

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

DEAN BEAVER, et al.,

Plaintiffs,

vs.

TARSADIA HOTELS, et als.,

Defendants,

CASE NO. 11CV1842-GPC(KSC)

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFFS’
MOTION FOR
RECONSIDERATION; AND
GRANTING TARSADIA
DEFENDANTS’ AND
PLAYGROUND’S MOTIONS FOR
SUMMARY JUDGMENT ON THE
NEGLIGENCE CAUSE OF ACTION**

[Dkt. Nos. 81, 94, 98, 138.]

Before the Court is Plaintiffs’¹ motion for reconsideration of two rulings in the Court’s order filed on October 16, 2013. (Dkt. No. 133.) In that order, the Court denied Plaintiffs’ motion for summary judgment based on the “unlawful” prong of California’s Unfair Competition Law (“UCL”) and granted Tarsadia Defendants² and Defendant Playground Destination Properties, Inc.’s (“Playground”) motions for

¹ Plaintiffs are Dean Beaver, Laurie Beaver, Steven Adelman, Abram Aghachi, Dinesh Gauba, Kevin Kenna and Veronica Kenna.

²Tarsadia Defendants consist of 5th Rock, Gregory Casserly, Gaslamp Holdings, LLC, MKP One, LLC, B.U. Patel, Tushar Patel, and Tarsadia Hotels.

1 summary judgment as to all causes of action³ except the negligence cause of action.
2 (Dkt. No. 128.) On November 12, 2013, Plaintiffs filed an amended motion for
3 reconsideration. (Dkt. No. 138.) Tarsadia Defendants and Playground filed their
4 oppositions on March 7, 2014. (Dkt. Nos. 146, 147.) A reply was filed on March 14,
5 2014. (Dkt. No. 148.)

6 In the Court's order on the parties' motions for summary judgment, the Court
7 requested supplemental briefing on the negligence cause of action. (Dkt. No. 128.)
8 Pursuant to the Court's direction, the parties filed supplemental briefs on the
9 negligence cause of action. (Dkt. Nos. 134, 135, 136.)

10 A hearing was held on April 18, 2014. (Dkt. No. 149.) Michael Rubin, Esq.,
11 Michael Reiser, Esq. and Tyler Meade, Esq. appeared on behalf of Plaintiffs. Alicia
12 Vaz, Esq. and Frederick Kranz, Esq. appeared on behalf of Tarsadia Defendants; and
13 Daniel Benjamin, Esq. appeared on behalf of Defendant Playground. Based on the
14 reasoning below, the Court GRANTS in part and DENIES in part Plaintiffs' motion for
15 reconsideration; and GRANTS Tarsadia Defendants and Playground's motions for
16 summary judgment on the negligence cause of action.

17 I.

18 MOTION FOR RECONSIDERATION

19 A. Legal Standard on Motion for Reconsideration

20 A district court may reconsider a grant of summary judgment under either
21 Federal Rule of Civil Procedure ("Rule") 59(e) or Rule 60(b). Sch. Dist. No. 1J,
22 Multnomah County, Or. v. AcandS, Inc., 5 F.3d 1255, 1262 (9th Cir. 1993). Plaintiffs
23 do not assert which rule they move under but it appears that Plaintiffs are moving under
24 Rule 59(e) based on the standard they assert.

25 Federal Rule of Civil Procedure 59(e) provides for the filing of a motion to alter
26

27 ³As to Tarsadia Defendants, summary judgment was granted as to the first cause
28 of action for violation of the anti-fraud provisions of the ILSA, the third cause of action
for fraud, and fifth cause of action for unfair competition. As to Playground, summary
judgment was granted as to the fifth cause of action for unfair competition.

1 or amend a judgment. Fed. R. Civ. P. 59(e). A motion for reconsideration, under
2 Federal Rule of Civil Procedure 59(e), is “appropriate if the district court (1) is
3 presented with newly discovered evidence; (2) clear error or the initial decision was
4 manifestly unjust, or (3) if there is an intervening change in controlling law.” Sch.
5 Dist. No. 1J, Multnomah County, Or., 5 F.3d at 1263; see also Ybarra v. McDaniel, 656
6 F.3d 984, 998 (9th Cir. 2011).

7 In addition, Local Civil Rule 7.1(i)(1) provides that a motion for reconsideration
8 must include an affidavit or certified statement of a party or attorney “setting forth the
9 material facts and circumstances surrounding each prior application, including inter
10 alia: (1) when and to what judge the application was made, (2) what ruling or decision
11 or order was made thereon, and (3) what new and different facts and circumstances are
12 claimed to exist which did not exist, or were not shown upon such prior application.”
13 Local Civ. R. 7.1(i)(1).

14 The Court has discretion in granting or denying a motion for reconsideration.
15 Fuller v. M.G. Jewelry, 950 F.2d 1437, 1441 (9th Cir. 1991). A motion for
16 reconsideration should not be granted absent highly unusual circumstances. 389
17 Orange St. Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999). “A motion for
18 reconsideration cannot be used to ask the Court to rethink what the Court has already
19 thought through merely because a party disagrees with the Court’s decision. Collins
20 v. D.R. Horton, Inc., 252 F. Supp. 2d 936, 938 (D. Az. 2003) (citing United States v.
21 Rezzonico, 32 F. Supp. 2d 1112, 1116 (D. Az.1998)).

22 Plaintiffs move for reconsideration arguing that the Court’s ruling that 1)
23 Plaintiffs’ claims under California’s Unfair Competition Law, California Business &
24 Professions Code section 17200 *et seq.* are governed by a three year statute of
25 limitations set forth under the Interstate Land Sales Full Disclosure Act (“ILSA”) rather
26 than the four year statute of limitations in section 17208 of the UCL is based on “clear
27 error”; and 2) that scienter is required to establish a violation of the ILSA’s anti-fraud
28 provision should be reconsidered based on “an intervening change in the controlling

1 law.” (Dkt. No. 138 at 16.)

2 Tarsadia Defendants oppose both issues while Playground only opposes the
3 reconsideration of the UCL claim since the fraud claim against it was previously
4 dismissed with prejudice.

5 **B. California’s Unfair Competition Law, UCL**

6 Plaintiffs’ argument is two pronged. First, Plaintiffs contend that the California
7 legislature intended the UCL’s four year statute of limitations to apply to all UCL
8 claims, including those based on federal law with shorter limitations period. This
9 argument is based on the California legislature’s freedom to enact any laws as long as
10 those protections do not violate the Supremacy Clause. Second, nothing in the ILSA
11 preempts the UCL or its four year statute of limitations. Specifically, they argue that
12 the ILSA invites states to enact parallel laws that are stricter than the ILSA under 15
13 U.S.C. § 1708 and § 1713. Since the ILSA has no preemptive effect, which is the only
14 way federal law can displace state law, courts have the authority to apply Plaintiffs’
15 UCL four year statute of limitations even though it borrows from a federal statute,
16 ILSA, with a shorter three year statute of limitations.

17 Tarsadia Defendants and Playground⁴ oppose arguing that Plaintiffs have failed
18 to meet the standard for reconsideration of “clear error” and are merely improperly
19 repeating their arguments in prior briefing. Second, they assert that when Congress has
20 established a time limit for enforcing a federal right, that limitations period must apply.

21 California’s Unfair Competition Law prohibits any “unlawful, unfair or
22 fraudulent business act or practice.” Cal. Bus. & Prof. Code § 17200. “Each of these
23 three adjectives [unlawful, unfair or fraudulent] captures a separate and distinct theory
24 of liability.” Rubio v. Capital One Bank, 613 F.3d 1195, 1203 (9th Cir. 2010)
25 (quotation marks omitted). The UCL’s coverage is broad, sweeping and embracing of
26

27 ⁴Playground only oppose the unfair and fraudulent prongs of the UCL. Judge
28 Sabraw dismissed the UCL “unlawful” claim as to Playground because Plaintiffs could
not state an ILSA or SLA claim. (Dkt. No. 34 at 17:8-11.) Playground concedes that
the unfair and fraudulent prongs are remaining. (Dkt. No. 98-1 at 24.)

1 anything that can be properly called a business practice and at the same time forbidden
2 by law. Cel-Tech Comms., Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 180
3 (1999). “It governs ‘anti-competitive business practices’ as well as injuries to
4 consumers, and has a major purpose ‘the preservation of fair business competition.’”
5 Id. (citations omitted)

6 The California Supreme Court explained that while the unfair competition law
7 is broad and sweeping, “it is not unlimited” and plaintiffs may not “plead around” an
8 “absolute bar to relief” by “recasting the cause of action as one for unfair competition.”
9 Id. at 182. For example, courts may not impose their own notions of what is fair or
10 unfair, specific legislation may limit the court’s power to declare conduct unfair, and
11 when specific legislation provides a safe harbor, plaintiffs may not use the general
12 unfair competition law to “assault that harbor.” Id. However, the limitation is narrow.
13 Chabner v. United Omaha Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000). “To
14 forestall an action under the unfair competition law, another provision must actually
15 ‘bar’ the action or clearly permit the conduct.” Cel-Tech Comms., Inc., 29 Cal. 4th at
16 183.

17 **C. Statute of Limitations**

18 **1. Unlawful Prong of the UCL**

19 Under the “unlawful” prong, the UCL incorporates other laws and treats
20 violations of those laws as unlawful business practices independently actionable under
21 state law. Chabner, 225 F.3d at 1048 (citing Cel-Tech Comms. Inc., 29 Cal. 4th at
22 180). Violation of almost any federal, state or local law may serve as the basis for an
23 “unlawful” UCL claim. Saunders v. Superior Court, 27 Cal. App. 4th 832, 838–39
24 (1994). “To state a cause of action based on an unlawful business act or practice under
25 the UCL, a plaintiff must allege facts sufficient to show a violation of some underlying
26 law.” Prakashpalan v. Engstrom, Lipscomb and Lack, 223 Cal. App. 4th 1105, 1133
27 (2014) (“unlawful practices are practices ‘forbidden by law, be it civil or criminal,
28 federal, state, or municipal, statutory, regulatory or court-made.’”).

