision. The Court relies upon Dr. Savitz's testimony that he was aware of the risk of IBD at the time he prescribed Accutane to Plaintiff and that his risk discussion would not change given a different warning. His testimony is quite supportive of Defendants' position, see PP25-26, 31-35, PP14, 33, 73, 76-77, and 79. The Court also relies upon Plaintiff's testimony at P116-17. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

47. Matthew Forgione, Jr. [New York]

Defendants' Contentions: Dr. Sherri Kaplan testified that she would have prescribed Accutane to Plaintiff if the label had stated that it is "possibly" or "probably" related to IBD, so long as the risk-benefit analysis came out in favor of use given the additional warning. *Bufano* NY Ex. 10; P61:14-62:8, P62:17-63:5. Defendants assert that Dr. Kaplan was aware of and considered the risk of IBD at the time she prescribed Accutane to Plaintiff. *Id.* at P21:19-22, P47:13-22, P55:15-57:6, P59:2-7. Dr. Kaplan also testified that she would prescribe Accutane to Plaintiff if he were presented in the same manner today despite what she now knows about the drug and its risks and side effects. *Id.* at P62:9-16, P105:8-17.

Plaintiff's Opposition: Plaintiff argues that Dr. Kaplan expected Defendants to warn doctors if they knew that Accutane could cause IBD. *Barreca* NY Ex. 2; P120:9-22. Plaintiff also argues that it is a mischaracterization to say that Dr. Kaplan testified that she would have prescribed Accutane to Plaintiff even given a change in the label. *Bufano* NY Ex. 10; P61:14-22.

Court's Analysis. Dr. Kaplan testified that she expected to be made aware of side effects, not that she was expected to but was not warned of IBD. *Barreca* NY Ex. 2; P120:9-22. After looking at the testimony on PP61-62 of Dr. Kaplan's deposition, the Court agrees with Defendants' characterization of the testimony. Lines 14-22 cannot be read in a vacuum, Dr. Kaplan clearly testified that if the risk/benefit analysis weighed in favor of prescribing Accutane, even given the proposed warning, she would prescribe Accutane.

Plaintiff has failed to prove, under either New Jersey or New York law, that a different warning would have changed Dr. Kaplan's prescribing decision. The Court relies upon Dr. Kaplan's testimony at PP59-63 particularly, where he discusses the "risk-benefit analysis." When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

48. Jaiwook Kim [New York]

Defendants' Contentions: Dr. Hyun-Soo Lee testified that he would have prescribed Accutane to Plaintiff even if the label had stated that Accutane is "possibly" or "probably" related to IBD, "may cause" IBD, or "can induce" IBD. *Bufano* NY Ex. 12; P59:3-12, P65:6-13; P59:22-60:13. Dr. Lee testified that he would prescribe Accutane to Plaintiff today if he were presented in the same manner despite what he now knows about Accutane and its risks and side effects. *Id.* at P58:25-59:2. Defendants argue that, regardless, any causal link is broken because Plaintiff testified that if he had read the warnings contained in the blister packaging, he would not have taken Accutane. *Mantell* NY Ex. G; P106:14-108:23.

Plaintiff's Opposition: Plaintiff asserts that Dr. Lee testified that had he been alerted to the cause and effect relationship of Accutane to IBD as opposed to simply an association, Dr. Lee would have included that risk discussion with Plaintiff and only then would let Plaintiff decide whether the prescription was appropriate. *Id.* at P62:15-24. Dr. Lee testified that the language "associated with" did not communicate causation to him. *Id.* at P58:9-21. In an affidavit, Plaintiff asserts that had Ms. Bufano asked whether or not Plaintiff would have taken Accutane if Dr. Lee disclosed the risk of IBD, it is Plaintiff's belief that he would not have taken Accutane under those circumstances. *Buchanan* NY Ex. Kim 1.

Court's Analysis: Dr. Lee's actual testimony at P62:15-24, when asked whether the warning language communicated a risk of IBD, was, "[y]es, it does."

Plaintiff has failed to prove, under either New Jersey or New York law, that a different warning would have changed Dr. Lee's prescribing decision. The Court relies upon Dr. Lee's

testimony at PP59-60 wherein he confirmed that he would have still prescribed Accutane to Plaintiff, if the label said "can induce." When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

49. Jeremy Blake Rosenstein [New York]

Defendants' Contentions: Defendants assert that Dr. Noam Glaser testified that he would have prescribed Accutane to Plaintiff even if the label had stated that Accutane is "associated with" IBD. *Bufano* NY Ex. 14; P219:12-222:2. What Dr. Glaser actually testified was that if the warning said Accutane is "associated with" IBD, he would have understood that there was a minimum or possible risk of developing IBD. *Id.* No testimony has been cited by Defendants where Dr. Glaser directly answered whether he would still prescribe Accutane given this change in language. *Id.* Dr. Glaser testified that the words "temporally associated with" IBD did communicate a risk that Accutane may or may not induce IBD, and so Defendants assert that Dr. Glaser was aware of and considered the risk that Plaintiff could develop IBD when he prescribed him Accutane. *Id.* P219:12-221:5. Dr. Glaser also testified that he would prescribe Accutane to Plaintiff today if her were presented in the same manner even knowing what he now knows about the drug and its risks and side effects. *Id.* at P234:23-235:15.

Defendants argue that, regardless, any causal link is broken because Plaintiff's mother testified that had she been aware that Accutane may cause IBD, rectal bleeding, or diarrhea, she would not have allowed her son to take it. *Mantell* NY Ex. I; P109:8-112:6.

Plaintiff's Opposition: Dr. Glaser testified that at the time he prescribed Accutane to Plaintiff, he was unaware that IBD was a permanent condition. *Samberg* NY Ex. G; P266:10-14. Plaintiff was a minor at the time he took Accutane, but his mother testified that had she been told that Accutane may cause IBD or a permanent injury, she would not have allowed her son to take it. *Samberg* NY Ex. I; P109:23-112:6, P186:14-21.

Court's Analysis: Plaintiff has failed to prove, under either New Jersey or New York law, that a different warning would have changed Dr. Glaser's prescribing decision. The Court relies upon Dr. Glaser's testimony that he understood the warning to communicate a risk of IBD at PP219-21 wherein he confirms that regardless of what he had learned at deposition, he still would have prescribed Accutane to Plaintiff. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

50. Ian S. White [New York]

Defendants' Contentions: Dr. Eric Treiber testified that he would have prescribed Accutane to Plaintiff even if the label had stated that Accutane is "associated with" IBD, "possibly" or "probably" related to IBD, "may cause," or "can induce" IBD. *Bufano* NY Ex. 17; P118:10-119:7, P122:18-123:11. Dr. Treiber also testified that he would prescribe Accutane to Plaintiff today if he were presented in the same manner despite what he now knows about Accutane and its risks and side effects. *Id.* at P123:12-17, P124:6-13. Defendants argue that, regardless, any causal link is broken because Plaintiff's mother testified that she would absolutely not have let her son take Accutane had she known of the possible side effects within the patient brochure, regardless of whether or not they were permanent or temporary. *Mantell* NY Ex. J; P143:13-17, P144:1-19, P169:10-17. Plaintiff's mother testified, "I would not have allowed him to take it if I was made aware of any type of side effect whatsoever." *Id.* at P144:18-19.

