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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.
Plaintiff,

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vs.

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Bashas' Inc.,
Defendant.

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The court has before it defendant Bashas', Inc.'s motion for an award of attorney's fees (doc. 23), plaintiff Robert Kubicek Architects & Associates, Inc.'s response (doc. 28), and Bashas' reply (doc. 37).

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I

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Robert Kubicek Architects & Associates, Inc. filed this action against one of its former employees, Robert Bosley, Bosely's architectural firm, and Bashas', asserting violations of the Copyright Act, and federal and state anti-racketeering statutes. See Kubicek v. Bosley, 11-CV-2112-PHX-DGC ("Bosley Action"). The claims against Bashas' were

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1 referred to the bankruptcy court where Kubicek’s pre-petition claims against Bashas’ were
2 dismissed. Kubicek then filed the instant action, asking us to withdraw the reference with
3 respect to its post-petition claims against Bashas’. We granted that motion and Kubicek filed
4 an amended complaint against Bashas’, asserting copyright claims, unjust enrichment, and
5 claims for declaratory and injunctive relief. See (doc. 13). We ultimately granted Bashas’
6 motion to dismiss all claims (doc. 20), and denied Kubicek’s motion for reconsideration (doc.
7 27). Bashas’ is the undisputed prevailing party.

8 Bashas’ now requests attorney’s fees and non-taxable costs in the amount of
9 \$109,866.81, pursuant to the Copyright Act, 17 U.S.C. § 505, and A.R.S. § 12-341.01. We
10 conclude that an award of attorney’s fees is appropriate under the Copyright Act and
11 therefore do not address whether fees would also be available under A.R.S. § 12-341.01.

12 II

13 Prevailing parties are eligible for attorney’s fees under the Copyright Act when “an
14 award will further the purposes of the Act.” Fantasy v. Fogarty, 94 F.3d 553, 558 (9th Cir.
15 1996). The Act’s primary purpose is “to stimulate artistic creativity for the general public
16 good.” Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156, 95 S. Ct. 2040, 2044
17 (1975). That purpose is also advanced when defendants present “a variety of meritorious
18 copyright defenses.” Fogerty v. Fantasy, Inc., 510 U.S. 517, 527, 114 S. Ct. 1023, 1029
19 (1994) (“Fogerty I”) (stating that “a successful defense of a copyright infringement action
20 may further the policies of the Copyright Act every bit as much as a successful prosecution
21 of an infringement claim by the holder of the copyright”).

22 A non-exclusive list of factors to consider in determining eligibility for an award of
23 fees under the Copyright Act are “frivolousness, motivation, objective unreasonableness
24 (both in the factual and in the legal components of the case) and the need in particular
25 circumstances to advance considerations of compensation and deterrence.” Id. at 534 n.19,
26 114 S. Ct. at 1033 n.19. “While no longer a prerequisite to a fee award, the ‘objective
27 unreasonableness’ . . . of a losing party’s claim can be a relevant indicator of whether the
28 Act’s primary objective is being served by the litigation.” SOFA Entm’t, Inc. v. Dodger

1 Prods., Inc., 709 F.3d 1273, 1280 (9th Cir. 2013) (quoting Fogerty I, 510 U.S. at 534 n.19,
2 114 S. Ct. at 1033 n.19).

3 We concluded in our order granting Bashas’ motion to dismiss that “Kubicek’s claims
4 for both copyright infringement and under state law “do not rise above the level of
5 speculation.” (Doc. 20 at 5). Despite more than two years of litigation, as well as a full jury
6 trial in the Bosley Action, Kubicek argued that it was unable to plead more specific facts
7 regarding infringement because it had an inadequate opportunity to conduct discovery. We
8 rejected the argument, finding that throughout these lengthy proceedings, Kubicek had more
9 than ample opportunity to frame its Complaint in such as way as to satisfy the minimal
10 pleading standards of Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009).
11 Its failure to do so supports the finding that Kubicek’s copyright claims asserted against
12 Bashas’ were objectively unreasonable. Therefore, because an award will advance the
13 purposes of the Act, we conclude that Bashas’ is entitled to recover its reasonable attorney’s
14 fees under 17 U.S.C. § 505.

15 III

16 Bashas’ seeks fees and nontaxable costs in the total amount of \$109,866.81, including
17 charges by two law firms—Burch and Cracchiolo, Bashas’ general legal counsel, and Mesch,
18 Clark & Rothschild, Bashas’ bankruptcy counsel.

19 We will only allow “reasonable” attorney’s fees under the Copyright Act. See 17
20 U.S.C. § 505. Two lawyers in the Mesch, Clark & Rothschild law firm, Michael McGrath
21 and Scott H. Gan, bill at rates of \$545 and \$450 an hour, respectively. We find that these
22 rates are excessive in comparison to the average hourly rate of \$300 in the Phoenix market.
23 Therefore, considering the number of hours billed by McGrath and Gan, we reduce the
24 requested attorney’s fee award by \$7,000.

25 We also find several of Kubicek’s objections to the claimed fees persuasive. First,
26 we agree that there are multiple instances of improper block billing. An example of the many
27 instances include entries on 7/10/12, 12/12/11, 3/21/12, 1/15/13, 4/9/13, 4/16/13, and
28 4/17/13. The inadequate documentation makes it difficult, if not impossible to determine the

1 reasonableness of the fees claimed. We will accordingly reduce the requested fees for
2 improper block billing by \$10,000.

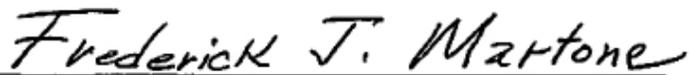
3 We also agree that there are numerous instances of billing for ministerial duties. Fees
4 charged for tasks that are clerical or ministerial in nature are not compensable. Therefore,
5 we will reduce the fee award by \$5,000.

6 Finally, we agree with Kubicek that the billing statements include duplicate billing
7 by multiple lawyers. This is due in large part to the fact that, between the two law firms, no
8 less than seven lawyers worked on this case, with multiple lawyers often billing for
9 performing the same work or attending the same meetings. Counsel have an obligation to
10 exercise billing judgment to eliminate duplicate or excessive fees, particularly where so many
11 lawyers are participating in the same case. The fee request will be reduced in the amount of
12 \$6,000 for excessive, duplicate billing.

13 **IV**

14 Based on the foregoing, **IT IS ORDERED GRANTING** Bashas' motion for an
15 award of attorney's fees and nontaxable costs (doc. 23), and **AWARDING** Bashas' total fees
16 and costs in the amount of \$81,866.81.

17 DATED this 12th day of September, 2013.

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20 **Frederick J. Martone**
21 **Senior United States District Judge**
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