IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kaplan v. Spocket Inc.,*
2026 BCSC 69

Date: 20260116
Docket: S235821
Registry: Vancouver

Between:

Kimberly Kaplan and Kaylee Astle

Petitioners

And

Spocket Inc., Saba Mohebpour and Christopher Brown

Respondents

Before: The Honourable Justice Fowler

Reasons for Judgment

In Chambers

Counsel for the Petitioners:	C. Ferris, KC R. Wollenberg
Counsel for the Respondents:	T. Tomchak S. Cormack
Place and Dates of Hearing:	Vancouver, B.C. July 23–24, 2025
Place and Date of Judgment:	Vancouver, B.C. January 16, 2026

Table of Contents

INTRODUCTION

[1] The petitioner, Ms. Kaplan was a consultant with the respondent company, Spocket, through her business, Kapgrowth Advisory Inc., between January 1, 2019, and June 4, 2020. As of July 23, 2024, the date when Ms. Kaplan was cross-examined on her affidavit, she was the general manager, senior vice-president, and chief executive officer of different technology companies.

[2] The petitioner, Ms. Astle was employed between March 18, 2019, and November 5, 2020, as the head of operations and finance at Spocket.

[3] The respondent, Spocket, which I may also refer to as the company or corporation as the context requires, is a closely held private company incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 [*CBCA*]. Spocket is a company that provides an online platform for drop-shipping and product supply services.

[4] The individual respondents, Mr. Mohebpour and Mr. Brown, were the only two directors of Spocket. Mr. Mohebpour became a director, the president and CEO of Spocket on July 6, 2018. Mr. Brown joined Spocket's board of directors (the "Board") on June 15, 2022.

[5] The petitioners were shareholders in Spocket after exercising their rights to purchase shares granted to them when they entered into the SOP agreements with Spocket.

[6] The petitioners seek various relief against Spocket and the individual respondents to rectify conduct that they claim was oppressive, unfairly prejudicial or which unfairly disregards their interests as shareholders in Spocket.

[7] More specifically, the petitioners assert that the Board made amendments to shareholder agreements that were applied retroactively to permit Spocket to repurchase the petitioners' shares at less than fair market value. The petitioners

claim that the respondents have disregarded their reasonable expectations and interests and thereby acted in an oppressive and unfairly prejudicial manner.

[8] The respondents submit that the petitioners have not established that their expectations were reasonable or that the respondents have acted in an oppressive, prejudicial or unfair manner. More particularly, the respondents submit that all the actions complained of by the petitioners were within the respondents' rights provided that they acted fairly.

[9] I start these reasons with the factual background required to appreciate the petitioners' claims. I then summarize the relevant legal principles before setting out my analysis and conclusions.

BACKGROUND

Spocket Adopts a Stock Option Plan

[10] On September 1, 2017, Spocket started a stock option plan (the "SOP" or the "Plan") to advance the interests of Spocket and its shareholders by acting as a "performance incentive" to the directors, employees and consultants for "continued and improved services" with Spocket. In addition, Mr. Mohebpour testified that "in the world of start-ups, companies offer stock options to their senior people to keep them for as long as possible in the company so they don't resign from the company."

[11] The terms of the SOP provide the Board with "full and complete authority" to interpret, administer, amend, alter or vary the Plan at any time, including to:

(i) adopt rules and regulations for implementing the Plan;

(ii) determine the eligibility of persons to participate in the Plan, the number of shares subject to options, the fair market value of shares and the vesting period of the options;

(iii) interpret and construe the provisions of the Plan;

(iv) restrict or limit the shares and the nature of such restrictions or limitations; and,

(v) take such other steps as they determine to be necessary or desirable to give effect to the Plan.

[12] Decisions of the Board about the plan must be recorded in writing and are binding on the corporation and on those eligible to participate in the Plan.

[13] A participant in the SOP who ceased to be a full-time employee or a consultant had 90 days to exercise vested options, with all unvested options expiring as of the date of termination of employment or consulting.

[14] A participant in the SOP was required to enter into an agreement with the corporation that set out the number of options, the exercise price and the vesting start date. The agreement specified a 12-month cliff period after which 25% of the options would vest, with the remaining options vesting at a rate of 2.08333% per month after the cliff date.

[15] The SOP agreement specified that the exercise of options and issuance of shares was subject to the terms and conditions of the Plan. In addition, a participant in the Plan acknowledged that the corporation may require the participant to sign "the then current shareholder agreement".

Spocket Amends Its Shareholders Agreements

[16] On July 18, 2018, Spocket terminated its prior shareholders agreement in favour of a Right of First Refusal and Co-Sale Agreement (the "**Original ROFR Agreement**"). The Original ROFR Agreement was intended to induce the Company's investors to purchase Class A Preferred Shares of the Company. To do so, it provided a general right of first refusal to investors to purchase all or any portion of shares that an existing or future shareholder may wish to transfer.

[17] The Original ROFR Agreement set out certain transfers to which the right of first refusal would not apply and prohibited any shareholder from transferring shares

to any entity the Board determined to directly or indirectly compete with the Company or that would place the Company at a competitive disadvantage.

[18] The Original ROFR Agreement provided that for the purposes of any provision in the Company's articles of continuance requiring shareholders' consent for a share transfer, each common shareholder was deemed to have consented to any transfer permitted or required under the Original ROFR Agreement.

[19] Finally, the Original ROFR Agreement provided that it could be amended and restated with written consent of, among others, common shareholders holding a majority of the shares.

[20] On the same date, July 18, 2018, Spocket executed a voting agreement, as amended on August 28, 2019 (the "**Original Voting Agreement**", together with the Original ROFR Agreement, the "**Original Shareholders Agreements**"). The Original Voting Agreement provided, among other things, that it may be amended and restated by the written agreement of: (i) the Company; (ii) the majority of the common shareholders and (iii) the majority of the preferred shareholders.

Ms. Kaplan's Acquisition of Shares in Spocket

[21] On January 1, 2019, Ms. Kaplan was retained by Spocket as a business consultant. Under her consulting agreement with Spocket, Ms. Kaplan was to be paid a consultancy fee of $3,000 per month in exchange for advisory services regarding growth and user acquisition.

[22] In addition, Ms. Kaplan was granted share options "representing .25% of the fully-diluted capitalization of the company", or 101,674 shares, vesting over 48 months and subject to a one year cliff period. This meant that on January 1, 2020, 25% of her options would vest, with the remainder vesting at a rate of 2.08333% for each following month.

[23] In August 2019, Mr. Mohebpour informed Ms. Kaplan that the Company did not see the value of her work and was no longer willing to pay her C$3,000 monthly

fee. From August 2019 onwards, Ms. Kaplan agreed to forego her consultancy fee and be paid for her work solely through the grant of her share options. She was comfortable doing so given the potential value she saw in the stock options.

[24] Ms. Kaplan signed the SOP agreement on October 29, 2019. The exercise price was set at $0.05 per share. The agreement contained several provisions that confirm that the options were subject to the terms and conditions of the SOP, including that Spocket may require Ms. Kaplan to execute the then current shareholders agreements, voting agreements and/or power of attorney, as may be required by the Board in its sole discretion.

[25] Ms. Kaplan acknowledged, when she signed the consulting agreement, that she had the opportunity to consult with independent legal and financial advisors of her choice. However, Ms. Kaplan did not consult with either legal counsel or financial advisors prior to signing. Nor did she recall raising any concerns regarding the agreement with Mr. Mohebpour.

[26] On June 4, 2020, Ms. Kaplan's consultancy work with Spocket ended. On the same date, Ms. Kaplan executed an adoption agreement, through which she became a shareholder in Spocket under the Original ROFR, albeit that she was not at that time the owner of any shares.

[27] Ms. Kaplan confirmed that she did not consult with anyone before signing the SOP agreement and had no concerns with the agreement at the time it was signed.

[28] On July 24, 2020, Ms. Kaplan exercised her vested options and purchased 36,009 common shares in Spocket at the exercise price of US$0.05 per share, for a total of US$1,800.45.

