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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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R & L Limited Investments, Inc., an)  
Arizona corporation,

No. CV 09-1525-PHX-MHM

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Plaintiff,

**ORDER**

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vs.

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Cabot Investment Properties, LLC, a)  
Massachusetts limited liability company;)  
14 Cabot Creekside Acquisition LLC, a)  
Delaware limited liability company;)  
15 Carlton P. Cabot, a single young man; and)  
Timothy J. Kroll, a single man,

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Defendant.

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Currently before the Court is Defendants' Motion to Stay Proceedings Pending  
19 Appeal (Doc. 37). Having considered this motion and its accompanying papers and  
20 determined that oral argument is unnecessary, the Court issues the following Order.

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**I. Background**

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Defendants previously moved to stay or dismiss this lawsuit and to compel arbitration  
23 on a dispute that involved the purchase and sale of a shopping center located in Georgia.  
24 (Doc. 6). Several investors participated in this investment opportunity and they collectively  
25 invested \$17.5 million. The Plaintiff in this case was one of the investors, R & L  
26 Investments, who invested approximately \$250,000 with Defendants. The Court denied  
27 Defendants' motion to compel arbitration and stay or dismiss the lawsuit based on the fact  
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1 that the arbitration clauses purported to waive certain non-waivable statutory rights under  
2 Arizona law; as such, the Court found they were substantively unconscionable. (Doc. 33).

3 Defendants now move to stay the proceedings pending appeal. (Doc. 37).

## 4 **II. Analysis**

5 The Ninth Circuit has held that the decision of whether to stay proceedings pending  
6 an appeal of an order denying a motion to compel arbitration "is a proper subject for the  
7 exercise of discretion by the trial court." Britton v. Co-op Banking Group, 916 F.2d 1405,  
8 1411-12 (9<sup>th</sup> Cir. 1990). While Defendants argue that they are entitled to an automatic stay,  
9 speculating about how the Supreme Court might hypothetically resolve a circuit split if  
10 presented with the question in the future, they concede that "it is the Ninth Circuit's decision  
11 in Britton which is binding on this Court." (Doc. 37 at 5). Because this Court is bound by  
12 actual precedent, not hypothetical precedent, Britton is controlling. Hart v. Massanari, 266  
13 F.3d 1155, 1170 (9<sup>th</sup> Cir. 2001) (explaining that "[a] district judge may not respectfully (or  
14 disrespectfully) disagree with his [or her] learned colleagues on his own court of appeals who  
15 have ruled on a controlling legal issue").

16 Under Britton, it is within the Court's discretion whether to deny Defendants' motion  
17 for a stay while they appeal the ruling that their arbitration clauses are unconscionable. 916  
18 F.2d at 1411-12; Long Beach Area Chamber of Commerce v. City of Long Beach, 603 F.3d  
19 684, 691 (9<sup>th</sup> Cir. 2010) (explaining that "where an appeal is taken from a judgment which  
20 does not finally determine the entire action, the appeal does not prevent the district court  
21 from proceeding with matters not involved in the appeal"). Four factors guide the Court's  
22 discretion: (1) whether the stay applicant has made a strong showing that it is likely to  
23 succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3)  
24 whether issuance of the stay will substantially injure the other parties interested in the  
25 proceeding; and (4) where the public interest lies. Hilton v. Baunskill, 481 U.S. 770, 776  
26 (1987). Each factor is analyzed below.

### 27 **(A) Strong Showing of Likelihood of Success on Appeal**

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1 To meet their burden, Defendants must "first show a strong likelihood of success on  
2 the merits . . . ." Monsanto, 2010 U.S. Dist. LEXIS 55189 at \*5. However, Defendants do  
3 not even attempt to argue that they are likely to succeed on the merits. Instead, they merely  
4 list five issues that they argue are the basis for their non-frivolous appeal. However, the  
5 standard of "not being frivolous" is much lower than "strong likelihood of succeeding."  
6 Because Defendants have failed to establish that they have a strong likelihood of succeeding  
7 on appeal, this factor weighs against granting Defendants motion for a stay.

