UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

John Brand, Daniel Juhl, John Mitola, and Jeff Bendel,

Plaintiffs,

v.

National Union Fire Insurance Company of Pittsburgh, PA,

Defendant.

Case No. 16-cv-1053 (WMW/SER)

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This lawsuit arises from an insurance-coverage dispute between Plaintiffs John Brand, Daniel Juhl, John Mitola, and Jeff Bendel (collectively, Plaintiffs) and Defendant National Union Fire Insurance Company of Pittsburgh, PA (National Union). As directors and officers of Juhl Energy, Inc. (Juhl Energy) or its subsidiaries, Plaintiffs are covered by Juhl Energy's management-liability insurance policy, which National Union issued in 2013. Plaintiffs seek a declaratory judgment that they are entitled to advancement of their litigation and arbitration costs. Plaintiffs and National Union each move for summary judgment. For the reasons addressed below, the Court denies Plaintiffs' motion for summary judgment, grants National Union's motion for summary judgment, and dismisses Plaintiffs' amended complaint.

BACKGROUND

A. The Insurance Policy

National Union issued an Executive Edge® Broad Form Management Liability Insurance Policy, Policy No. 03-001-08-80, to Juhl Energy for the coverage period of

June 24, 2013, to July 1, 2014 (the Policy). The Policy provides liability coverage for the directors and officers of Juhl Energy and its subsidiaries. Under the Policy, National Union has no duty to defend the insured persons. But National Union will advance the costs of the insured persons' defense up to $3 million, subject to a $100,000 deductible that the insured persons must exhaust before receiving benefits. The Policy defines "Defense Costs" as follows:

> reasonable and necessary fees, costs and expenses consented to by the Insurer . . . resulting solely from:
>
> (1) the investigation, adjustment, defense and/or appeal of a **Claim** against an **Insured**; or
>
> (2) an **Insured Person** lawfully: (i) opposing, challenging, resisting or defending against any request for or any effort to obtain the **Extradition** of that **Insured Person**; or (ii) appealing any order or other grant of **Extradition** of that **Insured Person**.
>
> **Defense Costs** shall not include: (i) **Derivative Investigation Costs**, (ii) **Pre-Claim Inquiry Costs**, or (iii) the compensation of any **Insured Person**.[1]

A "Claim," as defined by the Policy, is

> (1) a written demand for monetary, non-monetary or injunctive relief, including, but not limited to, any demand for mediation, arbitration or any other alternative dispute resolution process;
>
> (2) a civil, criminal, administrative, regulatory or arbitration proceeding for monetary, non-monetary or injunctive relief which is commenced by: (i) service of a complaint or similar pleading; (ii) return of an indictment, information or similar document (in the case of a criminal proceeding); or (iii) receipt or filing of a notice of charges.

The Policy also contains an allocation provision, which provides, in relevant part:

> [T]he **Insurer** has no obligation under this policy for defense or other costs incurred by, judgments against or settlements by an **Organization** arising out

[1] Terms that appear in bold in the Policy are defined in Section 13 of the Policy.

> of a **Claim** made against an **Organization** except as respects coverage for a **Securities Claim**, or any obligation to pay loss arising out of any legal liability that an **Organization** has to a claimant, except as respects a covered **Securities Claim** against such **Organization**.
>
> With respect to: (i) **Defense Costs** jointly incurred by; (ii) any joint settlement entered into by; and/or (iii) any judgment of joint and several liability against any **Organization** and any **Insured Person** in connection with any **Claim** other than a **Securities Claim**, such **Organization** and such **Insured Person** and the **Insurer** agree to use their best efforts to determine a fair and proper allocation of the amounts as between such **Organization**, such **Insured Person** and the **Insurer**, taking into account the relative legal and financial exposures, and the relative benefits obtained by such **Insured Person** and such **Organization**. In the event that a determination as to the amount of **Defense Costs** to be advanced under this policy cannot be agreed to, then the **Insurer** shall advance **Defense Costs** excess of any applicable Retention which the **Insurer** states to be fair and proper until a different amount shall be agreed upon or determined pursuant to the provisions of this policy and applicable law.

