IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

AUSTIN LEGAL VIDEO, LLC, DEPO-NOTES, LLC, and PASQUAL PEREZ, III,	§	No. 1:23-cv-00421-DAE
Plaintiffs,	§	
vs.	§	
DEPOSITION SOLUTIONS, LLC D/B/A LEXITAS, COURT REPORTERS CLEARINGHOUSE, INC., ALDERSON REPORTING COMPANY, INC., SOUTHWEST REPORTING & VIDEO SERVICE, INC., KENNEDY REPORTING SERVICE, INC., TEXAS COURT REPORTERS ASSOCIATION, INC., SPEECH TO TEXT INSTITUTE, INC., SHERRI FISHER, LORRIE SCHNOOR, SONIA TREVINO, AND SHELLY TUCKER	§	
Defendants.		

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS TO DISMISS

Before the Court are Motions to Dismiss by (1) Southwest Reporting & Video Service ("Southwest") (Dkt. # 27); (2) Texas Court Reporters Association ("TCRA") (Dkt. # 25); (3) Deposition Solutions, LLC ("Lexitas") (Dkt. # 28); and (4) Court Reporters Clearinghouse, Inc. ("CRC"), Sherri Fisher, Kennedy

Reporting Service, Inc. ("Kennedy"), Lorrie Schnoor, Sonia Trevino, and Shelly Tucker (Dkt. # 34). The Court finds these matters suitable for disposition without a hearing. After careful consideration of the filings and relevant case law, and for the reasons that follow, the Court **GRANTS IN PART** and **DENIES IN PART** Defendants' Motion to Dismiss.

BACKGROUND

Plaintiffs are Pasqual "Trey" Perez III and his two businesses: (1) Depo-Notes LLC, a speech to text technology business ("Depo-Notes") and (2) Austin Legal Video, LLC ("Austin Legal Video"), a videography business.

In 2019, Perez and Depo-Notes developed speech-to text technology that would allow them to produce transcripts of deposition proceedings in which they were serving as videographers (as Austin Legal Video) without the need for a certified shorthand reporter ("CSR"). (Dkt. # 22 at ¶¶ 40, 43.)

Perez marketed this product during depositions in which Austin Legal Video was being paid to provide videorecording services. Depo-Notes planned to offer unedited "rough" deposition transcripts, which CSRs sometimes provide to attorneys after a deposition to expedite analysis of testimony.

Depo-Notes faced quick backlash throughout the court reporting industry. (Dkt. # 22 at ¶¶ 46-47.) Defendants include litigation support firms ("LSF") who provide a "one-stop shop for attorneys engaged in litigation-related

discovery." These LSFs contract with attorneys to provide certified shorthand transcription and, where requested, the simultaneous videorecording of depositions. LSFs' primary value proposition to lawyers is their ability to staff depositions with CSRs. CSRs retained to record a deposition earn revenue from both their creation and verification of the certified transcript of each deposition and, when requested, from the expedited preparation of a "rough" deposition transcript. (Id. at ¶ 13.)

Plaintiffs allege that Defendant court reporters launched a group boycott of both Depo-Notes and Austin Legal Video, seeking damages under Section 1 of the Sherman Act, 15 U.S.C. § 1, and other state laws, including the Texas Antitrust Act, TEX. BUS. & COM. CODE §§ 15.04 et seq., arising out of the unlawful and anticompetitive practices of Defendants. (Id. at ¶ 5.)

Plaintiffs allege certain facts in the amended complaint of what they believe indicates a group boycott. Specifically, Plaintiffs point to oral and written messages from Defendants seeking to "fend off" Plaintiffs from entering the market. For example, Plaintiffs allege that one court reporter texted Plaintiffs that "I bet you would be welcomed back into the reporting community if you would just let the stupid software go. . . . Imagine how peaceful your life would be," and "[i]t is my understanding you are being blackballed." (Id. at ¶ 16.)

Defendants are LSFs, CSRs, and other organizations who challenge the notion of collusion or a horizontal group boycott.