[29] The notice to exercise signed by Ms. Kaplan confirms that the purchase was made pursuant to the SOP agreement dated October 29, 2019, and that it required Ms. Kaplan to become a party to "any existing investors' rights agreement, right of first refusal and co-sale agreement and voting agreement or any other agreement

providing for similar rights and obligations as the preceding agreements, as may be required by the Board in its sole discretion."

[30] In November 2020, Ms. Kaplan signed a power of attorney, coupled with an interest, appointing the CEO of Spocket, the respondent, Saba Mohebpour, as her sole and exclusive attorney with the full power of substitution to sign various corporate documents, including shareholder consents and amendments to shareholder agreements. Consideration for the power of attorney coupled with an interest is stated to be Spocket issuing Ms. Kaplan shares.

[31] Although the power of attorney was signed in November 2020, it is dated or backdated to June 4, 2020. The document commences, "The undersigned holder of common shares in the capital of Spocket." Ms. Kaplan was not a holder of common shares in June 2020. She did not become a holder of common shares until she exercised her options in July 2020.

[32] Mr. Mohebpour deposed that the power of attorney agreement was in a standard form used for all Spocket's option holders. By inference, it appears that powers of attorney have been used by Mr. Mohebpour since at least July 2018, whereupon the Original ROFR Agreement was signed by Mr. Mohebpour as power of attorney for the common shareholders, Jasper Pu Jia and Yandi Shi.

Ms. Astle's Acquisition of Shares in Spocket

[33] In March 2019, Ms. Astle started employment at Spocket as the Head of Operations and Finance. Under the terms of her employment agreement, Ms. Astle would receive an annual salary of C$120,000, benefits, vacation time and a discretionary bonus.

[34] In addition, Ms. Astle agreed that she would not compete with the Company during the term of her employment and for a period of 18 months afterwards.

[35] Ms. Astle acknowledged in her employment agreement that she had the opportunity to confer with an independent legal advisor before signing the

agreement if she had wished to. Ms. Astle testified that she did not consult with a lawyer prior to signing the employment agreement or raise any concerns with Mr. Mohebpour, or any other director of the company, about her employment agreement prior to commencing her employment.

[36] On October 29, 2019, Ms. Astle signed the SOP agreement, acquiring the option to purchase up to 305,022 shares at an exercise price of UD$0.05. The vesting start date was May 1, 2019. The shares vested over 48 months subject to a one-year cliff period, meaning that on May 1, 2020, 25% of her options would vest, with the remainder vesting at a rate of 2.08333% for each following month.

[37] As with the agreement signed by Ms. Kaplan, the SOP agreement contained provisions confirming that the options were granted subject to the terms and conditions of the Plan, including that Spocket may require Ms. Astle to execute the then current shareholders agreements, voting agreements and/or powers of attorney, as may be required by the Board in its sole discretion.

[38] On October 13, 2020, Ms. Astle gave notice to Spocket of her resignation, with her final day being November 5, 2020. Ms. Astle testified that she "resigned due to the toxic work culture and the mistreatment" she received from Mr. Mohebpour.

[39] Meanwhile, on September 10, 2020, Ms. Astle had incorporated 12329891 Canada Inc. as a shell company. In 2021, Ms. Astle started Blanka, which she described as a company that helped other companies or brands create makeup. Blanka also purchased inventory from third parties and fulfilled orders on behalf of Blanka's clients.

[40] On November 3, 2020, Ms. Astle received a letter from Mr. Mohebpour accepting her resignation and advising her that 114,383 of her options had vested. The letter stated that Ms. Astle had to exercise the options within 90 days of November 5, 2020.

[41] Ms. Astle alleges that she had trouble and a lack of cooperation from Mr. Mohebpour in obtaining her shares. It is alleged that Mr. Mohebpour attempted

to change the allotment of options available to her, required Ms. Astle to personally attend at the Spocket offices to pick up the package of documents for signature, and further refused to respond to Ms. Astle's requests for guidance about how to return the executed documents and payment by wire transfer.

[42] Mr. Mohebpour denies that Ms. Astle experienced any difficulties obtaining the necessary documents from Spocket required for her to exercise her options.

[43] It is not disputed that Ms. Astle executed a notice to exercise in the same form as Ms. Kaplan, electing to purchase 114,383 common shares of Spocket, at the price of US$0.05, for a total of US$5,719.15. Ms. Astle also signed adoption agreements making her a party to the Original ROFR and the Amended and Restated Voting Agreement. She also executed the same power of attorney as Ms. Kaplan.

[44] All the documents are dated November 5, 2020. Ms. Astle deposes that she received and signed all the documents in January 2021.

[45] I have determined that it is not necessary for me to resolve the conflict in the evidence between Ms. Astle and Mr. Mohebpour about the circumstances surrounding the signing of documents. Concerns about Ms. Astle encountering the problems she has described in exercising her options is of negligible relevance to my assessment of whether the conduct of Spocket or the individual respondents was oppressive.

[46] Ms. Astle confirmed that she did not seek legal advice prior to signing the SOP Agreement. Nor did she recall asking for any clarifications concerning the SOP Agreement prior to signing. Ms. Astle testified that she sought legal advice before executing the power of attorney and adoption agreements.

Share Valuation

[47] Mr. Mohebpour deposed that Spocket engaged an independent appraiser, Carta Valuations, LLC ("Carta"), to annually determine the fair market value of its

common shares. These appraisals are referred to as 409A valuations and are based on guidance and standards established in section 409A of the U.S. Internal Revenue Code. In accordance with Carta's independent appraisals, Spocket's common share price during the relevant period were as follows:

2018:	US$0.05
April 22, 2020:	US$0.18 (C$0.26)
April 22, 2022:	US$0.80 (C$1.02)
April 22, 2023:	US$0.81

[48] On November 20, 2020, Mr. Mohebpour sold 402,592 of his common shares of the Company to a venture capital firm for a price of US$4.97. The buyer of these shares was immediately permitted to exchange the common shares into Series A-2 Preferred Shares of the Company with additional rights, including a liquidation preference. Mr. Mohebpour deposed that the enhanced rights attaching to the preferred shares justified a higher valuation.

[49] Mr. Mohebpour deposed that the purchase price represented a negotiated price which did not reflect the fair market value of the shares, and which was likely impacted by the timing of the sale in November 2020, the peak of the COVID-19 valuation bubble.

Spocket Deems Ms. Astle a Competitor

[50] In March 2023, Spocket provided notice to Ms. Astle that it had deemed her to be a competitor of Spocket as of May 30, 2022, pursuant to the Amended ROFR. This is perplexing because the Amended ROFR did not come into existence until January 2023, and the definition of Competitor did not exist under the previous shareholder agreement.

[51] The Amended ROFR defines a competitor as including a person engaged directly or indirectly with a business which "is similar or substantially similar to, or competes with, the business" of Spocket. There is no evidence before me of the

evidence, methodology or process employed by Spocket in deeming Ms. Astle a competitor. There is no board resolution deeming Ms. Astle to be a competitor.

[52] There is very little evidence before me about the services provided by either Blanka or Spocket. Mr. Mohebpour attests that Spocket provides an "online platform for drop-shipping and product supply services," and that Blanka "is a platform that provides drop-shipping services to its customers."

[53] As stated earlier in these reasons, Ms. Astle deposed that Blanka is a company that helps other companies or brands create makeup, including purchasing inventory from third parties to fulfill orders on behalf of Blanka's clients. Ms. Astle stated that drop-shipping is a very common key-word term used in many apps including Shopify.

[54] The evidence does not permit me to determine that by providing drop-shipping services, Blanka, and thereby Ms. Astle, was engaged in a business that is similar, substantially similar, or competes with Spocket.

[55] In addition, Spocket's counsel sent Ms. Kaplan a letter in June 2022, reminding her of the obligations she owed to Spocket regarding confidentiality. The letter notes that Spocket was investigating Ms. Kaplan's potential involvement with Blanka. I understand that nothing came of this investigation.

[56] A few months later, on August 12, 2022, Spocket commenced litigation seeking damages against Blanka and Ms. Astle, on the basis that her business was a competitor of Spocket. From the evidence on this application, it appears that this civil case has stalled.

