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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CAROLYN WALLACE,

Plaintiff and Appellant,

v.

GEICO GENERAL INSURANCE  
COMPANY et al.,

Defendants and Respondents.

D061074

(Super. Ct. No. 37-2008-00079950)

APPEAL from an order of the Superior Court of San Diego County, Timothy B. Taylor, Judge. Affirmed.

This is the second appeal in this putative class action in which Carolyn Wallace alleges GEICO General Insurance Company and related entities<sup>1</sup> (collectively GEICO) wrongly denied coverage for automobile repairs performed at labor rates GEICO considered to be above prevailing market rates. In the first appeal, we reversed the trial

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<sup>1</sup> The related entities are GEICO, GEICO Casualty Company and GEICO Indemnity Company.

court's order striking the class allegations from Wallace's complaint, which was based on the court's erroneous conclusion that GEICO's post-lawsuit tender of payment of the difference between what Wallace paid for labor and what GEICO considered reasonable based on prevailing labor rates caused her to lose standing to act as a representative plaintiff on behalf of the putative class. (*Wallace v. GEICO General Ins. Co.* (2010) 183 Cal.App.4th 1390 (*Wallace I.*)) We remanded for further proceedings, including a motion regarding certification of the case as a class action. (*Id.* at p. 1403. )

Wallace subsequently moved for class certification. The trial court denied her motion on the ground that she had not submitted admissible evidence to establish the numerosity, ascertainability, and other procedural requirements for certification. In this second appeal, Wallace seeks reversal of the order denying class certification and also challenges earlier related rulings. We affirm.

## I.

### FACTUAL AND PROCEDURAL BACKGROUND

#### A. *Wallace's Lawsuit Against GEICO*

Wallace presented GEICO an estimate for repairs after her vehicle was damaged in an accident. GEICO refused to pay the full amount of the estimate because it considered the hourly labor rate charged by the repair shop to be above the prevailing market rate. Wallace had the repairs done anyway, and she paid the difference between what GEICO agreed to pay and what the repair shop charged her for labor.

Wallace filed a putative class action against GEICO. In the operative pleading, she asserted GEICO's refusal to pay the full labor charge for her repairs constituted a

breach of contract, a breach of the implied covenant of good faith and fair dealing, and a violation of the unfair competition law (Bus. & Prof. Code, § 17200 et seq.). On behalf of herself and a class of similarly situated individuals, Wallace sought damages, including punitive damages; "disgorgement of ill-gotten gains"; prejudgment interest; and costs, including attorney fees.

B. *The Trial Court Proceedings After Remand*

After we decided the first appeal and remanded the case, the parties conducted discovery on class certification issues. Wallace also filed two motions for class certification.

1. *Wallace's First Motion for Class Certification*

In her first class certification motion, Wallace asked the trial court to certify the following class:

"All eligible<sup>[2]</sup> individual purchasers of GEICO automobile insurance who are California residents and who, within four years preceding the filing of the Complaint, (1) made a claim to GEICO for insurance coverage on automobile repairs, (2) submitted a written repair cost estimate from an automobile repair shop of his or her choice to GEICO, (3) were denied the claim by GEICO, either in whole or in part, because GEICO asserted that the labor rate in the repair estimate exceeded the labor rate that GEICO was obligated to pay, and (4) were forced to either pay the difference in labor rates or become indebted to the automobile repair shop for that amount."

Wallace argued class certification was appropriate because the proposed class members were easily ascertainable and so numerous that joinder was impractical; common issues of law and fact predominated over individual issues; her claim was typical of the

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<sup>2</sup> Excluded from the class were "federal [*sic*] judges who have presided over this case," "persons employed by [GEICO]," "governmental entities and agencies" and "affiliates of [GEICO]."

proposed class; she and her counsel would adequately represent the proposed class; and a class action was superior to individual actions. In support of her motion, Wallace submitted declarations from two of her counsel. One declaration described counsel's extensive experience in class action litigation and was designed to establish that he would adequately represent the proposed class. The other declaration authenticated and attached copies of a letter from GEICO's counsel regarding production of claims files; our opinion in *Wallace I*; and selected pages from Wallace's deposition transcript.

