Celebration Co., 883 So. 2d 826, 832 (Fla. Dist. Ct. App. 2004)).

The issue before the court, therefore, is whether any or all of Grills's four allegations are stated with sufficiency when tested by Rule 9(b)'s requirements. The court will address each allegation in turn.

**A. Fraud with Respect to Marketing to Children**

Grills alleges that Defendants engaged in "deceptive marketing" techniques targeting toward children in order to obtain "replacement" consumers for those either quitting smoking or dying of smoking-related diseases. Grills further maintains that Defendants affirmatively misrepresented or purposefully concealed from the public this marketing strategy. In support of these allegations, in addition to vague references to unspecified research and unidentified "secret" or "internal" documents, Grills provides the following specific facts to the court:

- In 1969, the Chairman of the Tobacco Institute ("TI")[26] testified before a Senate subcommittee: "It is the intention of the cigarette manufacturers to avoid advertising directed to young person[s]...to avoid advertising which represents that cigarette smoking is essential to social prominence, success, or sexual attraction; and to refrain from depicting smokers engaged in sports or other activities requiring stamina or a conditioning beyond those required in normal recreation." Pl.'s Second Am. Compl. ¶ 49;

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[26] According to Grills' complaint, Defendants, in 1958, created TI -- a public relations organization "whose function was to make certain that defendants' false and misleading positions on issues . . . were kept constantly before the public, doctors, the press, and the government" -- which acted as Defendants' agent because Defendants effectively "controlled" TI. Pl.'s Second Am. Compl. ¶ 27.

- In 1983, TI published the pamphlet "Voluntary Initiatives of a Responsible Industry"; Grills alleges that "the pamphlet noted that in 1964, the industry knowledge that sales to children were illegal, that children would not appreciate the dangers of the product or its addictiveness, that most of the children who began to smoke would become addicted, and that a significant percentage would develop smoking-related diseases or suffer premature death as a result. [sic] They denied doing so with full knowledge that such denials were false and misleading." Id. ¶ 50 (quotation mark omitted);

- R.J. Reynolds developed the Joe Camel cartoon advertising campaign, which the company, in 1988, targeted to children through mass dissemination of products in matchbooks, signs, clothing, mugs and drink can holders. Id. ¶ 45;

- A series of 1984 R.J. Reynolds advertisements claimed that "We don't advertise to children." Id. ¶ 46;

- In 1991, in order "[t]o avoid full disclosure" about Joe Camel ads during a Federal Trade Commission investigation, R.J. Reynolds "instructed its advertising agency to destroy documents in the agency's possession" relating to the Joe Camel campaign. Id. ¶ 47.

Grills's complaint further contains allegations that the "Cigarette Companies"[27] have and continue to glamorize smoking in their advertisements as a rite of passage or status symbol; advertise in stores near high schools; promote brands heavily during spring and summer breaks; hand out gratis cigarettes where young people congregate; pay movie producers for product placement in films with large youth audiences; place advertisement in magazines read by young people; and sponsor sporting and other events appealing to youths. Id. ¶ 44.

These factual allegations fail to meet Rule 9(b)'s

[27] Grills does not identify which companies comprise the "Cigarette Companies" in his complaint.

requirements in at least three respects. First, Grills may only recover for his injuries pursuant to his smoking habit insofar as Defendants' actions in marketing to children fraudulently misled or induced him to smoke.[28] Therefore, Grills must present to the court "the content of [the fraudulent] statements [or omissions] and the manner in which they misled" him. Ziemba, 256 F.3d at 1202. But Grills began smoking in 1977, as an 18-year-old; accordingly, the Defendants' post-1977 actions lack the requisite causation to be relevant in Grills's case, absent further explanation as to their particular relevance with regards to Grills himself.

Second, the Defendants' actions, in 1977 and before, must be described with particularity; Grills's complaint must explain to

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[28] Grills's complaint alleges:

> By means of the wrongful course of conduct targeted broadly at a broad portion of the public... defendants intended to induce and did induce plaintiff, while he was under age to purchase defendants' harmful and addictive products.
>
> Plaintiff . . . began smoking the defendant's Marlboro, Marlboro Light[s] and Doral Cigarette products beginning from the year of 1977 when he entered the United States Army and was subject to the defendants' illegal and fraudulent marketing techniques, until the present, where his addiction to those products continues.
>
> Plaintiff currently smokes and has an addiction to Marlboro Light[s] cigarettes which ha[ve] also been marketed illegally to the general public by the defendants.

