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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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EVANSTON INSURANCE COMPANY, an  
Illinois Corporation

Plaintiff,

v.

BRIAN HARRISON, individually and  
doing Business as KINGDOM OF  
HARRON PRODUCTIONS, and  
CHRISTOPHER GELMS, an  
individual,

Defendants.

No. 2:20-cv-01672 WBS KJN

MEMORANDUM AND ORDER RE  
DEFENDANTS' MOTIONS TO  
DISMISS

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This case arises out of a dispute over whether plaintiff Evanston Insurance Company has a duty to indemnify or defend defendant Brian Harrison, individually and doing business as "Kingdom of Harron Productions" ("Kingdom of Harron"), under a commercial general liability insurance policy issued to Kingdom of Harron by plaintiff.

1 I. Factual and Procedural Background

2 On March 2-3, 2019, Kingdom of Harron held the "Kingdom  
3 of Harron's Edge of Spring Celtic Fantasy Fair" (the "Fair") in  
4 Auburn, California. (Pl.'s Compl. ¶ 10 ("Compl.") (Docket No.  
5 1).) Prior to holding the Fair, Kingdom of Harron purchased  
6 event insurance coverage ("the Evanston policy") from plaintiff  
7 to cover liability arising out of the Fair. (Id.)

8 The Evanston policy covers Kingdom of Harron for any  
9 payments Kingdom of Harron becomes legally obligated to pay as  
10 damages due to "bodily injury" or "property damage" occurring at  
11 the Fair, and gives plaintiff a "duty and right" to defend any  
12 suit seeking those damages, with a policy limit of \$1,000,000  
13 per occurrence ("Coverage A"). (Compl. ¶ 11-12.) It also covers  
14 Kingdom of Harron for medical expenses arising out of "bodily  
15 injury" caused by accident at the Fair, with a policy limit of  
16 \$5,000 per person ("Coverage C"). (Compl. ¶¶ 11, 16.) The  
17 policy contains multiple exclusions, however.

18 Coverage A contains an exclusion for bodily injuries or  
19 property damage that occurs as a result of an audience member,  
20 patron, or customer of the Fair's participation in a contest or  
21 athletic event (the "Participation Exclusion"). (Compl. ¶ 15.)  
22 It also contains an exclusion for any injuries arising out of any  
23 "assault or battery" occurring at the Fair (the "Assault or  
24 Battery Exclusion"). (Compl. ¶ 17.)

25 Coverage C contains an exclusion for medical expenses  
26 for bodily injury to any person engaged in physical exercise,  
27 games, or athletic contests at the Fair (the "Athletic Activities  
28 Exclusion"). (Compl ¶ 16.) Coverage C also contains an

1 exclusion for any medical expenses arising out of bodily injury  
2 that would otherwise be excluded under Coverage A (the "Coverage  
3 A Exclusion").

4 Defendant Christopher Gelms ("Gelms") attended the Fair  
5 on March 2, 2019. (Compl. ¶ 18.) Gelms participated in a "tug  
6 of war" game at the Fair where participants were made to stand on  
7 wooden blocks, and he broke his leg when a boy pushed him off his  
8 wooden block. (Id.) On March 20, 2019, Gelms filed a personal  
9 injury complaint in Placer County Superior Court for damages  
10 against Kingdom of Harron for the injuries he sustained at the  
11 Fair ("the underlying action").<sup>1</sup> (Compl. ¶¶ 6, 22.) Kingdom of  
12 Harron tendered a defense to plaintiff and requested that  
13 plaintiff indemnify it against the claims in the underlying  
14 action under the Evanston policy. Plaintiff denied coverage,  
15 contending that (1) damages arising from Gelms' injury were  
16 excluded under the policy's Participation Exclusion because Gelms  
17 was injured while participating in the "tug of war" game; (2)  
18 damages arising from Gelms' injury were excluded under the

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19  
20 <sup>1</sup> According to the Complaint, before Gelms filed his  
21 lawsuit in state court, Gelms filed a "Claim" in which he alleged  
22 that Kingdom of Harron was liable for his injuries. (Compl. ¶  
23 18.) Kingdom of Harron tendered the Gelms Claim to plaintiff  
24 under the Evanston Policy on March 13, 2019. (Compl. ¶ 19.) The  
25 complaint does not specify what type of "claim" Gelms filed, but  
26 the complaint attached to defendants' motion to dismiss indicates  
27 that it was a "Government Claim against Gold Country  
28 Fairgrounds." Plaintiff disclaimed coverage for the Claim on  
April 23, 2019, on the grounds that (1) damages arising from  
Gelms' injury were excluded under the Evanston policy's  
participation exclusion, because Gelms was injured while  
participating in the "tug of war" game; (2) Gelms' medical  
expenses were excluded under the Evanston policy's participation  
exclusion; and (3) Gelms' medical expenses were excluded under  
the Evanston policy's "Coverage A" exclusion. (Compl. ¶¶ 20-21.)