1 In this case, the underlying law are the disclosure provisions of the ILSA, 15
2 U.S.C. §§ 1703(a)(1)(A) & (B) and § 1703(d). (See Dkt. No. 81.) These provisions
3 have a three year statute of limitations from the date of signing of the contract, which
4 was either on May 18, 2006 or December 12, 2006. See 15 U.S.C. § 1711(a), (b). The
5 Complaint in this case was filed on May 18, 2011 in San Diego Superior Court. Under
6 the three year ILSA statute of limitations, Plaintiffs' cause of action would be time-
7 barred. However, it is undisputed that the cause of action would not be time-barred
8 under the four year statute of limitations under the UCL because the limitations period
9 commences after the cause of action accrued, not from the date of the signing of the
10 contract.

11 The statute of limitations under the UCL provides that “[*a*]ny *action* to enforce
12 *any* cause of action pursuant to this chapter shall be commenced within four years after
13 the cause of action accrued.” Cal. Bus. & Prof. Code § 17208 (emphasis added).
14 Restated, the statute of limitations provision is a broad provision applying to “any
15 action to enforce any cause of action.” See id. The California Supreme Court has held
16 that the four year statute of limitations applies even if the borrowed statute has a shorter
17 limitations period. Cortez v. Purolator Air Filtration Prods. Co., 23 Cal. 4th 163, 178-
18 79 (2000) (borrowed statute was California Labor Code). The court stated that “the
19 language of section 17208 admits of no exceptions. Any action on any UCL cause of
20 action is subject to the four-year period of limitations created by that section.” Id. at
21 179. In analyzing the holding in Cortez, the court in Blanks noted that the “general
22 rule is that a UCL cause of action borrows the substantive portion of the borrowed
23 statute to prove the ‘unlawful’ prong of that statute, but not the limitations procedural
24 part of the borrowed statute.” Blanks v. Shaw, 171 Cal. App. 4th 336, 363 (2009).

25 Despite the broad and sweeping nature of the UCL statute of limitations, it is not
26 unlimited and exceptions can apply. For example, in Blanks, the court of appeal held
27 that the one year statute of limitation under the Talent Agencies Act (“TAA”), Cal.
28 Labor Code 1700 *et seq.*, applied and not the UCL. Id. at 346. The court held that

1 “plaintiffs seeking affirmative relief under the TAA must bring their cases to the Labor
2 Commissioner within the Act’s one-year statute of limitations and cannot rely on the
3 longer statute contained in the Unfair Competition Law.” Id. In the case, the plaintiff
4 alleged a cause of action under section 17200, and alleged a defendant had engaged in
5 an unlawful business practice because he did not have the required licensure under the
6 TAA. Id. at 363. The court explained the general rule that the UCL claims has a four
7 year statute of limitations does not apply because the TAA vests exclusive original
8 jurisdiction in the Labor Commissioner, see Cal. Labor Code § 1700.44(c), and
9 imposes a one-year limitations period as a predicate to assert any claim. Id. at 364.
10 Plaintiffs seeking affirmative relief under the TAA may not invoke the jurisdiction of
11 the Superior Court until after the Commissioner has issued a ruling. Id. at 365.

12 California courts and the Ninth Circuit have not addressed whether the holding
13 in Cortez, that the four year statute of limitations under the UCL applies even if the
14 borrowed statute has a shorter limitations period, is applicable to an underlying federal
15 cause of action. As a result, district courts are divided on whether the UCL four year
16 statute of limitations applies when the UCL cause of action is based on a federal statute
17 with a shorter three year statute of limitations. The interpretation of footnote 3 in
18 Silvas v. E*Trade Mortg. Corp., 514 F.3d 1001, 1007 n. 3 (9th Cir. 2008) has created
19 much of the division.

20 In Silvas, the plaintiffs brought a single cause of action under the UCL alleging
21 “misrepresenting rescission rights under the Truth in Lending Act (“TILA”) and by
22 failing to provide a refund of the deposit as required by TILA.” Id. at 1003. The
23 plaintiffs did not assert a claim under TILA itself. Id. The district court dismissed the
24 complaint under Federal Rule of Civil Procedure 12(b)(6) holding that federal law
25 preempted the UCL claims, which the Ninth Circuit affirmed. Id. The Ninth Circuit
26 held that the Home Owners’ Loan Act (“HOLA”) and the accompanying regulations
27 by the Office of Thrift Supervision (“OTS”) preempted the entire field of lending
28 which also encompassed the TILA claims. Id. at 1008.

1 While HOLA, in its regulations, explicitly states that OTS occupies the entire
2 field of lending regulation for federal savings associations, HOLA provides an
3 exception under 12 C.F.R. § 560.2(c) where state laws of general applicability only
4 incidentally affecting federal savings associations are not preempted. Id. at 1006-07.
5 However, the court declined to address that issue because the claims were based on
6 types of laws listed in another provision, 12 C.F.R. § 560.2(b). In the alternative, the
7 Ninth Circuit explained that despite this exception, it noted that “when federal law
8 preempts a field, it leaves ‘no room for the States to supplement it.’” Id. at 1007 n.3.
9 The court further explained,

10 In this case, it is clear that the UCL has a much longer statute of
11 limitations than does TILA. Compare Cal. Bus. & Prof. Code § 17208
12 (West 2007) (providing a four-year statute of limitations period) with
13 15 U.S.C. § 1640(e) (providing a one-year limitations period for
14 TILA claims). It is also clear that Appellants seek to take advantage
15 of the longer statute of limitations under UCL to remedy TILA
16 violations, because without the extended limitations period their
17 claims would be barred.

18 An attempt by Appellants to go outside the congressionally enacted
19 limitation period of TILA is an attempt to enforce a state regulation
20 in an area expressly preempted by federal law.

21 Id. at 1007 n.3.

22 The court in Silvas also addressed TILA’s savings clause where state law is not
23 preempted unless the state law is inconsistent with TILA. 15 U.S.C. § 1610(b). The
24 court held that a “savings clause” or “no preemption clause” only applies to TILA and
25 does not preclude the preemptive effect of HOLA. Id. at 1007.

26 Since Silvas, many district court cases cite footnote 3 and have held that the
27 shorter federal statute of limitations should apply when a state law cause of action is
28 based on it. See O’Donovan v. Cashcall, Inc., No. C 08-3174 MEJ, 2012 WL 2568174,
at *3 (N.D. Cal. July 2, 2012) (under Electronic Funds Transfer Act (“EFTA”);
Newsom v. Countrywide Home Loans, Inc., 714 F. Supp. 2d 1000, 1014 (N.D. Cal.
2010) (“In addition, Plaintiffs impermissibly are attempting to revive an otherwise
time-barred TILA claim under the guise of a fraud claim.”); Santos v. Countrywide

1 Home Loan, No. 09cv912-AWI-SM, 2009 WL 2500710, at *7 (E.D. Cal. Aug. 14,
2 2009) (discussing Silvas proposition that UCL cannot be used to remedy violations of
3 a time barred TILA claim); Rodriguez v. U.S. Bank Nat'l Ass'n, No. 12-989 WHA,
4 2012 WL 1996929, at *2 (N.D. Cal. June 4, 2012) (underlying law of TILA and one
5 year statute of limitations). The court in O'Donovan explained that while cases
6 discussing Silvas addressed federal preemption, these courts also separately concluded
7 that a "federal statute of limitations period should apply when a state law cause of
8 action is based on it." O'Donovan, 2012 WL 2568174, at 3 (citing Newsom, 714 F.
9 Supp. 2d at 1014 (improper for plaintiffs to revive an otherwise time-barred TILA
10 claim, under the guise of a fraud claim, which has a longer statute of limitations);
11 Adams v. SCME Mortg. Bankers Inc., No. CV F 09-501 LJO SMS, 2009 WL 1451715,
12 at *11 (E.D. Cal. May 22, 2009) (holding that if a TILA claim is time barred, a UCL
13 claim based on TILA violations also fails because courts should not permit a plaintiff
14 to "plead around an absolute bar to relief simply by recasting the cause of action as one
15 for unfair competition").

16 In Jones v. Wells Fargo Bank, NA, No. 13cv903 NC, 2013 WL 2355447 (N.D.
17 Cal. May 29, 2013), the court noted the split by the district courts as to whether the
18 four year statute of limitations under section 17200 can be used to extend the limitations
19 period in which to bring a claim under TILA. Id. at *4. Ultimately, in that case, the
20 district court followed the Ninth Circuit statement in Silvas that "an attempt to take
21 advantage of the longer statute of limitations under § 17200 to remedy an otherwise
22 time-barred TILA violation 'is an attempt to enforce a state regulation in an area
23 expressly preempted by federal law.'" Id. (quoting Silvas, 514 F.3d at 1007). In
24 Champlaie v. BAC Home Loans Serv., LP, 706 F. Supp. 2d 1029, 1045 (E.D. Cal. Oct.
25 22, 2009), the Court followed Silvas for the proposition that the UCL may not be used
26 to extend TILA's statute of limitations. The court stated, "[t]here being no adverse
27 reasoning, the court follows Silvas on this issue." Id. In Irving, the court, not
28 referencing Silvas but citing to California law, stated, "[b]ecause the statute borrows

1 violations of other laws, a failure to state a claim under the ‘borrowed statute’ translates
2 to a failure to state a claim under the unlawful prong of the UCL. As plaintiffs have not
3 adequately pleaded that their ILSA claim is timely, their UCL claim based on
4 unlawfulness is similarly not adequately pleaded.” Irving v. Lennar Corp., No. CIV S-
5 12-290 KJM EFB, 2013 WL 1308712, at *15 (E.D. Cal. Apr. 1, 2013).

