IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

ROBERT L. BAKER, RLB ARTIST MANAGEMENT, LLC d/b/a LONGSHOT MANAGEMENT and d/b/a LONGSHOT MANAGEMENT, LLC.,	)	
Plaintiffs,	)	
vs.	)	**No. 20-445-III**
BRETT ELDREDGE, PARIS NOT FRANCE, INC., ALL OTHER RELATED OR AFFILIATED ENTITIES OWNED AND/OR CONTROLLED BY BRETT ELDREDGE, and BRICE ELDREDGE,	)	
Defendants.	)	

MEMORANDUM AND FINAL ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; AND DISMISSING CASE WITH PREJUDICE

This lawsuit concerns under which of two contracts the Plaintiffs should be paid—a 2013 Contract or a 2017 Contract. Under the 2013 Contract the Plaintiffs assert they would receive substantially more. The dispute is that the Plaintiffs assert there was no meeting of the minds on the 2017 Contract, and, therefore, the 2013 Contract remained in effect and governs the compensation dispute to require additional compensation to be paid

to the Plaintiffs.[1] The Defendants' position is that the unambiguous conduct and statements of the Plaintiffs beginning in April of 2017 and for 17 subsequent months and beyond constitute objective manifestations establishing acquiescence to the 2017 Contract and therefore the Plaintiffs have been fully paid and have no claim to more compensation. The parties' positions are presently before the Court on cross motions for summary judgment.

In their motion the Defendants seek dismissal of the entire complaint, the most recent one having been filed November 6, 2020, the *First Amended Complaint*. In their motion, the Plaintiffs seek entry of a partial judgment granting their *First Amended Complaint* as to liability and reserving quantification of damages. On December 7, 2020, oral argument was conducted on the cross motions, and the Court took the matter under advisement.

The briefing and oral argument of Counsel and the summary judgment record establish that while there are some disputed facts, those become immaterial depending upon the law that is applied. The parties, however, dispute the law. Thus, resolution of the parties' dispute on the law determines who prevails on summary judgment.

After studying the summary judgment record, researching the law, and considering argument of Counsel, the Court determines that the Defendants prevail.

[1] The pleadings do not contain a dollar amount *ad damnum*, and the record does not state an amount or estimate of the dollar differential of compensation between the two Contracts. Some indicator of the amount of the recovery sought is that the Defendants state in their October 13, 2020 *Memorandum* at page 1 that the Plaintiffs have already been fully paid "well over a million dollars in total management commissions, paid monthly" from April 2017 through the month of September of 2018 when Plaintiff Baker was terminated.

It is therefore ORDERED that the *Defendants' Motion for Summary Judgment*, filed October 13, 2020, is granted; the *Plaintiffs' Motion for Partial Summary Judgment on Defendants' Liability*, filed October 21, 2020, is denied; and the *First Amended Complaint* is dismissed with prejudice and court costs are taxed to the Plaintiffs.

The undisputed facts and conclusions of law on which this ruling is based are provided below.

This lawsuit was filed by an artist manager, Robert L. Baker, and his associated business entities, against a successful country music singer, recording artist and producer, Brett Eldredge and his associated entities (the "Entity Defendants"). The Plaintiffs seek recovery of compensation from Brett Eldredge and the Entity Defendants that the Plaintiffs assert is owed under a 2013 management agreement (the "2013 Contract"). The Plaintiffs also seek recovery from Brice Eldredge for damages for inducement of breach of the 2013 Contract. Brice Eldredge is the brother and financial manager of Brett Eldredge. For clarity, the Eldredges will be referred to herein only by their first names to distinguish them.

The genesis of the parties' contract dispute is the 2013 Contract, a hand-shake management agreement whereby Plaintiff Robert L. Baker and his associated Plaintiff entities (referred to collectively as the "Plaintiffs") would be compensated for artistic management services provided to Brett based upon 15% of his gross revenues with the exclusion of publishing revenues. In addition, the contract had a 12-month sunset provision where the artist continues to pay commissions to the manager for, in this case

12 months, following the manager's termination. The contract was terminable at will. From 2013 to 2016 the 2013 Contract was performed by both parties.

The summary judgment record establishes that at the initiation of Defendant Brice, he and the Plaintiffs discussed in February through April 2017 modifying the 2013 Contract with the 2017 Contract. In March of 2017, the compensation the Defendants paid to the Plaintiffs was reduced from 15% gross to net with adding a 5% commission of publishing royalties and other increased commission (Sound Exchange) from 5% to 10% to assist in offsetting the reduction. From March of 2017 until Plaintiff Baker's termination in September 2018, the Plaintiffs were paid in accordance with the 2017 changed terms. After a meeting in April 2017, Plaintiff Baker never spoke to the Defendants about the 2017 changed terms, and the Plaintiff accepted the payments continuously until his termination in 2018.

