product [the claim was] sufficient to invoke the duty not to deceive and avoid preemption by the Act.").

Philip Morris USA argues for broad PHSCA section 5(b) preemption, claiming that the PHSCA is "necessary and sufficient" and "adequate to inform the public of the health risks associated with smoking as a matter of law." Def.'s Mot. 7-8 (citing Altria, 129 S. Ct. at 544; Medtronic, Inc. v. Lohr, 518 U.S. 470, 489 n.9 (1996)). Defendant argues that "[r]egardless of the label attached to" Grills's claims, Def.'s Mot. 11 (quoting Lacey v. Lorillard Tobacco Co., 956 F. Supp. 956, 963 (N.D. Ala. 1997)), his fraudulent concealment/nondisclosure claims are completely preempted as they involve "claims that the Defendants should have provided additional information regarding the health risks associated with smoking." Id. 10-11; see also Laschke v. Brown & Williamson Tobacco Corp., 766 So. 2d 1076, 1078 (Fla. Dist. Ct. App. 2000).

However, the court is unpersuaded, especially in light of the Supreme Court's recent Altria Group decision which reaffirmed the Cipollone plurality opinion -- this time with majority support. See Altria Group, 129 S. Ct. at 549. First, the Supreme Court again emphasized a state's ability to "prohibit deceptive statements" including even such statements "in cigarette advertising." Id. at 544 (emphasis added); see also Cipollone, 505 U.S. at 528 ("petitioner's fraudulent-misrepresentation claims that do arise

with respect to advertising and promotions . . . are not preempted by § 5(b)") (emphasis added); Good v. Altria Group, Inc., 501 F.3d 29, 39-40 & n.13 (1st Cir. 2007) (collecting cases), aff'd, 129 S. Ct. 538 (2008).

Second, the court rejected analyses of other courts, including the Fifth Circuit, that expanded PHSCA preemption to fraud claims and held preempted aspects of fraud claims based upon a defendant's deception that "could easily be corrected by requiring additional warning on [cigarette] packages . . . . [making] the gravamen of Plaintiff's . . . claim . . . that the warnings mandated by Congress are inadequate . . . ." Brown v. Brown & Williamson Tobacco Corp., 479 F.3d 383, 393 (5th Cir. 2007) (quoting In re Tobacco Cases II, No. JCCP 4042, 2004 WL 2445337, at *21 (Cal. Super. Ct. Aug. 4, 2004), superseded on other grounds, In re Tobacco Cases II, 163 P.3d 106 (Cal. 2007)); see id. 393-95 (holding that "any state law claim[, including a claim for fraudulent concealment,] that would require additional communication between companies and consumers is pre-empted by the Labeling Act." (emphasis added)). See Altria Group, 129 S. Ct. at 542, 546 (rejecting Brown). The Supreme Court's holding comports with the axiom that the court begins with the "assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress," and, accordingly, "courts ordinarily accept the reading

that disfavors pre-emption." Altria Group, 129 S. Ct. at 543 (citations and internal quotation marks omitted); see also Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449-50 (2005); Medtronic, 518 U.S. at 485.

Third, Philip Morris USA's position also conflicts with Florida law.[21] Grills's fraudulent concealment claim extends to actions taken by Defendants other than advertising and promotion. In Florida, fraudulent concealment claims and fraudulent misrepresentation claims are identical, and, as such, both involve elements of knowing deception and an intent to deceive. See Irwin v. Miami-Dade County Pub. Schs., No. 06-23029-CIV-COOKE/BANDSTRA, 2009 U.S. Dist. LEXIS 14726, at *24 (S.D. Fla. Feb. 25, 2009) (citing Greenberg v. Miami Children's Hosp. Research Inst., Inc., 264 F. Supp. 2d 1064, 1073 (S.D. Fla. 2003); Coral Gables Distrib., Inc. v. Milich, 992 So. 2d 302, 303 (Fla. Dist. Ct. App. 2008)); see also Shepard, 1998 U.S. Dist. LEXIS 23410, at *9 ("A claim of fraudulent concealment is distinct from an action for failure to

