No. 16-16401

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MARTIN SIEGEL, ET AL.,

Plaintiffs-Appellees,

v.

DELTA AIRLINES, INC. AND AIRTRAN AIRWAYS INC.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Georgia, Atlanta Division
Civil Action No. 1:09-MD-2089-TCB

BRIEF OF THE AMERICAN ANTITRUST INSTITUTE
AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES
AND SUPPORTING AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 26.1-2, the following parties, not identified in the earlier-filed briefs, have an interest in the outcome of this appeal:

- American Antitrust Institute – Amicus Curiae
- Kenny Nachwalter – law firm for American Antitrust Institute
- Scott E. Perwin – counsel for Amicus Curiae
- Richard M. Brunell – counsel for Amicus Curiae

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel certifies that amicus curiae American Antitrust Institute is a nonprofit, non-stock corporation. It has no parent corporations, and no publicly traded corporations have an ownership interest in it.

/s/ Scott E. Perwin
Scott E. Perwin

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INTEREST OF AMICUS CURIAE

The American Antitrust Institute ("AAI") is an independent nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through education, research, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI is managed by its Board of Directors with the guidance of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http:/www.antitrustinstitute.org.[1] AAI has a strong interest in ensuring that private actions serve as an effective deterrent to antitrust violations, especially price fixing. AAI submits this amicus brief because appellants' arguments against class certification, if accepted, would threaten that interest and seriously undermine enforcement of the antitrust laws against price fixing.

[1] All parties have consented to the filing of this brief. Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions. Certain members of the Advisory Board (and a member of the Board of Directors) or their law firms represent parties in this matter but played no role in AAI's deliberations or the drafting of the brief. No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than amicus made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is an interlocutory appeal of the district court's grant of class certification.[2] Plaintiffs allege that Delta and AirTran's adoption of a $15 per flight first-bag fee in December 2008 was the product of a price-fixing conspiracy. Defendant airlines challenge the class-certification order on the grounds that plaintiffs failed to satisfy the requirements of ascertainability and predominance. As to ascertainability, AAI agrees with plaintiffs and amicus Public Citizen that Rule 23 contains no administrative feasibility prerequisite and that, in any event, the district court did not err in finding such a requirement was satisfied. However, this brief is limited to addressing the predominance issue and, in particular, defendants' misguided arguments that speculative and indirect offsets should reduce plaintiffs' undisputed overcharge damages, arguments with broad implications for enforcement of the antitrust laws against price fixing.

The airlines argue that common issues do not predominate because some members of the class benefited from the conspiracy or were uninjured. They submitted evidence that the "unbundling" of first-bag fees reduced base fares and, as a result, "many class members . . . paid *less overall* for air travel." Appellants' Br.

[2] The court certified a class of "[a]ll persons or entities in the United States and its territories that directly paid Delta and/or AirTran one or more first bag fees on domestic flights from December 5, 2008 through November 1, 2014." Op. 45 (alteration in original).

10. The airlines' experts opined that an increase in bag fees would result in lower base fares to some extent because the fees would reduce demand, although aggregate bag fees would exceed aggregate base-fare savings.[3] And they submitted an econometric study purporting to show that AirTran reduced its round-trip base fares by $16.91 (on average) more than competitors that operated without a first-bag fee. *Id.* at 44.[4] While this "savings" was less than the $15 bag fee on a per flight basis, the airlines argue that passengers benefited on net when they checked a bag on only one leg of a roundtrip flight or bought more than one ticket but checked only one bag. *Id.* at 44-45. And passengers who checked a bag on one trip but not on other trips during the class period also purportedly benefited from the conspiracy. *Id.* at 45. Moreover, the airlines sought to show that when Delta instituted a first bag fee of $15, it reduced its second bag fee from $50 to $25, meaning that passengers with two bags saved $10 during the eight-month period

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[3] *See, e.g.*, Surrebutal Report of Daniel M. Kasper ¶ 2 (Doc. 224-3 filed Dec. 9, 2010) ("[B]ecause the implementation of a bag fee by itself would have increased the total price to passengers checking bags, basic economics would dictate a reduction in demand from such passengers. Given the substantial competition Delta faces across its system, this reduction in demand could be expected to lead to some reduction in Delta's base fares (i.e., the fare excluding bag and other ancillary fees) paid by passengers in order for Delta to maintain economically viable passenger loads on its flights.").