6 On the other hand, courts have also held that the UCL’s four year statute of
7 limitations applies even if the borrowed statute has a shorter statute of limitations. RA
8 Medical Sys., Inc. v. PhotoMedex, Inc., 373 Fed. Appx. 784, 786 (9th Cir. 2010) (UCL
9 claims based on state law misappropriation of trade secrets). Also, in Hunt, the district
10 court held that the four year statute of limitations under section 17200 applied to the
11 underlying time barred federal Fair Debt Collection Practices Act (“FDCPA”) claim.
12 Hunt v. Wells Fargo Bank, No. 13-cv-02435-MCE-KJN, 2014 WL 1028391, at *4
13 n.4 (E.D. Cal. Mar. 17, 2014). In Hunt, the Court concluded that the California Civil
14 Code section 580b; the Rosenthal Fair Debt Collection Practices Act (“RFDCPA”),
15 Cal. Civil Code. § 1788 *et seq.* and the federal Fair Debt Collection Practices Act
16 (“FDCPA”), 15 U.S.C. § 1692 *et seq.* were time barred. Id. at *3. Without any
17 discussion that courts are divided on this issue and without discussing preemption, the
18 court then explained that the UCL, which has a four year statute of limitations, was
19 timely even though the underlying statutes had shorter statute of limitations and were
20 time barred. Id. at *4 n.4. “Because Plaintiff’s causes of action under the UCL
21 survives or fails based upon the underlying statutes, despite the fact those claims are
22 time-barred, it is nonetheless necessary to address the merits of Plaintiff’s predicate
23 causes of action.” Id. at *4. Ultimately, the UCL claim was dismissed because the
24 underlying causes of action failed to state a claim. Id. at *4-5.

25 After a careful analysis of Silvas, the Court concludes that footnote 3 in Silvas
26 concerned field preemption under HOLA; therefore, the district courts’ subsequent
27 extension of footnote 3 to also support the proposition that the federal statute of
28 limitations period should apply when a state law cause of action is based on it is not

1 based on legally supported analysis. Therefore, the field preemption analysis in Silvas
2 does not assist the Court in resolving the issues in this case. The Court now looks to
3 an analysis of the specific statute of limitations at issue.

4 **a. ILSA Statute of Limitations**

5 The primary purpose of a statute of limitations is to protect defendants against
6 “stale or unduly delayed claims” and to bar a plaintiff who has “slept on his rights.”
7 Credit Suisse Securities, (USA), LLC v. Simmonds, 132 S. Ct. 1414, 1420 (2012)
8 (citing Sand & Gravel Co., 552 U.S. 130, 133 (2008)); American Pipe & Const. Co. v.
9 Utah, 414 U.S. 538, 554 (1974).

10 In American Pipe & Const. Co., the United States Supreme Court stated:

11 [S]tatutory limitation periods are ‘designed to promote justice by
12 preventing surprises through the revival of claims that have been
13 allowed to slumber until evidence has been lost, memories have
14 faded, and witnesses have disappeared. The theory is that even if one
has a just claim it is unjust not to put the adversary on notice to
defend within the period of limitation and that the right to be free of
stale claims in time comes to prevail over the right to prosecute them.’

15 American Pipe & Const. Co., 414 U.S. at 554 (quoting Order of R.R. Telegraphers v.
16 Railway Express Agency, 321 U.S. 342, 348-49 (1944)).

17 Courts do not have the power to disregard the statute of limitations. Brown v.
18 Napa Valley Unif. Sch. Dist., No. 11cv5673-JCS, 2012 WL 4364673, at *6 (N.D. Cal.
19 Sept. 24, 2012) (citing Baldwin Cnty. Welcome Ctr. v. Brown, 466 U.S. 147, 152
20 (1984) (“Procedural requirements established by Congress for gaining access to the
21 federal courts are not to be disregarded by courts out of a vague sympathy for particular
22 litigants.”)). “In the long run, experience teaches that strict adherence to the procedural
23 requirements specified by the legislature is the best guarantee of evenhanded
24 administration of the law.” Mohasco Corp. v. Silver, 447 U.S. 807, 826 (1980).

25 Statute of limitations are established to cut off rights, with or without merit, and
26 “must be strictly adhered to by the judiciary.” Kavanagh v. Noble, 332 U.S. 535, 539
27 (1947) (two year statute applicable to income tax refund claims under § 322(b)(1)
28 rather than four year period under § 3313 applied so taxpayer suffered loss). The Court

1 explained that any inequities resulting from the difference in statute of limitations are
2 to be provided by Congress, not the courts and it is not the Court's province to
3 speculate as to why Congress established a shorter period of limitations relative to the
4 taxes at issue. Id. "It is enough that § 322(b)(1) creates a two-year period applicable
5 to all income tax refund claims and that the claim in this case is of that type." Id.

6 The ILSA has three separate statute of limitations provisions depending on the
7 type of violation. § 1711(a)(1) sets a limitations period "three years after the date of
8 signing of the contract of sale or lease." 15 U.S.C. § 1711(a)(1). § 1711(a)(2) sets a
9 limitations period "three years after discovery of the violation or after discovery should
10 have been made by the exercise of reasonable diligence." 15 U.S.C. § 1711(a)(2). §
11 1711(b) provides a limitations period "three years after the signing of the contract or
12 lease, notwithstanding delivery of a deed to a purchaser." 15 U.S.C. § 1711(b).

13 In 1979, the ILSA was amended to provide more protection to purchasers of
14 land. In order to provide consumers more time to review the property report and to
15 consider or reconsider the transactions, the bill was amended to require that the
16 property report always be given to the purchaser in advance of signing the contract as
17 opposed to at the time of signing the contract. H.R. REP No. 96-154 at 2352 (1979).
18 The amendment also extended the revocation right from three day to ten days in order
19 to give consumers sufficient time to thoroughly review the property report or to obtain
20 independent professional advice. Id.

21 The HR Conference Report on the ILSA amendment states that the
22 conferees wish to clarify that the purpose of the amendment contained
23 in the conference report is to limit to 3 years after the date of signing
24 the contract those suits based on requirements related to advertising,
25 to contract terms or to information reviewed by the Department of
26 Housing and Urban Development prior to sale. The fact of a material
omission or the use of an untrue statement of material fact in the
property report or the statement of record would be covered under this
statute of limitations. The longer statute of limitations which requires
a suit to be filed within 3 years from discovery of the violations applies
to a variety of fraudulent practices.

27 H.R. Conf. Rep. 96-716 at 2447-48 (1979).

28 The legislative history does not demonstrate that Congress intended to preempt

1 the area of statute of limitations and does not address whether a state can impose a
2 longer limitations period. While Congressional intent on the ILSA’s statute of
3 limitations must be respected, it is also true that state law can supplement the
4 provisions of the ILSA. See 15 U.S.C. §§ 1708(e), 1713.

5 With these underlying purposes and policies in mind, the Court looks at whether
6 there is another provision or doctrine that will bar applying the UCL’s four year statute
7 of limitations. See Cel-Tech Comms., Inc., 29 Cal. 4th at 183.

8 **b. Preemption**

9 Defendants argue that the ILSA preempts the UCL and is a bar to applying the
10 UCL’s statute of limitations. Plaintiffs oppose arguing no preemption exists.

11 Under the Supremacy Clause, the laws of the United States “shall be the supreme
12 Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary
13 notwithstanding.” U.S. Const., Art. VI, cl. 2. Accordingly, “state laws that conflict
14 with federal law are ‘without effect.’” Mut. Pharm. Co., Inc. v. Bartlett, — U.S. —,
15 133 S. Ct. 2466, 2473 (2013) (citations omitted). “Federal preemption occurs when:
16 (1) Congress enacts a statute that explicitly pre-empts state law; (2) state law actually
17 conflicts with federal law; or (3) federal law occupies a legislative field to such an
18 extent that it is reasonable to conclude that Congress left no room for state regulation
19 in that field.” Chae v. SLM Corp., 593 F.3d 936, 941 (9th Cir. 2010) (citations
20 omitted). As stated, there are three categories of preemption: express, field and
21 conflict. See id. Field and conflict preemption are subcategories of implied
22 preemption. Stengel v. Medtronic, Inc., 714 F.3d 1224, 1230 (9th Cir. 2013).

23 Field preemption is implied when Congress “‘so thoroughly occupies a
24 legislative field’ that it effectively leaves no room for states to regulate conduct in that
25 field.” Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992). Conflict
26 preemption examines a federal statute as a whole to determine whether it would be
27 “impossible for a private party to comply with both state and federal requirements,”
28 English v. General Elec. Co., 496 U.S. 72, 79 (1990), or where the state law “stands as

1 an obstacle to the accomplishment and execution of the full purposes and objectives
2 of Congress,” Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

3 At issue is whether conflict preemption applies. The ILSA has a savings clause⁵
4 which provides:

5 [n]othing in this chapter may be construed to prevent or limit the
6 authority of any State or local government to enact and enforce with
7 regard to the sale of land any law, ordinance, or code not in conflict
8 with this chapter. In administering this chapter, the Director shall
cooperate with State authorities charged with the responsibility of
regulating the sale or lease of lots which are subject to this chapter.

9 15 U.S.C. § 1708(e). The ILSA also provides that “[t]he rights and remedies provided
10 by this chapter shall be in addition to any and all other rights and remedies that may
11 exist at law or in equity.” 15 U.S.C. § 1713.

12 Defendants argue that conflict preemption applies because Congress included
13 specific statute of limitations under the ILSA and Plaintiffs’ efforts to expand the
14 statute of limitations expressly created by Congress stands as an obstacle to the
15 accomplishment and execution to the full purposes and objectives of Congress.
16 Plaintiffs contend that the ILSA does not preempt supplementary state laws.⁶

17 15 U.S.C. §1708(e) falls under a provision entitled “Certification of substantially
18 equivalent State law.” 15 U.S.C. § 1708. Section 1708(a) of the Interstate Land Sales

19 ⁵The ILSA has a similar savings clause as the Truth in Lending Act (“TILA”).
20 TILA’s savings clause states:

21 Except as provided in subsection (e) of this section, this part and parts
22 B and C of this subchapter do not annul, alter, or affect the laws of any
23 State relating to the disclosure of information in connection with credit
24 transactions, except to the extent that those laws are inconsistent with
the provisions of this subchapter and then only to the extent of the
inconsistency.

