

## *Colleen Witmer v. J. Scott Kirby, et al.*

**COURT:** Delaware Court of Chancery  
**CASE NUMBER:** 2024-0375-PAF  
**CASE LEADERS:** Christopher J. Orrico  
**CASE TEAM:** Daniel Meyer, Shiva Mohan

Stockholder plaintiff Colleen Witmer (“Stockholder”) asserted claims for breach of fiduciary duty against the board of directors (the “Board”) of United Airlines Holdings, Inc. (the “Company”) for its adoption of a Section 382 stockholder rights plan or “poison pill” with a 4.9% ownership trigger. Delaware law only allows for a poison pill with a 4.9% trigger if it is narrowly tailored to help a company preserve its valuable net operating loss (“NOL”) carryforwards which can be used to offset future tax liability. NOL carryforwards can be lost by the trading in Company shares of 5% or greater shareholders. Thus, the typical “NOL poison pill” is triggered at an ownership level in excess of 4.9% to dissuade stockholders from purchasing stock sufficient to trigger an ownership change that might threaten a company’s ability to use its NOL carryforwards.

In this case, Stockholder alleged that the Board enacted a 4.9% ownership trigger NOL poison pill under the guise of protecting the Company’s NOL tax attributes, but in reality to protect the Board’s incumbency. Stockholder asserted that the NOL poison pill contained improper features that served to entrench the positions of existing Board members and did not serve the purpose of protecting the Company’s NOL carryforwards.

Plaintiff filed a complaint challenging the NOL poison pill on April 10, 2024. On April 23, 2024, the Company announced that it amended its NOL poison pill to revise certain language that Plaintiff challenged. The parties subsequently stipulated that Stockholder’s legal action was moot, and on May 8, 2024, the Court approved the stipulation.

On May 10, 2024, Stockholder filed a motion for an award of attorneys’ fees and reimbursement of expenses (the “Fee Motion”). On August 7, 2024, the parties filed a joint letter with the Court and attached a notice to the Company’s stockholders with information on how Company stockholders may object to the Fee Motion (the “Notice”). On August 8, 2024, the parties filed a Stipulation and [Proposed] Order Concerning Notice of Plaintiff’s Counsel’s Application for An Award of Attorneys’ Fees and Reimbursement of Expenses. And on the same day, the Court granted the Order and approved the Notice. The Notice and Order can be found in the **Case Documents** list on the right of this page.

The Court will hear oral argument on the Fee Motion on November 17, 2024.

### **Case Documents**

- August 8, 2024 - [Granted] Stipulation and Order Concerning Notice of Plaintiff’s Counsel’s Application for an Award of Attorneys’ Fees and Reimbursement of Expenses
- August 7, 2024 - Notice to United Airlines Holdings, Inc. Stockholders Regarding Plaintiff’s Counsel’s Fee Application