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12 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**  
13 **IN AND FOR WASHOE COUNTY**

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15 GRYPHON GOLD CORPORATION, a  
Nevada corporation,

Case No. CV18-01557

Dept. No. B9

17 Plaintiff,

18 v.

19 WATERTON GLOBAL RESOURCE  
MANAGEMENT, INC., a Canadian company  
20 based in Toronto, Ontario, WATERTON  
GLOBAL VALUE, L.P., a limited partnership  
21 formed under the laws of the British Virgin  
Islands; WATERTON NEVADA SPLITTER,  
22 LLC, a Nevada limited liability company, and  
BOREALIS MINING COMPANY, LLC, a  
23 Nevada limited liability company; and DOES 1  
-10.

24 Defendants.

25 **MOTION TO DISMISS FIRST AMENDED COMPLAINT**  
26  
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1 **INTRODUCTION**

2 This Court said it best: “Fraud is not meant to be a pleading for a fishing expedition  
3 where discovery will prove it up later.” Ex. A at 19:1-2. For approximately 6 years, Bockhold  
4 and his long-time counsel have been actively looking for evidence that any one of the Waterton  
5 entities made a material misrepresentation of fact to Gryphon and that Gryphon acted in reliance  
6 on such representation. Unlike most fraud plaintiffs, Bockhold and counsel conducted extensive  
7 discovery on the issue of Gryphon’s demise during the Gryphon bankruptcy. Bockhold  
8 presented his best allegations against Waterton to the bankruptcy court, but the bankruptcy court  
9 dismissed the Chapter 11 proceeding, necessarily finding the claim too tenuous to be of value to  
10 the estate. Bockhold presented his best allegations blaming Waterton for Gryphon’s failure in a  
11 lawsuit against Gryphon’s former directors and officers, but that lawsuit was dismissed with  
12 prejudice. Bockhold presented his best allegations against Waterton to this Court in Gryphon’s  
13 165-paragraph original complaint (the “Original Complaint”), but this Court found that Gryphon  
14 failed to state a claim and ordered Gryphon to amend to plead more particularized facts, if it  
15 could do so. Court’s Order Granting in Part & Denying in Part Mot. to Dismiss at 4 (Jan 28,  
16 2019) (“MTD Order”).

17 It is now apparent that there are no facts supporting a fraud claim against Waterton.  
18 Gryphon’s Amended Complaint does not attempt to allege the missing facts, nor, importantly,  
19 does it provide Waterton with notice of what it must defend against. Rather, Gryphon’s  
20 Amended Complaint has swollen in size with extraneous accusations, and just reorders and  
21 restates the Original Complaint’s allegations. Stripped of its superfluous allegations and  
22 cosmetic changes, the Amended Complaint contains no new salient facts and, as a result, suffers  
23 from the same defects as the Original Complaint. Gryphon does not identify specific  
24 representations made by Waterton to Gryphon, which entity made them, when and where they  
25 were made, why they were false, and what Gryphon actually did, to its detriment, in reliance on  
26 those representations. Accordingly, the Court now should dismiss Gryphon’s claims with  
27 prejudice.

1 **BACKGROUND**

2 Waterton was a secured creditor to Gryphon when Gryphon was attempting to develop  
3 the Borealis Mine near Hawthorne, Nevada. Am. Compl. ¶ 16-17. Waterton loaned money to  
4 Gryphon on multiple occasions. *Id.* at ¶¶ 34, 35, 54, 55. Ultimately, Gryphon was unable to  
5 operate the Borealis Mine successfully, and the parties entered into a transaction whereby, in  
6 exchange for forgiveness of debt, Waterton became the majority owner and operator of the  
7 Borealis Mine. *Id.* at ¶ 55. Bockhold, a Gryphon shareholder, urged Gryphon’s management to  
8 instead obtain financing from his preferred sources, but Gryphon’s directors and officers did not  
9 follow his suggestions. *Id.* ¶¶ 56, 88.<sup>1</sup>

10 Gryphon’s demise continued. It ceased business operations and all but two of its  
11 directors resigned. *Id.* ¶ 95. On July 29, 2013, Gryphon filed for bankruptcy, which, by  
12 operation of the bankruptcy code, created a bankruptcy estate. *Id.* On December 13, 2013, the  
13 bankruptcy court appointed a Chapter 11 trustee (the “Trustee”), who assumed full authority to  
14 manage and administer the bankruptcy estate. *Id.* ¶ 97. The Trustee conducted discovery and  
15 retained several experts to assess the viability of the Borealis Mine as a profitable going concern,  
16 and the experts presented their findings to the bankruptcy court. *Id.* ¶ 98. Bockhold and counsel  
17 in the present case were active in the Gryphon bankruptcy, participating in discovery, retaining  
18 their own professionals, assisting the Trustee, and filing pleadings with the bankruptcy court. *Id.*  
19 ¶¶ 104, 120.