25 15 U.S.C. § 1610(a)(1).

26
27 ⁶While Plaintiffs argue that the savings clause indicates Congress’ intent not to
preempt state law, a savings clause is not a *per se* bar to conflict preemption. Geer v.
28 Am. Honda Motor Co., 529 U.S. 861, 869 (2000). The state law is still subject to
conflict preemption. Chicanos Por La Causa, Inc., v. Napolitano, 558 F.3d 856, 866
(9th Cir. 2009).

1 Act provides the mechanism by which Congress may adopt a state’s regulation of this
2 area.” Cranberry Hill Corp. v. Shaffer, 629 F. Supp. 628, 632 (N.D.N.Y. 1986). This
3 provision “allows HUD [now Director of the CFPB] to certify, and thereby adopt, a
4 state law which is substantially equivalent to the federal act.” Id. at 631. The purpose
5 of state certification “is to lessen the administrative burden on the individual developer,
6 arising where there are duplicative state and federal registration and disclosure
7 requirements, without affecting the level of protection given to the individual purchaser
8 or lessee.” Bodansky v. Fifth on Park Condo, LLC, 635 F.3d 75, 86 (2d Cir. 2011)
9 (quoting 24 C.F.R. § 1710.500(a)).

10 These provisions demonstrate that the ILSA allows for state regulation in this
11 area as long as state regulation does not conflict with the provisions of the ILSA. See
12 15 U.S.C. § 1708; see also Cranberry Hill Corp. v. Shafer, 629 F. Supp. 628, 631
13 (N.D.N.Y. 1986) (§ 1708(e) allows states to regulate land sales as long as their
14 regulation does not conflict with the federal act). The issue is whether the longer UCL
15 four year statute of limitations conflicts with or stands as an obstacle to the objectives
16 of the three year statute of limitations of the ILSA.

17 In TILA cases, courts have held that differences between federal and state statute
18 of limitations do not result in conflict preemption because the longer state statute of
19 limitations provides an additional level of protection for consumers and are not
20 inconsistent with federal law. See Quezada v. Loan Center of California, Inc., No.
21 CIV. 08-177 WBS KJM, 2008 WL 5100241, at *5 (E.D. Cal. Nov. 26, 2008.) (While
22 the UCL provides a longer statute of limitations and may offer additional remedies,
23 these factors alone do not render plaintiff’s UCL claims inconsistent with TILA); In re
24 First Alliance Mortgage Co., 280 B.R. 246, 251 (C.D. Cal. 2002) (“A Section 17200
25 claim merely advances the TILA purpose of meaningful disclosure of credit terms by
26 providing increased penalties for non-disclosure.”); Plascencia v. Lending 1st
27 Mortgage, No. 07-4485, 2008 WL 4544357, at *7 (N.D. Cal. Sept. 30, 2008) (“[T]he
28 fact that the UCL allows a claim to be brought within four years . . . simply provides an

1 additional level of protection for consumers.”). Therefore, the longer statute of
2 limitations period under the UCL does not stand as an obstacle or conflict with federal
3 law but provides additional protection to the consumers. Moreover, courts have held
4 that the ILSA does not preempt state law. Mariott v. Harris, 368 S.E.2d 225, 232 (Va.
5 1988) (“The [ILSA] does not preempt state law”); Cranberry Hill Corp., 629 F. Supp.
6 at 631-32 (no evidence that Congress intended to preempt this area).

7 In Sonada v. Amerisave Mortgage Corp., the district court denied Defendant’s
8 motion to dismiss state law claims based on TILA concluding that there is no conflict
9 preemption. Sonada v. Amerisave Mortg. Corp., No. C-11-1803 EMC, 2011 WL
10 2690451, at *9 (N.D. Cal. July 8, 2011). In the case, the defendant argued that TILA
11 preempts the state law claims under the California Consumers Legal Remedies Act
12 (“CLRA”) and California Business & Professions Code section 17200. Id. at 5. The
13 defendant argued that there is obstacle preemption because the state causes of actions,
14 which provide for a shorter statute of limitations and more stringent remedies, frustrate
15 the purpose and enforcement of TILA. Id. at 6. In addressing obstacle preemption, the
16 district court looked at the federal statute as a whole and identified its purpose and
17 intended effects. Id. at 6 (quoting Crosby v. Nat’l Foreign Trade Council, 530 U.S.
18 363, 372-73 (2000)). According to Crosby, if “the purpose of the act cannot otherwise
19 be accomplished - if its operation within its chosen field else (sic) must be frustrated
20 and its provisions be refused their natural effect - the state law must yield to the
21 regulation of Congress.” Crosby, 530 U.S. at 373.

22 The Crosby court determined that TILA’s purpose is to protect consumers’
23 choices through full disclosure of credit terms and concluded that state law does not
24 conflict with TILA merely because it provides greater protection to consumers. Id. at
25 7. The court explained that if “absent a clear indication that these limitations
26 constituted an essential ‘purpose of the act [which] cannot otherwise be accomplished’
27 were state law to expand lender liability . . . the express limitations on TILA’s
28 preemption provision must be respected. Id. at 8. In conclusion, the court noted that

1 “[i]f states are not prohibited from enacting more expansive disclosure requirements,
2 it is difficult to see why they are barred from enacting a longer limitations period.” Id.
3 at 8. The Court finds the reasoning on Sonoda well reasoned and persuasive.

4 Similarly, in this case, the purpose of the ILSA is to protect land purchasers from
5 fraud that was prevalent in the land sales industry. H.R. Rep. 96-154 at 2346; see also
6 Olsen v. Lake Country, Inc., 955 F.2d 203, 205 (4th Cir. 1991). The ILSA was geared
7 toward purchasers living in the same state where the land was located or purchasers
8 living out of state who were persuaded to buy land they had never seen by sophisticated
9 sales people promising that land was a good investment, suitable for homesites and
10 easily resaleable. Id. at 2346. As in Sonoda, the longer UCL statute of limitations, in
11 this case, cannot be said to be in conflict or an obstacle to the accomplishment and
12 execution of the ILSA. It provides purchasers, the group that the ILSA intended to
13 protect, with additional protections with a longer statute of limitations.

14 Accordingly, the Court concludes that the ILSA does not preempt the UCL. In
15 this case, Defendants have not provided compelling authority for the Court to apply the
16 shorter federal statute of limitations over the broad statutory requirement of a four year
17 UCL statute of limitations. There is no legislative authority that vests exclusive
18 jurisdiction to the federal statute; no safe harbor; and no preemption. See Cel-Tech
19 Comms., 20 Cal. 4th at 183. While it facially appears that Defendants may be
20 attempting to revive an otherwise time-barred ILSA claim, or to go outside the
21 congressionally enacted limitations period of the ILSA, no bar or authority exists for
22 the Court to disregard the statute of limitations applicable to the state law cause of
23 action under the UCL.

24 Accordingly, after a more detailed review and analysis of this issue, the Court
25 GRANTS Plaintiffs’ motion for reconsideration of the Court’s order granting Tarsadia
26 Defendants’ motion for summary judgment on the “unlawful” prong of the UCL based
27 on the statute of limitations due to “clear error.” The unlawful prong of the UCL is
28 timely. Therefore, the Court DENIES Tarsadia Defendants’ motion for summary

1 judgment on the “unlawful” prong of the UCL.⁷ The Court now looks at whether the
2 UCL four year statute of limitations applies to the unfair and fraudulent prongs of the
3 UCL.

4 **2. Unfair and Fraudulent Prongs of the UCL**

5 Plaintiffs assert that even if the unlawful prong is barred by the underlying ILSA
6 statute of limitations, the fraudulent and unfair business practices proscribed by the
7 UCL is not time barred as it does not borrow from other statutes and are based on
8 practices that are likely to deceive. Tarsadia Defendants and Playground oppose
9 arguing that the underlying basis for the fraudulent and unfair is derived from the ILSA
10 so the unfair and fraudulent prongs should also be time barred. Here, the unfair and
11 fraudulent prongs of the UCL are not dependent on any time barred underlying statute.
12 In line with the reasoning above, the four year statute of limitations for the UCL applies
13 to these prongs even though they are based on the ILSA. Accordingly, the Court
14 DENIES Tarsadia Defendants and Playground’s motions for summary judgment on the
15 unfair and fraudulent prongs of the UCL based on the statute of limitations as timely.

16 Since the Court reconsidered the statute of limitations issue on the UCL claim
17 and concludes that the claim is timely, the Court now looks at the merits of the UCL
18 claim on Plaintiffs’ motion for partial summary judgment and Playground’s motion for
19 summary judgment.

20 **D. Merits of UCL Cause of Action**

21 **1. Plaintiffs’ Motion for Partial Summary Judgment on Unlawful Prong**
22 **of UCL**

23 Plaintiffs’ motion for partial summary judgment seeks judgment solely on the
24
25
26

27 ⁷Defendants do not move for summary judgment on the merits of the UCL claim.
28 In their motion, they only argue that the UCL claims fails because there was no
violation of the ILSA and the UCL claims are time barred by the underlying ILSA three
year statute of limitations. Therefore those claims remain.

1 “unlawful” prong of the UCL based on violations of 15 U.S.C. § 1703(a)(1).⁸ In
2 opposition, Tarsadia Defendants allege that Plaintiffs lack standing to assert a UCL
3 claim because Plaintiffs do not allege that they lost money or property as a result of the
4 alleged unlawful act.

