

MAR 22 2017

SUSAN M. SPRAUL, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. NC-15-1174-KuBS  
 )  
 THE ZUERCHER TRUST OF 1999, ) Bk. No. 3:12-bk-32747  
 )  
 Debtor. )  
 )  
 \_\_\_\_\_ )  
 MONICA HUJAZI, )  
 )  
 Appellant, )  
 )  
 v. ) **MEMORANDUM\***  
 )  
 E. LYNN SCHOENMANN, Chapter 7 )  
 Trustee; WIN WIN ALEXANDER )  
 UNION, LLC, )  
 )  
 Appellees. )  
 \_\_\_\_\_ )

Argued and Submitted on January 19, 2017  
at San Francisco, California

Filed - March 22, 2017

Appeal from the United States Bankruptcy Court  
for the Northern District of California

Honorable Hannah L. Blumenstiel, Bankruptcy Judge, Presiding

Appearances: Bradley Kass of Kass & Kass Law Offices argued for  
 appellant Monica Hujazi; Thomas F. Koegel of  
 Crowell & Moring LLP argued for appellee E. Lynn  
 Schoenmann, Chapter 7 Trustee; Elsa Horowitz of  
 Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP  
 argued for appellee Win Win Alexander Union, LLC.

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\*This disposition is not appropriate for publication.  
 Although it may be cited for whatever persuasive value it may  
 have (see Fed. R. App. P. 32.1), it has no precedential value.  
See 9th Cir. BAP Rule 8024-1.

1 Before: KURTZ, BRAND and SPRAKER,\*\* Bankruptcy Judges.

2 **INTRODUCTION**

3 On remand from a prior appeal of the bankruptcy court's  
4 order approving the sale of two apartment buildings, the  
5 bankruptcy court found (for the second time) that the purchaser -  
6 Win Win Alexander Union, LLC - was a good faith purchaser within  
7 the meaning of § 363(m).<sup>1</sup> Monica Hujazi, the former principal of  
8 the debtor, now appeals from the bankruptcy court's second good  
9 faith finding.

10 Because that finding was not clearly erroneous, We AFFIRM.

11 **FACTS**

12 Most of the relevant facts pertaining to the bankruptcy  
13 court's sale order are set forth in this Panel's prior decision,  
14 Zuercher Trust of 1999 v. Kravitz (Zuercher Trust of 1999), 2014  
15 WL 7191348 (Mem. Dec.) (9th Cir. BAP Dec. 17, 2014). There is no  
16 need to reiterate most of those facts. Indeed, Hujazi's opening  
17 appeal brief adopted our prior factual recitation as her own.

18 To briefly recap, the bankruptcy court entered on June 10,  
19 2013, an order authorizing Peter Kravitz as chapter 11 trustee to  
20 sell an apartment building on Union Avenue to Win Win based on  
21

22 \_\_\_\_\_  
23 \*\*Hon. Gary A. Spraker, Chief United States Bankruptcy Judge  
24 for the District of Alaska, sitting by designation.

25 <sup>1</sup>Unless specified otherwise, all chapter and section  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
27 all "Rule" references are to the Federal Rules of Bankruptcy  
Procedure, Rules 1001-9037. All "Civil Rule" references are to  
the Federal Rules of Civil Procedure.

1 its initial credit bid of \$2.7 million.<sup>2</sup> The sale order further  
2 authorized Kravitz to sell a second apartment building on  
3 Alexandria Avenue to Vista Investment Group, LLC or its designee  
4 for \$6.8 million and also confirmed and authorized Win Win as the  
5 backup purchaser of the Alexandria property based on its credit  
6 bid of \$4.5 million "in the event that the sale of the Alexandria  
7 Property to Vista fails to close." Additionally, the sale order  
8 included a finding that both Win Win and Vista qualified as good  
9 faith purchasers for purposes of § 363(m). Ultimately, Kravitz  
10 consummated the sale of both properties to Win Win.