Other SOP Members Exercise Options

[57] Other individuals working for Spocket exercised their options to purchase common shares at the grant price of US$0.05:

a) On March 11, 2022, Kimberly Yap exercised her options and purchased 6,354 common shares.

b) On May 20, 2022, Imelda Dharmawi exercised her options and purchased 13,556 common shares.

c) On June 29, 2022, Thomas Hansen exercised his options and purchased 985,478 common shares.

d) On February 16, 2023, Shreyas Sali exercised his options and purchased 69,195 common shares.

Spocket Amends the Shareholders Agreements

[58] On January 16, 2023, without notice to either Ms. Kaplan or Ms. Astle, who were by that point shareholders, the Board passed a resolution approving an Amended and Restated Right of First Refusal and Co-Sale Agreement (the "Amended ROFR") and approving amendments to the Amended and Restated Voting Agreement.

[59] The Amended ROFR was passed with the consent of the common shareholders, including by Mr. Mohebpour exercising his powers of attorney, as follows:

Signatory	**Number of Common Shares**	**Percentage of Common Shares**
Techstars Seattle 2015 LLC ("Techstars")	1,006,571	9.35%
Yandi Shi	16,667	0.15%
Saba Mohebpour	8,581,563	79.75%
Saba Mohebpour, on behalf of Imelda Dharmawi	13,556	0.13%

Saba Mohebpour, on behalf of Kimberly Yap	6,354	0.06%
Saba Mohebpour, on behalf of Tom Hansen	985,478	9.16%
Saba Mohebpour, on behalf of Kimberly Kaplan	36,009	0.33%
Saba Mohebpour, on behalf of Kaylee Astle	114,383	1.06%
TOTAL	**10,760,581**	**100**

[60] Notably, the Original ROFR did not contain any provision whereby Spocket had the unilateral right to compel repurchase of a shareholder's shares. However, section 2.4 of the Amended ROFR, the Default Shareholder provision, and Section 2.5 of the Amended ROFR, the Competing Shareholder provision, gave Spocket the power to unilaterally repurchase the common shares of shareholders in two circumstances:

> Defaulting Shareholder
>
> Where a shareholder has acquired their Common Shares pursuant to any Stock Option Plan, then if such shareholder who is an individual, or if the Principal of such Shareholder, who is an employee or consultant of Spocket or a subsidiary, experiences a Triggering Event, Spocket is entitled to purchase and the Shareholder is required to sell all or any part of the Common Shares beneficially owned by such Defaulting Shareholder.
>
> "Triggering Event" is defined in s. 1.28 as meaning, with respect to an individual (a) such individual has their employment or engagement terminated for cause or breach, as applicable; or (b) such individual has their employment or engagement terminated without cause or for convenience, as applicable, or resigns.
>
> Under s. 2.4(c), the price payable where the employment was terminated under (b) of the definition of "Triggering Event" is the fair market value of the shares, determined as at the date of the event which gives rise to the right of purchase or sale, in good faith by the Board.

> Competing Shareholder
>
> If any Shareholder that has acquired their shares pursuant to any Stock Option Plan is ever deemed to be a Competitor, then Spocket shall be entitled to purchase and such shareholder to sell all or any part of the Common Shares beneficially owned by the Competing Shareholder at a price to be determined in accordance with s. 2.5(c), provided that such repurchase has been approved by way of a written instrument executed by the Common Holders holding a majority of the Shares then held by all of the Common Holders (excluding Common Shares issued or issuable upon the conversion of the Preferred Shares) and secondly, by way of written instrument executed by the majority of the Board.
>
> Section 2.5(c) provides that the price payable shall be the lesser of (i) the original issue price of such Common Shares; and (ii) fair market value of such Common Shares, determined as at the date of the event which gives rise to the right of purchase or sale, in good faith by the Board.

The Company Provides Notice of the Amendments

[61] On February 3, 2023, Spocket sent Ms. Kaplan and Ms. Astle notice that Spocket had amended the Original ROFR Agreement and Original Voting Agreement, as well as copies of the Amended Shareholders Agreements.

[62] Ms. Kaplan attests that she reached out by text message to another investor and shareholder of Spocket, Patrick Lor, to confirm the purpose of the amendments, but otherwise she did not seek any legal advice about the amendments. Ms. Astle stated that she did discuss the amendments with counsel.

Repurchase of Petitioners' Shares

[63] On March 3, 2023, the Board adopted a consent resolution approving the repurchase of the petitioners' shares pursuant to the terms of the Amended ROFR Agreement.

[64] On March 3, 2023, Spocket sent a notice to Ms. Kaplan stating that her 36,009 shares were subject to the Repurchase Provision contained in s. 2.4(a) of the Amended ROFR. The notice stated that the termination of her consulting agreement on June 4, 2020, constituted a Triggering Event, permitting Spocket to repurchase her shares at a price of US$0.18 per share, stated to be the fair market value of the shares on the date of the triggering event.

[65] The effect of the Board's application of the Amended ROFR, specifically the Default Shareholder Provisions, is that Ms. Kaplan was held by the Board to be a defaulting shareholder on a date when she would not have been the owner of any shares: Ms. Kaplan left Spocket on June 4, 2020, but did not purchase shares until July 24, 2020.

[66] On March 3, 2023, Ms. Astle also received a notice from Spocket indicating that the Board had approved the repurchase of her 114,383 shares pursuant to the Competing Shareholder Provisions of the Amended ROFR. The notice stated that Spocket deemed Ms. Astle a competitor on May 30, 2022, and that accordingly, her shares were to be repurchased in accordance with the Competing Shareholder Provision at the original issue price of US$0.05 per share.

[67] Ms. Astle was provided no information about how or why the Board had determined she was a competitor.

Spocket Repurchases Shares From Others

[68] In the months following, the Board of Spocket approved share repurchases for each of the other shareholders who had exercised options and purchased shares.

[69] On May 17, 2023, a resolution was adopted approving the repurchase of shares from Ms. Yap for a price of US$0.78, determined to be the "fair market value" of the shares "as at the date" that Ms. Yap's employment terminated, March 11, 2022.

[70] Also on May 17, 2023, a resolution was adopted approving the repurchase of shares from Ms. Dharmawi for a price of US$0.80, determined to be the "fair market value" of the shares "as at the date" that Ms. Dharmawi's employment terminated, May 20, 2022.

[71] On November 27, 2023, a resolution was adopted approving the repurchase of shares from Mr. Hansen and Mr. Sali.

[72] Mr. Hansen's employment with Spocket terminated on April 29, 2022. His shares were valued "as at the date" of the termination of his employment at US$ 0.80.

[73] Mr. Sali's employment was terminated on January 27, 2023. His shares were repurchased also for US$0.80, the fair market value "as at the date" of the end of his employment.

LEGAL PRINCIPLES

The Oppression Remedy: Guiding Legal Principles

[74] The petitioners seek relief under the oppression remedy in s. 241 of the *CBCA*:

> **Application to court re oppression**
>
> 241 (1) A complainant may apply to a court for an order under this section.
>
> **Grounds**
>
> (2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
>
> > (a) any act or omission of the corporation or any of its affiliates effects a result,
> >
> > (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
> >
> > (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

[75] Oppression is an equitable remedy that seeks to ensure fairness or what is "just and equitable". The remedy confers on the court a broad, equitable jurisdiction to enforce not just what is legal but what is fair. The remedy is intended to protect the reasonable expectations of shareholders: *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, at paras. 56 and 58.

[76] As Justice Savage stated in *Icahn Partners LP v. Lions Gate Entertainment Corp.* 2010 BCSC 1547 at para. 135:

> In applying this approach the court cautions that oppression is an equitable remedy, so one should look at business realities, not merely narrow legalities. Second, oppression is fact specific to the context and relationships at play: "[c]onduct that may be oppressive in one situation may not be in another": *BCE*, paras. 58 and 59. Wedge J. in this court said in *Casey v. CopperLeaf Technologies Inc.*, 2010 BCSC 417, at para. 22, "...if context is not everything in oppression claims, it is almost everything".