5 California Business & Professions Code section 17204 provides that “a person
6 who has suffered injury in fact and has lost money or property as a result of the unfair
7 competition” can bring a cause of action under this provision. Cal. Bus. & Prof. Code
8 § 17204. “A plaintiff suffers an injury in fact for purposes of standing under the UCL
9 when he or she has: (1) expended money due to the defendant’s acts of unfair
10 competition. . . .(2) lost money or property . . . or (3) been denied money to which he
11 or she has a cognizable claim.” Hall v. Time, Inc., 158 Cal. App. 4th 847, 854-55
12 (2008). Economic injury may include a “diminishment in the value of some asset a
13 plaintiff possesses.” Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 336 (2011)
14 (citing Overstock.com, Inc. v. Gradient Analytics, Inc., 151 Cal. App. 4th 688, 716, 61
15 (2007) (a plaintiff who alleged that a defendant’s defamatory statements diminished its
16 assets and reduced its market capitalization adequately alleged UCL standing). In
17 addition, the phrase “as a result of” requires that the “alleged unfair competition must
18 have caused the plaintiff to lose money or property.” Hall, 158 Cal. App. 4th at 849.
19 Plaintiff’s economic injury requires a showing of a “causal connection or reliance.”
20 Kwikset Corp., 51 Cal. App. 4th at 326.

21 The parties dispute the causation element to support standing. Plaintiffs argue
22 that if they had known their right to rescind, they would have rescinded in the fall of
23 2007. Moreover, Plaintiffs and Defendants’ experts agree that the Units have lost more
24 than half their value. (Dkt. No. 81-64, Meade Decl., Ex. 54 (Pls’ Expert Appraisal

25
26 ⁸ Plaintiffs allege four violations of the ILSA. They include Defendants’ failure
27 to (i) file a Statement of Record with HUD, (ii) give each buyer an ILSA-compliant
28 disclosure document called a Property Report before they signed their Purchase
Contracts, (iii) include in the standardized Purchase Contract a 20-day cure provision,
and (iv) disclose the two-year right to rescind under the ILSA that results from the first
three items mentioned. It is undisputed that Tarsadia Defendants did not comply with
these provisions.

1 Report at 2) (“As of March 22, 2013 the prices of condo-hotel units at the Hard Rock
2 San Diego have declined by not less than 57%”); Dkt. No. 81-55, Meade Decl.,
3 Ex. 65 (Tarsadia Ds’ Expert Appraisal Report at 2).) In opposition, Tarsadia
4 Defendants contend that Plaintiffs sought to rescind was due to the downturn in the
5 economy and the tightening lending market and not because of the failure to disclose
6 the right to rescind. Defendants also note that the experts conclusion that the Units lost
7 more than half their value was not caused by the alleged ILSA violations.

8 According to the Beavers and the Kennas, they stated that if they had known
9 they had the option to cancel the contract prior to August 2007, they would have
10 canceled it. (Dkt. No. 81-23, Meade Decl., Ex. 13, D. Beaver Depo. at 127: 2-10; Dkt.
11 No. 81-24, Ex. 14, L. Beaver Depo. at 46:10-15; Dkt. No. 81-26, Ex. 16, K. Kenna
12 Depo. at 208:3-25; Dkt. No. 81-27, Ex. 17, V. Kenna Depo. at 63:19-66:3.) Veronica
13 Kenna testified that she and her husband were told they could not get their deposit back
14 and the only choice was to get a balloon loan and deal with it later. (Dkt No. 81-27,
15 Meade Decl., Ex. 17, V. Kenna Depo at 64:5-66:3.)

16 Steven Adelman and Abraham Aghachi testified that they requested a return of
17 the purchase money deposit but were told around July/August 2007 that they would
18 forfeit their deposit. (Dkt. No. 81-23, Meade Decl., Ex. 11, Adelman Depo. at 78:3-
19 80:3; Dkt. No. 81-22, Meade Decl., Ex. 12, Aghachi Depo. at 33:6-36:18; 40:2-10;
20 41:14-42:24.) Dinesh Gauba testified that in the summer of 2007, due to the loan
21 situation when it was difficult to obtain a loan, she was not happy and her choice was
22 to either close or lose her deposit. (Dkt. No. 81-25, Meade Decl., Ex. 15, Gauba Depo.
23 at 121:3-122:1.) She also wanted to get out of the contract about a year after closing
24 when she was losing money and not happy with the rental management program. (Id.
25 at 66:22-67:18.)

26 In opposition, Defendants argue that Plaintiffs wanted to rescind because they
27 had trouble getting financing in 2007 because of the changing economy. They also cite
28 to the testimony of Plaintiffs. Agachi testified that the economy went down in 2007.

1 (Dkt. No. 104-10, Vaz Decl., Ex. 1, Agachi Depo. at 123:6-125:10.) L. Beaver testified
2 that she was aware that the economy and housing market changed in 2007 and 2008.
3 (Dkt. No. 104-11, Vaz Decl., Ex. 8, L. Beaver Depo. at 28:6-19.) She also stated that
4 her husband said if he knew they had the right to rescind, he would have rescinded
5 because the market was not doing well. (Id. at 46:10-20.) D. Beaver testified that San
6 Diego was affected by the housing crash in 2007 and he wanted to cancel the contract
7 due to the market. (Dkt. No. 104-11, Ex. 9, D. Beaver Depo. at 82:18-83:8; 131: 9-23.)
8 Adelman stated that around the time of [the collapse of] Bear Stearns, everything was
9 crashing and he felt that the Hard Rock Unit was a bad investment and he tried to get
10 out of the contract. (Dkt. No. 104-10, Ex. 2, Adelman Depo. at 224:4-225:10.) He
11 stated that he realized the economy was crashing when the lenders decided they would
12 not lend money. (Id.)

13 Veronica Kenna testified that had she obtained conventional financing, and not
14 a balloon loan, she would have been okay with the purchase. (Dkt. No. 104-12,
15 Hughes Decl., Ex. 14, V. Kenna Depo. at 108:16-109:9.) The balloon loan was a “dark
16 cloud over our head.” (Id. at 109:1-2.) She and her husband felt trapped into signing
17 something they were not ready for. (Id. at 116:12-23.) Kevin Kenna also testified that
18 he was not happy with the possibility of losing hundred thousand dollars that was
19 leveraged on his home. (Id., Ex. 15, K. Kenna Depo. at 58:4-59:11.) He was given the
20 option to take the loan, and then refinance in the next five years. (Id. at 59 at 6-11.)

21 Dinesh Gauba stated that in 2007 a lot changed in financing that year. (Id., Ex.
22 21, Gauba Depo. at 90:9-92:16.) By the time she was to obtain financing, in the
23 summer of 2007, the requirements had all changed. (Id. at 90:21-21:3.) She was told
24 that if she didn’t close, she would lose her deposit. (Id. at 92:1-6.) By the time of
25 closing, it was much harder to get financing and she could not get out of the contract.
26 (Id. at 147:25-148:1.) Then when she closed, the rental split was not working because
27 she was losing money every month. (Id. at 148:1-5.) She said that she would have
28 gotten out of the rental agreement and the mortgage because she had to put up more

1 money since loan guidelines had changed. (Id. at 149:1-14.) She stated that the change
2 in rates was not specifically Tarsadia’s fault but due to the condo hotel business in
3 general, the mortgage terms and the rental management agreement terms. (Id. at 149:7-
4 18.)

5 While many factors affected the loss of value in property, including the economy
6 and the housing market, Tarsadia Defendants’ failure to disclose and the alleged
7 misrepresentation as to their rescission rights prevented Plaintiffs from rescinding the
8 contract, a right they had under the ILSA. As a result, they were forced to close on the
9 Units with increased payments and/or with a balloon payment loan due to changes in
10 the loan guidelines and as a result, owned a Unit that lost significant value. The Court
11 concludes that Plaintiffs have sufficiently alleged standing to bring an action under the
12 unlawful prong of the UCL. Since Plaintiffs have demonstrated an absence of a
13 genuine issue of material fact as to the elements of the “unlawful” prong of the UCL
14 as to Tarsadia Defendants, the Court GRANTS Plaintiffs’ motion for partial summary
15 judgment on the unlawful prong of the UCL.

16 **2. Defendant Playground’s Motion for Summary Judgment on the**
17 **Unfair and Fraudulent Prongs**

18 **i. Unfair**

19 Playground argues that the UCL claim for unfair practices fails because it
20 requires a violation of a duty which Plaintiffs have failed to demonstrate. (Dkt. No.
21 98.) Plaintiffs assert that Playground, as the seller’s real estate agent, had a duty to
22 disclose to buyers information related to rescission rights which was wrongfully
23 concealed and Playground was aware no later than June 2007 that the purchase
24 contracts potentially violated the ILSA.

25 The California appellate court opinions differ as to what constitutes an “unfair”
26 business practice under the UCL ever since Cel-Tech was decided. Bardin v.
27 Daimlerchrysler Corp., 136 Cal. App. 4th 1255, 1264-75 (2006) (noting the split in
28 authority). In Cel-Tech, the California Supreme Court narrowed the term “unfair”

1 concluding that the prior court of appeal’s definition was “too amorphous” and
2 provided “too little guidance to courts and businesses.” Cel-Tech, 20 Cal. 4th at 184-
3 85. In Cel-Tech, the California Supreme Court adopted the following test, “[w]hen a
4 plaintiff who claims to have suffered injury from a direct competitor’s ‘unfair’ act or
5 practice invokes section 17200, the word ‘unfair’ in that section means conduct that
6 threatens an incipient violation of an antitrust law, or violates the policy or spirit of one
7 of those laws because its effects are comparable to or the same as a violation of the law,
8 or otherwise significantly threatens or harms competition.” Id. at 186-87. Cel-Tech
9 explicitly stated that its “unfair” test is limited to anti-competitive practices and not
10 actions by consumers. Id. at 187 n. 12.

