

1 **2145**
2 W. CHRIS WICKER, ESQ.
3 Nevada Bar No. 1037
4 SETH J. ADAMS, ESQ.
5 Nevada Bar No. 11034
6 WOODBURN AND WEDGE
7 6100 Neil Road, Ste. 500
8 Reno, Nevada 89505
9 Telephone: (775) 688-3000
10 Facsimile: (775) 688-3088
11 cwicker@woodburnandwedge.com
12 sadams@woodburnandwedge.com
13 Attorneys for Gryphon Gold Corporation

14 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

15 **IN AND FOR THE COUNTY OF WASHOE**

16 GRYPHON GOLD CORPORATION, a
17 Nevada Corporation

18 Plaintiff,

19 vs.

20 WATERTON GLOBAL RESOURCE
21 MANAGEMENT, INC., a Canadian
22 company based in Toronto, Ontario;
23 WATERTON GLOBAL VALUE, L.P., a
24 limited partnership formed under the laws of
25 the British Virgin Islands; WATERTON
26 NEVADA SPLITTER, LLC, a Nevada
27 Limited liability company, and BOREALIS
28 MINGING COMPANY, LLC, a Nevada
29 Limited liability company, and DOES 1-5,

30 Defendants.

Case No.: CV18-01557

Dept. No.: 9

31 **MOTION FOR ORDER TO: i) ENFORCE PRELIMINARY INJUNCTION; ii) SHOW**
32 **CAUSE WHY WATERTON SHOULD NOT BE HELD IN CONTEMPT FOR**
33 **VIOLATING THE PRELIMINARY INJUNCTION; AND iii) SANCTIONED FOR**
34 **VIOLATION OF NRS § 48.105.**

35 Plaintiff, GYPHON GOLD CORPORATION (“Gryphon”), by and through its counsel,
36 Woodburn and Wedge, hereby moves this Court for an Order to Show Cause Why Defendants
37 Waterton Global Resource Management, Inc., Waterton Global Value, L.P., Waterton Nevada

1 Splitter, LLC and Borealis Mining Company, LLC (collectively referred to herein as
2 “Waterton” or the “Defendants”) Should Not Be Held in Contempt for Violating the Preliminary
3 Injunction and Sanctioned for Violating NRS § 48.105 (hereafter referred to as the “Motion”).
4 This Motion is supported by the following Points and Authorities, the Affidavits of Murray
5 Bockhold (“Bockhold Affidavit”) and of Seth Adams (“Adams Affidavit”), the pleadings and
6 papers on file in this case to-date, and any oral argument the Court permits related to the Motion.

7 MEMORANDUM OF POINTS AND AUTHORITIES

8 I. INTRODUCTION

9 1. On July 27, 2018, Gryphon filed its complaint against Waterton and BMC LLC
10 alleging: i) Fraud / Intentional Misrepresentation, ii) Breach of the Implied Covenant of Good
11 Faith and Fair Dealing (Tortious Breach), and iii) [requesting] Injunctive Relief. Gryphon has
12 subsequently amended its complaint to remove its claim for Breach of the Implied Covenant of
13 Good Faith and Fair Dealing.

14 2. On August 1, 2018, Gryphon filed an application for the issuance of a temporary
15 restraining order (“TRO”) and motion for preliminary injunction. The Court issued a TRO on
16 August 2, 2018, which barred the Defendants from “removing, altering or adding any substance
17 or material, of any kind, from the ponds located at Borealis Mine.

18 3. On August 21, 2018, the Court heard oral argument on Gryphon’s motion for
19 preliminary injunction and Waterton’s opposition thereto. The Court granted a preliminary
20 injunction on September 6, 2018, which modified and extended the TRO, granted Gryphon the
21 right to inspect the Borealis Mine and laid out a plan for the draining of the pond and performing
22 an assay of the carbon found therein (the “First Preliminary Injunction”).

23 4. Pursuant to the First Preliminary Injunction, Gryphon, by and through its
24 Custodian, Murray Bockhold (“Bockhold”), undersigned counsel, and other representatives, as
25 well as representatives of Just Refiners (USA) Inc. (“Just Refiners”) conducted an inspection
26 of the Borealis Mine on August 31, 2019 (the “Inspection”).

27 5. Prior to conducting the Inspection, Waterton required Gryphon to enter into a
28 Stipulated Initial Protective Order which was filed in this Case on September 6, 2018 (the

1 “Protective Order”). Gryphon and Just Refiners were also required to execute Confidentiality
2 Agreements once they arrived at the Borealis Mine for the Inspection.

3 6. On September 12, 2018, Waterton filed a Motion to Modify Preliminary
4 Injunction which Waterton sought to have heard on shortened time. Waterton’s motion sought
5 to modify the First Preliminary Injunction to include a prohibition on Bockhold from contacting
6 any personnel currently employed at the Borealis Mine or Waterton or its affiliates without
7 express written permission. On September 13, 2018, Gryphon opposed Waterton’s motion to
8 modify and indicated that the mine employee who had been contacted by Bockhold had in fact
9 expressed a willingness to discuss practices at the Borealis Mine with Bockhold through a third
10 party See, Affidavit of Murray Bockhold in Support of Opposition, filed September 13, 2018).

11 7. On September 27, 2018, the Court issued an order denying Waterton’s motion
12 to modify, finding that Bockhold was not prohibited from communicating with non-
13 management personnel of the Defendants.

14 8. Around this same time, Waterton proposed an altered process for conducting the
15 assay of the pregnant-pond whereby the pregnant-pond at Borealis Mine would be drained and
16 the contents would then be transported to Just Refiner’s facility in Sparks, NV. According to
17 Waterton, altering the process to involve having the pregnant-pond drained, and the entirety of
18 the remaining (solid) contents bagged-up and transported to Just Refiner’s facility would result
19 in a more accurate assessment of the pregnant-pond’s gold/silver content in comparison with
20 the earlier methodology involving core samples. Adams Affidavit ¶ 4.

