Israel Dahan (No. 042701997)
Louis M. Solomon (*admitted pro hac vice*)
William Schwartz (*admitted pro hac vice*)
CADWALADER, WICKERSHAM & TAFT LLP
One World Financial Center
New York, New York 10281
Telephone: (212) 504-6000
Facsimile: (212) 504-6666

Attorneys for Defendant, Eli Manning

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ERIC INSELBERG, Plaintiff, v. NEW YORK FOOTBALL GIANTS, INC., JOHN K. MARA, WILLIAM J. HELLER, CHRISTINE PROCOPS, EDWARD WAGNER, JR., JOSEPH SKIBA, EDWARD SKIBA, ELI MANNING, BARRY BARONE, PARK CLEANERS, INC. and JOHN DOES A-Z, Defendants.	**Civil Action No. 2:14-cv-01317 (WJM/MF)** **Motion Day: April 21, 2014**

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT ELI MANNING'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT, WITH PREJUDICE

TABLE OF CONTENTS

PAGE

PAGE

TABLE OF AUTHORITIES

PAGE(S)

CASES:

PAGE(S)

PAGE(S)

PAGE(S)

PAGE(S)

STATUTES & OTHER AUTHORITIES:

Defendant, Eli Manning, respectfully submits this Memorandum of Law in support of his motion, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss, with prejudice, all of the claims and relief sought against him in the Complaint filed by Plaintiff, Eric Inselberg, specifically the claims for violation of the New Jersey Racketeer Influenced and Corrupt Organizations Act, N.J. Stat. Ann. §§ 2C:41-1, *et seq.* (Count I); tortious interference with prospective economic advantage (Count II); tortious interference with contractual relations (Count III); civil conspiracy (Count XII); and aiding and abetting (Count XIII). For all of the reasons discussed below, Defendant's motion should be granted in its entirety, and the Complaint against him should be dismissed, with prejudice.

INTRODUCTION

In a shameless effort to grab media and public attention, Plaintiff and his attorneys filed this baseless action on the eve of Super Bowl XLVIII – which was not so coincidentally set to take place in the very stadium that the New York Giants play their home games – and tactically included as a defendant, Eli Manning ("Manning") – the franchise quarterback of the Giants. Plaintiff and his attorneys know full well that each and every one of the claims asserted against Manning is wholly unfounded and warrants dismissal, even at the pleading stage. Indeed, the 65-page Complaint, covering 281 numbered paragraphs, only has a handful of allegations directed at Manning that, even if accepted as true for

purposes of this motion to dismiss (not that any of them are true), do not come close to pleading the requisite elements of the fictitious claims asserted against him. Accordingly, the Court should summarily dismiss the Complaint as against Manning for failure to state any claim upon which relief can be granted against him.

Notably, nowhere in the 65-page Complaint does Plaintiff allege that he had *any* direct dealings with Manning, that Manning provided him with *any* "fake" game-worn jerseys or helmets, or that Manning even knew him and what he did for a living. Moreover, nowhere in the Complaint does Plaintiff allege that he ever told the Federal Government during its five-year investigation of Plaintiff, or two-year indictment of Plaintiff for multiple counts of sports memorabilia mail fraud, that Manning was a participant in an alleged scheme to create "fake" game-worn jerseys and helmets for resale to the market. Yet, Plaintiff and his attorneys want this Court (and the public) to believe that Manning – one of the most respected and highest paid football players in the entire National Football League – and the New York Giants – one of the most valuable sports franchises in America – were part of some elaborate criminal "enterprise" organized for the purpose of harming Plaintiff through the creation and sale of "fake" game-worn jerseys and helmets. Such allegations are simply preposterous and further confirm that Plaintiff and his attorneys' inclusion of Manning as a defendant in this action is nothing more than

an inappropriate attempt to capitalize on Manning's fame and public notoriety.

STATEMENT OF FACTS

The 65-page Complaint asserts, for the most part, allegations and claims that do not concern or involve Manning whatsoever. Indeed, a significant portion of the Complaint is devoted to purported acts of obstruction of justice and witness tampering by various individuals and entities *other than Manning*. Specifically, the Complaint asserts allegations and claims against (i) all of the other named Defendants for malicious prosecution, abuse of process, trade libel and intentional infliction of emotional distress related to Plaintiff's indictment by the Government; (ii) Defendant Giants for unjust enrichment, unfair competition and misappropriation related to Plaintiff's purported helmet and wireless patents; and (iii) Defendants Joe and Ed Skiba for breach of contract related to a loan agreement Plaintiff purportedly entered into with them. As for Manning, the Complaint only contains a handful of allegations concerning his purported involvement in the creation of "fake" game-worn jerseys and helmets. The following is the sum total of the Complaint's conclusory, unsupported and plainly unfounded allegations against Manning.

The Complaint alleges, strictly *upon information and belief*, that in 2005 – more than eight years prior to the filing of this Complaint – Manning allegedly "instructed Joe Skiba to provide him with a helmet that appeared to have been

worn in a game" and that "Manning took that helmet, signed it, and placed it into the market, falsely claiming that it was a helmet used during his 2004 rookie season." Compl. at ¶ 124. Not only is this allegation unsupported by any evidence, but it is premised on Plaintiff's assumption that there was only one Manning game-worn rookie helmet – which Plaintiff purportedly obtained from Defendant Joe Skiba, *not* from Manning. *Id.* at ¶ 157.

The Complaint then alleges that in February 2008 – three years later and more than five years prior to the filing of this Complaint – Plaintiff purportedly obtained Manning's "one and only game-worn Super Bowl XLII helmet" from Defendant Ed Skiba – again, *not* from Manning – and that he still has the game-worn helmet in his possession. *Id.* at ¶ 125. According to Plaintiff, in the summer of 2008, Defendant Joe Skiba – *not* Manning – allegedly took a different helmet and made it appear as if it had been game-worn by Manning during Super Bowl XLII. *Id.* at ¶ 126. Plaintiff alleges that Joe Skiba did so at the request of Pat Hanlon – *not* Manning – so that the Manning Super Bowl XLII helmet could be displayed alongside the Super Bowl XLII helmet of David Tyree at the Sports Museum of America in New York City. *Id.* at ¶¶ 126-127. Plaintiff alleges that, in the fall of 2008, the "fake" Manning game-worn Super Bowl XLII helmet was moved to the Pro Football Hall of Fame in Ohio. *Id.* at ¶ 128. Putting aside the fact that all of these allegations are unsubstantiated, Plaintiff does not allege that

Manning had any knowledge or involvement whatsoever in the creation of a purportedly fake game-worn Super Bowl XLII helmet, or the placing of such a helmet in the Sports Museum of America in New York City or in the Pro Football Hall of Fame.

Again without any factual support, the Complaint baldly alleges that in or about the spring of 2008 – nearly six years ago – Manning purportedly instructed Joe Skiba to take jerseys and helmets and make them appear as game-worn, which Manning then allegedly provided to Steiner Sports, LLC ("Steiner Sports") for resale. The Complaint then alleges, strictly *upon information and belief*, that Manning misrepresented to Steiner Sports that the items he (Manning) provided were worn by him during Giants games, and that Steiner Sports – *not* Manning – purportedly sold those items to "unwitting customers." *Id.* at ¶ 129. Notably, the Complaint does not allege that Plaintiff was one of the purported "unwitting customers" who purchased any fake game-worn jerseys and helmets that Manning allegedly provided to Steiner Sports in 2008, or that Manning – as opposed to Steiner Sports – sold any such items to "unwitting customers."

