

BOIES, SCHILLER & FLEXNER LLP
OAKLAND, CALIFORNIA

1 William A. Isaacson (wisaacson@bsfllp.com)
 (Admitted *Pro Hac Vice*)
 2 Karen L. Dunn (kdunn@bsfllp.com)
 (Admitted *Pro Hac Vice*)
 3 Martha L. Goodman (mgoodman@bsfllp.com)
 (Admitted *Pro Hac Vice*)
 4 BOIES, SCHILLER & FLEXNER LLP
 5301 Wisconsin Ave, NW
 5 Washington, DC 20015
 Telephone: (202) 237-2727
 6 Facsimile: (202) 237-6131

7 John F. Cove, Jr. #212213
 (jcove@bsfllp.com)
 8 Kieran P. Ringgenberg #208600
 (kringgenberg@bsfllp.com)
 9 Meredith R. Dearborn #268312
 (mdearborn@bsfllp.com)
 10 Maxwell v. Pritt # 253155
 (mpritt@bsfllp.com)
 11 BOIES, SCHILLER & FLEXNER LLP
 1999 Harrison Street, Suite 900
 12 Oakland, CA 94612
 Telephone: (510) 874-1000
 13 Facsimile: (510) 874-1460

14 David C. Kiernan #215335
 (dkiernan@jonesday.com)
 JONES DAY
 15 555 California Street, 26th Floor
 San Francisco, CA 94104
 16 Telephone: (415) 626-3939
 Facsimile: (415) 875-5700

17 *Attorneys for Defendant Apple Inc.*

18 UNITED STATES DISTRICT COURT

19 NORTHERN DISTRICT OF CALIFORNIA - OAKLAND DIVISION

20 THE APPLE IPOD iTUNES ANTI-TRUST
 21 LITIGATION

Lead Case No. C 05-00037 YGR
 [CLASS ACTION]

22 This Document Relates To:
 23 ALL ACTIONS

**APPLE INC.'S NOTICE OF MOTION AND
 MOTION TO DISMISS FOR LACK OF
 SUBJECT-MATTER JURISDICTION
 PURSUANT TO FEDERAL RULES OF
 CIVIL PROCEDURE 12(b)(1) AND 12(h)(3),
 OR RULE 50**

Date: TBD
 Time: TBD
 Place: Courtroom 1, 4th Floor
 Judge: Honorable Yvonne Gonzalez Rogers

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BOIES, SCHILLER & FLEXNER LLP
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NOTICE OF MOTION

PLEASE TAKE NOTICE THAT on a date and time to be determined, Defendant Apple Inc. (“Apple”) will, in the United States District Court, Northern District of California, located at 1301 Clay St., Oakland, CA, Courtroom 1, 4th Floor, before the Honorable Yvonne Gonzalez Rogers, move for an order dismissing this case for lack of subject-matter jurisdiction pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(h)(3) or, in the alternative, Rule 50, on the ground that Plaintiffs lack Article III standing.

This motion is based on this notice of motion and motion, the following memorandum of points and authorities, and such other matters as may be presented to the Court at the time of the hearing.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(h)(3), or, in the alternative,
3 Rule 50, Apple respectfully requests that the Court dismiss this case for lack of subject-matter
4 jurisdiction. Plaintiffs cannot prove that they have suffered any injury and thus they lack Article
5 III standing.

6 **INTRODUCTION**

7 The named Plaintiffs in this action are Melanie Wilson (formerly Tucker) and Marianna
8 Rosen. Plaintiffs have already agreed that Ms. Wilson did not purchase any Apple iPod model
9 containing the firmware released with iTunes 7.0 or 7.4 or as to which Plaintiffs claim damages.
10 Moreover, objective evidence shows the same is true of Ms. Rosen. As a result, no named
11 plaintiff has suffered injury-in-fact and no named plaintiff has Article III standing.

12 Because of Apple's profound interest in vindicating itself against Plaintiffs' allegations,
13 Apple would consent to the Court's deferral of a decision on this issue until it decides a full Rule
14 50 motion at the close of Plaintiffs' case or, if such motion is denied, until the jury returns its
15 verdict.