11 We issued our decision in the prior sale order appeal on  
12 December 17, 2014. In that decision, we held: (1) the bankruptcy  
13 court's § 363(m) good faith finding was not clearly erroneous  
14 based on the record available to the bankruptcy court at the time  
15 the sale order was entered; (2) the bankruptcy court's good faith  
16 finding under § 363(m) precluded us from considering any of  
17 appellant's other issues challenging the sale and seeking  
18 reversal of the sale order; (3) one lingering good faith issue  
19 existed, which arose from appellant's argument that certain post-  
20 sale-order events evidenced the bad faith of Kravitz, Win Win and  
21 Vista; and (4) consistent with our precedent, the lingering good  
22 faith issue only could be properly addressed on remand to the  
23 bankruptcy court.

24 Roughly two months after our remand, on February 19, 2015,  
25 the bankruptcy court held a status conference to discuss the  
26

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27  
28 <sup>2</sup>In the current appeal, appellee chapter 7 trustee E. Lynn Schoenmann has appeared as Kravitz's successor in interest.

1 Panel's remand. None of the parties have provided a transcript  
2 of the status conference, so we don't know specifically what was  
3 said at the status conference. In any event, the court entered  
4 an order the day after the status conference requiring the  
5 Zuercher Trust or Hujazi, within thirty days, to file a motion  
6 for relief from or reconsideration of the sale order to address  
7 the good faith issue this Panel had remanded for consideration.<sup>3</sup>

8 Hujazi timely filed her motion for reconsideration or  
9 relief. Hujazi asserted that Kravitz unilaterally decided not to  
10 sell the Alexandria property to Vista for \$6.8 million and  
11 instead unilaterally and without court approval sold the  
12 Alexandria property to Win Win based on its backup credit bid of  
13 \$4.5 million, thereby causing a loss to the estate of  
14 \$2.3 million. Hujazi maintained that the Alexandria sale to  
15 Win Win contravened the court's sale order because the sale order  
16 permitted the trustee to sell the Alexandria property to Win Win  
17 only if Vista refused to close. According to Hujazi, because  
18 Kravitz backed out of the sale to Vista (as opposed to Vista  
19 backing out), Kravitz was required to obtain a new or revised  
20 sale order. Hujazi complained that it made no sense that Kravitz

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21  
22 <sup>3</sup>The bankruptcy court interpreted our December 2014 decision  
23 as recognizing a lingering good faith issue only with respect to  
24 the sale of the Alexandria property, so it stated in its  
25 February 20, 2015 order that any motion asking for relief from or  
26 reconsideration of the bankruptcy court's prior good faith ruling  
27 should "address the [m]ovant's concerns as to the sale of the  
28 Alexandria Property only." Hujazi's appeal brief does not  
contain any argument challenging this ruling of the bankruptcy  
court, so we decline to address it. See Christian Legal Soc'y  
Chapter of Univ. of Cal. v. Wu, 626 F.3d 483, 487-88 (9th Cir.  
2010); Brownfield v. City of Yakima, 612 F.3d 1140, 1149 n.4 (9th  
Cir. 2010).

1 could not deliver clear title to Vista but could turn around and  
2 deliver clear title to Win Win. Hujazi contended that fraud,  
3 collusion and unfair advantage among Kravitz, Win Win and Vista  
4 were demonstrated by the fact that Win Win turned around and  
5 resold the Alexandria property to Vista for \$6.8 million - the  
6 same price Vista had agreed to purchase the property from Kravitz  
7 for.

8 To support her arguments, Hujazi relied on declarations that  
9 Kravitz and Win Win had filed with this Panel in the sale order  
10 appeal. However, Hujazi did not present any new evidence.  
11 Moreover, the record suggests that Hujazi never requested any  
12 discovery regarding the post-sale-order events, either before or  
13 after this Panel's remand. Nor did she ever file a motion  
14 seeking an extension of time in order to conduct discovery.

15 Kravitz and Win Win both opposed the motion and filed  
16 declarations offering explanations why the Kravitz-Vista sale  
17 fell through, why no further court approval was necessary for  
18 Kravitz to consummate the backup sale to Win Win and why Win Win  
19 could and did resell the property to Vista for \$6.8 million.

