SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 304

BETTY T. YEE, Controller of the State of California,

Plaintiff,

v.

CLUBCORP HOLDINGS, INC., et al.,

Defendants.

Case No. CGC-19-576314

ORDER RE DEMURRER TO PETITION FOR WRIT OF MANDATE AND CROSS-COMPLAINT

CLUBCORP HOLDINGS, INC., et al.,

Cross-Complainants,

v.

BETTY T. YEE, Controller of the State of California,

Cross-Defendant.

INTRODUCTION

The above-entitled matter came on regularly for hearing on April 21, 2021. The Court issued a tentative ruling before oral argument. Having reviewed and considered the parties' written submissions and being fully advised, the Court sustains the demurrer with leave to amend as to the fourth cause of

action and otherwise overrules the demurrer.[1]

BACKGROUND

The Controller initiated this action on May 29, 2019 alleging three causes of action related to ClubCorp's alleged violations of the Unclaimed Property Law ("UPL"). (See Nov. 17, 2020 Order, 1-2.) After securing leave, ClubCorp filed its Verified Petition for Writ of Mandate [CCP § 1085] and Cross-Complaint ("Cross-Complaint") on November 17, 2020. (See *id.* at 7.)

In its Cross-Complaint, ClubCorp alleges five causes of action: (1) Violations of the California Administrative Procedure Act ("APA"); (2) Petition for Writ of Mandate; (3) Ultra Vires; (4) Violations of Due Process; and (5) Declaratory and Injunctive Relief. (See Cross-Complaint ¶¶ 99-162.) The gravamen of the Cross-Complaint is that the Controller cannot rely on a third-party auditor to conduct UPL audits. (See *id.* at ¶¶ 109, 112, 124-125, 151-152, 158-162.) To that end, ClubCorp alleges that the Controller improperly relies on its Policies and Procedures Applicable to State-Authorized Unclaimed Property Examinations Conducted by Contractors ("Third-Party Auditor Policies and Procedures" or "Policies and Procedures") when the Controller conducts audits. (See *id.* at ¶¶ 108, 121-124, 133-152, 158-162.) Further, ClubCorp alleges that the Controller could not use a third-party firm to conduct ClubCorp, in particular, because the Controller failed to give ClubCorp proper notice of the rules governing the use of a third-party firm. (*Id.* at ¶¶ 130-132.)

Presently before the Court is the Controller's demurrer to ClubCorp's Cross-Complaint. In short, the Controller contends that the Third-Party Auditor Policies and Procedures are valid and that the Controller's use of a third-party auditor is lawful. ClubCorp opposes the motion. In so doing, ClubCorp identifies three theories of liability: (1) (a) The Controller cannot use a third-party auditor in compliance

[1] The Controller's requests for judicial notice, as modified by the notice of errata, are granted, subject to the limitations set forth in this footnote. ClubCorp's objections to Exhibits 2-6 are overruled. (See Objections to RJN, 3-4.) As to those exhibits, the versions of AB 698 reflect official acts of the Legislature and are available online at http://leginfo.ca.gov/cgi-bin/postquery?bill_number=ab_698&sess=9798&house=B&author=cardenas. (See Controller's RJN, 3; Evid. Code, § 452(c), (h).) As to Exhibit 7, the Court takes judicial notice of the fact that a public meeting to discuss third-party auditor guidelines was held on June 8, 1998 and that the Controller provided a response to certain comments as set forth in Exhibit 7. (See Controller's RJN, Ex. 7; Controller's Response to Objection, 3; Evid. Code, § 452(c).) The Court does not derive any other facts from Exhibit 7. To the extent ClubCorp objects to judicial notice of these facts, the objection is overruled. As to Exhibit 8, the Court grants the request for judicial notice as modified by the errata, to which ClubCorp did not object.

with Code of Civil Procedure § 1571(c) unless the Policies and Procedures are valid, (b) the Policies and Procedures are regulations subject to the APA, (c) The Policies and Procedures are void because the Controller did not enact them in compliance with the APA, and, as a result, (d) the Controller's use of third-party auditors is unlawful; (2) As one means of establishing 1(c), above, the Controller failed to provide proper notice to the public or conduct a public hearing; and (3) The Controller violates due process when it uses ASUS to conduct audits. (Opposition, 10.)

LEGAL STANDARD

A party may demur where "[t]he pleading does not state facts sufficient to constitute a cause of action." (See Code of Civ. Proc., § 430.10(e).) A demurrer admits all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The complaint is given a reasonable interpretation, reading it as a whole and its parts in their context. (*Ibid.*) In reviewing a demurrer, the court also considers matters that may be judicially noticed. (*Ibid.*)

DISCUSSION AND ANALYSIS

I. Code of Civil Procedure § 1571 and the Adoption of the Policies and Procedures

The UPL "has dual objectives: (1) to reunite owners with unclaimed funds or property, and (2) to give the state, rather than the holder, the benefit of the use of unclaimed funds or property. [Citations.] The state, through the Controller, acts as the protector of the rights of the true owner. [Citation.] When considered in total context, the statutory scheme of the UPL compels the Controller to affirmatively take all steps necessary to carry out the purposes of the UPL. [Citation.]" (*Bank of America v. Cory* (1985) 164 Cal.App.3d 66, 74 [internal citations omitted].)