GEICO opposed Wallace's first class certification motion. GEICO argued that Wallace's class definition was vague and overbroad; and that she had not shown, or conducted the discovery needed to show, that the proposed class members were so numerous and easily identifiable that certification was proper. GEICO also argued that the proposed class members did not share a community of interest because issues requiring individualized litigation predominated over issues that could be litigated on a classwide basis and because Wallace's claim was not typical of the proposed class. Finally, GEICO argued that a class action was not superior to other methods of adjudication, such as small claims court actions. As part of its opposition, GEICO submitted a declaration from its counsel and exhibits detailing the many efforts GEICO had made to produce to Wallace copies of documents she had requested in discovery.

The trial court denied Wallace's first motion for class certification without prejudice. The court ruled that Wallace's claim was not typical of the class, in part because GEICO had fully reimbursed Wallace for the cost of her vehicle repairs and she therefore did not meet the fourth element of the class definition. The court also ruled that

Wallace "ha[d] not shown that numerosity exists making a class action a preferable vehicle to individual lawsuits." The court directed Wallace's counsel "promptly [to] attempt to locate an appropriate class representative who could then seek class certification after discovery."

2. *Wallace's Motion to Compel GEICO to Produce Documents*

In an effort to identify class members, Wallace served GEICO with several requests for production of documents, including copies of documents it had sent its insureds notifying them of its "refusal to pay in full the labor portion of any property damage estimate" based on GEICO's assertion that the labor rate in the estimate exceeded the applicable prevailing rate (hereafter, the labor rate letters). Wallace proposed two options to locate these documents and identify potential class members: (1) GEICO or its "outside vendor" would "use the labor rate[] letters . . . , or the language employed therein, as a starting point to search the relevant databases to identify all claims in which such a letter was sent"; or (2) GEICO would provide Wallace the "raw data" from the pertinent electronic databases and allow her consultants to perform the searches. Wallace requested that "a custom query (or queries) be written to search all databases where any claims data for the class period in question is stored, including but not limited to the [electronic claims file], [activity logs], and ADSERV databases, for any field of data associated with any claim that includes the term 'prevailing' or 'rates' in any database field related to a claim."

Dissatisfied with GEICO's response, Wallace moved the trial court for an order compelling GEICO to produce copies of the labor rate letters. The focus of her motion

was the first search method mentioned above, which she called "Option One." In her motion, Wallace briefly described Option One; complained that GEICO "ha[d] been extremely evasive in terms of answering whether or not [it] deem[ed] it possible to proceed in accordance with . . . Option One"; and asserted her consultants were "confident" that responsive documents could be located pursuant to Option One.

GEICO opposed the motion to compel on several grounds. GEICO argued it could not search its own databases for labor rate letters, and proposed statistical sampling and in-house computer review as alternatives for identifying potential class members. GEICO also complained that Wallace was engaged in an "expensive fishing expedition," and argued that she should have to pay for any custom database inquiries the court might order. GEICO's opposition included declarations concerning the burden and expense of the database searches requested by Wallace.

A GEICO employee stated that it was not possible for GEICO to search its own electronic database for the labor rate letters themselves because they are stored as images without identifying metadata, but that an outside estimating vendor (CCC Information Services, Inc. (CCC)) might be able to search its databases for the letters. A representative of CCC stated that CCC "provides products and services to numerous customers in the automotive repair and the insurance industry, including GEICO." Among other things, CCC provides "appraisal software . . . that assist[s] auto body shops and insurers in the process of making comprehensive repair estimates." If GEICO used the appraisal software to print labor rate letters, "data elements" of those letters "will likely be stored in CCC data stores." To locate any letters that might be stored in its

database, which included magnetic tapes, CCC would have to compose and run "separate custom programs to each identify data, pull the data, sort the data, and eventually present it in a meaningful format." CCC estimated it would cost at least \$300,000 to perform these tasks. The GEICO employee stated that if labor rate letters were "generated by CCC, the letters may not be placed in the GEICO claims file."

The GEICO employee also responded to Wallace's argument that labor rate letters could be located and potential class members could be identified by searching GEICO's activity logs.<sup>3</sup> Such a search would require a computer programmer and an analyst to spend three to four weeks, at a cost of approximately \$75 per hour each, just to create the program needed to perform the search. Actually performing the search would require diversion of employees from their regular tasks, disrupting GEICO's business operations. Further, the accuracy and completeness of any activity logs search could not be guaranteed because there is a lack of uniformity in entries describing similar events due to the fact that the information contained in the logs is entered by multiple GEICO employees who use their own terminology and abbreviations.