The Plaintiffs' *First Amended Complaint* asserts five causes of action:

Count I—Breach of Contract Against Defendant Brett and the Defendant Entities,
Count II—Quantum Meruit Against Defendant Brett and the Defendant Entities,
Count III—Statutory Inducement of Breach of Contract Against Defendant Brice,
Count IV—Common Law Inducement of Breach of Contract Against Defendant Brice, and
Count V—Accounting.

The Plaintiffs' characterization of the communications from February through April 2017 is they did not accept the terms of the 2017 Contract, and that the Plaintiffs made two counterproposals that the Defendants never responded to. The Plaintiffs' argument is that there was no explicit acceptance by the Plaintiffs of a modification of the 2013 Contract

from February—April 2017 when Brice and the Plaintiffs were having discussions on the matter. As to the subsequent payments made to the Plaintiffs from April 2017 through September 2018, the Plaintiffs argue that these constituted a modification to the 2013 Contract by the Defendants which was ineffective in terminating the 2013 Contract because it was a unilateral modification, quoting the Plaintiffs' briefing as follows.

> Defendants cannot meet their burden of proving that Plaintiffs unequivocally accepted Brice's 2017 Proposal. Defendants do not have – nor do they even contend to have – any written evidence of Plaintiffs accepting Brice's proposed modifications. Similarly, they do not even have a written memorialization of an alleged acceptance, such as the email exchange between Rob and Brett memorializing the 2013 Contract. Furthermore, Brice conceded at his deposition that Rob never verbally accepted Brice's proposed modifications. *See* Brice Depo. At 47:11-14.

Plaintiffs' Response in Opposition to Defendants' Motion for Summary Judgment, November 24, 2020, at 13.

This argument, however, does not engage with the Defendants' position because the Defendants' claim is not that there was explicit assent by the Plaintiffs during February to April 2017 when the parties were discussing modified terms to the 2013 Contract. The Defendants use a legal doctrine different than explicit assent, and they base that doctrine on the Plaintiffs' consistent, unambiguous conduct beginning in April of 2017 and continuing for 17 months or more thereafter.

The legal doctrine the Defendants assert is labeled variously as acquiescence, assent established through course of dealing/performance, contract implied in fact, implied consent, estoppel. The common principle is that, upon using an objective test, the establishing of an unambiguous course of dealing and conduct of a party, such as

repeatedly accepting contract payments, provides a basis in law that a contract is modified. *See, e.g.*, *Baldwin v. United Am. Land Co.*, No. 03A01-9508-CH-00250, 1995 WL 731788, at *1; 2 (Tenn. Ct. App. Dec. 12, 1995) ("The reduction in the percentage of revenue received by plaintiff was not recoverable since a new agreement was effectively made by plaintiff's acquiescence in accepting the lower percentages for more than four years . . . . Plaintiff's acquiescence in paying the advertising over a long period of time also served to modify the agreement. The Trial Court found the initial contract was later amended by the parties' conduct and the plaintiff was bound by the modifications which he had acquiesced to over four years. . . . Assent may be manifested wholly or partially by written or spoken words or by other acts. . . . The evidence does not preponderate against the Trial Court's determination that the parties modified the agreement by the continuation of the new business arrangement for more than four years.") (citations omitted); *Cummins v. Opryland Prods.*, No. M1998-00934-COA-R3CV, 2001 WL 219696, at *3 (Tenn. Ct. App. Mar. 7, 2001) ("Precedent requires us to use an objective test to determine mutual assent, rather than the outdated 'meeting of the minds' theory."); § 10:3.Modification—Mutual assent, 22 TENN. PRAC. CONTRACT LAW AND PRACTICE § 10:3 (West 2020) (footnotes omitted) ("Contracts can be modified or changed expressly or impliedly, and through oral or written means or by conduct. . . . The implied assent that can suffice for a contract modification occurs through the actions of the parties that evince a meeting of the minds to revise the contract on a particular point. . . . Such an implied agreement will be absent, however, with an ambiguous course of dealing between the

parties by which diverse inferences arise regarding the parties' intent on the continuation or modification of the existing contract.").