The UPL imposes reporting and payment requirements on the holders of unclaimed property. (See Code of Civ. Proc., §§ 1530, 1532.) "The Controller may at reasonable times and upon reasonable notice examine the records of any person if the Controller has reason to believe that the person is a holder who has failed to report property that should have been reported pursuant to this chapter." (Code of Civ. Proc., § 1571(a).) "When requested by the Controller, the examination shall be conducted by any licensing or regulating agency otherwise empowered by the laws of this state to examine the records of the holder. ...s" (Code of Civ. Proc., § 1571(b).) "Following a public hearing, the Controller shall adopt

guidelines as to the policies and procedures governing the activity of third-party auditors who are hired by the Controller." (Code of Civ. Proc., § 1571(c).)

The requirement set forth in subdivision (c) was adopted in 1998 to establish monitoring guidelines for third-party auditors. (See Controller's RJN, Ex. 1 at 4016-0110, 4016-0113.) During the drafting process, the language that would have required the Controller to "adopt regulations" was replaced with the operative requirement to "adopt guidelines" "[f]ollowing a public hearing," which appears in the enacted statute. (See *id.*, Ex. 5 at 156.)

The Controller held a public hearing regarding its proposed policies and procedures on June 8, 1999. (See Cross-Complaint ¶ 59; Controller's RJN, Ex. 7.) The Controller has not recovered a copy of any final 1999 guidelines. (Opening Brief, 11 n.4.) There is nothing in the demurrer record suggesting there were any further hearings regarding the guidelines after the hearing on June 8, 1999 or that any policies and procedures were adopted prior to September 2003. (See Cross-Complaint ¶¶ 52, 55, 59-62.) The Controller's website can presently be used to access the Policies and Procedures, which are dated September 2003 and on their face state that they were updated August 2020. (See Controller's Notice of Errata re RJN, Ex. A.)

II. First Cause of Action – APA

A. The APA

Subject to certain exceptions, "[n]o state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter." (Gov. Code, §§ 11340.5(a) [quoted text], 11340.9 [application of chapter].) "'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." (Gov. Code, § 11342.600.)

A regulation subject to the APA has two principal identifying characteristics. (*Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 333.) First, the agency must intend its rule to apply

generally, rather than in a specific case. (*Ibid.*) The rule need not apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. (*Ibid.*) Second, the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure. (*Id.* at 334.)

Regulations to which the APA does not apply include: "(d) A regulation that relates only to the internal management of the state agency. [¶] (e) A regulation that establishes criteria or guidelines to be used by the staff of an agency in performing an audit, investigation, examination, or inspection, settling a commercial dispute, negotiating a commercial arrangement, or in the defense, prosecution, or settlement of a case, if disclosure of the criteria or guidelines would do any of the following: [¶] (1) Enable a law violator to avoid detection. [¶] (2) Facilitate disregard of requirements imposed by law. [¶] (3) Give clearly improper advantage to a person who is in an adverse position to the state. [¶] (f) A regulation that embodies the only legally tenable interpretation of a provision of law." (Gov. Code, § 11340.9(d)-(f).)

B. Whether the APA Applies to the Policies and Procedures

The Controller argues that the APA does not apply to the Policies and Procedures for four reasons. First, the Controller argues that the APA does not apply because the Policies and Procedures permit the auditor to exercise discretion to follow alternative procedures. (Opening Brief, 12-14 [discussing *Modesto City Schools v. Education Audits Appeal Panel* (2004) 123 Cal.App.4th 1365].) Second, the Controller contends that the Policies and Procedures are exempt from the APA because regulations governing third-party audits would instruct those wishing to hide assets exactly how to do so. (*Id.* at 14.) Third, the Controller asserts that the Policies and Procedures reflect the only legally tenable interpretation of a provision of law to the extent they restate the definition of unclaimed property. (*Id.* at 14-15.) Fourth, the Controller argues that the Legislature did not intend to require the Controller to adopt regulations, so the Controller did not intend the Policies and Procedures to be subject to the APA. (*Id.* at 15.)

ClubCorp responds that the Policies and Procedures are regulations subject to the APA for four reasons. First, ClubCorp asserts that it has adequately alleged that the Policies and Procedures have a general application because they require all third-party auditors to (1) have sufficient training or experience; (2) not participate in examinations that could be construed as creating a conflict of interest;

(3) maintain strict confidentiality of any documents gathered during the examination; (4) enter into confidentiality agreements with the Controller and the audited entity; and (5) fully disclose to the audited entity the purpose, scope, and objectives of the examination, the general approach of the examination, the procedures to be applied, the holder's appeal rights, and various other matters. (Opposition, 12.) Second, ClubCorp argues that the Policies and Procedures implement Code of Civil Procedure § 1571(c).) (*Id.* at 12-13.) Third, ClubCorp contends that the Policies and Procedures implement the UPL's audit and enforcement provisions by publicizing rules regarding how third-party examinations must be conducted. (*Id.* at 13.) Fourth, ClubCorp asserts that the Policies and Procedures govern the Controller's procedure for conducting UPL audits. (*Ibid.*)

ClubCorp contends that the Policies and Procedures are mandatory and binding on third-party auditors, not discretionary. (*Id.* at 13-14.) Further, ClubCorp argues that no exemption applies because (1) the Policies and Procedures do not relate to the internal management of the Controller's Office; (2) the Policies and Procedures cannot be used by a company to avoid its obligations under the UPL; and (3) the Policies and Procedures do not interpret any statutory law because nothing in the UPL provides any rules regarding the use of third-party auditors. (*Id.* at 14-15.)

