**Pagination**

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Majority Opinion >

SUPREME COURT OF NEW YORK, ALBANY COUNTY

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Media Logic USA, LLC, Plaintiff, against Prinova US, LLC, Defendant.

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Index No. 900839-19

September 7, 2022, Decided

THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Contracts—Formation of Contract—Agreement lacked sufficient definiteness concerning pricing and was not capable of judicial enforcement. Contracts—Formation of Contract—Summary judgment denied where conflicting evidence existed regarding parties' intent to be bound by agreement.

For Plaintiff: Joseph B. Schmit, Mary Jane R. Morley and Rebecca A. Valentine, of counsel, Phillips Lytle, LLP, New York, New York.

For Defendant: John V. Baranello, of counsel, Moses & Singer LLP, New York, New York.

RICHARD M. PLATKIN, A.J.S.C.

RICHARD M. PLATKIN

This is a commercial action brought by plaintiff Media Logic USA, LLC ("Media Logic") to enforce the terms of an alleged contract with defendant Prinova US, LLC ("Prinova"). Discovery is complete, and a note of issue has been filed.

Media Logic now moves under CPLR 3212 for summary judgment on its claim for breach of contract and for dismissal of Prinova's counterclaim alleging unlawful eavesdropping.

Prinova opposes the motion and cross-moves for the dismissal of Media Logic's amended complaint in its entirety (*see* NYSCEF Doc No. 28 ["Complaint"]).

***BACKGROUND***

**A. The Parties and Their Business Dealings**

Media Logic is an Albany-based marketing agency (*see* NYSCEF Doc No. 175 ["SOMF"], ¶ 1). "Media Logic is different from many other marketing agencies, which simply provide discrete services requested by clients" (Complaint, ¶ 7). "Instead, Media Logic is a strategic marketing partner that develops comprehensive brand development and marketing strategies for its clients" ( *id.*, ¶ 8).

"Media Logic has over twenty-years of experience providing marketing services to clients in the food ingredients industry" (SOMF, ¶ 1). In particular, Media Logic served for many years as the marketing agency for "Prinova's competitor, Fortitech, Inc., which was purchased by DSM in 2012" (NYSCEF Doc No. 163 ["Schultz Aff."], ¶ 4; *see* SOMF, ¶¶ 1, 3).

Prinova is a limited liability company organized under the laws of Delaware with its principal place of business in Illinois (*see* SOMF, ¶ 2; *see also* NYSCEF Doc No. 33, ¶ 2). Prinova is a direct competitor to DSM in the food ingredients business (*see* Complaint, ¶¶ 11-12).

"After first retaining him as a consultant, Prinova employed non-party, Brian Wilcox . . . beginning in October 2017. Wilcox first joined Prinova as Chief Financial Officer and Executive Vice President. Prior to March 2018, Wilcox was promoted to Chief Operating Officer" (SOMF, ¶ 4).[1]

On August 30, 2017, Prinova representatives, including Don Thorp (president and owner), Bill Palagonia (general manager) and Brian Wilcox (then a consultant), traveled to Albany, New York to meet with Media Logic (*see id.*, ¶ 5).

Following the meeting, Wilcox emailed David Schultz, Media Logic's president, to offer positive feedback and indicate that Prinova's leadership was "asking about 'commitment levels in terms of time and $to win [Media Logic] over'" (*i.e.*, leave DSM and begin working for Prinova) (Schultz Aff., ¶ 8, *quoting* NYSCEF Doc No. 164).

Wilcox made a similar inquiry of Schultz on September 8, 2017, saying that he probably needed "to get some data from [Media Logic] on what it would take to get [Media Logic] to leave the dark side!" (NYSCEF Doc No. 165).

Wilcox raised the issue again in a call on September 14, 2017 (*see* Schultz **[*2]** Aff., ¶ 10). Schultz responded to Wilcox, who still was serving as a consultant to Prinova at the time, that Media Logic would "need a 3-year commitment of $500,000 per year in agency fees" ( *id.*).

After Wilcox joined Prinova in a senior executive role in October 2017, he informed Schultz that he expected Prinova to move forward with engaging Media Logic. Initially Wilcox spoke about convening an introductory/

kick-off meeting in December 2017, but later advised Media Logic that the meeting would be held in mid-January 2018 (*see id.*, ¶ 12).

In the meantime, DSM had advanced $625,000 to Media Logic for a 2018 marketing campaign, and a kick-off meeting for that project had been scheduled for January 9, 2018 (*see id.*, ¶ 13). Media Logic therefore found itself in the "uncomfortable position" of either having "to firm-up Prinova and part ways with DSM or stay the course with DSM" ( *id.*).

Schultz emailed Wilcox on December 22, 2017 to advise Prinova that if Media Logic was going to cancel the DSM kick-off meeting and return the $625,000 advance, it needed a firm commitment from Prinova (*see id.*, ¶ 14). Wilcox replied on December 27, 2017 that he and Don Thorp "are all good with hiring [Media Logic]" and suggested a meeting during the week of January 15, 2018 (NYSCEF Doc No. 166).

Between December 29, 2017 and January 8, 2018, Media Logic returned the advanced funds and advised DSM that it was resigning to work for Prinova (*see* Schultz Aff., ¶¶ 16-18). Schultz and another Media Logic executive, Phyliss Niner, then traveled to Illinois for a January 17, 2018 kick-off meeting with Thorp, Wilcox, Palagonia and other Prinova executives (*see id.*, ¶¶ 19-20).

On February 21, 2018, Schultz sent Wilcox an emailed copy of a Letter of Understanding that had been signed by Media Logic (*see* SOMF, ¶ 14). Wilcox responded on February 27, 2018 that the "letter looks good to [him]" (NYSCEF Doc No. 167). Wilcox then signed the letter on or about March 1, 2018 in his capacity as executive vice-president of Prinova (*see* NYSCEF Doc No. 151 ["LOU"]).

From March 2018 to September 2018, Media Logic provided marketing services to Prinova (*see* Schultz Aff., ¶ 29). During this period, Media Logic undertook 38 discrete marketing projects for Prinova (*see* SOMF, ¶ 42), and Prinova generally was satisfied with Media Logic's marketing work (*see e.g.* NYSCEF Doc No. 173).

According to Schultz, the parties adhered to a "distinct process" for the "majority of these [38] projects":

> First, the parties agreed to commence a project. If the project was identical or sufficiently similar to a project included in the Budget, Media Logic charged the corresponding fee from the Budget. If the project was similar to a project included in the Budget, but the actual scope of work was sufficiently different, Media Logic used the fee estimate in the Budget as a starting point and Prinova approved [a price] adjustment to the fee. . . . If the project was not sufficiently similar to a project in the Budget, Media Logic quoted a price to Prinova, and obtained approval prior to Media Logic invoicing for the work (Schultz Aff., ¶ 31).