8 **(B) Irreparable Injury in the Absence of a Stay**

9 Defendants argue that they would be irreparably injured in the absence of a stay  
10 because "the fees and expenses incurred by the parties in pursuing this litigation while the  
11 arbitration order is on appeal would be wasted." (Doc. 37 at 10). However, as Plaintiff  
12 correctly points out, "cases that are stayed due to a hardship caused by litigation costs  
13 generally involve additional case-specific costs that would be unnecessary if arbitration were  
14 compelled." (Doc. 42 at 14). Here, it appears the only litigation costs that will be incurred  
15 while the parties await appeal are discovery costs, which do not constitute irreparable injury.  
16 Castaneda v. United States, 2008 U.S. Dist. LEXIS 40567 at \*13 (C.D. Cal. May 20, 2008)  
17 ("The Court acknowledges that discovery can be burdensome. However, such a burden,  
18 while regrettable, does not constitute an irreparable injury."); see also Bradberry v. T-Mobile  
19 USA, Inc., 2007 U.S. Dist. LEXIS 58801 at \*10-11 (N.D. Cal. Aug. 2, 2007) ("The cost of  
20 some pretrial litigation does not constitute irreparable harm to Defendant."). Contrary to  
21 Defendants assertion, if their appeal was successful, the parties would still be able to use the  
22 discovery in arbitration. The JAMS arbitration rules require the parties to engage in much  
23 of the same disclosure and document exchanges as the Federal Rules of Civil Procedure.  
24 While Defendants point out one minor difference between the two systems – the fact that  
25 interrogatories are allowed by the Federal Rules, but not expressly permitted by the JAMS  
26 rules – this minor discrepancy can hardly be the basis for irreparable injury. Thus, this factor  
27 also weighs against granting the stay.

28 **(C) Substantial Injury to Other Parties**

1 Plaintiff argues that it will be substantially injured should the Court choose to grant  
2 the stay citing other district court cases that have held that delaying a plaintiff's day in court  
3 constitutes substantial injury. See Bradberry v. T-Mobile USA, Inc., 2007 U.S. Dist. LEXIS  
4 58801 at \*12 (N.D. Cal. Aug. 2, 2007) ("[D]elaying a plaintiff's day in court constitute[s] a  
5 substantial injury to the plaintiff."); Ford v. Verisign, Inc., 2006 U.S. Dist. LEXIS 88856 at  
6 \*8 (S.D. Cal. March 8, 2006). (Doc. 42 at 17). Plaintiff points out that the case has already  
7 been pending over a year, and that delay would risk "fading memories" and lost evidence.  
8 (Doc. 42). Defendants argue that "arbitration is intended to provide for more efficient and  
9 less expensive dispute resolution, advantages that will forever be lost if a stay is not entered,"  
10 (Doc. 42 at 8). However, Defendants' argument ignores the fact that whether the case is  
11 ultimately arbitrated or not, it is in Plaintiff's best interest to undertake discovery sooner  
12 rather than later. Given that Plaintiff's discovery will focus on the due diligence undertaken  
13 by the Defendants in their promotion of an investment over three years ago, it appears likely  
14 that the longer Plaintiff must wait to conduct this discovery, the more risk there is that  
15 pertinent evidence will disappear. Thus, this factor weighs against granting the stay as well.

16 **(D) The Public Interest**

17 Defendants argue that there is a strong public policy against proceeding with  
18 discovery when certain issues may ultimately be mooted on appeal. (Doc. 37 at 12).  
19 However, Plaintiff points out that this policy is only relevant in cases that present a strong  
20 likelihood of success on appeal or that present questions of first impression. (Doc. 42 at 18).  
21 Here, as discussed above, Defendants have failed to show that they have a strong likelihood  
22 of success on appeal. Plaintiff cites Arizona's "strong public policy to protect the public from  
23 unscrupulous investment promoters," Siporin v. Carrington, 200 Ariz. 97, 103, 23 P.3d 92,  
24 98 (App. 2001), and argues that this important public policy will be undermined in Plaintiff  
25 is unable to conduct discovery or advance this case while the appeal is pending. The Court  
26 finds that the public interest factor weighs neither in favor of nor against granting the stay.

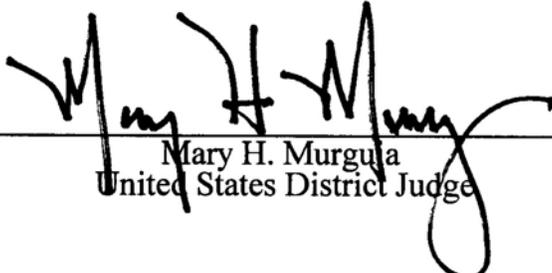
1           Having found that three of the four factors weighs against granting the stay (and that  
2 none of the factors weigh in favor of granting the stay), the Court will deny Defendants'  
3 Motion to Stay Proceedings Pending Appeal (Doc. 37).

4           **Accordingly,**

5           **IT IS HEREBY ORDERED** denying Defendants' Motion to Stay Proceedings  
6 Pending Appeal (Doc. 37).

7           DATED this 21<sup>st</sup> day of September, 2010.

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Mary H. Murgula  
United States District Judge