In reply, the Controller makes two core arguments. First, the Controller argues that its adoption of the Policies and Procedures did not implement or interpret the UPL. (See Reply, 7-10.) Second, the Controller contends that the Policies and Procedures are properly within the internal management exception because they guide contractors working on behalf of the Controller. (*Id.* at 10-12.)

For the reasons that follow, on the demurrer record, the Court finds that ClubCorp has adequately alleged that the APA applies to the Policies and Procedures.

1. General Application

On their face, the Policies and Procedures apply generally to all third-party audits. (See Controller's Notice of Errata Re RJN, Ex. A.) On demurrer, the Controller urges the Court to determine from the face of the Policies and Procedures that compliance is optional, rendering the Policies and Procedures analogous to the guidelines in *Modesto*. (See Opening Brief, 13-14.) The Court declines to do so.

In *Modesto*, in relevant part, the Court of Appeal analyzed whether an audit guide was an invalid

underground regulation because it had not been adopted in compliance with the APA. (*Modesto*, 123 Cal.App.4th at 1381-82.) There, an independent auditing firm reviewed Modesto City School's independent study agreements and found that Modesto's short-term independent study agreements lacked five of the elements required by the Education Code. (*Id.* at 1371-74.) The independent auditor conducted the audit using an audit guide provided by the Controller. (See *id.* at 1381-82; Educ. Code § 1503.) The version of Education Code § 1503 that was in effect during the relevant time period provided that the audit guide contained "suggested" audit procedures and permitted the auditor to either confirm compliance with the audit guide or, if not, state what other procedures were followed. (*Modesto*, 123 Cal.App.4th at 1382.) First, the Court of Appeal held that the audit guide was not applied generally because, by statute, the auditor had discretion to choose whether or not to follow the guide. (*Ibid.*) Second, the Court of Appeal held that the audit guide did not implement, interpret, or make specific the law enforced or administered by the agency because it merely proposed procedures to be employed in conducting an audit. (*Ibid.*) Third, the Court of Appeal held that the audit guide adopted an interpretation of the independent study requirements consistent with the statute as a prelude to enforcement, which does not require compliance with the APA. (*Ibid.*)

Here, the statute required the Controller to "adopt guidelines as to the policies and procedures governing the activity of third-party auditors who are hired by the Controller." (See Code of Civ. Proc., § 1571(c).) The Controller has adopted the Policies and Procedures. (See Controller's Notice of Errata re RJN, Ex. A.)

The "Statement of Purpose" in the Policies and Procedures provides: "The guidelines contain policy and procedures governing the activities of third- party auditors conducting examinations under California's Unclaimed Property Program. The guidelines are designed to: [¶] 1. Ensure that the examinations by third-party auditors are conducted objectively and impartially. [¶] 2. Ensure that the examinations are completed promptly and without undue burden to the holders. [¶] 3. Ensure that strict confidentiality is maintained for records obtained from the state and the holders. [¶] 4. Ensure that the holder under examination is fully apprised of its appeal rights." (*Ibid.*)

The "General Policies" section contains a list of "general policies" to which third-party auditors

"shall adhere." (*Ibid.*)[2] In nearly all instances, the ensuing list uses mandatory language. (*Ibid.*) The use of discretionary language, "should," indicates that the use of mandatory language is purposeful. (See *ibid.*) The topics covered by mandatory language include information third-party auditors are required to communicate to holders of unclaimed property, confidentiality, and recordkeeping. (See *ibid.*)

The Policies and Procedures proceed to describe requirements for the "opening conference," "working papers," sampling, interstate cooperation, closure, and correspondence. (See *ibid.*) Throughout these sections, the Policies and Procedures clearly and purposefully use mandatory and discretionary language, requiring third-party auditors to undertake certain actions and vesting third-party auditors with discretion as to other actions. (See *ibid.*)

On the demurrer record, considering ClubCorp's allegations, the governing statute, and the judicially noticed material, the Policies and Procedures are intended to have a general application. The statute at issue here is materially different from the statute that was at issue in *Modesto*. Here, the statute refers to "guidelines as to the policies and procedures governing the activity of third-party auditors who are hired by the Controller." While the word "guidelines" suggests that the document will not be binding, the reference to "policies and procedures governing" activities suggests that binding rules were anticipated. Regardless of whether the Legislature intended to instruct the Controller to issue regulations or something else, the Controller has acted. The ultimate question before the Court is whether the Policies and Procedures are themselves regulations. (See *State Water Resources Control Bd. v. Office of Admin. Law* (1993) 12 Cal.App.4th 697, 703 [whether Water Code labels a regulatory directive a "regulation" or a "water quality control plan" is immaterial for the purposes of the APA].) The Policies and Procedures themselves on their face contain numerous binding rules of general application.[3]

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[2] The same section also provides that third-party auditors are to comply with their contractual obligations. This indicates that that Policies and Procedures do not comprehensively govern the relationship between the third-party auditor and the Controller. However, it also indicates that the Policies and Procedures are intended to apply to all third-party auditor arrangements.