Prinova paid about $360,000 in agency fees to Media Logic for the 38 projects undertaken in **[*3]** 2018 (*see id.* , ¶ 32).

By the summer of 2018, however, Prinova had halted all marketing spending (*see* SOMF, ¶ 44), unbeknownst to Media Logic (*see* Schultz Aff., ¶ 33).[2] Shortly thereafter, Media Logic was informed that Wilcox was leaving Prinova and would no longer be involved with Media Logic or with Prinova's marketing (*see id.*, ¶ 34). On October 4, 2018, Prinova directed Media Logic to put its work on hold (*see* SOMF, ¶ 46; NYSCEF Doc No. 169).

Thorp emailed Schultz on January 28, 2019 to advise that it was time for Prinova and Media Logic to "part ways" (NYSCEF Doc No. 170). Prinova confirmed its intention to "move on" in a telephone call on February 5, 2019 (Schultz Aff., ¶¶ 37, 40).

**B. This Litigation**

Media Logic commenced this action on February 13, 2019 (*see* NYSCEF Doc No. 1). As amended, Media Logic's Complaint alleges two causes of action.

First, Media Logic sues for breach of the LOU, seeking to recover the minimum agency fees of $500,000 per year that Prinova was obliged to spend (*see* Complaint, ¶¶ 59-65). Media Logic's second cause of action is for promissory estoppel, alleging that it detrimentally relied on Prinova's clear promise to incur at least $500,000 per year in agency fees over a three-year period in discontinuing its business relationship with DSM and returning the $625,000 advance fee (*see id.*, ¶¶ 67-71).

In addition to the LOU, two other documents are annexed to Media Logic's Complaint: (1) a "3-Year Strategic Marketing Roadmap" (NYSCEF Doc No. 30 ["Roadmap"]) summarizing the general services that Media Logic intended to provide to Prinova, as well as the approximate financial investment required from Prinova (*see* Complaint, ¶ 31); and (2) a "Project Planning Budget" (NYSCEF Doc No. 31 ["Budget"]; *see also* Complaint, ¶ 32).

Prinova moved at the outset of the case to dismiss the Complaint under CPLR 3211 (a) (1) , (7) and (8). In a Decision & Order dated June 18, 2020, the Court denied the motion (*see* NYSCEF Doc No. 41 ["MTD Decision"]).

As to Prinova's contention that the LOU is not an enforceable contract because it lacks sufficient definiteness as to material terms — including the services to be provided by Media Logic, the pricing for the services, and the remedy if Prinova failed to meet the $500,000 annual minimum — the Court concluded "that the Complaint, as amplified by Shultz's affidavit in opposition to the motion, sufficiently states a claim for breach of contract and that Prinova's contentions regarding the indefiniteness of the LOU have not been conclusively established at this early stage of the litigation" ( *id.*, p. 14). "Media Logic's breach of contract cause of action should be allowed to proceed through discovery, so that the parties' contentions regarding the enforceability of the LOU can be determined on a fuller and firmer factual record" ( *id.*, p. 17).

The Court similarly "conclude[d] that . . . Media Logic should be permitted to proceed on its promissory estoppel claim as an alternative theory of recovery" ( *id.*, p. 19).

Prinova's original answer denied the material allegations of the Complaint, interposed forty affirmative defenses, and alleged two counterclaims concerning the LOU (*see* NYSCEF Doc No. 45).[3]

During discovery, Media Logic produced 13 **[*4]** audio recordings of meetings with Prinova (*see* SOMF, ¶¶ 51-53). Prinova contends that these recordings were made in violation of an Illinois eavesdropping statute, and it later amended its answer to assert an eavesdropping counterclaim and some additional affirmative defenses ( *see* NYSCEF Doc No. 90 ["Answer"], ¶¶ 33-49).

The parties completed discovery in November 2021, and Media Logic filed its note of issue on December 6, 2021 (*see* NYSCEF Doc No. 138). Under the parties' stipulated briefing schedule, the motion and cross motion were returnable on May 23, 2022. Remote oral argument was held on August 19, 2022 (*see* NYSCEF Doc No. 217), and this Decision & Order follows.

***DISCUSSION***

To obtain summary judgment, a movant must establish its position "'sufficiently to warrant the court as a matter of law *in directing* judgment'" in its favor (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 , 1067 , 390 N.E.2d 298 , 416 N.Y.S.2d 790 [1979], quoting CPLR 3212 [b] ). The proponent of the motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to eliminate any genuine material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 , 324 , 501 N.E.2d 572 , 508 N.Y.S.2d 923 [1986]). If the movant fails to satisfy this initial burden, the motion must be denied, "regardless of the sufficiency of the opposing papers" (*id.* at 324 ). But if the movant meets its initial burden, the burden shifts to the nonmoving party to demonstrate the existence of disputed material facts or a legal defense to the claim (*see id.* ).

**A. Enforcement of the LOU**

Media Logic moves for summary judgment on its claim alleging breach of the LOU. Prinova opposes the motion and cross-moves for dismissal of the claim on the ground that the LOU is nothing more than an unenforceable agreement to agree.

Media Logic bears the burden of establishing the formation of a valid contract, Prinova's breach, and its own performance under the LOU (*see Clearmont Prop., LLC v Eisner*, 58 AD3d 1052 , 1055 , 872 N.Y.S.2d 725 [3d Dept 2009]).

To demonstrate the formation of a valid contract, Media Logic must adduce objective evidence of the parties' mutual assent and intention to be bound by the LOU (*see Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397 , 399-400 , 361 N.E.2d 999 , 393 N.Y.S.2d 350 [1977]; *Kowalchuk v Stroup*, 61 A.D.3d 118 , 121 , 873 N.Y.S.2d 43 [1st Dept 2009]). The critical inquiry is "whether the [LOU] contemplated the negotiation of later agreements and if the consummation of those agreements was a precondition to a party's performance" ( *IDT Corp. v Tyco Group, S.A.R.L.*, 13 NY3d 209 , 213 , 918 N.E.2d 913 , 890 N.Y.S.2d 401 n 2 [2009]).

Media Logic also must establish that the LOU is reasonably certain in its material terms (*see Kolchins v Evolution Mkts., Inc.*, 31 NY3d 100 , 106 , 73 N.Y.S.3d 519 , 96 N.E.3d 784 [2018]; *Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475 , 482 , 548 N.E.2d 203 , 548 N.Y.S.2d 920 [1989], *cert denied* 498 U.S. 816 , 111 S. Ct. 58 , 112 L. Ed. 2d 33 [1990]). "[A] court cannot enforce a contract unless it is able to determine what in fact the parties have agreed to" (*Matter of 166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.*, 78 NY2d 88 , 91 , 575 N.E.2d 104 , 571 N.Y.S.2d 686 [1991]). Nevertheless, the contract terms need not be fixed with absolute certainty to give rise to an enforceable agreement (*see Kolchins*, 31 NY3d at 107 ).