[77] A claim for an oppression remedy involves a two-step enquiry:

a) Does the evidence support the reasonable expectation asserted by the claimant?

b) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest? *1168556 B.C. Ltd. v. 1164429 B.C. Ltd.*, 2024 BCSC 1727.

[78] The petitioners bear the onus of proving the reasonable expectations that are the basis of their claim and that those reasonable expectations were violated by conduct of the respondents that was oppressive, unfairly prejudicial or shows unfair disregard: *BCE* at para. 70.

The Test for Reasonable Expectations

[79] The reasonable expectations of the complainant, in this case two shareholders, are assessed in two-stages. First, the subjective expectations of the complainant must be established. Second, an objective analysis of the complainant's expectations must be conducted to determine whether the expectations were reasonable: *Jaguar Financial Corporation v. Alternative Earth Resources Inc.*, 2016 BCCA 193 at para. 113.

[80] The reasonableness of the expectations of the complainant is the foundation of the oppression remedy. The actual expectations of the complainant are never conclusive. In *First Bauxite Corporation (Re)*, 2019 BCSC 89, Madam Justice Fitzpatrick affirmed that "the test for reasonableness of expectations is whether they are realistic and objectively reasonable, as opposed to a 'wish list'", at para. 79.

[81] The assessment of reasonableness is objective and contextual. Justice Shergill summarized the law in *1168556 B.C. Ltd.*:

> [80] In determining whether expectations are reasonable, the court should have regard to the general commercial practice; the manner of the transactions; the nature of the corporation; the relationship between parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of the conflicting shareholders interests: *Icahn Partners LP v. Lions Gate Entertainment Corp.*, 2011 BCCA 228 at para. 59 citing *BCE* at para. 72.

[82] Given that the allegations in this case focus primarily on the conduct of the two directors of Spocket, it is important to consider the duties of directors. In *Icahn*, Savage J. made some general observations about the duties of directors:

> [129] It seems apt here to make a few general observations of directors' duties. The directors are responsible for the governance of the corporation. They are subject to a fiduciary duty to the corporation. The fiduciary duty which originated at common law is now embodied in the statutes.
>
> [130] The fiduciary duty is to act in the best interests of the corporation. In most cases the interests of the shareholders and the interests of the corporation are co-extensive. The interests of shareholders and the interests of the corporation may, however, conflict. The directors' duties in the case of conflict is not to the shareholders but to the corporation: *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68.
>
> [131] The fiduciary duty of the directors to the corporation is considered a broad, contextual concept. It is not confined to short term profit or share value but looks to "the long-term interests of the corporation": *BCE*, para. 38. That involves not only ensuring that the corporation meets its statutory obligations but also may involve "other requirements".

[83] Where there is a conflict between the interests of a shareholder and the interests of the corporation, the reasonable expectation of the shareholder is simply that the directors act in the best interests of the corporation and exercise their business judgment in a reasonable way. The Supreme Court held in *BCE* at para. 66:

> The fact that the conduct of the directors is often at the centre of oppression actions might seem to suggest that directors are under a direct duty to individual stakeholders who may be affected by a corporate decision. Directors, acting in the best interests of the corporation, may be obliged to consider the impact of their decisions on corporate stakeholders [...] However, the directors owe a fiduciary duty to the corporation, and only to the corporation. People sometimes speak in terms of directors owing a duty to

> both the corporation and to stakeholders. Usually this is harmless, since the reasonable expectations of the stakeholder in a particular outcome often coincides with what is in the best interests of the corporation. However, cases (such as these appeals) may arise where these interests do not coincide. In such cases, it is important to be clear that the directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation. [emphasis added]

The Test for "Oppression", "Unfair Prejudice" or "Unfair Disregard"

[84] In *BCE*, the Supreme Court emphasized that oppression is not established simply because a complainant's reasonable expectation was not fulfilled. Rather, the complainant must demonstrate that the unmet reasonable expectation was caused by corporate conduct that amounted to "oppression", "unfair prejudice" or "unfair disregard". The Supreme Court explained the second branch of the test in the following terms at para. 67:

> Even if reasonable, not every unmet expectation gives rise to claim under s. 241. The section requires that the conduct complained of amount to "oppression", "unfair prejudice" or "unfair disregard" of relevant interests. "Oppression" carries the sense of conduct that is coercive and abusive, and suggests bad faith. "Unfair prejudice" may admit of a less culpable state of mind, that nevertheless has unfair consequences. Finally, "unfair disregard" of interests extends the remedy to ignoring an interest as being of no importance, contrary to the stakeholders' reasonable expectations [...]. The phrases describe, in adjectival terms, ways in which corporate actors may fail to meet the reasonable expectations of stakeholders.

[85] I adopt the petitioners' summary of the types of conduct that are relevant to the test of whether oppression has been established:

> "Oppression" is conduct that is "burdensome, harsh and wrongful", "a visible departure from standards of fair dealing", and an "abuse of power". It is a wrong of the most serious sort. "Unfair prejudice" is generally seen as involving conduct less offensive than "oppression" but is conduct that is unjustly or inequitably detrimental to a shareholder's interests. "Unfair disregard" is viewed as the least serious of the three injuries, or wrongs, mentioned in section 241 of the *CBCA*. Conduct that unfairly disregards a complainant's interests has not been clearly defined by the courts. However, it is clear that the threshold for establishing it is even lower than that for establishing unfairly prejudicial conduct. (*Walker v. Betts*, 2006 BCSC 128, para. 80; and *BCE*, at paras. 92–94).

[86] Because the oppression remedy is focussed on fairness and equity, a petitioner is not required to establish that the acts complained of were either unlawful or otherwise actionable.

The Petitioners Must Prove a Personal Harm

[87] A complainant who alleges oppression must also show that the wrongful conduct caused a personal harm. As the Court held in *BCE*, "as in any action in equity, wrongful conduct, causation and compensable injury must be established in a claim for oppression".

[88] In *Stahlke v. Stanfield*, 2010 BCSC 142 at para. 19, the Court held that the complainant "must show that the failure to meet the reasonable expectation involved unfair conduct and prejudicial consequences. In other words, wrongful conduct, causation and compensable injury must be established".

[89] The oppressive conduct must cause a personal harm to the complainant, as opposed to a derivative harm to the corporation or the shareholders as a whole. A complainant is required to show that they suffered direct harm which was peculiar or separate and distinct from that suffered by all shareholders generally: as stated in *Jaguar* at para.186:

> Since the creation of the oppression remedy, courts have taken a broad and flexible approach to its application, in keeping with the broad and flexible form of relief it is intended to provide. However, the appellants' open-ended approach to the oppression remedy in circumstances where the facts support a derivative action on behalf of the corporation misses a significant point: the impugned conduct must harm the complainant personally, not just the body corporate, i.e., the collectivity of shareholders as a whole.

ANALYSIS

Step One - Expectations of the Petitioners

[90] In advancing their oppression claim the petitioners are required to identify their subjective expectations which they claim were breached by Spocket.

[91] In their petition, the petitioners describe their "reasonable expectations" of Spocket and Mr. Mohebpour as follows:

a) Spocket would fulfil its statutory obligations to treat all stakeholders in a fair manner in accordance with Spocket's duties as a reasonable corporate citizen;

b) That Mr. Mohebpour would not advance his own personal interests or the interests of a non-arms'-length third party, through the sale of the Mohebpour shares, at the expense of the company and its stakeholders; and

c) That Spocket and Mr. Mohebpour would not, through the abuse of his role as power of attorney and signatory with respect to the Kaplan Shares and the Astle Shares, permit an action that extinguishes the petitioners' legal rights and expropriates the petitioners as shareholders without their knowledge or consent.

[92] In their written submissions, the petitioners set out their "reasonable expectations" differently:

a) That the petitioners would remain shareholders of Spocket and benefit from the increase in value of their shares after they exercised their options;

b) That the respondents would abide by the agreements between the parties and the *CBCA*;

c) That Spocket would fulfil its statutory obligations to treat all stakeholders in a fair manner, in accordance with Spocket's duties as a reasonable corporate citizen; and

d) That Spocket and Mr. Mohebpour would not, through the abuse of his role as fiduciary under the Powers of Attorney, permit an action that extinguished the petitioners' legal rights and expropriated the petitioners as shareholders without their knowledge or consent.

