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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

8  
9 Robert Kubicek Architects & Associates,  
Incorporated,

No. CV-11-02112-PHX-DGC

10 Plaintiff,

**ORDER**

11 v.

12 Bruce C. Bosley and Joanne M. Bosley,  
13 The Bosley Group Incorporated, Bashas'  
Incorporated,

14 Defendants.  
15

16 Defendants Bruce C. Bosley, Joanne M. Bosley, and the Bosley Group, Inc.  
17 (“TBG”) (collectively “Defendants” or “Bosley Defendants”) move for summary  
18 judgment on the first, second, and third causes of action of Plaintiff’s complaint, alleging  
19 direct copyright infringement, contributory copyright infringement, and vicarious liability  
20 for copyright infringement. Doc. 63. This Court previously severed the claims against  
21 Defendant Bashas’ and referred them to the Bankruptcy Court. Doc. 26. The Court  
22 subsequently dismissed Plaintiff’s federal RICO, state-law racketeering, and alter ego  
23 claims, making the above-listed claims against the Bosley Defendants the only remaining  
24 claims in this case. Doc. 57. Defendants’ motion has been fully briefed. Docs. 74, 78.<sup>1</sup>

25 \_\_\_\_\_  
26 <sup>1</sup> Plaintiff’s request for oral argument is denied because the issues have been fully  
27 briefed and oral argument will not aid the Court’s decision. *See* Fed. R. Civ. P. 78(b);  
28 *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998).

1 The severed claims against Defendant Bashas' were dismissed in part by the  
2 Bankruptcy Court, and the remaining claims have since been withdrawn from that court  
3 and are currently pending before Judge Frederick J. Martone. No 2:12-cv-01947-FJM.  
4 Plaintiff Robert Kubicek Architects & Associates, Incorporated ("RKAA") filed a second  
5 motion to consolidate, requesting consolidation of the pending claims against Bashas'  
6 with the claims in this case. Defendant Bashas' filed a response in opposition (Doc. 80),  
7 and the Bosley Defendants filed a response in opposition and joinder in Bashas' response.  
8 Doc. 81. For the reasons set forth below, the Court will grant Defendants' motion for  
9 summary judgment in part, deny it in part, and deny Plaintiff's motion to consolidate.

## 10 **I. Background.**

11 RKAA is an architectural firm located in Phoenix, Arizona. Doc. 1, ¶ 13.  
12 Defendant Bruce Bosley began working as a draftsman for RKAA in 1982, after which  
13 he became a licensed architect, became a minority shareholder, and served as President  
14 and a member of RKAA's board of directors. *Id.*, ¶ 14-15. On March 14, 2007, Mr.  
15 Bosley resigned from the firm without prior notice. *Id.*, ¶, 20.

16 From 1997 up to the time of his resignation, Mr. Bosley worked as the architect  
17 principally responsible for managing RKAA's work for Bashas' Inc., a major, long-term  
18 client of the firm. *Id.*, ¶¶ 22, 24-25. After leaving RKAA, Mr. Bosley formed his own  
19 architectural firm, TBG, and seven other RKAA employees who had worked on Bashas'  
20 projects left RKAA and began working for TBG. *Id.*, ¶¶ 27-30. Bashas' stopped sending  
21 new work to RKAA, and instead sent its work to TBG. *Id.*, ¶ 36. RKAA alleges that  
22 about the time Mr. Bosley left to start his own company, Defendants acquired copies of  
23 RKAA's copyrighted architectural drawings related to Bashas' projects and later  
24 unlawfully copied and used the drawings in providing services to Bashas'. *Id.*, ¶¶ 44-53.

