Robin Denker et al v. Michael Ricchio
8:21-cv-01668 JVS (DFM)

TENTATIVE Order Regarding Plaintiffs' Motion for Partial Summary Judgment and Defendant's Motion for Summary Judgment

Before this Court are two motions for summary judgment. Plaintiffs Robin Denker and Jerry Klein ("Plaintiffs") move for partial summary judgment on their claims for Conversion and Elder Financial Abuse against Defendant Michael Ricchio ("Ricchio"). (Pl. Mtn., Dkt. No. 44.) Ricchio opposed the motion and Plaintiffs responded. (Def. Opp'n., Dkt. No. 49; Pl. Reply, Dkt. No. 51.) Ricchio also moves for summary judgment on all of Plaintiffs' claims in his favor. (Def. Mtn., Dkt. No. 46.) Plaintiffs opposed the motion and Ricchio responded. (Pl. Opp'n., Dkt. No. 50; Def. Reply, Dkt. No. 52.)

For the following reasons, the Court **GRANTS** in part and **DENIES** in part the motions.

I. BACKGROUND

The following facts are taken from the parties' respective Statements of Genuine Disputes. (Defendant's Statement of Genuine Disputes, Dkt. No. 49-2 ("Def. SGD"); Plaintiffs' Statement of Genuine Disputes, Dkt. No. 50-1 ("Pl. SGD").) Plaintiffs Robin Denker and Jerry Klein are "life partners" living in California. (Plf. SGD at ¶ 2.) In August, 2016, Ricchio was in an intimate relationship with Denker's daughter, Elissa Denker. (Id. at ¶ 3.) The couple married in October, 2017 and filed for divorce on June 4, 2019 (Id., Orange County Superior Court Case No. 19D004541).

On August 31, 2016, Ricchio sent an email to several people, including Denker[1] ("Denker"), about a potential investment in Iconomi ("ICN"), a type of cryptocurrency. (Id. at 4; Def. SGD at ¶¶ 1-2.) Plaintiffs reviewed the information Ricchio sent and spoke with Ricchio later the same day about making an

[1] Unless otherwise indicated, the use of "Denker" throughout this Order refers to Plaintiff Robin Denker. When the Court is referring to Elissa Denker, the Court will use her full name.

investment in ICN. (Pl. SGD at ¶¶ 5-6.) During this conversation, Plaintiffs asked Ricchio questions about the solvency of ICN, how long the return on investment would take, and when they would get their money back. (Id. at ¶ 7.) Additionally, Denker testified that Ricchio "told us that it would be a great investment and we should trust him." (Id.) In this initial conversation, Plaintiffs understood that Ricchio would manage the ICN investment at their direction, in part by providing Plaintiffs "information and data" about their investment's progress. (Id. at ¶ 8.)

Later the same day (August 31), Denker sent Ricchio $3,000 from her personal Chase account to be used to purchase ICN. (Id. at ¶ 11.) On each of the following two days (September 1 and 2), Denker sent Ricchio $5,000 from Klien's personal Chase account to be used to purchase ICN, bringing the total investment of the couple to $13,000. (Id. at ¶¶ 12-14.) There was no discussion with Ricchio about compensating him for making the investment for Plaintiffs. (Id. at ¶ 15.) Ricchio used the money Plaintiffs sent him to purchase ICN coins in September, 2016 and commingled the coins with his own cryptocurrency one or more of his own accounts. (Def. SGD at ¶¶ 7-10.) Plaintiffs were aware that Ricchio would hold their ICN coins in his account and were not "happy" about the arrangement, as Ricchio informed them it would be too technologically advanced for them to manage their own accounts. (Pl. SGD at ¶ 32.) Ricchio did not give Plaintiffs' any of the ICN coins that he purchased for them. (Id. at ¶ 11.)

Following Ricchio's purchase of ICN on behalf of Plaintiffs, he purchased two different cryptocurrencies (bitcoin and Ethereum). (Id. at ¶ 12.) The parties dispute at what time Plaintiffs requested Ricchio perform this transaction. Plaintiffs assert that, in January, 2018, they asked Ricchio to convert their ICN coins into bitcoin and Ethereum. (Id. at ¶¶ 63-64.) However, Ricchio denies receiving this instruction, stating instead that Plaintiffs asked him to sell their ICN when Ricchio sold his own ICON, in September, 2018. (Ricchio's Response to Pl. SGD ("Def. Resp. to Pl. SGD") at ¶¶ 63-64. Plaintiffs purchased "nano ledgers" (cryptocurrency hardware wallets) to store the bitcoin and Ethereum. (Pl. SGD at ¶ 64.) The parties dispute why the Plaintiffs purchased the ledgers. Plaintiffs contend that Ricchio instructed Plaintiffs to purchase "nano ledgers" and give them to Ricchio to hold their bitcoin and Ethereum cryptocurrencies. (Id. at ¶ 65.) Ricchio asserts that Klein wanted the ledgers so he could move unrelated cryptocurrencies from his Gemini exchange account onto a nano ledger. (Def. Resp. to Pl. SGD at ¶ 65.)

Because Plaintiffs did not have access to Ricchio's account, they relied on him for information about their investments. Prior to June 9, 2017, Denker "claims to have verbally asked Ricchio for information about the buy-in price "often," and that "he would never answer [Plaintiffs]." (Pl. SGD at ¶ 35.) On June 9, 2017, Denker sent an email to Ricchio asking what Plaintiffs paid per share and what the purchase date of their shares were. (Denker Decl., Ex. 7.) Ricchio responded to Denker's email stating that his recollection "[o]ff the top of [his] head" was that they paid "$0.25-$0.35 in November." (Pl. SGD at ¶ 36.) Because Plaintiffs understood that the ICN was to be purchased at $0.11 in September, 2016, Denker was "shocked" and "disappointed" by this information. (Id. at ¶¶ 37-38.) Plaintiffs discussed the email among themselves. (Id. at ¶ 39.) Plaintiffs assert, and Ricchio disputes, that Ricchio said in a phone conversation with Denker later that day that the information in his email was an off the cuff guess that she should not rely on. Denker Dep. at 131:22-133:1. Plaintiffs also assert that Ricchio confirmed to them on multiple occasions both in writing and verbally that he had purchased their ICN tokens at the initial offering price of $0.11 per coin. (Rubinsky Decl., Exs. I, J; Denker Decl. ¶¶ 9-10.)

In March 2019, Ricchio gave Plaintiffs an envelope with an accounting he created concerning their ICN investment. (Pl. SGD at ¶ 45.) After reviewing the information provided to them, Plaintiffs thought it was "all wrong," commenting to Ricchio that "all this looks like BS. What's going on?" (Id. at ¶ 46.) On July 18, 2019, Ricchio emailed Plaintiffs indicating his desire to "settle up . . . regarding the crypo[currency]" he owed them. (Id. at ¶ 47.)

In July, 2019, Ricchio emailed Plaintiffs stating he would "like to settle up with you" regarding the cryptocurrency he owed them and offered to help them "with the transfer and setup for your ledger." (Id. at ¶ 47.) The parties dispute what transpired after Ricchio sent this email. Ricchio argues that Plaintiffs did not respond. (Denker Dep. at 151:10-16; 155:21-156.) Plaintiffs assert that, while they did not respond to Ricchio's email at that time, they may have communicated on the phone. (Id. at 151:1-20.) Additionally, Plaintiffs contend that they informed Ricchio's father, who was acting as Ricchio's agent, that Denker would wait to respond to Ricchio's email until he and Elissa Denker had settled their divorce. (Id. at 155:1-156:16.) Plaintiffs further state that Ricchio knew that Plaintiffs did not respond to his email because they did not want to interfere with Ricchio's and Elissa Denker's relationship and pending divorce. (Rubinsky Decl.,

Ex. A ("Ricchio Dep.") at 154:5-155:22.)