Plaintiff's Opposition: Dr. Treiber testified that had Defendants advised him of causality assessments where a connection between Accutane and IBD was concluded to be "probable or very probably," he would have shared that information with Plaintiff. *Samberg* NY Ex. J; P139:25-141:4. Dr. Treiber also testified that if he had been advised of a latency risk he would have shared that information with Plaintiff. *Id.* at P146:17-148:20. Plaintiff was a minor at the time he used Accutane, but his mother testified that if she had received additional warnings regarding the risk of IBD, she would not have allowed her son to take Accutane. *Samberg* NY Ex. K; P147:21-150:6.

Court's Analysis: Plaintiff has failed to prove, under either New Jersey or New York law, that a different warning would have changed Dr. Treiber's prescribing decision. The Court relies upon Dr. Treiber's testimony at P112 wherein he stated that he "absolutely familiarized" himself with the Accutane warnings. See also his testimony at PP118-19 and 122-23 wherein he states that a label change would not have altered his decision to prescribe, particularly because of Plaintiff's condition. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

North Dakota Law. North Dakota is a difficult state to scrutinize. While this Court can envision a scenario in which North Dakota may embrace New Jersey's approach to the LID and

proximate cause, that is not the end of the discussion. I am loathe to predict just how the North Dakota Supreme Court would weigh in on this issue. Existing case law is not helpful, thus, I am hesitate to "predict." That said, New Jersey's approach is rational and fair and must control. Accordingly, the claims of the Plaintiffs residing in North Dakota must be addressed under New Jersey law.

51. Nicholas John Breden [North Dakota]

Defendants' Contentions: Dr. Richard Blaine testified that he would have prescribed Accutane to Plaintiff even if the label had stated that Accutane is "possibly or probably related to," "can induce" or "may cause" IBD. *Bufano* ND Ex. 2; P128:23-129:9, P129:24-130:3. Dr. Blaine was aware of and considered the risk that Plaintiff could develop IBD when he prescribed Accutane to Plaintiff. *Id.* at P106:14-20. Dr. Blaine testified that he would prescribe Accutane to Plaintiff today if he were presented in the same manner despite what he now knows about Accutane and its risks and side effects. *Id.* at P129:10-15, P129:24-130:3. Dr. Blaine also testified that he would not have changed his risk discussion with Plaintiff given the allegedly stronger warning. *Id.* at P129:16-130:10, ("No, because I still wouldn't have been convinced that it really did it much because there was no signs of it anywhere except in that brochure").

Defendants argue that, regardless, any causal link is broken because Plaintiff's mother testified that she would not have allowed her son to take Accutane if she had been made aware of warnings in the patient brochure. *Mantell* ND Ex. A; P123:25-125:24, P138:8-139:18.

Plaintiff's Opposition: Dr. Blaine testified that if he was provided with warnings that Accutane may cause IBD, he would have passed that along to his patient before prescribing the drug. *Bufano* ND Ex. 2; P153:11-15. Plaintiff was a minor at the time he used Accutane, but his parents testified that had they known of the association between Accutane and IBD they would not have allowed their son to take Accutane. *Buchanan* ND Ex. Breden 4; P105:11-106:3; *Buchanan* ND Ex. Breden 3; P127:15-20.

Court's Analysis: What Dr. Blaine actually testified was that if Defendants told him to warn of IBD, "that vigorously," he probably would have discussed it with his patients. *Bufano* ND Ex. 2; P153:11-15.

Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Blaine's prescribing decision. The Court relies upon Dr. Blaine's testimony at PP128-30, which is quite clear regarding why he didn't hesitate to prescribe Accutane. When asked were he practicing medicine today, would he still prescribe Accutane, his reply was "absolutely." When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

52. Nicholas A. Clausnitzer [North Dakota]

Defendants' Contentions: Dr. Joseph Luger testified that he would have prescribed Accutane to Plaintiff even if the label had stated that Accutane is "associated with," "possibly or probably related to," "can induce," or "may cause" IBD. *Bufano* ND Ex. 4; P80:14-81:18, P138:25-139:15. Defendants allege that Dr. Luger was aware of and considered the risk that Plaintiff could develop IBD when he prescribed Accutane to Plaintiff. *Id.* at P82:15-22, P121:13-24.

Plaintiff's Opposition: Dr. Luger testified that if he was provided warnings that Accutane caused IBD in rare circumstances, he probably would have change the discussion with his patients. *Bufano* ND Ex. 4; P142:7-10. Plaintiff was a minor at the time he took Accutane, but his mother testified that had she been warned of the linkage between Accutane and IBD, she would have reconsidered. *Buchanan* ND Ex. Clausnitzer 2; P107:21-108:2.

Court's Analysis: Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Luger's prescribing decision. The Court relies upon Dr. Luger's testimony at PP80-81 and 138-39, which is quite clear regarding why he didn't hesitate to prescribe Accutane. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

53. Heather Schmidt [North Dakota]

Defendants' Contentions: Dr. Lon Christianson testified that he would have prescribed Accutane to Plaintiff even if the label had stated that Accutane is "associated with," "possibly or probably related to," "can induce," or "may cause" IBD, so long as her mother was fully informed and Plaintiff did not have IBD. *Bufano* ND Ex. 6; P119:19-24, P117:17-21, P132:14-24, P134:9-14, P136:13-137:1. Defendants argue that, regardless, any causal link is broken because Plaintiff's mother testified that if she has been aware of the warnings in the patient brochure she would not have allowed her daughter to take Accutane. *Mantell* ND Ex. D; P137:10-14, P161:4-162:12, P139:7-10.

Plaintiff's Opposition: Dr. Christianson testified that if he was provided warnings that Accutane may cause IBD, he would have passed that along to his patient before prescribing the drug. *Bufano* ND Ex. 6; P132:25-133:7. Plaintiff was a minor at the time she took Accutane, but her mother testified that if she had been warned of the linkage between Accutane and IBD, she would not have allowed her daughter to take the drug. *Buchanan* ND Ex. Schmidt 2; P139:7-10.

Court's Analysis: Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Christianson's prescribing decision. The Court relies upon Dr. Christianson's testimony at PP117, 119, 132, 134, and 136-38 wherein he concludes that notwithstanding everything he's learned arising subsequent to litigation, he still prescribes Accutane. Plaintiff's reliance upon the testimony at P133 is misplaced. The witness' answer is in reply to three alternate scenarios; none of which were existent at the time Accutane was prescribed. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

54. Melinda Anne Shiek [North Dakota]

Defendants' Contentions: Dr. David Flach testified that he would have prescribed Accutane to Plaintiff even if the label had stated that Accutane is "associated with," "possibly or probably related to," "can induce," or "may cause" IBD. *Bufano* ND Ex. 8, P117:6-22, P139:5-11, P116:18-21, P139:12-15. Dr. Flach testified to being aware of the risk of IBD when he prescribed it to Plaintiff, however he stated that the risk was in the back of his mind because he found it to be rare and controversial. *Id.* at P108:11-15, P115:20-116:1. Dr. Flach testified that he would prescribe Accutane to Plaintiff if presented in the same manner today despite what he now knows about Accutane and its risks and side effects. *Id.* at P139:12-20, P141:21-142:1.