16 **STATEMENT OF FACT**

17 The Complaint names as plaintiffs Somtai Charoensak, Melanie Wilson (formerly
18 Tucker), and Marianna Rosen. Dkt. 322 (TX 2593). On October 14, 2014, Plaintiffs withdrew
19 named plaintiff Somtai Charoensak as a class representative because "he did not purchase an iPod
20 during the currently certified Class Period." Dkt. 823 at 1 n.1 (Oct. 14, 2014 Joint Pre-Trial Conf.
21 Stmt.). Three days into the presentation of evidence at trial in their case-in-chief, after Apple
22 discovered and raised with the Court that neither of the remaining two Plaintiffs purchased an
23 iPod for which the class seeks damages, Plaintiffs' counsel confirmed to the Court that named
24 plaintiff Melanie Wilson (formerly Tucker) did not purchase an iPod for which the class is
25 seeking damages. Declaration of Maxwell V. Pritt, Ex. E at 640:23-25. Later that same day,
26 Plaintiffs' counsel agreed to withdraw Ms. Wilson as a class representative. That leaves only Ms.
27 Rosen as the sole named plaintiff as to which injury is claimed and relief is sought.
28

1 In her January 24, 2007 deposition, Ms. Rosen testified that she purchased three iPods: (1)
 2 an iPod on February 18, 2004, Pritt Decl., Ex. A at 119:6-120:1 (Rosen Dep.); (2) an iPod mini in
 3 the summer of 2004, *id.* at 61:3-25; and (3) a black 30GB video iPod, or iPod classic 5th
 4 generation, on September 20, 2006, *id.* at 120:2-12, 122:5-12. See also Pritt Decl., Ex. B (TX
 5 2784) at 2-3 of 23. Three years later, on December 16, 2010, Ms. Rosen confirmed those three
 6 iPods were her only iPods in response to Apple's interrogatories: "Plaintiff has purchased a
 7 15GB iPod, and a 30GB video iPod for her own use. She also has purchased an iPod mini as a
 8 present for her sister. She has not purchased any other MP3 players." Pritt Decl., Ex. C at 15
 9 (Plaintiff Marianna Rosen's Response To Defendant Apple Inc's First Interrogatories).

10 One month later, on January 18, 2011, Ms. Rosen and the other two named Plaintiffs at
 11 that time (Charoensak and Tucker) moved for class certification, stating once again that Ms.
 12 Rosen had no iPods other than disclosed in discovery: "all three proposed class representatives
 13 have already given day-long depositions, have submitted their iPods for a forensic inspection by
 14 Apple's counsel, and have produced voluminous (and needlessly intrusive) documentation to
 15 Apple as part of the discovery process, including: copies of all music files stored on their personal
 16 computers; copies of their iTunes Purchase history; iTunes account names and passwords; copies
 17 of receipts documenting their iPod purchases from Apple; and lists of every compact disc they
 18 currently own." Dkt. 486 at 16 (redacted version); Dkt. 477 (under seal).

19 Prior to certifying the current class in this case, on May 19, 2011, Judge Ware granted
 20 summary judgment for Apple and against Plaintiffs on all of Plaintiffs' remaining claims except
 21 for Plaintiffs' claims that Apple engaged in anticompetitive and unlawful conduct under Section 2
 22 of the Sherman Act and California's Unfair Competition Law "as to iTunes 7.0." Dkt. 627 at 14-
 23 15. Judge Ware granted Plaintiffs' renewed motion for class certification on November 22, 2011,
 24 and certified a class of consumers and resellers who purchased directly from Apple specific
 25 models of iPods between September 12, 2006, and March 31, 2009. Dkt. 694. While Judge Ware
 26 originally included the iPod classic 5th generation in the class definition, that iPod (and several
 27 others identified in Judge Ware's order) did not contain the iPod firmware issued with iTunes 7.0
 28

1 (or iTunes 7.4), and Plaintiffs no longer claim damages for those iPod models. Dkt. 823 at 1
2 (Joint Pre-Trial Conf. Stmt.).