21 9. On October 1, 2018, in the process of setting up a conference call between
22 Gryphon, Waterton and Just Refiners to discuss the original and proposed procedures for
23 conducting the assay, counsel for Waterton indicated to counsel for Gryphon that they were
24 going to shelve the idea to bag and haul the carbon to Sparks and just revert to the idea of taking
25 core samples at the mine. During the conference call, Just Refiners indicated that the bagging
26 and transport process would yield a more complete and accurate assessment of the pregnant-
27 pond’s contents. Adams Affidavit ¶ 5.

28

1 10. It was agreed that the draining of the pregnant pond would begin on the
2 following Monday, October 8, 2013 and would consist of using two pumps, one large and one
3 small, to remove the water so that the carbon could then be extracted. It was contemplated that
4 the draining process would take approximately a day to a day-and-a-half and as such, Gryphon
5 arranged for a representative of Just Refiners to travel to the mine to be available for the
6 conclusion of the draining. On the evening of October 8th, counsel for Waterton advised that
7 the draining process was ahead of schedule and that the small pump would commence draining
8 out the last of the water from the pregnant pond beginning at 10a.m. on Tuesday, October 9th,
9 rather than the afternoon as had been contemplated. Adams Affidavit ¶ 6.

10 11. On October 9, 2018, Waterton filed a Joint Motion Requesting Status
11 Conference (the “Joint Motion”). The Joint Motion was the result of Waterton’s proposal to
12 alter the contemplated assay process in the First Preliminary Injunction so as to “more reliably
13 determine the amount of gold in the Pond as compared to attempting to calculate the likely
14 amount of gold in the Pond using the results of an assay.” (Joint Motion, ¶ 3).

15 12. Due to mechanical/electrical issues, the draining process was not able to be
16 completed on Tuesday the 9th. Waterton advised that they hoped to correct the issues and
17 resume the draining process so as to permit Just Refiners to assess how things were going on
18 Thursday, October 11th. Adams Affidavit ¶ 7.

19 13. On October 12, 2018, Bockhold, undersigned counsel, and representatives and
20 counsel for the Defendants participated in a telephonic settlement discussion. Before and during
21 the call, I advised all participants that the call was a settlement negotiation intended to foster
22 resolution of the case and as such, was protected under NRS 48.105. Adams Affidavit ¶ 9.

23 14. On October 24, 2018, Waterton filed a Joint Motion to Modify Preliminary
24 Injunction (the “First Modification Motion”). The First Modification Motion indicated:

25 In recent weeks, the Waterton Entities have suggested a process by
26 which they would remove gold-laden carbon from the Pond (the
27 “Carbon”) and have the Carbon processed to extract and then
28 refine gold from the Carbon. The Waterton Entities suggested this
 process because it will more reliably determine the amount of gold
 in the Pond, as compared to attempting to calculate the likely

1 amount of gold in the Pond using the results of an assay. Gryphon
2 has agreed to the Waterton Entities' suggested process.

3 First Modification Motion, ¶ 3.

4 15. The First Modification Motion also covered the surveillance and security
5 concerns associated with the extraction and storage of the pregnant-pond contents:

6 d. A third-party security service will be retained to provide 24/7
7 security during the removal and loading process.

8 f. The Supersacks will remain the custody of Just Refiners at its
9 Sparks, Nevada facility and monitored by 24/7 video surveillance
10 while the Parties, in good faith and in consultation with Just
11 Refiners, determine the appropriate methodology for evaluating and
refining the Carbon. The Parties may agree in writing on such
methodology without further order of the Court.

12 First Modification Motion, ¶ 6.

13 16. The Court approved the First Modification Motion on October 31, 2018.

14 17. On October 30, 2018, Waterton indicated that the removal/bagging process
15 would commence on Saturday, November 3, 2018, and was expected to take 3 or 4 days and
16 that KCA would act as the third-party observer. The removal/bagging process took much longer
17 than anticipated. On November 8, 2018, and again on November 15, 2018, undersigned counsel
18 inquired on the status of the removal/bagging, contact info for Kappes Cassiday ("KCA") and
19 whether or not the process of transporting the contents to Sparks had started yet. On November
20 16, 2018, Waterton indicated that the sludge removal was complete, 440 tons of the pregnant-
21 pond's contents had been shipped in Supersacks (the "Supersacks") to a lot owned by Q&D
22 Construction (the "Q&D Lot") in Sparks, NV, and that the process of removing the gold-laden
23 carbon was being videotaped/documentated and that the sampling protocol would commence on
24 Monday, November 19, 2018. Adams Affidavit ¶ 9.

25 18. On November 21, 2018, Waterton advised that samples taken by Just Refiners
26 revealed high levels of mercury which would prevent Just Refiners from processing the carbon
27 at the facility, and as such, the Supersacks would need to be returned to Borealis Mine for
28 draining. Adams Affidavit ¶ 10.

1 19. On November 27, 2018, the Court held a Status Conference at Waterton’s
2 request where Waterton indicated that due to the presence of mercury-laden water in the
3 Supersacks, they could not be tested by Just Refiners and also could not remain at the Q&D lot.
4 The Court ordered that the Supersacks be returned to the Borealis Mine where they could be
5 drained lawfully and provided a 24-hour stay so as to permit the parties to work out the terms
6 of the process going forward.

7 20. Later that same day, Waterton sought to set up another conference call with the
8 Court, ultimately, due to the Court’s schedule, the call was not able to be held. That evening, at
9 approximately 8:30 p.m., Undersigned Counsel received text messages from Waterton’s
10 Counsel indicating that a status call had been set up with the Court the next morning at 8:30
11 a.m. to approve a procedure to identify which Supersacks could be transported to Just Refiners
12 and which contained too much water necessitating their transport back to the Borealis Mine.
13 Adams Affidavit ¶ 12.

14 21. At the call conducted at 8:30 a.m. the following day, November 28, 2019,
15 Waterton indicated that KCA had determined which of the Supersacks needed to be returned to
16 the Borealis Mine but because Gryphon had not been involved in the process, the Court directed
17 the parties to communicate with KCA and Just Refiners to iron-out the procedure for
18 determining which bags could stay and which could not. Adams Affidavit ¶ 13.