Plaintiff's other prescribing physician, Dr. Kimberly Kelly, testified that she would have prescribed Accutane to Plaintiff even if the label had stated that Accutane is "associated with," "possibly or probably related to," "can induce," or "may cause" IBD. *Bufano* ND Ex. 9; P70:6-15, P71:2-13, P91:3-10, P70:19-22, P91:16-19, P92:17-22. Defendants allege that Dr. Kelly was aware of and considered the risk that Plaintiff could develop that IBD when she prescribed Accutane to Plaintiff. *Id.* at P56:8-13, P59:3-6, P70:1-10. Dr. Kelly also testified that she would prescribe Accutane to Plaintiff if she were presented in the same manner today despite what she now knows about the drug and its risks and side effects. *Id.* at P91:20-24, P92:17-22. Dr. Kelly testified that she would not change her discussion with Plaintiff given the proposed change in warning language. *Id.* at P71:2-5, P91:25-92:16.

Plaintiff's Opposition: Dr. Kelly testified that if she had been provided with information regarding a causal association between Accutane and IBD she would have shared that information with her patient. *Grounds* ND Ex. 2; P110:20-112:23.

Court's Analysis: What Dr. Kelly actually testified was that if she was provided with data "that was irrefutably proven" she would have shared it with her patients. *Id.*

Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Kelly's prescribing decision. The Court relies upon Dr. Kelly's testimony at PP70-71 and 91-92 wherein she stated that given what she knows, and Plaintiff presenting "with the same acne condition," she would still prescribe Accutane. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

55. Justin John Swenseth [North Dakota]

Defendants' Contentions: Dr. Hector Gallego testified that "he believed so," when asked whether he would still prescribe Accutane to Plaintiff if the label had stated that Accutane is "associated with," "possibly or probably related to," "can induce" or "may cause" IBD. *Bufano* ND Ex. 12, P89:2-15, P118:8-20. Dr. Gallego testified that he was aware of and considered the risk that Plaintiff could develop IBD when he prescribed Accutane to Plaintiff. *Id.* at P87:23-88:10. Dr. Gallego testified that he thinks he would would still prescribe Accutane to Plaintiff if he were presented in the same manner today and Dr. Gallego were still prescribing medicine. *Id.* at P111:21-25.

Plaintiff's Opposition: Dr. Gallego testified that he would warn patients about potential side effects before prescribing them medication, and it would have been useful if Defendants told him about the rare connection between Accutane and IBD. *Grounds* ND Ex. 3; P125:9-24, P130:1-21.

Court's Analysis: What Dr. Gallego actually testified was that he discussed the risk/benefit analysis with patients before he prescribed them medication, and it would have been more direct if Defendants put the "rare connection" between Accutane and IBD in their pamphlet along with the hair loss warning. *Id.*

Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Gallego's prescribing decision. The Court relies upon Dr. Gallego's testimony at PP88-89 and 118-119 wherein he almost seems to be defending a pharmaceutical product which

he has great faith in, e.g., "great advancement in the treatment of acne." When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

56. Byron Christian Volk [North Dakota]

Defendants' Contentions: Dr. Richard Blaine testified that he would have prescribed Accutane to Plaintiff even if the label had stated that Accutane is "possibly or probably related to" or "can induce" IBD. *Bufano* ND Ex. 14; P164:1-165:5, P165:25-166:16. Defendants assert that Dr. Blaine was aware of and considered the risk that Plaintiff could develop IBD when he prescribed Accutane to Plaintiff. *Id.* at P164:7-17. Dr. Blaine also testified that he would prescribe Accutane to Plaintiff if he were presented in the same manner today despite what he now knows about Accutane and its risks and side effects. *Id.* at P167:3-25.

Plaintiff's Opposition: Dr. Blaine testified that if he were provided warnings that Accutane may cause IBD, he would have passed them along to his patients before prescribing the drug. *Bufano* ND Ex. 14; P173:12-174:5.

Court's Analysis: Dr. Blaine testified that he would probably still prescribe Accutane given the proposed change in label language because no matter how things are worded, medical professionals rely on experts in the field. *Bufano* ND Ex. 14; P164:1-165:5, P165:25-166:16.

Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Blaine's prescribing decision. The Court relies upon Dr. Blaine's testimony at PP164-66 wherein he states that if he had not retired he "absolutely" will still prescribe Accutane. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

Ohio Law. Ohio Courts elected to follow the learned intermediary doctrine in *Seley v. G.D. Searle & Co.*, 423 *N.E. 2d* 831, 839-40 (Ohio 1981). Similar to New Jersey, Ohio accepts the heeding presumption, and in this instance, found that the failure to adequately warn was a proximate cause of the plaintiff's ingestion of the drug. *Id.* at 936. However, where the evidence demonstrates that "an adequate warning would have made no difference in the physician's decision as to whether to prescribe a drug or as to whether to monitor the patient thereafter, the presumption ... is rebutted, and the required element of proximate

causation between the warning and ingestion of the drug is lacking." *Id.* Thus, where the treating physician "unequivocally testifies that [he or she] would have prescribed the drug despite adequate warnings, judgment as a matter of law is appropriate." *Id.* Ohio law is consistent with New Jersey law on the issues raised by counsels' pleadings.

57. Matthew A. Baird [Ohio]

Defendants' Contentions: Dr. Kelly Zyniewicz testified that she would have prescribed Accutane to Plaintiff even if the label stated that Accutane is "associated with," "possibly or probably related to," "can induce" or "may cause" IBD. *Bufano* OH Ex. 2; P48:14-49:24, P50:13-22, P52:17-21, P89:13-25. Defendants allege that Dr. Zyniewicz was aware of and considered the risk that Plaintiff could develop IBD when she prescribed Accutane to Plaintiff. *Id.* at P44:17-45:2, P52:22-53:07. Dr. Zyniewicz also testified that she would prescribe Accutane to Plaintiff if he were presented in the same manner today despite what she now knows about Accutane and its risks and side effects. *Id.* at P74:20-75:05.

Plaintiff's Opposition: Dr. Zyniewicz testified that she did not know and appreciate that IBD could be an outcome of taking Accutane. *Bufano* OH Ex. 2; P47:18-48:13. Plaintiff testified that he would not have taken Accutane if his doctor explained to him that IBD was a possible side effect and that it is a permanent condition. *Buchanan* OH Ex. Baird 1; P150:6-18. Plaintiffs also argue that this case is premature for summary judgment because full fact discovery has yet to go forward. Nonetheless, the deposition of the "learned intermediary," Dr. Zyniewicz, was taken and presented to the Court.

Defendants' Reply: Defendants assert that Plaintiff's second prescriber, Dr. Bechtel's, deposition is not necessary and Plaintiff waited over two months after the filing of this Motion to raise the issue. Defendants assert that Plaintiff could have contacted Dr. Bechtel for an affidavit, but did not, and that, regardless, Dr. Zyniewicz was the initial prescriber who would have had the risk discussions with him before he began ingesting Accutane under her care.

Court's Analysis: When reviewing the entire string of questioning between Dr. Zyniewicz and her deposer, she clearly testified, at P48:10, that she understood users of Accutane to be at an increased risk of IBD. *Bufano* OH Ex. 2.

Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Zyniewicz's prescribing decision. The Court relies upon Dr. Zyniewicz's testimony at PP48-50 wherein he states that regardless of the language, he understood there was an association and still would have prescribed Accutane to Plaintiff. See also testimony at 52 and 89. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

58. Jeffery Churilla [Ohio]

Defendants' Contentions: Dr. Kenneth Lloyd testified that he would have prescribed Accutane to Plaintiff even if the label had stated that Accutane was "associated with" or "may cause" IBD. *Bufano* OH Ex. 4; P70:17-72:13. Dr. Lloyd testified that he was aware of the allegations that Accutane may cause IBD when he prescribed Accutane to Plaintiff, but he did not think there was convincing evidence of a direct association. *Id.* at P39:18-40:1. Dr. Lloyd testified that "[t]he fact that there is a suggestion that there's a relationship between [IBD] and the use of Accutane" would not deter him from using it for a patient with acne conglobota, the condition Plaintiff had. *Id.* at P70:11-71:6. Dr. Lloyd stated that he would probably prescribe Accutane to a patient today who had the same acne conglobate as Plaintiff had. *Id.* at P92:25-93:19. Additionally, Dr. Lloyd testified that he did not read the package insert or PDR for Accutane, undermining any causation argument that an inadequate warning affected his decision to prescribe Accutane to Plaintiff. *Mantell* OH Ex. C; P43:24-44:11. Defendants argue that, regardless, any causal link is broken because Plaintiff's mother testified that had she been aware of the side effects listed within the package insert and patient brochure, she would not have allowed her son to take Accutane. *Mantell* OH Ex. D; P131:25-132:20, P138:15-140:12, P133:6-18, P134:16-24.

Plaintiff's Opposition: Dr. Lloyd testified that had he been provided warnings that Accutane may cause IBD, he would have passed that warning along to the patient before deciding to prescribe the drug. *Bufano* OH Ex. 4; P97:21-98:14. Plaintiff was a minor at the time he used Accutane, but his mother testified that if she had been warned of the linkage between Accutane and IBD, she certainly would not have allowed her son to take the drug. *Buchanan* OH Ex. Churilla 1; P134:16-137:2.

Court's Analysis: Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Lloyd's prescribing decision. The Court relies upon Dr. Lloyd's testimony at PP43 and 70-72 wherein he is emphatic that he wouldn't hesitate to prescribe

Accutane to a patient with "acne conglobate".. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

59. Dawn Elizabeth Gruenke [Ohio]

Defendants' Contentions: Dr. Diane Bernardi testified that she would have prescribed Accutane to Plaintiff even if the label had stated that Accutane is "associated with," "possibly or probably related to," "can induce," or "may cause" IBD. *Bufano* OH Ex. 6; P40:22-42:1, P166:25-167:18, 165:17-166:13, P52:5-54:25. Defendants assert that Dr. Bernardi was aware of and considered the risk that Plaintiff could develop IBD when she prescribed Accutane to Plaintiff. *Id.* at P39:24-40:21. Dr. Bernardi also testified that she would still prescribe Accutane to Plaintiff if she were presented in the same manner today despite what she now knows about Accutane and its risks and side effects, but that she would be able to provide the patient better statistics on efficacy. *Id.* at P21:2-19, P59:1-14. Defendants assert that, regardless, any causal link is broken because Plaintiff testified that if she had read the patient brochure and been aware of the warnings she would not have taken Accutane. *Mantell* OH Ex. E; P125:16-126:3, P126:14-18.

Plaintiff's Opposition: Dr. Bernardi testified that she would have warned Plaintiff of the risk of IBD had that information been provided by Defendants. *Bufano* OH Ex. 6; P153:2-17. Plaintiff testified that she would not have taken Accutane if she understood there was a risk of developing IBD. *Buchanan* OH Ex. Gruenke 1; P125:16-126:18.

Court's Analysis: What Dr. Bernardi testified was that she would still provide the patient brochure to her patients even if different warnings had been provided within the brochure. *Bufano* OH Ex. 6; P153:2-17.

Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Lloyd's prescribing decision. The Court relies upon Dr. Bernardi's testimony at PP40-42, 52-54, and 165-167 wherein he confirms that a labeling change would not have altered his decision to prescribe Accutane to Plaintiff. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

60. Christopher N. Irons [Ohio]

Defendants' Contention: Dr. Craig Burkhart testified that he would have prescribed Accutane to Plaintiff even if the label had stated that Accutane is "possibly or probably related to," "can induce," or "may cause" IBD. *Bufano* OH Ex. 8; P110:21-111:14, P113:15-114:15. Dr. Burkhart testified that he was aware of the risk of IBD when he prescribed Accutane to Plaintiff,

and Defendants assert that he considered that risk. *Id.* at P90:6-91:9, P220:14-221:16. Dr. Burkhart also testified that he would still prescribe Accutane to Plaintiff if he were presented in the same manner today despite what he now knows about the drug and its risks and side effects. *Id.* at P111:21-113:4. Defendants assert that, regardless, any causal link is broken because Plaintiff's mother testified that if she had been aware of the side effects associated with Accutane provided in the patient brochure, she would not have allowed her son to take Accutane. *Mantell* OH Ex. F; P98:25-99:16.

Plaintiff's Opposition: Dr. Burkhart testified that he did not know what "IBD" stood for, and he was not aware whether IBD was a chronic and permanent condition and he was "not really sure" of the symptoms one can experience with "IBD," but he assumes they might have stomach problems. *Samberg* OH Ex. A; P52:23-55:12. Dr. Burkhart testified that Defendants did not stress any gastrointestinal problems, and if they had he would have warned his patients. *Id.* at P215:21-216:3. Plaintiff was a minor at the time he used Accutane, but his mother testified that had she received additional warnings regarding the risk of IBD, she would not have allowed her son to take it. *Samberg* OH Ex. E; P96:6-99:16, P101:4-12, P97:4-8.

Court's Analysis: Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Burkhart's prescribing decision. The Court relies upon Dr. Burkhart's testimony at PP110-114 wherein he confirmed that different label(s) "wouldn't have swayed me from sing the drug." When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

61. Christopher Albin Montooth [Ohio]

Defendants' Contentions: Defendants allege that Dr. Kevin Karikomi was aware of and considered the risk that Plaintiff could develop IBD when he prescribed Accutane to Plaintiff. *Bufano* OH Ex. 10; P48:23-49:3, P53:24-54:2, P57:20-58:13. Dr. Karikomi also testified that he would prescribe isotrentinoin to a patient today who is presented with the same symptoms that Plaintiff had when he was prescribed Accutane. *Id.* at P70:1-5, P114:11-14.

Plaintiff's Opposition: Dr. Karikomi testified that it was not his understanding that symptoms found in the 2000 Physician Desk Reference would continue on for the rest of Plaintiff's life. *Samberg* OH Ex. I; P104:7-107:2.

Court's Analysis: Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Karikomi's prescribing decision. The Court relies on Dr.

Karikomi's testimony that he was aware of the risk that Plaintiff could develop IBD at the time he prescribed Accutane to Plaintiff and that he would still prescribe Plaintiff Accutane today at PP48-49, 53-54, 57-58, 70, and 114. Plaintiff has not provided, by affidavits or otherwise, any proof that Dr. Karikomi would have changed his prescribing decision in the face of an allegedly stronger warning. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

62. Emily K. Warnick [Ohio]

Defendants' Contentions: Dr. Diane Bernardi testified that she would have prescribed Accutane to Plaintiff even if the label had stated that Accutane is "possibly or probably related to," "can induce," or "may cause" IBD. *Bufano* OH Ex. 12; P67:19-68:16, P69:5-12. Dr. Bernardi also testified that she would prescribe isotrentinoin today to someone presented with the same symptoms that Plaintiff had at the time she prescribed her Accutane if that patient had also tried other therapies to no avail. *Id.* at P131:18-132:11.