3 At trial, Ms. Rosen confirmed that she bought two iPods in 2004 that are not part of the
4 class period, Pritt Decl., Ex. D at 596:7-13, and confirmed that her September 20, 2006 purchase
5 was an iPod classic 5th generation, *id.* at 597:18-21, for which Plaintiffs are not seeking damages.
6 Ms. Rosen testified that she had purchased two additional iPods not previously disclosed: “an
7 iPod nano . . . in the fall of 2007” and an iPod touch “as a Hanukkah gift for her son in December
8 of ‘08.” *Id.* at 583:23-584:3. When questioned by Apple’s counsel about these purchases, Ms.
9 Rosen testified she was “pretty sure the iPod [nano] is in one of the boxes where all of the
10 technology is in my new house stored,” and was not sure she maintained any receipts for the
11 iPods, but that “all the receipts and all the records . . . on my purchases from Apple are easily
12 accessible.” *Id.* at 600:7-10; 600:13-16 (“I don’t think the physical paper receipt is a crucial
13 matter. If necessary we can access, anyone can access the receipt”).

14 Ms. Rosen also testified that she had the iPod touch that she purchased with her in Court
15 that day. *Id.* at 602:24-603:4. Her counsel later asked if Ms. Rosen would “be willing to show
16 that to the Apple lawyers, if they asked,” and Ms. Rosen testified she would. *Id.* at 611:24-612:1.
17 Apple asked, and the Court directed Ms. Rosen to provide Apple with the serial number on her
18 iPod touch. *Id.* at 618:14-16. Using the serial number on Ms. Rosen’s iPod touch
19 (1D9243X2201), Apple was able to locate the receipt for that iPod touch and discovered that, in
20 fact, Ms. Rosen purchased the iPod touch on July 10, 2009, over three months after the class
21 period ended in this case. Declaration of Tim O’Neil, Ex. 1 (TX 2865, July 10, 2009 Receipt for
22 Marianna Rosen with iPod touch, Serial Number ID9243X2201). Plaintiffs’ counsel conceded in
23 Court that the purchase was outside of the class period. Pritt Decl., Ex. E at 632:22-25.

24 Shortly before testimony began on the third day of trial, Plaintiffs’ lawyers produced to
25 Apple pages what appeared to be print-outs from a third party website (www.everymac.com) and
26 a screen shot iTunes. Using the serial numbers on the pages provided by Plaintiffs, Apple
27 identified that the iPods were not purchased by Ms. Rosen, but instead were ordered by her
28 former husband’s law firm, The Rosen Law Firm. O’Neil Decl., Ex. 2 (TX 2884, September 11,

1 2008 Receipt for The Rosen Law Firm). (New York Department of State records state that The
2 Rosen Law Firm P.A. is a Florida legal entity with an office in New York. Pritt Decl., Ex. F.)

3 ARGUMENT

4 “Article III’s ‘case-or-controversy’ requirement precludes federal courts from deciding
5 ‘questions that cannot affect the rights of litigants in the case before them.’” *Protectmarriage.com*
6 - *Yes on 8 v. Bowen*, 752 F.3d 827, 834 (9th Cir. 2014) (quoting *DeFunis v. Odegaard*, 416 U.S.
7 312, 316 (1974)). “This means that, at all stages of the litigation, the plaintiff ‘must have
8 suffered, or be threatened with, an actual injury traceable to the defendant [that is] likely to be
9 redressed by a favorable judicial decision.’” *Id.* (quoting *Spencer v. Kemna*, 523 U.S. 1, 7
10 (1998)).

11 “The objection that a federal court lacks subject-matter jurisdiction may be raised by a
12 party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry
13 of judgment.” *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506-07 (2006) (citing FED. R. CIV. PROC.
14 12(b)(1)). As “Rule 12(h)(3) instructs: ‘Whenever it appears by suggestion of the parties or
15 otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the
16 action.’” *Id.* (quoting FED. R. CIV. PROC. 12(h)(3)).¹

17 “Because the court (and not a jury) decides standing, the district court must decide issues
18 of fact necessary to make the standing determination.” *In re ATM Fee Antitrust Litig.*, 686 F.3d
19 741, 747 (9th Cir. 2012), *cert. denied sub nom. Brennan v. Concord, EFS, Inc.*, 134 S. Ct. 257
20 (2013); *see also Goldstein v. Costco Wholesale Corp.*, 278 F. Supp. 2d 766, 769, 772 (E.D. Va.
21 2003) (*sua sponte* raising standing issue and hearing argument after plaintiffs’ case-in-chief, and
22 finding that organizational plaintiff lacked standing based on evidence at trial; dismissing that
23 plaintiff).

