UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PATRICK CHENDES, JILLIAN SMITH,
and DION TUMMINELLO,

Plaintiffs,

v. Case No. 16-13980

XEROX HR SOLUTIONS, LLC,

Defendant.
_______________________________________/

OPINION AND ORDER DENYING PLAINTIFFS' MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT AND GRANTING DEFENDANT'S MOTION TO DISMISS

Plaintiffs bring this proposed class action against the record keeper for their respective retirement plans, Defendant Xerox HR Solutions, for alleged violations of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C.§ 1001. Following an amended complaint and a motion to dismiss, this court dismissed Plaintiffs' complaint with limited leave to replead certain allegations. (*See* Dkt. #38.) Before the court is Plaintiffs' second—and significantly broader—bite at the apple. With the limited leave they were given to replead, Plaintiffs have filed a second amended complaint. (Dkt. #41.) But the second amended complaint includes new allegations and new Defendants not contemplated in the last complaint, and Plaintiffs have accordingly sought leave to include these new items in the second amended complaint. (Dkt. #40.) Defendant opposes the amendments and moves to dismiss the latest complaint. (Dkt. ##49, 50.) The court has determined that a hearing is unnecessary. E.D. Mich. 7.1(f)(2). Because Plaintiffs' second amended complaint fails to address the deficiencies identified in the

court's prior order, and because the proposed amendments are futile, the court will deny leave to amend and grant Defendant's motion to dismiss.[1]

I. BACKGROUND

Plaintiffs are participants in three Ford Motor Company retirement plans ("Ford Plans")—tax-qualified retirement plans maintained by Ford for the benefit of its employees. (Dkt. #41 Pg. ID 1269, 1272.) The Ford Plans, in turn, are part of the Ford Defined Contribution Plans Master Trust, which allows plan assets to be commingled for investment and administrative purposes. (*Id.* at Pg. ID 1270.) At the end of 2015, the Master Trust assets totaled $13.94 billion. (*Id.* at Pg. ID 1271.)

Defendant Xerox HR provides platform and record keeping services for the Master Trust. (*Id.* at Pg. ID 1272.) At some point, Defendant contracted with Financial Engines, Inc. ("FE") "to provide professional investment advice services to individual participants in the retirement plans serviced on the Xerox HR recordkeeping platform." (*Id.* at Pg. ID 1273.) FE is a federally-registered investment advisor that has developed a computer-based investment advice program. (*Id.* at Pg. ID 1272–73.) While participants in the Ford Plans are usually responsible for directing investment of their accounts among available options (*id.* at Pg. ID 1272), they may elect to use FE's

[1] Each side has also filed a motion for leave to file a notice of supplemental authority. (Dkt. ##59, 60.) They attach cases decided by other courts while the present motions were pending. Each motion is accompanied by the certification required under E.D. Mich L.R. 7.1(a), which requires a party to seek concurrence from opposing counsel before filing a motion with the court—each side avers that the other does "not object to the filing of this motion." (*See* Dkt. #59 Pg. ID 2004; Dkt. #60 Pg. ID 2032.) The court will grant the motions, and in doing so notes that E.D. Mich L.R. 7.1(a) specifically contemplates the result of seeking and obtaining concurrence: no more than a stipulated (proposed) order is needed. *See also* E.D. Mich. LR 7.1(g)(1)(B) (allowing stipulations for additional supporting documents). Parties may—and should—avoid the time and expense of preparing unnecessary motions and briefs.

investment advice services. After collecting information about a participant, including the participant's age, savings, retirement goals, and risk tolerance, FE can provide two types of investment advice services: 1) the Online Advice Service, which makes recommendations about how participants should allocate their accounts among available investment choices, and 2) the Professional Management Program, which "takes control of the participant's account[]" and implements the recommended allocation on the participant's behalf. (*Id.* at Pg. ID 1282.) For the former service, FE receives a fee on a "per-participant basis"—it collects a specific dollar amount for each participant who is eligible to use the program. For the latter, FE charges plan participants a "percentage value" of their account on a scaled basis. (*Id.* at Pg. ID 1273.) Whether to use FE's services is up to individual plan participants. (*See id.* at Pg. ID 1275.)