The trial court granted Wallace's motion. It ordered GEICO to produce the labor rate letters and other documents responsive to her demands. The court ordered Wallace, over her objection, to "hire . . . CCC . . . to conduct an electronic search" and "pay CCC's reasonable costs to conduct the search" for the documents. The court further ordered her

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<sup>3</sup> GEICO's activity logs are electronic records of "an ongoing input of the life of all claim activity, including calls, requests, discussions, dates, car rentals, repair activity, etc." They "can be very extensive," "are claim-specific, and not designed to be searched or summarized."

to "pay the reasonable costs necessary to comply with [Insurance] Code section 791.13" by redacting protected information.<sup>4</sup>

Wallace challenged the cost-shifting portions of the order via a petition for writ of mandate, which this court summarily denied. According to her appellate briefing, Wallace ultimately "chose not to fund the CCC search." Nor did Wallace seek to obtain copies of the labor rate letters by an alternate, less expensive means, even though at the hearing on her motion to compel the trial court invited her to return to court with a "Plan B" (including using her own consultants to locate the labor rate letters) if she were unable to get the copies through CCC. Wallace therefore had no evidence there were other GEICO insureds who, like her, received a labor rate letter but still paid the full labor rate charged by the auto repair shop.

### 3. *Wallace's Second Motion for Class Certification*

In her second class certification motion, Wallace asked the trial court to certify the same class she proposed in her first certification motion. She made exactly the same arguments in support of certification. Wallace also submitted much the same evidence in support of the second motion, including a declaration of counsel describing his extensive experience in class action litigation and his commitment to adequate representation of the proposed class, and attaching and authenticating copies of the same documents she had

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<sup>4</sup> Insurance Code section 791.13 generally prohibits an insurer from disclosing to third parties any personal or privileged information about an insured that was obtained in an insurance transaction unless the insured gives written authorization for the disclosure. (§ 791.13, subd. (a).) Among the types of information that may not be disclosed without authorization are the insured's name, address and medical history. (§ 791.02, subds. (q), (s).)

submitted in support of her first motion. The only evidence submitted in support of the second class certification motion that was not also submitted in support of the first were copies of (1) the tentative ruling and reporter's transcript of the hearing on the first class certification motion, (2) a stipulation and order from a proceeding before the Department of Insurance concerning GEICO's disputed labor rate practices,<sup>5</sup> (3) a GEICO activity log entry pertaining to Wallace's claim for the repairs to her vehicle, and (4) a copy of the labor rate letter GEICO sent to Wallace.

GEICO opposed Wallace's second class certification motion. GEICO argued Wallace had presented no evidence showing the putative class members were so numerous and easily identifiable that certification was proper. GEICO also repeated its earlier arguments that the proposed class members did not share a community of interest because issues requiring individualized litigation predominated over issues that could be litigated on a class-wide basis; that Wallace's claim was not typical of the proposed class; and that a class action was not superior to other methods of adjudication, such as small claims court actions. As part of its opposition, GEICO again submitted a declaration from its counsel and exhibits detailing the many efforts GEICO had made to provide

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<sup>5</sup> In that proceeding, GEICO agreed to conduct a labor rate survey and submit the results to the Department of Insurance. (*Wallace I, supra*, 183 Cal.App.4th at p. 1394.) For insureds who complained to the Department or to GEICO about GEICO's refusal to pay labor rates higher than what it considered to be prevailing rates, GEICO also agreed to make adjustments to claims and to reimburse insureds additional amounts as required by the results of the survey. (*Ibid.*) Wallace cited the stipulation and order in support of her argument that GEICO's tender of payment did not render her claim atypical for purposes of class certification because she never accepted the tender and GEICO was not required to reimburse her under the terms of the stipulation and order.

Wallace with copies of the labor rate letters and other documents she requested in discovery.

The trial court denied Wallace's second motion for class certification. After stating some general principles governing such motions, the court ruled:

"[Wallace] has failed to show a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented. [Citation.] The community of interest embodies three factors: (1) predominant common questions of law or fact; (2) class rep[resentative]s with claims or defenses typical of the class; and (3) class rep[resentative]s who can adequately represent the class. [Citations.] [Wallace's] showing as to these factors is conjecture.

"The class is only precisely defined in a theoretical sense; there is no showing by admissible evidence that members of the class are so numerous that joinder is impractical; that members of the class are easily identifiable; that common issues of law and fact predominate over individual issues; that [Wallace's] claims are typical of the entire class; that [Wallace] and her counsel will adequately represent the class; or that class action treatment is superior to individual actions."