19 22. Waterton and Gryphon held a conference call later that same day, with
20 representatives of Just Refiners and KCA to come up with a manner in which it could be
21 determined which of the Supersacks could be tested by Just Refiners and which contained too
22 much water. The parties also agreed that Bockhold could inspect the Q&D Construction lot
23 where the Supersacks were being stored. It was during this site-visit, Bockhold learned that the
24 Supersacks were not being maintained in a secured lot and were not subject to 24/7 surveillance.
25 Bockhold Affidavit ¶ 9.

26 23. On November 29, 2018, Waterton filed a “Status Report Regarding November
27 28, 2018 Status Conference” which detailed Waterton’s perspective of the communications
28 which occurred on November 28th and 29th concerning the communications between Gryphon

1 and Waterton, wherein Waterton characterized Gryphon's requests for terms to be included
2 within an agreement as to the transport of the Supersacks back to Boreal Mine, as impermissible
3 and cited to the urgent need to transport the Supersacks back to the mine (although the Status
4 Report did not detail the environmental issues nor the concerns raised by Q&D Construction
5 regarding the storage/spillage on its property without its informed consent) and weather as
6 necessitating the transport procedure, as Waterton dictated, to be implemented as soon as
7 possible. Adams Affidavit ¶ 14.

8 24. The status report also indicated that Bockhold had filed a complaint with the
9 Nevada Department of Environmental Protection ("NDEP") which had led to Just Refiners
10 emailing counsel for Gryphon and Waterton, amongst others, indicating that Just Refiners
11 would no longer agree to perform the testing/assay process it had been retained to conduct. The
12 report contained no evidence supporting Waterton's position that Bockhold had made Just
13 Refiners' continued involvement untenable. While Waterton portrayed Bockhold as having
14 created an issue surrounding the environmental concerns associated with the Supersacks which
15 had the effect of causing Just Refiners to leave, neither Gryphon nor Bockhold were in any way
16 responsible for the Supersacks containing, or leaking, mercury-contaminated water. As a
17 Custodian for Gryphon however, Bockhold had a responsibility to Gryphon and its shareholders
18 to ensure that should Gryphon prevail in recovering Gryphon's former interest in the Borealis
19 Mine, that they don't accept liability associated with environmental liability and clean-up along
20 with it. Just Refiners, whom had been of tremendous value to both parties throughout the early-
21 stages of this case, did not provide any explanation for its choice to refuse to stay involved with
22 the testing and assay process. Representatives of Just Refiners told Bockhold on two occasions
23 that Waterton was not an existing client and they were seeking to establish a business
24 relationship with them going forward. While Just Refiners' decision to leave once they received
25 notice of NDEP getting involved, etc. is understandable, given that Just Refiners was
26 uninvolved with the bagging and transport process and therefore had no liability for the contents
27 thereof, had made the presence of mercury within the Supersacks known to all immediately
28 when they arrived, and had agreed to perform the testing/assay process on the bags which did

1 not need to be taken back to the mine, their sudden departure from this case was troubling to
2 say the least. While Just Refiners had no obligation to remain involved, Waterton’s portrayal
3 that their decision to cease further activities was Bockhold’s fault was an unfair and
4 inappropriate characterization to make. Bockhold Affidavit ¶¶ 10-12.

5 25. Waterton made a request for another status call, and on November 30, 2019 (the
6 “Second Status Call”), Waterton indicated that Gryphon had contacted representatives with
7 NDEP and with Q&D Construction and that this communication was an attempt to thwart the
8 Court’s order after the November 27th hearing. Gryphon was not afforded any forewarning of
9 these allegations nor any opportunity to address this mischaracterization. Adams Affidavit ¶ 15.

10 26. As a result of the Second Status Call, the Court ordered that all of the Supersacks
11 be transported to the Borealis Mine and ordered that the preliminary injunction in place in the
12 case be modified accordingly.

13 27. That same day, November 30, 2018, Waterton filed a Notice of Civil Claim in
14 the Supreme Court of British Columbia against Bockhold and against Ian Dawson/G.R. Dawson
15 Holdings Limited (an entity involved in having Bockhold appointed as the custodian for
16 Gryphon). This suit (the “Canadian Lawsuit”) sought damages for alleged defamation
17 committed by the defendants causing harm to Waterton. Bockhold Affidavit ¶ 13.

18 28. The Canadian Lawsuit contained direct references to and content from the
19 October 12th settlement discussion¹. Id.

20 29. On December 18, 2018, the Court entered an Order Modifying Preliminary
21 Injunction (the “Modified Injunction”). The Modified Injunction provided that the Supersacks
22 would be first partially dewatered at the Q&D Facility so as to permit the safe transport of the
23 contents back to the Borealis Mine, resealed with all of the Carbon sediment, and transported
24 and stored on the Leach Pad in a “secured and monitored manner.” The Modified Injunction
25 further authorized Gryphon to place two stationary cameras near the Leach Pad containing the
26

27
28 ¹ A copy of the Canadian Lawsuit is not attached to this Motion or to the Bockhold Affidavit as it contains not only information Gryphon believes was part of its confidential settlement negotiations with Waterton, but also contains disparaging remarks concerning Bockhold. A copy is available for in camera review should the Court wish to.

1 Supersacks so as to permit Gryphon to monitor the placement, storage and dewatering of the
2 Supersacks. Additionally, Gryphon was permitted access no more than once per day, under
3 supervision of staff, to provide for the ongoing maintenance of the surveillance cameras. Adams
4 Affidavit ¶ 17.

5 30. Pursuant to the Modified Injunction, KCA was to inspect the dewatered
6 Supersacks and make recommendations to Gryphon and Waterton on the appropriate next steps
7 for elemental analysis. The Modified Injunction provided that the parties would work together
8 to identify and retain suitable professionals who could assist in performing an elemental
9 analysis and that such professionals would be mutually acceptable to the parties. Adams
10 Affidavit ¶ 18.

11 31. On November 30, 2018, counsel for Waterton notified undersigned counsel that
12 24/7 surveillance at the Q&D Lot would start on December 1, 2018. Adams Affidavit ¶ 19.

13 32. On December 1, 2018 (a Saturday), counsel for Waterton contacted counsel for
14 Gryphon to advise him that the process of dewatering the Supersacks at the Q&D Lot would
15 occur on December 3, 2018 (a Monday). Adams Affidavit ¶ 20.