In maintaining that the LOU is a binding and enforceable contract, Media Logic focuses on objective manifestations of the parties' intention to be bound. Thus, Media Logic emphasizes certain **[*5]** detailed terms

of the LOU, seemingly cast in mandatory language, that prescribe Prinova's required annual minimum spend ( *see* LOU, ¶ 1), the financial arrangements governing media buys (*see id.*, ¶ 3), the process by which Media Logic will invoice Prinova (*see id.*, ¶¶ 4-5), ownership of work product (*see id.*, ¶ 7), the duration of the LOU ( *see id.*, ¶ 8), and Media Logic's promise of exclusivity (*see id.*, ¶ 9).

Media Logic also points to the absence of any language "expressly stating that the [LOU] is subject to further negotiations, or that there is no definitive agreement until the parties have reduced their agreement to a [more comprehensive] writing" (NYSCEF Doc No. 176 ["MOL"], p. 11 n 4).

Additionally, Media Logic highlights the fact that the LOU was signed by senior executives — Media Logic's founder and president, and the chief financial officer/executive vice-president of Prinova — and these executives believed that they were binding their respective companies to the LOU (*see* Schultz Aff., ¶¶ 27-28; *see also* NYSCEF Doc Nos. 156, 182 ["Wilcox EBT"], pp. 156-158 [LOU memorialized "arrangement between the parties"]).

Media Logic also points to evidence that Prinova recognized the LOU as a binding contract following execution and that it never contended otherwise prior to this litigation (*see* Schultz Aff., ¶ 26; NYSCEF Doc No. 171 ["Niner Aff."], ¶ 9; NYSCEF Doc No. 215).

Prinova responds by identifying other intrinsic and extrinsic evidence that is said to evince a contrary intention or at least raise factual questions about the parties' intentions. Specifically, Prinova points to narrative language within the LOU of a more tentative nature, such as the language explaining that Media Logic was "not asking for a guarantee to cover all of [the agency fees typically billed by Fortitech/DSM], [but] *would like to see* a minimum spend across all projects to be at least $500,000 per year in agency fees" (LOU, p. 1 [emphasis added]). The LOU similarly recites Media Logic's belief that "it would be *helpful* to provide [Prinova] with [Media Logic's] standard terms and conditions through this 'Letter of Understanding'" ( *id.* [emphasis added]).

Relatedly, Prinova argues that the LOU is not drafted with the formality and rigor ordinarily present in multi-million dollar commercial agreements between sophisticated parties. As Wilcox observed in his deposition, the LOU is "[not] something that you generally send out," and it certainly was "not a twenty-page contract with a customer or [supplier] that . . . would ha[ve] a lot of legalese" (Wilcox EBT, p. 156).

Prinova also observes that some of the allegedly material terms relied upon by Media Logic themselves lack definiteness. For instance, the LOU prohibits Media Logic from "compet[ing] with Prinova within Prinova's service area" (LOU, ¶ 9), but it does not define any "service area."

Finally, Prinova argues that its failure to return to Media Logic a fully-executed version of the LOU — and Media Logic's failure to insist on the return — is further evidence that the parties did not intend to be bound by the LOU (*see* NYSCEF Doc No. 181 ["Schultz EBT"], pp. 9-10).

Given the conflicting evidence adduced by the parties regarding **[*6]** their intent to be bound by the LOU, it would be inappropriate to grant either side summary judgment on this point.

But even assuming that the parties did share an intent to be bound, that is not the end of the inquiry. As the

proponent of the alleged contract, Media Logic also must establish that the LOU is reasonably certain in its material terms, so as to be capable of judicial enforcement (*see 166 Mamaroneck Ave.*, 78 NY2d at 91 ; *Four Seasons Hotels Ltd. v Vinnik*, 127 AD2d 310 , 317 , 515 N.Y.S.2d 1 [1st Dept 1987]). "[D]efiniteness as to material matters is of the very essence in contract law" (*Joseph Martin, Jr., Delicatessen, Inc. v Schumacher*, 52 NY2d 105 , 109 , 417 N.E.2d 541 , 436 N.Y.S.2d 247 [1981]), and "[a] contract must be definite in its material terms in order to be enforceable" (*Doller v Prescott*, 167 AD3d 1298 , 1300 , 91 N.Y.S.3d 533 [3d Dept 2018] [internal quotation marks, alterations and citation omitted]). "[A] mere agreement to agree, in which a material term is left for future negotiations, is unenforceable" (*Joseph Martin, Jr., Delicatessen*, 52 NY2d at 109 [citations omitted]).

As Prinova observes, the LOU lacks definiteness as to the pricing for the marketing services to be rendered by Media Logic. The LOU calls for Prinova to spend a minimum of $500,000 per year, and the vast majority of this spending necessarily will be on "project fees" — the fees charged by Media Logic for particular marketing projects (*e.g.*, advertising purchases, web development, graphic design, etc.) requested by Prinova (*see* LOU, ¶ 1).[4]

However, the LOU leaves to future negotiation the fees charged by Media Logic for the discrete marketing projects. "At the outset of each project, Media Logic will provide a price quote," and Media Logic will abide by "the agreed-upon price unless the scope changes and a revised quote is approved by Prinova" ( *id.*). Thus, the LOU presumes that the parties will reach mutual agreement, and there is no mechanism for resolving impasses.

While recognizing that pricing is not defined within the four corners of the LOU, Media Logic emphasizes authorities holding that, "[w]here the parties have completed their negotiations of what they regard as essential elements, and performance has begun on the good faith understanding that agreement on the unsettled matters will follow, the court will find and enforce a contract even though the parties have expressly left these other elements for future negotiation and agreement, *if some objective method of determination is available, independent of either party's mere wish or desire*" (*Metro-Goldwyn-Mayer v Scheider*, 40 NY2d 1069 , 1070-1071 , 360 N.E.2d 930 , 392 N.Y.S.2d 252 [1976] [internal quotation marks and citation omitted] [emphasis added]).

Objective criteria may "be found within the agreement or ascertained by reference to an extrinsic event, commercial practice or trade usage" (*Cobble Hill Nursing Home*, 74 NY2d at 483 ). The agreement itself, "other writings, usage and custom, the parties' situation, objectives, acts and utterances — a wide array of facts and circumstances can be relevant, and is admissible, in deciding whether gaps in a purported agreement are material, and, if not, how they should be filled in" (*Four Seasons Hotels*, 127 AD2d at 322-323 [citation omitted]). Striking down a contract as indefinite . . . is at best a last resort" (*166 Mamaroneck **[*7]** Ave. Corp.*, 78 NY2d at 91 [internal quotation marks and citation omitted]).