## 25 **II. Legal Standards.**

### 26 **A. Summary Judgment.**

27 A party seeking summary judgment "bears the initial responsibility of informing  
28 the district court of the basis for its motion, and identifying those portions of [the record]

1 which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex*  
2 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Summary judgment is appropriate if the  
3 evidence, viewed in the light most favorable to the nonmoving party, shows “that there is  
4 no genuine dispute as to any material fact and the movant is entitled to judgment as a  
5 matter of law.” Fed. R. Civ. P. 56(a). Summary judgment is also appropriate against a  
6 party who “fails to make a showing sufficient to establish the existence of an element  
7 essential to that party’s case, and on which that party will bear the burden of proof at  
8 trial.” *Celotex*, 477 U.S. at 322. Only disputes over facts that might affect the outcome  
9 of the suit will preclude the entry of summary judgment, and the disputed evidence must  
10 be “such that a reasonable jury could return a verdict for the nonmoving party.”  
11 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

12 **B. Copyright Act.**

13 Copyright protection applies to “original works of authorship fixed in any tangible  
14 medium of expression.” 17 U.S.C. § 102(a). This includes “technical drawings,  
15 including architectural plans” and “architectural works.” 17 U.S.C. § 102(a)(5) & (8),  
16 § 101 (defining works covered under § 102(a)(5)). “An ‘architectural work’ is the design  
17 of a building as embodied in any tangible medium of expression, including a building,  
18 architectural plans, or drawings.” *Id.* at § 102(a)(8). Such work “includes the overall  
19 form as well as the arrangement and composition of spaces and elements in the design,  
20 but does not include individual standard features.” *Id.*

21 Registration of a copyrighted work is not required for copyright protection. 17  
22 U.S.C. § 408(a). Registration is, however, a prerequisite for bringing a civil action for  
23 copyright infringement. *Id.* at § 411(a). The Ninth Circuit has found that the receipt of a  
24 completed application by the U.S. Copyright Office is sufficient for purposes of initiating  
25 litigation and that the processes of copyright registration and an underlying infringement  
26 case can proceed concurrently. *Cosmetic Ideas, Inc., v. IAC/Interactivecorp*, 606 F.3d  
27 612, 619-21 (9th Cir. 2010). Even rejection of a registration application does not bar a  
28 civil suit, as long as the Copyright Office has been notified of the litigation and served a

1 copy of the complaint. *Id.* at 619; 17 U.S.C. § 411(a). The Copyright Office may  
2 become party to the suit, but it is the court’s responsibility to determine the validity of a  
3 plaintiff’s copyright claim. 17 U.S.C. § 411(a).

4 To establish copyright infringement, a claimant must prove “(1) ownership of a  
5 valid copyright, and (2) copying of constituent elements of the work that are original.”  
6 *Feist Publ’n, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). A certificate of  
7 copyright registration “made before or within five years after first publication of the work  
8 shall constitute prima facie evidence of the validity of the copyright and of the facts  
9 stated in the certificate.” 17 U.S.C. § 410(c). This presumption “is not an  
10 insurmountable one, and merely shifts to the defendant the burden to prove the invalidity  
11 of the plaintiff’s copyrights.” *Masquerade Novelty, Inc. v. Unique Indus., Inc.*, 912 F.2d  
12 663, 668 (3d Cir.1990. “The burden on the defendant to rebut the presumption varies  
13 depending on the issue bearing on the validity of the copyright.” *Id.*

14 A work is “original” when it “possesses at least some minimal degree of  
15 creativity” and was “independently created by the author (as opposed to copied from  
16 other works).” *Feist*, 499 U.S. at 345. “The mere fact that a work is copyrighted does  
17 not mean that every element of the work may be protected. Originality remains the *sine*  
18 *qua non* of copyright; accordingly, copyright protection may extend only to those  
19 components of a work that are original to the author.” *Id.* at 348. Whether individual  
20 components of a work are sufficiently original to be protected is a question of fact. *See*,  
21 *e.g., Vargas v. Pfizer, Inc.*, 418 F.Supp.2d 369, 373 (S.D.N.Y. 2005) (finding a genuine  
22 dispute of fact over whether elements of a plaintiff’s musical composition were  
23 sufficiently original to warrant copyright protection).

