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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Mutual Life Insurance Company of New York,

Plaintiff,

vs.

Pointe Tapatio Resort Properties No. 1 Limited Partnership, an Arizona limited partnership; Pointe South Mountain Resort Properties No. 1 limited Partnership, an Arizona limited partnership; Expansion Pointe Properties Limited Partnership, an Arizona limited partnership,

Defendants.

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Pointe Tapatio Resort Properties No. 1 Limited Partnership, an Arizona corporation; Expansion Pointe Properties Limited Partnership,

Counterclaimants,

vs.

Mutual Life Insurance Company of New York, a New York corporation,

Counterdefendant.

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No. CIV 98-1671-PHX-JAT (LOA)  
No. CIV 98-1789-PHX-JAT (LOA)  
(Consolidated)

**ORDER**

1 This matter arises on Plaintiff/Counterdefendant MONY's Motion For  
2 Reconsideration And To Compel To Compel The Disclosure Of Documents etc. (doc. #325),  
3 filed on February 25, 2002. The Court has reviewed and considered the subject motion,  
4 Defendants/Counterclaimants THE POINTES' Response (doc. #) in opposition thereto and  
5 MONY's Reply. For the reasons set forth hereinafter, the motion will be denied.

#### 6 **BACKGROUND**

7 In early 2000, MONY timely sought through appropriate document discovery, and  
8 by subsequent motion to compel on May 8, 2000, certain documents relating to the drafting  
9 of the Joint Venture Agreements ("JVA's") in the possession of THE POINTES and by  
10 subpoena from THE POINTES' former attorney, Lyman Manser, and his employer, the Phoenix  
11 law firm of Lewis & Roca. THE POINTES opposed the production on the grounds that the  
12 documents were not discoverable under Rule 26(b)(1) because of the attorney-client and work  
13 product privileges. On June 16, 2000, the Court found that "Plaintiff has failed to sustain his  
14 burdens of proof and persuasion that Defendants have impliedly waived the attorney-client  
15 and/or work product privileges. . ." See, doc. #131. The motion to compel was denied without  
16 prejudice as the Court was persuaded that Defendants had not impliedly waived the privileges  
17 by, among others, only threatening litigation against Lewis & Roca for legal malpractice based  
18 upon its attorney's role in drafting the partnership JVA.

19 MONY now seeks reconsideration of the Court's prior discovery order based upon  
20 the fact THE POINTES have actually filed suit against Lewis & Roca and Mr. Mansur on April  
21 13, 2001 in the Maricopa County Superior Court. The lawsuit alleges, inter alia, that although  
22 the JVA and amendments thereto "reflect the interpretation and parties' intentions consistent  
23 with The Pointes' position in the Federal Case," it charges professional negligence "in the  
24 event that the Court decides or rules adverse to The Pointes in the ongoing [federal] litigation,  
25 i.e. that the documents are not sufficiently explicit for The Pointes to legally prevail on the  
26 business agreement. . ." See, paragraph 23 of Exhibit A to the subject Motion For  
27 Reconsideration. MONY's motion acknowledges that THE POINTES have produced over 50%  
28 of the documents provided by Lewis & Roca but claims that numerous other documents are

1 still being withheld under a claim of privilege that MONY is entitled to discover. MONY does  
2 not identify with specificity the particular documents or general categories of documents it  
3 seeks.<sup>1</sup>

4 THE POINTEs argue that the Court should deny the subject motion because (1) it  
5 is untimely as it was not filed within a reasonable time, (2) that there has not been a substantial  
6 charge in circumstances to warrant a finding of an implied waiver of the attorney-client  
7 privilege,<sup>2</sup> and (3) the attorney-client privilege has not been waived in this case.

8 The current status of the litigation is that the trial judge, the Hon. James A.  
9 Teilborg, has consolidated the matters into one jury trial beginning on May 29, 2002, motions  
10 in limine must be filed by this Friday, April 12, 2002, and responses thereto by April 26, 2002,  
11 and the final Pretrial Conference is set for May 10, 2002. Discovery formally ended by order  
12 on January 31, 2001.

13 **MOTION TO RECONSIDER**

14 A motion to reconsider must provide a valid ground for reconsideration by showing  
15 two elements. All Hawaii Tours Corp. v. Polunesian Cultural Ctr., 116 F.R.D. 645, 648-49 (D.  
16 Haw. 1987), rev'd on other grounds, 855 F.2d 860 (1988). First, it must demonstrate some  
17 valid reason why the Court should reconsider its prior decision. Id. Second, it must set forth  
18 facts or law of a strongly convincing nature to induce the Court to reverse its prior decision.  
19 Id. Courts have distilled three (3) major grounds justifying reconsideration. They are: 1) an  
20 intervening change in the controlling law, 2) the availability of new evidence, and 3) the need  
21 to correct clear error or prevent manifest injustice. Kern-Tulare Water Dist. v. City of  
22 Bakersfield, 634 F.Supp. 656, 665 (E.D.Cal.1986), aff'd in part and rev'd in part on other  
23 grounds, 828 F.2d 514 (9<sup>th</sup>. Cir, 1987); See generally C. Wright, A. Miller & E. Cooper, §4478  
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25 <sup>1</sup>Although Local Rule 1.10(k) addresses only motions to compel answers to  
26 interrogatories, the better practice to assist the Court is for counsel to identify which specific  
27 Requests or documents counsel is seeking to compel.