In opposing Prinova's pre-answer motion to dismiss the contractual claim founded upon the LOU, Media Logic identified three potential sources of objective pricing criteria: (1) custom and practice in the marketing industry concerning the use of master services agreements; (2) the parties' negotiations and discussions preceding execution of the LOU, including Media Logic's delivery of a Roadmap and Budget generally delineating the

services to be provided to Prinova and approximate pricing; and (3) the parties' course of conduct under the LOU, including the 38 discrete projects successfully undertaken by Media Logic (*see* MTD Decision, p. 15).

The Court declined to dismiss the claim, concluding that neither the LOU nor the other documentary evidence tendered by Prinova "utterly refute[d] Media Logic's reliance on industry custom and practice, the parties' negotiations and pre-execution conduct, and their performance under the LOU. If substantiated in discovery, the foregoing may provide an objective basis for filling of gaps in the LOU" ( *id.*, p. 16). The Court specifically observed that "the parties [had] successfully completed 38 discrete projects under the [LOU]," and "[d]iscovery would set forth the process by which Media Logic and Prinova agreed to the projects that would be conducted" ( *id.* [internal quotation marks and citation omitted]).

Now, following an opportunity to compile a "fuller and firmer factual record" ( *id.*, p. 17), Media Logic effectively has abandoned its reliance on industry custom and practice. This potential objective source of the missing pricing terms is not mentioned in Media Logic's motion for summary judgment, and the reference to industry custom and practice made in reply is unsupported by admissible evidence of any relevant custom or practice ( *see* NYSCEF Doc No. 211, p. 10; *cf. Metro-Goldwyn-Mayer*, 40 NY2d at 1070 ["only essential term" not addressed was start date for movie production, which could be "based on proof of established custom and practice in the industry, of which both parties were found to be aware, set in the context of the other understandings reached by them"]).[5]

Nor does Media Logic's motion press the argument that the negotiations and discussions preceding execution of the LOU, including the Roadmap and Budget, are a source of objective pricing criteria. Neither the Budget nor Roadmap was submitted as part of Media Logic's motion; the Roadmap is not mentioned anywhere in Media Logic's moving papers; and the only reference to the Budget appears in the paragraph of Schultz's affidavit discussing the process by which the parties negotiated the 38 discrete marketing projects performed following execution of the LOU.

As to the 38 projects, Media Logic maintained at the outset of the case that "[d]iscovery would set forth the process by which Media Logic and Prinova agreed to the projects that would be conducted, how much time would be conducted and the amount of money that would be charged for the projects. It would show that there was an agreement with **[*8]** regard to how those projects would be invoiced and that Prinova did pay those invoices without question" (NYSCEF Doc No. 40, pp. 18-19; *see also id.*, p. 20).

But following discovery, Media Logic has provided little, if any, new proof concerning the process by which the 38 projects were undertaken. Shultz merely reiterates his affidavit testimony from the prior motion practice almost three years ago regarding the "distinct process" for negotiating "the majority of the[ 38] projects":

> First, the parties mutually agreed to commence a project. If the project was identical or sufficiently similar to a project included in the Budget, Media Logic charged the corresponding fee from the Budget. If the project was similar to a project included in the Budget, but the actual scope of work was sufficiently different, Media Logic used the fee estimate in the Budget as a starting point and Prinova approved an adjustment to the fee prior to Media Logic invoicing for the work. If the project was not sufficiently similar to a project in the Budget, Media Logic quoted a price to Prinova, and obtained approval prior to Media Logic invoicing for the work (Schultz Aff., ¶ 31; *cf.* NYSCEF Doc

No. 34, ¶ 12).

Although this testimony shows that Media Logic chose to rely upon the Budget — a document that was not incorporated or referred to in the LOU — in "provid[ing] a price quote" to Prinova at the outset of each project (LOU, ¶ 1), nothing in the LOU obliged Media Logic to quote project fees in accordance with the Budget, even for the limited universe of projects that Media Logic deemed to be "sufficiently similar to a project included in the Budget" (Schultz Aff., ¶ 31). And even if Media Logic were bound by the Budget in quoting "sufficiently similar" projects ( *id.*), the LOU did not oblige Prinova to agree to the price quoted by Media Logic.

Rather, the LOU contemplated a process of negotiation and *mutual* agreement (*see* LOU, ¶ 1 ["agreed-upon price"]; Wilcox EBT, pp. 89-94 [pricing subject to "back and forth"]). Consistent with this framework, the proof adduced by Prinova shows that each of the 38 discrete projects was negotiated separately, did not rely on the LOU for pricing, and the prices charged to Prinova often differed from Media Logic's quotes, which themselves differed from the prices set forth in the Budget (*see* NYSCEF Doc No. 193; NYSCEF Doc No. 203, ¶¶ 67-91). As such, there is no basis to conclude that the 38 projects were performed in accordance with the LOU, as claimed by Media Logic.

The fact that the Budget was not incorporated into, or otherwise made part of, the LOU is significant and serves to meaningfully distinguish this case from *RES Exhibit Servs., LLC v Genesis Vision, Inc.* (155 AD3d 1515 , 64 N.Y.S.3d 786 [4th Dept 2017] [" *RES* "]), the primary authority relied upon by Media Logic. In rejecting an indefiniteness challenge to a master services agreement that, like the one here, contemplated future negotiations and the parties' execution of project authorization forms governing the scope of work to be performed and the pricing for the work (*see id.* at 1518-1519 ; *see also* NYSCEF Doc No. 39, pp. 103-115), the Fourth Department relied on **[*9]** "the parties' prior practice as expressed in the incorporated [project authorization forms] for the two attended trade shows," which the court found to constitute "objective criteria for determining the scope and price of the remaining work" (*RES*, 155 AD3d at 1519 ).[6] Thus, the *RES* parties incorporated pricing into their master services agreement.[7]

And contrary to Media Logic's repeated refrain, the fact that the parties successfully completed 38 discrete projects following execution of the LOU does not establish that the LOU is sufficiently definite to be capable of judicial enforcement. An agreement to agree may be workable, so long as the parties continue to reach agreement. But when circumstances change and the parties no longer are aligned with regard to pricing or some other material term, an agreement to agree is unworkable and unenforceable without an objective method of supplying the missing term or breaking the impasse (*see* Schultz EBT, pp. 30-32; NYSCEF Doc No. 210, ¶ 92).

In sum, the Court finds that the LOU lacks sufficient definiteness so as to be capable of judicial enforcement because it leaves to future agreement the pricing for Media Logic's marketing services and provides no objective criteria by which the Court can enforce Prinova's promise to spend a minimum of $500,000 per year on such services (*see Clifford R. Gray, Inc. v LeChase Constr. Servs., LLC*, 31 AD3d 983 , 985-986 , 819 N.Y.S.2d 182 [3d Dept 2006]). And this lack of definiteness as to pricing — a highly material term in most contracts (*see id.* ), but particularly in an agreement purporting to impose a minimum annual spending requirement — cannot be made up for by the parties' definiteness as to other material terms.

