

Apple trial continues, without a plaintiff for now

December 9 2014, by Brandon Bailey

In an unusual legal twist, a federal judge decided Monday that a billion-dollar, class-action lawsuit over Apple's iPods should continue, even though she also disqualified the last remaining plaintiff named in a case that has been on trial since last week.

U.S. District Judge Yvonne Gonzalez Rogers scolded Marianna Rosen and her attorneys on Monday for not providing more complete information about the iPods Rosen had purchased. That came after Apple lawyers successfully argued that the devices purchased by Rosen were not among those affected by the lawsuit.

But the [judge](#) also rejected Apple's argument that the case should be dismissed because it's too late to name a new plaintiff. She ordered the attorneys suing Apple to identify a new person, by Tuesday, who can serve as a lead plaintiff.

Both sides estimate about 8 million people bought iPods that are potentially affected by the lawsuit, which focuses on Apple's use of restrictive software that prevented iPods from playing music purchased from competitors of Apple's iTunes store. The plaintiffs say that amounted to unfair competition and that Apple was able to sell iPods at inflated prices because the software froze makers of competing devices out of the market.

While the plaintiffs argue the overcharges amounted to \$350 million, Apple could be ordered to pay triple that amount if the jury finds it

violated federal antitrust rules.

While the plaintiffs' lawyers represent the entire class of 8 million, class-action rules say the suit must identify at least one person as a "named plaintiff" who suffered the losses or injuries alleged in the case. Rosen had previously said she purchased several iPods that qualified, but Apple attorneys produced evidence that those devices either had the wrong software or were purchased outside the time frame of the lawsuit. A series of pretrial rulings had narrowed the case to covering just 19 months between September 2006 and March 2009.

Late last week, Rosen and her attorneys said she had purchased two other iPods in 2008. But Apple lawyers produced records that showed they were purchased with a credit card issued to the law firm of Rosen's husband. Apple attorney William Isaacson argued that meant she was not legally the purchaser.

Judge Rogers ruled late Monday that Rosen's purchases are "inadequate" to represent the whole class. And the judge showed impatience at having to deal with the question after jurors had already heard a week of testimony.

"I am troubled," the judge said, citing Rosen's failure to adequately account for her iPod purchases and "the failure of plaintiffs' counsel themselves to investigate sufficiently." But the judge said she has an obligation to the "millions of absent class members" to let the case continue if another lead plaintiff can be identified.

Two other plaintiffs had earlier withdrawn because their iPods were not covered by the lawsuit.

Plaintiffs' attorney Bonny Sweeney said her office has heard from a number of volunteers since the issue made headlines last week. "There

are plaintiffs who stand willing and ready to step in and we will have them in court tomorrow," she told the judge.

The judge curtly ordered Sweeney to give the candidates' names to Apple's lawyers Monday night, so Apple can have a chance to review whether they are eligible.

Apple lawyers insisted Monday they weren't happy about discovering the glitch. Although he argued in court briefs that the suit would have to be dismissed, Isaacson told the judge Monday, "We want to win this case on the merits." Outside court, he told reporters the issue may eventually be decided by a court of appeal.

When asked whether Apple plans to investigate the qualifications of any new plaintiff, Isaacson answered with one word: "Completely."

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