Pl.'s Second Am. Compl. ¶¶ 57-59.

the court "precisely what statements were made in what documents or oral representations or what omissions were made" and "the time and place of each such statement and person responsible for making (or, in the case of omissions, not making) same." Ziemba, 256 F.3d at 1202. The only pre-1977 action of Defendants explained with particularity is the 1969 testimony of the TI Chairman. Grills does not, however, explain how this statement "misled" him in any way nor does he describe to the court what effect at all, if any, this omission had upon him in his decision to begin smoking Defendants' products.

Third, Grills' general statements regarding actions by the "Cigarette Companies" are not accompanied with any specifics identifying which companies have used which practices and when the practices were utilized.

**B. Fraud with Respect to Cigarettes' Health Hazards**

Grills's allegations concerning Defendants' fraudulent misrepresentation and concealment of the health effects of cigarettes also run afoul of Rule 9. The complaint charges Defendants with the knowing misrepresentation or concealment of the health hazards of cigarette smoking. Grills identifies public statements that these organizations were researching the health risks of cigarettes, but does not elaborate thereon.[29] The

[29] The Tobacco Industry Research Committee ("TIRC") was formed by cigarette companies, which Grills alleges include Defendants. Pl.'s Second Am. Compl. ¶ 25. According to Grills's

complaint also contains only general statements that Defendants were aware of the negative health effects of cigarettes. See Pl.'s Second Am. Compl. ¶¶ 18 ("In the 1940's and early 1950's, scientific researchers published findings that indicated a relationship between cigarette smoking and diseases, including lung cancer."), 19 ("Senior Cigarette Company executives and researchers closely monitored such research and knew that if the public came to understand that cigarette smoking causes cancer and other diseases, the Cigarette Companies' profits would decline and the industry would face the prospect of civil liability and government regulation.").

Grills's complaint asserts the existence of a conspiracy or "enterprise" to effect a "concerted public relations campaign intended to preserve [Defendants'] products" birthed in a December

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complaint, in January 4, 1953, TIRC ran an advertisement in newspapers titled "A Frank Statement to Cigarette Smokers" which stated:

> We are pledging aid and assistance to the research effort into all phases of tobacco use and health. . . .
>
> In charge of the research activities of the Committee will be a scientist of unimpeachable integrity and national repute. In addition there will be an Advisory Board of scientists disinterested in the cigarette industry. A group of distinguished men from medicine, science, and education will be invited to serve on this Board. These scientists will advise the Committee on its research activities.

Id. No more information about this "Board" or the TIRC, or what these entities did or what happened with this research is mentioned in the complaint.

15, 1953 meeting in New York City at the Plaza Hotel,[30] id. ¶ 20, but does not inform the court of explicit acts of Defendants performed in furtherance of the conspiracy.

In fact, the complaint provides no specific instances of misrepresentation by Defendants regarding health risks, as Grills

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[30] The complaint states that, at the behest of the president of American Tobacco Co., Philip Morris USA, R.J. Reynolds and other tobacco companies met on December 15, 1953 in order to formulate "an industry response" to published research linking cigarettes and disease. The complaint alleges:

> At that meeting, these chief executives agreed that the published studies were "extremely serious" and "worthy of drastic action". . . . [T]he chief executives determined to respond to this serious public health issue with a concerted public relations campaign intended to preserve their profits . . . .
>
> The chief executives . . . agreed that the strategy they were implementing was a "long-term one" that required defendants to act in concert with each other on the current health controversy, as well as on issues that would face them in the future. This Enterprise and conspiracy still continues today.
>
> The fundamental goal of the Enterprise and conspiracy was to preserve and expand the market for cigarettes and to maximize the Cigarette Companies' profits. To achieve this goal, defendants' strategy was to respond to scientific evidence of the adverse health consequences of cigarette smoking - including issues regarding nicotine addiction - with fraud and deception. Rather than provide full disclosure to the public and in congressional, federal agency, and judicial proceedings about what they knew or learned about the dangers of cigarette smoking, defendants and their agents determined, in furtherance of this Enterprise and conspiracy, to deny that smoking caused disease or that nicotine was addictive, despite having actual knowledge to the contrary.