[4] Defendants offered no similar estimate for Delta but rather estimated that average base fares for all carriers that adopted bag fees declined by 2.9%. Appellants' Br. 34. That would imply a significantly smaller drop in other carriers' average base fares (including Delta's) than the estimate for AirTran.

the pricing was in effect. *Id.* at 47. And they contend that class members that were reimbursed for their bag fees by their employers also were uninjured. *Id.* at 49-50. Because plaintiffs purportedly failed to identify a common methodology to establish injury and exclude uninjured consumers from the class, the airlines maintain that class certification was improper.

Plaintiffs hotly dispute the existence of any base-fare savings[5] and the relevance of any offsets. Moreover, even if such savings exist and are relevant, they maintain that class certification was still appropriate because individualized damage determinations—and the possibility that some class members are not injured—do not preclude class certification.

The district court agreed that the airlines' evidence of base-fare and second-bag savings was irrelevant to damages. The court held that plaintiffs were entitled to the full amount of the overcharges they paid on first-bag fees, without offsets. And even if offsets were permissible in calculating damages and some members of the class were "net winners," the court held that the payment of the first-bag fees itself constituted antitrust injury, and thus injury was an issue common to all class

[5] Plaintiffs contend that the airlines' executives, as opposed to their expert economists, recognized that the introduction of bag fees did not entail any reduction in base fares. *See* Appellees' Br. 11-12 (citing, among other things, Delta CEO's testimony that "I don't think [the first bag fees] had any impact on average[] fares") (alterations in original). Plaintiffs also contend that the reduction in Delta's second bag fee was independent of the imposition of a first bag fee. *See id.* at 12 n.36 (citing evidence).

members. Likewise, the court held that "reimbursements would go at most to the quantum of damages, not the fact of damages, and therefore would not defeat class certification." Op. 30.

The district court was correct on all grounds. A person is "injured" within the meaning of § 4 of the Clayton Act when he or she pays a price for a component of service that is inflated due to a price-fixing conspiracy. And just as there is no "passing on" defense to price fixing under *Hanover Shoe*, *Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), there is no "offset" defense for claimed price reductions in other elements of service. The *Hanover Shoe* rule against offsets applies not only to "pass on" theories, but to other kinds of recoupment, benefits, and mitigation that purport to reduce a plaintiff's damages in a price fixing case.

Common-law tort principles support the district court's offset ruling. Under the common-law rule, benefits are only offset if they are directly and proximately caused by the tortious conduct. Among other things, this means that the benefit must be "special" to the plaintiff, which is not the case here as the purported benefits accrue to all passengers regardless of whether they check a bag. Also, the collateral source rule bars offsets where the overcharge was paid by a class member but reimbursed by his or her employer.

The airlines' base-fare offset argument has far reaching implications. While a la carte pricing can enhance consumer welfare, increasingly firms (not just airlines) are purporting to unbundle their services while also tacking on new fees that are not always transparent to consumers. *See, e.g.*, Howard A. Shelanski et al., *Economics at the FTC: Drug and PBM Mergers and Drip Pricing*, 41 Rev. Indus. Org. 303, 310 (2012) (noting increasing use of add-on fees such as hotel resort fees, airline fees, bank fees, and rental car fees). In every case involving a conspiracy to impose or increase such fees, it may be argued that remaining competition among the firms would tend to reduce the base price of the service. Indeed, in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980), the Supreme Court rejected a similar argument as a defense to price fixing of a "mere" component of price. If offsets are allowed on the airlines' theory, then blatant overcharges on fees will be subject to speculative reductions in damages, thereby undermining already insufficient deterrence of price fixing and complicating already complex antitrust litigation—the very reasons that *Hanover Shoe* rejected a passing on defense.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THE AIRLINES' PROPOSED OFFSETS ARE IRRELEVANT TO DAMAGES AND INJURY