For all of the foregoing reasons, the Court concludes that the LOU is not an enforceable contract, thereby requiring the dismissal of Media Logic's first cause of action.

**B. Promissory Estoppel**

Prinova moves for the dismissal of Media Logic's second cause of action, which alternatively seeks recovery under the doctrine of promissory estoppel. "The elements of a promissory estoppel claim are: (i) a sufficiently clear and unambiguous promise; (ii) reasonable reliance on the promise; and (iii) injury caused by the reliance" (*Castellotti v Free*, 138 AD3d 198 , 204 , 27 N.Y.S.3d 507 [1st Dept 2016] [citations omitted]; *see Villnave Constr. Servs., Inc. v Crossgates Mall Gen. Co. Newco, LLC*, 201 AD3d 1183 , 1186 , 161 N.Y.S.3d 480 [3d Dept 2022]). This doctrine further "is limited to cases where the promisee suffered an 'unconscionable injury'" ( *AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 AD3d 6 , 21 , 867 N.Y.S.2d 169 [2d Dept 2008], quoting *D & N Boening v Kirsch Beverages*, 99 AD2d 522 , 524 , 471 N.Y.S.2d 299 [2d Dept 1984], *affd* 63 NY2d 449 , 472 N.E.2d 992 , 483 N.Y.S.2d 164 [1984]).

Prinova first contends that it did not make a clear and unambiguous promise to Media Logic. According to Prinova, there only was a "general understanding" as to the conditions under which Media Logic would be prepared to sever its relationship with DSM, and that understanding did not extend to the minimum spending requirement set forth in the LOU (NYSCEF Doc No. 205 ["Opp Mem"], p. 14). The understanding at the time was that Media Logic was willing to terminate its relationship with DSM if Prinova would provide "a similar level **[*10]** of business" (Wilcox EBT, p. 82).

The Court does not find this argument to constitute a persuasive basis for the summary dismissal of Media Logic's promissory estoppel claim. Schultz testified that he told Wilcox that Media Logic would "need a 3-year commitment of $500,000 per year in agency fees" to sever the DSM relationship (Schultz Aff., ¶ 10), and any contrary testimony by Wilcox merely would give rise to a question of fact (*see* Opp Mem, p. 16, citing Wilcox EBT, pp. 99:23-100:6).[8]

Moreover, Prinova's own proof shows that Wilcox very clearly understood, and communicated to Thorp, that Media Logic could not part ways with DSM "unless [Prinova] was going to do a similar level of business" (Wilcox EBT, p. 82). Wilcox further testified that when Prinova made the decision in December 2017 to move ahead with engaging Media Logic, Thorp "had the number that [Schultz] provided [regarding Media Logic's annual agency fees with DSM], low six hundred[ thousands] I believe. That he definitely knew" ( *id.*). Following this exchange of information, Prinova provided the requested assurance to Media Logic (*see id.*, pp. 80-84; NYSCEF Doc No. 166; *see also* NYSCEF Doc No. 153 [Wilcox complaining to Thorp that "we made verbal commitments to (M)edia Logic when they switched," to which Thorp responded that "(b)usiness is fluid, it is ever changing, and we must change with it"]).

Given the testimony from Schultz and Wilcox regarding the circumstances by which Media Logic was engaged, the contemporaneous emails, and Wilcox's testimony that the subsequently executed LOU was intended to memorialize the parties' earlier agreements and understandings (*see* Wilcox EBT, pp. 96-99, 154-157), Prinova has failed to affirmatively demonstrate the absence of a clear and unambiguous promise (*cf. Delmaestro v Marlin*, 168 AD3d 813 , 816 , 92 N.Y.S.3d 312 [2d Dept 2019] [series of emails exchanged in effort to reach agreement on a written lease/purchase agreement did not include a "clear and unambiguous

promise that the contemplated transaction would be consummated or that the plaintiff would be able to move into the property in the absence of an executed agreement"]; *47 W. 14th St. Corp. v New York Wigs & Plus, Inc.*, 106 AD3d 527 , 527 , 965 N.Y.S.2d 454 [1st Dept 2013] ["evidence of the discussions (preceding written agreement) did not show a clear and unambiguous promise" to accept tenant's unilateral surrender of lease, in contravention of lease's "no waiver" and general merger clauses]).

Prinova further argues that Media Logic's reliance on the alleged promise was unreasonable. It maintains that "a mere general understanding cannot be reasonably relied upon," and it cites "[t]he distance between the LOU's execution (March 2018) and this alleged 'agreement' (December 2017)" (Opp Mem, pp. 16-17). To the extent that this argument is distinct from Prinova's claim that there was not a clear and unambiguous promise, the record shows that Media Logic fully disclosed to Prinova its dilemma with DSM and clearly informed Prinova that it needed a firm commitment before severing a lucrative, long-term client relationship and returning the $625,000 advance. Insofar as there is a question as to the reasonableness **[*11]** of Media Logic's actions, it is an issue for trial.

The Court also rejects Prinova's contention that Media Logic's claim of an unconscionable injury fails as a matter of law. Even accepting Prinova's position that Media Logic's claimed damages on its promissory estoppel claim are vastly overstated (*see* NYSCEF Doc No. 200),[9] the loss of DSM as a longtime client and return of the $625,000 advance may be found to constitute an unconscionable injury under the facts and circumstances of this case (*see Global Icons, LLC v Sillerman*, 45 AD3d 457 , 457 , 845 N.Y.S.2d 730 [1st Dept 2007]; *cf. AHA Sales*, 58 AD3d at 21 [no unconscionable injury where plaintiff "derived substantial revenues over the course of many years in reliance on the alleged representations by (defendants)"]).

Finally, given that the LOU failed as an enforceable contract for lack of definiteness, Media Logic may proceed to trial under the alternative theory of promissory estoppel.[10]

Based on the foregoing, the branch of Prinova's cross motion seeking dismissal of Media Logic's second cause of action is denied.

**C. Eavesdropping**

Prinova's third counterclaim seeks to recover damages from Media Logic for alleged violations of an Illinois eavesdropping statute (*see* Answer, ¶¶ 34-49). Media Logic moves for dismissal of the counterclaim on various grounds.

Under Illinois law, "[a] person commits eavesdropping when he or she knowingly and intentionally . . . [u]ses an eavesdropping device, in a surreptitious manner, for the purpose of . . . recording all or any part of any private conversation to which he or she is a party unless he or she does so with the consent of all other parties to the private conversation" ( 720 ILCS 5/14-2 [a] [2] ; *see* Answer , ¶ 46). A conversation is "private" if at least one of the participants "intended the communication to be of a private nature under circumstances reasonably justifying that expectation" ( 720 ILCS 5/14-1 [d] ).