20 As a result of their activity, Bockhold and his co-investor sought leave from the  
21 bankruptcy court to file a complaint against Waterton. *Id.* ¶ 132. On November 20, 2015, the  
22 bankruptcy court dismissed the bankruptcy and denied Bockhold’s request to pursue claims  
23 against Waterton, finding that the claims were not sufficiently valuable to provide any  
24 meaningful recovery to the estate. *Id.* ¶ 133. The Amended Complaint does not allege the  
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26 \_\_\_\_\_  
27 <sup>1</sup> Allegations of misfeasance by Gryphon’s directors and officers were the subject of a separate  
28 lawsuit of Bockhold and his counsel filed in this district. *G.R. Dawson Holdings Ltd. v. O’Neil*,  
CV17-00461 (the “D&O Lawsuit”). The D&O Lawsuit was dismissed on summary judgment.  
Notice of Ruling in Related Case (Jan. 17, 2019).

1 occurrence of any further events involving Gryphon until July 19, 2018, when Bockhold was  
2 appointed as Gryphon’s conservator. *Id.* ¶ 4.

3 On July 27, 2018, Gryphon, through Bockhold, filed its Original Complaint, which  
4 asserted a claim for fraud and a claim for tortious breach of the duty of good faith and fair  
5 dealing. Waterton moved to dismiss. On January 28, 2019, the Court dismissed with prejudice  
6 Gryphon’s claim for tortious breach of the duty of good faith and fair dealing. MTD Order at 4-  
7 5. The Court further ruled that Gryphon failed to state a fraud claim, but granted Gryphon leave  
8 to amend to plead additional facts. *Id.* at 4. On February 21, 2019, Gryphon filed the Amended  
9 Complaint.

### 10 STATEMENT OF ISSUE

11 This motion presents a simple issue for the court to resolve. In the MTD Order, the Court  
12 identified several deficiencies in Gryphon’s fraud claim and invited Gryphon to submit an  
13 amended complaint with additional facts that corrected the deficiencies. MTD Order at 4.  
14 Gryphon’s Amended Complaint is now before the Court. The question is whether Gryphon’s  
15 Amended Complaint includes any new facts that identify with particularity:

- 16 • “the specific representations made by Waterton”;
- 17 • “which Waterton entity of the four-named defendants made the representation”;
- 18 • when the representations were made;
- 19 • what made the representations false; and
- 20 • what Gryphon did in reliance on the representations.

21 *See* MTD Order at 4.

### 22 ARGUMENT

23 Under Nev. R. Civ. P. 12(b)(5), a complaint must be dismissed “where the allegations  
24 are insufficient to establish the elements of a claim for relief.” *Stockmeier v. Nev. Dep’t of Corr.*,  
25 124 Nev. 313, 316, 183 P.3d 133, 135 (2008). This Court has described the standard for  
26 pleading fraud as follows:

27 [I]n actions involving fraud, the pleading standard is heightened and requires the  
28 circumstances constituting fraud to be stated with particularity. NRCP 9(b). “The

1 circumstances that must be detailed include averments as to the time, the place,  
2 identity of the parties involved, and the nature of the fraud.” *Brown v. Kellar*, 97  
3 Nev. 582, 636 P.2d 847 (1981). To prevail on a claim of fraudulent  
4 misrepresentation, a plaintiff must prove the following elements by clear and  
5 convincing evidence “(1) A false representation made by the defendant; (2)  
6 defendant’s knowledge or belief that its representation was false or that defendant  
7 has an insufficient basis of information for making the representation; (3)  
8 defendant intended to induce plaintiff to act or refrain from acting upon the  
9 misrepresentation; and (4) damage to the plaintiff as a result of relying on the  
10 misrepresentation.” *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 446–47, 956 P.2d  
11 1382, 1386 (1998).

12 MTD Order at 3. As the Court noted during the December 20, 2018 hearing, Rule 9(b)’s  
13 particularity requirement serves two purposes, namely, to ensure that a defendant has  
14 notice of precisely what it must defend against and to ensure that discovery is  
15 appropriately focused. Ex. A at 18:15-19:6.

16 **I. Gryphon Fails to Plead Facts Establishing Fraud During the Gryphon Bankruptcy.**

17 Gryphon’s Amended Complaint alleges that the false representations giving rise to its  
18 claim occurred “throughout Gryphon’s Bankruptcy case.” *See* Am. Compl. ¶ 195. This should  
19 make it easy for Gryphon to identify the specific misrepresentations a Waterton entity allegedly  
20 made, which Waterton entity made them, to whom with Gryphon the alleged misrepresentations  
21 were made and when, and what Gryphon did in reliance. Gryphon does no such thing. This  
22 failure alone dooms Gryphon’s claim.