On March 11, 2020, Ricchio again sent an email to Plaintiffs stating that he "would like to settle up" and asked where Plaintiffs would like Ricchio to send their funds. (Pl. SGD at ¶ 49.) The parties again dispute what transpired afterwards. Ricchio asserts that Plaintiffs did not respond to Ricchio's email. (Denker Dep. at 154:19-21; 156:13-158:9; 161:22; 162:9.) Plaintiffs argue that they believed Ricchio's accounting of what they were owed to be false, and they therefore chose to retain counsel instead of responding directly to his email. (Id. at 157:1-158:9.)

On June 2, 2021, Plaintiffs' attorney sent a letter to Ricchio's attorneys[2] informing them that Plaintiffs "would like to have their cryptocurrency returned to them at this time." (Def. SGD at ¶ 16.) Ricchio's attorney responded on June 29, 2021. (Id. at ¶ 18.) Ricchio was aware that his attorney was corresponding with Plaintiffs' counsel. (Id. at ¶ 20.) Ricchio believes that he owes Plaintiffs at least $48,000 in connection with their investments. (Id. at ¶ 22.)

The parties dispute whether Plaintiffs knew that Ricchio was not a licensed cryptocurrency broker at the time of their investment. Ricchio asserts that Plaintiffs knew that Ricchio was not a licensed broker. Declaration of Jason Smith ("Smith Decl."), Dkt. No. 46-3, Ex. C ("Denker Dep.") at 113:4-10. Plaintiffs argue that the deposition testimony Ricchio cites to in support of his assertion supports a finding that Ricchio never told Plaintiffs he was a licensed broker, but that they knew "he had certificates," although they did not know "what they were or were not for." Declaration of Thomas Rubinsky ("Rubinsky Decl."), Dkt. No.50-4, Ex. B ("Denker Dep.") at 113:4-16.

The parties similarly dispute whether Ricchio was, or at least was holding himself out to be, a "cryptocurrency professional" or a "crytocurrency hobbyist." Ricchio characterizes himself as a "cryptocurrency hobbyist" because the "infrequent nature of [his] trading activity for his two largest cryptocurrency assets

[2] Ricchio steadfastly maintains that the entirety of this communication constitutes an inadmissable settlement communication under Federal Rule of Evidence 408. Although the Court agrees with Ricchio's characterization of this letter as part of a settlement discussion, as discussed in detail below, it is admissible to show that Ricchio was on notice that Plaintiffs requested that Ricchio return their funds to them and that he had knowledge of their request.

is consistent with him being a 'hobbyist.'" (Smith Decl., Ex. K, ("Ricchio's Report") at 10.) Plaintiffs disagree, arguing that his cryptocurrency trading activity is instead consistent with him being a professional cryptocurrency investor and trader. (Rubinsky Decl., Ex. D ("Plaintiffs' Expert Report") at 15-19.)

As of May 1, 2021, Denker was 65 years old. (Id. at ¶ 28.) Plaintiffs filed this lawsuit on June 25, 2021. (Pl. SGD at ¶ 1.)

II. LEGAL STANDARD

Summary judgment is appropriate where the record, read in the light most favorable to the nonmovant, indicates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Summary adjudication, or partial summary judgment "upon all or any part of [a] claim," is appropriate where there is no genuine dispute as to any material fact regarding that portion of the claim. Fed. R. Civ. P. 56(a); see also Lies v. Farrell Lines, Inc., 641 F.2d 765, 769 n.3 (9th Cir. 1981) ("Rule 56 authorizes a summary adjudication that will often fall short of a final determination, even of a single claim . . . .") (internal quotation marks omitted).

Material facts are those necessary to the proof or defense of a claim, and are determined by referring to substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In deciding a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 255.[3]

The moving party has the initial burden of establishing the absence of a material fact for trial. Anderson, 477 U.S. at 256. "If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact . . ., the court may . . . consider the fact undisputed." Fed. R. Civ. P. 56(e)(2). Furthermore, "Rule 56[(a)] mandates the entry of summary judgment . . . against a

[3] "In determining any motion for summary judgment or partial summary judgment, the Court may assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a) included in the 'Statement of Genuine Disputes' and (b) controverted by declaration or other written evidence filed in opposition to the motion." L.R. 56-3.

party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322. Therefore, if the nonmovant does not make a sufficient showing to establish the elements of its claims, the Court must grant the motion.

A court presented with cross-motions for summary judgment should review each motion separately, giving the nonmoving party for each motion the benefit of all reasonable inferences from the record. Center for Bio-Ethical Reform, Inc. v. Los Angeles Cty. Sheriff Dep't, 533 F.3d 780, 786 (9th Cir. 2008).

III. DISCUSSION

A. Evidentiary Objections

Before turning to the merits of the parties' arguments, the Court will address two evidentiary objections raised by Ricchio.

i. Attorney Client Privilege

Ricchio objects to Plaintiffs' statement that "Ricchio discussed Sven Buncher's June 2, 2021 letter with his attorneys" as invading the attorney client privilege.[4] (Def. SGD at ¶ 17.) Plaintiffs argue that Ricchio waived the privilege because he voluntarily disclosed this information at his deposition and his counsel did not object to it. See Weil v. Inv. / Indicators, Research & Mgmt., Inc., 647 F.2d 18, 25 (9th Cir. 1981) ("voluntary disclosure of the content of a privileged attorney communication constitutes waiver of the privilege as to all other such communications on the same subject"). However, Plaintiffs misinterpret what occurred at Ricchio's deposition. Plaintiffs' counsel asked Ricchio whether his attorneys informed him that Plaintiffs' attorneys sent the June 2021 letter. (Ricchio Dep. at 227:24-228:17.) Ricchio's attorney objected to the questions on

[4] The Court notes that there is no objection Ricchio's testimony that he was aware that his attorney was corresponding with Plaintiffs' attorney on Ricchio's behalf regarding the June 21, 2021 letters. (Def. SGD at ¶ 20.)

the record. (Id. at 228:18-25.) Therefore, Ricchio did not waive the privilege as to the contents of discussions he had with his attorneys regarding Sven Buncher's June 2, 2021 letter.

ii. Settlement Discussions

Second, Ricchio objects to all of Plaintiffs' uses of the June 2, 2021 letter between Plaintiffs' and Ricchio's attorneys, stating that it is a settlement offer and therefore barred by Federal Rule of Evidence ("FRE") 408. (Def. Opp'n. at 5.) Plaintiffs respond that the letter is not a settlement offer, but rather a demand for the return of Plaintiffs property. (Pl. Reply at 9-10.) Plaintiffs argue in the alternative that their use of the letter is to prove notice or knowledge, rather than to prove the validity of a disputed claim. (Id. at 10.)

FRE 408 states in relevant part that evidence of a party "furnishing promising, or offering ... a valuable consideration in compromising or attempting to compromise the claim" or statements made during compromise negotiations are inadmissible to "either prove or disprove the validity or amount of a disputed claim." Fed. R. Evid. 408(a). The Rule also states that such evidence is admissible for other purposes, and includes a non-exhaustive list of permissible alternative uses. Id. at (b) ("The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.").

Plaintiffs argue that the letter is not a settlement communication for two reasons. First, Plaintiffs argue that the letter from Ricchio's attorney is not "marked as a settlement letter or as any type of confidential communication." (Pl. Reply at 10.) The Court does not find this argument persuasive because Plaintiffs' counsel's own letter is, in fact, marked as a settlement letter. The end of the letter from Plaintiffs' counsel contains a notice that the "correspondence has been drafted in furtherance of settlement negotiations, and accordingly, all commensurate rights and privileges are reserved, including but not limited to, those set forth in Evidence Code sections 1119, 1152, and 1154, among other provisions." (Declaration of Sven Buchner ("Buchner Decl."), Ex. 1.) The cited Evidence Code provisions are California's analogues to FRE 408 and similarly prohibit using settlement discussions to prove or disprove the validity of a claim

or defense. See Cal. Evid. Code §§ 1119, 1152, 1154. This indicates that Plaintiffs' attorneys understood and intended the letter to be in furtherance of settlement negotiations. It follows, then, that Ricchio's response is a statement made furtherance of a settlement discussion.