Plaintiff's Opposition: Dr. Diane Bernardi testified that if the warning label said Accutane is "probably related to IBD," she would be more cautious about prescribing the drug, but that she is not 100 percent sure of such a risk. *Samberg* OH Ex. J; P161:17-162:21. Plaintiff was a minor at the time she ingested Accutane, but her mother testified that if she had received additional warnings regarding the risk of IBD, she would have asked more questions. *Samberg* OH Ex. G; P81:6-83:11. Plaintiff's mother also testified that if she was told that Accutane may cause permanent IBD, but that physicians did not know for sure, she would not have allowed her daughter to take it. *Id.* at P79:17-25.

Court's Analysis: When Plaintiff's mother was asked whether she would have allowed her daughter to take Accutane given different warnings, she responded that she did not know and would need a clarification of the numbers and would ask more questions about the findings. *Id.* Therefore, Defendants' Motion for Summary Judgment must be granted even under Plaintiff's own standard where Plaintiff's decision maker did not testify that she would not have allowed her daughter to take Accutane in the face of an allegedly stronger warning.

Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Bernardi's prescribing decision. The Court relies on Dr. Bernardi's testimony at PP 67-69 and 72-73 wherein response to one horrible scenario after another, e.g., permanent inflamed bowel and removal of colon, plus, what he has learned following litigation, the witness said "yes"

repeatedly, he would still prescribe Accutane. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

63. Cora Williams [Ohio]

Defendants' Contentions: Dr. Gregory Ganzer testified that he would have prescribed Accutane to Plaintiff even if the label had stated that Accutane is "possibly or probably related to" or "can induce" IBD. *Bufano* OH Ex. 14; P30:15-31:15. Defendants allege that Dr. Ganzer was aware of and considered the risk that Plaintiff could develop IBD when he prescribed Accutane to Plaintiff. *Id.* at P29:24-30:13. Dr. Ganzer testified that he would prescribe isotrentinoin to a patient today if there were presented in the same manner as Plaintiff at the time she was prescribed Accutane if that patient had tried other medications to no avail. *Id.* at P48:18-49:3. Defendants argue that, regardless, any causal link is broken because Plaintiff's mother testified that if she had read the warnings in the patient brochure she would not have allowed her daughter to take Accutane. *Mantell* OH Ex. H; P34:4-10, P35:16-21, P35:4-9, P36:7-37:10, P41:8-42:20.

Plaintiff's Opposition: Dr. Ganzer thought that the language, Accutane "has been temporally associated with IBD which can be long term" implies that there are potentially forms of IBD that "can occur temporarily and then resolve." *Bufano* OH Ex. 14; P15:17-16:1. Dr. Ganzer testified that he understood the word "temporally" to mean "rarely." *Id.* at P29:16-23. If Dr. Ganzer knew Accutane could cause IBD, that is something that he would relate to patients as a part of the risk/benefit analysis. *Id.* at P51:6-15. Plaintiff was a minor at the time she took Accutane, but her mother testified that she would not have let her daughter take Accutane if she had been told that it may cause IBD or have other permanent effects. *Buchanan* OH Ex. Williams2; P36:17-37:10, P41:23-42:20, P65:21-25.

Court's Analysis: Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Ganzer's prescribing decision. The Court relies upon Dr. Ganzer's testimony at PP30-31 wherein she confirms that changing the import of the warning from probably related to "can induce" would not have changed her decision to prescribe Accutane. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

Oklahoma Law. Oklahoma recognizes the learned intermediary doctrine applicable in prescription drug cases. *McKee v. Moore*, 648 *P.2d* 21, 24 (Okla. 1982). "The doctrine operates as an

exception to the manufacturer's duty from liability if the manufacturer adequately warns the prescribing physicians of the dangers of the drug. The reasoning behind this rule is that the doctor acts as a learned intermediary between the patient and the prescription drug manufacturer by assessing the medical risks in light of the patient's needs." *Edwards v. Basel Pharms.*, 933 P.2d 298, 300 (Okla. 1997) (citations omitted). In a failure-to-warn case under Oklahoma law against a drug manufacturer, a plaintiff must show that the manufacturer failed to warn the physician of a potential risk of taking the drug, and, second, that this failure to warn was the proximate cause of injury. *Eck v. Parke, Davis & Co.*, 256 *F.3d* 1013, 1018 (10th Cir. 2001) (applying Oklahoma law). Oklahoma law is consistent with New Jersey law on the issues raised by counsels' pleadings.

64. Stephen Blake Jenkinson [Oklahoma]

Defendants' Contentions: Dr. Joel Holloway testified that he would have prescribed Accutane to Plaintiff even if the label had stated that Accutane is "possibly or probably related to," "may cause," "can cause," or "can induce" IBD. *Bufano* OK Ex. 2; P166:14-24, P165:23-166:6, P169:14-20, P167:7-12. When asked what he would do if the label said "may cause," Dr. Holloway testified that he would not prescribe Accutane at the normal eighty milligram dose "period," and he would only prescribe it at a ten milligram dose. *Id.* Dr. Holloway also testified that there was nothing presented to him at his deposition in 2000 that would have caused him to change his decision to prescribe Accutane to Plaintiff in 2000. *Id.* at P167:13-25, P198:24-199:4.

Plaintiff's Opposition: Dr. Holloway testified that he did not believe that "temporally associated" indicated a causal effect. *Eisbrouch* OK Ex. 2; P103:10-105:6, P109:11-110:13. Dr. Holloway testified that he would not prescribe Accutane at a normal dosage if the label had said that is "has been possibly" or "probably related" to IBD or that Accutane could induce IBD. *Id.* at P165:4-14. Dr. Holloway testified that he would not prescribe Accutane given the different warning because "the language is clear if it was stated that way, and I'm not aware of it ever being stated that way." *Id.* at P165:16-22. Plaintiff was a minor at the time he took Accutane, but his mother testified that she could not say how different information would have affected her decision

to let her son take Accutane, but she would have wanted to discuss the information more with his doctor. *Eisbrough* OK Ex. 3; P247:11-20, P244:23-P245:16. Plaintiff's mother testified that if she were warned that Accutane could cause permanent damage to her son's intestinal tract, she would not have allowed him to take it. *Id.* at P247:4-20. Plaintiff's mother testified that if she knew that Plaintiff could develop IBD years after taking Accutane, she would not have allowed him to take it. *Id.* at P255:11-15.

Defendants' Reply: Defendants assert that while Dr. Holloway testified that he would not have prescribed Accutane to Plaintiff at the normal dosage given a different warning, Dr. Holloway did not prescribe Accutane at the normal eighty milligram dosage anyway. *Jenkinson Opp. Brief* OK; P2; *Bufano* OK Ex. 2; P95:4-96:13.

Court's Analysis: Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Holloway's prescribing decision. The Court relies upon Dr. Holloway's testimony at PP165-169 wherein he confirms that a different warning would not have altered the protocol he used when prescribing Accutane. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

65. Benjamin Paul Lowry [Oklahoma]

Defendants' Contentions: Defendants allege that Dr. Mark Dawkins was aware of and considered the risk that Plaintiff could develop IBD when he prescribed Accutane to Plaintiff. *Bufano* OK Ex. 4, P46:8-47:10, P115:9-20. Dr. Dawkins testified that he would prescribe Accutane to Plaintiff if he were presented in the same manner today despite what he now knows about Accutane and its risks and side effects. *Id.* at P81:11-15.