[93] The petitioners' reasonable expectations are further distilled in their reply submissions:

a) The expectation to not be forcibly removed as a shareholder; and

b) The expectation to participate in profits of that corporation.

[94] In their written and oral submissions, the petitioners did not pursue their claim that Mr. Mohebpour advanced his own personal interests at the expense of the company and its stakeholders. This is not surprising, because this is not a claim which impacts the petitioners personally, and as such is not a suitable basis for claiming an oppression remedy, but rather it is a claim that might be supportive of a derivative action on behalf of the corporation.

[95] A shareholder who alleges oppression must establish **on the evidence** both a reasonable expectation and a violation of that expectation. Mere assertions of expectations are not usually sufficient to prove a specific and reasonable expectation on the part of any shareholder: *Slaughter v. Ximen Mining Corp.*, 2018 BCSC 573 at paras. 66 and 68.

[96] The relevant point in time at which to consider the reasonable expectation of a shareholder is when the shareholder acquired the shares: *Raging River Capital LP v. Taseko Mines Limited*, 2016 BCSC 2302 at para. 48.

[97] There is a paucity of evidence of Ms. Kaplan's subjective expectations as a shareholder. In her affidavit, Ms. Kaplan states that she "had a reasonable expectation that I would be able to hold the shares I earned as compensation, and that I would be entitled to any growth in the value of my shares." Why she held this belief is not apparent from her affidavit, other than perhaps, to a limited degree, her statement that after Spocket stopped paying her monthly consultancy fee, her "compensation was solely though options".

[98] During cross-examination on her affidavit, Ms. Kaplan explained that she believed her consultancy with Spocket would be long term because the SOP

agreement specified a four-year term, but there is no evidence as to why she believed she was entitled to hold shares and realize growth in their value apparently indefinitely. She did, however, state that she valued the options more than she did her monthly consultancy fee, because she knew "the value of them would be higher than the $3,000 monthly fee."

[99] Secondly, Ms. Kaplan states that when she appointed Mr. Mohebpour as her power of attorney "with respect to any amendments to shareholder agreements" she had reasonable expectations that Mr. Mohebpour "would not use that entitlement and control to approve shareholder agreements on my behalf which permit an action that ousts me as a shareholder." Once again, the basis upon which Ms. Kaplan held this belief is not set out in her affidavit.

[100] During cross-examination on her affidavit, Ms. Kaplan acknowledged that she was aware that the exercise of her share options was dependent upon her becoming a party to Spocket's "current" shareholders' agreement, and that when she signed the power of attorney, she was aware that it appointed Mr. Mohebpour as her "sole and exclusive attorney" with the power to sign any amendments to shareholders' agreements. However, Ms. Kaplan explained that her belief was "that companies are meant to be taking every shareholder's consideration - - into consideration when making decisions and that, as a shareholder, my best interests or other stakeholder's interests were not taken into consideration." Ms. Kaplan stated that it was her belief that "[a] director should make decisions that are in the best interests of all stakeholders," but agreed that the power of attorney does not state it would be exercised in her best interests as a shareholder.

[101] There is an equal lack of evidence to support Ms. Astle's expectations. This is not surprising given that multiple paragraphs of her affidavit are worded identically to paragraphs of Ms. Kaplan's affidavit. For example, her evidence in her affidavit that "I had reasonable expectations that I would be able to hold the shares I had earned as compensation, and that I would be entitled to any growth in the value of my shares," is identical to the evidence provided by Ms. Kaplan in her affidavit.

[102] Similarly, Ms. Astle's evidence in her affidavit that "with respect to any amendments to shareholder agreements, I had reasonable expectations that Mr. Mohebpour would not use that entitlement and control to approve shareholder agreements on my behalf which permit an action that ousts me as a shareholder," is the same as the evidence of Ms. Kaplan in her affidavit.

[103] Finally, Ms. Astle's evidence in her affidavit that "had I known that any shares I purchased would have their valuation capped following my departure from Spocket, or that Spocket could unilaterally repurchase my shares at any value without my consent, I would not have chosen to exercise my options and purchase Spocket shares" is almost identically worded to the evidence of Ms. Kaplan in her affidavit.

[104] Like Ms. Kaplan, Ms. Astle was aware that her exercise of her share options required her to become a party to the current shareholder agreements, including appointing Mr. Mohebpour "as the sole and exclusive attorney - - with full power - - to sign any amendments to shareholder agreements." Ms. Astle acknowledged that she read these agreements and at least before signing the power of attorney, she consulted with a lawyer.

[105] In cross-examination on her affidavit, Ms. Astle agreed that the power of attorney does not require decisions to be made by the attorney in an individual shareholder's best interests, or that decisions cannot be made that might impact her legal rights or entitlements. She further agreed that neither of the two directors, named respondents, had provided her with any assurance that the power of attorney would not be used in a way that might impact her rights as a shareholder, or that the power of attorney would be used in her best interests rather than in the best interests of the company.

[106] Ms. Astle testified that she based her belief that Mr. Mohebpour would not use the power of attorney to impact her shareholder rights on "the normal course of business."

[107] Although not explicitly stated as an expectation, Ms. Astle does give evidence in her affidavit of her belief that Spocket could not or would not repurchase her shares “without a determination that I am indeed a competing shareholder”, as defined in the amended ROFR agreement. In cross-examination on her affidavit, Ms. Astle confirmed that she was aware that Spocket determined she was a competing shareholder because of her “involvement in shareholdings in Blanka,” but testified that she was not aware of the basis upon which the Board determined she was competing.

[108] I am very concerned about the similarities in the affidavits of the two petitioners. It must not be forgotten that an affidavit is a substitute for *viva voce*, or in court, oral testimony. As such an affidavit must be in the voice of the affiant not the lawyer who is drafting it. This means that an affidavit must use the language and turn of phrase of the affiant. Affidavits must not be crafted in a way that is intended to ‘meet’ or ‘match’ the requirements of any legal test. An affidavit must state in writing the admissible evidence in a manner the witness would say in court – nothing more and nothing less.

[109] If two witnesses testified orally with the degree of similarity revealed in the affidavits of Ms. Kaplan and Ms. Astle, a court would properly be concerned about collusion, which could then significantly undermine the credibility of the witnesses. Such a concern exists equally when evidence is presented by affidavit.

[110] I find the language of Justice Skolrood, as he then was, in *Slaughter* at para. 58 apposite and instructive:

> [58] I would add that even if these affidavits were admissible, they are not sufficient to establish the reasonable expectations alleged. They are all crafted using identical “cookie cutter” language clearly intended to satisfy the legal test for oppression, which raises a question as to their veracity. Moreover, the affidavits contain bald statements about the affiants’ expectations without providing any evidence as to the basis or source of those expectations. Further, none of these petitioners say how they would have voted their shares had they been permitted to do so or how the outcome of the vote, as it occurred, was oppressive of them or prejudicial to their interests. Similarly, none depose that they intended to or would have sold their shares during the period in which the hold legend was erroneously

> attached to their share certificates. Nor do they depose that they sold their shares as a result of anything done by the Company. Rather, they simply state, again in identical language, that they sold their shares to minimize losses, as Ximen's shares had decreased in value since January 2017.

[111] Despite the very limited evidence that has been tendered by the petitioners, and my concerns about how that evidence has been presented, I am prepared to infer from the evidence set out above, that the petitioners had an expectation that Spocket would not extinguish their legal rights as shareholders without their knowledge or consent. Given this conclusion, I accept the petitioners' more specific articulation of their expectations, as set out in their reply submissions, has been established by admissible evidence.

[112] To this I would add that the petitioners, as shareholders, would have a reasonable expectation that they would be treated fairly: *1168556 B.C. Ltd.* at para. 96.

Are the Petitioners Subjective Expectations Objectively Reasonable?