Plaintiffs also assert that Ricchio's letter "did not make any conditional offer of consideration that is contingent on settling any claims - rather, it is an unconditional offer to return Plaintiffs' assets to them. See Sheng v. M&T Bank Corp., 848 F.3d 78, 83 (2d Cir. 2017) ("an unconditional offer cannot be construed as an offer to settle or compromise under Rule 408") (internal quotations omitted). This is also unpersuasive. While the letter does offer to "transfer these funds to" Plaintiffs, the very next paragraph states that Smith hopes that Plaintiffs "will accept the funds in exchange for a waiver of any potential claims." (Buchner Decl., Ex. 2.) On its face, this is a settlement offer contingent on Plaintiffs waiving their claims against Ricchio. Therefore, the Court finds that both letters can accurately be construed as settlement discussions.

However, statements made during settlement negotiations may be admissible for another purpose. Plaintiffs argue that they seek to introduce the contested statements not to prove or disprove a validity or amount of a claim, but rather to show that Ricchio "was on notice that Plaintiffs wanted the property returned" and that "Plaintiffs had demanded the property be returned." (Pl. Reply at 10.) See Power Integrations, Inc. v. ON Semiconductor Corp., 396 F.Supp.3d 851, 860 (N.D. Cal. 2019) (admitting settlement communications for the purpose of proving notice). The Court therefore finds that the June, 2021 letters exchanged between Plaintiffs and Ricchio's attorneys are admissible for the limited purposes of proving notice that Plaintiffs wanted their property back and that Plaintiffs had communicated that desire to Ricchio through his attorneys.

B. Ricchio's Motion

Ricchio moves for summary judgment on each of Plaintiffs' eight claims. The Court will address the arguments for each claim in turn.

i. Conversion

"Conversion is the wrongful exercise of dominion over the property of another. The elements of conversion are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages." Lee v. Hanley, 61 Cal.4th 1125, 1240 (2015) (internal quotations omitted). The second element requires a showing that a defendant substantially interfered with property by "knowingly" or "intentionally" (a) taking possession of property without authorization; (b) preventing access to property; (c) destroying property; or (d) refusing to return property after demanded. See California Civil Jury Instructions ("CACI") No. 2100. However, California courts have held that conversion is a strict liability tort. See Burlesci v. Petersen, 68 Cal.App.4th 1062, 1066 (1998). Therefore, while "the act constituting the conversion must be intentionally done," "questions of the defendant's good faith, lack of knowledge, and motive are ordinarily immaterial." Id.; see also, Chase Inv. Serv. Corp. v. Law Offices of Jon Divens & Assoc., 748 F.Supp.2d 1145, 1178 (C.D. Cal. 2010).

Ricchio does not contest that Plaintiffs failed to present evidence of the first and third elements of conversion. In fact, Ricchio does not dispute that he "currently holds [Plaintiffs'] assets in one or more of his accounts," nor that he "has not returned to [Plaintiffs] any portion of the investment they made in 2016." (Def. SGD at ¶¶ 13-14.) Neither does he "believe he is entitled to keep Denker's or Klein's investments." (Id. at 15.) Rather, he argues only that, based on the undisputed facts, Plaintiffs cannot show that he "knowingly" or "intentionally" interfered with Plaintiffs' property. (Def. Mtn. at 4.) Specifically, he asserts that his continued retention of Plaintiffs' funds does not constitute conversion because "(1) Plaintiffs intentionally ignored Mr. Ricchio's attempts for two years to return the principal and proceeds from the ICN investment; (2) Plaintiffs cannot use the June 2, 2021 inadmissible settlement letter as the basis for their claim; and (3) the property in dispute was based on an oral agreement." The Court will address each of these arguments individually.

a. Plaintiffs' Failure to Respond to Ricchio's Attempts to Return the Principal and Proceeds from the ICN Investment

Ricchio first argues he attempted to return Plaintiffs' property to them over the course of two years, and that Plaintiffs "ignored" his efforts. (See Def. Mtn. at

4-5.) Ricchio asserts that he provided an initial accounting to Plaintiffs' on March 2019 (Denker Dep. at 92:24-95:6) and emailed Plaintiffs in an attempt to "settle up" on July 18, 2019 and March 11, 2020. (Id. at 150:10-151:9; 153:21-154:18). Ricchio states that he interpreted the undisputed fact that Plaintiffs did not respond to either email as the Plaintiffs ignoring him. (Id. at 151:10-16; 154:19-21.) He also interpreted their raising any objection about the accounting attached to the emails as satisfaction with their contents. (Id.) Because Plaintiffs ignored Ricchio's attempts to return their property, Ricchio argues that he did not "knowingly" or "intentionally" refuse to return their property, and summary judgment should therefore be granted in his favor.

While Plaintiffs agree that they did not reply to Ricchio's emails, they argue that they did not "ignore" Ricchio's communications. They present evidence that they communicated with Ricchio's father, who they assert was acting as Ricchio's agent at the time. (Id. at 151:10-156:16.) In these conversations, Plaintiffs state that they informed Ricchio's father that they were unsure of what amount of money they were owed, and that they would wait to respond to Ricchio's email until their children had an opportunity to work out their divorce troubles. (Id.; Klein Dep. at 28:8-25.) Plaintiffs further present evidence that Ricchio knew that their lack of response was due to their desire to let him and Elissa Denker resolve the issues in their relationship without other distractions. (Ricchio Dep. at 154:5-155:22.) Finally, Plaintiffs assert that Denker informed Ricchio that his accounting was incorrect and unreliable as early as March, 2019, and that Ricchio admitted the Excel sheets he gave Plaintiffs were "wrong" and "confusing." (Denker Dep. at 93:24-97:18; Ricchio Dep. at 169:171-14; 180:21-184:20.)

Plaintiffs have threfore proffered evidence rebutting Ricchio's assertion that he did not know that Plaintiffs were unsatisfied with his accounting. Plaintiffs have also provided evidence that they did communicate with Ricchio following his attempts to "settle-up," albeit through Ricchio's father. Accepting Plaintiffs' evidence as true, the Court finds there to be an issue of material fact as to whether Ricchio knowingly or intentionally interfered with Plaintiffs' property.

b. Plaintiffs' Use of the June 2, 2021 Communication

Ricchio next argues that the June 2021 settlement letter is the "sole basis" for Plaintiffs' conversion claim, and summary judgment must therefore be granted in his favor. (See Def. Mtn. at 5.)

As analyzed in Section A.ii., the Court finds that the letters between Ricchio's and Plaintiffs' attorneys are settlement negotiations within the meaning of FRE 408(a). Therefore, the parties may not use the communications as evidence to prove or disprove the validity of a claim or defense. If, then, Plaintiffs' "sole basis" for their conversion claim rested on this letter, Ricchio would be awarded summary judgment. However, Plaintiffs present substantial additional evidence separate from the settlement letter to support their conversion claim. For example, Plaintiffs proffer Ricchio's own testimony that he currently possesses Plaintiffs' property, which he knows is not his and that he must return. (Ricchio Dep. at 25:4-20.) Plaintiffs also point to Ricchio's testimony that he was aware that his attorney was in correspondence with Plaintiffs' counsel regarding Plaintiffs' request for the return of their cryptocurrency. (Id. at 224:18-22.) Finally, Plaintiffs assert that Ricchio was aware that he was wrongfully maintaining possession of Plaintiffs' property as of the date of this lawsuit's filing. (See Complaint, Dkt. No. 1.)