16 33. On December 6, 2018, Terry Albert of KCA circulated, via email, a report
17 detailing the pond sludge bagging which occurred at the Borealis Mine in November which was
18 dated December 4, 2018. (the "KCA Sludge Report"). Adams Affidavit ¶ 21.

19 34. On December 7, 2018, Mr. Albert sent a second email advising that the bag count
20 contained in KCA Sludge Report was incorrect and providing, by an attachment, a Bag Count
21 Correction. Adams Affidavit ¶ 22

22 35. On December 14, 2018, Waterton sent an email containing a sampling procedure
23 whereby the Supersacks would not need further dewatering with such samples being sent to
24 McClelland Laboratories for elemental analysis. That evening (a Friday), counsel for Waterton
25 notified counsel for Gryphon that the sampling would be occurring on the following Monday
26 (December 17, 2018). Adams Affidavit ¶ 23.

27 36. On December 20, 2018, counsel for Gryphon emailed counsel for Waterton
28 indicating that Gryphon would like to install the two surveillance cameras contemplated by the

1 Modified Injunction at the Borealis Mine. Counsel for Waterton replied on December 21, 2018
2 that they would accommodate Gryphon’s visit however all subsequent visits, including the
3 maintenance visits provided for in the Modified Injunction, would require Gryphon’s
4 representative/s to obtain a MSHA Surface Miner Certificate. Adams Affidavit ¶ 24.

5 37. On February 7, 2019, counsel for Waterton emailed a copy of an elemental
6 analysis performed by McClelland Laboratories, Inc. of the samples taken from the pond sludge
7 totes. The email indicated that the next step was to have McClelland’s analysis extrapolated to
8 determine the amount of precious metals that was in the pregnant-pond by combining the results
9 with the volume and other data KCA gathered. The email indicated that KCA had recommended
10 two firms for performing this calculation. Adams Affidavit ¶ 25.

11 38. On February 8, 2019, counsel for Gryphon emailed counsel for Waterton i)
12 indicating that Gryphon’s representative needed access to maintain the surveillance cameras
13 ASAP and ii) raising the claim that the Canadian Suit’s reference to confidential settlement
14 negotiations ran afoul of NRS 48.105. Waterton’s counsel and undersigned counsel exchanged
15 further emails and calls but did not come to a resolution on either issue. Adams Affidavit ¶ 26.

16 39. On February 11, 2019, counsel for Waterton and indicated that they had decided
17 to use KCA to perform the extrapolation calculations in lieu of using either of the firm’s KCA
18 had previously recommended using (or another firm). Adams Affidavit ¶ 28.

19 40. On March 13, 2019, Carl E. Defilippi with KCA emailed the parties a report
20 which Mr. Defilippi indicated contained the data and calculations used to estimate the gold,
21 silver and mercury quantities present in the material removed from the Borealis process pond
22 in November, 2018 (hereafter referred to as the “Estimate Report”). Adams Affidavit ¶ 29.

23 41. Counsel for Waterton filed the Estimate Report with this Court on March 18,
24 2019 as part of its Status Report, which estimated a rough value of the gold and silver estimated
25 to be present in the carbon as \$310,000.00. Adams Affidavit ¶ 30.

26 ///

27 ///

28 ///

1 **II. MEMORANDUM OF POINTS & AUTHORITIES**

2 **A. WATERTON SHOULD BE HELD IN CONTEMPT FOR**
3 **DISOBEDIENCE OF THE LETTER AND SPIRIT OF THE**
4 **PRELIMINARY INJUNCTION.**

4 42. District Courts have both inherent and statutory authority to enforce orders by
5 subsequent contempt proceedings. See City Council of Reno v. Reno Newspapers, Inc., 105
6 Nev. 886, 784 P.2d 974 (1989); see also All Minerals Corp. v. Kunkle, 105 Nev. 835, 784 P.2d
7 2 (1989). This Court’s statutory authority can be found in NRS 1.210(3) which provides that
8 this Court has authority to compel obedience to its lawful judgments, orders and process.

9 43. NRS 22.010 provides that the disobedience of or resistance to any lawful order
10 issued by the Court constitutes contempt. NRS 22.010(3) defines both acts and omissions
11 constituting contempt, and provides that, disobedience or resistance to a lawful order issued by
12 the Court shall be deemed an act of contempt. A person found guilty of contempt may be fined
13 up to \$500 for each act of contempt, may be imprisoned for up to 25 days, or both. A person
14 found guilty of contempt may also be required to pay the reasonable expenses, including
15 attorney’s fees, of the person seeking to enforce the order. NRS 22.100.

16 44. Moreover, “Nevada courts also possess inherent powers of equity and of control
17 over the exercise of their jurisdiction.” Jordan v. State, 121 Nev. 44, 59, 110 P.3d 30, 42 (2005).
18 As such, the judicial has “inherent authority to administrate its own procedures and to manage
19 its own affairs, meaning that the judiciary may make rules and carry out other incidental powers
20 when ‘reasonable and necessary’ for the administration of justice.” Halverson v. Hardcastle,
21 123 Nev. 245, 261, 163 P.3d 428, 440 (2007).

22 45. Waterton has engaged in ongoing actions and omissions from the
23 commencement of this case which have completely undermined the Court’s TRO and
24 preliminary injunctions (original and as modified) such that the very intent behind Gryphon’s
25 injunctive relief, maintaining the status quo and conducting an above-board assessment of
26 whether or not the pregnant pond still contains the precious metals former mine employees
27 watched get hidden there were still present. This contempt has taken many forms.

28 ///

1 **a. UNEXPLAINED ACTIVITY AT THE MINE AFTER THE TRO WAS ISSUED**

2 46. As was raised in Gryphon’s complaint, Gryphon has conducted ongoing
3 surveillance at the Borealis Mine since early 2018. It was this surveillance that lead to the filing
4 of the complaint when Gryphon observed unexplained activity at and around the pregnant pond
5 occurring at nighttime only during a period when the Borealis Mine was on care and
6 maintenance. Taken in conjunction with the sworn affidavits of former mine
7 employees/consultants regarding the purposeful diversion of gold and silver laden carbon to the
8 pregnant pond, it was logical to conclude that the nighttime activity was Waterton attempting
9 to remove this carbon and “cash in” on the minerals lying within. Bockhold Affidavit ¶ 3.