A. Offsets Are Inconsistent with Congressional Policy to Protect Consumers from Price Fixing

The airlines' offset arguments must be considered in light of the pernicious nature of price fixing and the crucial role that private actions play in deterring it. From the beginning, Congress intended § 4 "as a means of protecting consumers from overcharges resulting from price fixing." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979); *see Blue Shield of Va. v. McCready*, 457 U.S. 465, 477 (1982) ("[T]he unrestrictive language of the section, and the avowed breadth of the congressional purpose, cautions us not to cabin § 4 in ways that will defeat its broad remedial objective.").

"[H]orizontal price fixing [is] perhaps the paradigm of an unreasonable restraint of trade." *NCAA v. Bd. of Regents of Univ. of Ok.*, 468 U.S. 85, 100 (1984); *see Catalano*, 446 U.S. at 647 ("the archetypal example of such a practice"). Indeed, it is "the supreme evil of antitrust." *Verizon Commcn's, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004). As the Supreme Court has explained,

> "[P]rice-fixing cartels are condemned per se because the conduct is tempting to businessmen but very dangerous to society. The conceivable social benefits are few in principle, small in magnitude,

> speculative in occurrence, and always premised on the existence of price-fixing power which is likely to be exercised adversely to the public."

FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 434 n.16 (1990) (quoting 7 Philip Areeda, *Antitrust Law*, ¶ 1509, at 412-13 (1986)); *accord United States v. Apple, Inc.*, 791 F.3d at 290, 326-27 (2d Cir. 2015). Accordingly, "[w]hatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy." *United States v. Socony–Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940).

It is well settled that an agreement fixing a component of price is just as illegal as one fixing an overall price, and arguments that the ultimate price is unaffected or that purchasers benefit overall are not cognizable. *See Catalano*, 446 U.S. at 649 (horizontal agreement to eliminate one form of competition among sellers—credit sales—is per se illegal even if it could ultimately lead "to corresponding decreases in the invoice prices"); *Socony-Vacuum*, 310 U.S. at 220, 224 n.59 ("fact that sales on the spot markets were still governed by some competition is of no consequence"; "[p]rice-fixing agreements may or may not be aimed at complete elimination of price competition"); *Gelboim v. Bank of America Corp.*, 823 F.3d 759, 771 (2d Cir. 2016) ("[T]he fixing of a component of price violates the antitrust laws.").

Price-fixing agreements are sufficiently pernicious that they are one of the few "hard core" antitrust offenses that may be prosecuted criminally. *See, e.g.*, *United States v. Stop & Shop Cos.*, Crim. No. B 84-51, 1984 WL 3196 (D. Conn. Nov. 9, 1984) (conspiracy to discontinue double coupons is a per se criminal offense). As the Justice Department has explained, "Price fixing, bid rigging, and market allocation are economic crimes with potentially devastating effects on the U.S. economy. Such crimes rob purchasers, contribute to inflation, destroy public confidence in the economy, and undermine our system of free enterprise." U.S. Dep't of Justice, Antitrust Division, *An Antitrust Primer for Federal Law Enforcement Personnel* 1 (rev. April 2005), https://www.justice.gov/atr/file/761666/download.

At the same time, potential criminal prosecution is not the only, or even principal, means by which price-fixing violations are deterred. Private actions under § 4 of the Clayton Act are an indispensable component of enforcing the antitrust laws. "Congress created the treble-damages remedy of § 4 precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations."

Reiter, 442 U.S. at 344; *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) ("The treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators."); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969) ("[T]he purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws.").