23 Additionally, and just as in its Original Complaint, the Amended Complaint suffers from  
24 the numerous deficiencies identified in the MTD Order:

- 25 • Gryphon again fails to identify any representation Waterton made *to Gryphon* during the  
26 bankruptcy. Nowhere in the Amended Complaint does Gryphon plead that someone with  
27 Gryphon—an employee, director, officer, or attorney—was on the receiving end of a  
28 representation. This is unsurprising because Gryphon had no employees during the  
29 bankruptcy, Am. Compl. ¶ 3, and its remaining directors and officers resigned shortly  
30 after the bankruptcy began, *id.* ¶ 96.
- 31 • Gryphon fails to identify which Waterton entity made a representation. Gryphon’s  
32 grouping of two defendants together—e.g. “WGV/BMC LLC”—is no better than its prior  
33 references to all four defendant entities collectively. *See Swartz v. KPMG LLP*, 476 F.3d

1 756, 765 (9th Cir. 2007) (requiring that fraud plaintiffs “identif[y] the role of [each]  
2 defendant[] in the alleged fraudulent scheme” (internal quotation omitted)).

- 3 • Gryphon does not explain why any representation by a Waterton entity is false, nor is it  
4 possible to reasonably divine such information from the lengthy Amended Complaint.
- 5 • Gryphon does not allege that the subject Waterton entity knew any representation was  
6 false and intended for Gryphon to act in reliance.
- 7 • Gryphon does not allege that Gryphon took *any* action after filing for bankruptcy, let  
8 alone an action in reliance on a misrepresentation. This is unsurprising since, at the time  
9 of the bankruptcy, Gryphon had no employees or ongoing business and was down to just  
10 two directors (who resigned shortly after). Am. Compl. ¶¶ 3, 95-96.

11 Each of these failures is an independent ground on which to dismiss the Amended Complaint.

12 **II. Gryphon’s New Allegations Do Not Cure the Complaint’s Deficiencies.**

13 Rather than add facts supporting its fraud claim—as the Court instructed it to do—  
14 Gryphon instead focuses the Amended Complaint on three sets of irrelevant facts: First,  
15 Gryphon includes scores of inaccurate and misleading allegations describing transactions  
16 between Waterton and other companies that have nothing to do with this case; Second, Gryphon  
17 includes several allegations insinuating that Waterton has behaved improperly during this case’s  
18 pendency; and, Third, Gryphon still spends pages recounting the bad acts of its directors,  
19 officers, and other third parties involved in its demise. These sets of allegations demonstrate  
20 Gryphon’s desperation and its intent to use this case to harm Waterton’s business, but the  
21 allegations do not support a claim for fraud.

22 **A. The Allegations About Other Transactions Are Spurious.**

23 Gryphon added allegations concerning three other loans Waterton made to other mining  
24 companies. Am. Compl. ¶¶ 141-169. These allegations are inaccurate, misleading, and  
25 incomplete. Regardless, as Gryphon admits, they have no bearing on whether Waterton made a  
26 false representation to Gryphon upon which Gryphon detrimentally relied. Gryphon states that  
27 the addition of these allegations is for “the purpose of transparency and to show a pattern that  
28

1 describes a business model.” Am. Compl. ¶ 141. Of course “transparency,” “pattern,” and  
2 “business model” are not elements of fraud. *See Barmettler*, 114 Nev. at 446–47, 956 P.2d at  
3 1386. Rather, these allegations are only an attempt to disparage Waterton.

4 **B. The Allegations About Waterton’s Conduct in this Case Are Meritless.**

5 Near the end of the Amended Complaint, Gryphon makes several baseless allegations  
6 about the Court-supervised process for removing and sampling the carbon in the leach pond at  
7 the Borealis Mine. Am. Compl. ¶¶ 187-192. Gryphon does not allege that Waterton made any  
8 false statements during that process; as before, it says its fraud claim arises from statements  
9 made during the bankruptcy. Here again, then, the allegations have no apparent purpose other  
10 than to demonize Waterton.

11 Although the Court need not further parse these allegations to resolve this motion,  
12 Gryphon’s account of the carbon sampling process is also plainly misleading. At the Court’s  
13 direction, the parties have worked cooperatively to develop a process to accurately and finally  
14 determine the amount of gold in the leach pond. Gryphon has had the opportunity to have its  
15 own observers present at every step. Gryphon has largely chosen not to avail itself of that  
16 opportunity, a circumstance that is not Waterton’s fault. As Waterton has always acknowledged  
17 to the Court and Gryphon, the process has been a challenging one, but one in which Waterton  
18 has willingly and in good faith participated (at considerable upfront cost). Moreover, the  
19 accusations Gryphon levels for the first time in its Amended Complaint are all based upon events  
20 that apparently occurred months ago. If Gryphon truly had legitimate concerns, it had every  
21 opportunity to raise the issues with Waterton’s counsel or during one of multiple Court  
22 hearings.<sup>2</sup> *See, e.g.*, Ex. A 5:12-14. It did neither.