Plaintiff's Opposition: Dr. Dawkins testified that he believed "temporally associated with" meant that IBD would occur while a person was taking Accutane and not that Accutane causes IBD. *Bufano* OK Ex. 4; P95:10-96:3. Plaintiff testified that had Dr. Dawkins told him that IBD was a permanent condition, he would have been "extremely reticent." *Buchanan* OK Ex. Lowry 1; P152:13-19. Plaintiff also testified that if he had known IBD was a lifelong disease that would cause him to have a high likelihood of needing a colectomy or resection of the colon, as well as it being a potential cause of colon cancer, he would not have taken Accutane. *Id.* at P154:6-16.

Court's Analysis: Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Dawkins' prescribing decision. Plaintiff has failed to offer proofs, pursuant to *R.* 4:46:-5(a), in the form of an affidavit or otherwise, showing that a different

warning would have changed Dr. Dawkins' prescribing decision. The Court also relies upon Dr. Dawkins' testimony that he would still prescribe Accutane to Plaintiff today and that he understood the risk of IBD at the time he prescribed Accutane to Plaintiff at PP45-47 wherein his testimony demonstrates he had studied the use of Accutane to treat acne and had done a risk-benefit analysis prior to prescribing it. See also testimony at PP81 and 115. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

South Carolina Law. In a failure-to-warn cased brought under South Carolina law against a drug manufacturer, a plaintiff must show that the manufacturer failed to warn the physician of a potential risk of taking the drug and, second, that this failure to warn the doctor was the proximate cause of his injury. *Sauls v. Wyeth Pharms., Inc.*, 846 *F.Supp.2d* 499, 502 (D.S.C. Mar. 7, 2012). South Carolina Courts follow the LID and so the manufacturer has a duty only to warn the physician of the risks of the medication. *Id.* "[T]he plaintiff must 'demonstrate that the additional non-disclosed risk was sufficiently high that it would have changed the treating physician's decision to prescribe the product for the plaintiff." *Id.* (citations omitted). A plaintiff who cannot show that a different warning would have changed his or her physician's prescribing decision cannot prove proximate cause. *Id.* at 502-04. The LID has been acknowledged by the South Carolina Courts. *Madison v. Am. Home Prods. Corp.*, 358 *S.C.* 449 (S.C. 2004). South Carolina law is consistent with New Jersey law on the issues raised by counsels' pleadings.

66. Allison Collins Munn [South Carolina]

Defendants' Contentions: Dr. Lee Jordan testified that he would have prescribed Accutane to Plaintiff even if the label had stated that Accutane "caused" IBD. *Bufano* SC Ex. 2; P128:17-22. Defendants allege that Dr. Jordan was aware of and considered the risk that Plaintiff could develop IBD when he prescribed Accutane to Plaintiff. *Id.* at P81:15-82:12, P83:22-84:20.

Plaintiff's Opposition: Dr. Jordan testified that if Defendants communicated that Accutane causes IBD, he would have communicated that to his patients. *D'Arcy* SC Ex. 1; P127:7-24. Plaintiff testified that if the patient information guide or packaging specifically mentioned ulcerative colitis, she would have asked Dr. Jordan questions and she would not have taken Accutane. *D'Arcy* SC Ex. 2; P234:20-236:17, P237:14-240:13, P240:8-13.

Court's Analysis: Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Jordan's prescribing decision. The Court relies upon Dr. Jordan's testimony at P128 wherein he states that a different warning would not alter his decision to prescribe Accutane. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

67. Mary Ruth Sisk [South Carolina]

Defendants' Contentions: Defendants allege that Dr. Hudson C. Rogers was aware of and considered the risk that Plaintiff could develop IBD when he prescribed Accutane to Plaintiff. *Bufano* SC Ex. 4; P17:3-21, P95:17-96:5. Specifically, Dr. Rogers testimony was that he was aware of all of the risks of Accutane when he prescribed it to Plaintiff, but not that he was specifically aware of IBD. *Id.*

Plaintiff's Opposition: Plaintiff testified that had she been informed that diarrhea and rectal bleeding might be a permanent condition or symptoms, it may have affected her decision to take Accutane. *Eisbrouch* SC Ex. 3; P95:24-96:3.

Court's Analysis: Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Rogers' prescribing decision. The Court relies upon Dr. Rogers' testimony that he understood the risks associated with Accutane at PP17, and 95-98 wherein he states that a different warning would not alter his decision to prescribe Accutane. Plaintiff has failed to offer proofs in the form of an affidavit or otherwise, showing that a different warning would have changed Dr. Rogers' prescribing decision. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

68. Eric J. Snellings [South Carolina]

Defendants' Contentions: Defendants allege that Dr. Marshall A. Guill was aware of and considered the risk that Plaintiff could develop IBD when he prescribed Accutane to Plaintiff. *Bufano* SC Ex. 6; P21:15-23, P74:14-20, P77:15-19. Additionally, Defendants argue that Plaintiff

did not present any evidence that Dr. Guill affirmatively stated or even implied that he would have changed his risk discussion with Plaintiff had a stronger warning been provided.

Plaintiff's Opposition: Dr. Guill testified that he did not know of the latency risk of IBD associated with Accutane use. *D'Arcy* SC Ex. 3; P99:16-100:2. Dr. Guill also testified that if Accutane "had been a cause" of IBD, he would have shared that information with Plaintiff and he is not certain that he would prescribe it. *Id.* at P92:21-93:4. Plaintiff testified that if he knew there was a chance for a long-term disease that could not be cured due to his taking Accutane, he would not have taken the medication. *D'Arcy* SC Ex. 4; P285:23-286:14.

Court's Analysis: Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Guill's prescribing decision. The Court relies upon Dr. Guill's testimony that he understood the risk that Plaintiff could develop IBD when he prescribed Plaintiff Accutane at PP21-23 wherein he discusses his "stepladder approach" to treating his patients. Dr. Guill's "stepladder approach" exemplifies the approach of many of the dermatologists in the Accutane proceedings. See also testimony at PP74 and 77. Plaintiff has failed to offer proofs, in the form of an affidavit or otherwise, showing that a different warning would have changed Dr. Guill's prescribing decision. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

Virginia Law. In a failure-to-warn case brought under Virginia law against a drug manufacturer, a plaintiff must show that the manufacturer failed to warn the physician of a potential risk of taking the drug and, second, that this failure to warn the doctor was the proximate cause of his injury. *Talley v. Danek Med.*, 7 *F.Supp.*2d 725, 730 (E.D. Va. 1998), *aff'd*, 179 *F.*3d 154 (4th Cir. 1999). Virginia Courts follow the LID and so a manufacturer of prescription medical products has a duty to warn only physicians, and not patients, of the risks associated with the use of the product. *Id.* (citations omitted). A plaintiff who cannot show that a different warning would have changed his or her physician's prescribing decision cannot prove proximate cause. *Id.* "[A] plaintiff must not only show that a manufacturer's

warning was inadequate, but that such inadequacy affected the prescribing physician's use of the product and thereby injured the plaintiff." *Id.* Virginia law is consistent with New Jersey law on the issues raised by counsels' pleadings.