[3] At oral argument, the Controller argued that the Court misperceived the "general application" analysis because they are not adjudicatory, in the sense that they supply the standard for adjudicating a dispute, and because they do not contain a penalty for noncompliance. For that proposition, the Controller directed the Court to *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557. There, the California Supreme Court held that the "policy [before it] was expressly intended as a rule of general application to guide deputy labor commissioners on the applicability of IWC wage orders to a particular type of employment." (*Tidewater*, 15 Cal.4th at 572.) The California Supreme Court found that the policy before it was a regulation subject to the APA, it did not reject the application of the APA to the policy before it. (See *ibid.*) In so doing, the California Supreme Court explained that a rule need not have

Accordingly, at the demurrer stage, the Court is satisfied that the first element of the test for an "underground regulation," as laid out in *Modesto*, satisfied. (See *Modesto*, 123 Cal.App.4th at 1381.)[4]

2. Implement, Interpret, or Make Specific the Law Enforced or Administered by the Agency, or Govern its Procedure

The parties agree that the Policies and Procedures do not interpret the UPL. (Compare Opposition, 15; with Reply, 8.) The parties dispute whether the Policies and Procedures implement the UPL. (Opposition, 12-13; Reply, 9.)[5] For the reasons that follow, the Court concludes, on the demurrer record, that the Policies and Procedures do implement the UPL.

To begin, the Policies and Procedures tell third-party auditors how to conduct audits. Some of the instructions are mandatory. Some of the instructions are discretionary suggestions. The instructions are not comprehensive.

In *Modesto*, the Court of Appeal summarily rejected the suggestion that "propose[d] procedures to be employed in conducting an audit" "implement[ed], interpret[ed], or ma[d]e specific the law enforced or administered by the agency." (*Modesto*, 123 Cal.App.4th at 1382.) However, ClubCorp argues that *Californians for Pesticide Reform* provides a closer analogy. (Opposition, 12-13.) There, the parties disputed whether the Department of Pesticide Regulation's policy of prioritizing pesticides for risk assessment was a regulation subject to the APA. (See *Californians for Pesticide Reform*, 184

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universal application to apply generally, the requirement is satisfied by a rule that declares how a certain class of cases will be decided. (*Id.* at 571.) That recitation of the law does not mean that the only way general application can be shown is by showing that the regulation is a rule that will determine disputes, it merely explains that a rule that determines a class of disputes is a rule of general application. (*Ibid.*) For example, *Californians for Pesticide Reform v. Department of Pesticide Regulation* (2010) 184 Cal.App.4th 887 involved an internal policy that constituted a rule of general application. There, an internal policy governing the agency's prioritization of pesticides for review was a rule of general application because the "formal[] or informal[]" enforcement of the pesticide prioritization process would have a "broad and long-term application" as a "priority list" that "will be applied to all pesticides in the state," as opposed to on a discrete and specific project or during a discrete and specific time period. (*Californians for Pesticide Reform*, 184 Cal.App.4th at 907.) The same is true here on the demurrer record. On the facts alleged, the Policies and Procedures set forth rules that, whether enforced formally or informally, will have a broad and long-term application to all unclaimed property audits conducted by all third-party auditors hired by the Controller.

[4] *Taye v. Coye* (1994) 29 Cal.App.4th 1339 does not help the Controller. There, the Court of Appeal held that the auditor had not applied an auditing method that constituted a standard of general application used in all Medi-Cal cases, crediting testimony from the auditor concerning the methods he used. (*Taye*, 29 Cal.App.4th at 1345.) That mode of analysis is not possible on a demurrer.

[5] ClubCorp also asserts that the Policies and Procedures govern the Controller's procedure. (Opposition, 8.) The Court need not reach this argument, which is not supported by citation to caselaw, in light of the analysis in the body.

Cal.App.4th at 892-93, 906-09.) The Court of Appeal determined that the prioritization policy was generally applicable because it was a priority list that applied to all pesticides in the state. (*Id.* at 906-07.) The Court of Appeal determined that the prioritization was adopted to implement a statute because the purpose of the prioritization process was to make the implementation of the statute more efficient by determining the order in which pesticides will undergo risk assessment. (*Id.* at 907.) Nevertheless, the Court of Appeal held that the prioritization fell outside the scope of the APA because the internal management exception applied. (*Id.* at 907-09.)

Here, Code of Civil Procedure § 1571 is the provision of the UPL at issue. The Controller, through the Policies and Procedures, has taken the position that Code of Civil Procedure § 1571(a)-(b) have given the Controller broad latitude to conduct audits herself or with the assistance of a third-party auditor. (See Controller's Notice of Errata re RJN, Ex. A.) Those provisions do not address how an audit will proceed. (See Code of Civ. Proc., § 1571(a)-(b).) However, Code of Civil Procedure § 1571(c) requires the Controller to adopt guidelines as to the policies and procedures governing the activity of third-party auditors. Ultimately, the Controller has statutory authority to compel an audit and/or otherwise enforce the UPL. (See Code of Civ. Proc., § 1572.)

