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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

DC COMICS,

Plaintiff,

v.

PACIFIC PICTURES CPRORATION; IP
WORLDWIDE, LLD; IPW, LLC; MARC
TOBEROFF; MARK WARREN PEARY;
JEAN ADELE PEAVY; LAURA SIEGEL
LARSON; and DOES 1–10, inclusive,

Defendants.

Case No. 2:10-cv-03633-ODW(RZx)

**ORDER GRANTING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT IN PART
[577] AND DENYING DC'S MOTION
FOR SUMMARY JUDGMENT [588]**

I. INTRODUCTION

On October 17, 2012, this Court ruled in Plaintiff DC Comics' favor on its first and third claims for declaratory relief, effectively nullifying the termination notices Joe Shuster's heirs had filed and served on DC. While that order is pending on appeal, Defendants now move for summary judgment on DC's remaining state-law interference claims. In response, DC has cross-moved for summary judgment on its sixth claim for declaratory relief under California's unfair-competition law. The Court **GRANTS** Defendants' motion as to DC's fourth and fifth claims and **DENIES**

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1 the parties’ cross-motions on DC’s sixth claim pending resolution of Defendants’
2 appeal.¹

3 II. FACTUAL BACKGROUND

4 Writer Jerome Siegel and illustrator Joe Shuster joined forces in the 1930s to
5 create the character that would eventually become Superman. In 1937, they
6 surrendered their copyright interests in Superman to DC Comics when they joined DC
7 as independent contractors. Factually, this action weaves together the separate but
8 often-convergent tales of the Siegel and Shuster heirs’ attempts—with the help of
9 producer and attorney Marc Toberoff—to regain those Superman rights over the last
10 16 years. DC’s fourth claim focuses on the Shuster heirs’ efforts, while its fifth claim
11 confronts the Siegel heirs’ dealings.

12 A. The Shuster Termination

13 On October 2, 1992, following Joe Shuster’s death earlier in the year, DC
14 entered into an agreement with Shuster’s surviving siblings, Frank Shuster and Jean
15 Adele Peavy (the “1992 Agreement”). (Undisputed Fact (“UF”) 1.) Under the
16 Agreement, Frank and Jean agreed to “settle[] all claims to any payments or other
17 rights or remedies” they may have had “under any other agreement or otherwise” in
18 exchange for DC’s “agreement to pay [them], collectively, a total of \$25,000 a year.”
19 (Adams Decl. Ex. A.)

20 In 1998, Congress amended the 1976 Copyright Act to provide an author’s
21 estate, “[i]n the event that the author’s widow or widower, children and grandchildren
22 are not living,” the right to recover the author’s copyright by statutorily terminating
23 the author’s old copyright grants. *See* 17 U.S.C. § 304(c)(2)(D). In
24 November 2001—possibly as a result of the 1998 amendment—Jean and her son
25 Mark Peary (Shuster’s nephew) entered into an agreement with Toberoff’s loan-out
26

27 ¹ In light of Magistrate Judge Zarefsky’s March 13, 2013 Order denying DC’s request for leave to
28 conduct further depositions and compel responses to deposition questions, the Court **DENIES** DC’s
request for a Rule 56(d) continuance. In any event, the evidence DC sought by way of its Rule 56(d)
request has no bearing on the Court’s disposition on these cross-motions.

1 company, Pacific Pictures Corporation (PPC) (the “2001 PPC Agreement”). (UF 2.)
2 The purpose of this agreement was “to investigate, retrieve, enforce and exploit”
3 Shuster’s copyrights in the Superman works through “establishment of Joe Shuster’s
4 estate” and the estate’s exercise of its termination rights under § 304(c). (*Id.*)

5 On October 7, 2003, the Los Angeles County Superior Court appointed Mark
6 Peary to serve as executor of Shuster’s estate. (UF 3.) Then on October 27, 2003,
7 Mark (as executor) entered into another agreement with Pacific Pictures signed by
8 Jean, Mark, and Toberoff (the “2003 PPC Agreement”). (UF 4.) Through this second
9 PPC agreement, the Shuster estate “engage[d] PPC as the exclusive advisor for the
10 purpose of retrieving, enforcing and exploiting all of Joe Shuster’s, and his estate’s
11 rights, claims, copyrights, property, title and interests in and to Joe Shuster’s
12 creations.” (*Id.*) Among the rights contemplated in the 2003 PPC Agreement was the
13 Shuster estate’s “termination interest in ‘SUPERMAN’ pursuant to Section 304(d) of
14 the U.S. Copyright Law.” (*Id.*)

15 On November 10, 2003, Toberoff (acting as attorney for the Shuster estate)
16 served on DC Comics a notice of termination under 17 U.S.C. § 304(d). (UF 5.) This
17 termination notice was the subject of DC’s first, second, and third claims in this
18 action.

19 On September 10, 2004, Toberoff, Jean, and Mark purported to voluntarily
20 cancel the 2001 and 2003 PPC Agreements. (UF 6.²)

21 On October 17, 2012, this Court held that the 1992 Agreement constituted a
22 post-1976 revocation and re-grant of Shuster’s Superman rights. (ECF No. 507.) As
23 a result, that revocation pulled the Shuster heirs’ November 2003 termination notice
24 from the grasp of Congress’s 1998 extension of an author’s termination rights. (*Id.*)
25 That ruling is now on appeal before the Ninth Circuit.

