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be saved by a truthful amendment. In order to determine whether it is possible that the complaint can be saved, the court must consider the inadequacies identified by the Defendants.

II. Preemption

As noted above, Grills's complaint challenges Defendants' marketing and advertising of their cigarettes. If Grills' complaint alleged only that Defendants' marketing and advertising of their cigarettes contained inadequate warnings of smoking's negative health effects, the complaint would be preempted by the federal regulatory regime for cigarette advertising. Grills's complaint, however, attempts to allege that Defendants' activities involved actual fraud. To the extent that Grills can successfully plead such a cause of action, it would not be preempted.

A. Cipollone Federal Preemption

Under the Constitution's Supremacy Clause, U.S. Const. art. VI, cl. 2,[16] "state law that conflicts with federal law is 'without effect,'" Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992), i.e., it is preempted. At the same time, federal law does not displace all state regulation. Rather, the "historic police powers of the States [are] not to be superseded by . . . Federal

[16]"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

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Act unless that [is] the clear and manifest purpose of Congress." Id. (citation omitted). In deferring to state police power, a court will construe federal laws narrowly to avoid unintended preemption. Id. at 518.

Specifically with regard to the federal regulation of smoking, under the rule of Cipollone and its progeny, the federal regulation of cigarette labeling and advertising does preempt some state claims. That federal regulatory regime began following a 1964 conclusion of the Surgeon General's Advisory Committee that "[c]igarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action," U.S. Department of Health, Education, and Welfare, U.S. Surgeon General's Advisory Committee, Smoking and Health 33 (1964), and regulations issued by the Federal Trade Commission regarding unfair or deceptive advertising by cigarette companies, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8324-74 (July 2, 1964). Congress, in 1965, passed the Federal Cigarette Labeling and Advertising Act ("FCLAA").[17] When the FCLAA terminated by its

[17] The 1965 Act, among other things, "mandated warnings on cigarette packages (§ 5(a)), but barred the requirement of such warnings in cigarette advertising (§ 5(b))." Cipollone, 505 U.S. at 514 (citing Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965)). "However, § 5(c) of the Act expressly preserved 'the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes.'" Id. at n.9 (quoting 79 Stat. 283).

own terms, Congress further enacted the Public Health Cigarette Smoking Act of 1969 ("PHCSA"), which amended the 1965 Act to ban cigarette advertising in "any medium of electronic communication subject to [FCC] jurisdiction," Cipollone, 505 U.S. at 515, and, in addition, replaced section 5(b) with the following preemption provision:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this [Act].

15 U.S.C. § 1334(b). The new section 5(b) was enacted "to avoid the chaos created by the multiplicity of conflicting regulations." S. Rep. No. 91-566 (1969), reprinted in 1970 U.S.C.C.A.N. 2652, 2663.

In addition, Congress provided:

> [i]t is ... the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby --
>
> > (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and
> >
> > (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331.

Considering the scope of the PHCSA, in Cipollone, a plurality of the Supreme Court held that the PHCSA preempts those state law damages actions relating to smoking and health that challenge the adequacy of the warning on cigarette packages, such as claims that the manufacturers "post-1969 advertising or promotions should have included additional, or more clearly stated, warnings," and accordingly preempted the plaintiff's failure to warn claims. Cipollone, 505 U.S. at 524.

In Cipollone, the Supreme Court considered whether the PHCSA's ban on regulating advertising preempted state common law actions for breach of express warranty, failure to warn, fraudulent misrepresentation and conspiracy against defendant cigarette manufacturers. Id. at 509.

Justice Stevens's plurality[18] opinion analyzed the PHSCA under the rubric of express preemption, because, although Congressional

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[18] Justice Stevens's conclusion, that the FCLAA did not preempt common law causes of action for damages, obtained a clear majority; it was joined by Justices Rehnquist, White, Blackmun, O'Connor, Kennedy and Souter. At the same time, Justice Stevens's conclusion that only failure to warn claims were preempted by the PHCSA, and that other common law damages actions survived 1969, was joined by Justices Rehnquist, White and O'Connor, and, in the failure to warn preemption holding only, by Justices Scalia and Thomas, the latter which would have held all state common law damage actions preempted. Thus, Justice Stevens's analysis, differentiating between failure to warn claims and other state law claims, garnered only four votes - accordingly, Cipollone is referred to as a plurality opinion. However, much of Justice Stevens's analysis obtained majority support in his recent majority opinion in Altria Group, Inc. v. Good, __ U.S. ___, ___, 129 S. Ct. 538, 546-47, 549 (2008).

intent could also be "implicitly contained in [the Act's] structure and purpose," section 5 set forth an express preemption provision. Id. at 516, 517. In light of section 5, Justice Stevens, for the plurality, asked whether "the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health . . . imposed under state law with respect to . . . advertising or promotion,' giving that clause a fair but narrow reading." Id. at 524. The court decided that failure to warn claims did constitute such a requirement or prohibition and were therefore preempted. Id.