24 ¹ Because the issue of subject matter jurisdiction may be raised at any time, by a party or
25 the Court, *Arbaugh*, 546 U.S. at 506, Plaintiffs’ argument regarding Apple’s not consenting to a
26 change in the class definition is simply irrelevant. For the same reason, and because the burden
27 of proving the Court’s jurisdiction rests with the Plaintiffs, any complaint of “unfairness” in
28 raising this issue now rings hollow. *See Wright & Miller, Federal Practice and Procedure: Civil*
3d § 1393 (“the federal courts have made it clear beyond peradventure that not only is it
impossible to foreclose the assertion of this defense by the passage of time or the notion of
estoppel, but also it is impossible to cure or waive a defect of subject matter jurisdiction by
consent of the parties”).

1 Alternatively, the Court could decide the motion under Rule 50. Judgment under Rule 50
 2 against a party is required where “there is no legally sufficient basis for a reasonable jury to find
 3 for that party on that issue.” *Jorgensen v. Cassidy*, 320 F.3d 906, 917 (9th Cir. 2003).

4 **I. PLAINTIFF ROSEN HAS SUFFERED NO INJURY AND LACKS ARTICLE III**
 5 **STANDING.**

6 “[I]n order to have Article III standing, a plaintiff must adequately establish: (1) an injury
 7 in fact (*i.e.*, a concrete and particularized invasion of a legally protected interest); (2) causation
 8 (*i.e.*, a fairly traceable connection between the alleged injury in fact and the alleged conduct of the
 9 defendant); and (3) redressability (*i.e.*, it is likely and not merely speculative that the plaintiff's
 10 injury will be remedied by the relief plaintiff seeks in bringing suit).” *Sprint Commc’n Co.,*
 11 *L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 273-74 (2008) (citing *Lujan*, 504 U.S. at 560-61). “This
 12 triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-
 13 controversy requirement, and the party invoking federal jurisdiction bears the burden of
 14 establishing its existence.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 103-04 (1998).
 15 “A plaintiff must demonstrate standing for *each* claim he or she seeks to press and for *each* form
 16 of relief sought.” *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1139 (9th Cir. 2013) (citing
 17 *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)) (emphasis added).

18 “The standing requirement applies to class representatives, who must, in addition to being
 19 a member of the class they purport to represent, establish the existence of a case or controversy.”
 20 *Kirola v. City & Cnty. of San Francisco*, --- F. Supp.3d ---, No. C 07-3685 SBA, 2014 WL
 21 6705952, at *34 (N.D. Cal. Nov. 26, 2014). “[S]tanding is the threshold issue in any suit. If the
 22 individual plaintiff lacks standing, the court need never reach the class action issue.” *Lierboe v.*
 23 *State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022 (9th Cir. 2003) (quoting 3 Herbert B.
 24 Newberg on Class Actions § 3:19, at 400 (4th ed. 2002). “[I]f none of the named plaintiffs
 25 purporting to represent a class establishes the requisite of a case or controversy with the
 26 defendants, none may seek relief on behalf of himself or any other member of the class.”
 27 *O’Shea v. Littleton*, 414 U.S. 488, 494 (1974); accord *Huynh v. Chase Manhattan Bank*, 465 F.3d
 28 992, 1001 n.7 (9th Cir. 2006) (“It is well settled that at least one named plaintiff must satisfy the

1 actual injury component of standing in order to seek relief on behalf of himself or the class”)
 2 (quotation marks and alterations omitted); *Casey v. Lewis*, 4 F.3d 1516, 1519 (9th Cir. 1993)
 3 (same).

4 **A. No Named Plaintiff Purchased the Product Subject to the Alleged**
 5 **Overcharge.**

6 Here, there is no named plaintiff who can satisfy the requirements of injury-in-fact,
 7 causation, and redressability.

8 Counsel for Plaintiffs has agreed to withdraw Ms. Wilson as a Plaintiff, and no evidence
 9 adduced at trial or otherwise shows she purchased any allegedly affected iPods. Thus, she has
 10 suffered no injury.