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28 ² DC’s dispute over the effect and effectiveness of this “cancellation” does not factor into the Court’s
decision. The Court therefore merely notes this fact for the sake of a more complete factual record.

1 **B. The Siegel Termination**

2 In 1997, Jerome Siegel’s widow, Joanne Siegel, and his daughter, Laura Siegel
3 Larson, filed and served on DC notices of termination of Siegel’s Superman copyright
4 grants to DC. (UF 8.) DC contested the termination on April 15, 1999, and the
5 Siegels thereafter began negotiating a settlement with DC through Kevin Marks, their
6 attorney at the time. (UF 9–10.)

7 On October 19, 2001, Marks sent DC a letter outlining and accepting what he
8 believed were the terms of an oral offer DC had made on October 16, 2001. (UF 11.)
9 On October 26, 2001, DC responded to Marks with what it believed was a “more
10 fulsome outline” of the deal’s terms. (UF 12.) On February 1, 2002, DC’s outside
11 counsel followed up with a draft long-form agreement. (UF 13.)

12 On May 9, 2002, Joanne Siegel—angered by DC’s February draft—sent a letter
13 to DC’s parent company, AOL Time Warner, Inc., objecting to the draft and declaring
14 that “[a]fter four years we have no deal and this [February 1] contract makes an
15 agreement impossible.” (UF 14.)

16 Meanwhile, in February 2002 Toberoff formed a joint venture called
17 IP Worldwide, LLC with Ariel Emanuel, then-CEO of the Endeavor Talent Agency.
18 (UF 15; Adams Decl. Ex. G.) In late July or early August 2002—several months after
19 Joanne’s May 9 letter objecting to the February 1 draft—Toberoff informed Marks
20 that he was working with Emanuel and inquired whether the Siegels might be
21 interested in licensing their rights to them. (UF 16.³)

22 On August 8, 2002, Marks, Toberoff, and Emanuel participated in a conference
23 call where Toberoff and Emanuel made a formal offer to purchase the Siegels’ rights
24 for \$15 million. (UF 17.) DC contends (and Toberoff and Emanuel vehemently
25 dispute) that this August 2002 offer also included false representations that Toberoff

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27 ³ DC “disputes” this fact “to the extent defendants suggest this was Toberoff’s earliest effort to
28 induce the Siegels to repudiate their October 19, 2001, settlement agreement with DC and enter into
an agreement with him instead.” (Pl.’s Statement of Genuine Disputes 16.) Because the Court does
not reach the merits of DC’s fifth claim, DC’s dispute on this fact is irrelevant to this Order.

1 (1) had an unnamed “billionaire investor” ready to fund the \$15 million offer and
2 (2) could help the Siegels produce a Superman movie to compete with DC. (Pl.’s
3 Statement of Genuine Disputes (“SGD”) 17.) The following day, Marks sent a letter
4 conveying the offer to the Siegels, but he cautioned them that he believed the Siegels
5 had an agreement with DC that was subject only to documentation. (ECF No. 500-5,
6 at 338–39.)

7 On September 21, 2002, the Siegels sent a letter to Marks, with a copy to DC,
8 terminating Marks as their legal representative and reaffirming their intent to
9 discontinue “all negotiations with DC Comics.” (UF 19.)

10 On October 3, 2002, the Siegels entered into an agreement with IP Worldwide
11 (the “IP Worldwide Agreement”) whereby the Siegels “grant[ed] IPW the exclusive
12 right to represent [them] and the Rights throughout the world in negotiating and
13 assisting [them] to arrange and negotiate the sale, lease, license and all other
14 dispositions or exploitations of the Rights.” (UF 20.) Also under the Agreement,
15 IP Worldwide would “furnish and provide the legal services of Marc Toberoff, Esq.,
16 and the business services of Ariel Emanuel and IPW’s support staff . . . to market and
17 negotiate” exploitation of the Superman rights. (*Id.*) Defendants characterize this
18 agreement as a representation agreement, while DC maintains it was in reality “an
19 unlawful, rights-tying agreement.” (SGD 20.)

20 **C. Siegel Litigation and the Toberoff Timeline**

21 On October 8, 2004, after renewed negotiations with DC failed to result in a
22 settlement, Toberoff filed suit seeking to validate the Siegels’ termination notice.
23 (UF 23.) In response, DC asserted several counterclaims, including one arguing that
24 the October 19, 2001 letter from Marks to DC created a legally enforceable agreement
25 between the parties, notwithstanding the Siegels’ later protestations. (UF 24.) The
26 Ninth Circuit has since held that the October 19 letter constituted a binding agreement
27 between the parties, *Larson v. Warner Bros. Entmt., Inc.*, Nos. 11-55863, 11-56034,
28 2012 WL 1113259, at *1 (9th Cir. Jan. 10, 2012), and this Court subsequently

1 confirmed that the October 19 agreement remains enforceable. *Larson v. Warner*
2 *Bros. Entmt. Inc.*, Nos. 2:04-cv-08400-ODW(RZx), 2:04-cv-08776-ODW(RZx),
3 2013 WL 1164434 (C.D. Cal. Mar. 20, 2013).