[113] Having found that the petitioners subjectively expected that they would not be forcibly removed as shareholders and that they subjectively expected to participate in the profits of the corporation, I must now assess whether the petitioners have established with evidence that their expectations are objectively reasonable.

[114] In other words, does the evidence presented on this application establish that it was objectively reasonable for the petitioners to expect not to be forcibly removed as shareholders and to participate in the profits of the corporation?

[115] The assessment of reasonableness is highly contextual. I remind myself of the words of Justice Wedge in *Casey v. CopperLeaf Technologies Inc.*, 2010 BCSC 417 at para. 22: "In other words, if context is not everything in oppression claims, it is almost everything."

[116] Furthermore, when assessing objective reasonableness of the petitioners' subjective expectations, I am guided to consider the following factors: general commercial practice; manner of the transactions; nature of the corporation;

relationship between parties; past practices; steps the claimants could have taken to protect themselves; representations and agreements; and the fair resolution of the conflicting shareholders interests.

[117] I will now consider each of these factors.

General Commercial Practice

[118] The respondents submit that the amendments to shareholder agreements, permitting the repurchase of shares by the company when a person leaves their employment, is consistent with commercial practice. The evidence to support this are the statements in the affidavits of Mr. Mohebpour and Mr. Brown, that they understood or believed the amendments to the agreements to permit the repurchase of shares of former employees were consistent with industry, specifically North American venture backed technology companies, standards. In cross-examination on their affidavits, Mr. Mohebpour and Mr. Brown confirmed that their belief about industry standards was solely based on the advice of counsel.

[119] The reasons stated by the respondents for why various agreements were amended to retroactively permit Spocket to repurchase the petitioners' shares for a valuation established on a date many months prior to them being repurchased, are bald assertions that the amendments were in the best interests of the company and were consistent with industry standards, but I have been provided little evidence to substantiate these assertions.

[120] Commercial practice plays a significant role in the analysis of the reasonableness of expectations. However, in this case, it is difficult to determine from the evidence presented on this application what is 'normal' business practice for a corporation like Spocket.

[121] The respondents rely largely on statements about commercial practice made by courts in other cases. For example, in *McInerney v. RJM Holdings Limited*, 2019 ONSC 7179, the court stated that the repurchase of shares by the company upon termination would "accord with reasonable and usual commercial practice."

However, this cannot be an immutable commercial practice because the petitioners did not become shareholders until **after** they had left Spocket: Ms. Astle ended her employment with Spocket on November 5, 2020, the same day she elected to purchase Spocket shares, and Ms. Kaplan terminated her consultancy work with Spocket on June 4, 2020, and on July 24, 2020, Ms. Kaplan exercised her vested options and purchased shares in Spocket.

[122] In addition, the respondents rely on Fitzpatrick J.'s comments in *First Bauxite Corporation (Re),* at para. 87, that "no shareholder can have a "reasonable expectation" that he will **forever** hold shares in a given corporation, and never be subject to having those shares purchased without their approval." [Emphasis added]

[123] I do not take the petitioners to be saying that they expected to be shareholders in Spocket forever, but rather that they did not expect to be removed as shareholders when they were, or how they were.

Manner of the Transactions

[124] The petitioners' acquired their shares pursuant to a stock option plan. The purpose of the SOP was "to advance the interests of the Corporation and its shareholders by providing to the directors, officers, employees and consultants of the Corporation **a performance incentive** for continued and improved services with the Corporation and its affiliates."

[125] I note again that both petitioners did not exercise their options and become shareholders until after they had ceased employment with Spocket. As they were no longer working for Spocket, there was no longer any performance incentive for them as shareholders. In other words, their acquisition of shares after they had left Spocket was no longer consistent with the purpose of the SOP.

[126] This fact might tend to undermine the reasonableness of the petitioners' expectations that they could continue to share in the profits of Spocket as shareholders for the foreseeable future.

Nature of the Corporation

[127] Spocket is a small and closely held private company. There were two directors and only eight common shareholders. The evidence confirms that the petitioners held only about 1.4% of Spocket's common shares, while Mr. Mohebpour held approximately 80%.

[128] As a technology company it was necessary that it protect "competitively sensitive information", which Spocket achieved in part by prohibiting the transfer of shares to anyone, if the Board determined such transfer would result in the disclosure of information placing Spocket at a competitive disadvantage.

[129] Other steps were taken to ensure that Mr. Mohebpour would retain effective control of the company, for example by requiring subscribers to its SOP to designate Mr. Mohebpour their power of attorney and by limiting the number of shares that could be issued under the plan.

Relationship Between the Parties

[130] As noted in *BCE* reasonable expectations may arise because of the personal relationships between the claimants and other corporate parties: "Relationships between shareholders based on ties of family or friendship may be governed by different standards than relationships between arm's length shareholder in a widely held corporation." [At para. 75].

[131] There is no 'special' relationship between the petitioners and Spocket that justify applying a different standard to the assessment of the expectations of the petitioners.

[132] In fact, by the time Ms. Astle became a shareholder she had terminated her employment with Spocket because of a toxic work culture and because, as she alleges, she was mistreated by Mr. Mohebpour.

Past Practices

[133] As stated in *BCE*, “past practice may create reasonable expectations, especially among shareholders of a closely held corporation on matters relating to participation of shareholders in the corporation’s profits and governance.” [At para. 76].

[134] Pursuant to the SOP, upon termination of employment or engagement with the company all unvested options expired and a participant in the plan had 90 days to exercise vested options. The Original ROFR did not contain any provision whereby Spocket had the unilateral right to compel repurchase of a shareholder’s shares, outside of the right of first refusal and co-sale contexts.

[135] The past practice of Spocket, pursuant to the Original ROFR, was to permit participants in the SOP to acquire shares after their employment or consulting with Spocket had terminated. This is exactly what Ms. Kaplan and Ms. Astle had done.

[136] However, the Amended ROFR, passed by the Board on January 16, 2023, deemed the petitioners to be defaulting shareholders because their employment or engagement with Spocket had terminated, entitling Spocket to repurchase the petitioners’ shares.

[137] This was quite obviously a significant change in Spocket’s practices, made without notice to the petitioners.

[138] *BCE* acknowledges that past practices can change over time. However, it is only if “valid commercial reasons exist for the change and the change does not undermine the complainant’s rights,” that a change in past practice does not impact the assessment of the reasonableness of a complainant’s expectations.

[139] As set out earlier, the evidence for why the shareholder agreements were changed is very slim. It largely amounts to the bald assertions of Mr. Mohebpour and Mr. Brown that the changes were in the best interests of the company and were consistent with industry standards.

[140] I am unable to conclude, based on the evidence that has been provided, that there was a valid commercial reason for changing Spocket's past practice of permitting participants in the SOP, who were no longer employed or engaged with Spocket, to purchase or continue to hold common shares in Spocket.

Steps the Claimants Could Have Taken to Protect Themselves

[141] In assessing whether a shareholder's expectation is reasonable, "a court may consider whether the claimant could have taken steps to protect itself against the prejudice it claims to have suffered." *BCE* at para. 78.

[142] The respondents submit that had the petitioners exercised their rights to legal counsel before signing the various agreements, they would have been alerted to the fact that the Board retained a broad discretion to administer, amend or vary the SOP, and that the powers of attorney were not intended to be used in the best interests of the petitioners. That is all undoubtedly true, but I am not sure that leads to the conclusion that the petitioners could then have taken steps to protect themselves.

[143] Being alerted to the fact that the Board could make changes to the SOP does mean that they will, or that if they did make changes, it would include those now being complained about. For example, having been permitted to purchase shares after leaving the employment of Spocket, it would seem a remote possibility that the Board would then amend the shareholder agreement to deem such ex-employees defaulting shareholders, whose shares could then be repurchased based on a valuation not as of the time of the repurchase but as of the date they became a defaulting shareholder.

[144] Furthermore, there is no evidence the petitioners could have done anything to prevent the Board from taking the steps they took, not least because the petitioners were not notified that the Board was intending to amend the Original ROFR.

Representations and Agreements

[145] In *BCE* the Court held that “shareholder agreements **may** be viewed as reflecting the reasonable expectations of the parties.” at para. 79. [Emphasis added].