The Plaintiffs' initial response is they dispute that the foregoing is the law, and they assert that acceptance of reduced payments does not constitute assent to a contract modification, citing *Balderacchi v. Ruth*, 256 S.W.2d 390, 391 (Tenn. Ct. App. 1952); *E & A Northeast Ltd.*, 2007 WL 858779 at *1; and *Thompson v. Creswell Indus. Supply, Inc.*, 936 S.W.2d 955 (Tenn. Ct. App. 1996). These cases, however, do not stand for that proposition as applied to this case.

In *Balderacchi v. Ruth*, the Court of Appeals held that a terminable at will contract was not modified because the proof clearly established that the employee protested the modification and notified the employer that he would claim the full salary from the original at will contract. 36 Tenn. App. 421, 425, 256 S.W.2d 390, 392 (1952). Relying on these same facts, the Court of Appeals held that there was no basis for an estoppel. *Id.*

In stating the principles of Tennessee law, the Court held that the burden of proof was on the Defendant employer to show a modification of a terminable at will contract. An important aspect of the *Balderacchi* analysis is that an employer may establish modification of a terminable at will contract through three alternative methods: (1) through facts establishing mutual assent; (2) through facts establishing that an accord and satisfaction was reached; or (3) through facts establishing the basis for an estoppel. *Balderacchi* makes clear that these three options are independent of each other and only one of the three need be proven to establish a modification of a terminable at will contract.

> Modification of an existing contract cannot be accomplished by the unilateral action of one of the parties. There must be the same mutuality of assent and meeting of minds as required to make a contract. New negotiations cannot affect a completed contract unless they result in a new agreement. Neilson, etc., Canning Co. v. F. G. Lowe & Co., 149 Tenn. 561, 260 S.W. 142. And a modification of an existing contract cannot arise from an ambiguous course of dealing between the parties from which diverse inferences might reasonably be drawn as to whether the contract remained in its original form or was changed. Anderson v. Reed, 133 Okl. 23, 270 P. 854; Continental Supply Co. v. Levy, 121 Okl. 132, 247 P. 967.
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> Defendant had the burden of showing the modification of the contract by mutual assent **or** of establishing facts either constituting an accord **or** forming the basis of an estoppel. The proof fails to show either. There was no modification since the proof clearly shows that plaintiff protested and promptly notified defendant that the full salary would be claimed. For the same reason there was no basis for an estoppel.

Balderacchi v. Ruth, 36 Tenn. App. 421, 424–25, 256 S.W.2d 390, 391–92 (1952) (emphasis added).

In this case, the Plaintiff argues that *Balderacchi* precludes summary judgment for the Defendant because there are genuine issues of material fact as to whether the parties explicitly mutually assented to the new compensation terms. This argument on mutual assent, even if true, fails to recognize that the Defendant can establish a modification of a terminable at will contract without necessarily showing explicit mutual assent by the Plaintiff. The Defendant can also establish modification by showing the summary judgment record establishes facts proving that (1) an accord and satisfaction was reached by the parties **or** (2) the undisputed facts form the basis of an estoppel. The three alternative grounds for proving a modification of a terminable at will contract are independent. Proof of only one establishes modification of the contract.

Applying this law to the summary judgment record in this case, the Court concludes that the facts at issue in *Balderacchi* are distinguishable and do not preclude summary judgment. Unlike *Balderacchi*, where the Court of Appeals concluded that the specific facts in that case failed to show any of the alternative methods for modification of a terminable at will contract, the undisputed material facts in this case are much different. Here, the summary judgment record is clear as to the parties' course of dealing. There is no "ambiguous course of dealing between the parties" because, as admitted by the Plaintiffs, the Plaintiffs never protested the change in compensation terms by the Defendants. Instead, the Plaintiffs accepted the modified compensation terms without dispute for 17 months. Because the course of dealing between the parties subsequent to the change in compensation terms is clear and not ambiguous, there are no diverse inferences that might reasonably be drawn as to whether the contract remained in its original form or was changed. The contract was clearly changed and by the Plaintiffs' 17-month acceptance without protest, the Plaintiffs are estopped from claiming that the contract was not modified.

Also distinguishable are the facts in *Thompson v. Creswell Indus. Supply, Inc.*, 936 S.W.2d 955 (Tenn. Ct. App. 1996) and *E & A Ne. Ltd. P'ship v. Music City Record Distributors, Inc.*, No. M2005-01207-COA-R3CV, 2007 WL 858779 (Tenn. Ct. App. Mar. 21, 2007). Both of those cases, which cited to and relied upon the legal analysis of *Balderacchi*, involved facts critically different from the facts in this case. In both cases, in response to the alleged modification of the terminable at will contract, the other party affirmatively protested the modification.