### 24 **III. Defendants’ Motion for Summary Judgment.**

#### 25 **A. Relevant Copyright Materials and Acts of Copying.**

26 The Court must first determine whether RKAA has made claims based on the  
27 infringement of materials that it has either registered with the U.S. Copyright Office or  
28 for which it has applied to that office for copyright registration. RKAA has presented

1 evidence that it submitted registration applications for the following as “architectural  
2 works”: (1) the grocery design for “Food City by Bashas’ Store #141,” (2) the grocery  
3 design for “a new Bashas’ Market Store #166,” (3) the architectural design for “Ike’s  
4 Farmers Market by Bashas’ Store #9,” (4) the architectural design for “Ike’s Farmers  
5 Market by Bashas’ Store #125,” (5) the technical specifications for grocery design,  
6 “Generic Specifications (Project Manual),” and (6) the technical specifications for  
7 grocery design, “Project Manual for a new Bashas’ Market, Store #166.” Doc. 75-2 at 2-  
8 6, Decl. of Harvey G. Unti, ¶¶ 7-12; *see* Doc. 75-2 at 8-24.

9 In addition to identifying the relevant works for which it has sought copyright  
10 registration, RCAA must point to evidence sufficient to create a triable issue of fact on  
11 whether Defendants copied these particular works. RCAA asserts that on several  
12 occasions after Mr. Bosley left RCAA he accessed the firm’s computer system and  
13 forwarded emails to himself that, in some instances, had copies of RCAA drawings  
14 attached. Docs. 74 at 15; 75, ¶ 40. Neither the emails nor their attachments appear to  
15 pertain to any plans for which RCAA applied for copyright registration, however, and are  
16 therefore outside the scope of this lawsuit. 75-1 at 40-42.

17 RCAA also argues that a comparison of RCAA drawings and TBG drawings  
18 shows that portions of TBG’s work “are essentially identical to, and have been  
19 appropriated from, digital files containing RCAA’s plans, drawings, schedules, and  
20 design products.” Doc. 74 at 15. RCAA cites to the declaration and report of its expert,  
21 Irwin G. Pasternack, who opined that works prepared by TBG for a number of Bashas’  
22 projects “appear to be direct appropriations and plagiarizations of RCAA work product in  
23 virtually every respect, with intentional cosmetic changes that appear to have been  
24 designed to change certain aspects of the physical appearance of the documents in order  
25 to disguise the misappropriations and plagiarisms.” Doc. 75-6 at 4, ¶ 7(a).

26 As with the emails, Pasternack’s report pertains, in part, to drawings other than  
27 those for which RCAA applied for copyright registration, and opinions based on these  
28 drawings are outside the scope of this lawsuit. Doc. 75-6 at 9-10. The report also

1 pertains, however, to drawings for stores 141 and 166, for which RKAA applied for  
2 copyright registration. Doc. 75-6 at 22. The report opines, for example, that details from  
3 RKAA #166 and Bosley #174 “prove that a direct copy of the RKAA source file was  
4 appropriated for Bosley use.” Doc. 75-6 at 24. These and other assertions made by  
5 Pasternack related to stores 141 and 166 are sufficient to create a triable issue of fact on  
6 whether TBG copied from RKAA’s relevant copyrighted works.

7 **B. Originality.**

8 Defendants argue that the designs at issue do not qualify as original architectural  
9 works, making their registrations invalid. Doc. 63 at 8. Defendants argue that an  
10 “architectural work” is defined as “the overall form as well as the arrangement and  
11 composition of spaces and elements in the design,” and that the only details relating to  
12 the “overall form” of the stores at issue here are the storefront, which was designed by a  
13 firm other than RKAA, and the internal design for the layout of fixtures, which design  
14 has remained substantially the same for all grocery-stores since the 1980’s and was part  
15 of the “public domain” before architectural works became copyrightable in 1990. *Id.* at  
16 9-10.

17 Defendant also argues that in both 2001 and 2003 Bashas’ own construction  
18 department prepared a Master Set of Floor and Fixture Plans that have served as the basis  
19 for all subsequent plans and drawings RKAA has prepared for Bashas’. *Id.* at 10-11.  
20 Defendants assert, therefore, that the overall form and design of the stores for which  
21 RKAA claims a copyright is, at most, derivative from Bashas’ own work, and only  
22 Bashas’ has a right to prepare derivative works from its existing work. *Id.* at 11; 17  
23 U.S.C. § 106(2) (“the owner of copyright under this title has the exclusive rights to do  
24 and authorize . . . [preparation of] derivative works based upon the copyrighted work”).