Additionally, Plaintiffs may use the letters for another purpose unrelated to the validity of their conversion claim, such as to prove that Ricchio was on notice that Plaintiffs wanted him to return their money. This is precisely what Plaintiffs seek to do here. (See Pl. Opp'n at 9-10.) Therefore, the Court finds that Plaintiffs' claim for conversion is not entirely based on the June 2021 settlement letters, and Plaintiffs' use of the letters to prove notice is permissible.

c. The Disputed Property

Finally, Ricchio argues that Plaintiffs' conversion claim rests on an alleged oral contract between the parties, and Plaintiffs may not therefore assert a conversion claim. (See Def. Mtn. at 6.) In support of this argument, Ricchio cites to Zhai v. Liu. However, Zhai does not help Ricchio's position. In that case, the court dismissed a claim of conversion where the plaintiffs did not allege that they demanded the return of their property and the defendant refuse. 2017 U.S. Dist. LEXIS 222612, at *10 (C.D. Cal. May 4, 2017). The court held that "[w]hen a plaintiff seeks damages for conversion against a defendant who was originally in

lawful possession of property, the plaintiff must first show that they demanded the return of the property and defendant refused." Id. This is precisely what Plaintiffs allege and have presented evidence to support. (See Ricchio Dep. at 25:4-20; 224:18-22.)

The other cases Ricchio cites are similarly inapposite. See Farmers Ins. Exchange v. Zerin, 53 Cal. App. 4th 445, 452 (1997) (dismissing a conversion claim where the plaintiff did not establish a title or lien upon the property at issue); Emmert v. United Bank & Trust Co. of Cal., 14 Cal.App.2d 1, 4-5 (1936) (dismissing a conversion claim where the defendant negligently lost plaintiff's property). Plaintiffs have proffered evidence to support both that they own the property at issue, a fact which Ricchio does not dispute, and that Ricchio has not negligently lost their property, but rather refuses to return it. (See Ricchio Dep. at 23:20-25:20; 156: 8-12.)

Taking Plaintiffs' evidence as true, Plaintiffs have raised a dispute of fact as to whether Ricchio "knowingly" or "intentionally" interfered with Plaintiffs' property. Accordingly, the Court **DENIES** Ricchio's motion on Plaintiff's conversion claim.

ii. Breach of Fiduciary Duty

Ricchio argues that Plaintiffs' claim for Breach of Fiduciary Duty fails as a matter of law because the undisputed facts show that Ricchio did not owe Plaintiffs a fiduciary duty. (Def. Mtn. at 7.) For a person to enter into a fiduciary relationship, they must "either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law." Hasso v. Hapke, 227 Cal. App. 4th 107, 140 (2014) (internal quotation marks and citations omitted). "Fiduciary duties are imposed by law in certain technical, legal relationships," including the "investment advisor/client relationship." Id.

Ricchio asserts that it is "undisputed that Mr. Ricchio is not a professional investment advisor and never held himself out as one to Plaintiffs." (Def. Mtn. at 8.) However, this is a fact that is very much in dispute by the parties. (See Pl. Opp'n at 12-13; Denker Dep. at 113:4-16.) Ricchio describes himself as a "cryptocurrency hobbyist" because the "infrequent nature of [his] trading activity

for his two largest cryptocurrency assets is consistent with him being a 'hobbyist.'" (Smith Decl., Ex. K, ("Ricchio's Report") at 10.) Plaintiffs disagree, arguing that his cryptocurrency trading activity is instead consistent with him being a professional cryptocurrency investor and trader. (Rubinsky Decl., Ex. D ("Plaintiffs' Expert Report") at 15-19.) Plaintiffs also present evidence of Rucchio's resume and LinkedIn profile stating that Ricchio "managed and executed crypto-currency trades for portfolios." (Rubinsky Decl., Exs. E, F.)

Ricchio similarly asserts that the undisputed facts indicate that he was merely agreeing to do his future-in-laws a favor and help them invest in cryptocurrency, and did not "voluntarily and knowingly" undertake to act on behalf of Plaintiffs and for their benefit. (Def. Mtn. at 8.) To refute this assertion, Plaintiffs offer evidence that Ricchio told Plaintiffs that making the ICN investment directly would be too technologically complicated for Plaintiffs and he would therefore manage their investment inside his own account. (Denker Decl., ¶¶ 2-6; Klein Decl. at ¶¶ 2-5).

Taking Plaintiffs' evidence as true, there is a dispute of fact as to whether a fiduciary relationship existed between Plaintiffs and Ricchio. Ricchio's motion for summary judgment on this claim is accordingly **DENIED**.

iii. Breach of Confidential Relationship

Ricchio next moves for summary judgment on Plaintiffs' claim for Breach of Confidential Relationship because Ricchio was not in a confidential relationship with Plaintiffs and thus did not owe Plaintiffs duties accompanying such a relationship. (Def. Mtn. at 9.) Ricchio also argues that this claim is time-barred by the three-year statute of limitations. (Id.)

A confidential relationship exists when "(1) the vulnerability of one party to the other (2) [] results in the empowerment of the stronger party by the weaker which (3) empowerment has been solicited or accepted by the stronger party and (4) prevents the weaker party from effectively protecting itself." Richelle L. v. Roman Cath. Archbishop, 106 Cal. App. 4th 254, 272 (2003) (internal quotation marks and citations omitted).

First, Ricchio argues that "there is no evidence that either Plaintiff was 'vulnerable' to Mr. Ricchio" because they were "not physically or mentally impaired at any relevant time, they were not financially unsophisticated..., and they were not under duress or other financial or emotional stress." (Def. Mtn. at 10.) Plaintiffs assert that there is substantial evidence to the contrary, including Ricchio's testimony that he offered and agreed to purchase ICN for Plaintiffs because it was too technologically complicated for them to do themselves and they were"overwhelmed" by the process. (Pl. SGD at ¶ 59.) Plaintiffs additionally offer their own testimony that they informed Ricchio they would need his help to complete the ICN transaction, and that they would rely on and trust him. (Id.)

Ricchio asserts in his reply that his higher level of sophistication with cryptocurrency does not rise to the level of "vulnerability" for purposes of a Breach of Confidential Relationship Claim. (Def. Reply at 7.) In support of his argument, Ricchio cites to Persson v. Smart Inventions, Incorporated. 125 Cal. App. 4th, 1141 (2005).[5] However, the facts of that case are quite dissimilar to those before the Court. In Persson, the court held that a confidential relationship did not arise "in the course of arms-length buyout negotiations between two equal shareholders of a corporate enterprise, both of whom are represented by counsel and accountants." (Id. at 1162.) Here, in contrast, it is uncontested that Ricchio is a more sophisticated party with regards to cryptocurrency. (See Def. Resp. to Pl. SGD at ¶ 59.) It is similarly uncontested that Ricchio informed Plaintiffs that making the ICN investment themselves would be beyond their skill level, and he would manage their investments for them so their lack of sophistication would not prevent them from making the investment. (Id.)

Second, Ricchio contends that "there is nothing in the record to suggest that Mr. Ricchio was 'empowered' by Plaintiffs' alleged and unsupported vulnerability." (Def. Mtn. at 11.) Ricchio further argues that, because Ricchio "indisputably gained nothing whatsoever from this transaction," he has not, in fact, taken advantage of Plaintiffs. (Id.) In response, Plaintiffs submit that Plaintiffs originally wanted access to their cryptocurrency via an online account,

[5] Ricchio also cites to O'Neil v. Spillane, 45 Cal. App. 3d 147 (1975). However, the issue in that case was whether there was sufficient evidence to uphold a jury verdict finding undue influence. As Plaintiffs have not alleged undue influence, nor has Ricchio argued that Plaintiffs failed to present evidence of undue influence, this case is inapplicable.

but Ricchio put the assets into an account in his own name instead. (Denker Decl., ¶¶ 5-6; Klein Decl., ¶¶ 4-7.) Additionally, Plaintiffs point to Ricchio's testimony that, despite having previously offered to provide Plaintiffs with login information to view their investment, he chose not to do so because the account also contained his own assets. (Ricchio Dep. at 131:1-132:18.) Taking Plaintiffs' evidence as true, Ricchio commingling Plaintiffs' investments with his own and subsequently intentionally not providing Plaintiffs with login information could lead to a conclusion that he was empowered by their lack of sophistication.