11 As a result, California appellate courts have been divided as to which test of
12 “unfair” applies to consumer cases. Lozano v. AT&T Wireless Servs., Inc., 504 F.3d
13 718, 736 (9th Cir. 2007). Some courts define ‘unfair’ as “when it offends an
14 established public policy or when the practice is immoral, unethical, oppressive,
15 unscrupulous or substantially injurious to consumers” and requires the court to “weigh
16 the utility of the defendant’s conduct against the gravity of the harm to the alleged
17 victim.” South Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal. App. 4th 861,
18 887 (1999); see also Smith v. State Farm Mut. Auto. Ins. Co., 93 Cal. App. 4th 700,
19 719 (2001). Another line of cases holds that the public policy which is a predicate to
20 a consumer unfair competition action under the “unfair” prong of the UCL must be
21 tethered to specific constitutional, statutory, or regulatory provisions. Gregory v.
22 Albertson’s, Inc., 104 Cal. App. 4th 845, 853 (2002). A third line of cases adopted the
23 three factor test set forth in section 5 of the Federal Trade Commission Act, 15 U.S.C.
24 § 45(n) where “(1) [t]he consumer injury must be substantial; (2) the injury must not
25 be outweighed by any countervailing benefits to consumers or competition; and (3) it
26 must be an injury that consumers themselves could not reasonably have avoided.”
27 Camacho v. Automobile Club of Southern California, 142 Cal. App. 4th 1394, 1403
28 (2006).

1 The Ninth Circuit concluded that two tests, the Cel-Tech test where the
2 unfairness is tied to a “legislatively declared” policy, or the former balancing test under
3 South Bay, would apply to consumer cases. Lozano, 504 F.3d at 736 (rejecting FTC
4 test as applied in Camacho v. Automobile Club of S. California, 142 Cal. App. 4th
5 1394 (2006) to consumer cases). In Lozano, the court concluded that the district court
6 did not apply the wrong standard by relying on the balancing test from South Bay. Id.

7 In another Ninth Circuit case, the court conducted an analysis of the unfair
8 prong. Davis v. HSBC Bank Nevada, N.A., 691 F.3d 1152, 1169-70 (9th Cir. 2012).
9 The Ninth Circuit noted that the appellate courts are divided on the definition of
10 “unfair” and whether the Cel-Tech standard should apply to UCL actions brought by
11 consumers. Id. at 1170. The Ninth Circuit did not need to resolve that question
12 because the plaintiff failed to state a claim under both definitions: the new definition
13 in Cel-Tech and the former balancing test under South Bay. Id. at 1170. In analyzing
14 the new definition, the court noted that the plaintiff did not advance any claim that the
15 complained action threatened to violate the letter, policy, or spirit of the antitrust laws,
16 or that it harms competition. Id. at 1170. As to the balancing test, Plaintiff did not
17 allege that the acts were against public policy, immoral, unethical, oppressive, or
18 unscrupulous. Id.

19 The Court applies the Ninth Circuit’s analysis in Davis and Lozano to this case.
20 Plaintiffs seeks to apply the tethering test.⁹ (Dkt. No. 69, TAC ¶ 140; see also Dkt. No.
21 43-1, Ps’ Mot. For Leave to File TAC at 7 (“TAC also strengthens the existing UCL
22 ‘unfair prong’ claim against Playground by clarifying that this claim is not based on
23 negligence but is tethered to Playground’s violation of its statutory duty as a real estate
24 agent to ‘disclose all facts known to the [it] materially affecting the value or desirability
25 of the property that are not known to, or within the diligent attention and observation

26
27 ⁹In Plaintiffs’ opposition to Playground’s motion, in a footnote they raise an
28 alternative test for a UCL “unfair” claim laid out in Camacho v. Automobile of S.
California, 142 Cal. App. 4th 1394, 1403 (2006). However, Plaintiffs do not provide
any analysis of this standard to this case. Moreover, the Ninth Circuit rejected that
approach to consumer cases. Lozano, 504 F.3d at 736.

1 of, the parties.’ Cal. Civ. Code § 2079.16.”) Plaintiffs allege that Playground had a
2 duty to disclose to buyers all facts affecting the value or desirability of the Units as well
3 as duties of honesty, fair dealing and good faith to all purchasers. They do not allege
4 or show that the failure to disclose or affirmative misrepresentation is predicated on a
5 public policy and that the conduct threatened to violate the letter, policy, or spirit of the
6 antitrust laws or that it harms competition. See Gregory, 104 Cal. App. 4th at 854.
7 Plaintiffs only argue that the unfair practices are tethered to the disclosure policies, not
8 public policy. (See Dkt. No. 107 at 20.) Moreover, Plaintiffs have not alleged or
9 demonstrated that such acts are against public policy, immoral, unethical, oppressive,
10 or unscrupulous. See South Bay Chevrolet, 72 Cal. App. 4th at 887.

11 Accordingly, Plaintiffs have failed to demonstrate an issue of material disputed
12 fact and the Court GRANTS Playground’s motion for summary judgment on the
13 “unfair” prong of the UCL.

14 **ii. Fraudulent**

15 Playground argues that since there was no duty, or even if there was a duty, there
16 was no violation of any duty, the fraudulent prong fails. Plaintiffs oppose contending
17 Playground had a common law duty to disclose all facts known to it materially
18 affecting the value or desirability of the property that were not known to, or within the
19 diligent attention and observation of the buyers.

20 Distinct from common law fraud, fraudulent violation under the unfair
21 competition statute requires only a showing that “members of the public are likely to
22 be deceived.” Berryman v. Merit Prop. Mgmt., Inc., 152 Cal. App. 4th 1544, 1556
23 (2007). There can be a violation without “actual deception, reasonable reliance and
24 damage.” Daugherty v. American Honda Motor Co., Inc., 144 Cal. App. 4th 824, 838
25 (2006). In alleging a failure to disclose material facts, plaintiff must show that the
26 defendant had a duty to disclose those facts. Berryman, 152 Cal. App. 4th at 1557
27 (“Absent a duty to disclose, the failure to do so does not support a claim under the
28 fraudulent prong of the UCL.”); see also Buller v. Sutter Health, 160 Cal. App. 4th 981,

1 986 (2008). Additionally, the UCL “imposes an actual reliance requirement on
2 plaintiffs prosecuting a private enforcement action under the UCL’s fraud prong.” In
3 re Tobacco II Case, 46 Cal.4th 298, 326 (2009). In other words, the plaintiff “must
4 allege he or she was motivated to act or refrain from action based on the truth or falsity
5 of a defendant’s statement, not merely on the fact it was made.” Kwikset Corp., 51
6 Cal.4th at 327 n. 10.

7 Playground asserts there was no duty to disclose obligations under the ILSA as
8 it was not involved in any issues related to the ILSA and those issues and the drafting
9 of the contract were left to Tarsadia Defendants and their counsel, Greenberg Traurig.
10 Moreover, even if there were a duty, Playground did not know or was not aware about
11 any ILSA violation. Plaintiffs oppose arguing there was a duty to disclose information
12 about their rescission rights and Playground knew at the earliest in June 2007.

13 If a seller’s real estate agent is aware of facts materially affecting the value or
14 desirability of the property which are known or accessible only to him, he or she has
15 a duty to disclose them to the buyer. Holmes v. Summer, 188 Cal. App. 4th 1510,
16 1518-19 (2010); Cal. Civ. Code § 2079.16. A real estate agent may also be liable for
17 nondisclosure since the conduct in the transaction “amounts to a representation of the
18 nonexistence of the facts which he has failed to disclose.” Id. at 1519. A seller’s real
19 estate agent owes no duty to verify seller’s representations but only to “act in good faith
20 and not convey the seller’s representations without a reasonable basis for believing
21 them to be true.” Robinson v. Grossman, 57 Cal. App. 4th 634, 644 (1997).

22 Based on caselaw, Playground, as the seller’s real estate agent, had a duty to
23 disclose all facts known to it that materially affected the value or desirability of the
24 property that were not known to the buyer. The issue is whether Playground knew
25 about the ILSA violations.

26 Plaintiffs direct the Court to a June 20, 2007 letter from a purchaser, David
27 McCain, to Ed Coss, Tarsadia’s counsel, seeking to rescind the contract based on
28 violations of the ILSA. (Dkt. No. 81-54, Meade Decl., Ex. 44.) In response, on June

1 25, 2007, Brent McLean, a Tarsadia and Playground employee, downloaded a Florida
2 Bar Journal article entitled “The Interstate Land Sales Full Disclosure Act’s two-year
3 completion exemption.” (Dkt. No. 81-44, Meade Decl., Ex. 34.) According to
4 Plaintiffs, the article explained ILSA’s applicability, ILSA’s basic requirements, and
5 why Defendants’ reliance on the exemption was misplaced. On June 25, 2007, McLean
6 drafted memoranda discussing the McCain issue and concluded that the purchase
7 contract was exempt under the ILSA, and therefore, the ILSA was not violated. (Dkt.
8 No. 81-58, Meade Decl, Ex. 48; Dkt. No. 81-59, Meade Decl., Ex. 49.) Playground’s
9 outside attorney, Mike Smith, and Playground’s representatives Brian Bruce, Jason
10 Dolker, Trisha Peebles, Jana Martin, and Neil Vinet were all consulted before the
11 memorandum was prepared. (Dkt. No. 81-58, Meade Decl., Ex. 48 at 2; Dkt. No. 81-
12 59, Meade Decl., Ex. 49 at 2.) Subsequently, on July 6, 2007, General Counsel Coss
13 wrote a letter to McCain’s attorney concerning the alleged ILSA violations indicating
14 that she failed to state the basis of the alleged violation and that the ILSA would not
15 apply to McCain’s contract. (Dkt. No. 81-55, Meade Decl., Ex. 45 at 2-3.) Plaintiffs
16 argue that these facts demonstrate that Mike Smith, Playground’s attorney and
17 Playground executives were involved in the determination on whether the ILSA
18 applied. While Plaintiffs’ facts, in opposition, demonstrate that Playground was aware
19 of the ILSA issue; they do not show that Playground knew that there was a violation
20 of the ILSA. The Florida Bar Journal article concerned Florida law and discussed the
21 requirements and prohibitions under the ILSA along with exemptions, exclusion and
22 penalties. (See Dkt. No. 84-44.) It does not follow that the article would have
23 informed Playground that Tarsadia Defendants’ reliance on the exemption was
24 misplaced. Accordingly, the Court GRANTS Playground’s motion for summary
25 judgment on the fraudulent prong of the UCL.