25 RKAA argues in response that the fact that grocery store layouts have remained  
26 substantially unchanged for decades does not divest its plans for individual Bashas’ stores  
27 of originality because such a finding would ignore “the original thought and creativity by  
28 the architect that is inherent in integrating each necessary element into a suitable design

1 that reflects the desires of each customer, satisfies the site constraints and meets the  
2 building codes specific to each structure.” Doc. 74 at 6. As to Defendants’ assertion that  
3 the interior layout of the stores is merely derivative of Bashas’ own designs, RKAA  
4 maintains that Bashas’ itself relied on designs prepared for it by RKAA, and the only  
5 difference between Bashas’ master plans and RKAA’s earlier version of them is that the  
6 title block was changed. Docs. 74 at 7, 75, ¶ 21. RKAA points to Exhibit F of Robert W.  
7 Kubicek’s declaration, which it maintains depicts the drawings RKAA prepared as the  
8 basis for Bashas’ plans, thus showing that RKAA, not Bashas’, is the originator of any  
9 internal layout designs. Doc. 75-1 at 29.

10 Viewing the evidence in a light most favorable to RKAA, the Court concludes that  
11 RKAA has raised a genuine issue of material fact on whether the overall layout and  
12 designs it alleges Defendants appropriated for their own use contain sufficient original  
13 elements created by RKAA to be entitled to copyright protection. The standard for  
14 originality is not particularly demanding. “Original, as the term is used in copyright,  
15 means only that the work was independently created by the author (as opposed to copied  
16 from other works), and that it possesses at least some minimal degree of creativity.”  
17 *Feist*, 499 U.S. at 345. Whether RKAA’s designs are original or largely the same as the  
18 basic design of all grocery stores, and whether the layout of the stores must, in any case,  
19 be attributed to Bashas’ construction department and not to RKAA, are factual issues the  
20 Court cannot resolve at the summary judgment stage.

21 **C. Did RKAA Transfer or Waive its Copyright Rights?**

22 Defendants argue that the relevant copyright materials do not actually belong to  
23 RKAA, but to Bashas’, or that RKAA granted Bashas’ a license to use its plans and  
24 drawings through years of conduct that estops it from claiming infringement. Doc. 63 at  
25 5-8. Defendants point to the affidavit of Mr. Bosley that over RKAA’s more than 20-  
26 year working relationship with Bashas’, Bashas’ kept plans, drawings, and other  
27 documents related to its projects both at RKAA and at its own offices, and that RKAA  
28 freely provided Bashas’ with “any project file or material it wanted to use in whatever

1 way it wanted.” Doc. 64-1, ¶ 9. Mr. Bosley states that during his time as President of  
2 RKAA, he engaged in discussions with Bashas’ Vice President of construction and  
3 maintenance, Rick Hamm, and readily agreed that Bashas’ effectively owned the plans  
4 RKAA had prepared for it, and that on two occasions in 2002 and 2005, Bashas’ paid  
5 RKAA to compile and make copies of all of its project materials. *Id.*, ¶¶ 11, 12. Mr.  
6 Bosley also states that RKAA released plans to other architects for use on Bashas’  
7 projects in which RKAA was not involved. *Id.*, ¶¶ 12-13. This extended to TBG after  
8 Mr. Bosley resigned when, Defendants argue, RKAA allowed TBG to complete two or  
9 three time-critical projects for Bashas’ using files RKAA released. *Id.*, ¶ 14; *see* Dep. of  
10 Richard Hamm, Doc. 75-3 at 7: 2-19.