The TCRA moved to dismiss Plaintiffs' claims on June 2, 2023. (Dkt. # 25.) On June 16, 2023, Plaintiffs responded in opposition to the motion to dismiss filed by TCRA. (Dkt. # 26.) On June 19, 2023, Southwest moved to dismiss Plaintiffs' claims. (Dkt. # 27.) On June 19, 2023, Lexitas filed a motion to dismiss Plaintiffs' claims. (Dkt. # 28.) On June 20, 2023, CRC, Fisher, Kennedy, Schnoor, Trevino, and Tucker filed a motion to dismiss Plaintiff' claims. (Dkt. # 34.) On June 23, TCRA filed a reply to its motion to dismiss. (Dkt. # 37.) On August 17, 2023, Plaintiffs responded in opposition to the motions to dismiss filed by (1) CRC, Fisher, Kennedy, Schnoor, Trevino, and Tucker (Dkt. # 41); (2) Lexitas (Dkt. # 42); and (3) Southwest (Dkt. # 43). On August 24, 2023, Lexitas filed a reply to its motion to dismiss. (Dkt. # 46.) On August 24, 2023, CRC, Fisher, Kennedy, Schnoor, Trevino, and Tucker filed a reply to their motion to dismiss. (Dkt. # 47.) On August 25, 2023, Southwest filed a reply to its motion to dismiss. (Dkt. # 52.)

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted." Review is limited to the contents of the complaint and matters properly subject to judicial notice. See Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308, 322 (2007).

In analyzing a motion to dismiss for failure to state a claim, "[t]he [C]ourt accepts 'all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" In re Katrina Canal Breaches Litig., 495 F.3d 191, 205 (5th Cir. 2007) (quoting Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit, 369 F.3d 464, 467 (5th Cir. 2004)). To survive a Rule 12(b)(6) motion to dismiss, plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

A complaint need not include detailed facts to survive a Rule 12(b)(6) motion to dismiss. See Twombly, 550 U.S. at 555–56. In providing grounds for relief, however, a plaintiff must do more than recite the formulaic elements of a cause of action. See id. at 556–57. "The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions," and courts "are not bound to accept as true a legal conclusion couched as a factual allegation." Iqbal, 556 U.S. at 678 (internal quotations and citations omitted). Thus, although all reasonable inferences will be resolved in favor of the plaintiff, the plaintiff must plead "specific facts, not mere conclusory allegations." Tuchman v. DSC Commc'ns Corp., 14 F.3d 1061, 1067 (5th Cir. 1994); see also

Plotkin v. IP Axess Inc., 407 F.3d 690, 696 (5th Cir. 2005) ("We do not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions.").

When a complaint fails to adequately state a claim, such deficiency should be "exposed at the point of minimum expenditure of time and money by the parties and the court." Twombly, 550 U.S. at 558 (citation omitted). However, the plaintiff should generally be given at least one chance to amend the complaint under Rule 15(a) before dismissal with prejudice, "unless it is clear that the defects are incurable[.]" Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 329 (5th Cir. 2002).

DISCUSSION

I. Plaintiff Depo-Notes Lacks Standing

Standing to pursue an antitrust suit exists only if a plaintiff shows 1) injury-in-fact proximately caused by the defendants' conduct; 2) antitrust injury; and 3) proper plaintiff status, which assures that other parties are not better situated to bring suit. Jebaco, Inc. v. Harrah's Operating Co., 587 F.3d 314, 318 (5th Cir. 2009); Doctor's Hosp. of Jefferson, Inc. v. Se. Med. All., 123 F.3d 301, 305 (5th Cir. 1997)). Courts are instructed to interpret the Texas Fair Enterprise & Antitrust Act claim in harmony with federal judicial interpretations of equivalent federal statutes. Tex. Bus. & Com. Code §15.04; see also In re Memorial Hermann Hosp.

Sys., 464 S.W.3d 686, 708 (Tex. 2015) (Texas "rel[ies] heavily on the jurisprudence of the federal courts in applying the TFEAA.").

For purposes of this motion, the "injury in fact" and "antitrust injury" inquiries are essentially the same analytically. To establish injury-in-fact, antitrust plaintiffs must demonstrate that defendants' conduct caused their alleged harm. An injury suffered because of plaintiffs' own conduct or government action is insufficient. See Doctor's Hosp. of Jefferson, 123 F.3d at 305 (5th Cir. 1997); JSW Steel (USA) Inc. v. Nucor Corp., 586 F. Supp. 3d 585, 599 (S.D. Tex. 2022) ("when the plaintiff's damages are the result of a superseding cause, such as government action or the plaintiff's own decisions, that causal chain is broken, and the plaintiff does not have an actionable claim.").