10 47. Since the time Gryphon obtained its TRO (August 2, 2018), Gryphon has
11 continued to observe activity at the Borealis Mine which again raises concerns that Waterton
12 was doing anything but maintaining the status quo. Gryphon believes that the TRO and
13 preliminary injunction were thwarted by Waterton. Bockhold Affidavit ¶ 5-7.

14 48. Looking no further than Waterton’s own “Pond Project Tracker” provided by
15 Waterton, entries for labor costs associated with “shovel[ing] carbon from barren pond into
16 bags” and “Operate Crane lift bags of carbon from barren pond” appear on August 23, 2018.
17 The parties did not enter into their agreement for the removal of carbon from the mine until
18 much later as was detailed above. Bockhold Affidavit ¶ 6.

19 49. Additionally, surveillance revealed a pickup truck carrying what appears to be a
20 Supersack on August 28, 2018. Bockhold Affidavit ¶ 5.

21 50. The injunctive relief sought by Gryphon and awarded by this Court was intended
22 to prevent the removal of any and all carbon from Borealis Mine and to permit Gryphon to
23 properly ascertain what, if any, precious metals might remain within the pregnant pond. Given
24 the flurry of activity shortly after Gryphon obtained its TRO, as well as the activities detailed
25 below, Gryphon has little confidence that what has been sampled is an accurate reflection of
26 what the pregnant pond once contained and what Waterton purposely diverted from the Borealis
27 Mine after it took over operations. Bockhold Declaration ¶¶ 7, 16.

28 ///

1 **b. THE SUPERSACK FIASCO**

2 51. As is laid out in the facts above, what was originally contemplated to be a
3 relatively simple process whereby the pregnant pond would be drained and core samples taken
4 became anything but simple. It was Waterton who suggested the revised process where the
5 pregnant pond would be drained and the contents in their entirety removed and taken to be
6 tested. Waterton's justification for this proposal was that they wanted there to be no doubt as to
7 the contents and the original core sampling process, while good, still left the possibility of doubt
8 in the results by virtue of taking a sample and extrapolating it to the entire area. Adams
9 Declaration ¶

10 52. Just before speaking with Just Refiners, Waterton indicated that this revised
11 process might be too costly and not yield results any more accurate than the core sampling
12 process. The joint call with Just Refiners confirmed that it would be more accurate to have the
13 contents taken to Just Refiners' facility rather than conduct a core sampling process. Adams
14 Declaration ¶

15 53. So began the tortured process of draining, extracting, bagging, transporting,
16 sampling, dewatering, transporting (again), dewatering (again), sampling and testing, as is laid
17 out above. The process took far more time than was contemplated and yielded 440 tons of
18 mercury-laden water and carbon in 417 (+/-) Supersacks being taken from the Borealis Mine
19 (roughly an hour west of Hawthorne) to Sparks and back. The presence of water and mercury
20 in the Supersacks, at the levels which prevented Just Refiners from conducting the assay and
21 necessitating taking all of the bags back to the mine was inexcusable. Waterton offered no
22 explanation for why the Supersacks contained so much water and Mercury after an extensive
23 period of draining.

24 54. The Court accurately determined, during the November 27, 2018 Status Hearing,
25 that the mistake was Waterton's mistake to bear (in ordering that Waterton would transport the
26 Supersacks back to the mine at their expense). No opportunity existed during the Status Hearing
27 to ascertain *why* it was thought appropriate to bring the sacks to Sparks in the condition they
28 were in when they arrived.

1 55. Additionally, the presence of mercury within the water was another element for
2 which Waterton offered no explanation. Per Just Refiners, the level of mercury found from their
3 initial samples was “extraordinarily high” and exceeded what Just Refiners had the capability
4 or authorization to process in trying to perform the assays or refine the gold-laden carbon that
5 assays confirmed had significant economic value. Bockhold Affidavit ¶¶ 14, 17.

6 56. To be fair, certainly some moisture could be expected within the Supersacks
7 given that the contents were previously submerged. While the two-pump process utilized by
8 Waterton was intended to remove the water from the pregnant pond so as to expose the carbon
9 for removal, it could be reasonably expected that the content, once extracted, would be wet. But
10 once the Supersacks arrived in Sparks, the overwhelming majority contained so much water
11 that they were akin to gigantic water-balloons and even sampling of each bag was impossible
12 as the auger-style mechanism used would not have enough solid content to grasp and remove.
13 No explanation nor justification was offered as to why the Supersacks would be sealed and
14 transported in such a condition. What is without dispute however, is that between the water-
15 content and the unexpectedly high levels of mercury therein, the assay could not go forward as
16 was ordered.

17 57. It is Gryphon’s position that no explanation was offered because no explanation
18 was possible. The manner in which the draining, bagging, transporting and testing of the Pond
19 contents leaves Gryphon with no confidence in the results submitted to this Court.

20 **c. SURVEILLANCE CAMERA ACCESS**

21 58. As referenced above, shortly after the Modified Injunction was put in place after
22 the Court ordered the Supersacks to be returned to the Borealis Mine, Waterton responded to
23 Gryphon’s request to install the two contemplated surveillance cameras with a one-time
24 accommodation with a demand that all further maintenance pursuant to the Modified Injunction
25 to be performed by someone with a MSHA Surface Miner Certificate. Adams Declaration ¶

26 59. Not only was this certification requirement not included within the Modified
27 Injunction (nor even mentioned by Waterton in the litany of calls, emails and two status
28 conferences concerning the terms), but it is completely nonsensical and further evidence of

1 Waterton’s efforts to prohibit Gryphon from meaningfully participating in the process. Adams
2 Declaration ¶

3 60. The Borealis Mine is, appropriately so, a closed-facility which is under the
4 custody and control of the Defendants. As was frequently an issue through the myriad of
5 scheduling issues and delays associated with the draining and extraction processes, Gryphon
6 cannot always arrange to have an advisor get to the mine, particularly when the window to
7 arrange for such an observer is minimal and the distance to get there is so great. As such, the
8 surveillance cameras included in the Modified Injunction were Gryphon’s way of maintaining
9 some semblance of oversight over the operations being conducted with regard to the dewatering
10 process (2.0) that was to occur back at the mine. Bockhold Declaration ¶