To obtain coverage for any claim under the Policy, the insured person must notify National Union in writing within the time limit provided in the Policy.

B. The Unison Lawsuit

On December 5, 2013, Unison Co., Ltd. (Unison) filed a lawsuit (the Unison Lawsuit) related to the sale of wind-turbine generators for a wind farm in Winona County, Minnesota, against the four individual Plaintiffs in this case, as well as, Audrey Loethen; Bartly J. Loethen; Juhl Energy; Juhl Energy's subsidiary, Juhl Energy Development, Inc. (Juhl Development); Juhl Development's subsidiary, Winona Wind Holdings, LLC (Winona Wind Holdings); and Winona Wind Holdings' subsidiary, Winona County Wind, LLC (Winona County Wind) (collectively, the Unison Lawsuit Defendants).

Unison's claims arise from Juhl Development's purchase of two wind-turbine generators from Unison for a community wind farm developed and owned by Winona

County Wind, which was at the time of the purchase, a subsidiary of the Winona County Economic Development Authority. Unison and Juhl Development executed a Turbine Supply Agreement memorializing the purchase of the wind-turbine generators and a Financing Agreement and associated contracts by which Juhl Development secured a loan from Unison to finance the purchase of the wind-turbine generators. After the parties executed the Turbine Supply Agreement and the Financing Agreement, Juhl Development purchased Winona County Wind, including the wind farm. Unison alleges that Juhl Development's purchase of Winona County Wind violated the parties' Financing Agreement. Unison also alleges that Plaintiffs Juhl, Brand, and Mitola falsely represented that the Winona County Economic Development Authority would be the long-term owner and operator of the wind farm and that Unison relied on that false representation when Unison agreed to finance the purchase of the wind-turbine generators.

In its amended complaint, Unison asserted 17 claims against the Unison Lawsuit Defendants. Of the allegations in the amended complaint, the only claims involving the Plaintiffs in this case are Count One (fraudulent inducement against Juhl Energy, Juhl Development, and Plaintiffs Juhl, Brand, and Mitola), Count Nine (tortious interference with a contractual relationship against Audrey Loethen and Plaintiff Bendel), and Count Thirteen (unjust enrichment against Audrey Loethen and Plaintiff Bendel).

Based on the Turbine Supply Agreement, the Unison Lawsuit Defendants moved to compel arbitration. Unison moved for partial summary judgment on two of its breach-of-contract claims against Juhl Development on April 2, 2014. The Unison Lawsuit Defendants' motion to compel arbitration was denied on April 7, 2014, and they appealed.

On June 6, 2014, the district court in the Unison Lawsuit granted the Unison Lawsuit Defendants' motion to stay the proceedings pending appeal and denied without prejudice Unison's motion for partial summary judgment.

C. The AAA Arbitration

On April 21, 2014, while the Unison Lawsuit Defendants' appeal of the order denying the motion to compel arbitration was pending, Juhl Development and Winona County Wind—neither of which is an insured person under the Policy—commenced an arbitration proceeding against Unison alleging breach of warranty. The appeal of the order denying the motion to compel arbitration was not resolved until May 26, 2015, when the United States Court of Appeals for the Eighth Circuit reversed the district court's denial of the Unison Lawsuit Defendants' motion to compel arbitration. *See Unison Co. v. Juhl Energy Dev., Inc.*, 789 F.3d 816, 821 (8th Cir. 2015). On July 31, 2015, the district court issued an order staying federal court proceedings in the Unison Lawsuit until the resolution of the arbitration. In the arbitration proceeding, Unison asserted counterclaims against all of the Unison Lawsuit Defendants on October 23, 2015. Those counterclaims raise the same claims that Unison asserts in its amended complaint filed in the Unison Lawsuit.