In the Complaint, Plaintiff quotes selected portions of a self-serving email exchange he purportedly had with Joe Skiba in August 2008. *Id.* at ¶ 130, Ex. B. As an initial matter, Manning is not a party to that email exchange. But more significantly, this email exchange does not in any way support, much less confirm,

the Complaint's utterly conclusory and unfounded allegation that Manning was involved in the creation of fake game-worn jerseys and helmets. It also does not allege that Manning intended to use non-game-worn jerseys or helmets for any improper purpose.

Lastly, the Complaint alleges that in 2012, four years later, Manning allegedly gave two helmets to Steiner Sports – the helmet he wore during Super Bowl XLVI and the helmet he wore during the 2011 season that also served as his back-up Super Bowl XLVI helmet. *Id.* at ¶ 133. Plaintiff states that he purchased from Steiner Sports – *not* Manning – the Manning back-up Super Bowl XLVI helmet for approximately $11,500, and that an unknown third party purchased the Manning game-worn Super Bowl XLVI helmet for approximately $46,000. *Id.* Plaintiff claims that, based on his comparison of photographs of Manning's helmet during Super Bowl XLVI and photographs of the helmet sold by Steiner Sports, he believes that both Manning Super Bowl XLVI helmets sold by Steiner Sports were not game-worn helmets. *Id.* at ¶ 134. Plaintiff then states, strictly *upon information and belief*, that both "fake" helmets were created by Joe Skiba at the direction of Manning. *Id.* at ¶ 134. In other words, Plaintiff once again pleads no facts to support his unsubstantiated, "information and belief" allegations against Manning.

In short, the Complaint's few allegations against Manning are merely

conclusory and speculative statements that, in the end, only concern *three* game-worn helmets that Plaintiff purportedly obtained from individuals *other than Manning* during a seven-year period. And as acknowledged by Plaintiff, two of those Manning helmets are indeed game-worn, and the third, he only suspects may not be game-worn based on his review of certain unidentified photographs. Thus, the Complaint does not – and cannot – allege a viable claim against Manning.

ARGUMENT

I. STANDARDS FOR A MOTION TO DISMISS

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint, in whole or in part, if the plaintiff fails to state a claim upon which relief can be granted. In deciding a motion to dismiss under Rule 12(b)(6), "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, (2007)); *see also Baraka v. McGreevy*, 481 F.3d 187, 211 (3d Cir. 2007) (holding that a court is "not compelled to accept unwarranted inferences, unsupported conclusions or legal conclusions disguised as factual allegations."). Moreover, the well-pleaded factual allegations must be sufficient to raise a plaintiff's right to relief above a speculative level, such that it is "plausible on its

face." *Twombly*, 550 U.S. at 570. A claim has "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citation omitted). While "[t]he plausibility standard is not akin to a 'probability requirement' . . . it asks for more than a sheer possibility." *Id.*

As demonstrated below, the Complaint fails to plead sufficient, non-conclusory facts stating a plausible claim against Manning for violation of the New Jersey civil RICO statute, tortious interference with prospective economic advantage or contractual relations, aiding and abetting, or civil conspiracy. Accordingly, the Court should dismiss the Complaint as against Manning, with prejudice.

II. THE CLAIM AGAINST MANNING FOR VIOLATION OF THE NEW JERSEY CIVIL RICO STATUTE SHOULD BE DISMISSED

Plaintiff alleges a claim against Manning (and the other Defendants) for violation of the New Jersey civil RICO statute, N.J. Stat. Ann. § 2C:41-2(c), and for violation of the New Jersey civil RICO conspiracy statute, N.J. Stat. Ann. § 2C:41-2(d). "The RICO Act, generally, makes it a crime for a person to be employed by or associated with 'an enterprise' and to engage or participate or become involved in the business of the enterprise 'through a pattern of racketeering activity.'" *State v. Ball*, 141 N.J. 142, 151 (1995) (quoting N.J. Stat.

Ann. § 2C:41-2(c)).[1] Notably, the RICO Act was designed to "target only organized-crime-type activities that are *substantial in nature*." *Ball*, 141 N.J. at 161 (emphasis added).

To state a claim for violation of the New Jersey civil RICO statute, a plaintiff must allege (1) the existence of an enterprise; (2) that the enterprise engaged in, or its activities affected trade or commerce; (3) that the defendant was employed by or associated with the enterprise; (4) that the defendant participated in the conduct of the affairs of the enterprise; and (5) that the defendant participated through a pattern of racketeering activity. *Id.* at 181. In order to state a claim for violation of the New Jersey civil RICO conspiracy statute, a plaintiff also must allege that the defendant conspired to commit a RICO violation, *i.e.*, that the defendant "acted knowingly and purposely with knowledge of the unlawful objective of the conspiracy and with the intent to further its unlawful objective." *Id.* at 180.

---

[1] The New Jersey civil RICO statute was modeled after the Federal RICO statute, Title IX (Racketeer Influenced and Corrupt Organizations) of the Organized Crime Control Act of 1970, 18 U.S.C. §§ 1961-1968, which was designed to address "Congress' prime concern [of] the eradication of 'organized crime.'" *Ball*, 141 N.J. at 156 (quoting *United States v. Turkette*, 452 U.S. 576, 591 (1981)). Accordingly, where interpretive guidance is needed beyond what is available in New Jersey state court decisions, New Jersey courts seek guidance in cases interpreting Federal RICO. *See*, *e.g.*, *Cetel v. Kirwan Fin. Grp., Inc.*, 460 F.3d 494, 510 (3d Cir. 2006); *Zahl v. N.J. Dept. of L. and Pub. Safety*, No. 06-3749, 2009 WL 806540, at *5 (D.N.J. Mar. 27, 2009).

As demonstrated in Point II.B, *infra*, the Complaint does not come close to pleading all of the required elements to support a civil RICO claim against Manning. But, as a threshold matter, the Court should dismiss the New Jersey civil RICO claim against Manning, with prejudice, because Plaintiff lacks standing to allege such a claim in the first place.