The Court finds that Plaintiff Depo-Notes lacks standing to bring both antitrust claims as well as the tortious interference suit because it seeks to offer a product that it cannot under the Texas Government Code. Defendants are not "causing" the injury. Rather, the Texas Government Code prohibits Depo-Notes from entering the market. In a regulated industry, the failure to get needed regulatory approval may "cut[] the causal chain and convert[] what might have been deemed an antitrust injury in a free market into only a speculative exercise." In re Terazosin Hydrochloride Antitrust Litigation, 335 F. Supp. 2d 1336, 1368 (S.D. Fla. 2004); see, e.g., RSA Media, Inc. v. AK Media Grp., Inc., 260 F.3d 10,

15 (1st Cir. 2001) (plaintiff lacked antitrust standing where it "was not excluded from the market for outdoor billboards because of [defendant's] threats," but instead "because of the Massachusetts regulatory scheme that prohibits new billboards from being built.").

In this case, Depo-Notes is attempting to offer a product that it cannot under the Texas Government Code. Section 154.101(f) of the Texas Government Code provides that "all depositions conducted in this state must be recorded by a certified shorthand reporter." Section 154.101(b) provides that "[a] person may not engage in shorthand reporting in this state unless the person is certified as: (1) a shorthand reporter by the supreme court under this section; or (2) an apprentice court reporter or provisional court reporter." Depo-Notes is not certified in shorthand reporting.

Section 154.101(c) provides that "[a] certification issued under this section must be for one or more of the following methods of shorthand reporting: (1) written shorthand; (2) machine shorthand; (3) oral stenography; or (4) any other method of shorthand reporting authorized by the supreme court." A CSR must be certified for the method in which one has been licensed. For example, a CSR certified for machine shorthand cannot simply become an oral stenographer without re-testing and receiving the proper certification. See Tex. Gov't Code

§154.110(7). Again, Depo-Notes is not certified by the Judicial Branch Certification Commission.

Depo-Notes does not fall under any exceptions to the general rule that one must be certified to engage in shorthand reporting. Section 154.112 allows the employment of "[a] person who is not certified as a court reporter [to] be employed to engage in shorthand reporting until a certified shorthand reporter is available." Initially, Depo-Notes marketed its product to provide a rough draft transcript when a certified shorthand reporter was unavailable. However, Depo-Notes now attempts to provide a service when shorthand reporters are present. Depo-Notes cannot do this under the Texas Government Code because it is engaging in shorthand and no longer fits the exception under Section 154.112.

Texas Civil Practice and Remedies Code §20.001 allows for certain non-certified persons to take depositions on written questions in Texas and oral depositions outside the State of Texas and outside the United States. The only other exception, which is found at Tex. Gov't Code 154.114 exempts the following from Chapter 154's licensing requirements: (1) a party to the litigation involved; (2) the attorney of the party; or (3) a full-time employee of a party or a party's attorney. This exception does not apply to Depo-Notes.

Tex. Gov't Code §154.001(a)(6) defines the term "Shorthand reporting firm," "court reporting firm," and "affiliate office" to "mean an entity

wholly or partly in the business of providing court reporting or other related services in this state." Section 154.001(b) provides that, among other things a firm "is considered to be providing court reporting or other related services in this state if any act that constitutes a court reporting service or shorthand reporting service occurs wholly or partly in this state." Section 154.101(h) provides that "[a] court reporting firm shall register with the commission." Depo-Notes is neither licensed as CSRs or court reporting firms ("CRFs"). In attempting to transcribe a deposition without certification, Depo-Notes is violating Section 154 of the Government Code. Furthermore, Depo-Notes cannot hire certified shorthand reporters to certify their rough draft transcripts. To hire a certified shorthand reporter, Depo-Notes must register as a shorthand reporting firm.