69. Christopher Ryan Smith [Virginia]

Defendants' Contentions: Dr. Kenneth Greer testified that he would have prescribed Accutane to Plaintiff even if the label had stated Accutane is "associated with," "can induce," or "has been possibly or probably related to" IBD. *Bufano* VA Ex. 2; P47:15-48:9, P50:22-51:6, P80:19-81:1.

Plaintiff's Opposition: Dr. Greer testified that a different warning could have changed his risk-benefit analysis and whether he used the drug. *Bufano* VA Ex. 2; Ex.; P80-81. Plaintiff testified that if he had been advised that Accutane might cause IBD, a permanent disease, he would not have taken it. *Evola* VA Ex. B; P116:25-117:5.

Court's Analysis: Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Greer's prescribing decision. The Court relies upon Dr. Greer's testimony at PP47-51 wherein he confirms that if the warning was changed, he still would have prescribed Accutane. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

Wisconsin Law. Wisconsin is a difficult state to scrutinize. While this Court can envision a scenario in which Wisconsin may embrace New Jersey's approach to the LID and proximate cause, that is not the end of the discussion. I am loathe to predict just how the Wisconsin Supreme Court would weigh in on this issue. Existing case law is not helpful, thus, I am hesitate to "predict." That said, New Jersey's approach is rational and fair and must control. Accordingly, the claims of the Plaintiffs residing in Wisconsin must be addressed under New Jersey law.

70. Luke Gaeth [Wisconsin]

Defendants' Contentions: Defendants assert that Dr. Amani Maguid understood the risk of IBD when he prescribed Accutane to Plaintiff. *Bufano* WI Ex. 2; P71:13-72:19. What Dr. Maguid

specifically testified was that he discussed gastrointestinal side effects with his patients but he simply did not use the term IBD. *Bufano* WI Ex. Gaeth 2; P71:13-72:19.

Plaintiff's Opposition: Dr. Maguid testified that he believed "temporally associated" meant temporary. *Bufano* WI Ex. 2; P160:16-22, P80:18-25. Dr. Maguid testified that had he known a drug could possibly cause a permanent condition, he would not prescribe it. *Id.* at P157:25-158:3. Plaintiff was a minor at the time he took Accutane, but his mother testified that had she been told that IBD had been associated with Accutane, she would not have allowed her son to take it, even if the risk was less than one percent. *Buchanan* WI Ex. Gaeth 2; P203:11-15, P204:8-11. Defendants argue that, regardless, any causal link is broken because Plaintiff testified that he would not have taken Accutane had he known of the risk of certain symptoms which were listed in the patient brochure he should have received. *Mantell* WI Ex. A; P302:16-19.

Court's Analysis: Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Maguid's prescribing decision. The Court relies upon Dr. Maguid's testimony that he understood the risk of IBD when he prescribed Accutane to Plaintiff and that he warned patients of gastrointestinal side effects at PP71-72 wherein he explained his discussions with his patients. Plaintiff has failed to offer proofs, in the form of an affidavit or otherwise, showing that a different warning would have changed Dr. Maguid's prescribing decision. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

71. Valerie A. Hollnagel [Wisconsin]

Defendants' Contentions: Two prescribing physicians are named in Plaintiff's case, Dr. Behrds and Dr. Athena Daniolos. However, Defendants allege that there is no evidence that Dr. Daniolos ever prescribed Accutane to Plaintiff. Dr. Behrs testified that she would have prescribed Accutane to patients even if the label had stated that Accutane is "possibly or probably related to" IBD. *Bufano* WI Ex. 6; P33:23-34:5. Dr. Behrs also testified that she would consider Plaintiff a candidate for isotrentinoin if she were presented in the same manner today despite what she now knows about Accutane and its risks and side effects. *Id.* at P34:6-20.

Plaintiff's Opposition: Dr. Behr testified that she did not know that IBD was a potential side effect of Accutane. *Id.* at P20:11-15. Dr. Behr testified that "temporally" indicated to her only that the risk of IBD was during the course of treatment. *Id.* at P31:15-20. Plaintiff testified that if she had been told that Accutane could possibly cause diarrhea and rectal bleeding, she would

not have taken it. *Bufano* WI Ex. 4: P271:13-21. Plaintiff testified that she would not have taken Accutane even if the risk of IBD association was less than one in one thousand. *Id.* at P272:1-9, P272:20-24.

Court's Analysis: Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Behr's prescribing decision. The Court relies upon Dr. Behr's testimony at PP32-34 wherein she confirmed that a change in the wording of the warning would not have altered her decision to prescribe Accutane. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

72. Jeremy R. Noegel [Wisconsin]

Defendants' Contentions: Dr. David Lloyd Crosby testified that he would have prescribed Accutane to his patients in 2000 even if the label had stated that Accutane "can induce" IBD. *Bufano* WI Ex. 10; P30:18-31:5. Defendants argue that their Motion should also be granted because Plaintiffs have failed to provide affidavits where proofs are lacking. *R.* 4:46:-5(a).

Plaintiff's Opposition: Plaintiffs assert that Dr. Crosby's testimony indicates that he does not believe there is a real association with the use of Accutane and IBD because he believes the research is weak. *Id.* at P29:25-30:2. Plaintiff testified that, "after all this" he would not take Accutane if he knew that it may cause permanent diarrhea or rectal bleeding, he would not have taken it. *Buchanan* WI Ex. Noegel 1; P162:12-20.

Court's Analysis: Even under Plaintiff's standards Defendants' Motion must be granted. Plaintiff's testimony that "after all this" he would not take Accutane, cannot be relied upon for proximate cause. Plaintiff is not testifying as to what he would have done back when Accutane was prescribed to him and before he developed IBD, Plaintiff is testifying as to what he would do now given what he has been through. Additionally, Dr. Crosby's testimony does not reflect that he would have even changed his prescribing practices given a different warning because he does not believe there is a real association between Accutane and IBD.

Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Crosby's prescribing decision. The Court relies upon Dr. Crosby testimony at PP30-31 wherein he confirmed that a change in the wording of the warning would not have altered his decision to prescribe Accutane. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

73. Penny J. Vande Slunt [Wisconsin]

Defendants' Contentions: Dr. Tara Possow testified that she would have prescribed Accutane to Plaintiff even if the label had stated that Accutane is "associated with," "possibly or probably related to," "may cause," "can cause," or "can induce" IBD. *Bufano* WI Ex. 12; P96:12-97:25, P99:10-101:12. Dr. Possow testified that she would still prescribe Accutane to Plaintiff if Plaintiff were presented in the same manner today despite what she knows about Accutane and its risks and side effects. *Id.* at P101:21-102:6.

Plaintiff's Opposition: Plaintiff testified that if she had been warned that she could develop ulcerative colitis, but that the development of the disease may not occur until years after she had completed her treatment with Accutane, she probably would not have taken it. *Eisbrouch* WI Ex. 3; P188:15-21.

Court's Analysis: Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Possow's prescribing decision. The Court relies upon Dr. Possow's testimony at PP96-101 wherein she confirmed that a change in the wording of the warning would not have altered her decision to prescribe Accutane. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

74. Shelby M. Wolff [Wisconsin]

Defendants' Contentions: Dr. Jeffrey Berti testified that he would have prescribed Accutane to Plaintiff even if the label had stated that Accutane is "possibly or probably related" to IBD. *Bufano* WI Ex. 14; P54:6-19. Defendants allege that Dr. Berti was aware of the risk of IBD when he prescribed Accutane to Plaintiff. *Id.* at P47:9-48:9, P52:12-53:20. Dr. Berti also testified that he would prescribe Accutane to Plaintiff if she were presented in the same manner today despite what he now knows about Accutane and its risks and side effects. *Id.* at P54:20-55:2, P74:13-75:5.