A. Plaintiff Lacks Standing To Allege A New Jersey Civil RICO Claim Against Manning

In order to have standing to assert a New Jersey civil RICO claim against Manning, Plaintiff must allege that he sustained an *injury* to his business or property that was *proximately caused* by the commission of a RICO predicate act. N.J. Stat. Ann. § 2C:41-4(c); *Prof'l Cleaning & Innovative Bldg. Servs. v. Kennedy Funding, Inc.*, No. 2:05-CV-2384, 2009 WL 1651131, at *6 (D.N.J. June 12, 2009), *aff'd*, 408 Fed. Appx. 566 (3d Cir. 2010). Notably, the injury must be "a concrete financial loss and not mere injury to a valuable intangible property interest." *Maio v. Aetna, Inc.*, 221 F.3d 472, 483 (3d Cir. 2000); *see also Advanced Oral Techs., L.L.C. v. Nutrex Research, Inc.*, No. 10-5303, 2011 WL 198029, at *7 (D.N.J. Jan. 20, 2011) ("This requirement can be satisfied by allegations and proof of actual monetary loss, *i.e.*, an out-of-pocket loss. Damage to reputation will not suffice.") (internal quotation marks and citation omitted); *Desai v. Bd. of Adjustment*, 360 N.J. Super. 586, 595 (Super. Ct. App. Div. 2003) ("Anticipated profits that are too remote, uncertain, or speculative are not

recoverable."). With regard to proximate cause, courts consider "(1) the causal connection between the RICO violation and the harm to the plaintiff; (2) the directness or indirectness of the asserted injury; (3) the existence of more direct victims of the alleged violation; and (4) the potential for duplicative recovery or complex apportionment of damages." *Dow Chem. Co. v. Exxon Corp.*, 30 F. Supp. 2d 673, 695 (D. Del. 1998) (citation omitted); *see also Dist. 1199P Health & Welfare Plan v. Janssen, L.P.*, 784 F. Supp. 2d 508, 524 (D.N.J. 2011).

In *Dow*, the plaintiff alleged that the defendant, its competitor, obtained a patent through fraudulent misrepresentations made to the Patent and Trademark Office ("PTO"), thereby damaging Dow's ability to compete with the defendant. The court dismissed Dow's RICO claim, which was predicated on on mail and wire fraud, holding Dow did not have standing to bring a RICO action because the direct victim of the wire and mail fraud was the PTO, not Dow, and because so many intervening causes had occurred in the "chain of causation" before Dow was injured, including the exercise of discretion by the PTO. The court reasoned that "[a]ny injuries alleged by Dow are derivative, if not independent, of the harm suffered by the PTO and are more attributable to intervening causes than to the predicate acts themselves." *Dow*, 30 F. Supp. 2d at 696. *See also McCarthy v. Recordex Serv.*, 80 F.3d 842, 855 (3d Cir. 1996) (holding that because the plaintiffs were not the direct purchasers, but only indirect victims, they lacked

standing to pursue their RICO claims).

In the Complaint, Plaintiff identifies the following RICO predicate acts he alleges were committed by Defendants: mail and wire fraud, theft by deception, forgery, obstruction of justice, and witness tampering. Compl. at ¶¶ 177-183. Putting aside for now the fact that Plaintiff has not sufficiently alleged Manning's commission of any of these RICO predicate acts, as more fully discussed in Point II.B.2, *infra*, Plaintiff clearly has not alleged an *injury* to his business or property that was *proximately caused* by these RICO predicate acts. Thus, Plaintiff lacks standing to allege his civil RICO claim against Manning.

1. Mail And Wire Fraud

To state a claim for mail or wire fraud, Plaintiff must allege that Manning knowingly and willfully used the mail or wire to defraud Plaintiff. *See United States v. Antico*, 275 F.3d 245, 261 (3d Cir. 2001). Significantly, the heightened pleading standards of Federal Rule of Civil Procedure 9(b) apply to RICO claims based on mail and wire fraud, requiring plaintiffs to "state with particularity the circumstances constituting fraud," including the "the date, time and place" of the purported fraud. Fed. R. Civ. P. 9(b); *Lum v. Bank of Am.*, 361 F.3d 217, 224 (3d Cir. 2004); *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 314 (D.N.J. 2005) (noting "mail and wire fraud predicates . . . pleaded on information and belief . . . [a]s a general matter . . . are insufficient for purposes of Rule 9(b)").

The Complaint here is completely devoid of any facts, let alone particularized facts, showing Manning (or any other Defendant) used the mail or wire to defraud Plaintiff. In fact, Plaintiff does not even claim to have acquired any fraudulent game-worn sports memorabilia from Manning (or any other Defendant) – by mail, wire or otherwise. *See Busby v. Crown Supply, Inc.*, No. 88-0087-A, 1990 WL 302718, at *2 (E.D. Va. Dec. 19, 1990) (finding plaintiff did not show mail or wire fraud because he "failed to point to any record evidence, and the Court found none, that false cost information was transmitted via the mails and wires"). Rather, the only allegation in the Complaint involving the use of the mail relates to Steiner Sports – *not* Manning – possibly using the mail to provide fake Manning game-worn helmets and jerseys to "unwitting customers" – *not* to Plaintiff. Compl. at ¶ 129. And this allegation is based solely on Plaintiff's "information and belief." *Id.* Likewise, the only allegation in the Complaint concerning the use of the wire is Plaintiff's contention that a certain unnamed "prominent memorabilia auction house" – *not* Manning – purportedly advertised a fake game-worn Manning helmet on its website and *may have* sold it to some "unwitting buyer" – *not* to Plaintiff. *Id.* at ¶ 124.

Clearly, Manning (or any other Defendant) could not have caused Plaintiff to sustain a mail or wire fraud-related injury if they did not even engage in any

mail or wire transaction with Plaintiff, let alone a fraudulent one.[2]

2. Theft By Deception And Forgery

Theft by deception, N.J. Stat. Ann. 2C:20-4, requires a plaintiff to allege and eventually prove that the defendant "purposely obtain[ed] property of another by deception." *State v. Falco*, No. A-1745-08T4, 2010 WL 1926828, at *6 (N.J. Super. Ct. App. Div. May 14, 2010). Here, the Complaint does not allege that Manning (or any other Defendant) obtained *Plaintiff's* property or money, by deception or otherwise. In fact, Plaintiff does not even claim to have had any direct dealings with Manning. Moreover, the only purportedly fake game-worn item purchased by Plaintiff is Manning's back-up Super Bowl XLVI helmet, which he claims to have purchased from *Steiner Sports* – not from Manning. Compl. at ¶¶ 133-34, 157. Thus, if Plaintiff did not purchase any purportedly fake helmet directly from Manning (or any other Defendant), he could not have sustained an

---

[2] Plaintiff's bald allegation that, "[f]or the purpose of executing their schemes or artifices, the RICO Defendants did send and receive matters or things, or caused matters or things to be sent or received, through the mails (including private or commercial interstate carriers), and they did transmit, or caused to be transmitted, writings, signs, signals, pictures, and/or sounds by means of wire, radio, television and internet communications in interstate commerce," (Compl. at ¶ 180) (emphasis added), is nothing more than a conclusory recital of the elements of mail fraud and does not come close to satisfying the heightened pleading requirement of Rule 9(b). *See Slimm v. Bank of Am.*, No. 12–5846, 2013 WL 1867035, at *9 (D.N.J. May 2, 2013) (dismissing RICO claim where mail and wire fraud allegations "r[u]ng hollow as factually unsupported conclusory statements"). Moreover, Plaintiff does not allege that *he* sustained any injury as a direct result of such conduct by the RICO Defendants.

injury directly resulting from their commission of theft by deception. For the same reason, Plaintiff cannot claim to have sustained an injury proximately caused by the alleged commission of the predicate act of forgery.