4 On or before June 28, 2006, during discovery in *Siegel*, Warner Bros. (DC's
5 affiliate) received packages of anonymous documents likely stolen from Toberoff's
6 law firm, including many documents Toberoff maintained were attorney-client
7 privileged. (UF 38.) The packet was also accompanied by an anonymously drafted
8 cover letter titled "Superman/Marc Toberoff Timeline." (*Id.*) This Toberoff Timeline
9 accused Toberoff of wrongfully interfering with DC's relationships and agreements
10 with the Siegel heirs. (UF 39.) The parties continue to contest when Warner Bros.
11 actually received the Timeline, who at Warner Bros. actually received a copy of the
12 Timeline, and who and to what extent certain people read and fully digested the
13 contents of the Timeline. Suffice it to say for purposes of these cross-motions that the
14 Timeline was ultimately produced in December 2008. (ECF No. 153-15.)

15 **D. This Action**

16 On May 14, 2010, DC filed this action against Pacific Pictures, IP Worldwide,
17 Mark Peary (as representative of the Shuster estate), Jean Peavy, Joanne Siegel, and
18 Laura Siegel Larson. The Complaint asserted six claims: (1) declaratory relief as to
19 the invalidity of the Shuster copyright termination notice; (2) declaratory relief
20 regarding the scope of the Shuster termination notice; (3) declaratory relief with
21 respect to DC Comics' exclusivity period with the Shusters; (4) interference with the
22 1992 Shuster agreement; (5) interference with prospective economic advantage
23 regarding the October 19, 2001 Siegel-DC Comics agreement; and (6) declaratory
24 relief regarding the invalidity of the Shuster heirs' copyright assignment and consent
25 agreements. As noted, the Court has already ruled on DC's first through third claims,
26 and that order is now on appeal before the Ninth Circuit. (ECF Nos. 507, 541.)

27 Defendants now move for summary judgment on DC's fourth through sixth
28 claims for intentional interference and unfair business practices under California law.

1 (ECF No. 577.) In response, DC filed a cross-motion for summary judgment on its
2 sixth claim. (ECF No. 588.) Additional facts will be discussed as necessary.

3 **III. LEGAL STANDARD**

4 Summary judgment should be granted if there are no genuine issues of material
5 fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ.
6 P. 56(c). The moving party bears the initial burden of establishing the absence of a
7 genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).
8 Once the moving party has met its burden, the nonmoving party must go beyond the
9 pleadings and identify specific facts through admissible evidence that show a genuine
10 issue for trial. *Id.*; Fed. R. Civ. P. 56(c). Conclusory or speculative testimony in
11 affidavits and moving papers is insufficient to raise genuine issues of fact and defeat
12 summary judgment. *Thornhill’s Publ’g Co. v. GTE Corp.*, 594 F.2d 730, 738 (9th
13 Cir. 1979).

14 A genuine issue of material fact must be more than a scintilla of evidence, or
15 evidence that is merely colorable or not significantly probative. *Addisu v. Fred*
16 *Meyer*, 198 F.3d 1130, 1134 (9th Cir. 2000). A disputed fact is “material” where the
17 resolution of that fact might affect the outcome of the suit under the governing law.
18 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1968). An issue is “genuine” if
19 the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving
20 party. *Id.* Where the moving and nonmoving parties’ versions of events differ, courts
21 are required to view the facts and draw reasonable inferences in the light most
22 favorable to the nonmoving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007).

23 **IV. DISCUSSION**

24 Defendants attack each of DC’s state-law claims as untimely. The thrust of
25 Defendants’ argument is that these claims challenge Defendants’ allegedly tortious
26 conduct between 2001 and 2003, and the record establishes that DC was on notice of
27 this conduct no later than 2006. Further, while the statutes of limitations for these
28 claims range from two to four years, DC waited to file suit until 2010. DC responds

1 that the Toberoff Timeline exposed critical information Toberoff had concealed, and
2 as a result the statute of limitations should have been tolled until (at the earliest)
3 December 2008 when the Timeline was produced. The Court considers each of the
4 parties' arguments in turn.

5 **E. DC Comics' Fourth Claim for Tortious Interference with Contract**

6 DC's fourth claim for intentional interference with contract alleges that
7 Toberoff's purpose in approaching the Shuster heirs in 2001 to enter into a joint
8 venture with Pacific Pictures was "to induce them to repudiate the 1992 Agreement
9 and grant him the rights [the Shuster heirs] had already granted to DC Comics."
10 (FAC ¶ 177.) Defendants attack DC's tortious-interference claim as untimely.