The trial court continued:

"Despite having ample time (even before this court's ruling later reversed by the Court of Appeal, and certainly in the year since) to identify class members and provide the court with some evidentiary basis to identify those who are in the (now redefined) class versus customers of [GEICO] generally, [Wallace] has failed to do so. There is therefore no basis upon which the court could conclude that class notice which would comport with due process and not be impermissibly overbroad could be given. Accordingly, the motion must be denied."

## II.

### DISCUSSION

Wallace contends the trial court abused its discretion when it ordered her to pay CCC the costs of searching its electronic databases for labor rate letters and denied her

motions for class certification. She also contends the trial judge's errors in handling the case require assignment to a different judge on remand. As we shall explain, Wallace's contentions have no merit.

A. *Standards of Review*

We review an order denying class certification for abuse of discretion. (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1022 (*Brinker*); *Morgan v. Wet Seal, Inc.* (2012) 210 Cal.App.4th 1341, 1353.) An order denying class certification is presumed correct, and it will not be reversed on appeal unless it is not supported by substantial evidence (including reasonable inferences drawn from the evidence) or rests upon improper criteria or erroneous legal assumptions. (*Brinker*, at p. 1022; *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435-436.) Although we must analyze the reasons given by the trial court for denying certification, "[a]ny valid pertinent reason stated will be sufficient to uphold the order." (*Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 656 (*Caro*); accord, *Linder*, at p. 436.) "So long as that court applies proper criteria and its action is founded on a rational basis, its ruling must be upheld." (*Hamwi v. Citinational-Buckeye Inv. Co.* (1977) 72 Cal.App.3d 462, 472; accord, *Brinker*, at p. 1022.)

We also review for abuse of discretion orders on motions to compel discovery responses, including orders shifting the costs of responding. (*John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1186; *Toshiba America Electronic Components v. Superior Court* (2004) 124 Cal.App.4th 762, 767-768 (*Toshiba*.) We presume the trial court's order is correct, and we "uphold the trial court's determination, even if we disagree with

it, so long as it is within reason." (*Cates v. California Gambling Control Com.* (2007) 154 Cal.App.4th 1302, 1312 (*Cates*)). We "may affirm a trial court ruling on any proper basis presented by the record, whether or not relied upon by the trial court." (*Ibid.*)

B. *Analysis of Wallace's Claims of Error*

Wallace argues the court erred by refusing to certify a class and by depriving her of discovery needed to support certification. Specifically, she contends the court abused its discretion when it denied her first class certification motion on the ground that her claim was not typical of the class and when it ordered her "to fund a fruitless and prohibitively expensive method of searching for the labor rate letters." (Capitalization altered, boldface omitted.) She further contends these erroneous orders "fatally infected" the order denying her second class certification motion. We disagree. As we shall explain, the trial court properly concluded that, despite adequate opportunity for discovery, Wallace had presented no evidence the putative class members were so numerous or readily identifiable as to justify class certification.

We begin with the general principles regarding the ascertainability element of a class action. A case may be prosecuted as a class action "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court." (Code Civ. Proc., § 382.) To obtain certification of a case as a class action, the party advocating certification must demonstrate, among other factors, "the existence of an ascertainable and sufficiently numerous class." (*Brinker, supra*, 53 Cal.4th at p. 1021.) "Whether a class is ascertainable is determined by examining (1) the class definition, (2) the size of the class,

and (3) the means available for identifying class members." (*Reyes v. Board of Supervisors* (1987) 196 Cal.App.3d 1263, 1271.) "A class is ascertainable if objective means are available to identify its individual members at a reasonable expense." (*Bridgeford v. Pacific Health Corp.* (2012) 202 Cal.App.4th 1034, 1041.) Generally, class members are ascertainable when they can be easily identified by reference to official or business records. (*Archer v. United Rentals, Inc.* (2011) 195 Cal.App.4th 807, 828 (*Archer*); *Sevidal v. Target Corp.* (2010) 189 Cal.App.4th 905, 919 (*Sevidal*); *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932 (*Rose*).