Pl.'s Second Am. Compl. ¶¶ 19-22.

maintains that he cannot obtain such information because it is the "exclusive knowledge of defendants."[31] While "pleading requirements of Rule 9(b) may be relaxed when the facts relating to fraud are 'peculiarly within the perpetrator's knowledge,'" Barys ex rel. United States v. Vitas Healthcare Corp., 298 F. App'x 893, 897 (11th Cir. 2008) (per curiam) (quoting United States ex rel. Doe v. Dow Chem. Co., 343 F.3d 325, 330 (5th Cir. 2003)), "conclusory statements are insufficient to justify relaxation." Id. (citing United States ex rel. Clausen v. Lab. Corp. of Am., 290 F.3d 1301, 1314 n.25 (11th Cir. 2002). As explained in Clausen, Grills "is not without avenues for obtaining information" such as the public documents he references, e.g., advertisements, press-releases, statements to government entities in public hearings and so forth. Clausen, 290 F.3d at 1314 n.25.

Furthermore, Grills's statement that these public documents are in the "exclusive knowledge of the defendants" does not address a required element of his fraud claim, namely, that he relied on and was misled by the alleged public statements or omissions to his

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[31] "Defendants and their co-conspirators committed hundreds, and perhaps thousands, of act[s] involving material fraudulent misrepresentations, fraudulent concealment, and fraudulent non-disclosures over the course of the last forty-five year[s]. Defendants' and their co-conspirators' acts of concealment took a number of forms, many of which are unknown to Plaintiff because such actions and concealment are within the exclusive knowledge of defendants. Plaintiff [is] unable to allege in full the numerous advertisements, press releases, and other communications that defendants and their co-conspirators released over the past forty-five years because plaintiff did not have access to this information." Pl.'s Second Am. Compl. ¶ 55.

detriment. Rather, Grills's complaint fails to explain how Defendants misled him in particular. He provides no information to the court as to his own knowledge about the health effects of smoking and does not describe his reliance on the alleged misrepresentations and concealments of Defendants.

**C. Fraud with Respect to Addictiveness of Nicotine**

Grills builds a stronger case for his allegations that Defendants fraudulently misrepresented or concealed the addictiveness of nicotine. His complaint provides the court with information as to Defendants' knowledge of the addictiveness of nicotine[32] and cites particular fraudulent misrepresentations and concealments:

- "A 1977 Philip Morris study on the withdrawal effects of nicotine was permitted to proceed only if results were what the Cigarette Companies wanted. If not, as a Philip Morris researcher explained, 'we will want to bury it.'" Pl.'s Second Am. Compl. ¶ 32.

- A March 1980 internal memorandum, produced by "a Philip Morris scientist" which discussed "company research into the psychopharmacology of nicotine"; the research was "aimed at understanding that specific action of nicotine which causes the smoker to repeatedly introduce nicotine into his body." The memorandum noted that this was a "highly vexatious topic" that "company lawyers did not want to become public because nicotine's drug properties, if known, would support regulation of tobacco by the federal Food and Drug Administration." The memorandum thus observed that "[o]ur attorneys ... will likely continue to insist on a clandestine effort in order to keep nicotine the drug in low profile." Id.

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[32] See infra note 21. Grills further offers a general statement that Defendants "understood nicotine's addictive properties since the early 1960s at the latest." Pl.'s Second Am. Compl. ¶ 31.

- "In the early 1980's, Philip Morris hired Victor DeNoble and Paul Mete to study the effects of nicotine on the behavior of rats and to research and test potential nicotine analogues. DeNoble and Mele's research demonstrated that nicotine was addictive and that in terms of addictiveness, 'nicotine looked like heroin.' In August 1983, Philip Morris ordered DeNoble to withdraw a research paper on nicotine that had already been accepted for publication . . . . Less than a year later, Philip Morris abruptly closed DeNoble's nicotine research lab. Philip Morris executives threatened DeNoble and Mele with legal action if they published or talked about their nicotine research. The animals were killed, the equipment was removed, and all traces of the former lab were eliminated." Id.

- TI attacked the Surgeon General's 1988 report (concluding, based on non-industry research, that nicotine was addictive) saying that "claims that cigarettes are addictive contradict common sense. . . . The claim that cigarette smoking causes physical dependence is simply an unproven attempt to find some way to differentiate smoking from other behaviors." Id. ¶ 33.

- "On or about January 12, 1999, Philip Morris entered into an agreement with Liggett to purchase certain brands of cigarettes previously manufactured by Liggett . . . each of which, at the time of their sale to Philip Morris, contained the warning concerning the addictiveness of smoking. After it purchased these brands, Philip Morris altered the packaging . . . to eliminate the warning concerning addictiveness." Id. ¶ 34.