11 The statute of limitations for tortious interference with contract in California is
12 two years. *Kiang v. Strycula*, 231 Cal. App. 2d 809, 811–12 (1965); *see* Cal. Civ.
13 Proc. Code § 339(1). A tortious-interference claim typically accrues "at the date of
14 the wrongful act." *Trembath v. Digardi*, 43 Cal. App. 3d 834, 836 (1974). But in no
15 event does a claim accrue "later than the actual breach of the contract by the party
16 who was wrongfully induced to breach," because the breach is the culmination of the
17 alleged wrong. *Id.*

18 Defendants contend the actual breach at issue in DC's fourth claim occurred
19 when the Shuster heirs entered into the 2001 Agreement with Pacific Pictures.
20 (Mot. 8 (citing ECF No. 337 (finding in the context of Defendants' anti-SLAPP
21 motion that the 2001 and 2003 Pacific Pictures Agreements "essentially gut the 1992
22 Agreement, purporting to assign to Toberoff those rights which were already assigned
23 to DC Comics"))).) Defendants also acknowledge DC's position that two later events
24 could have triggered the two-year statute of limitations: the execution of the 2003
25 Agreement reaffirming the 2001 Agreement and the service of the Shuster termination
26 notices in late 2003. (Mot. 9; SUF 2, 4–5.) Defendants maintain that regardless the
27 date the Court looks at, DC's fourth claim is time barred because the "alleged 'actual

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1 breach' of the 1992 Agreement therefore occurred *seven to nine years* before DC filed
2 this suit in 2010.” (Mot. 9.)

3 DC responds that its fourth claim isn't based on a single breach occasioned by
4 the 2001 or 2003 Agreements, but rather “a series of contracts Toberoff induced the
5 Shusters to sign” that “violated DC's rights under its 1992 agreement with Joe
6 Shuster's heirs.” (Opp'n 6.) According to DC, its FAC also challenged additional
7 consent agreements that remained in effect until October 2012 “when the Court
8 declared Toberoff's agreements invalid.” (Opp'n 7–8.) In other words, DC primarily
9 invokes California's common-law continuing-wrong tolling rules. DC alternatively
10 contends that the discovery rule, codified in California Code of Civil Procedure
11 section 339, tolled its fourth claim until December 2008 when it received the Toberoff
12 Timeline. (Opp'n 10.)

13 *1. Continuing-wrong principles do not apply to DC's tortious-interference*
14 *claims*

15 There are two main branches of the continuing-wrong accrual principals in
16 California: the continuing-violation doctrine and the theory of continuous accrual.
17 *Aryeh v. Canon Bus. Solutions, Inc.*, 55 Cal. 4th 1185, 1197 (2013). The continuing-
18 violation doctrine (or the continuing-tort doctrine, as the Ninth Circuit has referred to
19 it), “applies where there is no *single incident* that can fairly or realistically be
20 identified as the cause of significant harm.” *Flowers v. Carville*, 310 F.3d 1118, 1126
21 (9th Cir. 2002) (emphasis added) (internal quotation marks omitted); *see Aryeh*, 55
22 Cal. 4th at 1197 (“Some injuries are the product of a series of small harms, any one of
23 which may not be actionable on its own.”).

24 In contrast, “continuous accrual applies whenever there is a continuing or
25 recurring obligation: When an obligation or liability arises on a recurring basis, a
26 cause of action accrues each time a wrongful act occurs, triggering a new limitations
27 period.” *Aryeh*, 55 Cal. 4th at 1199 (internal quotation marks omitted). Unlike
28 continuing violations, where each alleged wrong may not itself create a legal right of

1 action, continuing accrual concerns situations where each alleged action “provides all
2 the elements of a claim—wrongdoing, harm, and causation—[such that] each may be
3 treated as an independently actionable wrong with its own time limit for recovery.”
4 *Id.* Thus, while the continuing-violation doctrine “renders an entire course of conduct
5 actionable, the theory of continuous accrual supports recovery only for damages
6 arising from those breaches falling within the limitations period.” *Id.*

7 DC concedes that “it remains an open question under California law whether
8 the ‘continuing harm’ doctrine applies to intentional interference claims.” (Mot. 8;
9 *see also* Reply 6 (“The ‘continuing harm’ or ‘continuing accrual’ doctrine has never
10 been applied by a California court to a tortious interference claim.”).) Indeed, the
11 parties cite no cases, and the Court has found none, directly applying either of
12 California’s continuing-wrong principles to tortious-interference claims.⁴ Undeterred,
13 DC points to a recent California Supreme Court decision, *Aryeh v. Canon Business*
14 *Solutions, Inc.*, as reflecting that court’s “receptiveness to applying *all* common-law
15 tolling doctrines to plaintiff’s California-law claims.” (Opp’n 8 (citing *Aryeh*, 55 Cal.
16 4th at 1196–97).) But DC reads *Aryeh* too broadly.

17 In *Aryeh*, the California Supreme Court considered whether to apply common-
18 law tolling doctrines to California’s Unfair Competition Law, Cal. Bus. & Prof. Code
19 §§ 17200–17210, where the UCL was *silent* on “what it means for a UCL claim to
20 accrue.” *Aryeh*, 55 Cal. 4th at 1192–93. The court noted that such silence
21 “trigger[ed] a presumption in favor of permitting settled common law accrual rules to
22 apply” and concluded that “the UCL is governed by common law accrual rules to the
23 same extent as any other statute.” *Id.* at 1193.

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25 ⁴ At least one other federal court in California was likewise unable to find authority supporting
26 application of the continuing-violation theory to a claim for tortious interference with prospective
27 economic advantage, which shares the identical statute of limitations. *See Boon Rawd Trading Int’l*
28 *v. Paleewong Trading Co., Inc.*, 688 F. Supp. 2d 940, 952 (N.D. Cal. 2010) (“Indeed, based upon an
examination of California decisions that have applied the ‘continuing tort’ doctrine, none have
extended the doctrine to the tort of intentional interference with prospective economic advantage.”)