26 ////

27 ////

28 ////

1 **E. Whether Scierter is Required to Establish a Violation of ILSA’s Anti-Fraud**
2 **Provisions**

3 Plaintiffs argue that new authority, the Pre-Hearing Brief filed by the Consumer
4 Financial Protection Bureau in In re 3D Resorts-Bluegrass, LLC, Administrative
5 Proceeding File No. 2013-CFPB-0002 (Dkt. No. 138-1, Ex. A), filed on August 7,
6 2013, which was not available to Plaintiffs at the time of briefing demonstrates that
7 scienter is not an element of an ILSA fraud claim and the Court should deny
8 Defendants’ motion for summary judgment as to Plaintiffs’ ILSA fraud cause of action.
9 Tarsadia Defendants argue that the Pre-Hearing Brief does not constitute new or
10 controlling law to justify reconsideration of the Court’s prior order.

11 In the prior order, the Court held that Plaintiffs did not demonstrate the elements
12 of fraud as to knowledge of falsity and intent to defraud. (Dkt. No. 128.) The Court
13 concluded that the facts “do not show that Defendants knew the representations or
14 affirmative representations were false when made. Further, the facts do not show
15 Defendants’ intent to deceive Plaintiffs. Therefore, the facts do not create a genuine
16 issue of fact that Defendants knew or recklessly disregarded the probability that the
17 ILSA applied to the Hard Rock Units and whether they intended that the purchasers
18 would rely on those false statements and omissions.” (Dkt. No. 128 at 31.)

19 In the Pre-Hearing Brief, the CFPB wrote, “[s]imilarly, proof of scienter is not
20 required to establish an ILSA violation” and drops a foot note explaining its position.
21 (Dkt. No. 138-2 at 9 and n. 7.) The footnote cites to published and unpublished district
22 court cases from 1980 to 1993.

23 “An agency’s interpretation may merit some deference whatever its form, given
24 the ‘specialized experience and broader investigations and information’ available to the
25 agency, and given the value of uniformity in its administrative and judicial
26 understandings of what a national law requires.” U.S. v. Mead Corp., 533 U.S. 218,
27 234 (2001) (quoting Skidmore v. Swift, 323 U.S. 134, 139–40 (1944)). The Supreme
28 Court announced in Skidmore, that “[w]e consider that the rulings, interpretations and

1 opinions of the Administrator under this Act, while not controlling upon the courts by
2 reason of their authority, do constitute a body of experience and informed judgment to
3 which courts and litigants may properly resort for guidance. The weight of such a
4 judgment in a particular case will depend upon the thoroughness evident in its
5 consideration, the validity of its reasoning, its consistency with earlier and later
6 pronouncements, and all those factors which give it power to persuade, if lacking
7 power to control.” Skidmore, 323 U.S. at 140.

8 In Price, the Ninth Circuit stated that reasonable agency interpretation can carry
9 “at least some added persuasive force.” Price v. Stevedoring Servs. of America, 697
10 F.3d 820, 830-832 (9th Cir. 2012). In the case, the Court held that the Director’s
11 interpretation of the Longshore Act may merit Skidmore respect but only to the extent
12 that they exhibit certain characteristics as described in Skidmore. Id. at 830-833 and
13 n. 6. Interpretations contained in opinion letters are entitled to respect under Skidmore
14 but only to the extent that those “interpretations have the ‘power to persuade.’” San
15 Luis & Delta–Mendota Water Auth. v. United States, 672 F.3d 676, 708 (9th Cir.
16 2012). “Special Skidmore deference to agency litigating positions is more likely to
17 turn on factors such as the consistency of its position and its application of that position
18 through administrative practice than on the quality of its court advocacy.” Price, 697
19 F.3d at 832 n. 8.

20 In Price, the Court concluded that the Director was entitled to Skidmore respect
21 “as to the proper rate of interest, first because some of his arguments are persuasive and
22 second because the agency’s manual and practice have for some time consistently
23 advanced a reasonable position as to that rate. But the Director was not entitled to
24 Skidmore respect as to whether the interest should be simple or compound, because his
25 position on that issue is simply unpersuasive, notwithstanding its inclusion in the
26 agency’s manual and the Director’s consistent application of simple interest for some
27 time.” Id.

28 With respect to the inquiry whether the interpretation does not reflect the

1 agency's fair and considered judgment on the matter in question, "[i]ndicia of
2 inadequate consideration include conflicts between the agency's current and previous
3 interpretations; signs that the agency's interpretation amounts to no more than a
4 convenient litigating position; or an appearance that the agency's interpretation is no
5 more than a post hoc rationalization advanced by an agency seeking to defend past
6 agency action against attack." Price, 697 F.3d at 830 n. 4.

7 In this case, Plaintiffs merely argue that the Pre-Hearing Brief is sufficient to
8 demonstrate that the CFPB changed its position on whether scienter is required under
9 the anti-fraud provisions of the ILSA. However, Plaintiffs do not satisfy the standard
10 articulated in Skidmore to demonstrate that such deference should be accorded in this
11 case. They do not provide any facts or arguments that the Director's judgment on this
12 issue reveals "the thoroughness evident in its consideration, the validity of its
13 reasoning, its consistency with earlier and later pronouncements, and all those factors
14 which give it power to persuade, if lacking power to control." Skidmore, 323 U.S. at
15 140. Therefore, the Court will not accord Skidmore deference to the Pre-Hearing Brief.
16 The Court also notes while Plaintiffs argue that Skidmore deference should be accorded
17 the Pre-Hearing Brief, such deference does not demonstrate "an intervening change in
18 the *controlling* law" sufficient to justify reconsideration of this issue. The Pre-Hearing
19 Brief may have the power to persuade, but is not controlling law.

20 Furthermore, Tarsadia Defendants argue and the Court agrees that Plaintiffs
21 cannot seek reconsideration of an issue when the issue could reasonably have been
22 raised earlier in the litigation. While Plaintiffs' counsel asserts he did not obtain the
23 brief until around October 16, 2013 after the Court issued its Order, the cases cited in
24 support of the CFBP's position was available to Plaintiffs at the time of their briefing.¹⁰

25
26 ¹⁰Defendants note that courts are split on whether or not reliance is a required
27 element of an ILSA anti-fraud claim citing Ivar v. Elk River Partners, LLC, 705 F.
28 Supp. 2d 1220, 1236-38 (D. Colo. 2010); Garcia v. Santa Maria Resort, Inc., 528 F.
Supp. 2d 1283, 1296 (S.D. Fla. 2007). (Dkt. No. 146, Ds' Opp. at 29 n. 5.) Therefore,
the argument that scienter is not a requirement for the anti-fraud claim could have been
argued on summary judgment.

1 Moreover, Defendants argue and the Court agrees that Plaintiffs conceded that
2 scienter was a requirement of the anti-fraud provision under the ILSA in its opposition
3 to Tarsadia Defendants' motion for summary judgment.¹¹ (Dkt. No. 103 at 23:27-28;
4 24:15-22.) Lastly, even if scienter is not a required element, Plaintiffs did not
5 demonstrate a material issue of fact as to knowledge of falsity; therefore, the causes of
6 action for fraud would still fail. Accordingly, the Court DENIES Plaintiffs' motion for
7 reconsideration of the fraud causes of action.

8 **F. Plaintiffs' Request for Judicial Notice**

9 Plaintiffs filed a request for judicial notice of the Pre-Hearing Brief filed by the
10 Consumer Financial Protection Bureau in In re 3D Resorts-Bluegrass, LLC,
11 Administrative Proceeding File No. 2013-CFPB-0002. (Dkt. No. 138-1, Ex. A.)
12 Tarsadia Defendants object arguing that a Pre-Hearing Brief is a non-final, unapproved,
13 and un-adopted agency recommendation and is not subject to judicial notice.

14 Tarsadia Defendants also filed a request for judicial notice of the docket In re 3D
15 Resorts-Bluegrass, LLC, Administrative Proceeding File No. 2013-CFPB-0002; the
16 Order Cancelling Hearing in the case filed on October 8, 2013; and the Consent Order
17 in that case filed on December 3, 2013. (Dkt. No. 146-1.)

18 Federal Rule of Evidence 201(b)(2) allows judicial notice of a fact that is "not
19 subject to reasonable dispute in that it is . . . (2) capable of accurate and ready
20 determination by resort to sources whose accuracy cannot reasonably be questioned."
21 Fed. R. Evid. 201(b)(2). Courts can take judicial notice of records and reports of
22 administrative bodies." Interstate Natural Gas Co. v. Southern California Gas Co., 209
23 F.2d 380, 385 (9th Cir. 1953). Courts can also take judicial notice of state court
24 opinions and briefs filed in those proceedings. Holder v. Holder, 305 F.3d 854, 866
25 (9th Cir. 2002). Accordingly, the Court GRANTS both parties' requests for judicial
26 notice.

27
28 ¹¹ Plaintiffs argue that they did not concede that scienter is a required element;
however, they cite to their brief in their motion for class certification which was not
before the Court on the motions for summary judgment.

1 **G. Evidentiary Objections**

2 Tarsadia Defendants filed evidentiary objections to the declaration of Michael
3 Shrag. (Dkt. No. 146-3.) Shrag filed a declaration pursuant to Local Rule 7.1(i)(1)
4 requiring a movant to provide the facts and circumstances surround its application for
5 reconsideration. The declaration merely states Plaintiffs’ arguments in support of the
6 motion for reconsideration and is not used as evidence. Accordingly, the Court
7 overrules Tarsadia Defendant’s evidentiary objections.

