

Honorable Gregg W. Zive
United States Bankruptcy Judge



Entered on Docket
November 20, 2015

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and Borealis Mining Company, LLC

**IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

In re:

Chapter 11

GRYPHON GOLD CORPORATION,

Case No. BK-13-51496-GWZ

Debtor.

**FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER GRANTING
WATERTON GLOBAL VALUE, L.P.'S
AND BOREALIS MINING COMPANY,
LLC'S MOTION TO DISMISS OR
CONVERT**

Hearing Date: October 20, 2015

Hearing Time: 2:00 p.m.

This matter came before the Court on the 20th day of October, 2015, on Waterton Global Value, L.P.'s ("Waterton") and Borealis Mining Company, LLC's ("Borealis") Motion to Dismiss

1 or Convert (Dkt. 341). In preparation for this hearing, the Court has considered the following
 2 documents filed in relation to the Motion:

- 3 1. Declaration of Kanwaljit Toor in Support of Waterton's and Borealis' Motion to
 4 Dismiss or Convert (Dkt. 345);
- 5 2. Declaration of Richard Wells in Support of Waterton's and Borealis' Motion to
 6 Dismiss or Convert (Dkt. 346);
- 7 3. Supplemental Declaration of Isser Elishis in Support of Waterton's and Borealis'
 8 Motion to Dismiss or Convert (Dkt. 350);
- 9 4. Opposition to Motion to Dismiss or Convert (Dkt. 356);
- 10 5. Reply in Support of Motion to Dismiss or Convert (Dkt. 459);
- 11 6. Opposition of Certain Equity Security Holders to Motion to Dismiss or Convert
 12 (Dkt. 465);
- 13 7. In addition, the Court has considered the following filings:

14 390	6/23/2015	Equity Holders' Motion for Authority to: (1) Pursue Certain Claims Against Waterton Global, L.P.; (2) File an Objection to Waterton's Claim against the Estate; and (3) Seek Equitable Subordination of Waterton's Claim
15 391	6/23/2015	Declaration of John F. Murtha in support of Dkt. 390
16 392	6/23/2015	Declaration of Chris Jacobs in support of Dkt. 390
17 411	7/10/2015	Trustee's Response to Equity Holders' Motion for Authority
18 412	7/10/2015	Declaration of Gregory F. Wilson in support of Dkt. 411
19 416	7/10/2015	Opposition of Waterton and Borealis to Dkt. 390
20 417	7/10/2015	Wells Declaration in support of Dkt. 416
21 418	7/10/2015	Ex Parte Motion to File Two Documents Under Seal
22 421	7/15/2015	Order Granting Ex Parte Motion for Leave to Exceed Page Limit
23 422	7/16/2015	Ex Parte Motion for Order Authorizing Filing of Paper Under Seal
24 431	7/17/2015	Order Granting Ex Parte Motion Authorizing Filing of Paper Under Seal
25 427	7/16/2015	Equity Holders' Omnibus Reply in support of Dkt. 390
26 430	7/17/2015	Erratum to Exhibit 1 to Equity Holders' Omnibus Reply (with draft complaint attached)
27 433	7/20/2015	Ex Parte Motion for Leave to File Supplemental Brief
28 435	7/20/2015	Errata to Dkt. 433