In *Thompson v. Creswell Indus. Supply, Inc.*, the employee "voiced numerous complaints about the changes in the commission calculations." 936 S.W.2d at 956. The employee's protesting of a modification was established at trial when the Court "found that the witnesses who testified for the defendants regarding the plaintiff's acquiescence to the new terms were not credible." *Id.* at 957. Because there was not proof that the employee accepted the modified contract without objection, the Court applied the *Balderacchi* analysis that modification of a compensation agreement in an existing contract cannot be accomplished by the unilateral actions of one of the parties.

Similarly, in *E & A Ne. Ltd. P'ship v. Music City Record Distributors, Inc.*, the Court of Appeals affirmed a trial court's finding that a landlord had not mutually accepted a modification of a contract reducing the amount of rent from a tenant. No. M2005-01207-COA-R3CV, 2007 WL 858779, at *1 (Tenn. Ct. App. Mar. 21, 2007). Citing to the *Balderacchi* decision, the Court of Appeals held that "there is absolutely no evidence in the record to suggest that [the landlord] ever agreed to a reduction in rent" but "[t]o the contrary, [the landlord] re-affirmed its intention to hold Music City to the original terms of the lease in its letter of July 16, 2003, as well as in subsequent letters." *Id.* at *5 Despite accepting the lower rent for six months, the Court concluded that the letters sent by the landlord to the tenant "which made note of the 'incorrect rent payments,' and urged [the tenant] to remit a 'catch-up payment' and begin paying the correct amount once again" and "requested that the back rent be paid" were sufficient facts to negate a finding of mutual assent. *Id.* at *1-2. Likewise, even though the landlord had accepted six months of reduced rent, the fact that the landlord consistently objected to the reduced rent payment and

insisted on the tenant make a catch-up payment, the tenant had not met its burden to establish either waiver or estoppel.

The distinguishing fact in all three cases above that precluded a finding of mutual assent or estoppel is that the party who disputed the contract modification objected and/or protested to the terms of the alleged modification. In this case, however, it is undisputed that the Plaintiff never objected and/or protested to the modified terms of the 2017 Contract. Combining a lack of objection and/or protest to the modified terms with a blanket acceptance of payment under the modified terms for 17 months makes the facts of this case significantly different than *Balderacchi*, *Thompson* and *E & A Northeast Ltd. Partnership,* and these cases do not compel denying summary judgment in this case.

In addition to their defense to summary judgment using the foregoing cases, the Plaintiffs also defend against entry of summary judgment by characterizing the facts concerning the Plaintiffs' April 2017 conduct and actions subsequent thereto as "silence" or ambiguous conduct from which competing inferences arise, "Thus, Defendants must solely rely on Plaintiffs' alleged 'silence' – conduct that could at least be interpreted multiple ways, and other circumstances that cannot prove an unequivocal acceptance. *See E & A Northeast Ltd.,* 2007 WL 858779, at *4; *Balderacchi*, 256 S.W. 2d at 391." *Plaintiffs' Response,* November 24, 2020, at 13.

But the summary judgment record establishes that the Plaintiffs' conduct in accepting for 17 months compensation calculated under the terms of the 2017 Contract was not silence, it was assertive conduct, and that there is no ambiguity. There is the undisputed unambiguous course of conduct and dealing of the Plaintiffs accepting for 17

months compensation under the terms of the 2017 Contract. In addition to accepting the payments under the terms of the 2017 Contract, the Plaintiffs' actions with the Defendants and communications with others during that time objectively manifest that the Plaintiffs were performing under the terms of the 2017 Contract. These undisputed facts from the summary judgment record are as follows.

— Baker never complained about his pay to Brett and, before August of 2018, never once spoke with Brett about the 2017 Contract. In an August 2018 conversation that Baker describes as "tangential" to the issue of his contract, Brett and Baker were discussing the possibility of Baker partnering with another artist manager to co-manage Brett. Baker told Brett he would be required to pay the other artist manager 15% for that manager to agree to manage Brett. Baker's August 2018 statement leads to the conclusion that even he acknowledged he was not receiving 15% under the 2013 Contract but instead was being paid consistently with the 2017 Contract.