11 RKAA does not deny that it provided copies of its plans to Bashas’ over the years  
12 or that it permitted Bashas’ or other architects to use its plans on particular projects.  
13 RKAA instead argues that the right to possess copies of an original work or to use those  
14 works for limited purposes does not transfer ownership of the copyright – the exclusive  
15 right to control their reproduction and distribution. Doc. 74 at 10-12; *see* 17 U.S.C.  
16 § 106. RKAA argues that unlike granting someone permission to own or use copies of an  
17 original work, a transfer of copyright ownership requires a signed instrument from the  
18 copyright owner. 17 U.S.C. § 204(a). Defendants have produced no evidence of a signed  
19 transfer of copyright ownership in this case. Doc. 74 at 11.

20 RKAA argues that it did not give Bashas’ a license to use its plans at any time in  
21 any way it wanted, thereby waiving its right to assert any copyright infringement claims.  
22 RKAA points to Mr. Hamm’s deposition testimony that when a need arose for Bashas’ to  
23 use RKAA’s drawings, Hamm would convey “[j]ust that . . . we would like to have those  
24 released for specific reasons. They weren’t – it wasn’t cart blanch, it wasn’t everything.  
25 There were certain needs that we needed to have those released. And my conversation  
26 would have gone to Bruce, Mr. Bosley, and they would have requested what those needs  
27 were and why.” Doc. 75-3, Dep. of Richard Hamm, Doc. 75-3 at 5:3-8. RKAA  
28 acknowledges that it released drawings to TBG for the purpose of completing particular



1 Bashas’ projects, but argues that it did so only provisionally and that the releases, and Mr.  
2 Hamm’s testimony about them, show that this permission was only with respect to  
3 particular drawings and for a particular purpose. Doc. 74 at 10-11.

4 The Court concludes that the course of conduct and verbal agreements cited by  
5 Defendants are not sufficient to show that RKAA transferred the copyright ownership of  
6 any of its works to Bashas’ in accordance with the requirements of 17 U.S.C. § 204(a).  
7 RKAA has raised an issue of material fact about the extent to which it granted Bashas’ a  
8 license to use its drawings for work by other architects on other Bashas’ projects.  
9 Whether RKAA’s permission extended to TBG’s use of the particular architectural works  
10 allegedly copied by Defendants in this case is an issue of fact to be resolved at trial.

#### 11 **D. Specific Claims.**

12 RKAA states three separate types of claims: direct and contributory infringement  
13 against all Defendants and vicarious liability against Mr. Bosley. Doc. 1, ¶¶ 66-82. To  
14 the extent Defendants make additional arguments respecting these claims, the Court will  
15 address them below.

##### 16 **1. Direct Infringement Against Mr. Bosley.**

17 Defendants argue that RKAA’s claim of direct infringement against Mr. Bosley  
18 fails because RKAA has pointed to no evidence showing that Mr. Bosley copied or made  
19 use of the copyrighted materials at issue in this case. Doc. 63 at 11-12; citing *Costar*  
20 *Group, Inc. v. Loopnet, Inc.*, 373 F.3d 544, 549 (4th Cir. 2004) (“While the Copyright  
21 Act does not require that the infringer know that he is infringing or that his conduct  
22 amount to a willful violation of the copyright owner's rights, it nonetheless requires  
23 *conduct* by a person who causes in some meaningful way an infringement.”) (emphasis in  
24 original); *see also Perfect 10, Inc. v. Megaupload Ltd.*, No. 11cv0191—IEG (BLM).  
25 2011 WL 3203117, at \*4 (S.D. Cal. July 27, 2011) (“an important element of direct  
26 liability is volitional conduct.”)

27 The Court agrees that RKAA has failed to present evidence that Mr. Bosley  
28 engaged in direct copyright infringement. RKAA has not pointed to any evidence that

1 Mr. Bosley either personally copied or obtained relevant protected materials after he  
2 resigned from RKAA, or that he authored or contributed to the TBG drawings and plans  
3 that purportedly infringe on those materials. As previously discussed, the emails Mr.  
4 Bosley allegedly forwarded to himself from RKAA's computer system do not refer to the  
5 relevant documents for copyright infringement in this case. RKAA does not allege any  
6 additional overt acts from which a reasonable jury could conclude that Mr. Bosley  
7 directly infringed RKAA's copyright rights. The Court will grant summary judgment to  
8 Defendants on RKAA's direct copyright infringement claim against Mr. Bosley.