20 The court held a hearing on Hujazi's motion on May 7, 2015.  
21 After considerable discussion with the parties regarding what  
22 could be inferred from the declarations submitted, the bankruptcy  
23 court reaffirmed its prior good faith finding in light of the  
24 evidence submitted regarding post-sale-order events. On that  
25 evidence, the bankruptcy court found there was no fraud,  
26 collusion or unfair advantage. The court further found that the  
27 Kravitz-Vista sale could not close because a number of  
28 unanticipated issues arose, and neither party was willing or able

1 to bear the additional risk and expense associated with the  
2 unanticipated issues. According to the court, in compliance with  
3 the terms of the sale order, Kravitz then sold to Win Win based  
4 on its backup bid because Win Win was willing to bear, and did  
5 bear, the risks and costs of the unforeseen contingencies. The  
6 court rejected Hujazi's arguments that Kravitz unilaterally was  
7 unwilling to close the Vista sale and that the sale order did not  
8 authorize Kravitz to close the Alexandria sale with Win Win as  
9 the backup bidder unless Vista unilaterally and voluntarily  
10 refused to close. As the court put it, Hujazi's reading of this  
11 aspect of the sale order was "so stilted and impractical and  
12 inconsistent with decades of [bankruptcy] practice, as to be  
13 mind-boggling, quite frankly." Hr'g Tr. (May 7, 2015) at  
14 33:12-14.

15 The bankruptcy court additionally found that the net  
16 recovery to the bankruptcy estate resulting from either the Vista  
17 sale or the Win Win sale was exactly the same. In fact, Hujazi  
18 conceded this point during argument. Finally, the court found  
19 that there was nothing nefarious about Win Win's resale of the  
20 Alexandria Property to Vista for \$6.8 million. Rather, Win Win  
21 wanted to resell the property as soon as possible so that it  
22 could retire the debt it owed to East West Bank, and Win Win was  
23 able to resell the property to Vista because Win Win could and  
24 did assume a significant amount of additional expense and risk to  
25 resolve the unforeseen contingencies, which had prevented the  
26 Kravitz-Vista sale from closing.

27 The bankruptcy court entered its order denying Hujazi's  
28 motion on May 8, 2015, and Hujazi timely appealed.



1 the good faith issue in order to give Hujazi additional time to  
2 conduct discovery. See Orr v. Bank of Am., 285 F.3d 764, 783  
3 (9th Cir. 2002); Hasso v. Mozsgai (In re La Sierra Fin. Servs.,  
4 Inc.), 290 B.R. 718, 726 (9th Cir. BAP 2002).

5 The bankruptcy court abuses its discretion only if it  
6 applied an incorrect legal rule or its findings of fact were  
7 illogical, implausible or without support in the record. United  
8 States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc).

## 9 DISCUSSION

### 10 1. Appellate Standing Issue

11 Appellees argue that Hujazi lacks standing to appeal. Only  
12 a "person aggrieved" has standing to appeal, which means that the  
13 appellant must be "directly and adversely affected pecuniarily"  
14 by the order on appeal. Fondiller v. Robertson  
15 (In re Fondiller), 707 F.2d 441, 442 (9th Cir. 1983); see also  
16 Cheng v. K & S Diversified Invs., Inc. (In re Cheng), 308 B.R.  
17 448, 455 (9th Cir. BAP 2004), aff'd, 160 Fed.Appx. 644 (9th Cir.  
18 2005).

19 According to appellees, Hujazi is not directly and adversely  
20 affected pecuniarily because neither the Zuercher Trust  
21 bankruptcy nor Hujazi's personal bankruptcy have any realistic  
22 chance of concluding with surplus estates. Absent surplus  
23 estates, debtors typically lack standing to appeal orders  
24 affecting the size of the bankruptcy estate. In re Fondiller,  
25 707 F.2d at 442. Hujazi posits that the ultimate outcome of the  
26 bankruptcy cases depends in part on the outcome of the myriad  
27 appeals she has taken from the bankruptcy court's orders.