D. The Coverage Dispute

As required under the Policy, Plaintiffs provided notice of Unison's claims to National Union. AIG Claims, Inc. (AIG), the claims administrator for the Policy, confirmed that the Policy provides coverage for Plaintiffs but not for the six other Unison Lawsuit Defendants. Because Unison's claims involved insured and noninsured parties, Plaintiffs were instructed to contact AIG to address allocation, the process of determining which costs

are covered under the Policy (and therefore borne by National Union) and which costs are not covered. Counsel for Plaintiffs and the six noninsured Unison Lawsuit Defendants have consistently sought advancement under the Policy of 100% of the fees and costs incurred in both the Unison Lawsuit and the ensuing arbitration.

Plaintiffs filed this declaratory judgment action on April 21, 2016, and amended the complaint on May 6, 2016. Plaintiffs seek:

> declaratory relief in the form of an order requiring the Defendant to reimburse 100% of all of the fees, costs, disbursements, and expenses incurred by the Plaintiffs in conjunction with the Unison action, and that the same be done on a retroactive basis to the commencement of the action in December of 2013, and that the same allocation be applicable for all future attorneys' fees, costs, disbursements, and expenses associated with defense for all further actions associated with the Unison action, whether they be by arbitration or in the U.S. Federal District Court.

Both parties now move for summary judgment. Plaintiffs seek a declaration that the Policy entitles them to advancement of 100% of the fees and costs incurred in the Unison Lawsuit and arbitration. National Union seeks summary judgment in its favor, arguing that Plaintiffs have failed to establish that they are contractually entitled to 100% of the fees and costs incurred in the Unison Lawsuit and arbitration. Alternatively, National Union seeks a determination that certain categories of fees and costs are not "Defense Costs" under the Policy.

ANALYSIS

I. Legal Standard

Summary judgment is proper when the record before the district court establishes that there is "no genuine dispute as to any material fact" and the moving party is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine dispute as to a material fact

exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Courts must construe the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in favor of that party. *See Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1347 (2015). A nonmoving party asserting that a fact is genuinely disputed must cite "particular parts of materials in the record" that support the assertion. Fed. R. Civ. P. 56(c)(1)(A). The nonmoving party may not "rest on mere allegations or denials, but must demonstrate on the record the existence of specific facts which create a genuine issue for trial." *Krenik v. Cty. of Le Sueur*, 47 F.3d 953, 957 (8th Cir. 1995) (internal quotation marks omitted).

Insurance coverage disputes ordinarily may be resolved on summary judgment based on the court's interpretation of the disputed insurance policy provisions. *See, e.g.*, *Secura Ins. v. Horizon Plumbing, Inc.*, 670 F.3d 857, 860-61 (8th Cir. 2012); *Kresse v. Home Ins. Co.*, 765 F.2d 753, 754-55 (8th Cir. 1985). Under Minnesota law, "[t]he interpretation of an insurance policy, including the question of whether a legal duty to defend or indemnify arises, is one of law." *Midwest Family Mut. Ins. Co. v. Wolters*, 831 N.W.2d 628, 636 (Minn. 2013). An insurer is not obligated to pay the defense costs of claims its policy does not cover, "even when those claims are joined with covered claims." *Secura Ins.*, 670 F.3d at 864 (quoting *Enron Corp. v. Lawyers Title Ins. Corp.*, 940 F.2d 307, 311 (8th Cir. 1991)). The burden of proving allocation rests with the insured party. *UnitedHealth Grp. Inc. v. Columbia Cas. Co.*, 47 F. Supp. 3d 863, 873 (D. Minn. 2014).

II. Allocation of Defense Costs Under the Policy

The parties agree that the Unison Lawsuit is a Claim for which the Policy provides Plaintiffs the advancement of their defense costs. The dispute here is the proper allocation of defense costs between those individuals who the Policy covers and their co-defendants in the Unison Lawsuit who the Policy does not cover. Plaintiffs argue that no allocation is appropriate because the Policy requires National Union to advance them 100% of the fees and costs incurred in the Unison Lawsuit. National Union disagrees, asserting in its motion for summary judgment that Plaintiffs have not satisfied their burden of establishing what portion of the litigation costs should be allocated to the defense of claims against covered individuals.