11 61. MSHA Surface Miner Certification is a certification process for personal
12 conducting mining work². Had Gryphon or its representatives been actively participating in the
13 draining, bagging, dewatering, etc., it could certainly be understood that obtaining the MSHA
14 certification might be a requisite to ensure compliance with applicable regulatory agencies.
15 However, to the extent that Gryphon only needed to make minor adjustments to the surveillance
16 cameras and pop in new batteries, this hardly qualifies as the kind of labor contemplated by the
17 MSHA certification. Clearly, not all whom perform work of any kind on a mine are required to
18 obtain the certification – undersigned counsel was not required to obtain such certification prior
19 to conducting the Inspection. To require it of Gryphon’s representative was nothing more than
20 a thinly-veiled ploy to prevent Gryphon from maintaining ongoing, uninterrupted surveillance
21 of the dewatering process, which was to have occurred on the Leach Pad³.

22 62. Gryphon’s requests to have its agent service the cameras prior to their batteries
23 running dry are, as of the date of this motion, unresolved. Without the ability to maintain
24
25

26 ² 30 C.F.R. §48.22 provides the definition of “Miner” to which the certification process applies as “...any person
27 working in a surface mine or surface areas of an underground mine and who is engaged in the extraction and
28 a maintenance or service worker employed by the operator or a maintenance or service contracted by the operator
to work at the mine for frequent or extended periods.”

³ Despite the Modified Injunction containing the provision that the Supersacks were to be returned to the Leach Pad
at Borealis Mine, the sacks were in fact not placed on the Leach Pad and were placed next to the Pregnant Pond.

1 surveillance over the Supersacks and the carbon within, Gryphon has no means whatsoever to
2 ensure the sanctity of the storage, chain of custody, sampling, etc. Adams Affidavit ¶ 27.

3 **d. THE SAMPLING/ELEMENAL ANALYSIS PROCESS**

4 63. Unlike the process detailed in the Modified Injunction, what has actually
5 occurred has produced a result where Gryphon not only was intentionally kept uninvolved, but
6 the results themselves are based upon extrapolating the results of very limited samples to a huge
7 area. While the preliminary injunction, in all of its forms pre and post modification,
8 contemplated Gryphon and Waterton using neutrals to oversee the process and keep both parties
9 informed, what occurred in reality was anything but.

10 64. Gryphon received KCA's report on December 4, 2018 summarizing what KCA
11 witnessed during the draining, bagging and removal process. This was 19-days after the
12 Supersacks had already taken their lengthy road trip across Northern Nevada. Likewise, the
13 most recent KCA report, which was submitted to this Court as part of a status report by Waterton
14 on March 18, 2019, was provided to Gryphon without its input in the procedure or outcome.

15 65. This was not the outcome to be achieved in the Court's orders. Rather than the
16 mutual undertaking with neutral observers, etc., what Gryphon and this Court have been
17 provided are just self-serving claims that Waterton did everything it was supposed to.
18 Furthermore, despite Waterton's initial claims that draining, bagging and transporting the
19 entirety of any carbon found in the pregnant pond would be more accurate (since the contents
20 would be analyzed entirely rather than having samples taken and those results extrapolated to
21 project what the pregnant pond does, or does not, contain), the ultimate result obtained via the
22 testing arranged by Waterton is just an estimate. The "mistake", or series of mistakes which
23 lead to this process being utilized and the loss of the services of Just Refiners which Waterton
24 attributed to the activities of Bockhold, doesn't alter the reality that the results Waterton now
25 puts forward are nowhere as accurate as those which were agreed to.

26 66. The value provided in the Elemental Analysis, while significant, provides
27 Gryphon and this Court with absolutely no certainty as to what Waterton did, or did not, hide
28 in the pregnant pond. Very early in this case, Gryphon filed the Employee Affidavits, referenced

1 above, which indicated that during the period where Waterton diverted gold-laden carbon to the
2 pregnant-pond. In addition to indicating that the carbon at one point was so thick (appx. 4-feet)
3 that the employee could walk upon it just below the surface of the water, the affidavit also
4 indicates that he was directed, by the Defendants, to take test samples for assay. The employee
5 was not told what the results of the assay were other than they were “good.” The very same
6 employee received the same message when he was directed by the Defendants to divert the
7 solution flow straight to the pregnant-pond and avoid the carbon columns, as the latter was
8 “money in the bank.” These early assay results were done in 2015. Additionally, as referenced
9 in the Employee Affidavits of Kile and Chidester, samples they took (3) confirmed that the
10 carbon was loaded with gold. Bockhold Affidavit ¶ 1.

11 67. Given that the Employee Affidavits have not yet been addressed in whole or in
12 part in this litigation by the Defendants, than, given the Elemental Analysis, either there was
13 more gold-laden carbon in the pregnant-pond at one point (and it’s not there now) or the affiants
14 in the Employee Affidavits were lying. Once loaded with gold, carbon cannot “unload” itself.

15 68. Even recent information provided through the agents used in this case provides
16 a far different picture of the level of gold in the carbon. Just Refiners took a total of four samples
17 (in 2019) and the levels of gold/silver are much higher than what was reflected in the Elemental
18 Analysis (and in fact, is consistent with the results produced from the Kile/Chidester samples).
19 Bockhold Affidavit ¶ 16.

20 69. Gryphon’s numerous attempts to have grab-samples taken throughout this
21 process, from the Inspection, to the draining, and beyond were universally denied by Waterton
22 despite having several opportunities to provide such when it would be of minimal to no
23 inconvenience or interruption to the Defendants. On November 8, 2018, Bockhold walked upon
24 the surface of the then drained pregnant-pond and requested permission to take a sample, which
25 was promptly refused. Samples could have easily been taken shortly have the preliminary
26 injunction was first instituted. Waterton’s claims that taking such samples could lead to
27 inconsistent results, etc. is untenable given the lack of Gryphon’s involvement with the testing

28

1 process as it has actually unfolded and the lack of sufficient proof regarding the chain of custody
2 of all the samples Waterton has taken. Bockhold Affidavit ¶ 18.