3. Obstruction Of Justice And Witness Tampering

In the Complaint, Plaintiff alleges that he suffered injuries as a result of his Grand Jury indictment, which he claims was caused by certain Defendants' acts of obstruction of justice and witness tampering. Specifically, Plaintiff alleges that he sustained damage to his reputation, loss of numerous pre-existing personal and business relationships, loss of future income from his memorabilia business, and various psychological/well-being related injuries. Compl. at ¶¶ 148-163. As an initial matter, there are absolutely no allegations in the Complaint that *Manning* provided *any* statements or testimony to the FBI or Grand Jury. The Complaint also is devoid of any allegation that *Manning* intimidated, threatened, or persuaded any individual to provide false testimony to the FBI or Grand Jury. Thus, Manning could not possibly have caused any of Plaintiff's alleged obstruction of justice and witness tampering-related injuries.

In addition, even if Plaintiff had alleged that Manning was involved in such activity, none of Plaintiff's alleged injuries are sufficient to create standing. In particular, Plaintiff's alleged injuries relating to reputation, relationships, and emotional well-being are not economic injuries. *See Advanced Oral*, 2011 WL

198029, at *7. Likewise, the alleged injuries relating to potential future income arising from Plaintiff's memorabilia business are uncertain and speculative. *See Desai*, 360 N.J. Super. at 595. But more significantly, there is no direct causal link between any of Plaintiff's purported injuries and the alleged acts of obstruction of justice and witness tampering. As more fully explained in the Motion to Dismiss filed by Defendants John Mara, William Heller, Christine Procops, and the New York Giants, Plaintiff does not – and cannot – establish that, *but for* the alleged false statements and testimony by certain Defendants, he would not have been indicted by the Grand Jury. *See* Giants Defendants' Motion to Dismiss at pp. 12-14, 16. Moreover, Plaintiff does not – and cannot – show that, *but for* the indictment, his alleged injuries would not have occurred.

* * *

In short, the Complaint fails to allege facts demonstrating that Plaintiff sustained a non-speculative economic injury that directly flowed from Manning's (or any other Defendant's) commission of one of the predicate acts of racketeering activity alleged in the Complaint. Accordingly, the Court should find that Plaintiff lacks standing to pursue his New Jersey civil RICO claim against Manning.

B. The Complaint Does Not Sufficiently Allege The Requisite Elements Of A New Jersey Civil RICO Claim Against Manning

Assuming, *arguendo*, that Plaintiff has standing to pursue his New Jersey

civil RICO claim against Manning – he does not – the Court should still dismiss Plaintiff's New Jersey civil RICO claim because the Complaint does not sufficiently allege all of the requisite elements for such a claim. Specifically, the Complaint does not allege the "existence of an enterprise" or a "pattern of racketeering activity" as construed by New Jersey federal and state courts.

1. The Existence Of An "Enterprise"

The New Jersey civil RICO statute defines "enterprise" to include "any individual, sole proprietorship, partnership, corporation, business or charitable trust, association, or other legal entity, any union or group of individuals associated in fact although not a legal entity, and it includes illicit as well as licit enterprises and governmental as well as other entities." N.J. Stat. Ann. § 2C:41-1(c). In the seminal New Jersey civil RICO case, *State v. Ball*, the New Jersey Supreme Court gave clear, explicit guidance as to what constitutes an enterprise:

> The hallmark of an enterprise's organization consists rather in those kinds of interactions that become necessary *when a group, to accomplish its goal, divides among its members the tasks that are necessary to achieve a common purpose*. The division of labor and the separation of functions undertaken by the participants serve as the distinguishing marks of the "enterprise" because when a group does so divide and assemble its labors in order to accomplish its criminal purposes, it must necessarily engage in a high degree of planning, cooperation and coordination, and thus, in effect, constitute itself as an "organization."
>
> * * *
>
> [T]he focus of the evidence must be on the number of people involved and their knowledge of the objectives of their association, how the

> participants associated with each other, whether the participants each performed discrete roles in carrying out the scheme, the level of planning involved, how decisions were made, the coordination involved in implementing decisions, and how frequently the group engaged in incidents or committed acts of racketeering activity, and the length of time between them.

Ball, 141 N.J. at 162-63 (emphasis added).

In *Ball*, the defendants were convicted of carting waste generated in New York and dumping it at several unauthorized landfills in New Jersey. The defendants employed an elaborate scheme that included identifying potential locations, recruiting haulers, bribing a state license inspector, policemen and other public officials, employing lookouts, repeatedly changing locations when detection appeared imminent, laundering money, and covering up their illicit conduct. *Id.* at 151-54. In finding that the government had adequately alleged the existence of a RICO enterprise, the New Jersey Supreme Court discussed how the evidence presented at trial clearly showed "the common purpose of the associates, the continuing character of their efforts, and their functional division of labor," and the significant "organization of its members." *Id.* at 183. Specifically, the Court stated the following:

> The evidence demonstrates that *defendants were at the core of a large-scale dumping scheme involving many people. All were aware of the illegal objective of the enterprise, and they discussed their plans frequently*. The dirt brokers solicited the dumpers, arranged for the provision of dump sites, and generally oversaw the entire operation. The public-official defendants functioned as protectors of the scheme and deliberately frustrated official investigations into the dumping.

> Various other persons, such as the lookouts and the individual haulers, performed distinct roles integral to the running of the enterprise. Defendants planned where the dumping would occur and determined when sites had to be switched. The scheme required notice of when and where to dump each evening and the falsification of public records. *The scheme thus entailed an enterprise that displayed an "organization" of its members as evidenced by the interaction of the participants, and the extensive planning, coordination and cooperation necessary to effectuate its objectives.*

Id. at 183-84 (emphasis added).

Federal district courts have routinely adhered to the guidelines articulated in *Ball* in addressing New Jersey civil RICO claims. For example, relying on *Ball*, this Court dismissed a plaintiff's New Jersey RICO claim because it failed to "allege facts suggesting that Defendants worked together as a group, let alone that the group had a structure or made plans or coordinated any activities." *Demodulation, Inc. v. Applied DNA Scis., Inc.*, No. 2:11-cv-00296, 2012 WL 6204172, at *5 (D.N.J. Dec. 12, 2012). Likewise, in *In re Refco Inc. Securities Litigation*, Judge Jed Rakoff of the Southern District of New York, citing the standards articulated in *Ball*, dismissed a plaintiff's New Jersey RICO claim for failure to plead enterprise, noting as follows:

> Nothing in the Amended Complaint describes how the members of the enterprise "associated with each other"; whether the participants "performed discrete roles"; "the level of planning involved"; "how decisions were made"; or "the coordination involved in implementing decisions." There is nothing at all in the Amended Complaint about "division of labor" or "separation of functions." No inference can be derived that the Defendants collectively engaged in a "high degree of planning, cooperation and coordination." . . . [U]nder *Ball* there must

> be some allegations that indicate "a high degree of planning, cooperation and coordination" – and the Amended Complaint is sorely lacking in such allegations. Accordingly, the Plaintiffs have failed to plead with sufficient particularity that the Defendants operated as an organization, and therefore have failed to plead the requirement of an enterprise under NJRICO.