The ascertainability element is not merely a formal or a technical requirement of class action procedure. "Rather, it goes to the heart of the question of class certification, which requires a class definition that is "precise, objective and presently ascertainable." [Citation.] Otherwise it is not possible to give adequate notice to class members or to determine after the litigation has concluded who is barred from relitigating.'" (*Global Minerals & Metals Corp. v. Superior Court* (2003) 113 Cal.App.4th 836, 858; see also *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 914 ["Ascertainability is required in order to give notice to putative class members as to whom the judgment in the action will be res judicata."].) Indeed, "[b]ecause of the constitutional importance of notifying absent class members — who are suddenly before the court — such notice should not be left to the whim of litigants." (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 454.)

Here, the trial court refused to certify the case as a class action in part because Wallace had not proven the existence of class members who were numerous and

ascertainable. In denying her first certification motion, the court noted Wallace "has not shown that numerosity exists making a class action a preferable vehicle to individual lawsuits." In denying her second class certification motion, the court stated that "there is no showing by admissible evidence that members of the class are so numerous that joinder is impractical [or] that members of the class are easily identifiable." The court also expressed concern that Wallace's failure to identify putative class members, despite adequate time to do so, prevented it from providing them with notice that would satisfy due process. The record supports the trial court's conclusions.

The only evidence Wallace submitted with her class certification motions consisted of declarations from her counsel and attached exhibits. As noted above, the substance of the declarations pertained primarily to counsel's experience in litigating class actions. Counsel said nothing about how many putative class members existed or how they could be identified. The exhibits attached to counsel's declarations likewise contained no information about how many people were in the putative class or who they were. Wallace submitted no evidence that there was any person other than herself who resided in California, purchased an auto insurance policy from GEICO, submitted a claim for collision repairs, received a letter from GEICO refusing to pay the labor rate charged by the auto repair shop, but paid that rate anyway. In other words, she submitted no evidence that there was anyone else in the class she proposed for certification.

Nevertheless, in the legal memoranda submitted with her class certification motions, Wallace argued the putative class was numerous and ascertainable. Specifically, she asserted the putative class "*could be* thousands of individuals." (Italics

added.) This assertion was based on the fact that GEICO had received more than 20,000 auto collision repair claims during a four-month period and Wallace's inference from this fact that "it only stands to reason" that there would be thousands of putative class members. Wallace also asserted, without citation to any supporting evidence, that the identities of class members "may be easily discovered" from GEICO's records because the activity logs listed every insured who made a claim for auto collision repairs and indicated whether the insured had been sent a labor rate letter. These assertions do not satisfy Wallace's burden, however, because "unsworn averments in a memorandum of law prepared by counsel do not constitute evidence." (*Davenport v. Blue Cross of California* (1997) 52 Cal.App.4th 435, 454.)

Moreover, the inferences about numerosity that Wallace drew from the limited evidence on this issue before the trial court — that during a four-month period, GEICO had received more than 20,000 auto repair claims — are not the only reasonable ones. Although it seems reasonable to infer that those 20,000 insureds included some (perhaps even many) California residents, it does not also follow that "thousands" of insureds received labor rate letters and otherwise met Wallace's class definition. To the contrary, many insureds who submitted claims undoubtedly obtained repair estimates that included labor rates GEICO was willing to pay, and thus never received labor rate letters. Those who did receive such letters might well have chosen not to have repairs done at body shops that charged more for labor than GEICO would pay and, instead, taken their vehicles to other shops that charged lower rates GEICO would pay. Common sense dictates that an insured would rather not have to pay any portion of a larger repair bill if it

could have GEICO pay the entirety of a smaller bill for the same repairs. Thus, the trial court reasonably could infer from the limited information on which Wallace relied that her proposed class did not satisfy the numerosity requirement for certification. (See *Bauman v. Islay Investments* (1975) 45 Cal.App.3d 797, 801 (*Bauman*) [denial of class certification proper when plaintiff offered no proof anyone other than herself was member of proposed class]; *Parkinson v. Hyundai Motor America* (C.D.Cal. 2008) 258 F.R.D. 580, 590 [plaintiffs' "conclusory statement that an undefined 'many' are in the proposed class is insufficient" to establish numerosity].)

Wallace's inference that it would be easy to identify class members is also not the only one that can be drawn from the limited facts upon which she relied. Wallace correctly pointed out in her class certification motions that GEICO maintains activity logs that identify insureds who submitted a claim for auto collision repairs and to whom GEICO sent a labor rate letter. But to be included in the class proposed by Wallace, the insured also must have paid, or become indebted to, an auto body repair shop for the difference between the labor charge in the repair estimate and what GEICO was willing to pay. Wallace submitted no evidence that GEICO's activity logs contain information on that element of her class definition. In fact, the excerpt from GEICO's activity log pertaining to her own claim, which Wallace submitted as part of her second class certification motion, contained no information that she had paid the labor cost differential. Moreover, GEICO submitted a declaration in opposition to Wallace's discovery motion in which its employee stated that the activity logs are "not designed to be searched or summarized" and that "GEICO does not do such searches in its business."