1 Evanston policy's Assault or Battery Exclusion because of  
2 allegations in Gelms' complaint that he was pushed off the wood  
3 block upon which he was standing during the tug of war game; (3)  
4 Gelms' medical expenses were excluded under the Evanston policy's  
5 Participation Exclusion; and (4) Gelms' medical expenses were  
6 excluded under the Evanston policy's "Coverage A" exclusion.  
7 (Compl. ¶¶ 20-21, 24.)

8 On August 20, 2020, plaintiff brought this action  
9 seeking declaratory relief under 28 U.S.C. § 2201. (See  
10 generally Compl.) Plaintiff's complaint alleges that this court  
11 has subject matter jurisdiction based on 28 U.S.C. § 1332 because  
12 there is complete diversity of jurisdiction between plaintiff and  
13 each of the defendants and the amount in controversy exceeds  
14 \$75,000. (See Compl. ¶ 8.)

15 Plaintiff's First and Second Claims for Relief seek a  
16 declaration that plaintiff has no duty to defend Kingdom of  
17 Harron in the underlying action based on the Evanston policy's  
18 Participation Exclusion and the Evanston policy's Assault or  
19 Battery Exclusion, respectively. (See Compl. ¶¶ 25-32.)  
20 Plaintiff's Third, Fourth, Fifth, and Sixth Claims for Relief  
21 seek a declaration that plaintiff has no duty to indemnify  
22 Kingdom of Harron against the claims in the underlying action  
23 based on the Evanston policy's Participation Exclusion, Assault  
24 or Battery Exclusion, Athletic Activities Exclusion, and Coverage  
25 A Exclusion, respectively. (See Compl. ¶¶ 33-48.)

26 Defendants have filed identical motions to dismiss  
27 plaintiff's complaint on the ground that the court lacks subject  
28 matter jurisdiction over plaintiff's claims under Federal Rule of

1 Civil Procedure 12(b)(1) because no actual case or controversy  
2 exists between the parties.<sup>2</sup> (See Def. Kingdom of Harron's Mot.  
3 to Dismiss at 1 ("Harron Mot. to Dismiss") (Docket No. 7-1); Def.  
4 Gelms' Mot. to Dismiss at 2 (Docket No. 6-1).) Defendants also  
5 argue that plaintiffs' claims for declaratory relief fail to  
6 state a claim upon which relief can be granted under Rule  
7 12(b)(6) because they are either "moot and improper" or "not ripe  
8 for adjudication." (See Harron Mot. to Dismiss at 5-10; Harron  
9 Reply at 1-2.)

10 II. Legal Standard

11 A. Lack of Subject Matter Jurisdiction

12 Dismissal under Federal Rule of Civil Procedure  
13 12(b)(1) for lack of subject matter jurisdiction is appropriate  
14 if the complaint, considered in its entirety, fails to allege  
15 facts that are sufficient to establish subject matter  
16 jurisdiction. In re Dynamic Random Access Memory (DRAM)  
17 Antitrust Litig., 546 F.3d 981, 984-85 (9th Cir. 2008). A  
18 defendant can challenge subject matter jurisdiction in one of two  
19 ways--through a facial attack or a factual attack. A facial  
20 attack "accepts the truth of the plaintiff's allegations but  
21 asserts that they are 'insufficient on their face to invoke  
22 federal jurisdiction.'" Leite v. Crane Co., 749 F.3d 1117, 1121  
23 (9th Cir. 2014). A factual attack "contests the truth of the  
24 plaintiff's factual allegations, usually by introducing evidence

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25 <sup>2</sup> Defendants also filed identical reply briefs in  
26 response to plaintiff's opposition. (See Def. Kingdom of  
27 Harron's Reply ("Harron Reply") (Docket No. 12); Def. Gelms'  
28 Reply (Docket No. 11).) Because defendants' motions and reply  
briefs are the same, the court will cite only to defendant  
Kingdom of Harron's briefs when discussing defendants' arguments.

1 outside the pleadings.” Id. “The plaintiff bears the burden of  
2 proving by a preponderance of the evidence that each of the  
3 requirements for subject-matter jurisdiction has been met.” Id.

4 B. Failure to State a Claim

5 Federal Rule of Civil Procedure 12(b)(6) allows for  
6 dismissal when the plaintiff’s complaint fails to state a claim  
7 upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The  
8 inquiry before the court is whether, accepting the allegations in  
9 the complaint as true and drawing all reasonable inferences in  
10 the plaintiff’s favor, the complaint has stated “a claim to  
11 relief that is plausible on its face.” Bell Atl. Corp. v.  
12 Twombly, 550 U.S. 544, 570 (2007). “The plausibility standard is  
13 not akin to a ‘probability requirement,’ but it asks for more  
14 than a sheer possibility that a defendant has acted unlawfully.”  
15 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). “Threadbare  
16 recitals of the elements of a cause of action, supported by mere  
17 conclusory statements, do not suffice.” Id.