Defendant's contract with FE—what Plaintiffs call the "Master FE Agreement"—provides that FE will be the sole investment advisor on Defendant's platform; in exchange, FE gives Defendant a percentage take of the fees it collects from plan participants using the Professional Management Program. (*Id.* at Pg. ID 1284.) Under the terms of the Master FE Agreement, Defendant is also required to use its "status and influence" as record keeper to market FE's services to plans and their participants. (*Id.* at Pg. ID 1285–86.) Plaintiffs allege that Defendant "exercised de facto control" over the Ford Plan's decision to sign a separate contract with FE by: "marketing" FE's services to named fiduciaries, "declining to market" any of FE's competitors, using its influence as record keeper to "encourage" plans to use FE, and "refusing" to work with any other automated account management system, "thereby requiring Plans to change record[ ]

keepers if they wanted to use a provider other than Financial Engines." (*Id.* at Pg. ID 1286.)

According to Plaintiffs, Defendant's influence had some impact: the Ford Plans signed a separate agreement with FE. (*Id.* at Pg. ID 1273.) The Ford-FE agreement provides that FE is an ERISA fiduciary "with respect to the investment advice program," and it specifies the fees that FE charges to participants in the Professional Management Program. (*Id.*)

Plaintiffs' second amended complaint focuses on the terms of the Master FE Agreement.[2] Plaintiffs allege that because Defendant was already obliged to provide record keeping services to the Ford Plans, its cut of FE's take amounts to nothing more than a kickback. Defendant, in other words, provided no material services entitling it to a percentage of FE's fees—its relationship with FE was a "pay-to-play scheme" whereby Defendant demanded payment in exchange for making FE the exclusive investment service provider on its platform. (*Id.* at Pg. ID 1284.)

In their second amended complaint, Plaintiffs set forth seven counts. They claim that Defendant breached its fiduciary duties to the plans (Count III) and is responsible for several prohibited transactions under ERISA §§ 406(a) and (b), both in its fiduciary capacity (Counts IV and V) and as a non-fiduciary party in interest (Counts I and II). Plaintiffs also claim that Defendant and FE have engaged in a "pattern of racketeering activity" subjecting them to civil liability under RICO (Count VI). Finally, Plaintiffs allege that Defendant's parent companies—Xerox Corporation and Conduent, Inc.—are in

[2] Despite the parties' heavy reliance on its supposed terms, the actual agreement does not appear in the record.

possession of Defendant's ill-gotten proceeds and should be ordered to disgorge them (Count VII).

II. STANDARD

When a party may no longer amend its pleading as a matter of course, it may amend "only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). The rules provide for a "liberal amendment policy": Rule 15(a)(2) instructs the court to "freely give leave when justice so requires." *Brown v. Chapman*, 814 F.3d 436, 443 (6th Cir. 2016). The court is not obliged to permit amendment in every case, however—the court may deny leave to amend where there is evidence of undue delay, bad faith, repeated failure to cure deficiencies, undue prejudice, or futility of amendment. *Forman v. Davis*, 371 U.S. 178, 182 (1962). "A proposed amendment is futile if the amendment could not withstand a Rule 12(b)(6) motion to dismiss." *Riverview Health Inst. LLC v. Med. Mut. of Ohio*, 601 F.3d 505, 512 (6th Cir. 2010) (quotation omitted).

A Rule 12(b)(6) motion to dismiss tests the sufficiency of the complaint. *Id.* Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The complaint must demonstrate more than just a possibility of wrongdoing; rather, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief." *Id.* at 679. The court

views the complaint in the light most favorable to the plaintiff, and it accepts all well-pleaded factual allegations as true. *Tackett v. M & G Polymers, USA, LLC*, 561 F.3d 478, 488 (6th Cir. 2009). The court need not, however, "accept as true legal conclusions or unwarranted factual inferences." *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007).

III. DISCUSSION

Plaintiffs have filed their second amended complaint. (Dkt. #41.) The complaint is firstly an attempt to replead dismissed counts. But also includes an entirely new cause of action: violation of the Racketeer Influence Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962. And it includes new parties: Xerox Corporation and Conduent, Inc.—Defendant's parent entities—that Plaintiff alleges may be in possession of "ill-gotten proceeds of the misconduct at issue." (Dkt. #40 Pg. ID 1180.) As to these new claims, Plaintiffs seek leave to include them. (*See* Dkt. #40.) The court generally maintains discretion in deciding whether to permit an amended pleading. *See Brown v. Chapman*, 814 F.3d 436, 442 (6th Cir. 2016). Here, however, the court will analyze the requested amendments for futility—subjecting them to the same 12(b)(6) standard the court will use to evaluate the claims Plaintiffs were given leave to replead.