Plaintiffs' argument that allocation is unwarranted is founded on three assertions: (1) the defense of claims against entities and individuals that are not covered by the Policy is "reasonably related" to the defense of Plaintiffs, such that the cost of defending all claims should be covered; (2) the legal and financial exposure that Plaintiffs face is far greater than that faced by any other Unison Lawsuit Defendants because 14 of Unison's 17 claims are "derivative of the conduct of . . . Juhl, Brand, and Mitola"; and (3) the breach-of-warranty claim asserted by Juhl Development and Winona County Wind in the arbitration is a defense to Unison's claims against Plaintiffs. National Union counters that denying summary judgment is appropriate on each of these issues.

A.

In support of their motion for summary judgment, Plaintiffs' primary argument is that National Union must pay all litigation costs in this matter because both the defense of

entities and individuals not covered by the Policy and the prosecution of the arbitration breach-of-warranty claim are "reasonably related" to the defense of Plaintiffs. National Union's attack on this argument is two-fold. First, according to National Union, the Policy requires allocation based on the relative legal and financial exposure of the insured and noninsured parties. Second, National Union disputes Plaintiffs' assertion that all of the claims are "reasonably related" to the insured parties' defense.

Plaintiffs' primary argument is that when claims are brought against both insured and noninsured parties, the insured parties are entitled to any fees and costs "reasonably related" to their defense. But the cases Plaintiffs cite in support of their argument are inapposite. These cases involve directors' and officers' liability policies that impose a duty on the insurer to cover defense costs, but the policies in these cases do not specify the manner in which the defense costs should be allocated between insured and noninsured parties. *See, e.g.*, *Safeway Stores, Inc. v. Nat'l Union Fire Ins. Co.*, 64 F.3d 1282, 1289 (9th Cir. 1995) (using "reasonably related" standard in allocation of defense costs when policy did not require allocation); *Fed. Realty Inv. Tr. v. Pac. Ins. Co.*, 760 F. Supp. 533, 535-37 (D. Md. 1991) (adopting the "reasonably related" standard to allocation of expenses between covered and noncovered parties when applying Maryland law). Unlike the policies at issue in *Safeway Stores* and *Federal Realty Investment Trust*, the Policy here includes the specific standard for allocating defense costs between insured and noninsured parties and claims.

National Union argues that because the Policy contemplates allocation, the Policy's language, not the "reasonably related" standard employed in other cases, must govern this dispute. In its allocation section, the Policy provides that an Organization (in this case, Juhl

Energy and its subsidiaries) is covered only to the extent that it indemnifies insured parties. For "**Defense Costs** jointly incurred by . . . any **Organization** and any **Insured Party** in connection with any **Claim**," the Policy expressly requires the parties to determine together "a fair and proper allocation of the amounts as between such **Organization**, such **Insured Person** and the **Insurer**, taking into account the relative legal and financial exposures, and the relative benefits obtained by such **Insured Person** and such **Organization**."

Plaintiffs address this contractual language in response to National Union's motion for summary judgment. Plaintiffs contend that Juhl, Brand, and Mitola face the greatest potential liability because their "alleged misrepresentations . . . form the basis of the alleged breach of the underlying agreements." The only support for this assertion that Plaintiffs present is an affidavit from their counsel in the Unison Lawsuit. Plaintiffs repeatedly assert that the premise of each Unison claim is the alleged misrepresentations of Juhl, Brand, and Mitola. But Plaintiffs fail to demonstrate what, if any, relationship those alleged misrepresentations have to the subsequent alleged breaches by Juhl Development of the written agreements or the alleged tortious interference with contract and unjust enrichment by the other Unison Lawsuit Defendants.