18 III. Discussion

19 The Declaratory Judgment Act authorizes “any court of  
20 the United States” to “declare the rights and other legal  
21 relations of any interested party,” so long as that party  
22 presents “a case of actual controversy” within the court’s  
23 jurisdiction. 28 U.S.C. § 2201(a). The Ninth Circuit has  
24 established a two-part test, often referred to as the Kearns  
25 test, to evaluate challenges to the court’s subject matter  
26 jurisdiction over a plaintiff’s claims for declaratory relief.  
27 Principal Life Ins. Co. v. Robinson, 394 F.3d 665, 669 (9th Cir.  
28 2005). First, the court must determine “whether there is an

1 actual case or controversy within its jurisdiction.” Id. (citing  
2 Am. States Ins. Co. v. Kearns, 15 F.3d 142, 143 (9th Cir. 1994)).  
3 “Second, if the court finds that an actual case or controversy  
4 exists, the court must decide whether to exercise its  
5 jurisdiction by analyzing the factors set out in Brillhart v.  
6 Excess Ins. Co., 316 U.S. 491 (1942), and its progeny.” Id.  
7 (citing Kearns, 15 F.3d at 143-44).

8 A. Whether Plaintiff’s Declaratory Judgment Act Claims  
9 Present an Actual Case or Controversy

10 The requirement that a case or controversy exist under  
11 the first Kearns prong is “identical to Article III’s  
12 constitutional case or controversy requirement.” Kearns, 15 F.3d  
13 at 143. “Article III requires that there be a ‘substantial  
14 controversy . . . of sufficient immediacy and reality to warrant  
15 the issuance of a declaratory judgment.’” Aydin Co. v. Union of  
16 India, 940 F.2d 527, 528 (9th Cir. 1991) (emphasis in original)  
17 (quoting Md. Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270, 273  
18 (1941)). “[T]he case must also fall under one of the foundations  
19 of federal jurisdiction.” Kearns, 15 F.3d at 143 (quoting Aydin,  
20 940 F.2d at 528).

21 Here, as in Kearns, plaintiff’s claims fall under one  
22 of the foundations of federal jurisdiction because “jurisdiction  
23 is premised on diversity.” See id. The only question, then, is  
24 whether plaintiff’s claims for declaratory relief satisfy Article  
25 III by presenting a “substantial controversy of sufficient  
26 immediacy and reality.” Aydin, 940 F.2d at 528.

27 1. Plaintiff’s Duty to Defend Claims

28 A suit becomes moot, and “[t]here is . . . no case or

1 controversy . . . 'when the issues presented are no longer "live"  
2 or the parties lack a legally cognizable interest in the  
3 outcome.'" Chafin v. Chafin, 568 U.S. 165, 172 (2013) (quoting  
4 Already, LLC v. Nike, Inc., 568 U.S. 85, 89 (2013)).

5 Defendants argue that plaintiff's claims do not present  
6 a live controversy for the court to adjudicate because plaintiff  
7 already elected not to defend Kingdom of Harron in the underlying  
8 action before filing suit. (See Harron Mot. to Dismiss at 6.)  
9 According to defendants, plaintiff's claims therefore seek an  
10 advisory opinion indicating that plaintiff's prior refusal to  
11 defend Kingdom of Harron was proper, rather than a declaration  
12 that would aid plaintiff in shaping future conduct. (See id.  
13 (citing Britz Fertilizers, Inc. v. Bayer Corp., 665 F. Supp. 2d  
14 1142, 1173 (E.D. Cal. 2009) (Wanger, J.)).)

15 In Aetna Cas. & Sur. Co. v. Merritt, 974 F.2d 1196,  
16 1199-1200 (9th Cir. 1992), the plaintiff insurance company,  
17 Aetna, refused a request by its insured to defend him in a  
18 personal injury action in California state court. Merritt, 974  
19 F.2d at 1198. Aetna filed a complaint in federal court seeking a  
20 declaration that it owed no duty to defend or indemnify the  
21 insured based on the terms of the insurance policy. See id. The  
22 Ninth Circuit held that the district court had properly asserted  
23 jurisdiction over Aetna's claims for declaratory relief. See id.  
24 at 1199 ("We know of no authority for the proposition that an  
25 insurer is barred from invoking diversity jurisdiction to bring a  
26 declaratory judgment action against an insured on an issue of  
27 coverage.").

28 In Kearns, 15 F.3d at 143-45, the court similarly held

1 that a declaratory judgment action initiated by an insurer  
2 regarding its duty to defend and indemnify its insured in an  
3 underlying state court action presented a "case or controversy"  
4 capable of adjudication by a federal district court. See Kearns,  
5 15 F.3d at 144. Seeking to clarify prior decisions regarding  
6 whether an actual case or controversy exists in the context of  
7 insurance coverage disputes, the Ninth Circuit rejected as dictum  
8 a statement from a prior case that "there may not be a case or  
9 controversy" in a declaratory judgment action disputing a duty to  
10 defend. See id. (citing Cont'l Cas. Co. v. Robsac Indus., 947  
11 F.2d 1367, 1371-72 (9th Cir. 1991)). The court then explicitly  
12 reaffirmed its holding in Merritt that a declaratory judgment  
13 action regarding an insurer's duty to defend and indemnify  
14 presents a "case or controversy" under Article III and the  
15 Declaratory Judgment Act. See id. (citing Md. Cas., 312 U.S. at  
16 273).