A. Defendant's Fiduciary Status

As the court noted in its prior order, "[t]he threshold question in all cases charging breach of ERISA fiduciary duty is whether the defendant was 'acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint.'" *Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 552 (6th Cir. 2012) (quoting *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000)). The definition of an ERISA fiduciary is a "functional

one." *See Smith v. Provident Bank*, 170 F.3d 609, 613 (6th Cir. 1999). It includes anyone who "exercises any discretionary authority or discretionary control respecting management of [the] plan or exercises any authority or control respecting management or disposition of its assets." 29 U.S.C. § 1002(21)(A)(i). Fiduciary status "does not turn on formal designations such as who is the trustee." *See Smith*, 170 F.3d at 613. But a fiduciary is not necessarily a fiduciary for all matters, as it "may wear different hats." *See Pegram*, 530 U.S. at 225; *see also Coulter v. Morgan Stanley & Co.*, 753 F.3d 361, 366 (2d Cir. 2016).

Having duly considered Plaintiffs' three bases to impute fiduciary status on Defendant, the court rejected each. But it granted leave to replead as to one: whether Defendant acted as a fiduciary by "'exercis[ing] de facto control' over the election of FE as a fiduciary for the plans." (Dkt. #38 Pg. ID 1151.) Citing *Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir. 2009), the court explained that it was possible for a party to act as a functional fiduciary to the extent that the party exercised control over the means in which another fiduciary would act in a fiduciary capacity. (*Id.*) In so doing, the court provided some caution—it noted its doubt that anything short of an allegation that "Defendant was directly involved in the Ford-FE negotiations" would rise to the level of "de facto control" sufficient to impose liability. (*Id.*)

Plaintiffs' second attempt has fared no better on this score. The second amended complaint essentially alleges that Defendant used its influence as the Ford Plans' record keeper to encourage the Ford Plans to hire FE. They claim that Defendant said it would work with no other automated investment service provider on its platform, thereby requiring the Ford Plans to switch record keepers—"a difficult and complex undertaking"

(*see* Dkt. #41 Pg. ID 1288)—if they wanted to use a different provider. And, according to Plaintiffs, Defendant "market[ed]" FE to the Ford Plans, "declin[ed] to market" any of FE's competitors, and "encourage[d]" the Ford Plans to use FE. (Dkt. #41 Pg. ID 1286.) But these terms, chosen by Plaintiffs, belie the sort of influence that Defendant wielded here. Defendant did not choose FE for the Ford Plans; the Ford Plans did. (*See* Dkt. #41 Pg. ID 1273 ("Ford elected to include such investment advice and account management services among the optional services made available by Xerox HR to Plaintiffs and the other participants in the Ford Plans.").) And Plaintiffs have alleged nothing to suggest that the decision was not ultimately up to the Ford Plans to make.

In briefing, Plaintiffs argue that the court should distinguish between "authority" and "control" as those words are both used in statute and carry different meanings. (*See* Dkt. #54 Pg. ID 1791 (citing 29 U.S.C. § 1002(21)(A)(i)).) But Plaintiffs have alleged neither. There no indication that Defendant exercised final authority over the Ford Plans' selection of FE as a fiduciary, and Plaintiffs have alleged no facts showing that Defendant somehow "controlled" the process, either. Constraining certain choices available to the Ford Plans—whether to hire a record keeper that would permit a different automated investment advisor on its platform, whether to go without an automated investment advisor at all (as the Ford Plans had apparently done prior to hiring FE), or whether to engage an investment advisor that could work outside Defendant's platform—is not the same as *controlling* the choice that the Ford Plans made. In the absence of any factual allegations showing authority over the decision to hire FE or control over the Ford Plans' decision, Defendant is not plausibly alleged to have acted as a fiduciary in the circumstances of which Plaintiffs complain.

Because Plaintiffs have once more failed to show that Defendant was a fiduciary with respect to the challenged conduct, their claim against Defendant for breach of fiduciary duties (Count III) fails. And any claims for prohibited transactions premised on Defendant's status as a fiduciary (Counts III, IV, and V) also fail.