— In a July 31, 2018 email to two other artist managers discussing the potential of a strategic partnership with them to co-manage Brett (who accounted for approximately 90% of Baker's income), Baker stated that he had a "slightly different deal with each artist" and attached an Excel spreadsheet created by Baker illustrating actual and projected management commissions. The payments and projections reflected on Baker's spreadsheets clearly evidence that Brett was paying Baker consistently with the 2017 Contract, not the 2013 Contract.

— Baker was an independent contractor, not an employee, and he had the right to quit managing Brett at any time. Baker also had the right to manage other artists while managing Brett, and Baker routinely did so.

— After his termination, Baker asked another business manager to calculate what he would have been paid from 2017 until termination if Brett had paid Baker in accordance with the 2013 Contract and not the 2017 Contract. In one email exchange with that business manager, Baker referred to the 2013 Contract as the "original deal." Identifying the 2013 Contract as the "original deal," objectively manifests there was a later "deal," the 2017 Contract.

There is, then, no ambiguity about the Plaintiffs' conduct from April 2017 and subsequent thereto. It is consistent with the terms of the 2017 Contract.

Thus, based upon the conclusions of law stated above, the evidence and reasonable inferences drawn therefrom lead to one conclusions—the 2017 Contract came into effect and governs the Plaintiffs' compensation. There is no basis for the Plaintiffs' claims for recovery of compensation under Count I of the *First Amended Complaint* for breach of contract.

Not necessary nor dispositive but supportive of the outcome that the above actions terminated the 2013 Contract and brought into effect the 2017 Contract is that in many jurisdictions the law is that contracts terminable at will are unilaterally modifiable at will. These jurisdictions have held that when a party to an at-will contract notifies the other of prospective changes in the contract terms, the other party must either accept the terms or terminate the contract, and if the party continues to perform under the contract with knowledge of the changes made by the other party, the former is deemed, as a matter of law, to have accepted the changes.

> We note that jurisdictions other than those to which either Plaintiff or Defendant cited us have considered the question of whether the power to terminate at will necessarily includes the power to modify terms of the employment relationship. Like *Albrant*, some have concluded that, because either party has the power to terminate the relationship at will, if the employee continues to work, then he or she has accepted the proposed modification. *See Gebhard v. Royce Aluminum Corp.,* 296 F.2d 17, 19 (1st Cir.1961); *see also Facelli v. Southeast Mktg. Co.*, 284 S.C. 449, 327 S.E.2d 338, 339 (1985). Under this rule, accepted in the majority of jurisdictions that have considered the problem, an employer's right to terminate an employee at will necessarily and logically includes what may be viewed as a lesser-included right to insist upon prospective changes in the terms of that employment as condition of continued employment. *Cotter,* 880 F.2d at

> 1145; *Green v. Edward J. Bettinger Co.,* 608 F.Supp. 35, 42 (E.D.Pa.1984), *aff'd,* 791 F.2d 917 (3d Cir.1986), *cert. denied,* 479 U.S. 1069, 107 S.Ct. 960, 93 L.Ed.2d 1008 (1987).
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> A minority approach, exemplified by one case, *Bartinikas v. Clarklift of Chicago N., Inc.,* 508 F.Supp. 959, 961 (N.D.Ill.1981), holds that if the employee rejects the proposed modification, then the employer can either discharge the employee or abandon the proposed modification. The *Bartinikas* approach focuses on the proposition that there cannot be an effectively modified contract unless there is both an offer of modification by the employer and an acceptance of that modification by the employee. *Id.* at 961. We find that this focus is overly legalistic and does not lend itself to practical application. Although the *Bartinikas* case states that its approach is consistent with "modern notions of fairness in the workplace," *id.,* we find such statement illogical in light of the court's later concession that the employer can fire any employee who does not accept the proposed modification. *Id.* Thus, the *Bartinikas* approach encourages employers to fire employees, an approach that we hardly believe is in accordance with notions of fairness in the workplace. Rather, we adopt the majority approach as more enlightened as well as logical.

Stieber v. Journal Pub. Co., 901 P.2d 201, 204 (N.M. Ct. App. 1995).[2] In this case the 2013 Contract was a contract terminable at will.