Depo-Notes attempts to find a loophole in the law. Depo-Notes claims the Texas Government Code is silent on the "uncertified rough draft" market. For instance, Section 154.101(f) states "all depositions conducted in this state must be recorded by a certified shorthand reporter." Depo-Notes argues this says nothing about uncertified transcriptions *when a certified reporter is present*. This argument is unpersuasive because the Texas Government Code focuses on the act of transcription. Section 154.101(b) directly regulates the act of shorthand reporting and prohibits those from doing it without being certified. Even if a certified

reporter is present, Depo-Notes cannot simultaneously engage in shorthand reporting if it is not certified.[1]

Depo-Notes ultimately makes too many inferences to establish itself legally in the regulatory scheme. Depo-Notes emphasizes that Texas Government Code Section 154.101(d) states "[n]othing in this subsection shall be construed to either sanction or prohibit the use of electronic court recording equipment operated by a noncertified court reporter pursuant and according to rules adopted or approved by the supreme court." Id. Depo-Notes also cites an opinion by the Texas Attorney General who states, "[w]e note that in circumstances where a stenographic recording is already being made, individuals beyond these three categories [party, attorney, or employee] may also make a non-stenographic recording.") See Op. Tex. Att'y Gen. GA-0928 (2012) at n.5. However, this in no way implies that the non-stenographic recorder has a right to transcribe the recording into *written form*. The Opinion letter does not permit someone who legally creates a non-stenographic recording of a deposition to provide a rough transcript generated from that recording. That is the exclusive province of CSRs under the Texas Code.

[1] The real possibility of a conflict between the certified and uncertified transcripts could create significant disruption and require the retaking of a deposition.

Depo-Notes highlights that the Texas Judicial Branch Certification Commission ("JBCC"), which regulates court reporters, already dismissed a complaint lodged against Depo-Notes' speech to text technology. However, this was allegedly dismissed on jurisdictional grounds. (Dkt. # 22 at ¶ 50.)

The market that Depo-Notes argues they are entering does not exist without being certified. While CSRs do sell uncertified rough drafts, they do so only incidentally to the sale of a certified transcript. And because the reporters are certified, there is an indicia of reliability.

All transcripts are governed by the Uniform Format Manual ("UFM"). Depo-Notes emphasizes that the UFM is silent on how rough drafts are to be sold. However, even the UFM seems to imply that rough draft copies are to be supplied by those who are certified. For instance, a subsection of Section 4 which governs unedited drafts, says "[a] CSR may provide an unedited rough draft if it is printed on colored paper." It is directing formatting directions to CSRs because they are the only ones who can do it. It would create an imprudent safe harbor if uncertified reporters did not have to comply with any formatting rules or regulations. Allowing uncertified reporters to provide rough draft transcripts from depositions when they sit alongside certified CSRs would allow the uncertified reporters to offer a product without being bound by almost any regulation. This is not what the

Government Code intended. The Court must read the provisions so that they make sense wholistically.

The Court emphasizes that Depo-Notes is not merely licensing the technology to the court reporters or LSFs. It is not as if Depo-Notes is watching idly while certified court reporters are transcribing depositions. Rather, in Plaintiffs' amended complaint, they admit to participating in the transcription process. Depo-Notes admits that the cost to take a transcript recorded by Depo-Notes' software *and have someone finish it* was approximately $1.50. "*Having someone finish it*" violates the Texas Government Code. Depo-Notes is therefore involved in the transcription process and is attempting to create a record verbatim but does not have the licensing authority to do so. This is not merely letting a certified reporter press a button and let a transcript emerge. Rather, Depo-Notes admits that it is having "someone finish it." This "someone" should be certified because Texas Government Code establishes that "[a] person may not engage in shorthand reporting in this state unless the person is certified."

The policy underlying the certification process is worth remarking upon. The goal is to provide attorneys with an accurate record. There are studies that show automated speech can be unreliable and specifically there are reports of racial disparities in automated speech recognition. See Allison Koenecke et al., Racial Disparities in Automated Speech Recognition, Proceedings Nat'l Acad. Sci.

(2020). This is why certification is essential to court reporting and why Depo-Notes' efforts to evade the regulatory regime will not provide standing.

Ultimately, Depo-Notes lacks standing because the alleged injury-in-fact does not come from named Defendants. See Doctor's Hosp. of Jefferson, 123 F.3d at 305 (5th Cir. 1997); JSW Steel (USA) Inc. v. Nucor Corp., 586 F. Supp. 3d 585, 599 (S.D. Tex. 2022) ("when the plaintiff's damages are the result of a superseding cause, such as government action or the plaintiff's own decisions, that causal chain is broken, and the plaintiff does not have an actionable claim."). Therefore, the Court dismisses the claims brought by Depo-Notes.

II. Plaintiffs Perez and Austin Legal Video have failed to plausibly plead a conspiracy of the videography business as to some of the named Defendants.