To the contrary, Unison's amended complaint suggests that the claims are unrelated. Count One alleges that Juhl, Brand, and Mitola made representations that they knew to be false to Unison for the purpose of inducing Unison to execute the Financing Agreement. But the remaining counts do not mention Juhl, Brand, or Mitola. Instead, the remaining counts allege breaches of the written agreements executed by the parties and allege that other entities and individuals (including Plaintiff Bendel in Counts Nine and Thirteen)

procured and profited from breaching those written agreements. It is not evident, based on Unison's amended complaint and Plaintiffs' arguments, that Plaintiffs face primary legal and financial exposure in the Unison Lawsuit.

National Union also disputes that all of the claims in the Unison Lawsuit and arbitration are "reasonably related." Of the 17 claims in Unison's amended complaint, only three pertain to individuals covered by the Policy. And Unison's counterclaims in the arbitration are the same as their claims asserted in the Unison Lawsuit. Although Plaintiffs repeatedly argue that all of Unison's claims are premised on the alleged misrepresentations of Juhl, Brand, and Mitola, as addressed above, Plaintiffs do not explain *how* Unison's proof of its claims for breach of contract, tortious interference with contract, or unjust enrichment against other individuals and entities requires proof of material misrepresentations by these Plaintiffs (or anyone else). Moreover, the elements of these claims require no such proof.[2] Counsel for Plaintiffs and the other Unison Lawsuit Defendants state that the liability of Juhl, Brand, and Mitola under Count One is "the first element that must be proven in order

[2] *See Sysdyne Corp. v. Rousslang*, 860 N.W.2d 347, 351 (Minn. 2015) ("A cause of action for tortious interference with contract has five elements: (1) the existence of a contract; (2) the alleged wrongdoer's knowledge of the contract; (3) intentional procurement of its breach; (4) without justification; and (5) damages." (internal quotation marks omitted)); *Lyon Fin. Servs., Inc. v. Ill. Paper & Copier Co.*, 848 N.W.2d 539, 543 (Minn. 2014) ("The elements of a breach of contract claim are (1) formation of a contract, (2) performance by plaintiff of any conditions precedent to his right to demand performance by the defendant, and (3) breach of the contract by defendant." (internal quotation marks omitted)); *Dahl v. R.J. Reynolds Tobacco Co.*, 742 N.W.2d 186, 195 (Minn. Ct. App. 2007) ("The elements of an unjust enrichment claim are: (1) a benefit conferred; (2) the defendant's appreciation and knowing acceptance of the benefit; and (3) the defendant's acceptance and retention of the benefit under such circumstances that it would be inequitable for him to retain it without paying for it.").

to establish liability of the other defendants on the remaining counts." But these assertions are untethered to any applicable legal standard.

For these reasons, Plaintiffs are not entitled to summary judgment based on their contention that all the claims in the Unison Lawsuit and arbitration are "reasonably related." The express language of the Policy requires allocation based on the relative legal and financial exposures of, and relative benefits obtained by, the insured and noninsured Unison Lawsuit Defendants.

B.

In response to National Union's motion for summary judgment, Plaintiffs argue that the Policy requires National Union to advance 100% of the litigation costs because Plaintiffs bear the primary risk of legal and financial exposure. In the alternative, Plaintiffs argue that they are entitled to 82% of the total litigation costs because 14 of Unison's 17 claims are "derivative of the conduct of . . . Juhl, Brand, and Mitola."

National Union maintains that Plaintiffs improperly conflate "derivative liability" with claims that are derived from allegations against Plaintiffs. Unison's claims against the individuals and corporate entities that are not covered by the Policy are direct liability claims. These claims are not vicarious-liability claims premised on the misconduct of the Plaintiffs. Because those entities that are not covered by the Policy face independent liability that is separate from any liability derived from Plaintiffs' conduct, an assessment of the relative legal and financial exposure of Plaintiffs and their co-defendants is required under the Policy. National Union proposes that Plaintiffs face 40% of the exposure because

they comprise 40% of the Unison Lawsuit Defendants. National Union's estimate is more reasonable than Plaintiffs' contention that Plaintiffs bear the primary exposure.