8 **Conclusion**

9 Based on the above, the Court GRANTS in part and DENIES in part Plaintiffs’
10 motion for reconsideration. Specifically, the Court GRANTS Plaintiffs’ motion for
11 reconsideration on the claims under the UCL and concludes that the UCL cause of
12 action is governed by a four year statute of limitations and DENIES Plaintiffs’ motion
13 for reconsideration that scienter is required to establish a violation of the ILSA’s anti-
14 fraud provisions. As such, the Court also GRANTS Plaintiffs’ motion for summary
15 judgment on the “unlawful prong” of the UCL; and GRANTS Playground’s motion for
16 summary judgment on the “unfair” and “fraudulent” prongs of the UCL.

17 **II.**

18 **NEGLIGENCE CAUSE OF ACTION ON DEFENDANTS’ MOTIONS FOR**
19 **SUMMARY JUDGMENT**

20 Before the Court is also Tarsadia Defendants and Playground’s motion for
21 summary judgment on the remaining negligence cause of action in the Third Amended
22 Complaint. On October 16, 2013, the Court denied Plaintiffs’ motion for summary
23 judgment and granted in part and denied in part Tarsadia Defendants and Defendant
24 Playground’s motions for summary judgment. (Dkt. No. 128.) The Court granted all
25 Defendants’ motions for summary judgment but denied Defendants’ motions for
26 summary judgment on the negligence cause of action because no party addressed the
27 existence of a duty and breach of that duty based on the underlying ILSA disclosure
28 provision that was not only time barred but dismissed with prejudice. The Court

1 directed the parties to provide supplemental briefing on this issue.

2 On November 5, 2013, Playground and Tarsadia Defendants filed their
3 supplemental briefs. (Dkt. Nos. 134, 135.) On November 7, 2013, Plaintiffs filed their
4 supplemental brief. (Dkt. No. 136.) Based on the briefs, supporting documentation
5 and the applicable law, the Court GRANTS Tarsadia Defendants and Playground's
6 motions for summary judgment on the claim for negligence.

7 **Discussion**

8 In the supplemental briefing, Tarsadia Defendants argue that the negligence
9 claim is time barred for three reasons. First, the alleged "duty" arose from Defendants
10 failure to disclose a two year rescission right under 15 U.S.C. § 1703(d)(2) and as a
11 matter of law, a plaintiff cannot prevail on a state law cause of action based solely on
12 an alleged violation of the already dismissed federal statute. Second, they contend that
13 similar to the Court's analysis on the section 17200 claim, the state statute of
14 limitations cannot be used to revive an otherwise time-barred ILSA claim. Third, they
15 assert that the ILSA preempts the state law negligence claim because the state law
16 conflicts with the Congressional to impose a three year time bar from the date of
17 signing the contract. Playground argues that a state law cause of action premised on
18 a violation of federal law is subject to the federal statute of limitations which in this
19 case would be three years from the signing of the contract. In opposition, Plaintiffs
20 contends that the only way that the federal statute of limitations would apply is if the
21 claim is preempted by federal law. Since the ILSA does not preempt state law, the
22 Court may consider the negligence cause of action even if based on a time barred
23 federal claim.

24 As to preemption, as decided herein above, the Court finds that the ILSA does
25 not preempt state negligence law. Before addressing the remaining contentions, the
26 Court looks at the substantive elements of negligence.

27 The elements of a negligence cause of action are: (a) a legal duty to use due care;
28 (b) a breach of such legal duty; and (c) the breach as the proximate or legal cause of the

1 resulting injury. Ladd v. County of San Mateo, 12 Cal. 4th 913, 917 (1996). The
2 existence of a duty is a question of law for the court. Ky. Fried Chicken of Cal. v.
3 Superior Court, 14 Cal. 4th 814, 819 (1997). A federal statute or regulation may be
4 adopted as a standard of care in a negligence action. Di Rosa v. Showa Denko K.K.,
5 44 Cal. App. 4th 799, 808 (1996).

6 In this case, Plaintiffs have propounded a *per se* negligence theory based on the
7 claim Defendants violated the ILSA. Plaintiffs identify three duties that were violated:
8 (1) a duty to disclose Plaintiffs’ two-year right to rescind in the Public Report; (2) a
9 duty to replace the language in the Contract concerning the three-day right to rescind
10 with language disclosing this two-year right, and (3) a duty to otherwise disclose to
11 Plaintiffs their two-year right to rescind. (Dkt. No. 69, TAC ¶ 130.)

12 Under California’s negligence *per se* doctrine codified in California Evidence
13 Code section 669, “violation of a statute gives rise to a presumption of negligence in
14 the absence of justification or excuse, provided that the ‘person suffering . . . the injury.
15 . . . was one of the class of persons for whose protection the statute . . . was adopted.’”
16 Walters v. Sloan 20 Cal. 3d 199, 206-207 (1977). Under section 669, a plaintiff is
17 required to prove the following four elements to establish negligence *per se*: a plaintiff
18 must show that “(1) defendant violated a statute, ordinance or regulation of a public
19 entity, (2) the violation proximately caused his injury, (3) the injury resulted from an
20 occurrence of the nature which the statute was designed to prevent; (4) he was one of
21 the class of persons for whose protection the statute was adopted.” Sierra-Bay Fed.
22 Land Bank Assn. v. Superior Court, 227 Cal. App. 3d 318, 336 (1991) (citing
23 Capolungo v. Bondi, 179 Cal. App. 3d 346, 349-50 (1986)). The first two elements are
24 generally considered questions for the trier of fact; however the last two elements are
25 determined by the trial court as a matter of law, as they involve statutory interpretation.
26 Id.

27 Application of the doctrine of negligence *per se* means that the court has adopted
28 the conduct prescribed by the statute as the standard of care for a reasonable person in

1 the circumstances, and a violation of the statute is presumed to be negligence. Alcala
2 v. Vazmar Corp. 167 Cal. App. 4th 747, 755 (2008). Negligence *per se* is simply a
3 codified evidentiary doctrine, and thus the doctrine of negligence *per se* does not
4 establish tort liability. People of California v. Kinder Morgan Energy Partners, L.P.,
5 569 F. Supp. 2d 1073, 1087 (S.D. Cal. 2008). To apply negligence *per se* is not to state
6 an independent cause of action under California law because the doctrine does not
7 provide a private right of action for violation of a statute. Id.; Coppola v. Smith, 935
8 F. Supp. 2d 993 (E.D. Cal. 2013). Under California law, an underlying claim of
9 ordinary negligence must be viable before the presumption of negligence *per se* based
10 on the violation of a statute, regulation, or ordinance may be employed. Rosales v. City
11 of Los Angeles, 82 Cal. App. 4th 419, 430 (2000); Spencer v. DHI Mortg. Co., Ltd.,
12 642 F. Supp. 2d 1153, 1162 (E.D. Cal. 2009).

13 The presumption arising from the doctrine of negligence *per se* is dependent and
14 requires an analysis of the underlying causes of action pursuant to 15 U.S.C. §
15 1703(a)(1)(c) and 15 U.S.C. § 1703(d)(2). In the instant case, Plaintiffs acknowledged
16 these causes of action are time barred and the Court has dismissed with prejudice the
17 causes of action under 15 U.S.C. § 1703(a)(1)(c) and § 1703(d)(2). (Dkt. No. 20.)

18 Neither party has presented a case, by a California court or the Ninth Circuit,
19 where the standard of care is premised on a time barred federal statute such as the
20 ILSA. Plaintiffs acknowledge that the California legislature has not addressed whether
21 it intended a shorter limitations period to apply to negligence claims that rely on other
22 sources of law to establish a standard of care.

23 The Court concludes that the reasoning of the California Supreme Court in
24 Cortez in the context of the section 17200 statute of limitations does not fully apply to
25 negligence based claims. Contrary to the broad reach of the UCL statute of limitations,
26 which the Court concludes can be based on an underlying time barred federal statute,
27 Plaintiffs have not demonstrated that the negligence cause of action also has such a
28 broad reach. The statute of limitations for the negligence cause of action provides a

1 three year statute of limitations for “[a]n action for relief on the ground of fraud or
2 mistake. The cause of action in that case is not deemed to have accrued until the
3 discovery, by the aggrieved party, of the facts constituting the fraud or mistake.” See
4 Cal. Civ. Proc. § 338(d). In this statute, there is no language, as in the UCL, that a
5 negligence cause of action applies to “[a]ny action to enforce any cause of action.” See
6 Cal. Bus & Prof. Code § 17208. Moreover, no California court has issued rulings such
7 as Cel-Tech or Cortez that defines the broadness of the application of a negligence
8 cause of action. While the parties analyze the negligence cause of action similar to the
9 UCL cause of action, the Court concludes that the negligence and UCL causes of action
10 are distinct.

11 As such, Plaintiffs are unable to prove a violation of the federal statutes as they
12 are time barred. See Cal. Evid. Code § 669. Therefore, Plaintiffs cannot prove the
13 violation of any standard of care for a reasonable person, and the negligence cause of
14 action fails. Accordingly, the Court GRANTS Tarsadia Defendants and Playground’s
15 motions for summary judgment on the negligence cause of action.

16 **III.**

17 **CONCLUSION**

18 Based on the above, the Court GRANTS in part and DENIES in part Plaintiffs’
19 motion for reconsideration. Specifically, the Court GRANTS Plaintiffs’ motion for
20 reconsideration that California’s Unfair Competition Law, California Business &
21 Professions Code section 17200 *et seq.* cause of action is governed by a four year
22 statute of limitations and DENIES Plaintiffs’ motion for reconsideration that scienter
23 is required to establish a violation of the ILSA’s anti-fraud provisions. The Court also
24 GRANTS Plaintiffs’ motion for summary judgment on the “unlawful prong” of the
25 UCL, and GRANTS Playground’s motion for summary judgment on the “unfair” and

26 ////
27 ////
28 ////

1 “fraudulent” prongs of the UCL. The Court further GRANTS Tarsadia Defendants’ and
2 Playground’s motion for summary judgment on the negligence cause of action.

3 IT IS SO ORDERED.

4 DATED: July 1, 2014

5 
6 HON. GONZALO P. CURIEL
7 United States District Judge
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28