17 Here, plaintiff has also brought an action for a  
18 declaratory judgment regarding its duty to defend and indemnify  
19 defendant Kingdom of Harron in the underlying state court action.  
20 (See generally Compl.) Like the plaintiffs in Kearns and  
21 Merritt, plaintiff here "seeks a declaration regarding its  
22 obligations in the pending state court liability suit against"  
23 Kingdom of Harron. See Kearns, 15 F.3d at 144. Plaintiff's  
24 claims do not involve wholly past conduct, because according to  
25 the allegations of the Complaint and the representations of  
26 counsel at the oral argument on this motion the underlying action  
27 is still ongoing. Counsel represent that a default has been  
28 entered against the Kingdom of Harron in the underlying action

1 but that judgment has yet to be entered upon that default.

2           Based upon those representations, if this court  
3 declares plaintiff has a duty to defend, it still presumably  
4 fulfill that duty from this point forward by undertaking the  
5 defense and moving to set aside the default. See Merritt, 974  
6 F.2d at 1199. This court, of course, expresses no opinion on how  
7 the state court might rule on such a motion. Thus, under  
8 controlling Ninth Circuit precedent, plaintiff's claims for  
9 declaratory relief as to its duty to defend present a substantial  
10 controversy that is sufficiently immediate and real so as to  
11 satisfy Article III's case or controversy requirement. See  
12 Kearns, 15. F.3d at 144; Merritt, 974 F.2d at 1199; see also  
13 Progressive Cas. Ins. Co. v. Dalton, No. 2:12-CV-00713 MCE, 2012  
14 WL 6088313, at \*5 (E.D. Cal. Dec. 6, 2012) ("[C]ourts have  
15 'consistently held that a dispute between an insurer and its  
16 insureds over the duties imposed by the insurance contract [to  
17 defend and indemnify] satisfies Article III's case and  
18 controversy requirement.'" (quoting Gov't Emp. Ins. Co. v. Dizol,  
19 133 F.3d 1220, 1222 n.2 (9th Cir. 1998))).

20           Defendants' argument that this case is distinguishable  
21 from Kearns and Merritt is without merit. Defendants contend  
22 that Merritt differed from this case because, at the time the  
23 insurer in that case filed its complaint for declaratory relief  
24 in federal court, "no parallel state court proceeding existed,  
25 and once the state court action was filed it was stayed pending  
26 resolution of the [federal case]." (See Harron Reply at 4.)  
27 Defendants argue that the plaintiff in Merritt was therefore  
28 seeking a declaration as to its obligations in a future

1 proceeding, rather than one that was already underway and for  
2 which it had already disclaimed coverage, as is the case here.  
3 (See id.) However, the parallel state court proceeding in  
4 Merritt that defendants assert had not yet begun was a parallel  
5 suit for declaratory relief filed by the insured in state court.  
6 See Merritt, 974 F.2d at 1198. As in this case, the underlying  
7 state court action for damages against the insured in Merritt was  
8 already pending at the time the insurer filed its federal  
9 complaint. See id.

10 Defendants argue that Kearns does not govern this case  
11 because, there, the insurer agreed to defend the insured in the  
12 underlying state court action subject to a full reservation of  
13 rights before filing suit in federal court. (See Harron Reply at  
14 4.) However, defendants do not show that this distinction  
15 carries any legal significance. Defendants do not cite to any  
16 Ninth Circuit case law that indicates that an insurer must agree  
17 to defend an insured in an underlying state court action for a  
18 live case or controversy to arise. Defendants also overlook the  
19 fact that the insurer in Merritt had refused to defend its  
20 insured in the underlying state court proceeding for damages,  
21 just as plaintiff did here. See Merritt, 974 F.2d at 1199.

22 Finally, defendants argue that plaintiff's claims for  
23 declaratory relief as to its duty to defend are improper because  
24 an action for declaratory relief must act prospectively "to  
25 enable the parties to shape their conduct so as to avoid a  
26 breach." (See Harron Mot. to Dismiss at 5-8.) Defendants  
27 primarily rely on Britz Fertilizers, Inc. v. Bayer Corp., 665 F.  
28 Supp. 2d 1142 (E.D. Cal. 2009) (Wanger, J.). In Britz, the court

1 held that a claim for declaratory relief as to whether the  
2 plaintiff, Bayer, was obligated to provide an adequate defense  
3 under its contract with Britz was improper because it sought  
4 “only to address ‘past wrongs’ in connection with the  
5 [underlying] litigation.” See Britz, 665 F. Supp. at 1173.

6 However, Britz is distinguishable from this case for  
7 two reasons. First, the plaintiff in Britz was the defendant in  
8 the underlying state court litigation, and was requesting a  
9 declaration that another party, Bayer, owed it a defense and  
10 indemnification in the underlying action. See Britz, 665 F.  
11 Supp. at 1173. Second, the underlying action in Britz had  
12 already concluded by the time the plaintiff filed its action for  
13 declaratory relief. Id. Britz held that the plaintiff’s claim  
14 for declaratory relief was improper because the plaintiff already  
15 had a “fully matured cause[] of action” for monetary relief when  
16 it filed its federal complaint. Id. Plaintiff’s declaratory  
17 relief claim would therefore be a “superfluous second cause[s] of  
18 action for the determination of identical issues” rather than a  
19 tool to “enable the parties to shape their conduct as to avoid a  
20 breach.” Id. (internal citations omitted).