Third, Ricchio argues that "there is no evidence that Mr. Ricchio took any actions to prevent Plaintiffs from protecting themselves." (Def. Mtn. at 11.) Ricchio notes that he sold Plaintiffs' ICN at the same time he sold his, provided Plaintiffs with accounting with which he assumed they were satisfied, and attempted to return Plaintiffs' funds to them over the course of two years. (Id.) In opposition, Plaintiffs again assert that Ricchio failing to deposit Plaintiffs' ICN into a separate account or provide Plaintiffs with information to access the account in which Ricchio ultimately put their investment is sufficient to show that Ricchio prevented Plaintiffs from protecting themselves. (Ricchio Dep. at 131:1-132:18; Denker Decl., ¶¶ 5-6; Klein Decl., ¶¶ 4-7.) Plaintiffs additionally state that they are still unable to obtain satisfactory records from Ricchio about his initial purchase of ICN or his "alleged conversion" of their cryptocurrency into U.S. Dollars. (Ricchio Dep. at 153:7-11; Denker Decl., ¶ 20; Klein Decl., ¶ 11.) In his reply, Ricchio contends that it is "undisputed that Mr. Ricchio treated Plaintiffs' ICN investment with the same care and attention that he gave to his own ICN investment." (Def. Reply at 8.) However, Ricchio does not cite to any facts, disputed or undisputed, to support this assertion. Even if he had, the Court finds that, viewing the evidence in the light most favorable to the non-moving party, Plaintiffs' proffered evidence supports a conclusion that Ricchio's actions prevented Plaintiffs from protecting themselves.[6]

Finally, Ricchio asserts that Plaintiffs' claim is time-barred because Plaintiffs knew of his alleged abuse of their confidential relationship in September

[6] In his Reply, Ricchio argues for the first time that Plaintiffs have not presented evidence that Ricchio solicited Plaintiffs, in reference to the third element of a confidential relationship. (Def. Reply at 8.) Because Ricchio did not raise this issue in his initial motion and Plaintiffs have not had an opportunity to respond, the Court will not address it.

2016 when they sent him $13,000 to invest in ICN.[7] The Court disagrees, primarily because Ricchio points to no facts, disputed or not, in support of his contention that Plaintiffs knew or should have known when they made their initial investment that Ricchio would later engage in the abusive conduct of which Plaintiffs accuse him.

Viewing Plaintiffs' evidence as true, the Court finds that Plaintiffs have sufficiently raised a genuine issue of material fact as to the existence of a confidential relationship. Because "the existence of a confidential relationship ... is a question of fact," the Court finds that this claim should go to a jury. Persson, 125 Cal. App. 4th at 1161. Ricchio's motion for summary judgment on this count is therefore **DENIED**.

iv. Elder Financial Abuse

Ricchio next moves for summary judgment on Plaintiffs' claim for Elder Financial Abuse. (Def. Mtn. at 12.) Elder financial abuse occurs when a person "(1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder for a wrongful use or with intent to defraud." Cal. Welf. & Inst. Code § 15610.30. For purposes of this statute, an elder is defined as a person 65 years of age or older. Id. at § 15610.27. Ricchio advances two arguments: (1) that the alleged events underlying the claim for elder abuse took place prior to Denker turning 65; and (2) that there was no "taking" of property.

First, Ricchio argues that, because Denker did not turn 65 until May 1, 2021, her claim for elder financial abuse must fail, as all the relevant events leading to the alleged abuse occurred prior to her 65th birthday. This is essentially identical to the argument the court rejected in Ricchio's motion to dismiss. (See Dkt. No. 30 at 5.) It is undisputed that Robin Denker is now above the age of 65, and that she attained that age on May 1, 2021. (Def. SGD at ¶ 28.) It is similarly undisputed that Denker must have been an "elder" in order to constitute a violation of this statute. See Selleck v. Rode, No. 5:13-cv-03055-EJD, 2016 U.S. Dist.

[7] The parties disagree about whether the statute of limitations applied to this claim is three years, for fraudulent breaches of confidential relationships, or four years for non-fraudulent breaches. (See Cal. Civ. Proc. Code § 343, 338.) The Court declines to rule on this issue because it was not fully briefed by the parties, nor is it necessary to decide Ricchio's motion for summary judgment.

LEXIS 22054, at *30-31 (N.D. Cal. February 22, 2016). Ricchio asserts that the "only event which occurred after Ms. Denker turned 65 was her attorney's June 2, 2021 inadmissable settlement proposal."[8] (Def. Mtn. at 13.) However, Denker's claim for elder abuse is premised in part on Ricchio's continuing refusal to return Plaintiffs' property since June 2021. See Ross v. Fox, 2021 WL 3748002 at *13 (Cal. Ct. App. Aug. 25, 2021), as modified on denial of reh'g (Sept. 16, 2021), review denied (Dec. 1, 2021) (determining that a jury erroneously concluded that, because the fraudulent conduct occurred prior to the plaintiff turning 65, the elder abuse claim must fail). Therefore, Ricchio cannot be granted summary judgment on these grounds.

Second, Ricchio asserts that there is no evidence to support the notion that he "wrongfully retain[ed]" Plaintiffs' property, and Plaintiffs elder abuse claim must therefore fail. (Def. Mtn. at 14.) In response, Plaintiffs proffer the undisputed evidence that both Ricchio and his attorney knew in June 2021 at the latest that Plaintiffs wanted their cryptocurrency investments returned. (Ricchio Dep. at 224:18-22.) This knowledge combined with the fact that Ricchio has yet to return any of Plaintiffs' property establishes a triable issue of fact as to whether Ricchio "retained" Plaintiffs' assets.

For these reasons, Ricchio's motion for summary judgment on Plaintiffs' claim of financial elder abuse is **DENIED**.

v. Penal Code Section 496

Ricchio further asserts summary judgment is proper on Plaintiffs' claim under Penal Code Section 496 because the "undisputed facts fail to demonstrate that Mr. Ricchio possessed the requisite 'knowledge' that he was committing theft or fraud." (Def. Mtn. at 15.) A violation of Penal Code 496 occurs when "(i) property was stolen or obtained in a manner constituting theft, (ii) the defendant knew the property was so stolen or obtained, and (iii) the defendant received or

[8] The Court notes that Ricchio's argument regarding Plaintiffs' use of the settlement letter is unpersuasive for the reasons stated in II.A.ii, namely that Plaintiffs proffer the settlement letter in this context to show that Ricchio was on notice that Plaintiffs wanted their cryptocurrency returned to them.

had possession of the stolen property." Switzer v. Wood, 35 Cal. App. 5th 116, 126 (2019).

Ricchio proffers undisputed evidence that he intended for his emails to Plaintiffs in July 2019 and March 2020 to be attempts to return Plaintiffs' investment. (Pl. SGD at ¶¶ 47, 49.) Based on these emails and his purpose in sending them, Ricchio argues that he could not have "knowingly" stolen property he tried repeatedly to return. (Def. Mtn. at 15.) Plaintiffs contend that Ricchio "fraudulently appropriate[ed] a million dollars-worth of cryptocurrency" and "withheld their property from them," lying "about what he did with their assets in order to trick them into accepting a lower amount and keep the rest for himself." Plaintiffs present evidence that, because Ricchio created accountings, that he later admitted were "wrong," with the intent that Plaintiffs would rely on them, this establishes that he did so to "induce them into accepting the return of assets worth less than the true value of Plaintiffs' assets." (Ricchio Dep., at 169:20-171:14; 180:21-184:20; 187:23-188:14; 221:20-222:10; Pl. Opp'n. at 20.)

Although the Court views Plaintiffs' arguments as stretching credulity, it is not for the Court to weigh the credibility of witnesses' testimony. Taking Plaintiffs' evidence as true, the Court finds that Plaintiffs have presented a dispute as to whether Ricchio knowingly possessed stolen property, the Court **DENIES** Ricchio's motion as to this claim.

vi. Ricchio's Affirmative Defenses of Consent and Waiver

Ricchio alternatively moves for summary judgment on Plaintiff's claims for conversion, elder abuse, and violation of Penal Code 496 due to his affirmative defenses of waiver and consent.[9] "There can be no conversion where an owner either expressly or impliedly assents to or ratifies the taking, use, or disposition of his property." Farrington v. A. Teichert & Son, Inc., 59 Cal.App.2d 468, 474

[9] Ricchio asserts that, because the arguments he offers for consent may be viewed as Plaintiffs' failure to establish the element of "wrongfulness" in its claims for conversion, elder abuse, and violation of Penal Code 496, the burden is on Plaintiffs to prove lack of consent. That is an incorrect interpretation of the law. As an affirmative defense, the burden is on Ricchio to establish the defense. See Calhoun v. Google LLC, 526 F.Supp.3d 605, 619-20 (N.D. Cal. 2021) ("As the party seeking the benefit" of the defense, it is the defendant's "burden to prove consent.") (internal quotation marks and citations omitted).