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[21] Although the court is "not bound by a state court's interpretation of federal law regardless of whether [the court's] jurisdiction is based on diversity of citizenship or a federal question," Grantham v. Avondale Indus., 964 F.2d 471, 473 (5th Cir. 1992), the Florida Supreme Court's delineation of the scope of the state's fraud causes of action is not without effect here. See Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) ("[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.").

warn. Unlike a claim for failure to warn, fraudulent concealment requires a showing of intent to defraud or deceive"); Rivera v. Philip Morris, Inc., 395 F.3d 1142, 1149-50 (9th Cir. 2005); Izzarelli v. R.J. Reynolds Tobacco Co., 117 F. Supp. 2d 167, 174-76 (D. Conn. 2000). Although Philip Morris USA references Laschke,[22] that case relied upon another Florida District Court of Appeals decision, Brown & Williamson Tobacco Corp. v. Carter, 723 So. 2d 833, 836-37 (Fla. Dist. Ct. App. 1998) (per curiam). Notably, on appeal in Carter, the Florida Supreme Court criticized the lower court's treatment of this issue:

> The Carters argued . . . that, according to the language of Cipollone itself, the 1969 Act does not preempt their claims that rely solely on ATC's "testing or research practices or other action unrelated to advertising or promotion." The Carters also attached a number of so-called advocacy statements of the cigarette industry to its motion [and witness statements demonstrating] that "in numerous instances, major cigarette manufacturers conducted public relations campaigns, including but not limited to purchasing newspaper space for making public statements [and] issuing press releases." . . .
>
> In reversing the trial court on this issue, the district court [cited Griesenbeck v. Am. Tobacco Co., 897 F.Supp. 815 (D.N.J. 1995) for the proposition that "in the context of the labeling act, 'advertising or promotion' encompasses all forms of communication

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[22] Laschke, 766 So. 2d at 1078 (holding that "the Laschkes' claim for conspiracy to commit fraud through concealment, which attempts to allege a duty beyond that imposed by the Labeling Act, is also preempted for acts occurring after 1969"); see also Sonnenreich v. Philip Morris Inc., 929 F. Supp. 416, 419 (S.D. Fla. 1996) (holding that "[a]ny 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).

directed to a mass market."]

> We, however, are not persuaded that the Griesenbeck court's broad interpretation of the terms "advertising or promotion" is necessarily correct. Certainly, the plain language of the Cipollone opinion itself demonstrates that the Supreme Court envisioned that there were other forms of communication unrelated to advertising or promotion. See, e.g., Philip Morris Inc. v. Harshbarger, 122 F.3d 58 (1st Cir. 1997) (holding that Massachusetts statute requiring manufacturers of tobacco products to disclose additives and nicotine-yield ratings for their products to a state agency did not violate the 1969 Act, as such communication did not amount to advertising or promotion).

Carter v. Brown & Williamson Tobacco Corp., 778 So. 2d 932, 940-41 (Fla. 2000) (citations omitted). Thus, Carter recognized that a plaintiff may fault a defendant for fraudulent concealment of material facts in communications other than advertising and promotion covered by the PHSCA, e.g., public relations campaigns, press releases and statements to administrative agencies. Compare Spain, 363 F.3d at 1200 (preempting Alabama fraudulent suppression claims, relying upon Alabama law pursuant to Cantley v. Lorillard Tobacco Co., 681 So. 2d 1057, 1061 (Ala. 1996)[23]); Lacey, 956 F.

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[23] Cantley reasoned that the plaintiff's

> fraudulent suppression claim merely alleged generally that the defendants had failed to inform [the deceased] of the risks of smoking. Because manufacturers in the position of the defendants R.J. Reynolds and Lorillard can ordinarily communicate directly with consumers like [the deceased] only through "advertising or promotion" channels of communication, we must conclude that Cantley's fraudulent suppression claims, as pleaded, are inevitably based upon a "state law duty to disclose ... facts through ... advertising or promotion" channels of communication and, therefore, that they

Supp. at 963 (relying on Cantley in preempting an Alabama fraudulent suppression claim). As such, the court does not find Laschke determinative here.