B. Prohibited Transaction Claims (Counts I–V)

In its prior order dismissing Plaintiffs' complaint, the court disposed of three prohibited transaction claims against Defendant as a fiduciary—prohibited transactions under § 406(a)(1)(D), (b)(1), and (b)(3)—in part on the ground that each required some conduct involving "assets of the plan." The court determined that the fees at issue, lawfully paid to FE under the terms of its service agreement with the Ford Plans, were not "assets of the plan" under the terms of ERISA. (*See* Dkt. #38 Pg. ID 1156.) But in addressing Defendant's *non-fiduciary* liability for prohibited transactions, the court granted Plaintiffs leave to replead facts demonstrating that "the Ford Plans' other fiduciaries caused the plans to enter into a transaction they knew or should have known was prohibited." (Dkt. #38 Pg. ID 1161.) The court's order was admittedly vague as to whether Plaintiffs were given leave to replead facts showing that the fees paid to FE were "assets of the plan" as to establish Defendant's non-fiduciary liability. Plaintiffs have, indeed, asked leave to re-style their "assets of the plan" argument as to both the fiduciary and non-fiduciary liability of Defendant. (*See* Dkt. #40 Pg. ID 1178.) These renewed allegations, however, are still insufficient to impose liability.

i. Prohibited Transactions Involving "Assets of the Plan" (Counts II–V)

Plaintiffs allege that Defendant is liable for prohibited transactions under ERISA sections 406(a)(1)(C), 406(a)(1)(D), 406(b)(1), and 406(b)(3). The latter three require

transactions involving "assets of the plan." *See* 29 U.S.C. §§ 1106(a)(1)(D), (b)(1), (b)(3). In its prior order, the court dismissed claims based on these prohibited transactions because it determined that "the payments from FE to Defendant do not constitute 'plan assets.'" (Dkt. #38 Pg. ID 1158.) Again citing *Hecker v. Deere & Co.*, the court explained that money from the participating individual accounts, once transferred to FE as part of FE's agreement with the Ford Plans, were assets of FE—not plan assets. 556 F.3d 575, 584 (7th Cir. 2009) ("Once the fees are collected from the mutual fund's assets and transferred to one of the Fidelity entities, they become Fidelity's assets—again, not assets of the Plans."). The court noted that Plaintiffs had failed to cite any authority holding that plan assets paid to a service advisor continued to be plan assets post-transfer. It also pointed out that Plaintiffs had failed "to present any meaningful way that a court could draw a line" representing where plan assets ceased to belong to the plan. (Dkt. #38 Pg. ID 1159.)

Plaintiffs have taken the court's language as an invitation to try drawing the line. They allege, for example, that money was taken from participant accounts and transferred to FE, "a portion of which was to be transferred to Xerox HR." (Dkt. #41 Pg. ID 1313.) Plaintiffs conclusively state that "[t]hese transfers to Xerox HR were not separate and distinct transactions, but were part of the same transactions as the initial transfers to Financial Engines." (*Id.* at Pg. ID 1313–14.)

But simply calling a transaction an indirect, two-step transfer of plan assets does not make it one. Plaintiffs acknowledge that "assets of an employee benefit plan generally are to be identified on the basis of ordinary notions of property rights." *Hi-Lex Controls, Inc. v. Blue Cross Blue Shield of Mich.*, 751 F.3d 740, 745 (6th Cir. 2014)

(citation and internal quotation marks omitted). Under general notions of property rights, the payments FE collected from the Ford Plans were assets of FE—not the Ford Plans. That some portion of FE's take would eventually pass to Defendant by virtue of FE's independent contractual agreement with Defendant is inapposite; FE was not acting on Defendant's behalf when it collected money from the Ford Plans for the services it rendered. *See Chicago Dist. Council of Carpenters Welfare Fund v. Caremark, Inc.*, 474 F.3d 463, 476 n.6 (7th Cir. 2007). As Plaintiffs repeatedly allege, the Master FE Agreement set forth the terms of the Defendant's contractual relationship with FE, including FE's *contractual* obligation to pay Defendant some portion of the fees it collected from the Ford Plans. Nowhere do Plaintiffs allege that Defendant maintained some vested property interest in the money the Ford Plans paid to FE. Plaintiffs would have an "indirect" transfer of plan assets exist any time money from a plan made its way, however circuitously, into the hands of a party in interest. But such a position is unsupported in either the statute or the case law.