(1943). Consent may be express or implied, "but any consent must be actual." Calhoun v. Google, LLC, 529 F.Supp.3d 605, 619-20 (N.D. Cal. 2021) (quoting In re Google, Inc., 2013 WL 5423918, at *12 (N.D. Cal. Sept. 26, 2013)). Similarly, waiver is the "intentional relinquishment of a known right after knowledge of the facts." Roesch v. De Mota, 24 Cal.2d 563, 572 (1944). "There can be no waiver where the one against whom it is asserted has acted without full knowledge of the facts." Hacker Pipe & Supply Co. v. Chapman Valve Mfg. Co., 17 Cal. App. 2d 265, 274 (1936). Both defenses depend on Plaintiffs knowingly and intentionally consenting to Ricchio's activities, and knowingly and intentionally waiving their right to pursue the instant action.

Ricchio's primary argument for both defenses rests on Plaintiffs' failure to respond to his attempts to return their property. He asserts that Plaintiffs' intentional silence constitutes their consent to his continued possession of their property, as well as waiver of the right to bring claims against him on this basis. He argues that he cannot therefore be liable for conversion, or Plaintiffs' claims premised on conversion (elder financial abuse and Penal Code 496). (Def. Mtn. at 16-17.) See Cal. Civ. Code § 1501 ("All objections to the mode of an offer of performance, which the creditor has an opportunity to state at the time to the person making the offer, and which could then be obviated by him, are waived by the creditor if not then stated.")

Plaintiffs contend that any failure to respond in any way to Ricchio's emails (a fact Plaintiffs dispute) did not constitute consent to Ricchio's conduct or waiver of their property rights. (Pl. Opp'n. at 21.) Plaintiffs assert that Ricchio knew they were waiting to respond to his emails until he and their daughter worked out their marital relationship. (Ricchio Decl. at 154:5-155:22.) Plaintiffs additionally assert that Ricchio knew Plaintiffs wanted an accurate accounting of their investment, and ultimately, the correct amount of cryptocurrency returned to them. (Denker Dep. at 128:2-14; 133:16-24.)

Taken together, and viewing the evidence in the light most favorable to the non-moving party, the Court finds that there is a triable issue of fact as to Ricchio's defenses of consent and waiver. The Court first notes that Ricchio makes the same objections to Plaintiffs' use of the June 2021 settlement letters in his motion and reply, and the Court rejects them here for the same reasons. Further, Plaintiff has presented evidence that, contrary to Ricchio's assertions,

they did not knowingly or intelligently consent to his continued possession of their assets. In particular, Plaintiff notes that the parties were aware of Ricchio's emails, were unsatisifed with the accounting he provided, and chose to communicate with Ricchio's fther in order to "be respectful of efforts to repair the marital relationship" with Elissa Denker. (Pl. Opp'n. at 20-21; Pl. SGD at ¶¶ 44-50.) Plaintiffs have also presented evidence that Ricchio had actual knowledge of this in June 2021 at the latest. (Pl. SGD at ¶ 69.)

Additionally, the statutes to which Ricchio cites in support of his assertion that Plaintiffs waived objections to Ricchio's conduct or accounting do not, in fact, support his position. See Cal. Civ. Code § 1501 (stating that objections to the method of performance are waived by a creditor if not stated at the time of the offer of performance); Cal. Code Civ. Proc. § 2076 (noting that a person to whom tender is made must specify objections at the time of the tender, or else waives them).

While his attempts to return Plaintiffs' assets in 2019 and 2020 certainly weigh in his favor, merely not responding to his emails does not constitute waiver or consent. For these reasons, the Court **DENIES** Ricchio's summary judgment motion on these defenses.

vii. Statute of Limitations

Separate from Ricchio's argument that Plaintiffs' claim for breach of confidential relationship is time-barred, Ricchio also asserts that Plaintiffs' claims for breach of oral contract, negligence, and promissory estoppel are barred by the applicable two-year statute of limitations. See Cal. Code Civ. Proc. § 339(1) (enacting a two-year statute of limitations for actions "upon a contract, obligation or liability not founded upon an instrument of writing").

Ricchio asserts that the "undisputed facts demonstrate that Plaintiffs believed as early as June 9, 2017, that Mr. Ricchio did not handle the ICN investment as per their understanding of the alleged oral agreement with him." (Def. Mtn. at 20.) The parties agree that, on June 9, 2017, Denker emailed Ricchio asking for an accounting of their cryptocurrency investments. (Pl. SGD at ¶ 35.) The parties also agree that Ricchio's response via that day reflected that he purchased ICN at "$0.25-$0.35," instead of the $0.11. (Id. at ¶ 36.) Ricchio

argues that these undisputed facts amount to Plaintiffs knowing on June 9, 2017 that he had breached the oral agreement Plaintiffs allege they had. (Def. Mtn. at 19-20.) However, Plaintiffs assert, and Ricchio denies, that Plaintiffs did not believe that Ricchio had breached their agreement at that time, and instead "called him on the phone to ask about the information he had provided 'off the top of [his] head' looked incorrect." (Denker Dep. at 131:22-136:9; Denker Decl. at ¶¶ 9-10.) Plaintiffs further state that Ricchio "subsequently confirmed numerous times" that he purchased ICN at the September 2016 initial offering price of $0.11. (Id.) Therefore, Plaintiffs could not have known at that point that Ricchio had breached any oral agreement they had, because he assured them the number he gave in the June, 2017 email was incorrect. (Id.) Although Ricchio denies that Plaintiffs called him to discuss the contents of the June 9 email (Def. Reply at 10.), the standard of review for motions for summary judgment compels the Court to accept the non-moving party's evidence as true. Therefore, Plaintiffs' proffered evidence sufficiently presents a triable issue of fact as to whether Plaintiffs believed as of June 2017 that their agreement had been breached.

Ricchio argues that the same facts also show that Plaintiffs promissory estoppel claim is time-barred. However, this argument fails for the same reasons, notwithstanding the fact that Plaintiffs' promissory estoppel claim "is based on Ricchio not returning bailed property in 2021," rather than him purportedly purchasing ICN at a higher price. (Pl. Opp'n. at 23.)

For these reasons, the Court **DENIES** Ricchio's motion for summary judgment as to Plaintiffs claims for breach of oral contract, negligence, and promissory estoppel on statute of limitations grounds.

vii. Economic Loss Rule

Ricchio next asserts that Plaintiffs' claim for negligence is barred by the economic loss rule. (Def. Mtn. at 22-23.) In doing so, he repeats essentially the same argument the Court previously addressed in its order on his motion to dismiss. (See Dkt. No. 30 at 11-12 (holding that pleading alternate theories of recovery is permissible.) Aware of this, Ricchio argues that, while Plaintiffs may plead alternate theories of recovery, recovering under both a bailment theory and a negligence theory is impermissible. (Def. Mtn. at 23.) Ricchio further argues

that "Plaintiffs are not claiming that Mr. Ricchio violated some duty independent of the purported oral agreement among the parties" that would permit them to recover both in tort and in contract. (Id. at 21.) See Robinson Helicopter Co., Inc. v. Dana Corp., 34 Cal.4th 979, 988 (2004) ("the economic loss rule requires a purchaser to recover in contract for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise."). However, that is precisely what Plaintiffs do here. Not only do they claim that Ricchio breached their oral agreement, but they also claim that he violated the duties he owed them both as their fiduciary and in their confidential relationship. Even if Ricchio was correct, and Plaintiffs could not recover under both a breach of contract theory and a negligence theory, Plaintiffs are not moving for summary judgment on these claims, and they have yet to go to trial. Therefore, at this stage, Plaintiff is not presently recovering under either theory.