It follows that, while some of Grills's fraudulent concealment/nondisclosure claim may be preempted, Grills's claim of actual fraud is not.

III. Federal Rule 9(b)

While Cipollone permits Grills to bring fraud actions against the Defendants, Grills's Complaint fails to provide detailed allegations of fraudulent behavior, on the parts of named Defendants, and of how this behavior specifically affected Grills himself. Accordingly, as currently plead, Grills's complaint does not provide sufficient particular allegations of such fraud as required by Rule 9(b).

In a diversity fraud action, the Federal Rules require a complaint to "state[] with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b); see Whitehurst v. Wal-Mart, 306 F. App'x 446, 449 (11th Cir. 2008) (per curiam) (citing Next Century Commc'ns Corp. v. Ellis, 318 F.3d

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> [are] preempted. The trial judge properly entered summary judgments against Cantley's fraudulent suppression claims.

Cantley, 681 So. 2d at 1061.

1023, 1027-28 & n.1 (11th Cir. 2003) (per curiam)).[24] The Rule 9(b) particularity requirement dictates that the complaint must set forth

> (1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud.

Rogers v. Nacchio, 241 F. App'x 602, 608 (11th Cir. 2007) (per curiam) (quoting Ziemba v. Cascade Int'l, Inc., 256 F.3d 1194, 1202 (11th Cir. 2001)). A plaintiff "need not prove [his] allegations in the complaint but must provide particular facts so the Court is not 'left wondering whether a plaintiff has offered mere conjecture or a specifically pleaded allegation on an essential element of the lawsuit.'" Mitchell v. Beverly Enters., 248 F. App'x 73, 75 (11th Cir. 2007) (quoting United States ex rel. Clausen v. Lab. Corp. of Am., 290 F.3d 1301, 1313 & n.23 (11th Cir. 2002)). Failure to meet Rule 9(b)'s standards results in dismissal of the complaint. Clausen, 290 F.3d at 1310.

The court is sympathetic to the fact that Grills is proceeding *pro se*. However, while "[p]*ro se* pleadings are held to a less

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[24] Florida state law also requires a complaint to plead fraud "with particularity." See Thompson v. Bank of N.Y., 862 So. 2d 768, 771 (Fla. Dist. Ct. App. 2003) (per curiam) (explaining Cady v. Chevy Chase Sav. & Loan, Inc., 528 So. 2d 136, 138 (Fla. Dist. Ct. App. 1988) (per curiam)).

stringent standard than pleadings drafted by attorneys and are therefore liberally construed," Whitehurst, 306 F. App'x at 447 n.2 (citing Tannenbaum v. United States, 148 F.3d 1262, 1263 (11th Cir. 1998) (per curiam)), a defendant's *pro se* status in civil litigation "generally will not excuse mistakes he makes regarding procedural rules." Mickens, 181 F. App'x at 875 (citing McNeil v. United States, 508 U.S. 106, 113 (1993) (explaining that we "have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel")); see also Whitehurst, 306 F. App'x at 449 (applying Rule 9(b) despite plaintiff's *pro se* status); Barrett v. Scutieri, 281 F. App'x 952, 954-55 (11th Cir. 2008) (per curiam) (same). Thus, Grills's complaint must comply with Rule 9(b).[25]