***1. The Parties' Proof***

During discovery, Media Logic produced 13 audio recordings, totaling almost 11 hours, to Prinova (*see* SOMF,

¶ 51).

Eleven recordings were made by Phyliss Niner, a Media Logic executive, using her iPhone. Niner explains that it is her practice to record marketing strategy sessions so that she can actively participate and check the recording later to "catch important details and check if [she] missed anything. The recording is done for the benefit of the client, to ensure that [she] can adequately address all of their requests and incorporate their thoughts in developing marketing strategy" (Niner Aff, ¶ 12).

Five such recordings were made at strategic planning meetings in Illinois on April 11, 2018 (*see id.*, ¶ 16; Schultz Aff., ¶ 38). According to Niner, "the individual meeting participants," including Bill Palagonia, "had full knowledge that [she] was recording the . . . meetings. . . . Before the start of every session on April 11, 2018, [Niner] informed all session participants that [she] would be recording the meetings," and "[n]o one objected" (Niner Aff., ¶¶ 16-17). Moreover, the recordings were made on Niner's iPhone, which "was placed in the center of the conference table" around which the meeting participants were seated, and "[i]t was clear from the screen of [the] iPhone **[*12]** that it was recording the sessions" ( *id.* ¶ 18). Niner's testimony regarding the Illinois meetings is confirmed by Schultz (*see* Schultz Aff., ¶ 38).

After learning of Prinova's claim that the five recordings violated Illinois law, Niner searched her iPhone and found six more recordings (*see* Niner Aff., ¶¶ 22-23). Niner avers that one recording, made on March 14, 2018, begins with a Prinova employee saying "Okay" after being informed that Niner was recording the meeting ( *id.*, ¶ 25); two of the recordings did not involve individuals located in Illinois; and the remaining three recordings are said to have involved strategy sessions for public-facing marketing materials, including color choices and tag lines (*see id.*, ¶ 27), with much of the same information appearing in the parties' emails and other written communications (*see id.*, ¶ 28).

In addition, Schultz recorded two difficult telephone conversations with Palagonia near the end of the Media Logic/Prinova relationship (*see* Schultz Aff., ¶ 39). Schultz avers that he was in New York for both conversations and unaware of Palagonia's location (*see id.*, ¶¶ 39-40). Schultz also avers that no confidential Prinova information was discussed during the calls, and, to the extent that any confidences were revealed, they were Media Logic's confidences (*see id.*).

Prinova disputes many of these contentions. Palagonia submits an affidavit in which he offers the following attestation as to the five meetings recorded by Niner on April 11, 2018 and the two telephone conversations later recorded by Schultz:

> At no point was I made aware that these meetings or conference calls were being recorded. I did not provide Media Logic with my permission or consent to record these conversations, nor was it ever understood or industry practice that a vendor would record meetings or conversations with [Prinova] without prior knowledge or consent (NYSCEF Doc No. 201 ["Palagonia Aff."], ¶ 8).

Palagonia further avers that he was in Illinois during the two recorded calls with Schultz (*see id.*, ¶ 6).

Thorp submits a similar, but less detailed, affidavit. He avers that he was present at the April 11, 2018 strategy meetings, and "[a]t none of those meetings did [h]e ever consent to Media Logic recording" (NYSCEF Doc No.

202, ¶ 3). But Thorp does not say whether he was aware that Niner was recording the meetings or address the consent to recording allegedly given by other Prinova attendees.

***2. Analysis***

Given the affidavit testimony of Palagonia and Thorp, Prinova's opposition to the motion suffices to raise triable issues of fact as to whether Media Logic's recordings were done surreptitiously and without the express or implied consent of all of the Prinova participants. Nonetheless, the eavesdropping counterclaim must be dismissed for the following reasons.

***a. No "Private Conversations" Were Recorded***

It is apparent from the legislative history of the Illinois eavesdropping statute and controlling precedent of the Supreme Court of Illinois that the conversations recorded by Media Logic were not "private conversation[s]" ( 720 ILCS 5/14-1 [d] ).

The Illinois eavesdropping statute prohibits **[*13]** the recording of a "private conversation," which is defined as a conversation where at least one participant "intended the communication to be of a private nature under circumstances reasonably justifying that expectation" (*id.* ). This requirement was added in late 2014, following the Illinois Supreme Court's decision in *People v Clark* (2014 IL 115776 , 379 Ill. Dec. 77 , 6 NE3d 154 [Ill 2014]), which struck down a predecessor eavesdropping statute on First Amendment grounds.

While recognizing that "[i]ndividuals have a valid interest in the privacy of their communications and a legitimate expectation that their private conversations will not be recorded by *those not privy to the conversation*," the Illinois Supreme Court declared the former statute unconstitutional because it criminalized "a whole range of conduct involving audio recordings of conversations that cannot be deemed in any way private":

> If another person overhears what we say, we cannot control to whom that person may repeat what we said. That person may write down what we say and publish it, and this is not a violation of the eavesdropping statute. Yet if that same person records our words with an audio recording device, even if it is not published in any way, a criminal act has been committed. The person taking notes may misquote us or misrepresent what we said, but an audio recording is the best evidence of our words. Yet, the eavesdropping statute bars it. Understandably, many people do not want their voices broadcast to others or on the Internet to be heard around the world. But, to a certain extent this is beyond our control, given the ubiquity of devices like smartphones, with their video and audio recording capabilities and the ability to post such recordings instantly to the Internet. Illinois' privacy statute goes too far in its effort to protect individuals' interest in the privacy of their communications. Indeed, by removing all semblance of privacy from the statute . . ., the legislature has severed the link between the eavesdropping statute's means and its end (*id.* at 161-162 [internal quotation marks and citation omitted] [emphasis added]).

The Illinois legislature responded by amending the statute to limit its ambit to "private conversation[s]," which are defined as conversations in which at least one of the parties "intended the communication to be of a private

nature under circumstances reasonably justifying that expectation, . . . including, but not limited to, an expectation derived from a privilege, immunity, or right established by common law, Supreme Court rule, or the Illinois or United States Constitution" ( 720 ILCS 5/14-1 [d] ).

In this regard, the Illinois Supreme Court consistently has held that there can be no legitimate expectation of privacy from recording where the person making the recording is a party to the conversation. In recognizing in *Clark* that individuals have "a legitimate expectation that their private conversations will not be recorded *by those not privy to the conversation*" ( 6 NE3d at 160 [emphasis added]), the Illinois Supreme Court essentially reaffirmed its earlier decision in **[*14]** *People v Herrington* (163 Ill. 2d 507 , 645 NE2d 957 , 206 Ill. Dec. 705 [Ill 1994]), which ruled that "there can be no expectation of privacy by the declarant where the individual recording the conversation is a party to that conversation" (*id.* at 958 ).