These misrepresentations are significant because, Grills argues, nicotine renders the smoker unable to quit once addicted to cigarettes. Grills provides statistical information to this effect. See id. ¶¶ 15, 16, 17, 35.

Grills's complaint further asserts that he became addicted and is still addicted to nicotine found in Defendants' cigarettes. See id. ¶¶ 58-59. The fact of Grills's addiction, however, does not completely fulfill his Rule 9(b) obligation to inform the court,

with particularity, how Defendants misled him.

Grills alleges that

> 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. ¶ 30. However, Grills provides no information or facts regarding his own state of mind or his own knowledge of the addictiveness of nicotine. Furthermore, he does not describe how Defendants' misrepresentations and concealment of research on nicotine affected his smoking. Grills's cited events -- in or before 1977, when he began smoking -- include only a commencement of research into nicotine's addictiveness with an intent to cover up the results; thus, as Grills has presented the facts to the court, the actual fraudulent misrepresentation or concealment of this research took place after Grills began smoking. As to post-1977 events, Grills has not explained to the court how these events misled him or caused his damages, especially in light of his contention that nicotine in cigarettes makes it nearly impossible to quit smoking, regardless of the information available to the smoker on the health effects and addictiveness of cigarettes. Indeed, Grills claims to be still addicted to cigarettes, and thus unable to quit smoking, despite his knowledge of the aforementioned facts.

**D. Fraud with Respect to Manipulation of Nicotine Levels**

Grills's Second Amended Complaint also fails to plead with particularity Grills's claims that Defendants fraudulently manipulated nicotine levels in their products. Grills presents the court with some evidence that Defendants knew about the addictiveness of nicotine and were investigating methods to manipulate nicotine in their products.[33] Grills also identifies for the court specific instances in which Defendant R.J. Reynolds

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[33] In this regard, Grills alleges, among other things, that:

> Philip Morris internally discussed methods for increasing the nicotine content of cigarettes as early as 1960. . . . [R.J.] Reynolds, understanding the importance of retaining sufficient nicotine to maintain dependence on its so-called "low tar/low nicotine" cigarettes, internally proposed in 1971 that the company undertake research into determining more exactly the "habituating level of nicotine." . . .
>
> [A]s explained in an internal 1973 [R.J.] Reynolds document: . . . Methods which may be used to increase smoke pH and/or nicotine "kick" include: (1) increasing the amount of (strong) burley in the bl[e]nd, (2) reduction of casing sugar used on the burley and/or blend, (3) use of alkaline additives, usually ammonia compounds, to the blend, (4) addition of nicotine to the blend, (5) removal of acids from the blend, (6) special filter systems to remove acids from or add alkaline materials to the smoke, and (7) use of high air dilution filter systems. Methods 1-3, in combination, represent the Philip Morris approach, and are under active investigation [by R.J. Reynolds].

Pl.'s Second Am. Compl. ¶¶ 31, 36. Grills does not identify the above-mentioned "internal" discussions, research or documents by name, specific date, or author or provide other identifying information.

denied publicly that they manipulate nicotine levels.[34] However, the remaining information Grills provides contains only vague allegations of secret documents and/or statements and/or actions by cigarette companies not parties to this litigation (e.g., American Tobacco Co., Lorillard, Brown & Williamson, British American Tobacco). Grills alleges that "the Cigarette Companies":

- use "highly sophisticated technologies designed to deliver nicotine in precisely calculated ways that are more than sufficient to create and sustain addiction";
- use "selective breeding and cultivation of plants for nicotine content and careful tobacco leaf purchasing and blending plants, and control nicotine delivery (i.e., the amount absorbed by the smoker) with various design and manufacturing techniques"; and
- use "other additives, ingredients, and techniques" to "increase the potency, absorption or effect of nicotine"

Pl.'s Second Am. Compl. ¶¶ 36-37. But, as with other parts of his complaint, Grills does not identify who the "Cigarette Companies" are, nor does he explain which of the Defendants practice which manipulation techniques.

Missing from Grills's complaint are any specific allegations

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[34] According to Grills's complaint, R.J. Reynolds, in a 1994 advertisement appearing after the Health Subcommittee hearings, stated

> We do not increase the level of nicotine in our four products in order to addict smokers. Instead of increasing the nicotine levels in our products, we have in fact worked hard to decrease "tar" and nicotine ....

and touted its use of "various techniques that help us reduce the 'tar' (and consequently the nicotine) yields of our products." Pl.'s Second Am. Compl. ¶ 40 (emphasis omitted).

of nicotine manipulation as to the particular Defendants before the court. Rule 9 (b) does not permit Grills to rely on such general assertions leveled at unidentified defendants. Nor does Grills provide any explanation as to how Defendants' supposed manipulation and Defendants' misrepresentation of this manipulation affected Grills himself as a smoker. Again, Grills must provide information as to his own state of mind and inform the court as to "the manner in which [the alleged misrepresentations] misled" him. Ziemba v. Cascade Int'l, Inc., 256 F.3d 1194, 1202 (11th Cir. 2001).