However, the plurality permitted the plaintiff's other causes of action, including the fraudulent misrepresentation and fraudulent concealment claims, noting that fraud claims were based not on "a duty based on smoking and health" but on "the duty not to deceive." Id. at 528-29; see also Altria Group, 129 S. Ct. at 545-47. This approach recognized that Congress narrowly phrased section 5(b) so as not to preempt state police power. See id. at 529; S. Rep. No. 91-566 (1969), reprinted in 1970 U.S.C.C.A.N. 2652, 2663. The plurality also reasoned that Congress did not intend to "insulate cigarette manufacturers from long-standing rules governing fraud." Cipollone, 505 U.S. at 529. Whereas state failure to warn claims would result in inconsistent cigarette labeling regulations, fraud claims do not create "diverse, non-uniform, and confusing" standards that would conflict with

Congress's goal of uniformity of requirements for cigarette labeling and/or advertising. Id.

This Circuit, following Cipollone, subsequently has concluded that "a manufacturer's duty to warn is in essence a duty to warn through advertising and promotion" and therefore is preempted. Spain v. Brown & Williamson Tobacco Corp., 363 F.3d 1183, 1197 (11th Cir. 2004) (upholding the Alabama Supreme Court's recognition that a "such a claim in essence alleges that the defendants breached their state duty to warn through advertising and promotion, and therefore are preempted by the federal Labeling Act"). However, the Circuit has not further delineated the scope of the PHCSA's preemption pre- or post-Cipollone, although, along with a majority of circuit courts,[19] the Circuit has consistently upheld Cipollone's preemption analysis. Spain, 363 F.3d at 1192 (stating that the Eleventh Circuit joins other courts who have "treated the plurality opinion in Cipollone as if it were a

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[19] See, e.g., Brown v. Brown & Williamson Tobacco Corp., 479 F.3d 383, 393 (5th Cir. 2007); Good v. Altria Group, Inc., 501 F.3d 29, 36 (1st Cir. 2007); Rivera v. Philip Morris, 395 F.3d 1142, 1147-50 (9th Cir. 2005); Jeter v. Brown & Williamson Tobacco Corp., 113 F. App'x 465, 467 (3d Cir. 2004); Glassner v. R.J. Reynolds Tobacco Co., 223 F.3d 343, 348-49 (6th Cir. 2000); Aldana v. R.J. Reynolds Tobacco Co., No. 2:06-3366-CWH, 2007 U.S. Dist. LEXIS 76050, at *9-11 (D.S.C. Oct. 12, 2007); Espinosa v. Philip Morris USA, Inc., 500 F. Supp. 2d 979, 983-84 (N.D. Ill. 2007); Clinton v. Brown & Williamson Holdings, Inc., 498 F. Supp. 2d 639, 650-52 (S.D.N.Y. 2007); Griesenbeck v. Am. Tobacco Co., 897 F. Supp. 815, 823 (D.N.J. 1995); Burton v. R.J. Reynolds Tobacco Co., 884 F. Supp. 1515, 1519-21 (D. Kan. 1995), aff'd in part and rev'd in part on other grounds, 397 F.3d 906 (2005).

majority opinion"); see also Peel v. R.J. Reynolds Tobacco Co., No. 1:98-CV-2426-TWT, 1999 U.S. Dist. LEXIS 22691, at *11 (N.D. Ga. Apr. 29, 1999) (noting that "the Court is bound to follow the plurality opinion of the Supreme Court in Cipollone").

Although not a case under the PHCSA or FCLAA, the Circuit followed its Spain adoption of the Cipollone plurality preemption analysis in Papas v. Upjohn Co., 985 F.2d 516, 517-19 (11th Cir. 1993) (per curiam) (holding that the Federal Statute FIFRA (Federal Insecticide, Fungicide, and Rodenticide Act) expressly preempts common law claims). Thus, in light of both Papas and Spain, the Circuit's preemption analysis, consistent with Cipollone, defers to Congressional aims and applies a presumption against preemption.[20]