For these reasons, the Court finds that Ricchio is not entitled to summary judgment on based on the Economic Loss Rule, and therefore **DENIES** his motion as to negligence.

viii. Breach of Oral Contract

Finally, Ricchio argues that Plaintiffs claim for breach of oral agreement fails as a matter of law because it is "duplicative of many of Plaintiffs' claims." (Def. Mtn. at 23.) Ricchio asserts that, because Plaintiffs' breach of contract claim is essentially a claim for a breach of bailment, Plaintiffs cannot bring both the bailment claim and a negligence claim premised on the same facts. (Id.)

The elements of a breach of contract claim are (1) the existence of a contract, (2) performance or excuse for nonperformance, (3) defendant's breach, and (4) damages. Oasis West Realty, LLC v. Goldman, 51 Cal. 4th 811, 821 (2011). "Breach of the bailment contract may be asserted by the bailor when there is a failure to return that which was bailed." Gebert v. Yank, 172 Cal. App. 3d 544, 551(1985). Bailments are referred to as "deposits" under California law. Id. A person who receives a deposit is called a depositary (as opposed to a bailee). A person who gives the property is called a depositor (as opposed to a bailor). See Cal. Civ. Code. §§ 1813 et seq. A depository can be liable to a depositor when its

negligence causes loss or injury to the deposit. See Cal. Civ. Code §§ 11838, 1840.

Ricchio argues that, based on this "underlying statutory scheme, courts have held that a claim for a breach of bailment is duplicative of claims of negligence and breach of contract." (Def. Mtn. at 24.) Because the "damages being sought for the alleged breach of bailment are identical to those being sought under nearly every theory in this case," Plaintiffs should be precluded from pursuing double recovery. (Id.) However, the cases Ricchio cites in support of his argument are inapposite. In Intercargo Ins. Co. v. Burlington N. Santa Fe R.R., the court held that, because the plaintiff's breach of bailment claim was duplicative of its negligent claim, the defendant's raising a triable issue of fact as to the plaintiff's negligence claim could be applied to its bailment claim for purposes of summary judgment. 184 F.Supp.2d 1103, 1115-16 (C.D. Cal. 2001). The court did not, as Ricchio asserts, dismiss the plaintiff's claim because its duplicative nature precluded the plaintiff from seeking damages under both theories. Id. Similarly, the court in In re Sony Gaming Networks and Customer Data Security Breach Litigation dismissed the plaintiff's breach of bailment claim because plaintiffs did not establish how personal information could be construed as personal property that was bailed to Sony. 903 F.Supp.2d 942, 975 (S.D. Cal. 2012). The court concluded as a result that "any damages Plaintiffs might be able to recover under this unorthodox claim for bailment would be recover under its negligence and/or consumer protection claim." Id. See also Bell v. Blizzard Entm't., Inc., 2013 U.S. Dist. 12132004 at *9 (C.D. Cal. July 11, 2013) (noting that no court has found that personal information could be chattel that could be bailed).

As the Court noted in its order on Ricchio's motion to dismiss, seeking recovery under alternate theories, even inconsistent theories, is well-accepted. (See Dkt. No. 30 at 11-12.) Plaintiffs claim for bailment therefore does not fail as a matter of law simply because it is duplicative of other claims. For these reasons, Ricchio's motion for summary judgment on this claim is **DENIED**.

C. Plaintiffs' Motion

Plaintiffs move for partial summary judgment on their claims for conversion and elder financial abuse. The Court will address the arguments for each claim in turn.

i. Conversion

"Conversion is the wrongful exercise of dominion over the property of another. The elements of conversion are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages." Lee v. Hanley, 61 Cal.4th 1125, 1240 (2015) (internal quotations omitted). The second element requires a showing that a defendant substantially interfered with property by "knowingly" or "intentionally" (a) taking possession of property without authorization; (b) preventing access to property; (c) destroying property; or (d) refusing to return property after demanded. See California Civil Jury Instructions ("CACI") No. 2100. However, California courts have held that conversion is a strict liability tort. See Burlesci v. Petersen, 68 Cal.App.4th 1062, 1066 (1998). Therefore, while "the act constituting the conversion must be intentionally done," "questions of the defendant's good faith, lack of knowledge, and motive are ordinarily immaterial." Id.; see also, Taylor v. Forte Hotels Int'l., 235 Cal. App. 3d 1119, 1124 (1991) ("The act must be knowingly or intentionally done, but a wrongful intent is not necessary.").

As to the first element, the parties do not dispute that Plaintiffs have an ownership interest in their investment proceeds. (See supra at Section III.B.i.).

The parties strongly disagree on the second element. Plaintiffs argue that Ricchio (1) knew that Plaintiffs asked him to return their assets, (2) has not yet returned any of Plaintiffs' assets, and (3) is intentionally maintaining possession over the assets he agrees belong to Plaintiffs. (Pl. Mtn. at 10.) The crux of Plaintiffs' argument here is that the June 2021 settlement letter constituted a demand for a return of their property and that Ricchio's refusal to return their assets at that time constitutes conversion. (Id.; Rubinsky Decl., Ex. 3.) Although any conversation Ricchio had with his attorney about this letter is protected by the attorney-client privilege, (see supra at Section III.A.ii.), the fact that his attorneys received and responded to it is undisputed. (Def. SGD at ¶ 20; Rubinsky Decl., Ex. 5.) Plaintiffs argue that this indicates that Ricchio himself had notice of

Plaintiffs' desire to have their property returned, even if such knowledge is imputed. (Pl. Mtn. at 10.) Additionally, Plaintiffs present undisputed evidence that Ricchio has not returned to Plaintiffs any portion of the investment they made in 2016, nor does he believe he is entitled to keep Plaintiffs' investment. (Def. SGD at ¶¶ 14-15.)

In opposition, Ricchio asserts (1) that his attempts to return the property negate any argument that he wrongfully withheld their assets, (2) that the June 2021 settlement letter is not only inadmissible, but also does not constitute a demand for the return of property, and (3) that not accepting a settlement proposal which was nine times higher than the funds he believed he owed Plaintiffs does not amount to him "knowingly" or "intentionally" engaging in wrongful conduct. (Def. Opp'n at 10-11.)

First, the undisputed facts show that Ricchio knew in June 2021 at the latest that Plaintiffs wanted their investment proceeds returned. The Court has previously addressed Ricchio's arguments concerning the admissibility of the June 2021 settlement letters and holds again that the letters are admissible to show notice and knowledge that Plaintiffs made a demand for the return of their property. Additionally, although Plaintiffs may not present evidence of the contents of Ricchio's and his attorney's conversations regarding the June 2021 settlement letter, doing so is unnecessary at this juncture. "Under general agency principles, an attorney is his client's agent, and ... the agent's knowledge is imputed to the principal even where ... the agent does not actually communicate with the principal, who thus lacks actual knowledge of the imputed fact." Roche v. Hyde, 51 Cal. App. 5th 757, 797 (2020). Therefore, even if Ricchio did not discuss the letter at all with his attorney, their knowledge of Plaintiffs' demands is imputed to Ricchio under agency principles. For these reasons, the Court finds as a matter of law that Ricchio had notice of Plaintiff's demands for the return of their property in June 2021.

The Court next finds that the undisputed facts show that Ricchio is intentionally maintaining possession and control over assets he knows do not belong to him for more than one year following Plaintiffs' initial demand for return. (Def. SGD at ¶¶ 14-15.) Ricchio argues that, because he attempted to return the assets, and does not even believe that they belong to him, he cannot have wrongfully maintained control over Plaintiffs' property. (Def. Opp'n. at 11.)

However, because conversion is a strict liability tort, it is immaterial that Ricchio attempted to return their assets in 2019 and 2020. See Chase Inv. Services Corp. v. Law Offices of Jon Divens & Assoc., LLC, 748 F.Supp.2d 1145, 1179 (C.D. Cal. 2010) ("the defendant's good faith or lack thereof is immaterial."). Once he had notice that Plaintiffs wanted their assets returned, and he refused to return them, his conduct constituted conversion.

