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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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In re:  
Bashas' Inc., et al.,  
Debtors,

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) No. CV 12-01497-PHX-FJM  
) No. BK 09-16050-JMM  
) Adv. No. 12-AP-0226-JMM

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**ORDER**

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Robert Kubicek Architects & Associates,  
Inc.  
Plaintiff,

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vs.  
Bashas' Inc.,  
Defendant.

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The court has before it defendant Bashas' Inc.'s motion to dismiss (doc. 14), plaintiff Robert Kubicek Architects & Associates, Inc.'s ("Kubicek") response (doc. 16), and Bashas' reply (doc. 19).

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**I**

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Kubicek is an architectural firm that formerly employed Bruce Bosley. Even before hiring Bosley, Kubicek performed architectural work on Bashas' projects. Bosley eventually became the principal architect managing Bashas' work. Bosley left Kubicek in 2007 and formed his own firm, The Bosley Group, taking with him other Kubicek employees and

1 setting off a string of litigation.

2 On July 12, 2009, Bashas' filed a voluntary petition for Chapter 11 bankruptcy  
3 protection. Kubicek was given notice but never filed a proof of claim. Instead, on October  
4 27, 2011, Kubicek filed the original Complaint in this action against both Bashas' and  
5 Kubicek, alleging copyright infringement. Kubicek v. Bosley, CV-11-2112-PHX-DGC (the  
6 "Bosley Action"). Kubicek alleged that Bosley and Bashas' willfully infringed and were  
7 making unlawful use of Kubicek's copyrighted architectural plans and misappropriated other  
8 proprietary materials in violation of 17 U.S.C. § 506(a) and common law.

9 On January 12, 2012, Judge Campbell granted Bashas' motion to refer the claims  
10 against Bashas' to bankruptcy court, while retaining the claims against Bosley. The  
11 bankruptcy court eventually discharged Kubicek's pre-petition claims against Bashas', but  
12 did not dismiss post-petition claims for damages and equitable relief. Kubicek then filed the  
13 instant action, asking us to withdraw the reference with respect to its post-petition claims  
14 against Bashas'. We granted that motion and Kubicek filed the amended Complaint now  
15 before us (doc. 13).

16 In the meantime, Judge Campbell granted in part and denied in part Bosley's motion  
17 for summary judgment in the Bosley Action (doc. 83) and the case went to trial. The jury  
18 found in favor of defendants on all claims, concluding that neither the Bosley Group nor  
19 Bosley individually is liable to Kubicek for direct, contributory, or vicarious copyright  
20 infringement (doc. 167).

## 21 II

22 In the present case, Kubicek asserts claims against Bashas' for direct and willful  
23 infringement of copyrights and for contributory and vicarious liability for the infringing  
24 conduct of The Bosley Group. Given the jury verdict in the Bosley Action, finding that  
25 Bosley is not liable for copyright infringement, Kubicek's current claims against Bashas' for  
26 contributory and vicarious liability based on Bosley's infringing conduct are foreclosed.

27 With respect to Bashas' liability for direct copyright infringement, the first amended  
28 Complaint generally alleges that Bashas' continues to retain infringing documents, refuses

1 to surrender such documents, and has used and/or made unauthorized copies of those  
2 documents, all constituting ongoing infringements of Kubicek’s copyrighted works and  
3 misappropriation of its propriety materials. FAC §§ 54-55, 57. Kubicek seeks a declaration  
4 resolving any question regarding the right, title and ownership interest in Kubicek’s  
5 copyrighted work.

6 Bashas’ moves to dismiss, arguing that Kubicek has failed to identify any claims  
7 against Bashas’ for post-petition conduct.<sup>1</sup> Kubicek argues in response that its post-petition  
8 claims cannot be pled with more particularity because information for more detailed factual  
9 allegations is solely within the control of Bashas’ and it has had inadequate opportunity to  
10 conduct discovery.