**E. Leave to Amend in Order to Comply with Rule 9**

As with the amendments for jurisdictional defects discussed above, leave to amend here should be granted "when justice so requires." Fed. R. Civ. P. 15(a)(2). "Ordinarily, if the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, leave to amend should be freely given." Hall v. United Ins. Co. of Am., 367 F.3d 1255, 1262 (11th Cir. 2004) (citations and quotation marks omitted); see also Bell v. Fla. Highway Patrol, No. 07-15274, 2009 U.S. App. LEXIS 7995, at *5 (11th Cir. Apr. 15, 2009) (per curiam); Friedlander v. Nims, 755 F.2d 810, 813 (11th Cir. 1985) (A "district court should give a plaintiff an opportunity to amend his complaint rather than dismiss it when it appears that a more carefully drafted complaint might state a claim."). However, the court need not "allow an amendment (1) where there has been undue delay, bad faith, dilatory motive,

or repeated failure to cure deficiencies by amendments previously allowed; (2) where allowing amendment would cause undue prejudice to the opposing party; or (3) where amendment would be futile." Bryant v. Dupree, 252 F.3d 1161, 1163 (11th Cir. 2001) (per curiam) (citation omitted); see also Whitehurst v. Wal-Mart, 306 F. App'x 446, 449 n.5 (11th Cir. 2008) (per curiam) (collecting cases).

As we have explained above, Grills's has failed twice to cure deficiencies by amending his complaint. Nothing in the record, however, suggests bad faith or motive. In addition, as a consequence of the court's consideration of the preemption issue, it is not possible to conclude today that Grills's complaint cannot be saved by truthful amendment such that further amendment would be futile. Rather, it is possible that if pled with particularity, Grills's allegations could be "a proper subject of relief." Hall v. United Ins. Co. of Am., 367 F.3d 1255, 1262 (11th Cir. 2004) (citations and quotation marks omitted). Finally, the court notes that Grills's Second Amended Complaint addressed some of the deficiencies identified by prior court orders.

Accordingly, it is appropriate to permit Grills one last and final opportunity to amend his complaint. However, should Grills further amend his complaint, and should such an amended complaint, as filed with the court, also fail to adequately allege a jurisdictional basis and otherwise satisfy the Federal Rules of Civil Procedure, the court's view on this point will undoubtedly

change. See id.; Osahar v. U.S. Postal Serv., 297 F. App'x 863, 864 (11th Cir. 2008) (per curiam) ("Osahar attempted to amend his complaint five times. Before the last amendment, the district court warned Osahar that his failure to satisfy Rule 8(a)(2) would result in a dismissal. Osahar did not comply and failed repeatedly to state a claim upon which relief could be granted. It would have been futile to allow Osahar to amend his complaint yet again.").

## CONCLUSION

In sum, Grills has failed to (1) allege diversity jurisdiction including specifically his failure to allege his own citizenship in the state of Florida and (2) sufficiently plead fraud with particularity, as required by Fed. R. Civ. P. 9(b), although, as explained above, the majority of Grills's fraudulent concealment claim, if properly plead, could survive preemption.[35]

The court therefore

- DISMISSES Plaintiff's Second Amended Complaint, pursuant to Fed. R. Civ. P. 12(h)(3), without prejudice, for failure to comply with Fed. R. Civ. P. 8(a); and
- GRANTS Plaintiff one last opportunity to amend and address the above-mentioned deficiencies in Plaintiff's Second Amended Complaint. If Plaintiff's complaint is not so amended within seventy-five (75) calendar days of this order, i.e., by October 19, 2009, this dismissal shall be with prejudice.

Judgment will issue accordingly.

Donald C. Pogue, Judge

Dated: August 4, 2009
New York, New York

[35]On July 21, Defendant Philip Morris USA additionally filed a Motion to Suspend Case Management and Scheduling Order and to Stay All Proceedings Pending Court's Ruling on Motion to Dismiss. The court's disposition moots this motion.