Plaintiffs have again failed to plead prohibited transactions involving "assets of the plan," and Defendant is therefore entitled to dismissal of the prohibited transaction claims in Counts II–V.[3]

ii. Prohibited Transactions Not Involving Assets of the Plan (Counts I, IV)

As before, the conclusion that the complained-of transactions did not involve "plan assets" does not dispose of Plaintiffs' claims under ERISA § 406(a)(1)(C), which

[3] To the extent that these counts were premised on Defendant's status as a fiduciary, Defendant is already entitled to dismissal as outlined above. But this section serves as an alternative ground for dismissal where Defendant's status as a fiduciary is an element, and as an independent basis for dismissal where Defendant is alleged to be a party in interest.

prohibits a plan fiduciary from "causing the plan to engage in a transaction . . . constitut[ing] a direct or indirect furnishing of goods, services, or facilities between the plan and a party in interest"—and does not require plan assets to be involved. The court granted Plaintiffs leave to replead this claim in two ways: first, if Plaintiffs could plead facts establishing that Defendant was a fiduciary, they were granted leave to replead facts "that would tend to show that Defendant . . . *caused* the Ford Plans to enter into a transaction constituting the 'furnishing of goods, services, or facilities between the plan and a party in interest'" (Dkt. #38 Pg. ID 1159 (emphasis in original)); second, as to Defendant's liability as a non-fiduciary, Plaintiffs were given leave to replead "that the Ford Plans' other fiduciaries caused the Plans to enter into a transaction that they knew or should have known was prohibited." (*Id.* at Pg. ID 1161.)

As noted above, Plaintiffs' first attempt to replead falls short by virtue of their inability to show that Defendant was a fiduciary with respect to the challenged conduct. It similarly fails, however, because Plaintiffs have still not demonstrated that Defendant caused the Ford Plans to retain FE. The analysis here largely follows the track of the analysis, above, regarding Defendant's fiduciary status: Defendant's use of its *influence* in this circumstance is not enough to establish that it *caused* the Ford Plans to retain FE.

And as far as the court has seen, Plaintiffs have pointed to no further factual allegations on this point, but instead rely on conclusory statements—in briefing, they direct the court to a footnote in the second amended complaint that reads as follows: "Plaintiffs also allege here that Xerox HR 'caused' the prohibited transaction at issue. Under the facts here, both Xerox HR and the Plans' named fiduciaries can be said to

have caused the Plans to enter into relationships with Financial Engines." (Dkt. #41 Pg. ID 1311.) No further factual basis is offered to explain how the causal link is satisfied. At this stage, the court is not required to "accept as true legal conclusions or unwarranted factual inferences," *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007), and it will not do so here. Plaintiffs' conclusory allegations that Defendant caused the Ford Plans to enter into a prohibited transaction is insufficient to withstand a motion to dismiss.

What remains is Plaintiffs' claim that the Ford Plans' named fiduciaries caused the Plans to enter into a prohibited transaction under § 406(a)(1)(C) for which Defendant is liable (Count I). Plaintiffs and Defendant argue over various points of this count: whether Defendant can be liable for a transaction to which it was not a party (namely, the Ford-FE Agreement), for example, and whether the Ford Plans' named fiduciaries were required to have knowledge of FE's allegedly excessive fees to state a claim for a prohibited transaction. (*See* Dkt. #49 Pg. ID 1637–43; Dkt. #54 Pg. ID 1804–08.)

But the court has identified a more fundamental failing of Plaintiffs' second amended complaint on this point. The crux of Plaintiffs' allegation in Count I is that "[t]he retention of Financial Engines and Xerox HR as service providers . . . was prohibited under ERISA § 406(a)(1)(C)." (Dkt. #41 Pg. ID 1330.) Plaintiffs claim here that the very act of hiring Defendant and FE was a prohibited transaction under ERISA. They say that the Plans' named fiduciaries knew or should have known that FE was a party in interest, that the Plans' named fiduciaries caused the plans to engage FE, and that the Plans' named fiduciaries knew or should have known that FE was "furnishing services" to the Plans. In the alternative, Plaintiffs say, the same is true of Defendant—the Plans'

named fiduciaries knew FE and Defendant were parties in interest, engaged Defendant and FE, knew that Defendant and FE were furnishing services to the Plans. (*Id.* at Pg. ID 1329–30.)