And *Herrington* itself was based on the Illinois Supreme Court's earlier precedent in *People v Beardsley* (115 Ill. 2d 47 , 503 NE2d 346 , 104 Ill. Dec. 789 [Ill 1986]), which held that the recording of a conversation between two police officers by a criminal suspect in the back seat of a police car could not be considered eavesdropping:

> [T]he contents of the conversation were plainly revealed to the defendant, who was sitting in the backseat of [the officer's] squad car.
>
> Because the defendant witnessed the responses of the officers, he would have been competent to testify thereto and to describe the same. Hence, the defendant's recording of the officers' conversations was not to obtain information which was otherwise inaccessible . . . . The defendant in the present case could have made notes or transcribed the conversation between [the officers] and testified concerning it. Instead of immediately transcribing the conversation, however, the defendant simultaneously recorded it with electronic equipment. Accordingly, there was no listening secretly to what was said in private, no surreptitious interception of a private conversation, and no violation of the statutory prohibition against eavesdropping (*id.* at 352 ).

Each of the 13 recordings that is the subject of Prinova's counterclaim was recorded by a party to the conversation. Further, there is no evidence of any publication, dissemination or other use of the audio recordings,[11] and no other facts or circumstances that support a legitimate expectation of privacy from the mere recording of the parties' conversations and meetings.

Under the circumstances, the Court considers itself bound by the clear and controlling precedent of the Supreme Court of Illinois to conclude that Media Logic's recordings fall outside the ambit of the eavesdropping statute because Prinova lacked a justifiable expectation that the recorded conversations would be private from Media Logic.

***b. No Damages***

Prinova's inability to identify any damages flowing from the alleged eavesdropping provides an alternative ground for dismissal.

Illinois law provides a civil remedy to persons injured by violations of the eavesdropping statute. In addition to

injunctive relief, the statute allows for an award of actual and punitive damages (*see* 720 ILCS 5/14-6 [1] [a] -[c] ). Prinova claims that it was actually "damaged by . . . its significant fees in defending a case that is legally and factually unsupportable" and by "dilution of the goodwill associated with its business due to its involvement in this litigation" (Opp Mem, p. 20). Prinova also seeks an award of punitive damages (*see id.*).

The Court concludes that Prinova has failed to identify a plausible basis for an award of actual damages. The undisputed factual record establishes that the recordings made by Media Logic were not published or disseminated in any way, other than being produced **[*15]** to Prinova during pretrial discovery subject to a confidentiality order, and Media Logic has stipulated that the records will not be published or disseminated (*see supra*, n 11). Moreover, the Media Logic employees who made the recordings were participants in the meetings and calls, and many of the topics discussed were the subject of emails or other communications between the parties.

Further, it is apparent that Prinova's involvement in this litigation and any reputational damage that it has suffered, or may suffer, from its treatment of Media Logic did not stem from the recordings. Media Logic has never based its claims on the recordings or even sought to use the recordings in this litigation. Indeed, as articulated in *Clark* and *Beardsley* , Media Logic employees are perfectly competent to testify as to any of their meetings, conversations or other dealings with Prinova irrespective of the recordings.

Finally, even if Media Logic's conduct could be understood to violate the Illinois eavesdropping statute, an award of punitive damages is unwarranted as a matter of law. Punitive damages are available "when the defendant's tortious conduct evinces a high degree of moral culpability, that is, when the tort is committed with fraud, actual malice, deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others" (*Flynn v Maschmeyer*, 2020 IL App (1st) 190784 , 441 Ill. Dec. 205 , 156 NE3d 540 , 561 [Ill App 2020] [internal quotation marks and citation omitted]).[12]

It is apparent that the audio recordings were made in a good-faith, but mistaken, belief that the one-party consent allowed in New York (*see People v Lasher*, 58 NY2d 962 , 963 , 447 N.E.2d 70 , 460 N.Y.S.2d 522 [1983]) is the law of all fifty States.[13] This is particularly true as to the eight recordings made by Media Logic executives who were physically present in New York at the time. And as to the five Illinois recordings, it is clear that Niner did make some efforts to obtain the prior consent of the Prinova meeting participants, even if some of the participants now say that they were not aware of the recordings or that they did not expressly consent. In sum, Media Logic's conduct simply does not evince the kind of moral culpability or willful misconduct that would warrant the imposition of punitive damages.

***c. Illinois Law Does Not Apply to the Recordings Made from Within New York***

Finally, even if Prinova had a viable claim that Media Logic violated the Illinois eavesdropping statute and caused Prinova to sustain damages, the Illinois eavesdropping statute should not be applied to the eight recordings that were made by Media Logic employees physically present in New York (*see* SOMF, ¶ 61).

Given the obvious conflict between an Illinois statute purporting to require the consent of all parties and New York law, which allows one-party consent, this Court must apply New York's choice of law rules to determine which law to apply (*see Tanges v Heidelberg N. Am.*, 93 NY2d 48 , 54 , 710 N.E.2d 250 , 687 N.Y.S.2d 604

[1999]). New York uses interest analysis, under which "the law of the jurisdiction having the greatest interest in resolving the particular **[*16]** issue" is given controlling effect (*Cooney v Osgood Mach.*, 81 NY2d 66 , 72 , 612 N.E.2d 277 , 595 N.Y.S.2d 919 [1993]; *see Mashreqbank PSC v Ahmed Hamad Al Gosaibi & Bros. Co.*, 23 NY3d 129 , 138 , 989 N.Y.S.2d 458 , 12 N.E.3d 456 [2014]).

Courts applying interest analysis ordinarily distinguish "between laws that regulate primary conduct (such as standards of care) and those that allocate losses after the tort occurs (such as vicarious liability rules). If conflicting conduct-regulating laws are at issue, the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders" (*Cooney*, 81 NY2d at 72 ). This follows because "the locus jurisdiction's interests in protecting the reasonable expectations of the parties who relied on it to govern their primary conduct, and in the admonitory effect that applying its law will have on similar conduct in the future, assume critical importance" (*Matter of Wimbledon Fund, SPC [Class TT] v Weston Capital Partners Master Fund II, Ltd.*, 184 A.D.3d 448 , 450 , 126 N.Y.S.3d 93 [1st Dept 2020] [internal quotation marks, brackets and citations omitted]).

The Illinois eavesdropping statute is a penal statute regulating primary conduct, the alleged tortious misconduct was committed in New York, and there was no publication, dissemination or other injury-producing conduct occurring in Illinois. On these facts, New York law should apply (*see Cooney*, 81 NY2d at 74 ["the traditional rule of *lex loci delicti* almost invariably obtains"]; *cf. Locke v Aston*, 31 AD3d 33 , 37-38 , 814 N.Y.S.2d 38 [2d Dept 2006]; *Golden Archer Invs., LLC v Skynet Fin. Sys.*, 908 F Supp 2d 526 , 539 [SD NY 2012] [suggesting that New York Court of Appeals ultimately may need to resolve this choice-of-law issue]).