1	437	7/21/2015	Order Denying Ex Parte Motion (Dkt. 433)
2	442		Transcript of hearing held on 7/21/2015
3	---	---	Minutes of 7/21/2015 hearing prepared internally
4	464	8/25/2015	Order Granting in Part and Denying in Part Equity Holders' Modified Motion (Dkt. 390)
5	341	4/14/2015	Waterton's and Borealis' Motion to Dismiss or Convert
6	459	8/21/2015	Waterton's and Borealis' Reply in support of Motion to Convert or Dismiss
7	462	8/24/2015	Supplement to Waterton's Opposition to Equity Holders' Motion for Authority
8	AP 1	7/29/2015	Adversary Complaint (Case No. 15-05037)
9	450-453	8/14/2015	Equity Holders' Reply to Waterton's Supplement (Dkt. 462)
10	476	9/22/2015	Trustee's Motion to Approve Assignment of Certain Debtor Claims
11	477	9/22/2015	Declaration of Gregory F. Wilson in support of Dkt. 476
12	484	10/6/2015	Waterton's and Borealis's Opposition to Trustee's Motion to Approve Assignment of Certain Debtor Claims
13	485	10/6/2015	Declaration of Richard Wells in support of Dkt. 484
14	496	10/13/2015	Trustee's Reply in support of Motion to Approve Assignment of Certain Debtor Claims
15	483	10/05/2015	Equity Holders' Response to and Joinder with Trustee's Motion (Dkt. 476)
16			
17	339	3/26/2015	Order Following 2/6/2015 Status Conference
18	---	---	Minutes of Judge Beesley's 2/6/2015 hearing and relevant portions of transcript
19	341	4/14/2015	Motion to Dismiss or Convert
20	345	4/14/2015	Declaration of Kanwaljit Toor in support of Dkt. 341
21	346	4/14/2015	Declaration of Richard Wells in support of Dkt. 341
22	350	4/16/2015	Submission of Supplemental Declaration (of Isser Elishis) in support of Dkt. 341
23	356	4/28/2015	Bockhold-Dawson Opposition to Motion to Dismiss or Convert
24	357	4/28/2015	Declaration of John F. Murtha in support of Dkt. 356
25	358	4/28/2015	Declaration of W. Chris Wicker in support of Dkt. 356
26	465	9/8/2015	Certain Equity Security Holders' Joinder in Opposition (Dkt. 356)
27	459	8/21/2015	Waterton's and Borealis's Reply in support of Dkt. 341
28	460	8/21/2015	Declaration of Richard Wells in support of Dkt. 459
	140	3/31/2014	Trustee's First Interim Status Report

143	4/23/2014	Final Order Granting Trustee Authority to Borrow Money Pursuant to the Provisions of 11 USC § 364(c)
198	7/28/2014	Waterton's and Borealis' Response to Trustee's Second Status Report
196	7/21/2014	Trustee's Second Interim Status Report
217	8/25/2014	Waterton's and Borealis' Supplemental Response to Trustee's Second Status Report
218	8/25/2014	Declaration of Lisanna Lewis in support of Dkt. 217
220	8/25/2014	Trustee's First Discovery Status Report
259	11/20/2014	Trustee's Third Interim Status Report
296	1/16/2015	Order Granting Motion for Order Authorizing Trustee to Release Documents Obtained During her Investigation
307	2/5/2015	Waterton's and Borealis' Status Update to the Court Regarding Funding for Gryphon Reorganization Plan and Motion to Convert or Dismiss
310	2/5/2015	Bockhold-Dawson Group's Response to Status Update (Dkt. 307)
339	3/26/2015	Order Following Status Conference held 2/6/2015
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8. Other documents and hearing transcripts as noted on the record.

It appearing from the record that notice of hearing has been given as required by law; appearances were made at the hearing by Laura Granier, Chris Richardson and Courtney O'Mara on behalf of Waterton and Borealis, John Murtha and Chris Wicker on behalf of equity-holders Bockhold-Dawson, and Greg Wilson and Jeff Hartman on behalf of the Trustee, Christina Lovato, Janet L. Chubb on behalf of certain equity security holders, all as noted on the record of the proceedings; the Court having considered the arguments of counsel at the hearing, and, pursuant to Bankruptcy Rule 7052 which incorporates Rule 52 F.R.Civ.P., the Court makes the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. On July 29, 2013, Gryphon Gold Corporation ("Debtor") filed its voluntary petition for relief under Chapter 11 of the Bankruptcy Code. Three months after initiation of this case,

1 the Court appointed a Trustee at Gryphon’s request as it had no management, no income-
2 producing assets, no employees and no income with which to propound a reorganization
3 plan. Debtor’s sole asset is a 36% membership interest in Borealis, which interest is
4 encumbered by Waterton’s security interest. The primary asset of Borealis is the Borealis
5 Mine, a gold and silver open-pit heap leaching mining operation near Hawthorne, Nevada in
6 the Walker Lane Mineral Belt. The Borealis Mine is not currently operating. Waterton
7 provided evidence that an \$8 million environmental reclamation bond must be maintained
8 and that Borealis is incurring approximately \$3.8 million in annual care and maintenance
9 costs.
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11 2. An equity holder group in the Debtor, Bockhold-Dawson, has asserted since at least
12 February 2013 that Gryphon has legal claims Gryphon can assert against Waterton related to
13 the debt for equity swap that occurred between Waterton and the Debtor in January 2013
14 (the “Litigation Claims”). Based on the Bockhold-Dawson group’s assertions about these
15 potential claims, the Court authorized the Trustee to conduct an investigation to evaluate the
16 value of the Borealis Mine, account for the funds loaned to the Debtor from Waterton,
17 evaluate the debt for equity conversion, and investigate the potential claims against
18 Waterton.
19