1 Unlike the UCL, California Code of Civil Procedure section 339 (which
2 supplies the statute of limitations for both of DC’s tortious-interference claims)
3 expressly provides that a claim on a contract does not accrue until “discovery of the
4 loss or damage suffered by the aggrieved party.” Cal. Civ. Proc. Code § 339(1). As
5 the Court in *Aryeh* noted, a statute must be construed in light of common-law
6 decisions, “unless its language clearly and unequivocally discloses an intention to
7 depart from, alter, or abrogate the common-law rule concerning the particular subject
8 matter.” *Aryeh*, 55 Cal. 4th at 1193. By expressly providing for the common-law
9 discovery rule and no other common-law tolling principles, section 339 appears to
10 reflect the legislature’s clear and unequivocal intent to preclude application of
11 common-law tolling mechanisms other than the discovery rule. *See Wildlife Alive v.*
12 *Chickering*, 18 Cal. 3d 190, 195 (1976) (“Under the familiar rule of construction,
13 *expressio unius est exclusio alterius*, where exceptions to a general rule are specified
14 by statute, other exceptions are not to be implied or presumed.”). The Court therefore
15 has serious reservations about whether continuing-wrong principles could ever toll the
16 statute of limitations on claims for tortious interference with contract.

17 But the Court need not go so far as to hold that the continuing-wrong doctrines
18 unequivocally do not apply to intentional-interference claims, as neither principle
19 applies on the facts here. With respect to continuing violations, DC contends
20 “Toberoff induced the Shusters to enter into a series of illicit, subsisting, rights-tying
21 contracts that continued to interfere with DC’s rights through the filing of DC’s
22 lawsuit.” (Opp’n 9.) But DC’s position now directly contradicts its fourth claim,
23 which alleges that “Toberoff’s ultimate purpose in approaching the Shuster Heirs was
24 to induce them to repudiate the 1992 Agreement and grant him the rights they had
25 already granted to DC Comics.” (FAC ¶ 177.) DC goes on to allege that Toberoff
26 carried out this purpose by forming a joint venture with the Shusters and Pacific
27 Pictures “for the express purpose of ‘exploiting all of Joe Shuster’s, and his estate’s

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1 rights, claims, copyrights, property, title and interests in and to Joe Shuster's
2 creations' through" termination of Shuster's grant to DC under 17 U.S.C. § 304. (*Id.*)

3 As this Court has already found, "the Pacific Pictures Agreements essentially
4 gut[ted] the 1992 Agreement, purporting to assign to Toberoff those rights which were
5 already assigned to DC Comics." (ECF No. 337, at 3.) These agreements therefore
6 constituted at least an implied repudiation of the 1992 Agreement—a discrete act for
7 which DC could have filed suit. Then on November 10, 2003, the Shusters served DC
8 with termination notices for the copyrights subject to the 1992 Agreement—another
9 overt act of repudiation for which DC could have filed suit. And so on. The Court
10 need not address each of Defendants' allegedly wrongful actions to convey the
11 obvious: DC's harm was not the result of small harms that may not have been
12 actionable on their own. Rather, each was an independently actionable act. The
13 continuing-violation doctrine therefore cannot apply here.

14 Neither can continuing-accrual principles apply. In assessing the applicability
15 of continuing-accrual tolling, the court in *Aryeh* looked "to the nature of the obligation
16 allegedly breached." 55 Cal. 4th at 1200. There, the court found that the defendant, a
17 lessor of copier machines, owed plaintiff, the lessee, a continuing "duty not to impose
18 unfair charges in monthly bills—[] a continuing one, susceptible to recurring
19 breaches." *Id.*

20 In contrast, here the 1992 Agreement—a purported one-time transfer of
21 Shuster's rights to DC—did not create a continuing obligation. And while contracts
22 between parties often are capable of multiple minor, actionable breaches that alone
23 would be insufficient to invalidate the entire contract, DC complains of Toberoff's
24 aim to induce the Shusters' *repudiation* of the 1992 agreement entirely. (FAC ¶ 177.)

25 As noted, continuing accrual addresses cases where each allegedly wrongful act
26 provides all the elements of a claim. The elements of a claim for intentional
27 interference with contract are "(1) a valid contract between plaintiff and a third party;
28 (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed

1 to induce a breach or disruption of the contractual relationship; (4) actual breach or
2 disruption of the contractual relationship; and (5) resulting damage.” *Pac. Gas &*
3 *Electric Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1126 (1990). At the latest, the
4 termination notices the Shuster heirs served on DC in November 2003 evidence the
5 heirs’ unequivocal intention to have conclusively repudiated the 1992 agreement.
6 And importantly, DC identifies no other agreements it had with Shuster or the Shuster
7 heirs for which the later Shuster-Toberoff consent agreements could have caused new
8 and separate harms to DC. Thus, the Court cannot find that any of Defendants’
9 actions after November 16, 2003, constituted a new and actionable harm for which a
10 new tortious-interference-with-contract claim could have accrued.

11 2. *The discovery rule does not save DC’s fourth claim*

12 DC also invokes section 339’s discovery rule. To this end, DC maintains that
13 “Toberoff’s misconduct became actionable, at the very earliest, when Judge Larson
14 ordered the Timeline produced to DC in December 2008—17 months before DC filed
15 suit.” (Opp’n 10.) Not so.