[2] Consistent with the holding in the *Stieber v. Journal Pub. Co.* case, the Court also located the following jurisdictions that hold that when a party to an at-will contract notifies the other of changes in the contract terms, the other party must either accept the terms or terminate the contract and if the party continues to perform under the contract with knowledge of the changes made by the other party, the former is deemed, as a matter of law, to have accepted the changes. *See, e.g., Cotter v. Desert Palace, Inc.*, 880 F.2d 1142, 1145 (9th Cir. 1989) (citations omitted) ("Nevada recognizes the common law doctrine of employment at-will. The doctrine provides that "employment for an indefinite term may be terminated at any time for any reason or for no reason by either the employee or the employer without legal liability." An employer privileged to terminate an employee at any time necessarily enjoys the lesser privilege of imposing prospective changes in the conditions of employment."); *Gebhard v. Royce Aluminum Corp.*, 296 F.2d 17, 19 (1st Cir. 1961) ("Since defendant could discharge plaintiff at any time, it could equally initiate modifications at any time, other than as to accrued matters. Plaintiff's only alternatives were to accept the new conditions, or quit. Flint v. Youngstown Sheet & Tube Co., 2 Cir., 1944, 143 F.2d 923, 925; Swalley v. Addressograph Multigraph Corp., 7 Cir., 1946, 158 F.2d 51, 54, certiorari denied 330 U.S. 845, 67 S.Ct. 1086, 91 L.Ed. 1290. By continuing to work, plaintiff, knowing the newly proposed terms, accepted them as a matter of law."); *Ranko v. Gulf Marine Products Co. Inc.*, 126 A.F.T.R.2d 2020-6247 (W.D. Wash. Sept. 25, 2020) ("If an employment contract is terminable at will, an employer may unilaterally modify the terms of employment, so long as the employee receives reasonable notice and the changes apply prospectively. *See Duncan v. Ala. USA Fed. Credit Union, Inc.*, 148 Wn. App. 52, 58, 70, 77–78 & n.100, 199 P.3d 991 (2008) (affirming the trial court's conclusion that an employer could implement a new compensation plan that resulted in lower

Lastly, in defense to Defendants' summary judgment motion, the Plaintiffs assert that there are disputed issues of fact. These disputes are the discussions in February through April of 2017 between the Plaintiffs and Brice on what was said by Plaintiffs about changing from the 2013 Contract to the 2017 Contract. Under Tennessee summary judgment law, disputed facts that are immaterial do not preclude summary judgment. "Not all factual disputes require the denial of a motion for summary judgment. Many factual disputes are minor or are not germane to the grounds of the motion. Thus, factual

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pay because the parties executed a unilateral, terminable-at-will contract). In *Duncan*, the court reasoned that "[o]f necessity, the greater right in either party to terminate without cause include [s] the lesser right to unilaterally and prospectively modify contract terms." *Id.* at 77 (quoting *MacKenzie Ins. Agencies v. Nat. Ins. Ass'n*, 110 Nev. 503, 508, 874 P.2d 758 (Nev. 1994) (Steffen, J. dissenting)).''); *Johnson v. Associated Milk Producers, Inc.*, 886 N.W.2d 384, 390-94 (Iowa 2016) (citations omitted) ("As an at-will contract, the distributorship could be modified by either party as a condition to the continuation of the relationship. In general, when a party to an at-will contract notifies the other of changes in the contract terms, the other must either accept the terms or terminate the contract. If the party continues to perform under the contract with knowledge of the changes made by the other party, the former is deemed, as a matter of law, to have accepted the changes."); *Martin v. Golden Corral Corp.*, 601 So. 2d 1316, 1317, FN 2 (Fla. Dist. Ct. App. 1992) ("We recognize that there is a split in authority regarding acceptance of the modification. Some jurisdictions hold that if the employee is notified of the change and continues to work, he has accepted the change as a matter of law. *See Gebhard v. Royce Aluminum Corp.*, 296 F.2d 17, 19 (1st Cir.1961); *Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 229 (Tex.1986). Other jurisdictions hold that if the employer notifies the employee of the change and the employee rejects the change, the employee has not accepted the modification and the employer either must fire the employee or comply with the original employment agreement. *See Bartinikas*, 508 F.Supp. at 961 (applying Illinois law)."); *Albrant v. Sterling Furniture Co.*, 736 P.2d 201, 203 (Or. Ct. App. 1987) (footnotes and citations omitted) ("It is well established in Oregon that, without some contrary agreement, an employment contract is terminable at the will of either party. That means that an employer ordinarily may discharge an employee for any reason and at any time. It follows that an employer may also modify the employment contract so long as the modification applies only prospectively. An employee impliedly accepts such modifications by continuing employment after the modification."); *Hathaway v. Gen. Mills, Inc.*, 711 S.W.2d 227, 229 (Tex. 1986) (citations omitted) ("In employment at will situations, either party may impose modifications to the employment terms as a condition of continued employment. The party asserting the modification still must prove that the other party agreed to modify the employment terms. Generally, when the employer notifies an employee of changes in employment terms, the employee must accept the new terms or quit. If the employee continues working with knowledge of the changes, he has accepted the changes as a matter of law. Thus, to prove a modification of an at will employment contract, the party asserting the modification must prove two things: (1) notice of the change; and, (2) acceptance of the change."); *Green v. Edward J. Bettinger Co.*, 608 F. Supp. 35, 41–42 (E.D. Pa. 1984), *aff'd*, 791 F.2d 917 (3d Cir. 1986) ("Moreover, and more importantly, the defendant had the unquestioned right to terminate the entire agreement at any time. The undoubted right to terminate an at-will contract necessarily includes the right to insist upon changes in the compensation arrangements as a condition of continued employment.").