Allowing the airlines' proposed offsets, which are inadmissible as defenses to liability, would weaken the per se rule and seriously undermine the utility of private actions under § 4 to deter price fixing.

B. *Hanover Shoe* and *Valley Drug* Preclude Offsets to Price Fixing Overcharges

To promote deterrence and avoid unduly complicating private antitrust actions, the Court in *Hanover Shoe* rejected the "passing on" defense. The Court held that "when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of § 4," regardless of whether the buyer fully passed on the overcharge to its customers. *Hanover Shoe*, 392 U.S. at 489. In *Illinois Brick*, the Court reaffirmed *Hanover Shoe* and followed its reasoning to preclude the offensive use of passing on theories. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745-46 (1977)

("We think the longstanding policy of encouraging vigorous private enforcement of the antitrust laws supports our adherence to the *Hanover Shoe* rule, under which direct purchasers are not only spared the burden of litigating the intricacies of pass-on but also are permitted to recover the full amount of the overcharge.").

In *Valley Drug*, this court read *Hanover Shoe* liberally to hold that when direct purchasers pay an overcharge for a product and their profits are *increased* as a result, they nonetheless suffer injury and damages in the amount of the overcharge. *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1193 (11th Cir.2003) ("[W]e read *Hanover Shoe* as directing a court to overlook the potential net gain, or conversely the potential absence of a net loss, that a direct purchaser may in fact have experienced for the purposes of providing the direct purchaser with standing to sue and a means for calculating damages in antitrust violation litigation.").

The district court correctly held that *Hanover Shoe* and *Valley Drug* preclude the offsets alleged here. The airlines seek to distinguish these cases on the ground that they deal with the "pass on" defense, and that "[a]ccounting for reductions of Defendants' own base fares to determine the 'but for' price is not analogous to a 'pass on' defense." Appellants' Br. 41. But *Hanover Shoe*'s rule against offsets extends beyond pass-on theories.[6] For example, in *Hawaii v.*

[6] And defendants' claim in *Valley Drug* was not simply that the national wholesalers passed on the overcharges to their customers, but that they benefited from the collusion because their markups were higher and they sold more of the price-

Standard Oil Co. of Cal., 405 U.S. 251 (1972), the Court noted that, given "a payment of money wrongfully induced, damages are established by the amount of the overcharge. Under § 4, courts will not go beyond the fact of this injury to determine whether the victim of the overcharge has partially recouped its loss in some other way . . . ." *Id.* at 262 n.14 (internal quotation marks omitted); *see also In re Elec. Books Antitrust Litig.*, 11 MD 2293(DLC), 2014 WL 1282293, *17 (S.D.N.Y. Mar. 28, 2014) (*Hanover Shoe* teaches that "speculatively raising potential offsets, even when those offsets are directly related to the goods at issue" is inappropriate); *In re Airline Ticket Comm'n Antitrust Litig.*, 918 F. Supp. 283, 286 (D. Minn. 1996) ("In a horizontal price-fixing case, . . . mitigation and offset generally do not affect the ultimate measure of damages"); *cf. In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. C-07-5944, 2016 WL 6216664, *11 (N.D. Cal. Oct. 25, 2016) ("the law does not require mitigation in a price-fixing conspiracy case").[7]

The district court's offset ruling is fully supported by *Hanover Shoe*'s policies against "unduly complicating the issue of proof of damages," and undermining

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inflated product than they otherwise would have. *See Valley Drug*, 350 F.3d at 1191.