20 3. To complete this investigation, Bockhold-Dawson loaned the Trustee \$500,000 most of
21 which the Estate expended during the year-long investigation which concluded with reports
22 from the Trustee’s independent experts which were submitted to this Court in November
23 2014.
24

25 4. Based on the investigation, the Trustee concluded that at the then current range of gold
26 prices (November 2014), the mine had no commercial viability and there was no likelihood
27 of recovering the money invested in the Borealis Mine. See FTR Recording at 5:19:11 to
28

1 5:19:20. The Court does not question the conclusion of the Trustee's experts. Dkt. # 159, at
2 2:28.

3 5. In the 27 months this case has been pending, no one has come forward with a proposed plan
4 to demonstrate a viable reorganization for the Debtor is on the horizon. No draft plan or
5 disclosure statement has ever been filed and presented to the Court. Given the current and
6 foreseeable depressed gold and silver market, there is no reasonable likelihood of the Estate
7 or any party being able to propose a viable plan in the foreseeable future.

8
9 6. The Estate has no income and is subject to additional costs and obligations resulting in a
10 negative cash flow and further diminution of the value of the Estate.

11 7. Waterton has provided evidence that it has advanced significant funds to keep the Borealis
12 Mine operating and, now, to ensure the Mine remains in compliance with all environmental
13 requirements while it is being kept in care and maintenance condition. Waterton has
14 presented evidence that to date it has provided approximately \$38 million in cash to the
15 Borealis Mine either through loans to the Debtor, funding its share of operations and more
16 recently, while it is maintaining the Mine in care and maintenance, environmentally safe
17 condition.

18
19 9. Waterton timely filed a secured claim for approximately \$13.8 million. That claim is valid
20 until it has been successfully challenged which, to date, it has not.

21
22 10. The Trustee is willing to sell the Litigation Claims to Bockhold-Dawson for \$300,000
23 proposing that \$150,000 of that amount would pay administrative claims and the other
24 \$150,000 would be distributed to unsecured creditors. That is a very small premium that

1 unsecured creditors will get paid. *See* FTR Recording at 5:05:55 to 5:06:17. The Trustee
2 also would receive 10% of any net proceeds that might arise from the prosecution of the
3 Litigation Claims. This arrangement may appear to be attractive because there is very little
4 risk because Bockhold-Dawson as assignee of the Litigation Claims will pay all fees and
5 costs to pursue such litigation; however, the very same attorney's fees provision Bockhold-
6 Dawson relies upon in its Adversary Complaint to require Waterton to pay fees as a non-
7 prevailing party also would burden the Estate with a significant potential fee award that
8 could further decrease the value of the estate's assets available to pay creditors.
9

10 II. CONCLUSIONS OF LAW

11 1. Upon motion of a party in interest and a demonstration of "cause" under §1112(b)(1)
12 and (4), the Court shall convert a case to Chapter 7 or dismiss the case if it is in the best interest of
13 the estate's creditors. The Court enjoys broad discretion in determining whether relief under
14 1112(b) is appropriate. See, e.g., In re Abijoe Realty Corp., 943 F.2d 121, 128 (1st Cir. 1991).
15 Under §1112(b)(4) the bases for finding cause include a wide variety of circumstances, including
16 substantial or continuing loss to or diminution of the estate and the absence of a reasonable
17 likelihood of rehabilitation; and failure to timely file a disclosure statement, or to file or confirm a
18 plan. 11 U.S.C. §1112(b)(4). The list of enumerated grounds in §1112(b)(4) is not exclusive or
19 exhaustive, and the Court must determine whether cause exists, and if it does, whether conversion
20 or dismissal is in the best interest of the creditors. See In re Van Owen Car Wash, Inc., 82 B.R.
21 671, 673 (Bankr. C.D. Cal. 1988). The Court may consider whether creditors favor conversion or
22 dismissal when determining the best interests of creditors or the estate. Loop Corp. v. United States
23 Trustee, 290 B.R. 108, 115 (D. Minn. 2003), *aff'd* 379 F.3d 511 (8th Cir. 2004); In re Miell, 419
24 B.R. 357, 367 (Bankr. N.D. Iowa 2009).
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27 2. After conducting a year-long investigation that cost nearly \$500,000 to compensate
28 the independent professionals retained to assist in the investigation, the Trustee determined in her