In the Court's view, the Policies and Procedures implement at least Code of Civil Procedure § 1571(b),[6] which authorizes the Controller to retain third-party auditors to conduct audits.[7] Simply, the

[6] At oral argument, ClubCorp argued that even if Code of Civil Procedure § 1571(b) can be said to authorize third-party audits, the universe of third-parties addressed by that provision excludes private contractors such as ASUS. The Controller responded that even if Code of Civil Procedure § 1571(b) does not authorize her to contract with private entities to conduct audits, there is an implicit statutory authorization for her to do so. Taking a step back from this dispute, the Policies and Procedures themselves expressly rely on Code of Civil Procedure § 1571(b) as "authority for the Office of the State Controller to request that the unclaimed property examination be conducted by third-party auditors on behalf of the State of California." (Controller's Notice of Errata re RJN, Ex. A.) On the demurrer record, the Court is satisfied that the Controller adopted the Policies and Procedures to implement the Controller's authority under Code of Civil Procedure § 1571(b). It is immaterial to this conclusion, and to the resolution of the present motion, whether a private contractor such as ASUS is within the grant of authority under Code of Civil Procedure § 1571(b). Separately, ClubCorp argues that the Policies and Procedures implement Code of Civil Procedure § 1571(c), which requires the Controller to adopt guidelines. In that vein, Code of Civil Procedure § 1571(c) appears to be the primary tether to which the Controller may be able to attach an implicit authorization to hire private contractors such as ASUS as a third-party contractor. To the extent there is such an implicit grant of authority, whether tethered to Code of Civil Procedure § 1571(c), some other provision, or free-floating, the Policies and Procedures implement that authority. Of course, the adoption of the Policies and Procedures was also intended to comply with Code of Civil Procedure § 1571(c). The Court does not reach the question of whether the adoption of guidelines constitutes an implementation of, as opposed to mere compliance with, the express terms of that provision. Nor does the Court reach the question of whether the Legislature intended to

Policies and Procedures contain numerous requirements that govern UPL audits conducted by third-party auditors under the supervision of the Controller pursuant to the statutory authority granted by Code of Civil Procedure § 1571(b). The analogy to *Californians for Pesticide Reform* is closer than the analogy to *Modesto*. As in *Californians for Pesticide Reform*, the Policies and Procedures here set forth a policy governing how a grant of statutory authority will be implemented. Unlike *Modesto*, the Policies and Procedures include, on their face, binding rules, not mere suggestions. On a demurrer, the second prong of the test for an underground regulation is satisfied.

3. Exemptions

a. Internal Management

The parties dispute whether the internal management exception can apply, given that the Policies and Procedures govern conduct of third parties retained by the Controller to conduct audits. (Compare Opening Brief, 14; Opposition, 14; Reply, 10-11.) On demurrer, the Court finds the exception inapplicable to the Policies and Procedures.

The internal management exception does not apply to a decision-making process that implicates the interests of persons and entities outside the state agency. (*Cal. School Bds. Ass'n v. State Bd. of Educ.* (2010) 186 Cal.App.4th 1298, 1334.) For example, a methodology for determining which companies to select for investigation under an enforcement program – an internal enforcement and selection mechanism – is not a regulation. (See *ibid.* [citing *Americana Termite Co. v. Structural Pest Control Bd.* (1988) 199 Cal.App.3d 228, 233]; see also *Californians for Pesticide Reform*, 184 Cal.App.4th at 907-09.) Even so, the exception is narrow and has been held inapplicable, even where the policies govern internal administrative matters, if the policies or procedures affect the interests of persons

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foreclose any audit from being conducted by a third-party auditor hired by the Controller unless and until the Controller had complied with Code of Civil Procedure § 1571(c).

[7] The Controller argued that the collection of cases discussed in *Tidewater*, 14 Cal.4th at 571-72, illustrates that the Policies and Procedures in issue here do not implement a statute. (See Reply, 8.) The closest analogy is *People v. French* (1978) 77 Cal.App.3d 511. There, the parties disputed whether a DOJ checklist for conducting breath tests constituted regulations. (*French*, 77 Cal.App.3d at 519.) The Court ruled that the checklist did not. (*Ibid.*) The Court ruled that the DOJ checklist could not be a regulation because the checklist was not adopted pursuant to a statute enforced or administered by the DOJ as there was no statutory grant of authority to that department. (*Ibid.*) The agency in which statutory authority had been vested had adopted a regulation governing breath tests. (See *id.* at 520.) Here, in contrast, the Controller is the agency who has been granted statutory authority to either conduct audits, or delegate responsibility to third-party auditors overseen by her office.

other than the agency itself. (*Cal. School Bds. Ass'n*, 186 Cal.App.4th at 1334 [collecting cases].)

By its plain language, the exception applies to regulations that relate "only to the internal management of the state agency." (Gov. Code, § 11340.9(d).) Third-party auditors are not internal to the state agency. Accordingly, on its face the exception is inapplicable. Moreover, ClubCorp has alleged that it, as an entity subject to an audit as an alleged holder of unclaimed property, is directly affected by the Policies and Procedures such that it has an interest in ensuring their legitimacy. (See Cross-Complaint ¶¶ 41, 45, 97, 110, 130; *Cal. School Bds. Ass'n*, 186 Cal.App.4th at 1334.) For all the foregoing reasons, the Court finds the exception inapplicable on the demurrer record.