### 11 III

12 Copyright protection applies to “original works of authorship fixed in any tangible  
13 medium of expression,” 17 U.S.C. § 102(a), including technical drawings and “architectural  
14 works.” Id. § 102(a)(5), (8). Registration of a copyrighted work is a prerequisite for  
15 bringing a civil action for copyright infringement. 17 U.S.C. § 411(a). Receipt by the U.S.  
16 Copyright Office of an application for registration is sufficient for purposes of initiating  
17 litigation. Cosmetic Ideas, Inc. v. IAC/Interactivecorp, 606 F.3d 612, 619-21 (9th Cir. 2010).

18 To establish copyright infringement, a claimant must show (1) ownership of a valid  
19 copyright, and (2) copying of protected elements of the copyrighted work. Feist Pub’l, Inc.  
20 v. Rural Tel. Serv. Co., 499 U.S. 340, 361, 111 S. Ct. 1282, 1296 (1991).

21 We agree with Bashas’ that Kubicek has failed to allege sufficient facts “to raise a  
22 right to relief above the speculative level.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555,  
23 127 S. Ct. 1955, 1965 (2007). A pleading that asserts only conclusions and formulaic  
24 recitations of the elements of the cause of action is insufficient. See Ashcroft v. Iqbal, 556  
25 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009).

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27 <sup>1</sup>In ruling on this Rule 12(b)(6) motion, we do not consider matters referred to by  
28 Bashas’ that are outside the pleadings, with the exception of rulings in the Bosley Action of  
which we take judicial notice.

1 Here, the majority of the allegations contained in the first amended Complaint involve  
2 conduct that occurred between March 2007 and August 2009, before Bashas' Chapter 11  
3 filing. It is already established that pre-petition claims against Bashas' are discharged.  
4 Therefore, we consider Bashas' claims related to post-petition conduct only.

5 Kubicek broadly alleges that Bashas' willfully infringed copyrighted architectural  
6 plans and misappropriated proprietary materials, FAC ¶ 1; Bashas' "supplied the Bosleys  
7 with [Kubicek] copyrighted and proprietary material from Bashas' own file," FAC ¶ 42; and  
8 "Bashas' did not disclose, and actively concealed from [Kubicek], the fact they had acquired  
9 copies and were making unauthorized and unlawful use of [Kubicek's] Copyrighted Works  
10 and proprietary materials," FAC ¶ 44. Kubicek argues that Bashas' has wrongfully copied,  
11 used and retained copyrighted materials, but it fails to identify those materials and fails to  
12 provide any details regarding how or when the materials were copied or used.

13 At a minimum, Kubicek must identify which materials it alleges were infringed and  
14 allege that it has either registered those materials with the U.S. Copyright Office or applied  
15 to that office for copyright registration. Kubicek identifies only two architectural designs in  
16 the Complaint that have registered copyrights—the design for "Food City by Bashas' Store  
17 # 141, and "A New Bashas' Market Store" # 166. FAC ¶ 37. But it makes no claims that  
18 Bashas' has infringed these copyrights.

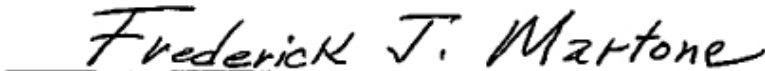
19 Kubicek argues that it is unable to plead more specific facts regarding the  
20 infringement because it has had inadequate opportunity to conduct discovery. The claims  
21 asserted against Bosley and Bashas' were originally filed almost two years ago. The  
22 bifurcated claims asserted against Bosley mirror the claims against Bashas'. These claims  
23 have been fully explored in the Bosley Action through discovery, jury trial, and now  
24 judgment. During these proceedings Kubicek certainly had sufficient opportunity to frame  
25 its Complaint in such a way as to satisfy the minimal pleading standards of Iqbal.

26 But here there are no allegations that would support a claim for post-petition  
27 infringement. Kubicek identifies no instances of construction, remodeling, utilization or  
28 copying of any specific architectural plan or other misappropriation of its proprietary

1 materials since the date of the Chapter 11 filing. Instead, Kubicek's claims for both  
2 copyright infringement and state law claims do not rise above the level of speculation.

3 **IT IS ORDERED GRANTING** Bashas' motion to dismiss (doc. 14). The clerk shall  
4 enter final judgment.

5 DATED this 7<sup>th</sup> day of May, 2013.

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8 **Frederick J. Martone**  
9 **Senior United States District Judge**

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