Given the Courts' decision on standing, what remains is the Plaintiffs' claims of a potential boycott of Austin Legal Video. Austin Legal Video is a separate LLC and distinct entity from Depo-Notes. Austin Legal Video provides a videography service rather than Depo-Notes which provides a transcription of depositions.

As the Court already determined, Plaintiffs could not plead a conspiracy against Depo-Notes because it lacked standing. It is now incumbent on Plaintiffs to plausibly plead a boycott of the videography business.

For the reasons set forth below, the Court finds that Plaintiffs failed to plausibly plead a boycott of the videography business as so some of the named Defendants.

"A claim under section 1 of the Sherman Act requires proof of three elements: that the defendant (1) engaged in a conspiracy (2) that restrained trade (3) in a particular market." Spectators' Commc'n Network Inc. v. Colonial Country Club, 253 F.3d 215, 220 (5th Cir. 2001). A group boycott is the type of concerted action that may violate Section 1. Id. at 222.

Plaintiffs must plead facts that Defendants agreed with each other to boycott the videography business and had conscious commitment to a common scheme. Plaintiffs must plead facts that tend to exclude the possibility of independent action. See, e.g., Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n, 776 F.3d 321, 333 (5th Cir. 2015). Defendants argue the facts pled only reflect independent business decisions rather than collusion. On the other hand, Plaintiffs argue that the horizontal boycott should be viewed in its totality and an inference of a boycott can be drawn through the individual actions of each Defendant.

Because "unilateral conduct is excluded from [the Sherman Act's] purview," Plaintiffs must plausibly allege nonconclusory facts that, if proven, would allow a reasonable jury to conclude that each Defendant agreed with others

to harm Plaintiffs. Johnson v. Hosp. Corp. of Am., 95 F.3d 383, 392 (5th Cir. 1996); Twombly, 557 U.S. at 549, 553-54. To plead an illegal agreement for purposes of Plaintiffs' antitrust group boycott claim, the Amended Complaint cannot simply assert "parallel conduct that could just as well be an independent action," and must instead assert "plausible grounds" that "raise a right to relief above the speculative level." Twombly, 557 U.S. at 545, 557; EuroTec Flight Solutions, LLC v. Safran Helicopter Engines S.A.A., No. 3:15-CV-3454-S, 2019 WL 3503240, at *15 (N.D. Tex. 2019). The Court will review each motion in turn.

1. Texas Court Reporters Association

Texas Court Reporters Association ("TCRA") is a Texas nonprofit corporation. A number of named Defendants are members of the TCRA.

Plaintiffs have failed to plausibly plead that the TCRA boycotted Austin Legal Video because the only allegation asserted is focused on Depo-Notes, not the videography business. For instance, Plaintiffs allege that "Depo-Notes was specifically discussed at a February 23, 2020 meeting of the TCRA in Corpus Christi." (Dkt. # 22 at ¶ 53.) This has nothing to do with Austin Legal Video, a videography service. Furthermore, a complaint filed to the JBCC from one of the TCRA members specifically addressed Depo-Notes. Plaintiffs pled "Defendant court reporters used "legal and regulatory means to suppress Depo-Notes new technology." (Dkt. # 22 at ¶ 50.) Plaintiffs failed to plausibly plead that the TCRA

attempted to boycott Austin Legal Video as a videography service and the complaint only outlines what the TCRA did in relation to Depo-Notes. Therefore, the Court dismisses Plaintiffs' claims against the TCRA.

2. Defendants Kennedy Reporting Service, Inc. ("Kennedy") and Lorrie Schnoor

Kennedy is a Texas corporation. Defendant Schnoor owned Kennedy and was the President of the TCRA.

As with the TCRA, Plaintiffs failed to plausibly plead a boycott of Austin Legal Video as a videography service. The only mention of Kennedy and Schnoor is related to the complaint filed with the JBCC which, as stated in the amended complaint, is strictly focused on using "regulatory means to attempt to suppress Depo-Notes." (Dkt. # 22 at ¶ 50.) There is almost no mention of Kennedy nor Schnoor having any relation to Austin Legal Video. Further, Plaintiffs did not plead that Kennedy ever did business with Austin Legal Video. Therefore, Kennedy would be boycotting something it never participated in to begin with. Thus, the Court finds that Plaintiffs failed to plausibly plead that Kennedy and Schnoor conspired with other defendants to boycott Austin Legal Video. The Court dismisses Plaintiffs' claims against the Kennedy and Schnoor.