826 F. Supp. 2d 478, 533-34 (S.D.N.Y. 2011) (internal citations omitted).

In paragraphs 167 through 172 of the Complaint, Plaintiff purports to detail the alleged association-in-fact "Giants Enterprise" he claims existed between all of the Defendants in this case. However, nowhere in those paragraphs or anywhere else in the Complaint does Plaintiff allege facts sufficient to establish the "hallmarks of an enterprise's organization" as articulated in *Ball* and the other cases cited herein. Specifically, Plaintiff fails to identify who was the "leader" of the Giants Enterprise and fails to allege facts showing (i) that the members of the Giants Enterprise were "aware of the illegal objective of the enterprise," (ii) "how the participants [in the Giants Enterprise] associated with each other," (iii) "how decisions were made [in the Giants Enterprise]," or (iv) the existence of a "high degree of planning, coordination and cooperation" among the members of the so-called Giants Enterprise. *Ball*, 141 N.J. at 162-63. Moreover, Plaintiff fails to allege facts demonstrating a deliberately planned "division of labor" or "separation of functions" among the members of the so-called Giants Enterprise. *Id.* at 162. Notably, Plaintiff does not allege that Manning interacted with any other members of the so-called Giants Enterprise other than Joe Skiba, or that Manning even knew

of the existence or objectives of this purported Enterprise.

In addition, Plaintiff does not adequately allege that Defendants acted as a group to "achieve a common purpose." *Id.* Although Plaintiff states that "the members of the Giants Enterprise shared the common purpose of obtaining pecuniary gain, including money, in connection with the operation of the Giants football team, and therefore had a shared interest in promoting the brand and public image of the Giants football team" (Compl. at ¶ 170), such bald parroting of the legal elements of the cause of action, without more, cannot possibly be sufficient to establish the existence of an organized-crime-type enterprise. Indeed, the goal of every franchise in the NFL is to make money through the operation of their football team and to promote the brand and public image of their team.

Accordingly, because Plaintiff did not – and cannot – allege facts sufficient to show the existence of a criminal "Enterprise," Plaintiff's New Jersey civil RICO claim against Manning should be dismissed.

2. Pattern Of Racketeering Activity

Even assuming, *arguendo*, that Plaintiff has adequately alleged the existence of the so called Giants Enterprise – he has not – to pursue his New Jersey civil RICO claim against Manning, he also must allege that Manning participated in the affairs of the so-called Giants Enterprise through a pattern of racketeering activity, *i.e.*, that he personally committed at least two predicate acts within a span of ten

years. N.J. Stat. Ann. § 2C:41-1(d); *Capers v. Fedex Ground*, No. 2:02-CV-5352, 2012 WL 2050247, at *4 (D.N.J. June 6, 2012) (finding the plaintiffs' civil RICO allegations in the third amended complaint "woefully inadequate" because, among other failures, it did not adequately allege "that each alleged member committed at least two acts of racketeering activity within ten years of each other"). In addition, Plaintiff must allege that the multiple racketeering acts supposedly committed by Manning "are related and that they amount to or pose a threat of continued criminal activity." *Pathfinder Mgmt., Inc. v. Mayne Pharma PTY*, No. 06-cv-2204, 2008 WL 3192563, at *14 (D.N.J. Aug. 5, 2008) (finding plaintiff failed to establish pattern, in part, because "there [was] no threat of additional repeated criminal conduct"). This element of RICO was designed to serve the New Jersey Legislature's goal of ensuring that RICO liability does not attach to sporadic or isolated instances of wrong doing. *Ball*, 141 N.J. at 167.

In *Zahl*, for example, the plaintiff alleged that his former employee reported billing irregularities to the New Jersey medical licensing board, causing two investigations and the revocation of the plaintiff's medical license. 2009 WL 806540, at *1. The plaintiff also claimed the former employee had conspired with other defendants to force him out of his medical practice. The court found that, because there did "not appear to be any reason for any additional activity against [the plaintiff] by the defendants," the "allegations [were] too idiosyncratic in terms

of the activities of the participants and the objects sought for this Court to find that the Second Amended Complaint satisfies the continuity requirement." *Id.* at *8.

In the Complaint, Plaintiff inappropriately lumps all of the Defendants together and states, in conclusory form, that they collectively engaged in a pattern of racketeering activity, including mail fraud, wire fraud, theft by deception, forgery, obstruction of justice and witness tampering, from 2001 to 2013. Compl. at ¶¶ 176-182. As an initial matter, Manning could not have engaged in any purported racketeering activity associated with the so-called Giants Enterprise prior to 2004 as he was not even a member of the Giants football team. *Id.* at ¶ 9. But even for the period post-2004, Plaintiff has not sufficiently alleged Manning's participation in any, let alone two, of the identified predicate acts.

Specifically, as discussed in Point II.A.1, *supra*, Plaintiff does not allege any particularized, non-conclusory facts showing that Manning used the mail or wire to commit fraud, let alone that any such fraud is likely to occur in the future. Rather, the only allegations related to the use of mail or wire concern non-Defendant Steiner Sport's possible use of the mail to provide allegedly fake Manning game-worn helmets and jerseys to third-party customers, and an unnamed, non-Defendant memorabilia auction house's advertisement of an allegedly fake game-worn helmet on its website.

Likewise, as discussed in Point II.A.2, *supra*, Plaintiff has not adequately

alleged a predicate act of theft by deception against Manning. *See* N.J. Stat. Ann. § 2C:20-4. Such act requires a defendant to "purposely obtain property of another by deception." *Falco*, 2010 WL 1926828, at *6. Here, Plaintiff does not allege that Manning obtained *Plaintiff's* property or money, by deception or otherwise. In fact, Plaintiff does not allege that he had any direct dealings with Manning or purchased any sports memorabilia directly from Manning. Moreover, the only purportedly fake game-worn item purchased by Plaintiff is Manning's back-up Super Bowl XLVI helmet, which he claims to have purchased from *Steiner Sports*, not Manning.

Similarly, Plaintiff has not sufficiently alleged Manning's commission of the predicate act of forgery, to the extent Plaintiff is even alleging such a predicate act. In the Complaint, Plaintiff baldy alleges that the "RICO Defendants" violated N.J. Stat. Ann. § 2C:41-1(a)(1)(o), entitled "forgery and fraudulent practices and all crimes defined in chapter 21 of Title 2C of the New Jersey Statutes." Compl. ¶ 177. However, Plaintiff does not specify which particular portion of N.J. Stat. Ann. § 2C:41-1(a)(1)(o), or which of the more than thirty crimes listed in chapter 21 of Title 2C, he believes was violated by Manning. Neither Manning nor the Court should be required "to guess which particular claims are being asserted on the basis of which events." *Godfrey v. Thermco*, No. 13-4750, 2013 WL 5952046, at *5 (D.N.J. Nov. 4, 2013). Moreover, such a conclusory, non-particularized

allegation by Plaintiff cannot possibly satisfy his Rule 9(b) heightened pleading obligation. *Lum*, 361 F.3d at 224. Notably, Plaintiff cannot even assert a claim of forgery against Manning, as such claim only applies to the illicit modification of a *writing* (*see* N.J. Stat. Ann. § 2C:21-1(a)(1)-(3)), which the Complaint does not allege to have occurred.