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[20] As a result, district courts within the Circuit have followed suit, and construed the "relating to smoking and health" language of section 5(b) narrowly by looking to each of a plaintiff's common law claims to determine whether it is preempted, generally by preempting failure to warn and warning neutralization claims (which result in deviations from the PHCSA) but not fraud claims, as they retain state police powers to identify and punish deceptive advertising practices. See, e.g., Sonnenreich v. Philip Morris Inc., 929 F. Supp. 416, 419 (S.D. Fla. 1996) (holding that "any attempt by Defendants to notify its customers of the dangers of smoking would employ the same techniques as a traditional advertising or promotional campaign, which is preempted post 1969"); Shepard v. Philip Morris Inc., No. 96-1720-CIV-T-26B, 1998 U.S. Dist. LEXIS 23410, at *2-10 (M.D. Fla. Apr. 28, 1998) (distinguishing between a claim based on failure to warn and a claim based on fraudulent concealment, which requires an intent to defraud or deceive); Wolpin v. Philip Morris, Inc., 974 F. Supp. 1465, 1469 (S.D. Fla. 1997) (construing the PHCSA narrowly in holding that the PHCSA "cannot be construed to preempt state regulation of second-hand smoke when the Act was never intended to address the problem of second-hand smoke").

Furthermore, the Cipollone preemption analysis of the PHSCA has now been specifically ratified by the Supreme Court's 2008 decision in Altria Group, 129 S. Ct. at 549. The court accordingly looks to Cipollone and its progeny, as followed by the Circuit in Spain and Papas, to analyze the instant motion before it.

B. Grills's Nondisclosure/Fraudulent Concealment Claims

Following the Cipollone and Altria Group preemption analysis, the court must determine whether Grills's claims are based on a breach of a duty to adequately warn of the dangers associated with Defendants' products after 1969. See Spain, 363 F.3d at 1196-97; Papas, 985 F.2d at 517-19. Again, in so doing, the court bears in mind Grills's *pro se* status and reads his complaint broadly. See McQueen v. Tabah, 839 F.2d 1525, 1529 (11th Cir. 1988).

Here, as in Cipollone, Grills partly alleges that manufacturers did not "provide adequate warnings of the health consequences of cigarette smoking." 505 U.S. at 524 (citation and internal quotation marks omitted). For example, Grills insists that the Defendants had "superior access to information about the health effects of cigarettes, nicotine and addiction," Pl.'s Second Am. Compl. ¶ 54, and yet "members of the public did not fully appreciate the health effects and addictive nature of cigarettes" and

> the average consumer has not been fully aware of the addictive properties of nicotine, and most beginning smokers - particularly children and young adults - either were unaware of the addictiveness of nicotine or falsely

> believe that they will be able to quit after smoking for a few years and thereby avoid the diseases caused by smoking.

Id. ¶¶ 28, 30. Grills also appears to challenge some of Defendants' marketing and advertising techniques, including Defendants' attempts to "attract[] new smokers and children." Id. ¶ 48. See Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 546-52 (2001) (holding that the PHSCA preempts state limits on advertising to minors). In part, therefore, Grills appears to fault manufacturers for generally failing to disclose the health risks of smoking and the addictive properties of nicotine to consumers. This claim does not sound in fraud, and, instead, is more properly categorized as a failure to warn or warning neutralization claim. In line with Cipollone and Altria Group, to the extent that Grills is seeking additional, or more clearly stated warnings, this claim is preempted.

Nevertheless, much, if not most, of Grills's fraudulent concealment claim survives preemption. His claim is similar to the Cipollone plaintiff's fraud claim, the latter of which alleged "false representation of a material fact [and] conceal[ment of] a material fact." 505 U.S. at 528. Grills alleges that Philip Morris USA and R.J. Reynolds "intentionally or recklessly failed to disclose or deliberately concealed [] material facts from the public . . . , government agencies, smokers and under age youths," or "made [] statements recklessly with conscious disregard for the

truth or falsity of their representations to the public." Pl.'s Second Am. Compl. ¶¶ 53-54. More specifically, Grills alleges that the Defendants marketed their products to children, knew that cigarettes were hazardous to its consumers' health, knew that nicotine is highly addictive and manipulated the nicotine levels in their products to enhance addiction. Grills further alleges that Defendants lied about or fraudulently concealed the above information from the public, legislative and administrative regulatory bodies and judicial proceedings. In this sense, the majority of Grills's complaint resembles Cipollone and Altria Group, in that it involves a claim "based on allegedly false statements of material fact made in advertisements" and other communications, Cipollone, 505 U.S. at 528, and based on false or "misleading" statements which "induced [Grills] to purchase [Defendants'] product." Altria Group, 129 S. Ct. at 546. Thus, Grills's claim relies "not on a duty 'based on smoking and health' but rather on a more general obligation--the duty not to deceive." Cipollone, 505 U.S. at 528-29; see Altria Group, 129 S. Ct. at 545-46; see also Shepard, 1998 U.S. Dist. LEXIS 23410, at *6-10 (holding that "[u]nlike a claim for failure to warn, fraudulent concealment requires a showing of intent to defraud or deceive. . . . [Where the Plaintiff alleged that the] Defendant intentionally concealed known information about the dangerous and addictive qualities of their product in order to induce the sale of their