28 <sup>2</sup>THE POINTEs fail to raise the work-product privilege as a basis to preclude the  
renewed discovery request. The Court deems that this issue has been waived by THE POINTEs.

1 at 790. Absent a Local Rule on the timeliness of filing a motion for reconsideration, Courts  
2 apply the reasonable-time standard set forth in Rule 60(b).<sup>3</sup> See, Dais v. Lane Bryant, Inc., 203  
3 F.R.D. 115, 117 (S.D. N.Y.). Arizona's Local Rule 1.10(p) does not address the timeliness  
4 issue. Thus, for the subject motion to be timely, it must have been filed within a reasonable  
5 time.

#### 6 ANALYSIS

7 THE POINTES argue that MONY's motion is untimely since it was not raised  
8 within a reasonable time. What is, of course, a reasonable time is a fact-intensive  
9 determination in every case. The record herein reflects that discovery ended by court order  
10 on January 31, 2001. THE POINTES' lawsuit against their former attorney at Lewis & Roca  
11 was not filed until April 13, 2001, over 10 months before MONY filed the subject motion on  
12 February 25, 2002 seeking reconsideration of the Court's June 16, 2000 order. MONY does  
13 not verify in its Reply or Motion For Reconsideration when precisely it or its Phoenix  
14 attorneys at Snell & Wilmer first learned of THE POINTES' state court suit against Lewis &  
15 Roca. Addressing this issue in its Reply MONY writes:

16 In early 2002, the Pointe recently produced documents in its malpractice  
17 litigation which it had previously withheld from MONY on privilege grounds.  
18 Based on information and belief, the Pointe produced those documents as part of  
19 an agreement with Lewis & Roca concerning required discovery disclosures under  
20 the Arizona Rules of Civil Procedure. The Pointe did not advise MONY of its  
21 document production in the malpractice matter-MONY discovered this fact  
22 through its own efforts. Shortly after MONY learned of this production, it brought  
23 the instant motion.

24 See, page 6, MONY's Reply.

25 MONY implies that THE POINTES improperly withheld from MONY the fact that  
26 THE POINTES had sued Lewis & Roca. The Court is not, however, provided any interrogatory,  
27 other discovery request, or case law addressing the specific issue that would mandate THE  
28 POINTES to seasonally supplement its prior discovery responses as required by Rule 26(e),

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29 <sup>3</sup> Rule 60(b), FRCvP, provides in pertinent part, "[o]n motion and on such terms as are  
30 just, the court may relieve a party or a party's representative from a final judgment, order, or  
31 proceeding for the following reasons ... (6) any other reason justifying relief from the  
32 operation of the judgment [or order]." Rule 60(b) requires that "[t]he motion shall be made  
33 within a reasonable time."

1 FRCvP, that suit was filed against Lewis & Roca. The Court is aware of no rule that would  
2 require this disclosure to MONY. If MONY were able to discover the Lewis & Roca suit  
3 “through its own efforts” sometime in 2002, why couldn’t MONY have been more vigilant to  
4 periodically check the Clerk’s office of the Maricopa County Superior Court to locate a public  
5 record that existed since mid-April, 2001? For example, checking the Clerk’s internet site,  
6 www.clerkofcourt.maricopa.gov/, by party name from any home or office computer with an  
7 internet connection would have discovered THE POINTEs’ suit against Lewis & Roca. There  
8 is no evidence that the suit was hidden from public view or from anyone to cared to look for  
9 it.

10           Permitting discovery now at the 11<sup>th</sup> hour is problematic both for not only all  
11 counsel who should be gearing up for a complex jury trial and drafting, among others, their  
12 motions in limine but for the undersigned and the trial judge as well. Motions in limine are due  
13 this Friday, April 12, 2002. To force counsel to take their limited time and resources away  
14 from their trial preparation now to engage in even limited discovery is unreasonable.  
15 Moreover, MONY has not clearly indicated with any specificity what documents it actually  
16 seeks. It would be one thing if it were only a handful of documents; it is entirely a different  
17 matter if MONY is seeking hundreds of documents in a case that already has disclosed and  
18 exchanged thousands, if not hundreds of thousands, of documents. Moreover, to avoid an order  
19 that may be overly broad, the Court, if it were inclined to grant the belated discovery request,  
20 would be required to issue an order mandating more specificity of that which MONY seeks  
21 and, perhaps, conducting an in camera review. This takes time of which there is little left  
22 before the Pretrial Conference, only 4 weeks away. Finally, were the aggrieved party inclined  
23 to appeal the undersigned’s decision to the trial judge, it is not inconceivable that the trial  
24 judge would be hearing a discovery motion on the eve of trial, only six weeks away. A primary  
25 purpose of the Rule 16, RCvP, scheduling order, which sets, among others, a discovery  
26 deadline, is to avoid just this kind of last minute rush.

27           MONY seeks reconsideration over 20 months after this Court’s decision regarding  
28 the issue and over 10 months after THE POINTEs filed suit against Lewis & Roca in state