That leaves only the predicate acts of obstruction of justice and witness tampering. Plaintiff alleges that the "RICO Defendants" engaged in obstruction of justice and witness tampering by providing false statements and testimony to the FBI and the Grand Jury that later indicted him for engaging in the sale of fraudulent sports memorabilia over a period of eight years. Compl. at ¶¶ 181-82. However, as noted above, there are absolutely no allegations in the Complaint that *Manning* provided any statements or testimony to the FBI or Grand Jury. The Complaint also is devoid of any allegation that *Manning* intimidated, threatened, or persuaded any individual to provide false testimony to the FBI or Grand Jury. Thus, Plaintiff's attempt to lump Manning into the predicate acts of obstruction of justice or witness tampering is wholly meritless.

In short, the Complaint does not adequately allege Manning's commission of any, let alone two, acts of racketeering activity that are related and pose a threat of continuing into the future. Accordingly, Plaintiff's claim against Manning for violation of New Jersey civil RICO should be dismissed, with prejudice.

C. The Complaint Does Not Sufficiently Allege The Requisite Elements Of A New Jersey RICO Conspiracy Claim Against Manning

As part of his New Jersey RICO claim, Plaintiff alleges that Manning violated New Jersey's RICO conspiracy statute, N.J. Stat. Ann. § 2C:41-2(d). According to the New Jersey Supreme Court,

> [A] RICO conspiracy has two separate elements: an agreement to violate RICO and the existence of an enterprise. The agreement to violate RICO itself has two aspects. One involves the agreement proper, that is, an agreement to conduct or participate in the conduct of the affairs of the enterprise. The other involves an agreement to the commission of at least two predicate acts. If either agreement is lacking, the defendant has not embraced the objective of the conspiracy – the substantive violation of the RICO Act – that is required for any conspiracy conviction under classic conspiracy law.

Ball, 141 N.J. at 176. Additionally, Plaintiff must show that "the defendant acted purposely with knowledge of the unlawful objective of the conspiracy charged in the indictment and with an intent to further that objective." *Id.*

Here, Plaintiff has failed to even allege the existence of an enterprise, as discussed in Point II.B.1, *supra*. In addition, Plaintiff does not allege facts showing that Manning knowingly agreed to violate New Jersey's RICO statutes. Indeed, the Complaint is devoid of *any* allegations of Manning's knowledge of any purported conspiracy, let alone his knowing agreement to participate in such a conspiracy. Accordingly, Plaintiff's New Jersey civil RICO conspiracy claim against Manning should be dismissed as well.

III. THE CLAIMS AGAINST MANNING FOR TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE AND CONTRACTUAL RELATIONS SHOULD BE DISMISSED

In order to assert a viable claim against Manning for tortious interference with prospective economic advantage, Plaintiff must allege *each* of the following: (1) that Plaintiff had a reasonable expectation of economic advantage; (2) that Manning intentionally and maliciously interfered with that expected economic advantage; (3) that but for Manning's interference, Plaintiff would have realized a prospective gain; and (4) that Plaintiff suffered damages as a direct result of Manning's misconduct. *See Printing Mart-Morristown v. Sharp Elecs. Corp.*, 116 N.J. 739, 751-52, (1989). Many courts include a fifth element, namely, that Manning had knowledge of Plaintiff's expectancy of economic advantage. *See, e.g.*, *Lightning Lube v. Witco Corp.*, 4 F.3d 1153, 1167 (3d Cir. 1993); *Varrallo v. Hammond Inc.*, 94 F.3d 842, 848 n.9 (3d Cir. 1996).

Similarly, to assert a claim against Manning for tortious interference with contractual relations, Plaintiff must allege: (1) that a contractual relationship existed; (2) that Manning intentionally and maliciously interfered with that relationship; (3) that but for Manning's interference, the contractual relationship would still be viable; and (4) that Plaintiff suffered damages as a direct result of Manning's misconduct. *See Matrix Essentials, Inc. v. Cosmetic Gallery, Inc.*, 870 F. Supp. 1237, 1247 (D.N.J. 1994).

As demonstrated below, the Complaint does not come close to alleging facts sufficient to satisfy all of the foregoing elements for Plaintiff's claims against Manning for tortious interference with prospective economic advantage or contractual relations. Accordingly, the Court should dismiss these claims, with prejudice.

A. The Complaint Does Not Sufficiently Allege Facts Showing That Manning Interfered With Plaintiff's Prospective Business Opportunities Or Contractual Relationships, Let Alone With Intent And Malice

As noted above, in order to proceed with his tortious interference claims against Manning, Plaintiff must allege both that Manning interfered with Plaintiff's sports memorabilia business opportunities or contractual relationships *and* that Manning's interference was undertaken intentionally and with malice, *i.e.*, through "devious, improper and unrighteous means." *Lightning Lube*, 4 F.3d at 1167. *See also IDT Corp. v. Unlimited Recharge, Inc.*, No. 11-cv-4992, 2012 WL 4050298, at *10 (D.N.J. Sept. 13, 2012) (alleging the "[d]efendants [attempted] to lure away [the plaintiff's] customers and made false statements about the health of [the plaintiff's] business intending to 'convince potential customers not to deal with [the plaintiff]'"). New Jersey courts routinely dismiss claims for tortious interference where the plaintiff does not allege facts demonstrating the defendant's knowledge of the plaintiff's prospective economic opportunity or contractual relationship. *See, e.g., Mu Sigma, Inc. v. Affine, Inc.*, No. 12-cv-1323, 2013 WL

3772724, at *5 (D.N.J. July 17, 2013) (dismissing the plaintiff's complaint because, *inter alia*, the plaintiff failed to adequately plead "whether Defendants had knowledge of [the Plaintiff's] expectancy"). "It is a simple proposition that a person cannot intentionally interfere with a contract that he knows nothing about. In order to subject someone to liability under this tort, the individual must have knowledge of the contract with which he has allegedly interfered." *Major League Baseball Promotion Corp. v. Colour-Tex, Inc.*, 729 F. Supp. 1035, 1051 (D.N.J. 1990); *see also Lightning Lube*, 4 F.3d at 1170 (holding "a defendant cannot be liable for interfering with a contract of which he or she was unaware"); *see also DeCosta v. English*, No. 11-2651, 2012 WL 528760, at *7 (D.N.J. Feb. 16, 2012) (finding the plaintiff's "original and proposed amended pleading both fail to identify any existing or prospective contractual or economic relationships with which defendants allegedly interfered").

The decision in *Trump Taj Mahal Associates v. Costruzioni Aeronautiche Giovanni Agusta, S.p.A.*, is instructive. In that case, the plaintiff-corporation sued the defendant, a helicopter manufacturer, under multiple theories of liability, following a helicopter crash in which three of the plaintiff's executives died. 761 F. Supp. 1143, 1145 (D.N.J. 1991), *aff'd*, 958 F.2d 365 (3d Cir. 1992). The plaintiff alleged that the defendant tortiously interfered with its contractual relations with the decedents, because the defendant knew that the helicopter design was

defective, that a crash due to the defect was inevitable, that the crash would injure or kill someone, and that the victim would likely be a businessman, since businessmen were the defendant's core consumer base. *Id.* at 1163-64. Notwithstanding such allegations, the court held that the plaintiff failed to state a claim for tortious interference because, even if the defendant's allegedly wanton actions and omissions constituted malice toward the business community generally, that malice was not directed at the relationship the plaintiff had with the decedents. *Id.* In fact, there was "no allegation in the complaint that [the defendant] was aware of the contractual relationship between plaintiffs and their deceased executives." *Id.* at 1164.