3. Defendants Sonia Trevino and Sherri Fisher

The sole allegation against Defendant Trevino and Fisher is that they are members of the Texas Court Reporters Association (TCRA). (Dkt. # 22 at ¶

18.) Nothing else links Defendants Trevino and Fisher to a plausible coordinated conspiracy among the other named Defendants. Therefore, the Court finds adequate grounds under Rule 12(b)(6) to dismiss the claims against Defendants Trevino and Fisher.

4. Defendant Shelly Tucker

Defendant Tucker works for Lexitas as a court reporter. Defendant Tucker wrote an email to Austin Legal Video saying "[i]t is my understanding you are being blackballed… the rest of us know we will be blackballed if we agree to help you." (Dkt. # 22 at ¶ 16.) Plaintiffs have not adequately pleaded that Defendant Tucker participated in the boycott. Rather, the allegations indicate that Defendant Tucker is reflecting on what she understands others are doing. Nothing links Defendant Tucker to the other named Defendants. It is Defendant Tucker that is providing evidence of others who are coordinating a plausible conspiracy against Plaintiffs. She is not incriminating herself in that scheme. Therefore, the Court dismisses the claims against Defendant Tucker.

5. Defendant Court Reporters Clearinghouse, Inc. ("CRC")

CRC is a Texas court reporting and litigation services corporation. CRC sent Plaintiffs approximately $7,000 in business in 2016, $13,441 in 2017, $32,413 in 2018, $7,914 in 2019, and $538 in business in 2020. (Dkt # 22 at ¶14).

Plaintiffs failed to plead any act specifically taken by CRC that would plausibly suggest coordinated behavior. In fact, only one paragraph in the amended complaint addresses CRC specifically. In that paragraph Plaintiffs allege that on September 27, 2019, CRC President Sherry Schritchfield wrote "court reporters were 'concerned' about Plaintiffs' proposed rough draft offerings." (Dkt. # 22 at ¶ 45.) Finally, Plaintiffs connect this to Austin Legal video by claiming "CRC later stopped sending business to Plaintiffs." (Id.) However, from this alone, Plaintiffs have not pleaded any coordination among other Defendants. Rather, it solely suggests an independent business decision not to contract with someone who was offering a product (Depo-Notes) that this Court now finds violates the Texas Government Code. Because Plaintiffs have not plausibly alleged a meeting of the minds with other Defendants, this Court dismisses claims against CRC.

6. Deposition Solutions, LLC ("Lexitas")

Lexitas is a Texas court reporting and litigation services corporation. Plaintiffs sent approximately $41,417 in business in 2016, $44,702 in 2017, $119,600 in 2018, $151,558.14 in 2019, but only $32,048 in 2020, and zero in 2021 and 2022. (Dkt. # 22 at ¶ 12.)

Plaintiffs plead two key facts regarding Lexitas' alleged participation of a boycott against Austin Legal Video. The first, is an email from Bo Davis, a regional manager at Lexitas, which read, "I need you and your team not to

continue to advertise your product directly to our court reporters. I am feeling that this could cause a backlash from our reporters which could cause them to no longer wish to cover work from our firm if they have a sense that we are looking to put them out of business." (Dkt. # 22 at ¶ 47.) The "product" mentioned in the email is Depo-Notes. Davis is requesting Austin Legal Video cease marketing the product. Based on this email alone, it is not clear that Davis is colluding against Austin Legal Video or solely Depo-Notes. The pleadings fail to disentangle the two businesses. Because Depo-Notes lacks standing, Plaintiff must show a boycott against the videography service. The email from Bo Davis does not do that.

The second key factual allegation is from a court reporter working for Lexitas who wrote in an email, "it is my understanding you are being blackballed." (Dkt. # 22 at ¶ 46.) It is not clear from the pleadings whether this is "blackballing" Depo-Notes, Austin Legal Video, or both. In that same email, the worker says, "it would have to be significant page rate for me to risk being blackballed in this small community." (Id.) This part of the email suggests the worker is referring to speech to text transcription, rather than videography. Because Depo-Notes does not have standing, Plaintiff must plausibly plead a boycott of the videography business. However, later in a later email, that same court reporter wrote, "I bet you would be welcomed back in the reporting community if you would just let the stupid

software go. ….” The email also says, “[i]s what you hope to profit from this technology going to be worth what you lose in other business?” (Id.)