23  
24  
25 <sup>2</sup> For example, Gryphon cherry picks certain entries from a spreadsheet detailing work done at  
26 the Borealis Mine during the pond draining process. Am. Compl. ¶ 188. As Gryphon well  
27 knows, but neglects to mention, the referenced spreadsheet was prepared by Waterton for  
28 Gryphon’s benefit to detail the work and costs associated with the Court-approved process to  
drain the pond. Shoveling a small amount of carbon from the edges of the barren pond was  
required to be performed in advance of the transfer of liquid from the preg pond, which Gryphon  
would have observed for itself if it elected to have a representative present.

1           **C.     The Allegations About Third Parties Are Irrelevant.**

2           Just as in its Original Complaint, Gryphon levels numerous accusations against  
3 Gryphon’s own directors and officers, professionals retained by the Trustee during the Gryphon  
4 bankruptcy, and other third parties. But to state a fraud claim against *Waterton*, Gryphon must  
5 identify a misrepresentation made *by Waterton*. Gryphon’s grievances against third parties are  
6 therefore extraneous.

7           Gryphon’s allegations concerning statements made by its former directors and officers  
8 are largely unchanged from the Original Complaint, *see, e.g.*, Am. Compl. ¶¶ 65-67; Compl. ¶¶  
9 77-79, and from the now-dismissed complaint in the D&O Lawsuit. Gryphon alleges, just as it  
10 did in the Original Complaint, only that “Defendants, individually and in concert with one  
11 another, are believed to have directed and/or influenced the actions and inactions of Gryphon’s  
12 former officers and directors.” Am. Compl. ¶ 94; *cf.* Compl. ¶ 100. This broad, conclusory  
13 accusation does not satisfy Rule 9. Gryphon does not allege what its “belie[f]” is based on or  
14 identify what misrepresentations by Gryphon’s management *Waterton* directed or influenced,  
15 how *Waterton* did so, when *Waterton* did so, and whether *Waterton* knew that the representations  
16 were false. Contrary to the Court’s order, it fails to identify “which *Waterton* entity of the four-  
17 named defendants” directed or influenced such representations. MTD Order at 4.

18           Gryphon, through Bockhold, blames its failure on other third parties as well. Gryphon  
19 apparently believes that its attorneys underperformed during transactions with *Waterton* and in  
20 the lead-up to its bankruptcy, but they are not parties to this action. *See, e.g.*, Am. Compl. ¶¶ 72-  
21 73, 88. Gryphon, through Bockhold, also accuses the court-supervised Trustee and the  
22 professionals she retained of incompetence in the performance of their duty to investigate the  
23 viability of the Borealis Mine. *E.g. id.* ¶¶ 100, 119. Gryphon’s attempt to blame those  
24 individuals for its failure to successfully emerge from bankruptcy is particularly misplaced in  
25 this case. *See In re Crown Vantage, Inc.*, 421 F.3d 963, 971 (9th Cir. 2005) (holding that, under  
26 the *Barton* doctrine, leave of the bankruptcy court is required before asserting claims against  
27 bankruptcy trustee or other court-appointed officers).



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None of the conduct by third-parties that Gryphon complains of amounts to a misrepresentation by Waterton to Gryphon upon which Gryphon acted in reliance. The Court therefore should not credit any of these allegations.

**CONCLUSION**

Gryphon and Bockhold have had ample opportunity, in this Court and others, to plead particular facts establishing fraud. Like prior attempts, their most recent attempt has failed. Gryphon’s Amended Complaint is a prelude to just the sort of fishing expedition that Nevada law does not allow. The Court therefore ought to dismiss the Amended Complaint and, because of Gryphon’s multiple failed pleadings in this Court and others, ought to do so with prejudice.

The undersigned affirms that this document does not contain the social security of any person.

DATED this 14th day of March 2019.

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1 **CERTIFICATE OF SERVICE**

2 I, Martha Hauser, certify:

3 I am employed in the City of Reno, County of Washoe, State of Nevada by the law  
4 offices of Holland & Hart LLP. My business address is 5441 Kietzke Lane, Second Floor,  
5 Reno, Nevada 89511. I am over the age of 18 years and not a party to this action.

6 On March 14, 2019, I electronically filed the foregoing **MOTION TO DISMISS**  
7 **FIRST AMENDED COMPLAINT**, with the Clerk of the Second Judicial District Court via  
8 the Court's e-Flex system. Service will be made by e-Flex on all registered participants.

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14 /s/ Martha Hauser  
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**EXHIBIT INDEX**

EXHIBIT	DESCRIPTION	# OF PAGES
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