16 As noted, California Code of Civil Procedure section 339 expressly provides
17 that a claim on a contract does not accrue until “discovery of the loss or damage
18 suffered by the aggrieved party.” Cal. Civ. Proc. Code § 339(1). This so-called
19 “discovery rule” “postpones accrual of a cause of action until the plaintiff discovers,
20 or has reason to discover, the cause of action.” *Nogart v. Upjohn Co.*, 21 Cal. 4th
21 383, 463 (1999). A plaintiff “discovers” the cause of action the moment “he at least
22 suspects a *factual basis*, as opposed to a *legal theory*,” for the elements of the claim—
23 in other words, when plaintiff suspects “that someone has done something wrong to
24 him.” *Id.* (emphasis added) (internal quotation marks omitted).

25 DC is correct that “the discovery rule postpones accrual of a cause of action
26 until plaintiff discovers the facts underlying its claims.” (Opp’n 10.) But a plaintiff
27 need not suspect facts “supporting *each specific legal element of a particular cause of*
28 *action*” to have discovered that cause of action; rather, California courts “look to

1 whether the plaintiffs have reason to at least suspect that a *type* of wrongdoing has
2 injured them.” *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal. 4th 797, 807 (2005)
3 (emphasis added). “So long as a suspicion exists, it is clear that the plaintiff must go
4 find the facts; she cannot wait for the facts to find her.” *Jolly v. Eli Lilly & Co.*, 44
5 Cal. 3d 1103, 1111 (1988).

6 Defendants contend that DC was on inquiry notice of its tortious-interference
7 claim no later than November 10, 2003, when Toberoff filed termination notices on
8 the Shuster heirs’ behalf. (Mot. 10; SUF 5.) This is a close call. But the Court need
9 not resolve this issue because DC received *actual notice* of a potential claim on
10 November 15, 2006, when it received complete, unredacted copies of both the 2001
11 and 2003 Agreements. (Mot. 10; SUF 25); *Eagle Precision Techs., Inc. v. Eaton*
12 *Leonard Robolix, Inc.*, No. 03CV352-BEN (WMc), 2006 WL 6544087, at *4 (S.D.
13 Cal. Apr. 6, 2006) (plaintiff in intervention “had sufficient information to ‘at least
14 suspect’ wrongdoing” when it “received a copy of the [interfering] Agreement”).
15 Thus, by November 16, 2006, DC was equipped with the knowledge that

- 16 • In November 2001, the Shuster heirs entered into an agreement with Toberoff’s
17 production company, Pacific Pictures, “to investigate, retrieve, enforce and
18 exploit” the Superman copyrights via “termination pursuant to Section 304(c)
19 of the U.S. Copyright Law” (SUF 2);
- 20 • In October 27, 2003, the Shuster estate entered into a second agreement with
21 Pacific Pictures for the same purpose (*see* SUF 4); and
- 22 • In November 2003, Toberoff served copyright termination notices on DC
23 Comics (SUF 5).

24 With this information, DC should have far more than *suspected* “that a type of
25 wrongdoing ha[d] injured” it. *Fox*, 35 Cal. 4th at 807.

26 It does not matter, as DC tries to argue, that it didn’t receive the Toberoff
27 Timeline until 2008 or that “important new evidence concerning Toberoff’s web of
28 illicit consent agreements has come to light” in discovery in this matter. (Opp’n 10.)

1 That the Toberoff Timeline supplied additional information supporting one of many
2 elements of its tortious-interference claim does not change the fact that DC had
3 enough information prior to 2008 to have filed suit and opened the door to discovery.
4 And that DC has uncovered important evidence in discovery once it did file suit is
5 wholly unremarkable—that’s the purpose of discovery. The point here is that DC had
6 more than enough knowledge by November 2006 to have tickled a suspicion that its
7 business relationship with the Shusters was being tampered with. It was then—and
8 not when DC gathered the smoking-gun evidence supporting each element of its cause
9 of action—that it should have filed suit.

10 The Court therefore **GRANTS** Defendants’ motion as to DC’s fourth claim.

11 **F. DC Comics’ Fifth Claim for Tortious Interference with Prospective**
12 **Economic Advantage**

13 DC’s fifth claim alleges that Toberoff tortiously interfered with DC’s
14 relationship with Joanne Siegel and Laura Siegel Larson when he conveyed an offer to
15 their then-attorney, Kevin Marks, to license their Superman rights in August 2002.
16 According to DC, this offer wrongfully induced the Siegels to end their negotiations
17 with DC (even though the Siegels had called an agreement with DC “impossible”
18 three months earlier in May 2002). (Mot. 1.)

19 Like DC’s fourth claim, DC’s fifth claim for intentional interference with
20 prospective economic advantage is governed by section 339’s two-year statute of
21 limitations. *E.g., Boon Rawd Trading*, 688 F. Supp. 2d at 952 (N.D. Cal. 2010). The
22 parties raise similar arguments regarding the applicability of continuous-wrong
23 accruing principles and the discovery rule, albeit applied to a different set of facts, i.e.,
24 those facts relating to the Siegel heirs as opposed to the Shuster heirs. For the reasons
25 addressed above, the Court questions whether continuing-wrong principles can even
26 apply to intentional-interference claims but nevertheless finds those principles
27 inapplicable here. The Court therefore confines its discussion of DC’s fifth claim to

28 ///

1 when DC discovered Toberoff's alleged interference with its economic relations with
2 the Siegels.