disputes warrant denial of a motion for summary judgment only when they are material. Tenn. R. Civ. P. 56.04 (requiring a moving party to demonstrate that there is no genuine dispute as to any 'material fact')." *Green v. Green*, 293 S.W.3d 493, 513–14 (Tenn. 2009). To be material, a fact must be germane to the claim or defense on which the summary judgment is predicated**.** *Id. (*citing *Eskin v. Bartee*, 262 S.W.3d at 732; *Luther v. Compton*, 5 S.W.3d 635, 639 (Tenn.1999)).

In this regard the facts identified above that the Plaintiffs assert are disputed by the Defendants are that in the only conversations the parties had concerning the 2017 Contract in February and April of 2017 the Plaintiffs never said they accepted or agreed and they made counterproposals. These, however, are insufficient as a matter of law. Because of the material facts in the summary judgment record establishing acquiescence, assent through course of dealing/performance, contract implied in fact, implied consent, estoppel of the 17 months of consistent, unambiguous conduct of objectively manifesting assent to the 2017 Contract, the Plaintiffs, as a matter of law, would have to show constant refusal to accept the modification, that they voiced numerous complaints about the modification, and/or formal, official letters of disagreement with a modification. These are the facts of *Balderacchi*, *Thompson*, and *Northeast*, quoting as follows.

Balderacchi v. Ruth, 36 Tenn. App. 421, 423–24, 256 S.W.2d 390, 391; 392 (1952) (emphasis added), provides,

> The proof consisting entirely of the testimony of plaintiff and that of Mr. Williams, defendant's Knoxville manager, shows without dispute that plaintiff refused to accept the reduction in salary and that he **'constantly told * * * Mr. Williams that he was not being paid as his contract stipulated, and that they would have to pay him the difference in the amounts.'** He

> also protested when defendant told him that his salary would be reduced and, at that time, told defendant that he could not work for $50 a week and insisted that he be paid according to the contract. Although plaintiff was paid by check throughout the period in question, the checks were not introduced by defendant and there is no suggestion that they contained language appropriate to an accord; nor is it contended that plaintiff was put upon notice that the old contract was terminated.
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> There was no modification since the proof clearly shows that plaintiff protested and promptly notified defendant that the full salary would be claimed.

Thompson v. Creswell Indus. Supply, Inc., 936 S.W.2d 955, 956 (Tenn. Ct. App. 1996) (emphasis added), provides. "The plaintiff claims that he never agreed to the new scales at either company, and **voiced numerous complaints about the changes** in the commission calculations."

E & A Ne. Ltd. P'ship v. Music City Record Distributors, Inc., No. M2005-01207-COA-R3CV, 2007 WL 858779, at *1–2; 5 (Tenn. Ct. App. Mar. 21, 2007) (emphasis added), provides,

> On or about July 16, 2003, E & A's property manager sent Music City a letter which made note of the "incorrect rent payments," and urged Music City to remit a "catch-up payment" and begin paying the correct amount once again. Music City's response of July 28 declared that it "will not pay 'catch-up' for prior rental payments," and all its subsequent rental payments were for the reduced amount.
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> In a letter sent on August 12, 2003, E & A set forth its position once again, and again requested that the back rent be paid. When no response was forthcoming, E & A retained counsel, who sent a letter to Music City on November 7, 2003 stating that the reduced payments for the previous six months had resulted in a deficiency of $11,145 to date. The letter concluded:
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> > This is notice of your material breach of contract. Please remit the amount owed to my office promptly in order to avoid

> further expenditures of attorney fees and protracted proceedings.
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> My client reserves all rights and remedies.
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> * * *
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> Further, there is absolutely no evidence in the record to suggest that E & A ever agreed to a reduction in rent. **To the contrary, E & A re-affirmed its intention to hold Music City to the original terms of the lease in its letter of July 16, 2003, as well as in subsequent letters.**[4]

[4] The trial court noted that it was the landlord's practice to address rental deficiencies in mid-month after a tenant was in arrears thirty or sixty days, and that E & A had changed its property managers in June of 2003, which created an understandable delay.