11 As to Ms. Rosen, the evidence does not permit the reasonable conclusion that she
 12 purchased one of the allegedly affected iPods. Plaintiffs have asserted that she purchased three
 13 iPods: two iPod touch models (one of which she had in court during her testimony) and an iPod
 14 nano. None were identified in Ms. Rosen’s interrogatory responses submitted in 2010. Pritt
 15 Decl., Ex. C at 15 (TX 2869). No store receipts or credit card statements proffered by Plaintiffs
 16 show when they were purchased or by whom. However, Apple’s business records, searched by
 17 reference to the serial numbers associated with the iPods Plaintiffs identified, show that Ms.
 18 Rosen purchased one iPod Touch on July 10, 2009, well after the class period ended in this case,
 19 and that the other two iPods were purchased by The Rosen Law Firm, which is a Florida legal
 20 entity, not Ms. Rosen. Pritt Decl., Ex. F. Because Ms. Rosen did not purchase any allegedly
 21 affected iPod in the class period, she has suffered no damages and thus lacks standing.

22 Accordingly, under Rule 12(b)(1) and 12(h)(3) or, in the alternative, Rule 50, the Court
 23 must dismiss the Plaintiffs’ claims with prejudice, decertify the class, and enter judgment for
 24 Apple. *See Rector v. City and Cnty. of Denver*, 348 F.3d 935, 937 (10th Cir. 2003) (“we find that
 25 the named plaintiffs Terri Rector and Damian Spencer lack standing to represent the absent class
 26 members for the most significant claims presented. We have thus remanded these claims for
 27 decertification and dismissal”); *Moreno v. AutoZone, Inc.*, 410 F. App’x 24 (9th Cir. 2010)
 28 (affirming district court’s decision to vacate prior class certification and dismiss for lack of

1 standing); *Kirola*, 2014 WL 6705952, at *1, *63 (entering judgment for defendant where plaintiff
 2 lacked standing); *Holloway v. Best Buy Co., Inc.*, No. C 05–5056 PJH, 2009 WL 1533668, at *8
 3 (N.D. Cal. May 28, 2009) (granting defendants’ motion for judgment on the pleadings and
 4 dismissing the complaint because none of the named plaintiffs had standing, and so “they cannot
 5 represent a class on such claims”).

6 **B. Substitution Of A New Class Representative Cannot Cure Plaintiffs’ Lack Of**
 7 **Standing.**

8 The Ninth Circuit has already resolved the “unusual procedural dilemma” facing this
 9 Court—whether a class action “must be dismissed without more” where the class representative
 10 lacks standing, “or if other proceedings may follow under which it may be possible that the suit
 11 can proceed as a class action with another representative, subject to the district court’s assessment
 12 whether a substitute representative is adequate for Rule 23 class purposes.” *Lierboe v. State*
 13 *Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1023 (9th Cir. 2003). The court held such cases must
 14 be dismissed:

15 We are mindful of judicial economy considerations, especially because an
 16 important procedural issue in this proposed class action has already been briefed,
 17 namely, whether insureds seeking to “stack” one coverage policy with another can
 18 properly proceed as a “class” of plaintiffs in light of, among other considerations,
 19 any case-by-case analysis required to compute each claimant’s necessary medical
 20 bills that are the subject of coverage. However, ***because this is not a mootness***
 21 ***case, in which substitution or intervention might have been possible, we remand***
 22 ***this case to the district court with instructions to dismiss.*** We are persuaded by
 the Seventh Circuit’s approach in an analogous case, *Foster v. Center Township*
of LaPorte County, 798 F.2d 237, 244–45 (7th Cir. 1986), which held that where
 the sole named plaintiff “never had standing” to challenge a township’s poor-
 relief eligibility guidelines, and where “she never was a member of the class she
 was named to represent,” the case must be remanded with instructions to dismiss.