On this record, the trial court could reasonably conclude that class members were not ascertainable because they could not "be identified readily without unreasonable expense or time by reference to official or business records." (*Archer, supra*, 195 Cal.App.4th at p. 828; see also *Sevidal, supra*, 189 Cal.App.4th at p. 921 [class members were not ascertainable when defendant's computer records could identify customers who met some elements of class definition but not all]; *Bauman, supra*, 45 Cal.App.3d at p. 801 [denial of class certification was proper when plaintiff failed to produce information identifying class members she contended could be readily ascertained from defendants' books and records].)

We acknowledge that the trial court did not expressly state these inferences as reasons for denying Wallace's class certification motion, and other inferences reasonably can be drawn. Nevertheless, "[w]e must '[p]resum[e] in favor of the certification order . . . the existence of every fact the trial court *could* reasonably deduce from the record . . .'" (*Brinker, supra*, 53 Cal.4th at p. 1022, italics added.) "Where a certification order turns on inferences to be drawn from the facts, "the reviewing court has no authority to substitute its decision for that of the trial court."" (*Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1287.) We therefore may not set aside the trial court's conclusion that Wallace did not prove the existence of a class whose members were numerous and readily identifiable, a burden that "rested squarely with [her]." (*Cooper v. American Sav. & Loan Assn.* (1976) 55 Cal.App.3d 274, 286; see also *Brinker*, at p. 1021 ["party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class"].) Furthermore, because

Wallace did not meet this burden, the trial court did not abuse its discretion by refusing to certify her case as a class action. (*Sevidal, supra*, 189 Cal.App.4th at p. 922; *Bauman, supra*, 45 Cal.App.3d at pp. 802-803.)

Wallace complains on appeal, however, that the trial court erred by denying class certification because its discovery order prevented her from proving the existence of an ascertainable class. According to Wallace, "[i]f the court had ordered GEICO to search its own [activity logs] for references to the labor rate letters, rather than ordering [her] to fund a fruitless and prohibitively expensive search by CCC, [she] could have identified other similarly situated class members and supplied the very evidence the trial court ultimately found to be lacking." "Without this essential discovery," Wallace contends, she "was hamstrung in her ability to make an evidentiary showing on the relevant factors for class certification. She could not prove that there was an ascertainable class with numerous members, because the trial court had refused to order GEICO to conduct the necessary search of its own databases that would have uncovered such evidence." We are not persuaded.

Wallace is in no position to challenge the trial court's discovery order, which required her to employ CCC to conduct the search for the labor rate letters. In her motion to compel production of documents and in her counsel's supporting declaration, Wallace specifically proposed that "GEICO IT staff, *or GEICO's outside vendor*," i.e., CCC, use the labor rate letters (or language contained in them) "as a starting point to search *the relevant databases* to identify all claims in which such a letter was sent." (Italics added.) In correspondence that led up to the motion (also included as part of the motion), Wallace

requested custom queries "be written" to search "*all databases . . . where any claims data for the period in question is stored.*" (Italics added.) Having demanded such a broad search by GEICO or CCC, Wallace is not being entirely forthright when she argues on appeal that she "never asked the court to order that CCC search *its own* databases for the labor rate letters." And, having induced the trial court to order one of the search options she proposed, Wallace will not be heard to complain on appeal that the court erred in doing so. (See, e.g., *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 420 ["plaintiffs are estopped to complain of the trial court's error because they participated in its commission"]; *Telles Transport, Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159, 1167 (*Telles Transport*) ["a party is estopped from asserting prejudicial error where his own conduct caused or induced the commission of the wrong"].)