21 Here, in contrast, plaintiff Evanston is not a party to  
22 the underlying action, but rather the insurer from whom the  
23 defendant in the underlying action seeks defense. Plaintiff’s  
24 claims for declaratory relief are therefore not duplicative or  
25 superfluous of any claims for monetary relief because it is  
26 Kingdom of Harron, not plaintiff, who will potentially have a  
27 claim for breach of contract based on plaintiffs’ refusal to  
28 defend it in the underlying action. See id. Because the

1 underlying action here is still ongoing, plaintiff's claims for  
2 declaratory relief will help it "shape its conduct" so as to  
3 avoid breach: if the court finds that plaintiff does owe Kingdom  
4 of Harron a duty to defend under the Evanston policy, plaintiff  
5 could still defend Kingdom of Harron before the underlying action  
6 is resolved. See id.<sup>3</sup>

7  
8 <sup>3</sup> Defendants also cite to a number of other cases from  
9 the Eastern District of California, most of which simply restate  
10 the same general rule articulated in Britz that declaratory  
11 relief operates prospectively to declare future rights, rather  
12 than to redress past wrongs. (See Harron Mot. to Dismiss at 6-  
13 7.) Most of these cases simply state the same general rule  
14 articulated in Britz that declaratory relief operates  
15 prospectively to declare future rights, rather than to redress  
16 past wrongs. See, e.g., C & C Props., Inc. v. Shell Co., No.  
17 1:14-cv-01889 JAM JLT, 2015 WL 5604384, at \*8-9 (E.D. Cal. Sep.  
18 23, 2015) (seeking declaratory relief for trespass claim). The  
19 only case cited by defendants that involves an insurance  
20 company's duty to defend and indemnify, Public Service Mutual  
21 Insurance Co. v. Liberty Surplus Insurance Co., 51 F. Supp. 3d  
22 937 (E.D. Cal. 2014) (England, J.), also holds that the  
23 plaintiff's claims for declaratory relief would be superfluous of  
24 its other claims for damages that had already matured and is thus  
25 distinguishable for the same reason as Britz. See Public  
26 Service, 51 F. Supp. at 950.

27 Defendants also point to a number of cases from other  
28 states that have held that "declaratory relief cannot be used by  
an insurer to seek a court's advisory validation of its prior  
denial of coverage." (See Harron Mot. to Dismiss at 7-8.) Not  
only do many of these cases involve situations in which the  
underlying action had already concluded by the time the plaintiff  
filed its suit for declaratory relief, see, e.g., Mid-Century  
Ins. Co. v. Estate of Morris ex. rel. Morris, 966 N.E. 2d 681  
(Ind. Ct. App. 2012); Morgan v. Guaranty Nat. Cos., 489 S.E.2d  
803 (Ga. 1997), these cases appear to be inconsistent with  
binding Ninth Circuit precedent that has held that a district  
court may assert jurisdiction over a claim seeking a declaration  
that the insurer did not err in denying a defense to the insured  
in the underlying action. See Merritt, 974 F.2d at 1199. Out of  
circuit state court decisions also do not lend much insight as to  
whether a federal court has subject matter jurisdiction over a  
claim before it.

1           Accordingly, because plaintiff's claims for declaratory  
2 relief as to plaintiff's duty to defend Kingdom of present a  
3 "case or controversy" under Kearns and Merritt. See Kearns, 15.  
4 F.3d at 144; Merritt, 974 F.2d at 1199, the court has subject  
5 matter jurisdiction over plaintiff's First and Second Claims for  
6 Relief and that plaintiff has successfully stated claims upon  
7 which relief can be granted. See Kearns, 15. F.3d at 144;  
8 Twombly, 550 U.S. at 570.

9           2. Plaintiff's Duty to Indemnify Claims

10           In order for plaintiff's claims to be ripe for  
11 adjudication under Article III, they must present a "substantial  
12 controversy . . . of sufficient immediacy and reality to warrant  
13 the issuance of a declaratory judgment." Aydin, 940 F.2d at 528  
14 (quoting Md. Cas., 312 U.S. at 273.

15           As with plaintiff's duty to defend claims, Kearns and  
16 Merritt are again instructive. See Kearns, 15. F.3d at 144;  
17 Merritt, 974 F.2d at 1199. Both cases involved insurers seeking  
18 declaratory relief as to their duty to defend and indemnify their  
19 insured against underlying state claims, and, contrary to  
20 defendants' assertions, there is no indication in either of those  
21 cases that the court intended to cabin its holding that  
22 jurisdiction was proper only to claims concerning the duty to  
23 defend. See Kearns, 15. F.3d at 144; Merritt, 974 F.2d at 1199.