23 *Id.* (emphasis added). Judge Armstrong faced this dilemma little more than a week ago in
 24 *Kirola v. City and County of San Francisco*, finding that, notwithstanding seven years of
 25 litigation and a five-week bench trial on the merits, the class representative in fact lacked
 26 “constitutional standing to pursue any claims on behalf of the class.” 2014 WL 6705952, at *48.
 27 As the court explained in rejecting the plaintiff’s argument “that any deficiencies in her standing
 28 as a class representative can be rectified by allowing class members who testified at trial to be

1 substituted in her stead,” the “issue here is not mootness . . . but the lack of standing. As a result,
 2 substitution is not an appropriate solution to Kirola’s lack of standing.” *Id.* Thus, Judge
 3 Armstrong “conclude[d] that Kirola cannot rectify her lack of standing by substituting additional
 4 class members as class representatives.” *Id.*

5 Numerous other cases are in accord. *Lidie v. State of Cal.*, 478 F.2d 552, 555 (9th Cir.
 6 1973) (“where the original plaintiffs were never qualified to represent the class, a motion to
 7 intervene represents a back-door attempt to begin the action anew”); *Walters v. Edgar*, 163 F.3d
 8 430, 432-33, 437 (7th Cir. 1998) (affirming dismissal of class action where named plaintiffs
 9 lacked standing; rejecting argument that other members of the class should have been named as
 10 class representatives); *McClune v. Shamah*, 593 F.2d 482, 486 (3d Cir. 1979) (“A motion for
 11 intervention under Rule 24 is not an appropriate device to cure a situation in which plaintiffs may
 12 have stated causes of action that they have no standing to litigate”); *Williams v. Boeing Co.*, No.
 13 C98-761P, 2005 WL 2921960, at *10 (W.D. Wash. Nov. 4, 2005) (“this is not a case where the
 14 named Plaintiffs initially had viable . . . claims during the relevant liability period that
 15 subsequently became moot. Instead, the named Plaintiffs have not demonstrated standing in the
 16 first instance to maintain such claims. Under these circumstances, decertification of the . . . class
 17 is warranted and intervention would not be appropriate”), *aff’d* 517 F.3d 1120 (9th Cir. 2008);
 18 *Spears v. Washington Mut., Inc.*, No. C-08-00868 RMW, 2009 WL 2761331, at *2 (N.D. Cal.
 19 Aug. 30, 2009) (“intervention is only possible if a named plaintiff presently has standing to sue
 20 The Bencosmes, then, may not intervene unless plaintiffs can show that a named plaintiff
 21 presently has standing to sue”); *In re Exodus Commc’ns. Sec. Litig.*, No. C-01-2661 MMC, 2006
 22 WL 2355071, at *1 (N.D. Cal. August 14, 2006) (“where the named plaintiffs in a class action
 23 lack standing, the action must be dismissed and new named plaintiffs with standing may not
 24 intervene”).

25 Ignoring this governing law, Plaintiffs referred the Court the case of *Sosna v. Iowa*, 419
 26 U.S. 393 (1975), which applied the doctrine of “capable of repetition yet evading review,”
 27 allowing some claims for injunctive relief which cannot be fully litigated before becoming moot.
 28 *Id.* at 400-01. That doctrine is limited to claims otherwise barred by the prudential consideration

1 of mootness, and has no application where the plaintiff lacks injury-in-fact. *See Friends of the*
 2 *Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 191 (2000) (“if a plaintiff lacks standing at the
 3 time the action commences, the fact that the dispute is capable of repetition yet evading review
 4 will not entitle the complainant to a federal judicial forum”); *Alcoa, Inc. v. Bonneville Power*
 5 *Admin.*, 698 F.3d 774, 794 (9th Cir. 2012) (“Because the petitioners lack standing to challenge
 6 the Second Period, this claim cannot be salvaged under the ‘capable of repetition, but evading
 7 review’ doctrine”); *see also WorldCom, Inc. v. FCC*, 308 F.3d 1, 10 (D.C. Cir. 2002)
 8 (“WorldComs’ half-hearted attempt to make out a theory that the issue was ‘capable of repetition,
 9 yet evading review’ is therefore inapposite, as that familiar exception to mootness cannot confer
 10 standing on a claim when injury in fact was missing at the outset”); *Stickrath v. Globalstar, Inc.*,
 11 No. C07-1941 TEH, 2008 WL 5384760, at *7 (N.D. Cal. Dec. 22, 2008) (“whereas the dismissal
 12 of a putative class representative whose claim is found to be barred on the basis of time does not
 13 invalidate the claims of the entire class, a standing defect invalidates the entire case”).