Even if Wallace had not lost her right to challenge the discovery order on appeal, we would reject the challenge because the trial court acted within its discretion by issuing the order. In deciding whether to order precertification discovery concerning the identity of potential class members, a trial court has discretion and must weigh potential abuses of the class action procedure against potential benefits that might be gained. (*Starbucks Corp. v. Superior Court* (2011) 194 Cal.App.4th 820, 825; *CashCall, Inc. v. Superior Court* (2008) 159 Cal.App.4th 273, 284.) As part of that discretion, the court may order the party demanding discovery to pay any "significant 'special attendant' costs beyond those typically involved in responding to routine discovery." (*San Diego Unified Port Dist. v. Douglas E. Barnhart, Inc.* (2002) 95 Cal.App.4th 1400, 1405.) One type of

special attendant costs a demanding party *must* pay is costs incurred to locate electronically stored data "through detection devices" and to "translate any data compilations included in the demand into reasonably usable form." (Code Civ. Proc., § 2031.280, subd. (e); see *Toshiba, supra*, 124 Cal.App.4th at p. 773 [Code Civ. Proc., § 2031.280, subd. (e) "shifts to the discovering party the expense of translating a data compilation into usable form"].) Here, the evidence indicated the labor rate letters Wallace requested in discovery were likely stored on magnetic tapes in CCC's database; and to produce copies of the letters would have required CCC to compose and run several different computer programs to identify, pull, sort and present the data in a meaningful format. The trial court therefore was required by statute to shift to Wallace the reasonable costs of CCC's electronic database search.<sup>6</sup> Consequently, its order granting the requested discovery and directing Wallace to pay those costs was "within reason" and not, as she contends, an abuse of discretion. (*Cates, supra*, 154 Cal.App.4th at p. 1312.)

We also reject Wallace's related argument that because CCC's electronic database search would have been "fruitless and prohibitively expensive," the trial court was required instead to order GEICO to search its own activity logs for references to labor

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<sup>6</sup> It is not clear the redaction costs the trial court also ordered Wallace to pay — a ruling she challenges on appeal — qualify as "special attendant" costs that may be shifted to the demanding party. We need not decide the point, however. Although Wallace resisted having to pay the costs of conducting an electronic database search for the labor rate letters, she made no discernible argument in the trial court that she did not have to pay the costs of redacting personal information from responsive documents. She therefore forfeited her appellate challenge to the portion of the discovery order directing her to pay redaction costs. (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 264-265; *Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1065-1066.)

rate letters, a method Wallace asserts would have been "cheaper and far more effective." As we shall explain, neither the record nor the law supports her contentions.

The search of CCC's database would not necessarily have been so ineffective or costly as Wallace complains. Although Wallace is correct that "GEICO submitted no evidence that the labor rate letters were in fact 'printed by GEICO using the CCC [appraisal software,]" GEICO did submit evidence from which it may be inferred that CCC could recover labor rate letters from its electronic database, namely, the declarations stating that GEICO used CCC as its estimating vendor, that CCC used appraisal software in the estimate process, and that if that software were used to print labor rate letters, "data elements" of the letters would "likely be stored in CCC data stores." From that evidence, the trial court reasonably could conclude that a search of CCC's database was an appropriate method of discovery because it "appear[ed] reasonably calculated to lead to the discovery of admissible evidence." (Code Civ. Proc., § 2017.010; see *Lipton v. Superior Court* (1996) 48 Cal.App.4th 1599, 1612 [discovery is proper when it "*might lead*" to admissible evidence (italics added)].) Nor would a search of CCC's electronic database necessarily have been so unduly costly as Wallace complains. Although CCC estimated it would cost at least \$300,000 to search for and recover the labor rate letters, the trial court ordered Wallace to pay only the "*reasonable costs*" of the search. (Italics added.) The cost-shifting required by Code of Civil Procedure section 2031.280, subdivision (e) "does *not* mean that the demanding party must always pay *all* the costs associated with retrieving usable data from backup tapes." (*Toshiba, supra*, 124 Cal.App.4th at p. 773, italics added.) Accordingly, since the search of CCC's electronic

database would not necessarily have been "fruitless" or "prohibitively expensive," the court did not err by ordering Wallace to undertake that search. (See *id.* at pp. 767-768 [discovery management lies within trial court's discretion, and order granting discovery will not be reversed if authorized by law and supported by evidence].)

In any event, if Wallace truly believed the search of CCC's database would be unproductive or its \$300,000 estimate was unreasonable, she was not without remedy. She could have sought relief from the trial court in the form of a protective order after developing information (e.g., by searching and translating a sample of CCC's tapes to find out whether they contained useful information) relevant to a determination of the extent to which she should have to pay for the search. (See *Toshiba, supra*, 124 Cal.App.4th at p. 773.) Alternatively, Wallace could have returned to the trial court and presented a "Plan B" — *as the court expressly invited her to do* — if she could not get the discovery she needed through CCC. Her failure to take these steps in the trial court precludes her from attacking on appeal the cost-shifting aspect of the court's discovery order. (See, e.g., *Telles Transport, supra*, 92 Cal.App.4th at p. 1167 ["a party loses the right to appeal an issue caused by affirmative conduct or by failing to take the proper steps at trial to avoid or correct the error"].)