[7] There is little doubt that *Hanover Shoe* precludes the airlines' argument that the payment of a first-bag fee on a given flight should be offset by base-fare savings on *subsequent* flights. *See Hanover Shoe*, 392 U.S. at 490 n.8 (the "'general tendency of the law, in regard to damages at least, is not to go beyond the first step'" (quoting *Southern Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918))); *see also Adams v. Mills*, 286 U.S. 397, 407 (1932) ("In contemplation of law the claim for damages arose at the time the extra charge was paid.").

the "enforcement and deterrence functions" of § 4. *Valley Drug*, 350 F.3d at 1194-95. Determining whether *unilateral* "unbundling" of services leads to lower base prices is complex.[8] While economic theory may predict some offset in a competitive market, whether such reductions are likely in an oligopoly is another matter, let alone in a market assumed to be infected with price fixing. *Cf. Catalano*, 446 U.S. at 647-49 ("While it may be that the elimination of a practice of giving [interest-free credit] will ultimately lead in a competitive market to corresponding decreases in the invoice price, that is surely not necessarily to be anticipated."). Indeed, since the great recession, increasing ancillary fees in the airline industry *as a whole* have not been associated with decreasing base fares, arguably because of a lack of transparency in fees and tacit coordination in the industry. *See* Comments of the American Antitrust Institute 4-5, Notice of Proposed Rulemaking on Transparency of Airline Ancillary Fees and Other Consumer Protection Issues, U.S. DOT Dkt. OST-2014-0056 (Sept. 29, 2014) ("[T]he airline industry has learned

[8] Indeed, the complexity of the airlines' analyses demonstrates the point. *See, e.g.*, R. 224-4, Expert Report of Darin N. Lee ¶ 32 & Ex. C (offering multiple regression analysis with numerous variables, and maintaining that the effect on fares will vary according to all the factors that affect a fare on a given route and the "myriad of reasons why two passengers on the same route can pay different base fares"). *But see* R. 269-1, Reply Report of Hal J. Singer ¶¶ 6-9 (criticizing defendants' expert studies for failing to control for carrier-specific fuel costs, among other things).

how to unbundle and charge for its various ancillary activities without simultaneously reducing the price of its core offering—air transportation fares.").

Beyond increasing the complexity of price-fixing cases, allowing offsets would undermine deterrence. It is generally agreed that treble damages insufficiently deter horizontal price fixing. *See, e.g.*, Herbert Hovenkamp, *Federal Antitrust Policy* 719 (4th ed. 2011) ("Treble damages [are] . . . underdeterrent with respect to . . . naked collusion."); John M. Connor & Robert H. Lande, *Cartels as a Rational Business Strategy: Crime Pays*, 34 Cordozo L. Rev. 427, 430 (2012) ("[D]espite all the existing sanctions, collusion remains a rational business strategy. Cartels are a crime that, on average, pays. In fact, it pays very well."). In part, this is because treble damages do not compensate for significant harms caused by price fixing, including the time value of money (prejudgment interest), the loss arising from reduced purchases (deadweight loss), and in some jurisdictions, the higher prices that the conspiracy enables non-conspirators to charge (i.e., "umbrella" harms). *See* Robert H. Lande, *Are Antitrust 'Treble' Damages Really Single Damages?*, 54 Ohio State L.J. 115, 129-53 (1993).

Nor are harms to quality ordinarily compensable because they are often too difficult to measure. For example, in the case of first-bag fees, passengers who choose *not* to check their bags to save the first-bag fee, but who would prefer to do so, will suffer the inconvenience of having to carry on their bags, but they will be unable to recover damages for this harm. Moreover, passengers who check their bags (as well as those who do not) will not be able to recover for the degraded quality of the flying experience resulting from the increased amount of carry-on baggage. *See* U.S. Govt. Accountability Office, *Consumers Could Benefit from Better Information about Airline-Imposed Fees and Refundability of Government-Imposed Taxes and Fees* 29 (July 2010) [hereinafter *GAO Study*] (noting reports from association of flight attendants that increasing carry-on baggage due to checked-bag fees can slow passenger boarding, delay pushbacks, create stressful boarding situations, and adversely affect the safety of passengers and flight attendants); Christine Negroni, *More Fees, More Carry-Ons*, N.Y. Times, March 29, 2011, at B6 (reporting that huge increase in the number of carry-on bags that needed to be screened may adversely affect passenger wait times in security lines).