3 Defendants insist that DC had actual notice of most of the facts underlying its
4 claim for tortious interference with prospective economic advantage by 2006.
5 Specifically,

- 6 • On September 21, 2002, DC received a letter from the Siegels terminating
7 Marks and formally ending all negotiations with DC. (SUF 19.)
- 8 • By 2003, Emanuel and Toberoff had informed DC that they were representing
9 the Siegel interest and recommenced negotiations with DC. (SUF 22.)
- 10 • On October 7, 2006, DC deposed Marks, who testified that Emanuel and
11 Toberoff had made an offer in August 2002 to purchase the Siegels' Superman
12 rights for \$15 million. (SUF 26–28)
- 13 • By November 15, 2006, DC received a full, unredacted copy of the Siegels'
14 October 3, 2002 IP Worldwide Agreement, whereby the Siegels retained
15 Emanuel and Toberoff to “arrange and negotiate the sale, lease, license, and all
16 other dispositions and exploitations” of the Siegels' Superman rights. (SUF 20,
17 25.) This agreement was executed shortly after the Siegels formally fired
18 Marks and terminated negotiations with DC on September 21, 2002.
- 19 • On November 17, 2006, DC deposed Toberoff, questioning him at length about
20 the August 2002 offer and IP Worldwide Agreement. (SUF 31, 34–36.)

21 Thus, by late 2006, DC knew that Toberoff offered to license the Siegels'
22 Superman copyrights in August 2002, knew that the Siegels had formally terminated
23 negotiations with DC in September 2002, and knew that the Siegels had entered into
24 an agreement with Toberoff and Emanuel in October 2002 to market the Superman
25 rights. This was more than enough to alert DC of a potential claim for intentional
26 interference with prospective economic advantage.

27 But if any doubt remained, DC's own pleadings in the *Siegel* case
28 unequivocally reflect DC's notice of a potential claim as of 2007. In May 2007, both

1 sides in *Siegel v. Warner Bros. Entertainment Inc.*, No. 2:04-cv-08400-ODW-RZ,
2 moved for summary judgment concerning, in part, whether the October 19, 2001 letter
3 constituted a binding agreement. In its briefing, DC argued that the effort to reduce
4 the terms of that letter into a long-form agreement “came to naught when Plaintiffs
5 abruptly fired Mr. Marks and terminated discussions with DC shortly after receiving
6 Mr. Toberoff’s ‘\$15 million plus’ offer.” (SUF 47.) Thus, as late as May 2007, DC
7 itself set forth in a submission to this Court sufficient facts to have put it on notice that
8 it may have had an interference claim.

9 DC disputes Defendants’ reference to Marks’s and Toberoff’s depositions
10 insofar as neither deposition revealed (and thus DC was unable to question either of
11 them on) “the fraudulent business offer concerning a ‘billionaire investor’ that
12 Toberoff made to the Siegels.” (SGD 27–28, 34–36.) DC also argues that its 2007
13 briefing “contain[ed] no mention of Toberoff’s fraud, including his false business
14 offer to the Siegels concerning a ‘billionaire investor,’ confirming that DC did not
15 know about Toberoff’s wrongdoing until it obtained the Timeline in December 2008.”
16 (SGD 47.) As it does with its fourth claim, DC insists that it couldn’t have
17 “discovered” its fifth claim until December 2008 when it received the Toberoff
18 Timeline revealing the fraudulent nature of Toberoff’s business offer. (*See* SGD 27–
19 28, 34–36.)

20 But DC’s Timeline arguments amount to little more than diversionary attempt
21 to draw the Court’s attention away from the fact that its fourth and fifth counterclaims
22 are unquestionably time barred. Even without the Timeline, DC had more than
23 enough inquiry—if not actual—notice no later than late 2003 (with respect to its
24 fourth claim) and late 2006 (with respect to its fifth claim) to have piqued a reasonable
25 suspicion that Toberoff may have meddled in its business affairs with the Siegels and
26 Shusters. Armed with this knowledge, DC “could have filed suit, basing its
27 interference claim[s] on known, non-privileged events (*e.g.*, the Siegels’ ending of
28 negotiations and their retention of Toberoff / Emanuel shortly thereafter) and included

1 its other allegations on the basis of ‘information and belief.’” (Mot. 17.) Further fact
2 investigation—including inquiry into the Timeline—is the very purpose of pretrial
3 discovery for which one files suit. *Jolly*, 44 Cal. 3d at 1111 (“A plaintiff need not be
4 aware of the specific ‘facts’ necessary to establish the claim; that is a process
5 contemplated by pretrial discovery.”) In short, receipt of the Timeline and digestion
6 of the panoply of facts contained therein was mere surplusage considering the array of
7 facts it had well before 2008 putting it on suspicion of its claims. Statutes of
8 limitation would mean very little if a claim did not accrue until the aggrieved party
9 was in actual possession of all the facts necessary to establish the claim.