The Plaintiffs do not allege any facts of constant, numerous, officially documented rejections of the 2017 Contract and that is followed by unambiguous conduct of acquiescence. Accordingly, there are not genuine issues of material fact to preclude summary judgment in favor of the Defendants and denied to the Plaintiffs as to the Count I breach of contract claim in the Plaintiffs' complaint. Count I is dismissed with prejudice.

As to the Plaintiffs' Count II claims to recover compensation for quantum meruit, it is dismissed on summary judgment as well. The summary judgment record establishes without dispute that the Plaintiffs' claims to recover compensation in this case are governed by a contract whether it be the 2013 Contract or the 2017 Contract. Under Tennessee law there can be no claim for quantum meruit where a contract is in effect. *Ridgelake Apartments v. Harpeth Valley Utilities Dist. of Davidson & Williamson Ctys.*, No. M2003-02485-COA-R3CV, 2005 WL 831594, at *9 (Tenn. Ct. App. Apr. 8, 2005) ("No matter what terms are used to describe the purely equitable remedy provided by quasi contract implied in law, *quantum meruit* and unjust enrichment, this equitable remedy is

generally not available if a valid and enforceable written contract governs the subject matter in issue between the parties."); *Scandlyn v. McDill Columbus Corp.*, 895 S.W.2d 342, 349 (Tenn. Ct. App. 1994) ("As we have earlier determined, an express contract existed between plaintiffs and defendants with respect to the payment of maintenance fees in exchange for utilities and services. In this state, no right exists in law or equity which allows a party to abandon an express contract and seek recovery in quantum meruit or under an implied contract theory.").

As to Counts III and IV of the Plaintiffs' *First Amended Complaint*, these are claims brought against Defendant Brice for inducing breach of the 2013 Contract under Tennessee statute and common law. The above conclusions of law that the 2013 Contract was not breached renders these claims moot.

One other matter the Court must address is that the Defendants assert an additional ground for dismissal of the inducement of breach claims against Brice. That ground is the "unity of interest" defense, the theory being that because Brice is so closely associated with Brett, Brice can not constitute a separate, third-party to induce a breach of contract between Brett and the Plaintiffs. *See, e.g.*, *Waste Conversion Sys., Inc. v. Greenstone Indus., Inc.*, 33 S.W.3d 779, 781-82 (Tenn. 2000); *Forrester v. Stockstill*, 869 S.W.2d 328, 329 (Tenn. 1994); *Molloy v. Hrisko*, No. M201401351COAR3CV, 2015 WL 4323028 (Tenn. Ct. App. July 14, 2015). The law in Tennessee, however, is somewhat undeveloped on this theory, especially on facts such as the ones in this case. The Court therefore does not grant Defendants' summary judgment on this basis, and if the inducement claim against Brice were not moot, the Court would require the Counts III and IV claims to be tried to obtain

facts that would show whether Brice was so closely associated with Brett and the Defendant Entities as to fit within the unity of interest defense. Such evidence is not, though, necessary because the essential element for inducement claims of breach of the 2013 Contract is not present based upon the analysis above that the 2017 Contract terminated the 2017 Contract.

Finally, Count V of the Plaintiffs' *First Amended Complaint* seeking an accounting of the time periods in question to determine the full amount of damages owed to the Plaintiffs is dismissed as moot because the Court has concluded that the Defendants did not breach the 2013 Contract.

In conclusion, on all of the above grounds the Defendants' motion for summary judgment is granted, the Plaintiffs' motion for summary judgment is denied, and the case is dismissed with prejudice.

s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR

cc: Due to the pandemic, and as authorized by the COVID-19 Plan of the Twentieth Judicial District of the State of Tennessee, as approved by the Tennessee Supreme Court, this Court shall send copies solely by means of email to those whose email addresses are on file with the Court. If you fit into this category but nevertheless require a mailed copy, call 615-862-5719 to request a copy by mail.

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Rule 58 Certification

A copy of this order has been served upon all parties or their Counsel named above.

s/Phyllis D. Hobson December 23, 2020
Deputy Clerk
Chancery Court