3 70. Waterton, by way of filing the Elemental Analysis, asks this Court to accept the
4 conclusion reached in the Elemental Analysis as being dispositive of the claims raised by
5 Gryphon. The fact that Waterton chose to file this report the day before filing its most recent
6 motion to dismiss is not by chance. Waterton seeks to hide its contempt no differently than it
7 hid the gold originally.

8 71. The Defendants knew in 2015 that the loaded carbon in the pregnant pond
9 contained gold by virtue of having it tested. Likewise, the assay results taken subsequent to
10 2015 also reflected relatively high levels of gold. Waterton now seeks to portray the value of
11 any precious metals as being relatively insignificant. This position is akin to the position taken
12 by the Defendants during Gryphon's bankruptcy case, which is referred to in Gryphon's
13 complaint/amended complaints (and is where the Bankruptcy Judge determined that Gryphon
14 did have colorable claims against the Defendants⁴). Here again, Waterton seeks to claim that
15 the value of the precious metals determined to be in the carbon is insignificant. Bockhold
16 Affidavit ¶ 19.

17 72. At every turn, Waterton has repeatedly indicated that it wants to get to the bottom
18 of Gryphon's claims regarding the pregnant-pond. Despite this, their actions have been nothing
19 but a wanton disregard for the orders implemented to do this very thing. Waterton's personal
20 attacks mischaracterizing Bockhold's intentions and the Canadian Lawsuit intended to divert
21 his attention and resources to prosecute this case were done to end this litigation before the
22 remainder, and the true gravamen of Gryphon's lawsuit, could be addressed. Furthermore, just
23 looking at Waterton's contrary positions detailed above, one can only assume that Waterton
24 would stop at nothing to prevent an accurate determination of what is (and WAS) in the pregnant
25 pond:

- 26 • Unexplained truck activity occurring on the road leaving the Borealis Mine with
27 Supersacks;

⁴ Insert reference to SJA Declaration with transcript as exhibit.

- 1 • The draining process was frequently delayed, and particularly so when representatives
2 of Just Refiners were there to witness it;
- 3 • Extended periods of time existed where the pregnant pond was drained of water, parties
4 (including Bockhold himself) were able to walk upon the surface, yet the Supersacks
5 with the contents were not yet transported to Sparks, NV;
- 6 • Gryphon is kept in the dark until the Supersacks are in Sparks, NV and only then finds
7 out that i) there are 417 sacks weighing 440 tons; ii) Just Refiners cannot store them and
8 they'll have to be taken to a third-party site;
- 9 • Once the Supersacks arrive at the Q&D Lot, they are determined to so water-laden that
10 they are untestable and that they contain such a high level of Mercury that Just Refiners
11 is unable/unwilling to test them at its facility;
- 12 • Waterton uses the necessity of draining-off (dewatering) the mercury-laden water on a
13 permitted site combined with the leakage which has occurred to-date as the reason that
14 the sacks must immediately be returned to Borealis, all the while characterizing
15 Bockhold's notification to NDEP and Q&D about the Mercury-leakage as an attempt
16 by him to thwart the Court's order that the sacks be returned to the mine for dewatering;
- 17 • Waterton partially dewateres the Supersacks so that they can be transported, then places
18 the contents back at its mine (not on the Leach Pad), undermines the order granting
19 Gryphon the ability to maintain surveillance, and months later, issues an Elemental
20 Analysis using the very kind of extrapolation-methodology originally determined (by
21 Waterton) to not be conclusive enough to address Gryphon's claims.

22 73. Waterton's production of a report which completely ignores the process agreed
23 to, evidences a complete and total disregard for this Court and the letter and spirit of the orders
24 entered in this case to-date.

25 **B. WATERTON SHOULD BE PENALIZED FOR ITS PURPOSEFUL
26 VIOLATION OF NRS 48.105 IN DISCLOSING COMMUNICATIONS
27 MADE DURING A CONFIDENTIAL SETTLEMENT NEGOTIATION
28 AND FOR FILING A DEFAMATION SUIT AGAINST GRYPHON'S
CUSTODIAN WHICH WAS DONE TO CHILL THIS LITIGATION.**

74. As indicated above, Waterton filed suit against Bockhold in Canada, seeking
damages for alleged defamation against Waterton. While the Canadian Suit is still pending
before the Supreme Court of British Columbia, Waterton's use of communications during a
confidential settlement negotiation in this case, as well as the timing of when the suit was filed,
deserve scrutiny by this Court.

1 75. Both in advance of the Settlement Call and during the call, counsel for Gryphon
2 notified all parties attending that the call was a protected, confidential settlement negotiation.
3 Adams Affidavit ¶ 26.

4 76. The purpose of NRS is to “prevent evidence of settlement offers from
5 ‘haunt[ing] a future legal proceeding.’” Davis v. Beling, 278 P.3d 501, 510 (Nev. 2012)
6 (quoting Morrison v. Beach City LLC, 991 P.2d 982, 985 (Nev. 2000); see also Morrison, at
7 984-85 (warning of “an undesirable chilling effect on parties’ attempts to reach a settlement”).
8 Both the Davis and Morrison cases interpreted NRS 48.105 in light of its underlying purpose,
9 to promote parties in litigation to have candid discussions during settlement negotiations.

10 77. Similarly, the timing of when Waterton chose to file the Canadian Lawsuit is
11 suspicious. While filed the same day as the Court was holding a telephonic status call with the
12 parties in this Case (ironic in its own right as will be discussed below), it was not served on
13 Bockhold and the other defendants until mid-December. Unlike Gryphon’s contact with NDEP
14 and Q&D, Waterton’s only basis for filing the suit when it did was to purposely try to chill
15 Gryphon’s ability to prosecute this lawsuit and to participate meaningfully in the testing/assay
16 process by diverting Bockhold’s attention and resources. Bockhold Affidavit ¶ 20.