Based on this pleading, the Court finds that Plaintiffs have made a plausible showing of a boycott against Austin Legal Video. “Welcome back” implies that Perez and Austin Legal Video are not currently welcome. In this part of the email, Plaintiffs specify that the videography business is also being boycotted. The email questions whether Depo-Notes is worth the impact it is having on the “other business.” Plaintiffs have therefore plausibly plead through the email that Defendants are willing to do business with Austin Legal Video but are currently holding out. From this portion of the email, it is plausible that “blackballing” refers to both Depo-Notes and Austin Legal Video. The term “blackball” connotes a synchronization and coordination among various actors. The reference to being blackballed coupled with the decline in videography revenue starting in 2019, is sufficient to let the claims against Lexitas move forward. The Court therefore will not dismiss this claim.

7. Southwest Reporting & Video Service, Inc. (“Southwest”)

Southwest is a Texas court reporting and litigation services corporation. Southwest sent approximately $11,084 in business in 2016; $11,957 in 2017; $25,217 in 2018; but only $4,162 in 2019 (the year the alleged boycott began); $1,296 in 2020; and $0 in 2020 and 2021. (Dkt. # 22 at ¶ 12.) In addition

to boycotting Plaintiffs, Southwest is also accused of refusing to work with those affiliated with Perez and his two businesses. (Id.)

The Court also finds that Plaintiffs have pled a plausible conspiracy by detailing actions taken by Southwest to coordinate a boycott with other Defendants against Austin legal Video. Specifically, Plaintiffs alleged a videographer named Walter Bryan was asked whether he still worked with Plaintiffs before he was hired for a job by Southwest. (Dkt. # 22 at ¶ 16.) When Bryan applied to work with Southwest on January 6, 2023, Southwest's scheduling coordinator said, "I just need to ask, since you were previously affiliated with Austin Legal Video, are you still working with Trey Perez?" Id. at ¶ 16. Only after Bryan confirmed that he was not still working for Perez did he receive consideration for the job. Asking such a question during a job interview creates a plausible inference that Plaintiffs were being "blackballed."

The amended complaint against Southwest survives the motion to dismiss because it specifically alleges a boycott against Austin Legal Video as a videography service. It does not rely on a boycott of Depo-Notes (which would fail for a lack of standing). The interaction with Bryan also creates an inference of collusion among others.

This factual allegation asserted against Southwest's scheduling coordinator coupled with the drop in revenue are grounds for denying Southwest's

motion to dismiss. Any justification for the decline in business such as the rise of virtual depositions due to the Covid-19 pandemic is not to be decided in this motion. Therefore, the Court will allow the claims brought by Austin Legal Video against Southwest to proceed.

III. Tortious Interference

A. Plaintiffs Failed to Plead Tortious Interference of Existing Contracts

With regard to the interference of an existing contract, the Court finds that Plaintiffs have not plausibly pled the claim. To plead tortious interference of an existing contract, Plaintiffs must show (1) an existing contract subject to interference, (2) a willful and intentional act of interference with the contract, (3) that proximately caused the plaintiff's injury, and (4) caused actual damages or loss. Prudential Ins. Co. of Am. v. Fin. Rev. Servs., Inc., 29 S.W.3d 74, 77 (Tex. 2000) (citing ACS Invs., Inc. v. McLaughlin, 943 S.W.2d 426, 430 (Tex. 1997)).

In surveying Texas Law, the Fifth Circuit noted that Plaintiffs must present evidence that some obligatory provision of a contract [was] breached. A breach must result from the defendant's conduct in order for the plaintiff to prevail. WickFire, L.L.C. v. Laura Woodruff; TriMax Media, L.L.C., 989 F.3d 343, 354 (5th Cir. 2021), as revised (Mar. 2, 2021); El Paso Healthcare Sys., Ltd. v. Murphy, 518 S.W.3d 412 (Tex. 2017). In this case, Plaintiffs did not plead any current contracts that were broken because of the plausible conspiracy. Rather, the

complaint alleges interference with Plaintiffs' prospective dealings. "Without sufficient proof that the defendant's conduct resulted in "some obligatory provision of a contract ha[ving] been breached," the plaintiffs' tortious interference claim is infirm as a matter of law. Walker v. Beaumont Indep. Sch. Dist., 938 F.3d 724, 749 (5th Cir. 2019) (quoting Better Bus. Bureau of Metro. Houston, Inc. v. John Moore Servs., Inc., 441 S.W.3d 345, 361 (Tex. App. 2013, pet. denied). Therefore, because Plaintiffs have not pled the first element of a tortious interference, the Court dismisses claims regarding current contracts. M-I LLC v. Stelly, 733 F. Supp. 2d 759, 775 (S.D. Tex. 2010) (Without identifying an existing contract that is subject to interference, M–I has failed to plead adequately the first element of a tortious interference with contract claim).