Plaintiff's Opposition: Dr. Berti testified that he understood IBD to only be a permanent condition sometimes. *Id.* at P32:15-19. Plaintiff was a minor at the time she took Accutane, but her mother testified that she does not think she would have let her daughter take Accutane if she had been aware there was a risk of diarrhea, rectal bleeding, and other permanent side effects. *Buchanan* WI Ex. Wolff 2; P147:20-148:18, P150:14-151:11.

Court's Analysis: Plaintiff has failed to prove, under New Jersey law, that a different warning would have changed Dr. Berti's prescribing decision. The Court relies upon Dr. Berti's

testimony at P54 wherein he confirmed that a change in the wording of the warning would not have altered his decision to prescribe Accutane. When the LID is applied to the facts of this case, Defendants' Motion must be GRANTED.

VII. FINAL RULING

Consistent with the Court's rulings in the above claims, whose captions and docket numbers are attached hereto as "Schedule A", the Court has entered an Order GRANTING Summary Judgment of seventy-two (72) of these matters, and thus dismissing them with prejudice. The Motions for Summary Judgment as to *Karry Lynn Homan vs. Hoffman-LaRoche, et al.* Docket No.: ATL-L-7686-11, and *Matthew Porter vs. Hoffman-LaRoche, et al.* Docket No.: ATL-L-8825-11, are DENIED.

Appropriate Orders have been entered. Conformed copies accompany this Memorandum of Decision.

Dated: October 12, 2016

NELSON C. JOHNSON, J.S.C.

SCHEDULE A

	Plaintiff's Name	Docket Number	State
1	Bostic, Rachel	ATL-L-2771-10	Alabama
2	Carter, Landon T.	ATL-L-3446-05	Alabama
3	Fortenberry, Aaron J.	ATL-L-561-07	Alabama
4	Huckabee, Melissa C.	ATL-L-3416-07	Alabama
5	Lemay, Melissa D.	ATL-L-4697-05	Alabama
6	Martin, Amy Danielle	ATL-L-1720-09	Alabama
7	Dinbokowitz, Sr., Troy T.	ATL-L-3779-10	Arizona
8	Gupta, Anjali	ATL-L-4241-10	Arizona
9	Lopez, Adriana Elizabeth	ATL-L-3319-11	Arizona
10	Rice, Kathryn J.	ATL-L-2380-07	Arizona
11	Crespin, Chandler J.	ATL-L-4014-11	Colorado
12	Homan, Karry Lynn **MOTION DENIED**	ATL-L-7686-11	Colorado
13	Mayhew, Ben M.	ATL-L-2022-06	Colorado
14	Morphew, Holly Ann	ATL-L-2023-06	Colorado
15	Sackett, Lindsey	ATL-L-3284-04	Colorado
16	Stransky, Josh P.	ATL-L-571-11	Colorado
17	Williams, John Charles	ATL-L-3952-10	Colorado
18	Cohen, Margaret Beall	ATL-L-1548-08	Georgia
19	Hughes, Meredith L.	ATL-L-3802-10	Georgia
20	Jackson, Meghan M.	ATL-L-7602-05	Georgia
21	Parker, Travis M.	ATL-L-13688-06	Georgia
22	Williams, Kristie G.	ATL-L-2024-06	Georgia
23	Wilson, Sherry	ATL-L-6111-11	Georgia
24	Foster, Derrick N.	ATL-L-7709-11	Illinois
25	Koher, Ryan G.	ATL-L-1774-10	Illinois
26	Meersman, Thomas Robert	ATL-L-281-09	Illinois
27	Porter, Matthew **MOTION DENIED**	ATL-L-8825-11	Indiana
28	Brunson, Jr., Calvin P.	ATL-L-6012-11	Mississippi
29	Coombes, Ryan Hunter	ATL-L-3768-10	Mississippi
30	Johnson, John Patrick	ATL-L-4473-09	Mississippi
31	Boothe, Aaron K.	ATL-L-2340-11	Missouri
32	Dralle, Christopher Martin	ATL-L-5470-10	Missouri
33	Lindsey, Jason Patrick	ATL-L-560-07	Missouri
34	Rose, Erica Lynn	ATL-L-1732-10	Missouri
35	White, Kacy Jo	ATL-L-3846-10	Missouri
36	Whittlesey, Brent R.	ATL-L-3515-05	Missouri
37	Hagert, Matthew	ATL-L-13677-06	Nebraska
38	McClelland, Kaine Kenneth	ATL-L-3081-09	Nebraska

39	Kurzenberger, William John	ATL-L-6079-11	Nebraska
40	Nocita, Michael Angelo	ATL-L-976-11	Nebraska
41	Scoggins, Jr., Dennis G.	ATL-L-3874-10	Nebraska
42	Swanson, Deric H.	ATL-L-6323-11	Nebraska
43	Alexandrowicz, Jr., Gregory S.	ATL-L-2643-11	New York
44	Beshara, David J.	ATL-L-4197-06	New York
45	Brady, Christopher T.	ATL-L-4131-10	New York
46	DeIaco, Kelli	ATL-L-593-08	New York
47	Forgione, Jr., Matthew	ATL-L-3012-11	New York
48	Kim, Jaiwook	ATL-L-8212-05	New York
49	Rosenstein, Jeremy Blake	ATL-L-5155-09	New York
50	White, Ian S.	ATL-L-3945-10	New York
51	Breden, Nicholas John	ATL-L-945-09	North Dakota
52	Clausnitzer, Nicholas A.	ATL-L-1459-09	North Dakota
53	Schmidt, Heather	ATL-L-3061-09	North Dakota
54	Shiek, Melinda Anne	ATL-L-6470-11	North Dakota
55	Swenseth, Justin John	ATL-L-10632-11	North Dakota
56	Volk, Byron Christian	ATL-L-2909-09	North Dakota
57	Baird, Matthew A.	ATL-L-2043-05	Ohio
58	Churilla, Jeffery	ATL-L-2949-07	Ohio
59	Greunke, Dawn Elizabeth	ATL-L-3760-08	Ohio
60	Irons, Christopher N.	ATL-L-3808-10	Ohio
61	Montooth, Christopher Albin	ATL-L-3796-10	Ohio
62	Warnick, Emily K.	ATL-L-3818-10	Ohio
63	Williams, Cora	ATL-L-13681-06	Ohio
64	Jenkinson, Stephen Blake	ATL-L-7706-11	Oklahoma
65	Lowry, Benjamin Paul	ATL-L-2774-09	Oklahoma
66	Munn, Allison Collins	ATL-L-3586-11	South Carolina
67	Sisk, Mary Ruth	ATL-L-7977-11	South Carolina
68	Snellings, Eric J.	ATL-L-7764-10	South Carolina
69	Smith, Christopher Ryan	ATL-L-8823-11	Virginia
70	Gaeth, Luke	ATL-L-4703-05	Wisconsin
71	Hollnagel, Valerie A.	ATL-L-8188-05	Wisconsin
72	Noegel, Jeremy R.	ATL-L-8263-05	Wisconsin
73	Vande Slunt, Penny J.	ATL-L-8173-11	Wisconsin
74	Wolff, Shelby M.	ATL-L-8348-05	Wisconsin