10 For these reasons, the Court **GRANTS** Defendants’ motion with respect to
11 DC’s fifth claim.

12 **G. The Court Defers Ruling on DC’s Sixth Claim at this Time**

13 DC’s sixth claim seeks a declaration that “[t]he various copyright assignments
14 and consent agreements between Toberoff and/or his companies, the Siegel Heirs, and
15 the Shuster Heirs are void and unenforceable, including under California’s unfair
16 competition law.” (FAC ¶ 188 (citing Cal. Bus & Prof. Code §§ 17200–17210).) As
17 framed, DC’s sixth claim (like its third claim) seeks essentially the same relief DC
18 seeks through its first claim, albeit on state-law unlawful-competition grounds and
19 with respect to the Siegels *and* the Shusters. *Compare* FAC ¶ 134 (First claim: “A
20 declaration by this Court regarding the validity of the Shuster Termination Notice is
21 warranted . . . to establish the parties’ respective rights and obligations with respect to
22 the copyright interest in the Superman material.”), *with* FAC ¶ 188 (Sixth claim: “A
23 declaration by this Court is warranted . . . to establish the parties’ respective rights and
24 obligations with respect to the copyright interest in the Superman material.”).

25 First, the Court notes that DC’s sixth claim, unlike its first and third claims,
26 brings the Toberoff’s dealings with the Siegels within its ambit (although only in
27 passing). But DC’s opposition and cross-motion focuses solely on Toberoff’s dealing
28 with the Shusters and appears to disclaim the Siegels’ role in its sixth claim. (*See*,

1 e.g., Opp’n 18 (“The Court’s final judgment in DC’s favor on its Third Claim . . .
2 compels that judgment enter in DC’s favor on its Sixth Claim.”.) And in any event,
3 the relief DC seeks vis-à-vis the Siegels—a declaration of the parties’ respective rights
4 and obligations with respect to the Superman copyrights—is duplicative of the relief it
5 sought in *Siegel v. Warner Bros. Entertainment Inc.*, No. 2:04-cv-08400-ODW-RZ
6 (C.D. Cal. filed Oct. 8, 2004). The Court has already granted DC’s requested relief in
7 that matter, and all that remains is for the Court to define the contours of the relief
8 regarding Superboy and the early Superman ads. *Larson v. Warner Bros. Entmt. Inc.*,
9 Nos. 2:04-cv-08400-ODW(RZx), 2:04-cv-08776-ODW(RZx), 2013 WL 1164434
10 (C.D. Cal. Mar. 20, 2013). Thus, to the extent DC has not disclaimed the Siegels’ role
11 in its sixth claim, that claim is nevertheless moot with respect to Toberoff’s dealings
12 with the Siegels.

13 This leaves the sixth claim as it applies to Toberoff’s dealings with the
14 Shusters. DC notes that this claim seeks to void the allegedly “illicit consent
15 agreements that violate the grant-making provisions in § 304(c)(6)(D).” (Opp’n 21.)
16 DC specifically notes that the Court’s December 11, 2012 Judgment in DC’s favor on
17 its first and third claims “compels that judgment enter in DC’s favor on its Sixth
18 Claim.” (Opp’n 18 (citing ECF No. 540).) Given the Court’s conclusion in the
19 Judgment that “the 2001 Pacific Pictures agreement, 2003 Pacific Pictures agreement,
20 and 2008 consent agreement[] are deemed invalid and unenforceable under section
21 304(c)(6)(D),” Defendants are correct that DC’s sixth claim is *presently* moot.
22 Ordinarily this moot claim should be dismissed because it presents no live controversy
23 between the parties. *Am. Rivers v. Nat’l Marine Fisheries Serv.*, 126 F.3d 1118, 1123
24 (9th Cir. 1997).

25 But the Court recognizes that aspects of its order granting DC’s motion for
26 summary judgment on DC’s first and third claims—the resolution of which is what
27 moots DC’s sixth claim—is currently on appeal before the Ninth Circuit. As the
28 parties well know by now, Defendants’ notice of appeal “confer[red] jurisdiction on

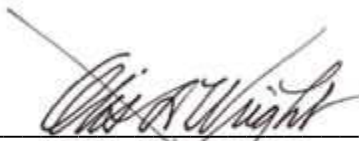
1 the court of appeals and divest[ed this Court] of control over those aspects of the case
2 involved in the appeal.” *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58
3 (1982). As a result, this Court currently lacks jurisdiction to pass on the underlying
4 subject matter of DC’s sixth claim. Further, to the extent that the sixth claim presents
5 issues distinct from DC’s first and third claims, the Court declines to reach those
6 issues at this time, as an affirmance by the Ninth Circuit would obviate the need to
7 reach these issues.

8 **V. CONCLUSION**

9 For the reasons set forth above, the Court **GRANTS** Defendants’ motion for
10 summary judgment on DC’s fourth and fifth claims, which are barred by the two-year
11 statute of limitations. Defendants’ motion with respect to DC’s sixth claim and DC’s
12 entire cross-motion on that claim are **DENIED WITHOUT PREJUDICE** pending
13 resolution of Defendants’ current appeal before the Ninth Circuit.

14
15 **IT IS SO ORDERED.**

16
17 April 4, 2013

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19 

20 **OTIS D. WRIGHT, II**
21 **UNITED STATES DISTRICT JUDGE**