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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,

) 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.

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Plaintiff,

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vs.

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Bashas' Inc.,

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Defendant.

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The court has before it Kubicek's motion for reconsideration of our Order dated May 8, 2013 (doc. 22), in which we held that Kubicek had failed to state a claim against Bashas' for either direct or contributory copyright infringement.

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Kubicek's complaint asserted broad allegations that Bashas' willfully infringed Kubicek's architectural plans and misappropriated proprietary materials, but it asserted no facts to identify what copyrighted materials Bashas' infringed or how or when the materials were copied or used. The majority of the allegations in the complaint involved claims of direct and contributory infringement that occurred before Bashas' Chapter 11 filing, all of

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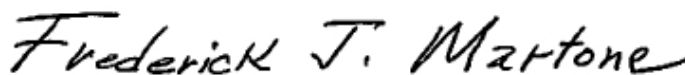
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1 which were discharged in bankruptcy. We concluded that there were no allegations in the
2 complaint that would support a claim against Bashas' for post-petition direct or contributory
3 infringement. Kubicek challenges this conclusion in its motion for reconsideration, again
4 referring to paragraphs in the complaint that only generally assert allegations involving
5 unidentified "Copyrighted Works," with no reference to when or how these "Works" were
6 infringed. This is insufficient to state a claim, particularly regarding post-petition conduct.

7 Kubicek again complains that it was unable to plead with more particularity because
8 it had an inadequate opportunity to conduct discovery. It now asserts that it has obtained
9 "newly discovered evidence" in the trial against The Bosely Group, Kubicek v. Bosely, CV-
10 11-2112-PHX-DGC (the "Bosely trial"), putting it "in a position for the first time to plead
11 with substantial detail the particulars of Bashas' infringing activities." Motion at 5. First,
12 this "newly discovered" evidence allegedly came to light during the Bosely trial, almost a
13 month before our ruling on Bashas' motion to dismiss. Yet Kubicek never sought to amend
14 its response to the motion before us. Second, this "new" evidence still does not identify
15 when the allegedly infringing actions occurred—an essential element in this case given that
16 Bashas' liability is limited to post-petition conduct. Third, the so-called new evidence was
17 obtained from "knowledgeable former employees of Bashas' and Mr. Bosley himself,"
18 Motion at 4. But there is no allegation that Kubicek was somehow prevented from timely
19 obtaining this information. Kubicek has been aggressively pursuing these claims against
20 Bashas' and Bosely for years. Evidence sufficient to support its claims would have been
21 discovered with the exercise of reasonable diligence.

22 **IT IS ORDERED DENYING** Kubicek's motion for reconsideration (doc. 22).

23 DATED this 17th day of June, 2013.

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26 **Frederick J. Martone**
27 **Senior United States District Judge**
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