1 judgment and based on the expert reports prepared on behalf of the Estate, that as of November
2 2014, based upon the then current gold prices, there was no likelihood of recovering the money
3 invested in the Borealis Mine and the mine was not commercially viable. There is no basis to
4 question the Trustee's determination and, therefore, if the Borealis Mine cannot be economically
5 operated, Borealis does not have any value and the Debtor's 36% membership interest also has no
6 value. See FTR Recording at 5:14:05 to 5:14:48. In any event, whatever value the Debtor's interest
7 may have, such interest is encumbered by Waterton's lien and does not provide any benefit to the
8 estate or the creditors of the estate.
9

10 3. "Cause" for dismissal includes a substantial or continuing loss or diminution of the
11 estate in the absence of a reasonable possibility of rehabilitation. Diminution of the Estate in this
12 case continues even with the Borealis Mine shutdown because of the care and maintenance and
13 environmental reclamation requirements that continue as financial burdens on the Borealis Mine
14 like all comparable mines.
15

16 4. To avoid conversion or dismissal, the test under § 1112(b)(4)(A) requires that the
17 Court determines that there is a reasonable likelihood of rehabilitation and that the debtor's business
18 prospects justify continuation of a reorganization effort. See, e.g., Johnston v. Jem Dev. Co. (In re
19 Johnston), 149 B.R. 158, 162 (9th Cir. B.A.P. 1992) (debtor lacked sufficient income to fund the
20 plan). This question turns on whether the debtor or some other party in interest is capable of
21 performing the necessary correction within a reasonable period of time to avoid continuing losses.
22 Here, there is an absence of a reasonable likelihood of rehabilitation for this Debtor. See FTR
23 Recording at 5:15:17 to 5:15:49. Gold and silver prices have collapsed and there is no likely
24 foreseeable rebound for precious metals pricing. The Debtor's only hope is costly litigation and
25 hope is not enough. See In re De Jounghe, 334 B.R. 760, 771-72 (1st Cir. 2005 (where
26 reorganization "hinged" on the speculative recovery of stock in a pending adversary proceeding, the
27 bankruptcy court was justified in finding that the debtors had little likelihood of reorganization); In
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1 re Imperial Heights Apartments, Ltd., 18 B.R. 858, 863-64 (Bankr. S.D. Ohio 1982) (where the only
2 asset of the estate was “an alleged cause of action for a lawsuit claiming a tenuous equity in an
3 apartment complex,” there was neither a reasonable likelihood of reorganization nor an ability to
4 effectuate a plan); In re Quarles, 194 B.R. 94, 97 (U.S.D.C. W.D. Va. 1996) (debtor's “premise that
5 outcomes in pending litigation favorable to him will cure his financial ills is pure speculation”). The
6 only “income” the Debtor has reported on its monthly statements are tax, telephone and security
7 deposit refunds totaling \$4,852.00. See, e.g., Doc. 221, p. 4. The \$500,000 of “receipts” the
8 Debtor reflects on its schedules is an administrative priority claim of Bockhold-Dawson who loaned
9 the money to the Debtor for the Trustee’s lengthy investigation described above. See Doc. 95.

11 5. The Ninth Circuit is among the Courts requiring that a Debtor make progress
12 towards confirmation to avoid conversion or dismissal. See, e.g., In re ACI Sunbow, LLC, 206
13 B.R. 213, 219 (Bankr. S.D. Cal. 1997)(“ it would be a perversion of the bankruptcy process to allow
14 a debtor to remain under the protection of Chapter 11 to the detriment of creditors once it was
15 established that a debtor could not effectuate a plan, whether because of inability to meet statutory
16 or economic feasibility requirements for confirmation, or otherwise.”)