24           In fact, Kearns explicitly stated that Merritt had  
25 "held that in a declaratory judgment action brought to determine  
26 a duty to defend or indemnify, the court may exercise  
27 jurisdiction." See Kearns, 15. F.3d at 144 (emphasis added).  
28 The court then added that it was reaffirming Merritt's holding in

1 part because of the Supreme Court's decision in Maryland Casualty  
2 v. Pacific Coal & Oil, in which the Court "held that an insurer's  
3 declaratory judgment action regarding its duty to defend and  
4 indemnify was sufficiently ripe, even when the underlying  
5 liability action in state court had not yet proceeded to  
6 judgment." See id. (citing Md. Cas., 312 U.S. at 270). Because  
7 Kearns explicitly held that a claim for declaratory relief as to  
8 an insurer's duty to indemnify its insured in underlying state  
9 court proceedings presents "a case or controversy," plaintiff's  
10 claims seeking a declaration as to its duty to indemnify Kingdom  
11 of Harron are sufficiently ripe for adjudication. See id.

12 Defendants cite to Yellowstone Development, LLC v.  
13 United Fire & Casualty Co., No. CV 11-12 BU CSO, 2011 WL 13077970  
14 (D. Mont. Aug. 11, 2011) and Western International Syndication Co.  
15 v. Gulf Insurance Co., No. CV 04-2349 RGK JWJ, 2004 WL 5573919  
16 (C.D. Cal. Dec. 20, 2004), as examples of cases in which district  
17 courts in the Ninth Circuit have held that a claim for a  
18 declaration as to an insurer's duty to indemnify was not ripe for  
19 adjudication because the claim had not "taken on a fixed and  
20 final shape so that a court can see what legal issues it is  
21 deciding." See Yellowstone, 2011 WL 13077970, at \*3 (citing N.  
22 Cty. Commc'n Co. v. Cal. Catalog & Tech., 594 F.3d 1149, 1154  
23 (9th Cir. 2010)).

24 Defendants do not articulate why plaintiff's duty to  
25 indemnify claims in this case are too nebulous or unfixed for the  
26 court to "see what legal issues it is deciding" prior to the  
27 conclusion of the underlying action, beyond merely asserting that  
28 they are claims seeking a declaration as to plaintiff's duty to

1 indemnify. (See id.) The court is not persuaded that  
2 plaintiff's duty to indemnify claims are not ripe. See Kearns,  
3 15 F.3d at 144 (citing Md. Cas., 312 U.S. at 270). The court is  
4 instead persuaded by those cases in which district courts have  
5 found that, under Kearns, claims for declaratory relief as to an  
6 insurer's duty to indemnify an insured in an underlying action  
7 that is still pending are sufficiently ripe for review. See,  
8 e.g., Dalton, 2012 WL 6088313, at \*5-6 (citing Kearns, 15 F.3d at  
9 144) ("That a defendant's liability may be contingent does not  
10 necessarily defeat jurisdiction of a declaratory judgment action,  
11 and the Act allows a plaintiff to bring a claim in certain cases  
12 of unresolved contingencies.").<sup>4</sup>

13 The court therefore finds that it has subject matter  
14 jurisdiction and that plaintiff's Third through Sixth Claims for  
15 Relief adequately state claims upon which relief can be granted.  
16 See id.; Twombly, 550 U.S. at 570.

17  
18 B. Whether the Brillhart Factors Counsel Exercising  
19 Jurisdiction

20 Even when a plaintiff's claims for declaratory relief  
21 present the court with a "case or controversy" under Article III,  
22 the court must decide whether to exercise its discretion to

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23 <sup>4</sup> The remainder of the cases upon which defendants rely  
24 either do not involve claims for declaratory relief as to an  
25 insurer's duty to indemnify, or address whether declaratory  
26 relief for duty to indemnify claims is appropriate in California  
27 state court. (See Harron Reply at 6-7.) None of these cases  
28 contradict the Ninth Circuit's holding in Kearns that claims for  
declaratory relief as to an insurer's duty to indemnify are  
sufficiently ripe for review, even when the underlying action has  
not yet concluded. See Kearns, 15 F.3d at 144.

1 assert jurisdiction over those claims by analyzing the factors  
2 set out in Brillhart. Principal Life, 394 F.3d at 672 (citing  
3 Kearns, 15 F.3d at 143). The Brillhart factors, which are non-  
4 exclusive, state that "(1) the district court should avoid  
5 needless determination of state law issues; (2) it should  
6 discourage litigants from filing declaratory actions as a means  
7 of forum shopping; and (3) it should avoid duplicative  
8 litigation." Id. (quoting Gov't Emp. Ins. Co. v. Dizol, 133 F.3d  
9 1220, 1225 (9th Cir. 1998)).

10 "Essentially, the district court 'must balance concerns  
11 of judicial administration, comity, and fairness to the  
12 litigants.'" Id. (quoting Kearns, 15 F.3d at 144). Other  
13 considerations the court may take into account are whether the  
14 declaratory action "is being sought merely for the purposes of  
15 procedural fencing or to obtain a 'res judicata' advantage, and  
16 whether the use of a declaratory action "will result in  
17 entanglement between the federal and state court systems."  
18 Dizol, 133 F.3d at 1225 n.5.