Without the evidentiary and legal support required for summary judgment, Plaintiffs' claims that they are subject to greater legal and financial exposure than the other Unison Lawsuit Defendants are unavailing. Plaintiffs have not satisfied their burden of demonstrating that they are entitled to either 100% or 82% of the costs of litigation in the Unison Lawsuit as "Defense Costs" under the Policy.

C.

Plaintiffs also argue that, although the breach-of-warranty claim was asserted in arbitration by Juhl Development and Winona County Wind (neither of which is an insured party under the Policy), Plaintiffs are entitled to the costs of prosecuting the breach-of-warranty claim in arbitration because Plaintiffs' success on that claim in arbitration would prevent Unison from prevailing on its claims against Plaintiffs.

To support their argument that the costs associated with bringing a claim for affirmative relief can be considered defense costs, Plaintiffs rely on *IBP, Inc. v. National Union Fire Insurance Co.*, 299 F. Supp. 2d 1024 (D.S.D. 2003). The court in *IBP, Inc.*, concluded that the insured party under the policy was entitled to recover the costs it incurred prosecuting a cross-claim against a third party because the cross-claim was a defense to a claim that the third party asserted against the insured in a separate proceeding. 299 F. Supp. 2d at 1031. Under the reasoning in *IBP, Inc.*, coverage can extend to an *insured party* asserting an affirmative claim as a defense to a claim covered by an insurance policy. But *IBP, Inc.*, does not support Plaintiffs' argument that an insurer must pay the costs of an

affirmative claim brought by a noninsured party simply because the affirmative claim also is effectively a defense to a claim against the insured party.

Plaintiffs argue that the breach-of-warranty claim is a complete defense to all of Unison's claims in the Unison Lawsuit and arbitration. But the legal basis for Plaintiffs' assertion, if any, does not accompany their argument.[3] Even if judgment in favor of Juhl Development and Winona County Wind on the breach-of-warranty claim provided a defense to Unison's claims against Plaintiffs, it is not necessarily the case that Plaintiffs are entitled to 100% of the costs of prosecuting the claim. Other individuals and corporate entities that are not covered by the Policy are independently subject to liability in the Unison Lawsuit. As addressed above, such liability is not derivative of Plaintiffs' conduct. Therefore, assuming without deciding that *IBP, Inc.*, and the Policy support Plaintiffs' contention that they can recover expenses for an affirmative claim brought by parties who are not covered under the Policy, the allocation provision does not require National Union to advance Plaintiffs 100% of those expenses.[4]

In summary, because Plaintiffs have not demonstrated that they are entitled to an advancement of 100% of the litigation costs in the Unison Lawsuit and arbitration, the Court denies Plaintiffs' motion for summary judgment and grants National Union's motion for summary judgment.

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[3] Plaintiffs assert that proof of the breach-of-warranty claim would both eliminate Unison's damages as to Count One of the amended complaint and invalidate the contracts on which Unison's remaining claims are premised. But Plaintiffs' mere assertions do not demonstrate that their legal theory is correct.

[4] In light of this conclusion, the Court need not address National Union's alternative argument that certain fees and costs incurred by Plaintiffs are not covered under the Policy.

ORDER

Based on the foregoing analysis and all the files, records and proceedings herein, **IT IS HEREBY ORDERED**:

1. The motion for summary judgment filed by Plaintiffs John Brand, Daniel Juhl, John Mitola, and Jeff Bendel, (Dkt. 35), is **DENIED**.

2. The motion for summary judgment filed by Defendant National Union Fire Insurance Company of Pittsburgh, PA, (Dkt. 27), is **GRANTED**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: January 17, 2018

s/Wilhelmina M. Wright
Wilhelmina M. Wright
United States District Judge