b. Staff Audit Guidelines

The Controller implies that the APA does not apply to the Policies and Procedures because disclosure of the Policies and Procedures would (1) enable a law violator to avoid detection; (2) facilitate disregard of requirements imposed by law; or (3) give clearly improper advantage to a person who is in an adverse position to the state. (Opening Brief, 14; Gov. Code, § 11340.9(e).) Among other things, ClubCorp responds that any such argument is premature on a demurrer because the Controller will have to adduce facts to support any of these findings. (Opposition, 14-15.) ClubCorp also questions whether the Policies and Procedures would be made publicly available, as they are, if their public disclosure would cause any of the ills identified by the Controller. (*Ibid.*)

In the demurrer context, the Court is satisfied that ClubCorp has alleged the applicability of the APA. To the extent the Controller argues that the evidence will show that the predicates for the application of this exemption apply, the Controller will have an opportunity to adduce that evidence.

c. Only Legally Tenable Interpretation of the Law

To the extent the Policies and Procedures interpret the law, the Controller argues that the interpretation set forth in the policies and procedures is the only legally tenable one. (Opening Brief, 14-15.) This argument is intended to head off the possibility that the Policies and Procedures may be treated as a regulation because they restate, for example, the definition of unclaimed property. (*Ibid.*) But, as discussed above, the parties have agreed and the Court has assumed that the Policies and Procedures do not interpret the UPL. Accordingly, this exception is not implicated.

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C. Other Issues

ClubCorp alleges the violation of the APA as a standalone cause of action. In the moving papers, the Controller's lone challenge to the APA cause of action is on the ground that the APA does not apply to the Policies and Procedures. (See Opening Brief, 6, 11-15; see also Reply, 7-12.) In the reply brief, the Controller adds an additional argument. (Reply, 10 n.2.)[8] Specifically, the Controller contends that ClubCorp cannot assert a cause of action pursuant to the APA because the Policies and Procedures do not apply to or affect ClubCorp. (See *ibid.*) This belated argument is unpersuasive in the demurrer context, ClubCorp has adequately alleged that the Policies and Procedures directly impact ClubCorp as set forth above. (See Cross-Complaint ¶¶ 41, 45, 97, 110, 130.)

III. Third Cause of Action – Ultra Vires

ClubCorp alleges that the Policies and Procedures are invalid because, among other things, they were not properly promulgated under the APA and/or in compliance with Code of Civil Procedure § 1571(c). (Cross-Complaint ¶¶ 121-122.) Going further, ClubCorp alleges that any audit conducted by a third-party auditor is invalid because the Controller never enacted valid Policies and Procedures. (*Id.* at ¶¶ 124-125.)

In her demurrer, the Controller does not seem to dispute that if the Policies and Procedures were required to be promulgated pursuant to the APA, then the Policies and Procedures themselves are invalid. (Opening Brief, 17-18; Reply 13-14.) However, the Controller does dispute the contention that the audits conducted by third-party auditors are in turn invalid. (See Opening Brief, 17-18; Reply, 13-14.) In opposition, ClubCorp argues that both the adoption of the Policies and Procedures and the use of a third-party auditor is ultra vires and must be voided. (Opposition, 18-20.)

A general demurrer is properly overruled where a complaint states a claim under any possible legal theory. (See *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) Consistent with the discussion above, in which the Court overrules the demurrer to the first cause of action, the Court concludes that ClubCorp has stated a claim under its third cause of action insofar as ClubCorp challenges the validity of the Policies and Procedures. Accordingly, the Court overrules the demurrer to the third

[8] The footnote also suggests that the second cause of action for writ of mandate and the first cause of action for violation of the APA are a single inseparable cause of action. The Court need not reach any such contention, as it overrules the demurrer to both causes of action separately.

cause of action.[9]

IV. Second Cause of Action – Writ of Mandate

ClubCorp asks the Court to issue a writ of mandate directing the Controller to set aside the Policies and Procedures, to refrain from any use of third-party audit firms to conduct unclaimed property examinations, and to vacate and reverse all unclaimed property examinations that were conducted by third-party audit firms because the Policies and Procedures are unlawful. (Cross-Complaint ¶¶ 112, 114.) ClubCorp alleges that it is irreparably harmed by the Controller's adoption of the Policies and Procedures and that it has no plain, speedy, and adequate remedy at law to challenge the guidelines other than by seeking a writ of mandate. (*Id.* at ¶¶ 116-117.)

In the opening brief, the Controller argued only that its demurrer should be sustained because the APA does not apply and the Controller adopted the Policies and Procedures in compliance with Code of Civil Procedure § 1571(c). (Opening Brief, 16.) The Court rejects these contentions for the same reasons that it overrules the demurrer to the first and third causes of action.

In reply, the Controller argued for the first time that that ClubCorp may not seek relief by way of a writ of mandate because (1) the Policies and Procedures do not apply to ClubCorp; and (2) ClubCorp has a plain, speedy, and adequate remedy at law – it can dispute or appeal the results of an audit conducted by a third-party auditor. (Reply, 10 n.2.) These belated arguments are unpersuasive.

"A writ of mandate may be issued against a public body or public officer to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust or station in cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. Two basic requirements are essential to the issuance of the writ: (1) A clear, present and usually ministerial duty upon the part of the respondent; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty. A ministerial duty is one generally imposed upon a person in public office who by, virtue of that position, is obligated to perform in a prescribed manner required by law when a given state of facts exists." (*Flores v. California Dept. of Corrections and Rehab* (2014) 224 Cal.App.4th 199, 205 [citations and quotation marks omitted].) As a general proposition courts will not

[9] In so doing, the Court does not rule on ClubCorp's contention that the use of a third-party auditor is ultra vires if the Policies and Procedures are invalid.

issue a writ of mandate to enforce an abstract right of no practical benefit to petitioner, or where to issue the writ would be useless, unenforceable, or unavailing. (*County of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 595-96.)