19 1. Determination of State Law Issues

20 In considering first Brillhart factor, courts often  
21 examine whether adjudicating the declaratory judgment action will  
22 require the determination of novel questions of state law.  
23 Dalton, 2012 WL 6088313, at \*7 (citing Carolina Cas. Ins. Co. v.  
24 Bolling, Walter & Gawthrop, No. Civ. S-04-2445 FCD PAN, 2005 WL  
25 1367096, at \*5 (E.D. Cal. May 31, 2005)); N.E. Ins. Co. v.  
26 Masonmar, Inc., No. 1:13-cv-00364 AWI SAB, 2013 WL 2474682, at \*3  
27 (E.D. Cal. Jun. 7, 2013).

28 The present case will require the court to determine

1 whether the Evanston policy provides coverage for a suit against  
2 Kingdom of Harron seeking damages for personal injuries to Gelms  
3 that occurred during Gelms' participation in activities at the  
4 Fair. (See Compl. ¶¶ 22-24.) "While the interpretation of an  
5 insurance policy 'is governed by state law, the principles of  
6 contract interpretation are well settled, and [a federal  
7 district] court is an appropriate forum to adjudicate [the]  
8 matter.'" Dalton, 2012 WL 6088313, at \*7 (alterations in  
9 original) (quoting Mitsui Sumitomo Ins. Co. of Am. v. Delicato  
10 Vineyards, No. CIV. S-06-2891 FCD GGH, 2007 WL 1378025, at \*6  
11 (E.D. Cal. May 10, 2007)).

12 California law regarding an insurer's duty to defend  
13 and indemnify is well-defined. See Burgett, Inc. v. Am. Zurich  
14 Ins. Co., 830 F. Supp. 2d 953, 959 (E.D. Cal. 2011) (England, J.)  
15 (summarizing California law regarding the duty to defend);  
16 Certain Underwriters at Lloyd's of London v. Superior Court, 24  
17 Cal. 4th 945, 958 (Cal. 2001) (summarizing California law  
18 regarding the duty to indemnify). Construing plaintiff's claims  
19 is unlikely to involve novel state law issues. See Sumitomo,  
20 2007 WL 1378025, at \*6 (holding that determination of whether  
21 insurance policy covered spoilage of wine due to heat wave did  
22 not require the court to determine novel questions of state law);  
23 Dalton, 2012 WL 6088313, at \*7 (holding that determination of  
24 whether directors & officers insurance policy provided coverage  
25 for corporate losses "should involve a relatively straightforward  
26 analysis of the policy, without infringing on novel state law  
27 issues").

28 Accordingly, the first Brillhart factor weighs in favor

1 of the court retaining jurisdiction. See Principal Life, 394  
2 F.3d at 672.

3 2. Discourage Forum Shopping

4 The second Brillhart factor counsels district courts to  
5 disclaim jurisdiction if doing so would “discourage litigants  
6 from filing declaratory actions as a means of forum shopping.”  
7 Principal Life, 394 F.3d at 672. “This factor is usually  
8 understood to favor discouraging an insurer from forum shopping,  
9 i.e., filing a federal court declaratory action to see if it  
10 might fare better in federal court at the same time the insurer  
11 is engaged in a state court action.” Am. Cas. Co. v. Krieger,  
12 181 F.3d 1113, 1119 (9th Cir. 1999). This factor relates to “the  
13 defensive” or “reactive” nature of a federal declaratory judgment  
14 suit. Robsac, 947 F.3d at 1372 (overruled on other grounds). “A  
15 declaratory judgment action by an insurance company against its  
16 insured during the pendency of a non-removable state court action  
17 presenting the same issues of state law is an archetype of what  
18 we have termed ‘reactive’ litigation.” Id.

19 Here, it does not appear that plaintiff has engaged in  
20 forum shopping by filing this action. Plaintiff is not a party  
21 to the underlying action for personal injuries against Kingdom of  
22 Harron, and there does not appear to be any suit filed by  
23 defendants in state court regarding the coverage issues contained  
24 in plaintiff’s complaint (Compl. ¶¶ 22-48). Accordingly, nothing  
25 indicates that plaintiff brought this action to see if it would  
26 “fare better in federal court at the same time [it was] engaged  
27 in a state court action.” See Krieger, 181 F.3d at 1119; Dalton,  
28 2012 WL 6088313, at \*8 (“All parties acknowledge that the FDIC

1 has yet to file a lawsuit in state court, demonstrating both that  
2 Progressive is not a party in an underlying lawsuit and that the  
3 coverage issues before the Court are not being litigated in any  
4 other forum.”); Masonmar, 2013 WL 2474682, at \*3 (holding that  
5 there was no suggestion plaintiff had engaged in forum shopping  
6 where plaintiff was not a party to the underlying state court  
7 action).