[146] *Main v. Delcan Group Inc.*, (1999), 47 B.L.R. (2d) 200, a case cited in *BCE*, states that shareholder agreements can be used as a “guide when determining the reasonable expectations of the shareholders” at para. 50.

[147] The respondents argue that the petitioners’ expectations cannot be objectively reasonable, because everything they complain about was authorized by the shareholder agreements.

[148] I accept that the Board was authorized to make changes to the Original ROFR. However, I do not accept that this means the petitioners expectations are thereby rendered unreasonable.

[149] Firstly, agreements are only guides to assessing the expectations of parties. Secondly, the fact that a company or a director is authorized to do something, does not ineluctably lead to the conclusion that if it conflicts with a shareholder's expectations, the shareholder’s expectations must have been unreasonable.

Fair Resolution of the Conflicting Shareholders Interests

[150] Directors owe a duty to act in the best interests of the corporation. Correspondingly, the reasonable expectation of shareholders is that directors will act in the best interests of the corporation: *BCE* at para. 66.

[151] The respondents submit that they used their business judgment and determined that they had a legitimate need for a mechanism under which to repurchase its shares.

[152] I have reviewed the affidavits of the two directors, Mr. Mohebpour and Mr. Brown, and the attachments, as well as the transcripts of their cross-examinations, and find that there is very little evidence before me of how the changes to the Original ROFR were in the best interests of Spocket.

[153] What the respondents' submissions amount to is this: the directors have a duty to act in the best interests of the company, the directors authorized these changes to the Original ROFR, therefore the changes were in the best interests of the company. This tautology prevents scrutiny of the decisions of the directors.

[154] There is no evidence that the amendments to the Original ROFR, that authorised the repurchase of the petitioners' shares based on a valuation as of the date of the triggering event, was in the best interests of the corporation.

[155] By contrast, changes to the Original ROFR had potentially significant impacts on the petitioners, including by denying them any increase in the value of their shares between the repurchase date and the date of the triggering event, which in the case of Ms. Kaplan was the date her consulting engagement ended, and in the case of Ms. Astle the date she was deemed by the Board to be a competitor.

[156] It is also important to note that Ms. Astle was deemed to be a competitor by the Board without notice to her and without providing her with an opportunity to present any evidence to assuage concerns that her business was a competitor. Notice and an opportunity to be heard are essential elements of a fair resolution process.

Conclusion re. Objective Reasonableness

[157] Having considered all the evidence, and the submissions of the parties, and the relevant factors set out in *BCE*, I find that the subjective expectations of the petitioners, that they would not be forcibly removed as shareholders and that they expected to participate in the profits of the corporation, were objectively reasonable.

[158] The past practice of Spocket was to permit individuals who were no longer employed or engaged with Spocket to hold the shares they had purchased pursuant to the terms of the SOP. The lack of evidence establishing why this past practice was changed without notice to the petitioners, why or how this change was consistent with general commercial practice, leads me to conclude that the petitioners' expectations were objectively reasonable.

[159] In addition, the petitioners, as shareholders, had a reasonable expectation that they would be treated fairly. It was not fair to the petitioners that amendments to the Original ROFR were made without notice to them, particularly given that such amendments significantly impacted their rights as shareholders, and which adopted a valuation date for the shares many months prior to the date they were repurchased by the company. Finally, the determination by the board that Ms. Astle was a competitor without notice and without an opportunity to be heard, was markedly unfair.

Step Two - Were Reasonable Expectations Violated by Conduct Falling Within the Terms "oppression", "unfair prejudice" or "unfair disregard" of Relevant Interests?

[160] I am satisfied that the evidence does not establish that the respondents engaged in conduct that can be characterized as 'oppressive.'

[161] To be characterized as oppressive conduct requires a finding of some degree of moral culpability, for example, taking advantage of a power position in an unfair or abusive manner, *Feng v. Bao*, 2021 BCSC 2067 at para. 26. Oppressive conduct is described as "burdensome, harsh and wrongful", "a visible departure from the standard of dealing" and an "abuse of power." *BCE*, at para. 92.

[162] The petitioners have alleged that Mr. Mohebpour attempted to thwart Ms. Astle's efforts to exercise her options within the 90-day period, that initially the petitioners, as the only two female shareholders, were "targeted" by the Amended ROFR to have their shares repurchased, and that Mr. Mohebpour's use of the power of attorneys granted by the petitioners, to act contrary to the interests of the petitioners, was cumulatively oppressive.

[163] The evidence does not establish that the petitioners were targeted because they were female and neither does it establish that Mr. Mohebpour attempted to thwart Ms. Astle's efforts to exercise her options. Based on the conflicting affidavit evidence, even as expanded upon during cross-examination, I cannot find that Mr. Mohebpour acted in what would clearly have been an abusive manner.

[164] The question of how Mr. Mohebpour exercised the powers conferred on him by the granting of the powers of attorney, is more challenging. The petitioners argue that they signed standard powers of attorney which conferred upon Mr. Mohebpour a fiduciary duty to act in the petitioners' best interests, not his interests or the interests of anyone else. The respondents submit that the powers of attorney signed by the petitioners were powers of attorney with an interest, which they argue are often found in shareholder agreements. A power of attorney with an interest permits the donee to exercise the powers conferred in their own interests and not in the interests of the donor, see *10008480 Manitoba Ltd v. All-Fab Building Components LP*, 2025 MBCA 59 at paras. 27–35.

[165] I find it is not necessary for me to resolve this difficult issue because I have, as set out below, concluded that the conduct of the respondents was otherwise unfairly prejudicial to the petitioners' interests. The petitioners are seeking remedies pursuant to the oppression remedy provisions of the *CBCA*. This is not a claim for damages for breach of fiduciary duty.

[166] Unfair prejudice "connotes a less culpable state of mind, that nevertheless has unfair consequences." Whereas oppression focusses on the nature of the impugned conduct, "unfair prejudice tends to focus on the effect of the impugned conduct on the shareholder." *Beck v. 0973415 B.C. Ltd.*, 2021 BCSC 2323 at para. 35.

[167] As stated in *Mack v. Universal Dental Laboratories Ltd.*, 2020 ABQB 738:

> [148] Broadly, shareholders are entitled to reasonably expect fair treatment. In order to establish oppression, a claimant must show that its interests were limited unfairly: *R Floden* at para 33. Although bad faith is oppression, a court does not have to find bad faith or want of probity; the focus is on effect, not motive. Any remedy granted is not meant to punish the defendant, only to rectify the oppression: *McGovern-Burke v Martineau*, 2016 ABQB 514 at paras 56–58.

[168] The respondents submit that their conduct was not unfairly prejudicial because, as I understand their submissions, the changes made to the Original

ROFR, permitting retroactive repurchase of the petitioners' shares, were made for legitimate business purposes.

[169] The respondents also submit, relying on *CW Shareholdings Inc. v. WIC Western International Communications Ltd.*, [1998] 160 D.L.R. (4th) 131; 1998 CanLII 14838 (ON SC), that the actions taken by the Board in amending the Original ROFR were business decisions, made honestly, prudently, in good faith and on reasonable grounds, and as such this Court should not usurp the function of the Board in managing the company.

[170] I have already determined that the evidence for why the specific changes were made is inadequate. Other than bald assertions that such changes were consistent with industry standards, made on the recommendation of counsel, I have little evidence from which I can determine that these specific changes were for legitimate business purposes.

[171] Further complicating the analysis is that no written minutes were taken during Board meetings and neither director took any notes.

[172] I am satisfied that the reasonable expectations of the petitioners were breached by conduct of the respondents that was unfairly prejudicial to their interests. The petitioners expected that they would not be forcibly removed as shareholders and that they expected to participate in the profits of the corporation. These expectations were objectively reasonable. While the decision to repurchase shares of ex-employees taken alone may not have be unfairly prejudicial, the decision to do it without notice and at a valuation on a date many months before the repurchase date, is unfairly prejudicial. Furthermore, the process by which Ms. Astle was declared a competitor was, as discussed earlier, unfairly prejudicial to her interests.