Ricchio contends that Plaintiffs' demand for their property identified a sum nine times greater than the returns Ricchio had earned for Plaintiffs. (Def. Mtn. at 11.) Had he returned the full amount demanded, he would have given Plaintiffs far more than what they were owed. Therefore, his failure to comply with Plaintiffs' demand was justified. See Cerra v. Blackstone, 172 Cal.App.3d 604, 609 (1985) ("*Unjustified* refusal to turn over possession on demand constitutes conversion even where possession by the withholder was originally obtained lawfully") (emphasis added). The Court disagrees. Although the actual amount of cryptocurrency or U.S. dollars Ricchio owes Plaintiffs is disputed, Ricchio testified in his deposition that he knew he owed Plaintiffs at least $48,000. (Def. SGD at ¶ 22.) Ricchio's failure to return any amount of Plaintiffs' funds, even if the reason for doing so was in good faith, constitutes an intentional act for purposes of conversion. See Greif v. Sanin, 74 Cal.App.5th 412, 450 (2022) (finding that an escrow agent's failure to act on a customer's escrow cancellation instructions for two years constituted conversion). Similarly, Ricchio's argument that he no longer possesses the bitcoin and Ethereum is unpersuasive. All that is required to show conversion is that Ricchio was at one point in possession of Plaintiffs' property, Plaintiffs demanded its return, and Ricchio refused to return it. See Ox Labs, Inc. v. Bitpay, Inc., 2020 WL 1039012, at *2-3 (finding that conversion occurred "either when Defendant allegedly sold the 200 Bitcoins at issue, or if Defendant did not sell the Bitcoins, when it refused to return the 200 Bitcoins after Plaintiff demanded their return").

Finally, regarding the third element of conversion, the parties disagree about the amount of money Plaintiffs are owed and therefore what the proper amount of damages is. However, Plaintiffs do not move for summary judgment as to the amount of damages, merely that there is no dispute of material fact that Plaintiffs have been damaged. Because the undisputed facts show that Ricchio knows that he currently possesses at least $48,000 that rightfully belong to Plaintiffs, this element is met as a matter of law. (See Def. SGD at 10.)

Ricchio also argues that, because there are triable issues of fact regarding his affirmative defenses of waiver and consent, Plaintiffs cannot be awarded summary judgment on their claim of conversion. (Def. Opp'n at 8-9.) This argument is misplaced. Plaintiffs do not move for summary judgment on Ricchio's affirmative defenses, and they are therefore not at issue here. Additionally, the Court may grant summary judgment on claims notwithstanding the possibility that the defendant may later prove their affirmative defenses. As the Court noted in its analysis of Ricchio's request for summary judgment on his affirmative defenses, there are triable issues of fact such that they should go before a jury. The Court will therefore not rule on them at this point.

For these reasons, the Court **GRANTS** Plaintiffs motion for partial summary judgment, but only as to establishing a prima facie case of conversion, subject to any affirmative defenses and showings of amount of damages at trial.

ii. Elder Financial Abuse

Finally, Plaintiffs move for summary judgment on their claim for elder financial abuse. Financial abuse of an elder occurs "when a person or entity '[t]akes, secretes, appropriates, obtains, or retains real or personal property of an elder' for 'a wrongful use or with intent to defraud, or both,' as well as by 'undue influence...'" Paslay v. State Farm Gen. Ins. Co., 248 Cal. App. 4th 639, 656 (2016) (quoting Cal. Welf. & Inst. Code § 15610.30, subds. (a)(1), (a)(3)). An elder is "any person residing in [California], 65 years or older." Cal. Welf. & Inst. Code § 15610.27. "A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult." Cal. Welf. & Inst. Code § 15610.30 subd. (c).

Under the statute, wrongful conduct occurs only when the party interfering with the elder's property actually knows or should have known that it will result in harm to the elder. See Paslay, 248 Cal. App. 4th at 658. Under this objective standard, the proof required is "whether a reasonable person would have known that the conduct would or would be likely to harm either the victim personally, or

the interest in property." *Elder Abuse Litigation* Ch. 8 (Financial Abuse) § 8:3, Rutter Group (2021); See also Jenkins v. O'Kain, 2021 WL 4860512 at *2 ("Section 15610 makes clear that the standard for evaluating wrongful conduct is not based on subjective intent but is instead based on what the defendant objectively knew or should have known at the time of when he deprived property from the elder adult.").

Plaintiffs assert that summary judgment is proper on their elder abuse claim because the undisputed facts show that Ricchio is currently in possession of assets belonging to Plaintiffs, that Denker was 65 years old when requested the return of her property in June 2021, and that Ricchio knew or should have known that his continued retention of her property would cause her harm. (Plf. Mtn. at 14-15.) It is undisputed that Ricchio remains in possession of some amount of assets belonging to Denker, although the precise dollar amount is unclear at this point. (Def. SGD at ¶¶ 13-15.) It is similarly undisputed that Denker achieved the age of 65 on May 1, 2021, rendering her an "elder" when she demanded the return of her investments in June 2021. (Id. at ¶ 28.) Ricchio does dispute, however, that his failure to return Plaintiffs investment funds constitutes retaining an elder's property for a wrongful use. (Def. Opp'n. at 12-13.)

Plaintiffs assert that the undisputed facts establish that Ricchio maintained possession of assets worth at least $48,000 (Def. SGD at ¶¶ 13-15), belonging to an elder (Id. at ¶ 28), and was aware that Denker had been diagnosed with cancer (Id. at ¶ 29). Taken together, Plaintiffs proffer, "an objectively reasonable person would know that keeping assets worth no less than $48,000 away from an elder who asked for them to be returned while under active treatment for cancer including chemotherapy, even though the person with possession does not claim ownership over the assets and agrees they should be returned, would be harmful to the elder." (Pl. Mtn. at 15.) However, these assertions mischaracterize the undisputed facts. First, Ricchio testifies in his deposition that he became aware some time in 2021 that Denker was diagnosed with cancer. (Ricchio Dep. at 29:24-30:5.) However, there are no facts to support that Ricchio knew that Denker was "under active treatment for cancer including chemotherapy," as Plaintiffs assert. (Pl. Mtn. at 15.) Additionally, a reasonable person in Ricchio's position could understand Plaintiff's failure to respond to his offers to return their assets as Plaintiffs not having an urgent need for them. Although Plaintiffs assert that their reason for not responding to Ricchio's emails was to give him space to

work on his personal relationships, this does not preclude a conclusion that Plaintiffs also were not in any financial stress requiring an immediate of the funds they invested. Finally, while Plaintiff's conversion claim rests strongly on that tort being one of strict liability, Plaintiffs cannot rely on the same arguments under this statute. The statute states that a person must have actually known (knowledge), or should have known (negligence) that their retention of property would harm an elder. See Cal. Welf. & Inst. Code § 15610.30. A reasonable person could have interpreted Plaintiffs' non-acceptance of his offers to return their property as a lack of urgent financial need. Therefore, the Court finds that there are triable issues of fact as to whether Ricchio knew or should have known that his continued retention of Plaintiffs' investments would cause Denker harm.

For these reasons, the Court finds as a matter of law that Ricchio's current possession of assets belonging to Denker and that Denker was an elder as of May 1, 2021. The Court **DENIES** all other requested relief. See Fed. R. Civ. P. 56(g).

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** in part and **DENIES** in part Plaintiffs' motions for summary judgment and **DENIES** Ricchio's motion for summary judgment.

IT IS SO ORDERED.

The Court **VACATES** the September 26, 2022, hearing. Any party may file a request for hearing of no more than five pages no later than 5:00 p.m. on Tuesday, September 27 stating why oral argument is necessary. If no request is submitted, the matter will be deemed submitted on the papers and the tentative will become the order of the Court. If the request is granted, the Court will advise the parties when and how the hearing will be conducted.