17 78. Waterton portrayed Bockhold as being a loose-cannon who was trying to
18 disobey the Court’s order after the November 28th hearing. However, the very activity
19 portrayed as being disobedient, communicating with NDEP and Q&D, was a product of trying
20 to ensure that, should Gryphon successfully recover its interest in the Borealis Mine, that it
21 didn’t inherit a host of environmental and civil damages lawsuits/claims along with it. Bockhold
22 Affidavit ¶ 10. In addition to being the kind of actions any custodian or receiver would be
23 expected to undertake, Bockhold’s role as custodian for Gryphon afforded him with the
24 protections associated therewith.

25 79. Furthermore, the unexplainable water and mercury content in the Supersacks
26 was not the product of something Gryphon or Bockhold did; neither had ANYTHING to do
27 with the draining nor bagging process. This was entirely Waterton’s fault and a “mistake” for
28 which they have, to-date, offered absolutely no excuse for.

1 80. Having conducted three status hearings/calls within four days and faced with a
2 situation involving 400+ Supersacks leaking mercury-laden water, the Court understandably
3 took issue with any activity perceived as undermining the Court’s order to have the Supersacks
4 transported back to the Borealis Mine. Gryphon’s communications were not intended in any
5 way to thwart the Court’s order. Bockhold Affidavit ¶¶ 10-11. Had notice and a hearing been
6 possible prior to the November 30, 2018 Status Call, Gryphon, Bockhold and undersigned
7 counsel might have had the opportunity to better respond to the allegations raised by Waterton
8 and the alleged withdrawal of Just Refiners due to the NDEP report. However, to the extent that
9 this Court perceived the limited contact with NDEP and Q&D as running afoul of the Court’s
10 Orders, than certainly Waterton’s filing of a defamation lawsuit against Bockhold, an effort to
11 purposely undermine Bockhold’s ability and means to continue this litigation, should be
12 scrutinized to a far greater degree.

13 81. Beyond just filing the Canadian Lawsuit, the use of statements from the
14 Settlement Call was inexcusable. Given the admonishments by Gryphon’s counsel, there should
15 have been absolutely no confusion that the call was intended to foster the resolution of this
16 litigation and as such, the call was intended to be confidential. Akin to the behavior exhibited
17 by Waterton throughout this lawsuit, detailed above, Waterton believed that they were not
18 subject to counsel’s admonishment or the law governing confidential settlement negotiations
19 and filed suit.

20 **III. CONCLUSION**

21 Based upon the foregoing, it is clear that Waterton violated the Preliminary Injunction
22 currently in-place between the parties. Waterton’s actions were part of a concerted effort to
23 ensure that the assay/testing procedure underpinning the Preliminary Injunction was done
24 without adequate participation or oversight by Gryphon, and done during a period where, due
25 to Waterton’s actions, i) Gryphon’s custodian was sued for defamation in Canada, ii) the testing
26 process was purposely delayed and manipulated , iii) Gryphon’s ability to maintain surveillance
27 of the activities at the Mine were thwarted and iv) the chain of custody of the carbon was not
28 maintained. Accordingly, Gryphon respectfully requests that the Court issue an order directing

1 Waterton to show cause why it should not be held in contempt for violating the Preliminary
2 Injunction.

3 Additionally, Gryphon also requests that the Court enter an order:

- 4 1. Directing Waterton to:
 - 5 a. Permit Gryphon’s representative to have immediate access to the Gryphon’s
 - 6 surveillance equipment for maintenance and upkeep;
 - 7 b. Provide Gryphon’s own testing representative access to the de-watered
 - 8 Pond-Content in order to conduct its own analysis thereof;
- 9 2. Finding that Waterton violated NRS 48.105 in disclosing confidential settlement
- 10 negotiations which took place during this case in Waterton’s Defamation suit;
- 11 3. Terminating, or alternatively, modifying, the terms of the Protective Order, such that
- 12 Gryphon may disclose any and all information and evidence taken from the
- 13 Preliminary Inspection in this case going forward;
- 14 4. An award of sanctions based upon Waterton’s violation of the Preliminary
- 15 Injunction and NRS 48.105 appropriate both the compensate Gryphon’s attorneys’
- 16 fees associated with bringing this motion and an amount sufficient in the Court’s
- 17 determination sufficient to compel Waterton to comply with the terms of the Court’s
- 18 Orders and Nevada Law in the future.
- 19 5. Releasing Gryphon for all or part of the Draining Expenses and the Dewatering
- 20 Expenses as described in this Motion; and
- 21 6. Providing such other relief as is appropriate under the circumstances.

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Affirmation pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person

DATED this 15th day of April, 2019.

WOODBURN AND WEDGE

By:



W. Chris Wicker, Esq.
Nevada Bar No. 1037
Seth J. Adams, Esq.
Nevada Bar No. 11034
Attorneys for Gryphon Gold Corporation

1 **CERTIFICATE OF SERVICE**

2 ***Gryphon Gold Corporation v. Waterton Global Resource Management, Inc., et al.***
3 **CV18-01557**

4 I hereby certify that I am an employee of Woodburn and Wedge and that on this date, I
5 caused to be sent via e-Flex electronic service, a true and correct copy of the **MOTION FOR**
6 **ORDER TO: i) ENFORCE PRELIMINARY INJUNCTION; ii) SHOW CAUSE WHY**
7 **WATERTON SHOULD NOT BE HELD IN CONTEMPT FOR VIOLATING THE**
8 **PRELIMINARY INJUNCTION; AND iii) SANCTIONED FOR VIOLATION OF NRS**
9 **48.105 to:**

10
11 Jeremy J. Nork, Esq.
jnork@hollandhart.com
12 Laura K. Granier, Esq.
lkgranier@hollandhart.com
13 HOLLAND & HART LLP
14 5441 Kietzke Ln, 2nd Floor
15 Reno, NV 89511
Attorneys for Defendants

16 Christopher L. Richardson, Esq.
Chris.richardson@dgsllaw.com
17 Richard Kirk Mueller, Esq.
Kirk.mueller@dgsllaw.com
18 Karl Kyler Burgy, Esq.
Kyler.burgi@dgsllaw.com
19 DAVIS GRAHAM & STUBBS LLP
20 1550 17th Street, Suite 500
21 Denver, CO 80202
Attorneys for Defendants

22 DATED this 15th day of April, 2019.

23
24
25 By: 
26 An Employee of Woodburn and Wedge
27
28