18 6. A debtor's inability to accomplish substantive progress toward confirmation of a plan
19 inherently carries the risk of unreasonable and undue delay, which is nearly always prejudicial
20 toward creditors, In re Babayoff, 445 B.R. 64, 79 (Bankr. E.D.N.Y. 2011), and which is adequate
21 justification, in and of itself, for dismissal of a Chapter 11 case for cause. See e.g., In Re De
22 Jounghe, 334 B.R. at 770–771 (upholding the bankruptcy court's dismissal of the debtor's Chapter
23 11 case for unreasonable delay, prejudicial to creditors, where a debtor had been in bankruptcy for
24 14 months and in Chapter 11 for nearly a year and yet had failed to file a plan or disclosure
25 statement); In re Babayoff, 445 B.R. at 79 (finding undue delay where two years had passed without
26 demonstrating the ability to file or confirm a feasible plan); In re Tornheim, 181 B.R. 161, 165
27 (Bankr. S.D.N.Y. 1995) (finding cause to convert or dismiss present after 16 months where the
28

1 debtor's "failure to file a plan ... show[ed] both unreasonable, prejudicial delay and an inability to
2 effectuate a plan"). In the present case, over the course of more than two years, neither the Debtor,
3 the Trustee, nor any party in interest has been able to file a plan and disclosure statement. The
4 Estate does not have the ability to finance any such effort or to pay its proportionate share of the
5 care and maintenance costs of the Borealis Mine.
6

7 7. The purpose of the Bankruptcy Code provisions for reorganization is to provide for
8 rehabilitation or for liquidation of the Estate's assets. The only asset for liquidation here is the
9 Debtor's 36% interest in Borealis, which is an asset that is subject to continuous diminution in value
10 and is subject to the secured claim of Waterton. Simply put, continuation of this proceeding does
11 not provide any potential benefit to the estate or to creditors of the estate.
12

13 8. Cause exists for dismissal under Section 1112(b) and no unusual circumstances exist
14 to establish it is not in the estate's best interest to dismiss. Neither the Debtor nor any other party
15 has been able to establish there is a reasonable likelihood a plan will be confirmed within a
16 reasonable period of time.

17 NOW, THEREFORE, the Court hereby grants the Motion and it is hereby ORDERED that
18 this bankruptcy proceeding be dismissed.

19 Prepared by:

20 DAVIS GRAHAM & STUBBS

21 By: /s/ Laura K. Granier

22 Laura K. Granier

23 Christopher L. Richardson

24 Attorneys for Waterton Global Value, L.P.

25 APPROVED/~~DISAPPROVED~~

26 /s/ John F. Murtha

27 John F. Murtha, Esq.

28 W. Chris Wicker, Esq.

Attorneys for Equity Security Holders

Murray Bockhold and G. R. Dawson Holdings 10

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APPROVED/~~DISAPPROVED~~

/s/ Gregory F. Wilson
Gregory F. Wilson, Esq.
Gregory F. Wilson and Associates PC
Attorneys for Trustee Christina W. Lovato

APPROVED/~~DISAPPROVED~~

/s/ Janet L. Chubb
Janet L. Chubb, Esq.
Kaempfer Crowell
Attorneys for Certain Equity Security Holders

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LR 9021 CERTIFICATION

In accordance with LR 9021, counsel submitting this document certifies that the order accurately reflects the court’s ruling and that:

_____ The court has waived the requirement set forth in LR 9021(b)(1).

_____ No party appeared at the hearing or filed an objection to the motion.

 X I have delivered a copy of this proposed order to all counsel who appeared at the hearing, and any unrepresented parties who appeared at the hearing, and each has approved or disapproved the order, or failed to respond, as indicated below:

Counsel who approved the order:

John F. Murtha, Esq.
Attorney for Equity Security Holders
Murray Bockhold and G. R. Dawson

Gregory F. Wilson, Esq.
Attorneys for Trustee Christina W. Lovato

Janet L. Chubb, Esq.
Kaempfer Crowell
Attorneys for Certain Equity Security Holders

_____ I certify that this is a case under Chapter 7 or 13, that I have served a copy of this order with the motion pursuant LR 9014(g), and that no party has objected to the form or content of the order.

DAVIS GRAHAM & STUBBS

By: /s/ Laura K. Granier
Laura K. Granier
Christopher L. Richardson
Attorneys for Waterton Global Value, L.P.

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