Count I, in other words, is premised on FE's status as a party in interest to the Ford Plans at the time the Plans' named fiduciaries hired FE. But therein lies the problem: FE did not become a party in interest to the Ford Plans *until* it was hired by the Ford Plans—not before. *See* 29 U.S.C. § 1002(14) (defining "party in interest" to mean, among other things, (A) "any fiduciary, . . . counsel, or employee of such employee benefit plan," and (B) "a person providing services to such plan"). Plaintiffs cannot credibly claim that FE was a fiduciary or a party providing services *before* FE was hired by the Plans' named fiduciaries. To say, as Plaintiffs do, that the hiring of FE was a prohibited transaction because FE was a party in interest providing services to the Ford Plans is a contradiction of terms that undermines Plaintiffs' claim. Indeed, to follow Plaintiffs' apparent logic as pleaded here would mean that it would be a prohibited transaction to hire any service provider for an ERISA plan because such a hiring would amount to engaging a party in interest to provide services for a plan.

To the extent that Plaintiffs' mean to suggest that the hiring of FE resulted in an indirect furnishing of "goods, services, or facilities" between the Ford Plans and Defendant—as an already-hired party in interest—by way of FE, the claim similarly fails. As pled, Plaintiffs suggest that what has changed hands between the Ford Plans, FE, and Defendant is money—not "goods, services, or facilities." Plaintiffs have not, therefore, pleaded facts showing that Defendant is liable for some prohibited transaction caused by the Plans' named fiduciaries.

C. Pattern of Racketeering Activity Under RICO (Count VI)

Plaintiffs' newly-asserted claim alleges that Defendant is liable for violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961. As relevant here, RICO makes it unlawful for a person "employed by or associated with" an enterprise to "conduct or participate" in the enterprise's affairs through a "pattern of racketeering activity": commission of two or more acts "indictable" under certain provisions of title 18 of the United States Code. *See* 18 U.S.C. §§ 1962(c), 1961(1)(B), 1961(5). "To state a RICO claim, a plaintiff must plead the following elements: '(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.'" *Ouwinga v. Benistar 419 Plan Servs., Inc.*, 694 F.3d 783, 791 (6th Cir. 2012) (quoting *Moon v. Harrison Piping Supply,* 465 F.3d 719, 723 (6th Cir. 2006)).

Plaintiffs assert that Defendant has committed a pattern of racketeering activity through violations of 18 U.S.C. § 1954. That section makes it unlawful for "an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan" to receive or agree to receive "any fee kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of the actions, decisions, or other duties relating to any question or matter concerning such plan." § 1954(1). According to Plaintiffs, Defendant "repeatedly influenc[ed] the Plans to retain Financial Engines to the exclusion of any other automated individualized account management service providers in exchange for kickbacks" in the form of Defendant's percent take of FE's fees. (Dkt. #41 Pg. ID 1343.) They say that this scheme has caused them injury in the form of higher fees—but for Defendant's unlawful conduct, FE could have charged plan

participants less for its services. The parties dispute whether Plaintiffs have alleged that Defendant committed the predicate racketeering acts, whether Plaintiffs have pleaded a viable RICO enterprise, and whether Plaintiffs have adequately alleged causation.

The court will deny leave to include this claim because, as alleged in the proposed second amended complaint, it is futile. The claim fails because Plaintiffs have failed to plead the predicate acts: violation of 18 U.S.C. § 1954. Plaintiffs claim that Defendant is liable under the statute because it is "an administrator, officer, trustee, custodian, counsel, agent, or employee" of the Ford Plans or, alternatively, "an officer, counsel, agent, or employee of an employee organization any of whose members are covered" by the Ford Plans. (*See* Dkt. #41 Pg. ID 1318.) But they do not explain how it is that Defendant fits into any of these categories; at this stage, the court is not required to accept as true Plaintiffs' legal conclusions. *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). Indeed, the court is dubious that Defendant could properly be held criminally liable for violation of § 1954 as required by RICO. *See* 18 U.S.C. § 1961(c) (defining "racketeering activity" as an act "*indictable* under any of the following provisions of title 18, United States Code" (emphasis added)). Section 1954 seems to impose only individual—not corporate—criminal liability. *See Vaughn v. Air Line Pilots Ass'n Int'l*, 395 B.R. 520, 547 (E.D.N.Y. 2008) ("It is clear that the statute targets individual conduct, not any organization or union, and plaintiffs do not dispute this reading of § 1954."). In the absence of some *factual* allegation showing that Defendant is properly considered an administrator, officer, trustee, custodian, counsel, agent, or employee of the Ford Plans within the meaning of § 1954, Plaintiffs have failed to plead a predicate act for the purposes of RICO liability.