B. Prospective Tortious Interference

To prevail on a prospective tortious interference claim, Plaintiffs must establish that (1) there was a reasonable probability that [it] would have entered into a business relationship with a third party; (2) the defendant either acted with a conscious desire to prevent the relationship from occurring or knew the interference was certain or substantially certain to occur as a result of the conduct; (3) the defendant's conduct was independently tortious or unlawful; (4) the interference proximately caused the plaintiff injury; and (5) the plaintiff suffered actual damage or loss as a result. Coinmach Corp. v. Aspenwood Apt. Corp., 417

S.W.3d 909, 923 (Tex. 2013). Parties disagree over whether an independent tortious or lawful conduct has been pled. Independently tortious conduct is that which would violate some independent tort duty. Boyce Producing Corp. v. Fulton, 45 Fed. Appx. 322 (5th Cir. 2002) (citing Wal-Mart Stores, Inc. v. Sturges, 52 S.W.3d 711, 713 (Tex.2001)). Defendants argue no tort has been alleged. Plaintiffs assert the underlying tort is a Sherman Act violation.

As the 5th Circuit noted in Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Disc. Centers, Inc., a plaintiffs' antitrust and underlying tortious interference claim "rise and fall together." 200 F.3d 307, 312–316 (5th Cir. 2000). Courts within the Fifth Circuit find tortious interference claims invalid when the antitrust claims they rest upon are found invalid. But that also means the reverse is true. The Texas Supreme Court has explicitly stated that "a plaintiff [can] recover for tortious interference by showing an illegal boycott." Wal-Mart Stores v. Sturges, 52 S.W.3d 711, 726 (Tex. 2001). The specifics of how Defendant was pressured and how the contract was interfered with are the same facts that support Plaintiffs' antitrust claims. See Sanger Ins. Agency v. Hub Int'l, Ltd., 802 F.3d 732, 748 (5th Cir. 2015) (reversing the dismissal of a tortious interference and antitrust claim because "the merits of Sanger's antitrust claim . . . will ultimately determine whether it also has an actionable tortious interference claim" and "our resolution of

these antitrust issues largely dictates our treatment of the . . . tortious interference with prospective business relations [claim.]").

Because the Court finds Plaintiffs plausibly pled an alleged conspiracy as to some of the Defendants, they have also plausibly pled that those Defendants maliciously interfered with the formation of new contracts. Those Defendants plausibly interfered with the formation of new contracts based on the long history of doing business with Austin Legal Video.

CONCLUSION

For the reasons stated in this Order, the Court: (1) **GRANTS** TCRA's Motion to Dismiss (Dkt. # 25); (2) **GRANTS** CRC, Fisher, Kennedy, Schnoor, Trevino, and Tucker's Motion to Dismiss (Dkt. # 34); (3) **GRANTS IN PART** and **DENIES IN PART** Southwest's Motion to Dismiss (Dkt. # 27); and (4) **GRANTS IN PART** and **DENIES IN PART** Lexitas' Motion to Dismiss (Dkt. # 28). In accordance with this Order, all claims alleged by Depo-Notes are **DISMISSED WITH PREJUDICE**, and the remaining Plaintiffs' antitrust and tortious interference claims against TCRA, CRC, Fisher, Kennedy, Schnoor, Trevino, and Tucker are **DISMISSED WITHOUT PREJUDICE**. Furthermore, the Court **DISMISSES WITHOUT PREJUDICE** Plaintiffs' claims for tortious interference of existing contracts against Southwest and Lexitas. The only remaining claims in

this case are Austin Legal Video and Perez's antitrust and the tortious interference of prospective contract claims against Southwest and Lexitas.

IT IS SO ORDERED.

DATED: Austin, Texas, November 16, 2023.

David Alan Ezra
Senior U.S. District Judge