## 9 **2. Contributory Infringement Against Mr. Bosley and TBG.**

10 “[A] defendant is a contributory infringer if it (1) has knowledge of a third party’s  
11 infringing activity, and (2) induces, causes, or materially contributes to the infringing  
12 conduct.” *Perfect 10*, 2011 WL 3203117, at \*5. Defendants argue that the contributory  
13 infringement claim against Mr. Bosley fails because RKAA presents no evidence that  
14 TBG engaged in direct infringement and, even if it did, there is no evidence that Mr.  
15 Bosley had knowledge of the infringement or did anything to induce, cause, or contribute  
16 to the infringement. Doc. 63 at 13 14.

17 For the reasons already discussed, the Court does not agree that RKAA has failed  
18 to produce evidence from which a reasonable jury could conclude that TBG engaged in  
19 direct copyright infringement. The Court also finds that RKAA has presented sufficient  
20 evidence to create an issue of fact that Mr. Bosley knew of and contributed in some way  
21 to TBG's alleged infringement. The Pasternack Declaration, referred to above, states  
22 that, given Mr. Bosley's years of “experience in overseeing the architectural work done  
23 by RKAA for Bashas’, it is . . . highly unlikely that Mr. Bosley would have failed to  
24 recognize the extensive misappropriation and plagiarization of earlier RKAA work he  
25 had supervised incorporated into the TBG work product I have reviewed.” Doc. 75-6 at  
26 5, ¶ 8. Drawing all reasonable inferences in favor of RKAA, this evidence is sufficient to  
27 create an issue of fact on whether Mr. Bosley knew of and failed to interfere with – and  
28 thus arguably contributed to – TBG's alleged infringing conduct. The Court will deny

1 summary judgment to Defendants’ on this claim.

2 Defendants argue that RKAA’s claim of contributory infringement against TBG  
3 fails because it is premised on allegations that Bashas’ engaged in direct infringement,  
4 and RKAA has presented no evidence of direct infringement by Bashas’. Doc. 63 at 13.  
5 The Court agrees that the evidence upon which RKAA relies to show that TBG infringed  
6 on its past work pertains solely to plans prepared for Bashas’ by TBG, and RKAA  
7 presents no evidence that Bashas’ either copied the relevant plans without permission or  
8 was involved in the creation of the TBG plans that purportedly copied from them. To the  
9 extent that the contributory infringement claim against TBG is predicated on its own  
10 alleged infringement, this claim is subsumed in the direct infringement claim. The Court  
11 will grant summary judgment to Defendants on RKAA’s contributory infringement claim  
12 against TBG.

### 13 **3. Vicarious Liability of Mr. Bosley.**

14 Vicarious liability for copyright infringement arises where “the right and ability to  
15 supervise” the conduct of the infringer coalesces with “an obvious and direct financial  
16 interest in the exploitation of copyrighted materials.” *Shapiro, Bernstein & Co. v. H.L.*  
17 *Green Co.*, 316 F.2d 304, 307 (2nd Cir. 1963); *see Fonovisa, Inc. v. Cherry Auction, Inc.*,  
18 76 F.3d 259, 262 (9th Cir. 1996) (following *Shapiro* as the landmark case on vicarious  
19 copyright liability). This is so whether or not the superior has actual knowledge of the  
20 infringement. *Shapiro*, 316 F.2d at 307.

21 Defendants argue that RKAA’s claim of vicarious liability against Mr. Bosley fails  
22 as to TBG because Mr. Bosley has no direct financial interest in any of TBG’s employees  
23 committing an infringement. The Court does not agree. Drawing all inferences in favor  
24 of RKAA, the Court finds that Mr. Bosley as owner and founder of TBG had a direct  
25 financial interest in TBG securing and retaining Bashas’ as a client. Because TBG’s  
26 alleged use of copyrighted materials is directly related to work it performed on Bashas’  
27 behalf, Mr. Bosley’s financial interest in allegedly exploiting these materials is both  
28 obvious and direct. The Court will deny summary judgment to Defendants on RKAA’s

1 claim of vicarious copyright infringement against Mr. Bosley.