It also fails because Plaintiffs have not pleaded a RICO enterprise. Under RICO, an enterprise is "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). The enterprise element "require[s] a certain amount of organizational structure which eliminates simple conspiracies from the Act's reach." *Ouwinga*, 694 F.3d at 794 (quoting *VanDenBroeck v. CommonPoint Mortg. Co.*, 210 F.3d 696, 699 (6th Cir. 2000), *abrogated on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008)). "In order to establish the existence of an 'enterprise' under § 1962(c), a plaintiff is required to prove: (1) an ongoing organization with some sort of framework or superstructure for making and carrying out decisions; (2) that the members of the enterprise functioned as a continuing unit with established duties; and (3) that the enterprise was separate and distinct from the pattern of racketeering activity in which it engaged." *Id.* at 793. Plaintiffs here fail as to this last element—they do not set forth an enterprise that is separate from the alleged pattern of racketeering activity.

An association in fact requires proof of three "structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associations to pursue the enterprise's purpose." *Boyle v. United States*, 556 U.S. 938, 946 (2009). Evidence of a pattern of racketeering activity may be used to prove the existence of an enterprise—but an enterprise remains "a separate element that must be proved." *Id.* at 947. Plaintiffs here have not set forth facts showing an organizational structure separate from the alleged pattern of racketeering activity. They allege that Defendant and FE worked together in a scheme whereby Defendant would market FE's services to the exclusion of other providers for a cut of FE's profits from the

Plans. But this alleged scheme is not one that would permit a jury to "infer the existence of an enterprise," *see Ouwinga*, 694 F.3d at 795, because it does not require some organizational structure to complete. It lacks, in other words, an organizational structure separate from some "simple conspiracy" that is outside RICO's reach. *Ouwinga*, 694 F.3d at 794. Because the enterprise Plaintiffs describe is indistinguishable from the crimes they allege were committed, Plaintiffs have not pleaded facts showing that Defendant and FE together comprise a viable RICO enterprise. *See also Green v. Morningstar, Inc.*, No. 17 C 5652, 2018 WL 1378176, at *5 (N.D. Ill. Mar. 16, 2018) ("In other words, if the alleged predicate acts are removed, there is nothing left in the complaint to sustain the allegation of an ongoing, structured enterprise among Defendants.").

D. Equitable Relief Against Defendant's Corporate Parents (Count VII)

Plaintiffs seek to add Defendant's corporate parents as defendants liable under ERISA § 502(a)(3). These claims, however, are derivative of Plaintiffs' claims against Defendant directly for breach of fiduciary duties and prohibited transactions. Because those claims against Defendant fail, Plaintiffs' claims against these corporate parents necessarily fail and will be dismissed.

IV. Conclusion

Plaintiffs have again failed to carry their burden to plead facts showing that they are entitled to relief. Accordingly,

IT IS ORDERED that Plaintiffs' Motion for Leave to File a Notice of Supplemental Authority (Dkt. #59) is GRANTED;

IT IS FURTHER ORDERED that Defendant's Motion for Leave to File a Notice of Supplemental Authority (Dkt. #60) is GRANTED;

IT IS FURTHER ORDERED that Plaintiffs' Motion for Leave to File a Second Amended Class Action Complaint (Dkt. #40) is DENIED; and

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss Plaintiffs' Second Amended Class Action Complaint (Dkt. #49) is GRANTED; Plaintiffs' Second Amended Class Action Complaint (Dkt. #41) is DISMISSED.

s/Robert H. Cleland /
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: June 25, 2018

I hereby certify that a copy of the foregoing document was mailed to counsel of record on this date, June 25, 2018, by electronic and/or ordinary mail.

s/Lisa Wagner /
Case Manager and Deputy Clerk
(810) 292-6522

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