28 We need not parse the parties' complex appellate standing



1 question, which arguably would require us to predict the likely  
2 end results of various litigation and two bankruptcy cases.  
3 Instead, we rely on other facts to conclude that Hujazi has  
4 standing to appeal. Namely, because Hujazi is personally liable  
5 on the Alexandria and Union loans as a codebtor, she has an  
6 ongoing personal stake in the sale of the properties which  
7 secured those loans and how those sales affected her personal  
8 liability. Cf. Zuercher Trust of 1999 v. Schoenmann  
9 (In re Zuercher Trust of 1999), 2016 WL 721485, at \*7 (Mem. Dec.)  
10 (9th Cir. BAP Feb. 22, 2016) (holding that Hujazi's codebtor  
11 status gave her standing to appeal a different sale order).

12 In this Panel's 2014 decision in the sale order appeal, we  
13 noted that Hujazi was a codebtor on the Alexandria and Union  
14 loans. See 2014 WL 7191348, at \*1. In addition, Hujazi made  
15 this same point during the post-remand hearing on her motion for  
16 relief or reconsideration. The appellees never challenged  
17 Hujazi's assertion of codebtor status.

18 We acknowledge that Hujazi might receive a discharge in her  
19 personal bankruptcy case, which in theory would end her personal  
20 liability for the Union and Alexandria loans. Even so, whether  
21 she ultimately will receive that discharge is debatable. The  
22 deadline for objecting to her discharge has been continued from  
23 time to time and currently is not set to expire until April 21,  
24 2017. Furthermore, given Hujazi's pending appeal concerning the  
25 order for relief entered in her personal bankruptcy case and  
26 given her aggressive opposition to the chapter 7 trustee's  
27 efforts to administer her personal bankruptcy estate, it is not  
28 hard to imagine that she might never receive a discharge.

1 In short, we conclude for appellate standing purposes that  
2 Hujazi is directly and adversely affected pecuniarily by the  
3 bankruptcy court's denial of her post-remand motion for relief or  
4 reconsideration.

## 5 **2. Reaffirmation of the Good Faith Finding**

6 We should not and will not revisit the legal question of  
7 what generally constitutes good faith under § 363(m). This  
8 Panel's prior decision in the sale order appeal, 2014 WL 7191348,  
9 ably addressed that issue and its legal analysis is law of the  
10 case. See generally Am. Express Travel Related Servs. Co. v.  
11 Fraschilla (In re Fraschilla), 235 B.R. 449, 454 (9th Cir. BAP  
12 1999) (explaining doctrine and its exceptions), aff'd, 242 F.3d  
13 381 (9th Cir. 2000) (table).

14 As explained in our prior decision, we remanded for  
15 consideration of the factual issue of whether post-sale-order  
16 events evidenced any fraud, collusion or grossly unfair advantage  
17 over other bidders that would justify reconsideration of the  
18 bankruptcy court's June 2013 good faith finding.

19 In their respective briefs and declarations filed in  
20 opposition to Hujazi's post-remand motion, Kravitz and Win Win  
21 offered detailed explanations: (1) why Kravitz's sale to Vista  
22 fell through; (2) why no further court approval was necessary for  
23 Kravitz to consummate the backup sale to Win Win; and (3) why Win  
24 Win could and did resell the property to Vista for \$6.8 million.

25 Kravitz explained in his declaration that he attempted to  
26 close the sale to Vista for roughly six weeks, but that a number  
27 of unexpected issues arose when he attempted to procure title  
28 insurance for the sale. For instance, he could not find any

1 title insurer who was willing to issue a policy before the appeal  
2 period ended or while the Zuercher Trust's appeal from the sale  
3 order was pending. Also, notwithstanding the sale free and clear  
4 of liens and other interests language in the sale order, the  
5 title insurers were unwilling to issue a policy unless certain  
6 lien notices issued by the City of Los Angeles were released. In  
7 addition, Kravitz learned during his closing attempts that a  
8 \$225,000 withholding tax was going to be incurred as a result of  
9 the cash sale to Vista and would need to be paid out of escrow.  
10 Vista maintained that these and other sale costs were the  
11 responsibility of the seller, but the estate had inadequate funds  
12 to satisfy them. According to Kravitz, as a result of his  
13 inability to resolve these unexpected issues, Vista declined to  
14 close.