ClubCorp has adequately pled a claim for writ relief predicated on its request for a writ directing the Controller to set aside the Policies and Procedures. As discussed above, at the demurrer stage the Cross-Complaint, read in the context of the record before the Court by way of judicial notice, is sufficient to allege the invalidity of the Policies and Procedures. It follows that the Policies and Procedures must be set aside and replaced. ClubCorp, as an entity subject to an audit by a third-party auditor, has a clear, present, and beneficial right in the performance of that duty. ClubCorp, as an audited entity, is the type of entity that the promulgation of guidelines after the appropriate process is intended to benefit because the guidelines ensure, among other things,[10] that ClubCorp is treated fairly by the auditor. (See Controller's RJN, Ex. 1 at 4016-0113 [author's letter to governor explaining that the bill "would assist owners of unclaimed property and provide a few protections and rights for holders of unclaimed property; suggesting through the use of the word "additional" that the disclosure requirements imposed on the Controller were intended to be a benefit for holders of property]; Controller's Notice of Errata Re RJN, Ex. A.) Moreover, ClubCorp has adequately alleged its beneficial interest in valid guidelines. (See Cross-Complaint ¶¶ 41, 45, 97, 110, 130.) Further, the Court is not persuaded on the demurrer record that an opportunity to dispute the findings resulting from an audit that is conducted without proper guidelines in place constitutes a plain, speedy, and adequate remedy at law. For all of the foregoing reasons, the demurrer to the second cause of action is overruled.[11]

V. Fifth Cause of Action – Declaratory and Injunctive Relief

In the caption of the Cross-Complaint, the fifth cause of action is described as a claim for declaratory and injunctive relief. In the body, it is described as a claim for declaratory relief. (Cross-Complaint ¶¶ 153-162.) Injunctive relief is listed only as a remedy sought, specifically referenced in

[10] The guidelines are also intended to ensure that third-party auditors do not have a conflict of interest, which may be in the form of a relationship with the audited entity. (See Controller's RJN, Ex. 1 at 4016-0110.)

[11] As with the third cause of action, addressed above, the Court does not reach ClubCorp's theories that the Controller must not proceed with any audits using a third-party auditor or that any past audits must be invalidated in ruling on the present demurrer.

only the first cause of action. (See Cross-Complaint ¶¶ 35, 110, Prayer for Relief ¶ 9.) Both parties summarily brief the fifth cause of action as a derivative cause of action. (Opening Brief, 20; Opposition, 22; but see Reply, 15 [raising ripeness challenge].)

First, the Court interprets the fifth cause of action as a cause of action for declaratory relief. Injunctive relief is a remedy sought in connection with the causes of action set forth above. The Court need not and does not presently decide whether ClubCorp may be entitled to that remedy – the causes of action are well pled. There is no need for a separate cause of action for injunctive relief, and none is included in the Cross-Complaint.

Second, the Controller's treatment of the declaratory relief claim as a derivative claim fails to address the standards for pleading a declaratory relief claim. A complaint for declaratory relief is legally sufficient if the facts alleged reveal an actual controversy between the parties – the pleader need not establish it is entitled to a favorable judgment. (*Alameda County Land Use Ass'n v. City of Hayward* (1995) 38 Cal.App.4th 1716, 1722; *Centex Homes v. St. Paul Fire & Marine Ins. Co.* (2015) 237 Cal.App.4th 23, 29; *Market Lofts Community Ass'n v. 9th Street Market Lofts, LLC* (2014) 222 Cal.App.4th 924, 931.) The existence of an actual controversy does not turn on who will win, it turns on whether the parties have a disagreement about their legal rights and obligations that is ripe for judicial review. (See *Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1582; *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 909-10.) The Controller has not identified any deficiency in the allegations.[12] The demurrer to the fifth cause of action is overruled.

VI. Fourth Cause of Action – Due Process

A. Procedural Due Process

"A person may not be deprived of life, liberty, or property without due process of law or denied

[12] In reply, the Controller argues that a delay in ruling on ClubCorp's due process claim will not visit a hardship upon ClubCorp because no audit has yet taken place. (Reply, 14-15.) But the declaratory relief claim is not predicated solely on the due process claim – it is primarily predicated on the dispute regarding the validity of the Policies and Procedures and the implications the validity of the Policies and Procedures have on the Controller's authority to use a third-party auditor to audit ClubCorp. (Cross-Complaint ¶¶ 154-160.) That controversy has progressed to the point that the Controller has filed suit seeking to compel ClubCorp to submit to an audit – the audit is not presently proceeding because the parties are at impasse regarding the Controller's authority to use a third-party auditor and the Court has not ruled on the dispute. Whether or not the due process claim is ripe, the Controller has alleged a ripe claim for declaratory relief.

equal protection of the laws[.]" (Cal. Const., art. I, § 7(a); accord U.S. Const., 14th Amend. ["No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"].) The federal and state Constitutions compel the government to afford persons due process before depriving them of any property interest. (*Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 212; *Dep't of Forestry & Fire Protection v. Howell* (2017) 18 Cal.App.5th 154, 173.)