***CONCLUSION***

Based on the foregoing,[14] it is

**ORDERED** that Prinova's third counterclaim is dismissed; and it is further

**ORDERED** that Media Logic's motion is granted to the extent indicated in the preceding paragraph and denied in all other respects; and it is further

**ORDERED** that Media Logic's first cause of action is dismissed; and it is further

**ORDERED** that Prinova's cross motion is granted to the extent indicated in the preceding paragraph and denied in all other respects; and it is further

**ORDERED** that, upon searching the record (*see* CPLR 3212 [b] ), Prinova is entitled to a favorable declaration on its first counterclaim; and it is further

**ORDERED, ADJUDGED** and **DECLARED** that the LOU is not a valid and enforceable contract; and it is further

**ORDERED** that, upon searching the record, Prinova's second counterclaim, alleging, in the alternative, that Media Logic breached the LOU, is dismissed; and finally it is

**ORDERED** that counsel shall appear for a remote conference on **September 27, 2022** at **10:00 a.m.**, and the

parties shall confer in advance of such conference regarding: (1) the parties' willingness to pursue mediation/ADR in advance of trial, and (2) mutually-agreeable dates for an in-person trial in the first quarter of 2023.

This constitutes the Decision & Order of the Court, the original of which is being uploaded to NYSCEF for electronic entry by the Albany County Clerk. Upon such entry, counsel for plaintiff shall promptly serve notice of entry on all parties entitled to such **[*17]** notice.

Albany, New York

September 7, 2022

RICHARD M. PLATKIN

A.J.S.C.

*Papers Considered*:

NYSCEF Doc Nos. 147-205, 208-215, 217.[15]

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fn 1

Wilcox had worked with Media Logic before in his prior roles as a senior executive with Fortitech and DSM ( *see* Schultz Aff., ¶ 5).

fn 2

Prinova was acquired by Nagase Group Co. in the summer of 2019 (*see* SOMF, ¶ 45), and Media Logic believes that Prinova was attempting to reduce corporate spending in the period leading up to the acquisition (*see id.*, ¶ 47).

fn 3

The first counterclaim seeks a declaration regarding the enforceability of the LOU (*see id.*, ¶¶ 12-15), and the second pleads a claim for breach of the LOU "in the alternative" ( *id.*, ¶¶ 16-31).

fn 4

Apart from "project fees," the only other type of fee mentioned in the LOU is a monthly retainer of $6,000 for strategic consultation and support (*see id.*). However, Media Logic never invoiced Prinova for the retainer ( *see* Schultz EBT, p. 28), and neither side's papers address the retainer.

fn 5

Master services agreements often include price sheets, hourly rate lists, or project rate lists, but no such objective pricing terms are included or incorporated into the LOU (*cf.* NYSCEF Doc No. 194 [proposed amended LOU]). Nor does the LOU make any provision for resolving pricing disputes.

fn 6

As both sides observe, the LOU is not an integrated agreement; as such, there is no bar to reading it together with the Budget. But there is no evidence that the parties bound themselves to the Budget as an objective source of pricing criteria.

fn 7

It also bears emphasis that the agreement in *RES* contained a liquidated damages clause, thereby allowing the court to avoid the inherent "difficult[y]" associated with determining the plaintiff's damages under a master services agreement that left the scope of work and pricing to future negotiations (id. at 1516 , 1518-1520 ).

fn 8

In the testimony cited by Prinova, Wilcox does not deny that Schultz told him that Media Logic would need a 3-year commitment of $500,000 per year in agency fees; Wilcox merely testified that he did not "discuss[] the exact number with Don [Thorp]."

fn 9

It is difficult to understand how Media Logic's damages on its claim for promissory estoppel could exceed its claimed damages under the LOU. After all, the Complaint alleges that "Prinova clearly and unambiguously promised to incur at least $500,000 per year in agency fees . . . for each of three years if Media Logic agreed to stop working with DSM" (Complaint, ¶ 67). And even Media Logic's claimed damages under the LOU appear be substantially overstated, in that Media Logic's expert merely computed "lost revenue" (NYSCEF Doc No. 200, ¶ 7), without any consideration of the costs associated with the performance of Media Logic's work.

fn 10

In a footnote, Prinova argues that Media Logic is precluded from proceeding on this quasi-contractual claim because Media Logic moved for summary judgment on its contractual claim (*see* Opp Mem, p. 14 n 6). Media Logic's motion was made in the context of a case where the enforceability of the LOU had been

challenged from the outset (*see* NYSCEF Doc No. 6), and Media Logic did not move for summary judgment on its alternative claim of promissory estoppel. Rather, Media Logic carefully denominated the claim as an alternative theory of recovery and preserved it in the event that the Court accepted Prinova's arguments and found the LOU to be unenforceable (*cf. On the Level Enters., Inc. v 49 E. Houston LLC*, 104 AD3d 500 , 501 , 964 N.Y.S.2d 85 [1st Dept 2013]). On these facts, the Court declines to dismiss the promissory estoppel claim as barred by the doctrine of election of remedies (*see Kramer v Greene*, 142 AD3d 438 , 441-442 , 36 N.Y.S.3d 448 [1st Dept 2016]; *see generally* 28 NY Prac, Contract Law § 4:13).

fn 11

At oral argument, Media Logic, through its counsel, stipulated that it would not disseminate the 13 recordings (*see* NYSCEF Doc No. 217, pp. 54-55). Thus, this case does not and will not present any issue of dissemination.

fn 12

To similar effect is New York law, which allows punitive damages "only when a defendant purposefully causes, or is grossly indifferent to causing, injury and defendant's behavior cannot be said to be merely volitional; an unmotivated, unintentional or even accidental result of a legally intentional act cannot, alone, qualify.

Punitive damages are awarded to punish and deter behavior involving moral turpitude" (*Marinaccio v Town of Clarence*, 20 NY3d 506 , 512 , 986 N.E.2d 903 , 964 N.Y.S.2d 69 [2013] [citations omitted]).

fn 13

"[I]n New York, as in a majority of the states and under federal law, a telephone conversation may be taped as long as one party to the conversation consents to the taping" (*Locke v Aston*, 31 AD3d 33 , 35 , 814 N.Y.S.2d 38 [1st Dept 2006]; *accord Hernandez v Money Source Inc.*, [2022 BL 240626], 2022 WL 2702894 , *5 , [2022 BL 240626], 2022 US Dist LEXIS 123054 , *14 [ED NY, July 12, 2022, No. 17-cv-6919 (GRB/AYS)]).

fn 14

The parties' remaining arguments, to the extent not expressly addressed, have been considered and found to be either unavailing and/or unnecessary to entertain given the disposition reached herein.

fn 15

The Court takes judicial notice of the prior filings and proceedings in this case.