

FILED

JUL 5 - 2007

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA**

**U.S. BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA**

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6 In re:) Chapter 11
7 THE VILLAS AT HACIENDA)
8 DEL SOL, INC.,) Case No. 4-05-bk-1482-EWH
9 Debtor.) **AMENDMENT TO MEMORANDUM**
10) **DECISION DATED 3/15/07**
11) **TO CORRECT FOOTNOTE 4**

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13 On March 15, 2007, the court entered a Memorandum Decision. However, the
14 court notes that a portion of the footnote's text was missing. Therefore, the following
15 footnote 4 replaces footnote in the Memorandum Decision entered on March 15, 2007:

16 Exhibits 3 and 7 were produced by Gersten and Collier in response to Mason's
17 discovery requests. The documents were reviewed by a certified public
18 accountant called as a witness by Mason. Because the certified public
19 accountant was not disclosed as an expert witness, he was not treated as an
20 expert witness at the Evidentiary Hearing. However, Fed. R. Bankr. P. 9014(c)
21 excepts Fed.R.Civ.P. 26(a)(2) from being applied in contested matters "unless
22 otherwise ordered by the court." Nothing in the Scheduling Order required such
23 a disclosure, so the ruling made at the Evidentiary Hearings that the accountant
24 could not be treated as an expert witness was incorrect. However, even if all of
25 the accountant's testimony, including those parts of it which were based on
26 hearsay or evidence provided by third parties is considered as expert testimony,
27 it only demonstrated that there was a lack of backup documentation to support
28 GCE's book entries. By itself, that testimony does not demonstrate that the GCE
Entities did not make advances to the Debtor. In re Opelika Manufacturing
Corp., 66 B.R. 444, 450 (Bankr. N.D. Ill. 1986) (testimony of an expert, even if
uncontradicted by another expert, is not conclusive) citing Security First National
Bank of L.A. v. Lutz, 322 F.2d 348 (9th Cir. 1963); Del Mar Avionics, Inc. v.
Quinton Instrument Co., 836 F.2d 1320, 1325 (Fed. Cir. 1987) (court is not
obliged to adopt a conclusion stated by an expert witness; court's obligation is to
weigh expert and other testimony, and "it is the court's, not the expert's,
responsibility to decide the case") (citation omitted); Minnesota Mining and
Manufacturing Co. v. Berwick Industries, Inc., 532 F.2d 330, 333 (3rd Cir. 1976)

1 ("it is axiomatic that the trier of fact is not bound to accept expert opinion, even if
2 it is uncontradicted") (citation omitted).

3 Dated this 5th day of July, 2007.

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6 EILEEN W. HOLLOWELL
7 UNITED STATES BANKRUPTCY JUDGE

8 Copies of the foregoing mailed this
9 5th day of July, 2007, to:

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