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[25] As was noted above and in the court's previous orders, Grills is also expected to comply with Federal Rule of Civil Procedure 8 and Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) in order to survive a Rule 12(b)(6) motion to dismiss. However, fraud was not at issue in Twombly. See Twombly, 550 US at 576 n.3 (Stevens J., dissenting) ("The Federal Rules do impose a 'particularity' requirement on 'all averments of fraud or mistake,' neither of which has been alleged in this case." (citation omitted)). Rather, Rule 9(b) involves pleading requirements that are at least as, if not more, stringent than Rule 8, as applied in light of Twombly. It follows that this Circuit's pre-Twombly analysis of Rule 9(b) continues to apply here. See Whitehurst, 306 F. App'x at 449; Barrett, 281 F. App'x at 954-955; see also Shandorf v. MCZ/Centrum, Fla. XIX, LLC, No. 08-61314-CIV-COHN-SELTZER, 2009 U.S. Dist. LEXIS 34316, at *1-9 (S.D. Fla. Apr. 15, 2009); Bivens v. Roberts, No. 208CV026, 2009 U.S. Dist. LEXIS 27725, at *17-18 (S.D. Ga. Mar. 31, 2009) (increased level of specificity for fraud over and above Twombly requirements); Bates v. Milano, No. 2:08-cv-320-FtM-29DNF, 2009 U.S. Dist. LEXIS 48029, at *2-3 (M.D. Fla. June 9, 2009) (same); United States ex rel. Westfall v. Axiom Worldwide, Inc., No.

Grills, in asserting causes of action for fraud, fraudulent misrepresentation and fraudulent concealment, makes four basic allegations in his complaint: (1) Defendants illegally marketed their products to children and fraudulently misrepresented and concealed this fact; (2) Defendants knew that cigarettes were hazardous to its consumers' health but fraudulently misrepresented and concealed this fact; (3) Defendants knew that nicotine is highly addictive but fraudulently misrepresented and concealed this fact; and, finally, (4) Defendants manipulated the nicotine levels in their products to enhance addiction and fraudulently misrepresented and concealed this fact. As a result of these actions, Grills claims, the court should award him $1 million in compensatory damages, accounting for the amount Defendants were "unjustly enriched" by his purchase of their products as well as the negative health effects of cigarettes that he has suffered as a result of his addiction to nicotine and smoking of cigarettes. Grills also requests $1 million in punitive damages.

In evaluating the adequacy of Grills's allegations, for purposes of considering the defendant's motion to dismiss, the court construes all factual allegations in the complaint in favor of the plaintiff. Corsello v. Lincare, Inc., 428 F.3d 1008, 1013 (11th Cir. 2005) (per curiam). Applying this construction, the

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8:06-cv-571-T-33TBM, 2009 U.S. Dist. LEXIS 45809, at *8-18 (M.D. Fla. May 20, 2009). The court therefore focuses on Grills's compliance with Rule 9(b).

court must then determine whether Grills's allegations, separately or together, sufficiently state a claim for fraud.

To state a claim, Grills's allegations must address each of the elements of that claim. Causes of action for fraud, fraudulent misrepresentation, fraudulent inducement and fraudulent concealment have identical elements, which are: (1) false statement of material fact or suppression of truth by the defendant; (2) the defendant knew or should have known the statement was false, or made the statement without knowledge as to truth or falsity; (3) the defendant intended the false statement or omission induce the plaintiff's reliance; and (4) the plaintiff justifiably relied to his detriment. See Equity Lifestyle Props., Inc v. Fla. Mowing & Landscape Serv., Inc., 556 F.3d 1232, 1240 n.13 (11th Cir. 2009); Roberts v. Rayonier, Inc., 135 F. App'x 351, 362 n.8 (11th Cir. 2005) (per curiam) (quoting Butterworth v. Quick & Reilly, Inc., 998 F. Supp. 1404, 1410 (M.D. Fla. 1998)); Michaud v. Seidler, No. 08-80288-CIV-RYSKAMP/VITUNAC, 2008 U.S. Dist. LEXIS 95945, at *4-5 (S.D. Fla. Nov. 17, 2008) (quoting Webb v. Kirkland, 899 So.2d 344, 346 (Fla. Dist. Ct. App. 2005)); Livingston v. H.I. Family Suites, Inc., No. 6:05-cv-860-Orl-19KRS, 2006 U.S. Dist. LEXIS 31895, at *20-21 (M.D. Fla. May 22, 2006) (citing Albertson v. Richardson-Merrell, Inc., 441 So. 2d 1146, 1149-50 (Fla. Dist. Ct. App. 1983) (per curiam)); Mickens v. Tenth Judicial Circuit, 181 F. App'x 865, 876-77 (11th Cir. 2006) (per curiam) (citing Simon v.