In short, "[t]he concern in *Hanover Shoe* for the complexity that would be introduced into treble-damages suits [as well as] the Court's concern for the reduction in the effectiveness of those suits" if a passing on defense were allowed, *Illinois Brick*, 431 U.S. at 745, fully apply to the airlines' proposed offsets.

C. Common-Law Tort Damages Principles Bar Offsets

The district court's offset ruling is also supported by common law tort-damages rules, which apply proximate-cause principles to offsetting benefits. *See* Restatement (Second) of Torts § 920 & cmt. d (Am. Law Inst. 1979); *cf. McCready*, 457 U.S. at 477-78 (employing proximate-cause analysis to guide application of § 4).

In finding the offsets irrelevant, the district court emphasized that any base-fare reductions were *independent* of the first-bag fee overcharge in the sense that the reductions involved different transactions (paid for separately) and that they applied regardless of whether a passenger paid a bag fee. Op. 26-27. The court's reasoning is consistent with the common-law rule that the benefits from tortious conduct may offset harm only when the tortious conduct "conferred a *special* benefit to the interest of the plaintiff that was harmed." Restatement (Second) of Torts § 920 (emphasis added). Here, the purported base-fare reductions are "common to the community." *Id.* cmt. c. The fact that the benefit occurs in a transaction different from the one in which the harm is incurred and is for a different service[9] also indicates that the requisite causal connection between the tortious conduct and the

[9] *See GAO Study* at 20-21 (noting that fees for optional services, like baggage fees, are not subject to the excise tax on amounts paid for "air transportation").

purported benefit is absent. *See* Dan B. Dobbs et al., *The Law of Torts* § 482 (2d ed. 2016) (requiring "direct benefits" from "the very act of injury").

The common-law rule also precludes an offset unless "the benefit is one the plaintiff wants." *Id.*; *see* Restatement (Second) of Torts § 920 cmt. f (benefits rule does not "permit the tortfeasor to force a benefit on [plaintiff] against his will"). However, the district court noted that "there is no suggestion in the case at hand that class members were subjectively aware of any offsetting benefits, let alone that they could be said to have been 'content' to make a 'tradeoff' in the form of being subjected to a first-bag fee to receive those benefits." Op. 62.

D. The Collateral Source Rule Bars Offsets for Reimbursements

Basic tort damages principles also support the district court's ruling that payment of first bag fees may not be offset by reimbursements of such fees by third parties. Under the collateral source (or benefit) rule, "[p]ayments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable." Restatement (Second) of Torts § 920A(2).

The collateral source rule is based "on the belief that the wrongdoer should be made to pay—the better to deter like conduct—whether or not the victim has providently supplied another source of compensation." *Carter v. Berger*, 777 F. 2d 1173, 1175 (7th Cir. 1985). It rests on a "similar enforcement principle" as the no-passing-on rule in antitrust. *Blue Cross & Blue Shield of N.J., Inc. v. Phillip Morris, Inc.*, 138 F. Supp. 2d 357, 361 (E.D. N.Y. 2001); *see Carter*, 777 F.2d at 1175 ("same approach"); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 185 F. Supp. 826, 829 (M.D. Pa. 1960) (citing collateral-source principles in rejecting passing on defense). The rule has been applied to antitrust offenses, *see, e.g., In re Abbott Labs. Norvir Antitrust Litig.*, 2007 WL 1689899, *3-*4 (N.D. Cal. June 11, 2007), and to claims under other federal statutes, *see, e.g., City of Chicago Heights v. Lobue*, 914 F. Supp. 279, 284 n.6 (N.D. Ill. 1996) (RICO).