Here, the Complaint is devoid of any allegation demonstrating Manning's interference in Plaintiff's sports memorabilia business, let alone with the requisite improper intent and malice. The Complaint does not allege that Manning contacted any of Plaintiff's customers or contracting parties and sought to lure them away from doing business with Plaintiff. The Complaint also does not allege that Manning was aware of and specifically targeted any of Plaintiff's prospective economic opportunity or contractual relationship. Indeed, as noted above, the Complaint does not even allege that Manning knew Plaintiff or what Plaintiff did for a living. Clearly, Manning could not have intended to interfere with Plaintiff's business opportunities or contractual relationships if he was unaware of Plaintiff

and his business ventures.

Accordingly, Plaintiff's tortious interference claims against Manning are wholly deficient and should be dismissed, with prejudice.

B. The Complaint Does Not Sufficiently Allege Facts Showing That Plaintiff Sustained Actual Damages As A Direct Result Of Manning's Purported Tortious Interference

Not only does the Complaint fail to allege facts showing Manning's intentional and malicious interference with Plaintiff's prospective business opportunities or contractual relationships, it also fails to allege any facts showing that Plaintiff sustained actual damages as a direct result of Manning's purported tortious interference. New Jersey courts routinely dismiss claims for tortious interference where the complaint "fails to identify a single, specific customer that [plaintiff] either lost or could have acquired *but for* [defendant's] conduct." *Am. Millennium Ins. Co. v. First Keystone Risk Retention Grp., Inc.*, 332 Fed. Appx. 787, 790 (3d Cir. 2009) (affirming lower court's dismissal of complaint) (emphasis added). A plaintiff's "generalized claims of 'lost business'" are simply insufficient to support a tortious interference claim. *Metromedia Energy, Inc. v. Griffin*, No. 10-1692, 2011 WL 4343801, at *4 (D.N.J. Sept. 13, 2011) (dismissing a counterclaim because "Defendants fail[ed] to identify any potential customers that they lost or could have acquired but for [Plaintiffs'] conduct"); *DeCosta*, 2012 WL 528760, at *7 ("Here, DeCosta's original and proposed amended pleading both fail

to identify any existing or prospective contractual or economic relationships with which defendants allegedly interfered."); *Novartis Pharm. Corp. v. Bausch & Lomb, Inc.*, No. 07-5945, 2008 WL 4911868, at *7 (D.N.J. Nov. 13, 2008) ("Even at the pleading stage, a plaintiff may not rest a claim . . . on a mere hope that additional contracts or customers would have been forthcoming . . . .") (quoting *Advanced Power Sys., Inc. v. Hi-Tech Sys., Inc.*, 801 F. Supp. 1450, 1459 (E.D. Pa. 1992)) (internal quotation marks omitted).

Here, the Complaint fails to identify any specific customer, business opportunity or contract that Plaintiff lost or could have gained as a direct result of Manning's purported creation of fake game-worn jerseys or helmets. While the Complaint alleges, in conclusory fashion, that the real Manning game-worn helmets he acquired from Joe or Ed Skiba (*i.e.*, Manning's 2004 rookie helmet and Super Bowl XLII helmet) now have diminished value due to the alleged presence of forgeries in the marketplace (Compl. at ¶ 157), the Complaint does not allege that Plaintiff ever attempted to sell those Manning game-worn helmets or that any potential buyers refused to buy those helmets from Plaintiff at fair market value. Accordingly, the Court should follow the above precedent and dismiss Plaintiff's tortious interference claims for lack of actual, non-speculative damages proximately caused by Manning's tortious interference – not that Plaintiff has alleged the existence of a tortious interference by Manning to begin with, as

already discussed above.

IV. THE CLAIM AGAINST MANNING FOR CIVIL CONSPIRACY SHOULD BE DISMISSED

To make out a claim for civil conspiracy, a plaintiff must allege "(1) a combination of two or more persons; (2) a real agreement or confederation with a common design; (3) the existence of an unlawful purpose, or of a lawful purpose to be achieved by unlawful means; and (4) proof of special damages." *Pathfinder Mgmt.*, 2008 WL 3192563, at *19 (quoting *Morganroth & Morganroth v. Norris, McLaughlin & Marcus*, P.C., 331 F.3d 406, 414 (3d Cir. 2003)) (internal quotation marks omitted). Significantly, a plaintiff cannot assert a claim for civil conspiracy unless he alleges facts sufficient to infer that the defendant committed a tortious act that would be actionable even without the conspiracy. *See Williams v. Fort Lee Pub. Sch.*, Nos. 2:11-06314, 2:12-03853, 2013 WL 6865665, at *6 (D.N.J. Dec. 23, 2013) (dismissing the plaintiff's civil conspiracy claim, with prejudice, because the plaintiff "provided no evidence supporting any underlying wrong that could provide the basis for a conspiracy."); *Eli Lilly & Co. v. Roussel Corp.*, 23 F. Supp. 2d 460, 497 (D.N.J. 1998) (dismissing the plaintiff's civil conspiracy claim because all of the underlying claims warranted dismissal).

In *Eli Lilly*, the plaintiff, a pharmaceutical company, alleged, *inter alia*, that the defendant, a competitor company, conspired with other corporations to defraud the plaintiff by making negligent misrepresentations to the plaintiff regarding the

defendant's product and tortiously interfered with the plaintiff's business relations. *Id.* at 492-94. The court dismissed Eli Lilly's civil conspiracy claim given its failure to adequately plead any of the tort claims on which its conspiracy claim was predicated. *Id.* In so doing, the court noted as follows:

> Plaintiff cannot bring an action alleging civil conspiracy unless defendants committed an act which would be actionable even without the conspiracy. Thus, the conspiracy is not the gravamen of the charge, but merely a matter of aggravation, enabling the plaintiff to recover against all the defendants as joint tortfeasors. The actionable element [of plaintiff's claim] is the tort which the defendants agreed to perpetrate and which they actually committed. [Plaintiff] has failed to establish a right of action against . . . Defendants under any of its statutory or common law theories. *A conspiracy is not actionable absent an independent wrong; therefore, the dismissal of [plaintiff's] other causes of action requires dismissal of the conspiracy claim.*

Id. at 497 (emphasis added; citation omitted).

Here, even assuming, *arguendo*, that the Complaint has sufficiently alleged an "agreement" between Manning and Joe Skiba to create fake game-worn sports jerseys and helmets (it has not), the Complaint is devoid of any allegation that Manning and Joe Skiba conspired to injure Plaintiff through such conduct. As noted above, the Complaint does not even allege that Manning knew Plaintiff or what he did for a living, let alone that Manning deliberately set out to harm Plaintiff. Thus, as in *Eli Lilly*, because the Complaint does not sufficiently allege an underlying and independent wrong committed by Manning, Plaintiff cannot proceed with his civil conspiracy claim against Manning.