14 CONCLUSION

15 For the foregoing reasons, Defendant Apple respectfully requests that its motion to
 16 dismiss be granted.

17 Date: December 5, 2014

Respectfully submitted,

18 BOIES, SCHILLER & FLEXNER LLP

19
 20 By: /s/ William A. Isaacson
 21 William A. Isaacson

22 *Attorneys for Defendant Apple Inc.*

BOIES, SCHILLER & FLEXNER LLP
OAKLAND, CALIFORNIA

1 William A. Isaacson (wisaacson@bsfllp.com)
(Admitted *Pro Hac Vice*)
2 Karen L. Dunn (kdunn@bsfllp.com)
(Admitted *Pro Hac Vice*)
3 Martha L. Goodman (mgoodman@bsfllp.com)
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4 BOIES, SCHILLER & FLEXNER LLP
5 5301 Wisconsin Ave, NW
6 Washington, DC 20015
Telephone: (202) 237-2727
Facsimile: (202) 237-6131

7 John F. Cove, Jr. #212213
(jcove@bsfllp.com)
8 Kieran P. Ringgenberg #208600
(kringgenberg@bsfllp.com)
9 Meredith R. Dearborn #268312
(mdearborn@bsfllp.com)
10 Maxwell V. Pritt # 253155
(mpritt@bsfllp.com)
11 BOIES, SCHILLER & FLEXNER LLP
12 1999 Harrison Street, Suite 900
Oakland, CA 94612
Telephone: (510) 874-1000
Facsimile: (510) 874-1460

13 David C. Kiernan #215335
14 (dkiernan@jonesday.com)
JONES DAY
15 555 California Street, 26th Floor
San Francisco, CA 94104
16 Telephone: (415) 626-3939
Facsimile: (415) 875-5700

17 *Attorneys for Defendant Apple Inc.*

18 UNITED STATES DISTRICT COURT

19 NORTHERN DISTRICT OF CALIFORNIA - OAKLAND DIVISION

20 THE APPLE IPOD iTUNES ANTI-TRUST
21 LITIGATION

Lead Case No. C 05-00037 YGR
[CLASS ACTION]

22 This Document Relates To:
23 ALL ACTIONS

**[PROPOSED] ORDER GRANTING APPLE
INC.'S MOTION TO DISMISS FOR LACK
OF JURISDICTION AND DECERTIFYING
RULE 23(b)(3) CLASS**

24 Date: TBD
25 Time: TBD
26 Place: Courtroom 1, 4th Floor
27 Judge: Honorable Yvonne Gonzalez Rogers
28

1 This matter came before the Court on Defendant Apple Inc.'s ("Apple") motion to dismiss
 2 for lack of subject-matter jurisdiction pursuant to Federal Rule of Evidence 12(b)(1) and 12(h)(3),
 3 or Rule 50. Having considered the motion, argument on the motion, the evidence and testimony
 4 presented at trial and with the motion, and the entire record in this matter, IT IS HEREBY
 5 ORDERED that the motion is GRANTED.

6 The Court makes the following findings of fact:

- 7 1. Plaintiffs in this action only claim damages on specific models of iPods sold by Apple
 8 from September 12, 2006, to March 31, 2009. Oct. 14, 2014 Joint Pre-Trial Conf.
 9 Stmt., Dkt. 823 at 1.
- 10 2. On October 14, 2014, Plaintiffs withdrew named plaintiff Somtai Charoensak as a
 11 class representative because "he did not purchase an iPod during the currently certified
 12 Class Period."
- 13 3. On December 5, 2014, Plaintiffs withdrew named plaintiff Melanie Tucker (now
 14 Wilson) as a class representative because she did not purchase any iPod for which the
 15 class seeks damages.
- 16 4. During discovery in this case, Plaintiff Marianna Rosen provided interrogatory
 17 responses on December 16, 2010, stating: "Plaintiff has purchased a 15GB iPod, and
 18 a 30GB video iPod for her own use. She also has purchased an iPod mini as a present
 19 for her sister. She has not purchased any other MP3 players."
- 20 5. At trial on December 3, 2014, Ms. Rosen testified that she purchased two iPods in
 21 2004, and purchased a fifth generation iPod with video in September 2006. She also
 22 testified that she purchased two additional iPods that were not referenced in her
 23 interrogatory responses: "an iPod nano . . . in the fall of 2007" and an iPod touch "as a
 24 Hanukkah gift for [her] son in December of '08."
- 25 6. Ms. Rosen offered no receipts, credit card statements, or other written records of the
 26 purchases of the alleged purchases in the fall of 2007 and December 2008. Ms. Rosen
 27 testified that counsel never asked her to preserve or produce records of these (or any)
 28