Accordingly, the collateral source rule should apply in this case to preclude any reduction in damages on account of the fact that class members' employers or other third parties reimbursed them for their travel. "[T]he fact of subsequent reimbursement . . . is [not] of any concern to the wrongdoers." *Adams*, 286 U.S. at 407; *see also New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1078-80 (2d Cir. 1988) (holding that bid riggers could not reduce damages to state on account of reimbursement of highway contracts by federal government).[10]

[10] The airlines cite *In re Northwest Airlines Corp.*, 208 F.R.D. 174 (E.D. Mich. 2002) for the proposition that reimbursement does not implicate the policy considerations of *Hanover Shoe.* Appellants' Br. 51. However, in that case the court did not consider the collateral source rule, and in any event granted class certification notwithstanding the likelihood of reimbursement.

E. Even If Offsets Are Relevant to Damages, the Payment of an Optional Fee Plainly Constitutes Injury

The district court correctly held that even if the airlines' offset theory were cognizable as a matter of *damages*, the potential offsets would not negate the fact of plaintiffs' *injury* when they paid a first-bag fee. *See In re Nexium Antitrust Litig.*, 777 F.3d 9, 27 (1st Cir. 2015) ("[I]f a class member is overcharged, there is an injury even if that class member suffers no damages."). The case law generally holds that an agreement to fix a component of price—whether a particular fee or list prices—injures all purchasers in the market without a showing that their individually negotiated prices were higher. *See In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1254 (10th Cir. 2014) ("Under the prevailing view, price-fixing affects all market participants, creating an inference of class-wide impact even when prices are individually negotiated."). And that is because fixing a component of price influences the "starting point for prices." *Gelboim*, 823 F.3d at 776; *see, e.g., Urethane*, 768 F.3d at 1255 (conspiracy to raise list prices had common impact because "it would have affected the entire market, raising the baseline price for all buyers"). It follows that the payment of a fee that is inflated because of price fixing constitutes an injury without a showing that the consumer necessarily paid a higher "all in" price.

The airlines cite *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1175, 2014 WL 7882100 (E.D.N.Y. Oct. 15, 2014), for the proposition that "'the proper inquiry in determining impact is not whether a plaintiff is overcharged on fuel and surcharges in isolation, but rather whether the plaintiff was overcharged on [the] total or 'all-in' price of a given transaction.'" Appellants' Br. 42 (quoting *Air Cargo* at *44). However, the plaintiffs in *Air Cargo* conceded the need to show higher "all in" prices and they did not "advance the argument that the defendants have conferred injury on [their] customers merely by 'fixing' the starting point for negotiations," an argument that the court noted "may have some basis under existing law." *Air Cargo* at *44 n.21 (citing numerous cases). Moreover, the fuel and security surcharges in *Air Cargo* were mandatory fees for all customers which were sometimes avoided through individual negotiation of base rates. That is a far cry from the situation in this case in which the fees were paid by some customers but purportedly offset by market-wide price reductions affecting all consumers. The airlines cite no case (and we are aware of none) contradicting the common-sense proposition that the payment of money for an optional component of service inflated by price fixing is an injury for the purposes of § 4.[11]

[11] We also agree with plaintiffs that a class may be certified even if some members of the class suffer no injury. *See Nexium*, 777 F.3d at 29-31; *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1136 (9th Cir. 2016); *Cordes & Co. Financial Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 108 (2d Cir. 2007).

CONCLUSION

For the foregoing reasons, this Court should hold that defendants' proposed offsets are irrelevant and affirm the district court's class-certification order.

Respectfully submitted,

s/ Scott E. Perwin

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February 1, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing brief is proportionately-spaced, has a type-face of 14 points, and, as calculated by my word processing software (Microsoft Word), contains 5060 words, less than half the number of words permitted by the Court for the parties' briefs. The electronic version of the foregoing brief has been scanned for viruses and is virus-free according to the anti-virus program.

/s/ Scott E. Perwin
Scott E. Perwin

CERTIFICATE OF SERVICE

I hereby certify that this brief has been served through the Court's ECF system on counsel for all parties required to be served on February 1, 2017.

/s/ Scott E. Perwin
Scott E. Perwin