In addition, the Complaint does not allege that Plaintiff lost any specific contracts, customers, or opportunities to profit due to Manning's purported tortious interference, or that he "would have succeeded in [engaging in any contract relating to his businesses] in the absence of interference." *Juice Entm't v. Live Nation Entm't*, No. 11-7318, 2012 WL 2576284, at *3 (D.N.J. July 3, 2012). "The damage is the essence of the action, not the conspiracy." *Kurtz v. Oremland*, 33 N.J. Super. 443, 456 (Super. Ct. Ch. Div.) *aff'd*, 16 N.J. 454 (1954) (dismissing a civil conspiracy claim where plaintiff failed to show that he was damaged by the underlying tortious interference claim). Plaintiff here cannot show that he sustained damages from any tort that Manning allegedly conspired to commit. Thus, Plaintiff's claim of civil conspiracy against Manning should be dismissed, with prejudice.

V. THE CLAIM AGAINST MANNING FOR AIDING AND ABETTING SHOULD BE DISMISSED

In order to assert a claim for aiding and abetting against Manning, Plaintiff must allege *each* of the following: (1) that Manning assisted another in performing a wrongful act that caused an injury to Plaintiff; (2) that Manning was generally aware of his role as part of an overall illegal or tortious activity at the time that he provided the assistance; and (3) that Manning knowingly and substantially assisted the principal violation. *Hurley v. Atl. City Police Dep't*, 174 F.3d 95, 127 (3d Cir. 1999). "A claim for aiding and abetting . . . requires proof of the underlying

tort[.]" *State, Dep't of Treasury, Div. of Inv. ex rel. McCormac v. Qwest Commc'ns Int'l, Inc.*, 387 N.J. Super. 469, 484 (Super. Ct. App. Div. 2006).

As an initial matter, the Complaint does not specify which tort, or which co-Defendant, Manning allegedly aided and abetted. Under *Godfrey*, neither Manning nor the Court should be required "to guess which particular claims are being asserted on the basis of which events." *Godfrey*, 2013 WL 5952046, at *5. For this reason alone, Plaintiff's aiding and abetting claim should be dismissed.

But assuming Manning or the Court were required to guess which underlying tort is the basis of Plaintiff's aiding and abetting claim, it could only be the claim of tortious interference with prospective economic advantage or contractual relations that Plaintiff has alleged against Defendant Joe Skiba. This is because the only individual with whom Plaintiff alleges Manning associated himself concerning the purported creation of fraudulent game-worn memorabilia was Defendant Joe Skiba. *See*, *e.g.*, Compl. at ¶¶ 122, 124, 129. Therefore, Plaintiff's aiding and abetting claim against Manning must be dismissed if Plaintiff has not sufficiently alleged claims against Defendant Joe Skiba for tortious interference with prospective economic advantage and contractual relations.

As demonstrated below, the Complaint does not allege facts sufficient to state such tortious interference claims against Defendant Joe Skiba. However, even if it did, Plaintiff's aiding and abetting claim against Manning still fails

because the Complaint does not allege that Manning had actual knowledge of such tortious interference by Joe Skiba and nonetheless substantially assisted Joe Skiba in the commission of such tortious interference. Accordingly, Plaintiff's aiding and abetting claim against Manning should be dismissed, with prejudice.

A. The Complaint Does Not Sufficiently Allege The Tortious Interference Claims Against Defendant Joe Skiba

The elements of the causes of action for tortious interference with prospective economic advantage and contractual relations are discussed in Point III, *supra*. Both torts require Plaintiff to allege that Joe Skiba interfered with Plaintiff's business opportunities or contractual relations through "devious, improper and unrighteous means." *Lightning Lube*, 4 F.3d at 1167. To this end, Plaintiff must allege that Joe Skiba was aware of and specifically targeted Plaintiff's prospective economic opportunities or contractual relationships. *See Major League Baseball*, 729 F. Supp. at 1051. Moreover, Plaintiff must allege that he sustained actual damages proximately caused by Joe Skiba's intentional and malicious interference. Generalized or speculative claims of lost business or contracts are simply insufficient to sustain a claim for tortious interference. *See Am. Millennium Ins. Co.*, 332 Fed. Appx. at 790.

Here, the Complaint does not contain any factual allegations that Joe Skiba interfered in Plaintiff's sports memorabilia business opportunities or contracts, let alone intentionally or maliciously. The Complaint lacks any allegation that Joe

Skiba contacted any of Plaintiff's existing or potential clients or contracting parties in an effort to dissuade them from conducting business with Plaintiff. Nor does the Complaint allege that Joe Skiba created fraudulent game-worn helmets or jerseys with the specific intent of injuring Plaintiff and his sports memorabilia business. To the contrary, Plaintiff acknowledges that he and Joe Skiba had a long-time business and personal relationship. *See* Compl. at ¶ 19. Moreover, the Complaint does not allege that Plaintiff sustained any actual damages as a direct result of Joe Skiba's purported creation of fake game-worn sports memorabilia.

Accordingly, given the Complaint's lack of factual allegations sufficient to state a claim against Joe Skiba for tortious interference with prospective economic advantage or contractual relations, the Complaint likewise fails to state a claim against Manning for aiding and abetting Joe Skiba in the commission of such tortious conduct.

B. The Complaint Does Not Sufficiently Allege Facts Showing That Manning Knowingly And Substantially Assisted Joe Skiba In The Commission Of Tortious Activity

Plaintiff's aiding and abetting claim also fails because the Complaint does not allege facts demonstrating that Manning was "generally aware of his role as part of an overall illegal or tortious activity at the time that he provide[d] the assistance," and that Manning provided knowing and substantial assistance to Joe Skiba. *See Kubert v. Best*, 432 N.J. Super. 495, 522 (Super. Ct. App. Div. 2013);

Hurley, 174 F.3d at 127. In fact, many courts require a showing of *actual knowledge*, noting that anything less would be "inconsistent with the standard for aiding and abetting liability, which requires 'willful and knowing' substantial assistance." *Cafaro v. HMC Int'l*, No. 07-2793, 2009 WL 1622825, at *5 (D.N.J. June 10, 2009) (holding that "for liability to attach there must be actual knowledge and substantial participation.").

Here, even assuming Joe Skiba did tortiously interfere with Plaintiff's sports memorabilia business, there is absolutely no allegation in the Complaint that *Manning* knew Joe Skiba was engaged in such tortious conduct and nonetheless substantially assisted Joe Skiba in the commission of such tortious activity. In fact, the Complaint is devoid of any allegation that Manning knew Plaintiff or that Joe Skiba purportedly had a business and personal relationship with Plaintiff. Plainly, Manning could not possibly have aided and abetted Joe Skiba's alleged tortious interference in Plaintiff's prospective economic gain or contractual relations, if he did not even know of Plaintiff's existence or that Joe Skiba was engaged in such interference in the first place.

Accordingly, Plaintiff's claim against Manning for aiding and abetting the commission of a tort should be dismissed, with prejudice.

CONCLUSION

For all of the foregoing reasons, the Court should grant Defendant Eli Manning's motion and dismiss all of the claims alleged against him in Plaintiff's Complaint, with prejudice.

Dated: March 20, 2014

/s/ Israel Dahan
Israel Dahan (No. 042701997)
Louis M. Solomon (admitted *pro hac vice*)
William Schwartz (admitted *pro hac vice*)
CADWALADER, WICKERSHAM & TAFT LLP
One World Financial Center
New York, New York 10281
Telephone: (212) 504-6000
Facsimile: (212) 504-6666

Attorneys for Defendant, Eli Manning