8 Defendants contend for the first time in their reply  
9 brief that plaintiff’s action for declaratory relief was  
10 “reactive” because plaintiff was aware when it filed its action  
11 that Kingdom of Harron was in default in the underlying action  
12 and that Gelms would likely (1) seek a default judgment and (2)  
13 file an action in state court against Kingdom of Harron and  
14 plaintiff to enforce the default judgment. (See Harron Reply at  
15 12.) Defendants assert that because a threat of future state  
16 court litigation involving the same issues of coverage and  
17 indemnification at issue in plaintiff’s suit existed when  
18 plaintiff filed its suit, plaintiff’s suit should be considered  
19 reactive and the court should refuse to assert jurisdiction.  
20 (See id.)

21 Not only is defendants’ argument waived because it was  
22 raised for the first time in defendants’ reply brief, see Bazuaye  
23 v. INS, 79 F.3d 118, 120 (9th Cir. 1996), the court finds the  
24 argument unpersuasive. Courts consider declaratory judgment  
25 actions to be “reactive” when they are brought during the  
26 “pendency of a non-removable state court action presenting the  
27 same issues of state law.” Robzac, 947 F.3d at 1372 (overruled  
28 on other grounds) (emphasis added); Great S. Life Ins. Co. v.

1 Zarate, No. C 96-4520 FMS, 1997 WL 136246, at \*2 (N.D. Cal. Mar.  
2 13, 1997) (holding that second Brillhart factor counseled against  
3 asserting jurisdiction because plaintiff's suit for declaratory  
4 relief was reactive, as it sought "declaratory relief in [federal  
5 court] regarding its obligations under state law for the same  
6 policy"). Here, plaintiff's claims brought in response to a  
7 state court action presenting different issues of state law, and  
8 they were brought five months after that suit was filed and  
9 almost three months after plaintiff disclaimed coverage for the  
10 underlying action. (See Compl. ¶¶ 22-24.)

11 Because Kingdom of Harron had the opportunity to file a  
12 parallel action for declaratory relief in state court as to  
13 plaintiff's duty to defend or indemnify during this time period,  
14 there is no evidence that plaintiff engaged in a "race to the  
15 courthouse" to file its action for declaratory relief before  
16 defendants could. See Dalton, 2012 WL 6088313, at \*8 (finding  
17 that, because defendant "had sufficient time to file a lawsuit .  
18 . . there is accordingly no viable claim that [the insurer]  
19 participated in a race to the courthouse").

### 20 3. Avoid Duplicative Litigation

21 The third Brillhart factor cautions district courts to  
22 avoid exercising jurisdiction where doing so would lead to  
23 duplicative litigation. Principal Life, 394 F.3d at 672. "If  
24 there are parallel state proceedings involving the same issues  
25 and parties pending at the time the federal declaratory action is  
26 filed, there is a presumption that the entire suit should be  
27 heard in state court." Id. at 1225 (citing Chamberlain v.  
28 Allstate Ins. Co., 931 F.2d 1361, 1366-67 (9th Cir. 1991)).

1 However, "cases . . . 'in which there are no parallel state court  
2 proceedings' lie at the 'outer boundaries' of the district  
3 court's discretion [to decline jurisdiction] under the  
4 Declaratory Judgment Act." Md. Cas. Co. v. Knight, 96 F.3d 1284,  
5 1289 (9th Cir. 1996) (citing Wilton v. Seven Falls Co., 515 U.S.  
6 277, 289 (1995)).

7 As discussed above, the underlying state court action  
8 involves different parties and different claims than those at  
9 issue here. While the underlying action may require the state  
10 court to resolve some of the same factual issues as this case--  
11 such as whether Gelms participated in the tug of war game at the  
12 Fair and whether he was pushed off of his wooden block during  
13 that game--the two courts will use these factual determinations  
14 to resolve different legal issues. See Masonmar, 2013 WL  
15 2474682, at \*4. The state court will presumably need to  
16 determine whether Kingdom of Harron can be held liable for Gelms'  
17 injuries as a result of these facts. (See Compl. ¶¶ 18-24.)  
18 This court will have to determine whether the underlying action  
19 falls under one of the Evanston policy's stated exceptions based  
20 on the content of Gelms' allegations and claims in state court.  
21 (See Compl. ¶¶ 25-48.) Thus, at most, plaintiff's claims call  
22 for duplicative adjudication of some of the facts at issue in the  
23 underlying action, while determination of each case's legal  
24 issues will remain separate. See Masonmar, 2013 WL 2474682, at  
25 \*4.

26 Thus, there is no parallel state proceeding in this  
27 action, and dismissing plaintiff's claims would require the court  
28 to act at the "outer boundaries" of its discretion to decline

1 jurisdiction. See Knight, 96 F.3d at 1289. The court therefore  
2 finds that the third Brillhart factor weighs against dismissing  
3 plaintiff's claims.

4 Because the three Brillhart factors weigh in favor of  
5 exercising jurisdiction, the court will assert jurisdiction over  
6 plaintiff's claims for declaratory relief. See Dizol, 133 F.3d  
7 at 1223.

8 IT IS THEREFORE ORDERED that defendants' motions to  
9 dismiss (Docket Nos. 6, 7) be, and the same hereby are, DENIED.

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Dated: November 18, 2020



WILLIAM B. SHUBB  
UNITED STATES DISTRICT JUDGE