The Appropriate Remedy

[173] The petitioners seek multiple remedies, which can be broken into five categories:

1. A declaration that the affairs of Spocket are being conducted in a manner oppressive or unfairly prejudicial to the petitioners.

2. A declaration that the repurchase of the petitioners' shares is void.

3. An order directing Spocket to reissue shares to the petitioners.

4. An order directing Spocket pay the respondents fair value for their shares or damages.

5. Costs.

[174] Section 241(3) of the *CBCA* sets out the powers of the court upon a finding that the affairs of a corporation or the powers of directors of the corporation were conducted or exercised in a manner that was unfairly prejudicial:

> **Powers of court**
>
> (3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,
>
> (a) an order restraining the conduct complained of;
>
> (b) an order appointing a receiver or receiver-manager;
>
> (c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;
>
> (d) an order directing an issue or exchange of securities;
>
> (e) an order appointing directors in place of or in addition to all or any of the directors then in office;
>
> (f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;
>
> (g) an order directing a corporation, subject to subsection (6), or any other person, to pay a security holder any part of the monies that the security holder paid for securities;
>
> (h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;
>
> (i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 155 or an accounting in such other form as the court may determine;

> (j) an order compensating an aggrieved person;
>
> (k) an order directing rectification of the registers or other records of a corporation under section 243;
>
> (l) an order liquidating and dissolving the corporation;
>
> (m) an order directing an investigation under Part XIX to be made; and
>
> (n) an order requiring the trial of any issue.

[175] There are four general factors to guide the court in fashioning a fit remedy under s. 241(3) of the *CBCA*:

> (a) the remedy must be a fair way of dealing with the situation;
>
> (b) the remedy should go no further than necessary to rectify the oppression;
>
> (c) the remedy may only vindicate the reasonable expectations of parties in their capacity as corporate stakeholders and not those expectations that arise merely by virtue of a familial or personal relationship; and
>
> (d) the remedy must take into account the general corporate law context.

Dais v. Virvilis, 2018 BCSC 459, at para. 96; *Wilson v. Alharayeri*, 2017 SCC 39, at paras. 49–57.

[176] The remedy must be surgically crafted to correct impugned conduct *Elliot v. Sidney and Zella Clark Holdings Ltd.*, 2022 BCSC 2077 at para. 117.

[177] Ms. Kaplan purchased 36,009 common shares on July 24, 2020. Ms. Astle purchased 114,383 shares in November, 2020.

[178] As a result of the amendments to the Original ROFR, the company repurchased Ms. Kaplan's shares based on their valuation as of the date she left the company, not the date they were repurchased. As a result of the determination that Ms. Astle was a competitor, she was simply reimbursed the price she originally paid for her shares.

[179] On March 3, 2023, Spocket sent a notice to Ms. Kaplan stating that her 36,009 shares were to be repurchased. The company valued her shares as of the

date she terminated her engagement with Spocket, June 4, 2020, based on the 409A valuation at US$0.18.

[180] Ms. Astle also received a notice from Spocket on March 3, 2023, indicating that the Board had approved the repurchase of her 114,383 shares pursuant to the Competing Shareholder Provisions of the Amended ROFR. The notice stated that Spocket deemed Ms. Astle a competitor on May 30, 2022, and that accordingly, her shares were to be repurchased, in accordance with the Competing Shareholder Provision, at the original issue price of US$0.05 per share.

[181] I find that the most appropriate remedy, which is crafted to directly address the expectations that were unfairly prejudiced, is for the petitioners to be paid the value of the shares as of the date that they were repurchased, March 3, 2023, less the amount they have already been paid for the repurchase of the shares.

[182] The petitioners seek an independent business valuation to establish the value of the respondents' shares on this date. The petitioners specifically argue that it would not be appropriate to rely on the 409A valuations, which I note were also used to determine the price to be paid to other shareholders when their shares were repurchased.

[183] I am satisfied that it would be appropriate at this time to rely on the 409A valuations as determined by Carta Valuations, LLC, as set out in the attachments to the affidavit of Mr. Mohebpour.

[184] On April 22, 2022, Spocket's common shares were valued at US$0.80 and on April 22, 2023 they were valued at US$0.81. I am satisfied that valuing the petitioners shares at US$0.80 is fair and equitable.

[185] Consequently, I make an order pursuant to section 241(3)(j) compensating the petitioners as follows:

> Ms. Kaplan: 36009 shares at US$0.80 = $28,807.20 - $6,481.62 = US$22,325.58

Ms. Astle: 114,383 shares at US$0.80 = $91,506.40 - $5,719.15 = US$85,787.25

[186] The respondents submit that a discount should be applied to these amounts to account for the fact that the petitioners were no longer working at Spocket and therefore were no longer contributing to the increase in value of the company's shares.

[187] I am not satisfied that a discount is appropriate. An individual's contributions to the success of a business do not end the day they leave that business. Ms. Kaplan provided consulting services directed to growing Spocket's business. Ms. Astle was head of operations and finance. Both petitioners appear to me to have had roles at Spocket that likely contributed to the success of the business well beyond the date they left.

Personal Liability of Directors

[188] I must now consider whether to impose personal liability on the individual respondents for the amount owing to the petitioners, either in whole or partially: *Wilson* at para. 52.

[189] In *Wilson*, the Court endorsed a two-pronged approach to assessing personal liability of directors. Firstly, the impugned conduct must be properly attributable to the directors in that the director must have exercised, or failed to exercise, a power so as to effect the impugned conduct. Second, imposition of personal liability must be fit in all the circumstances.

[190] Four general principles guide whether an order imposing personal liability would be fit. I adopt the respondents' summary of these principles: *Wilson* at paras. 53–55.

(a) The first principle is that the oppression remedy request must in itself be a fair way of dealing with the situation. Indicia of fairness may include, for example, circumstances where directors have derived a personal benefit from

the conduct complained of, such as an immediate financial advantage or increased control of the corporation.

(b) The second principle is that any order under s. 241(3) should go no further than necessary to rectify the oppression.

(c) Thirdly, any order made under this s. 241(3) may serve only to vindicate the reasonable expectations of shareholders, creditors, directors or officers in their capacity as corporate stakeholders. They may not vindicate expectations arising from a personal relationship.

(d) Finally, the fourth principle is that a court should consider the general corporate law context in exercising its remedial discretion under s. 241(3). Director liability cannot be a surrogate for other forms of statutory or common law relief, particularly where other relief may be more fitting in the circumstances.

[191] Personal benefit and bad faith are the usual characteristics of conduct that attracts personal liability: *Wilson* at para. 50.

[192] While the directors are implicated in the conduct which was unfairly prejudicial to the petitioners' reasonable expectations, I have concluded that imposition of personal liability is not fit in all the circumstances.

[193] There is no evidence the directors acted in bad faith. There is no evidence they secured any personal benefit from their conduct. Furthermore, the remedy of compensation paid by the company is sufficient to rectify the misconduct.

Punitive Damages

[194] In their written submissions the petitioners seek punitive damages. However, such relief is not specifically sought in the petition.

[195] In *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, the Court affirms that it is a "basic proposition in our justice system that before someone is punished they ought

to have advance notice of the charge sufficient to allow them to consider the scope of their jeopardy as well as the opportunity to respond to it. This can only be assured if the claim for punitive damages, as opposed to compensatory damages, is not buried in a general reference to general damages."

[196] The failure to specifically seek punitive damages is fatal to the petitioners' claim.

[197] Even if a claim for punitive damages had been properly pleaded, I would have declined to make such an order. The evidence simply does not support the granting of such an exceptional remedy. There is no evidence that the respondents have engaged in "high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour": *Whiten* at para. 94.

CONCLUSION

[198] I make the following orders:

a) There will be a declaration that the affairs of Spocket have been conducted in a manner that was unfairly prejudicial to the interests of the petitioners.

b) Spocket shall pay compensation to Ms. Kaplan in the amount of US$22,325.58.

c) Spocket shall pay compensation to Ms. Astle in the amount of US$85,787.25.

[199] The petitioners are awarded their costs.

"The Honourable Justice Fowler"