The record also does not support Wallace's contention that a search of GEICO's activity logs would have been a "cheaper and far more effective" way to locate labor rate letters than a search of CCC's electronic database would have been. The only detailed evidence regarding an activity log search was contained in GEICO's employee's declaration submitted in opposition to Wallace's discovery motion. The employee stated

activity logs are "not designed to be searched or summarized," and "GEICO does not do such searches in its business." To perform the search requested by Wallace, a computer programmer and an analyst would have to spend three to four weeks, at a cost of approximately \$75 per hour each, just to create a customized program to perform the search, the results of which likely would be inaccurate and incomplete due to a lack of uniformity in entries describing similar events. Even if the activity log indicated a labor rate letter was sent, if the letter was generated using CCC's appraisal software, hard copies of the letters might not have been placed in GEICO's claim files. If the search produced any responsive data, GEICO would then manually have to redact any protected information about the insured. The analysis and programming needed to search the activity logs for labor rate letters and redaction of any letters that might be located would require diversion of employees from their regular tasks, which would be "disruptive to GEICO business" and "difficult to achieve within GEICO's operational environment." Thus, a search of GEICO's activity logs for references to labor rate letters, though technologically feasible, would have been expensive, time-consuming and potentially unproductive.

Wallace points to no evidence regarding the feasibility of the activity log search to contradict that submitted by GEICO. The only evidence she cites in support of her argument that such a search would have been a cheaper and more effective way to locate labor rate letters than a search of CCC's electronic databases would have been is a statement of her counsel in a declaration submitted in support of the discovery motion. According to Wallace's counsel, when her consultants gained access to GEICO's activity

logs, they "identified certain database features/functions that they *believe* will lend themselves to searches/reports that *could* aid in the identification and production of claims files wherein a labor rates letter was sent." (Italics added.) This hearsay statement "is too qualified, tentative and conclusionary to constitute substantial evidence" that a search of GEICO's activity logs would identify potential class members in an efficient manner. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1111.) Accordingly, we reject as factually unsupported Wallace's contention that a GEICO activity log search "was a technologically feasible and economically viable search method that had an excellent chance of locating many of the requested labor rate letters."

### C. *Conclusion*

In sum, on the limited factual record before it, the trial court did not abuse its discretion by ruling that Wallace did not meet her burden to show that the members of her proposed class were so numerous that it would be "impracticable to bring them all before the court" (Code Civ. Proc., § 382; see *Brinker, supra*, 53 Cal.4th at p. 1021), or that they could "be readily identified without unreasonable expense or time by reference to [GEICO's business] records" (*Rose, supra*, 126 Cal.App.3d at p. 932; accord, *Sevidal, supra*, 189 Cal.App.4th at p. 919). Although the trial court could have assumed with Wallace that other GEICO insureds met her class definition, "assumptions, inferences, and speculations are no substitute for evidence. We think the trial court correctly required [Wallace] to prove that her action qualified as a class action, and when she failed to do this at a hearing held for that express purpose the court properly [denied her motion for class certification]." (*Bauman, supra*, 45 Cal.App.3d at pp. 802-803.)

Our affirmance of the trial court's order denying class certification on the ground that Wallace did not establish the existence of a numerous and ascertainable class makes it unnecessary for us to address the parties' arguments about whether she satisfied the typicality and other remaining procedural requirements of class certification. "Any valid pertinent reason stated will be sufficient to uphold the order." (*Caro, supra*, 18 Cal.App.4th at p. 656.) We also need not address Wallace's argument, which is premised on a reversal, that the case should be assigned to a different trial judge on remand. We nevertheless note Wallace has "not shown that the interests of justice require disqualification of the judge who has presided over this case for the past five years, and whose order we are affirming on appeal." (*Barboza v. West Coast Digital GSM, Inc.* (2009) 179 Cal.App.4th 540, 547.)

#### DISPOSITION

The October 7, 2011 order denying Wallace's motion for class certification is affirmed.

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IRION, J.

WE CONCUR:

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HUFFMAN, Acting P. J.

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AARON, J.