The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and an opportunity to meet it. (*Today's Fresh Start*, 57 Cal.4th at 212.) The opportunity to be heard must be afforded at a meaningful time and in a meaningful manner. (*Ibid.*) The dictates of due process are flexible and vary according to context. (*Ibid.*)

B. Application

ClubCorp alleges, for various reasons, that the Controller's use of a third-party audit firm, ASUS, to audit ClubCorp violates the due process clauses of the United States and California Constitutions. (See Cross-Complaint ¶¶ 132-133, 152.) But the alleged "protectable...interest[s]" that ClubCorp invokes are prospective – interests in money ClubCorp will have to spend if it is audited by ASUS and interests in information it will have to turn over if it is audited by ASUS. (*Id.* at ¶¶ 41, 144-147.) In reply, the Controller argues for the first time that ClubCorp cannot plead a claim for a due process violation without alleging that the audit has begun. (Reply, 14.)[13] Although the issue was not raised in the opening papers, ClubCorp cited multiple federal cases permitting a due process challenges to third-party auditing regimes to proceed before the audit was completed. (See Opposition, 20-21; *Plains All American Pipeline L.P. v. Cook* (3d Cir. 2017) 866 F.3d 534, 544-45; *Univar, Inc. v. Geisenberger* (D. Del. 2019) 409 F.Supp.3d 273, 282; but see *Fidelity & Guar. Life Ins Co. v Chiang* (Nov 13, 2014) 2014 WL 6090559, at *8.) But each of these cases require the audit to begin – the plaintiff must show that it was required to submit a dispute to a self-interested party. (*Plains All American Pipeline*, 866 F.3d at 544-45; *Univar*, 409 F.Supp.3d at 282.) Here, the audit has not begun. (See Cross-Complaint ¶¶ 41,

[13] In the opening brief, the Controller argues only that the use of a third-party auditor cannot constitute a due process violation. (Opening Brief, 18-20.)

144-147.)[14] The Court sustains the demurrer to the fourth cause of action because, on the facts alleged, ClubCorp has not been subjected to an audit.[15] ClubCorp is given leave to amend.[16]

CONCLUSION AND ORDER

The Controller's demurrer to the first, second, third, and fifth causes of action is overruled. The Controller's demurrer to the fourth cause of action is sustained with leave to amend.

IT IS SO ORDERED.

Dated: April 22, 2021

Anne-Christine Massullo
Judge of the Superior Court

[14] At oral argument, ClubCorp argued that the Court should look to the Controller's complaint in this action to see that an audit has begun. In ruling on a demurrer to ClubCorp's Cross-Complaint, the Court treats ClubCorp's allegations as true and considers judicially noticeable facts. ClubCorp has not, however, articulated a reason for the Court to look for factual allegations in support of its cross-claims in the Controller's complaint. To the extent ClubCorp can allege additional facts establishing that it is asserting a due process claim based on audit by ASUS that has begun, ClubCorp is given leave to do so.

[15] As alluded to above, ClubCorp's due process theory is one predicate for the fifth cause of action for declaratory relief. Under that cause of action, ClubCorp seeks a determination that the audit cannot go forward because, among other reasons, permitting it to go forward would result in a due process violation. As described above, the Court has overruled the demurrer to the fifth cause of action. Accordingly, the Court's ruling does not remove the due process issue from this case or deprive ClubCorp of a mechanism by which to assert its due process theory before the audit begins. However, as noted above, the Court does not presently decide whether the due process theory is ripe for resolution through a declaratory relief action, given the alternative theories that support the declaratory relief cause of action. Nor does the Court reach the substantive disputes regarding the viability of the due process theory, which in any event go beyond the proper scope of a demurrer to a declaratory relief cause of action.

[16] At oral argument, without citing to factual allegations in the Cross-Complaint, ClubCorp argued that the facts here compare favorably to the facts in *Plains All American*. On the present record, the Court disagrees. In *Plains All American*, the state contracted with a private auditor to audit the plaintiff, the private auditor sent document requests, the plaintiff wrote a letter to the state objecting to the use of a private auditor, and the state instructed the plaintiff to comply with the private auditor. (*Plains All American Pipeline*, 866 F.3d at 537-38.) At that point, the plaintiff sued. (*Id.* at 538.) The Third Circuit held that the plaintiff had raised a justiciable as-applied procedural due process challenge to the appointment of the private auditor because the plaintiff was challenging an appointment that had taken place. (*Id.* at 544-45.) Here, ClubCorp alleges not that ASUS has been appointed to conduct an audit, but that the Controller would like to retain ASUS to conduct an audit. (Cross-Complaint ¶ 41.) Accordingly, while the parties have certainly broached the subject of whether the Controller may retain ASUS to audit ClubCorp, the Controller did not cross the line identified in *All American Pipe* after which an as-applied due process claim may be asserted. But, again, the Court does not address whether the due process theory may be litigated under the declaratory relief cause of action.

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.251)

I, Ericka Larnauti, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On April 27, 2021, I electronically served the attached document via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: April 27, 2021

T. Michael Yuen, Clerk

By: _____
Ericka Larnauti, Deputy Clerk