1 purchases, even though she had already filed a lawsuit seeking to serve as a class
2 representative at the time of the alleged purchases.

3 7. Ms. Rosen also testified that she had the iPod touch that she purchased with her in
4 Court that day.

5 8. Counsel for Apple visually inspected the iPod that day and obtained a serial number
6 for that product. Apple personnel conducted a search using the serial number from the
7 iPod touch produced in court and located an electronic receipt for that iPod touch.
8 The receipt shows that Ms. Rosen purchased the iPod touch on July 10, 2009. (TX
9 2865.)

10 9. On December 4, 2014, Plaintiffs' counsel conceded that the purchase of the iPod touch
11 Ms. Rosen referenced in her trial testimony was outside of the class period.

12 10. On December 4, 2014, Plaintiffs' counsel provided Apple a serial number for a
13 second iPod touch. Apple searched its records for a match to that serial number and
14 located a receipt showing that the iPod with the serial number was not purchased by
15 Ms. Rosen, but instead was ordered by her former husband's law firm, The Rosen Law
16 Firm. The receipt also shows a second purchase of an iPod nano on the same date,
17 also by The Rosen Law Firm. (TX 2884.)

18 11. Ms. Rosen's testimony as to two purchases of iPods from 2004, if believed, would not
19 support any claim of injury in fact because Plaintiffs do not claim any damages for
20 purchases in that time period.

21 12. Ms. Rosen's testimony as to the purchase of an classic fifth generation iPod in 2006
22 does not support any claim of injury in fact because Plaintiffs do not claim damages
23 on that model of iPod.

24 13. The Court finds that Ms. Rosen's trial testimony with regard to her alleged purchase of
25 the two iPods in 2007 and 2008 was not credible. Counsel for Plaintiffs have
26 conceded that Ms. Rosen's trial testimony was inaccurate at least as to the date of one
27 of her purchases. Moreover, her testimony was contradicted by her own prior
28 Interrogatory response, as well as a receipt produced by Apple that is linked to the

BOIES, SCHILLER & FLEXNER LLP
OAKLAND, CALIFORNIA

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specific serial numbers provided by Plaintiffs’ counsel, which state that the purchases were by The Rosen Law Firm.

14. The Court further finds that Plaintiffs have failed to prove by a preponderance of the evidence that Ms. Rosen purchased from Apple any iPod for which Plaintiffs claim damages in the relevant time period from September 12, 2006, to March 31, 2009.

15. Because Ms. Rosen had no purchase of any allegedly affected iPod in the class period, she has suffered no damages and thus lacks standing under Article III of the United States Constitution.

For the foregoing reasons, it is HEREBY ORDERED that Apple’s motion to dismiss for lack of subject-matter jurisdiction is GRANTED, the Court’s prior certification Order of November 22, 2011 (Dkt. 694) is VACATED, and the Consolidated Amended Complaint (Dkt. 322) is DISMISSED WITH PREJUDICE. The Clerk shall enter judgment for Apple and close the case.

It is further ORDERED that within thirty (30) days of this Order, class counsel, Robbins Geller Rudman & Dowd LLP, shall prepare, file, and serve a proposed form of notice to absent class members that advises them of this Order and of their right to proceed individually if they so choose. Apple shall have fifteen (15) days from the filing of Plaintiffs’ proposed form of notice to comment and suggest any revisions thereto.

IT IS SO ORDERED.

Dated: _____, 2014

Hon. Yvonne Gonzalez Rogers
UNITED STATES DISTRICT JUDGE