2 **4. Summary of Claims.**

3 In sum, the Court finds that RCAA has pointed to insufficient evidence to support  
4 its claims of direct copyright infringement against Mr. Bosley and contributory copyright  
5 infringement against TBG. The Court will grant Defendants motion for summary  
6 judgment as to these claims. The Court finds that RCAA has presented sufficient  
7 evidence to support its claims of direct copyright infringement against TBG, and  
8 contributory and vicarious copyright infringement against Mr. Bosley. Accordingly, the  
9 Court will deny Defendant's motion for summary judgment as to these claims.

10 **E. Attorneys' Fees.**

11 Defendants seek an award of attorneys' fees and renew their request for attorneys'  
12 fees associated with their motion for judgment on the pleadings. Doc. 63 at 16. As the  
13 Court previously found (Doc. 57 at 8), Defendants' request is premature. The Court will  
14 address attorneys' fees after this case is resolved.

15 **IV. Motion to Consolidate.**

16 RCAA has filed a second motion to consolidate its claims against Bashas' (No  
17 2:12-cv-01947-FJM) with the claims in this case. Doc. 79. The Court denied RCAA's  
18 previous motion to consolidate as premature because the only matter pending in the  
19 Bashas' case at that time was RCAA's motion to withdraw the reference from the  
20 Bankruptcy Court. *See* Doc. 69 at 1. RCAA argues that now that Judge Martone has  
21 ruled on that motion and withdrawn the reference, its motion to consolidate is ripe.  
22 Doc. 79 at 7. RCAA argues that its claims against the Bosley Defendants and Bashas'  
23 are deeply interconnected, and consolidation is proper to avoid duplicative discovery  
24 efforts and potentially inconsistent rulings in parallel cases. *Id.* at 8-9.

25 The Court continues to find that consolidation is inappropriate. Even though both  
26 actions are currently pending, they are at opposite stages of litigation. Discovery in this  
27 action ended on July 27, 2012; summary judgment briefing became final on October 29,  
28 2010; and, with the entry of this order, the case is now ready for trial. By contrast, the

1 Bashas' action is only in its beginning stages, and the extent of triable claims in that case  
2 is as yet unknown. The Bankruptcy Court dismissed RKAA's pre-petition claims  
3 (Doc. 79-1 at 1-2), and RKAA has filed a notice of appeal (Doc. 81 at 2-3). Bashas'  
4 attests that it intends to move to dismiss RKAA's remaining claims. Doc. 80 at 6. Thus,  
5 whether and to what extent RKAA will have any claims against Bashas' suitable for  
6 consolidation with this case depends on outcomes yet to be determined.

7 As the Court has previously noted, this is the fourth action RKAA has filed against  
8 the Bosley Defendants. *See* Docs. 57 at 1; 81 at 1-2. The Bosley Defendants have been  
9 litigating these cases for nearly four years and the instant case for over one year. Doc. 81  
10 at 2. Consolidation at this stage would require Defendants to await discovery and the  
11 resolution of outstanding issues and dispositive motions in the Bashas' action before  
12 bringing this case to final resolution. Because this would create substantial  
13 inconvenience and delay, the Court will deny the motion. *See, e.g., Mills v. Beech*  
14 *Aircraft Corp., Inc.*, 886 F.2d 758, 761-62 (5th Cir. 1989) (finding consolidation proper  
15 "when two or more district court cases involve common questions of law and fact and the  
16 district judge finds that consolidation would avoid unnecessary costs or delay[,]” but that  
17 it “may properly be denied in instances where the cases are at different stages of  
18 preparedness for trial.”).

19 **IT IS ORDERED:**

- 20 1. Defendants' motion for summary judgment (Doc. 63) is **granted in part**  
21 **and denied in part** as set forth in this order.
- 22 2. Plaintiffs' second motion to consolidate (Doc. 79) is **denied**.
- 23 3. The Court will set a final pretrial conference by separate order.

24 Dated this 14th day of December, 2012.

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28 \_\_\_\_\_  
David G. Campbell  
United States District Judge