15 As explained by both Kravitz and Win Win, Win Win was  
16 willing and able to close notwithstanding these additional  
17 issues. Win Win agreed to move forward with the sale even though  
18 no title insurance policy could be obtained. Also, because the  
19 sale to Win Win was based on a credit bid and was not a cash  
20 sale, the \$225,000 withholding tax would not accrue.

21 Win Win also explained that it was motivated to close its  
22 purchase from Kravitz and its sale to Vista because it needed to  
23 retire the debt it owed to East West Bank. In fact, as Win Win  
24 maintained, it would have been significantly better off if the  
25 Kravitz-Vista sale had closed. In order for Win Win to close its  
26 purchase from Kravitz and its sale to Vista, it had to assume a  
27 number of additional risks and costs that it would not have  
28 incurred if the Kravitz-Vista sale had closed.

1 In contrast, Kravitz's \$4.3 million sale to the backup  
2 bidder Win Win (in lieu of closing its \$6.8 million sale to  
3 Vista) did not diminish the estate's benefits from the sale or  
4 increase its burdens. The estate still received all of the  
5 benefits it bargained for before obtaining court approval. As  
6 Kravitz stated:

7 Fortunately for the estate, by selling Alexandria to  
8 Win-Win as the back-up bidder, I was able to preserve  
9 the tremendous benefit to the estate that I had  
10 negotiated under the original bid procedure terms.  
11 Specifically, Win-Win paid both \$50,000.00 fees to the  
12 estate for a total of \$100,000.00 cash; Win-Win agreed  
13 to cap its post-petition administrative claims  
14 (estimated to be \$1.2 million as of the sale date) to  
15 no more than \$50,000.00 and subject to my right to  
16 object to such claims; Win-Win removed all its secured  
17 liens from the Alexandria and Union properties  
18 resulting in the removal of \$15 million in secured  
19 claims against the estate; and Win-Win's claims against  
20 the estate were reduced to unsecured claims of  
21 approximately \$5.3 million (down from the \$15 million  
22 plus in secured claims).

23 Kravitz Decl. (April 17, 2015) at ¶ 6.

24 As for the \$2.5 million difference in sale price between the  
25 aborted Vista sale and the completed Win Win sale, Kravitz  
26 pointed out that all of the gross sale proceeds lost would have  
27 been paid to Win Win on account of its secured claim and thus the  
28 estate did not lose any net sale proceeds.

The findings of the bankruptcy court reflect that it  
credited the declaration testimony the parties presented and that  
it found Kravitz's and Win Win's explanations of the post-sale-  
order events credible. Also, the court inferred from those  
explanations that there was no fraud, collusion or grossly unfair  
advantage taken by or between Kravitz, Win Win or Vista.

Hujazi presented no controverting evidence. In essence, she

1 asked the court to reject the appellees' explanations and to  
2 infer bad faith from the bare outline of the post-sale-order  
3 events. Assuming without deciding that the bankruptcy court  
4 could have inferred bad faith as Hujazi urged, the court's choice  
5 not to do so was not clearly erroneous. Anderson v. City of  
6 Bessemer City, N.C., 470 U.S. 564, 574 (1985) ("Where there are  
7 two permissible views of the evidence, the factfinder's choice  
8 between them cannot be clearly erroneous."). Put another way, we  
9 cannot say that the bankruptcy court's renewed finding of good  
10 faith with respect to the Alexandria sale was illogical,  
11 implausible or without support in the record.

12 Hujazi also argued that bad faith was apparent because  
13 Kravitz's backup sale to Win Win contravened the sale order. But  
14 the bankruptcy court rejected this argument, reasoning that  
15 Hujazi's interpretation of the sale order was overly restrictive  
16 and impractical. According to the bankruptcy court, Kravitz's  
17 sale to the backup bidder was contemplated by and in full  
18 compliance with the sale order.

19 The sale order in relevant part provided as follows:

20 Win Win is confirmed as the back-up purchaser of the  
21 Alexandria Property in the event that the sale of the  
22 Alexandria Property to Vista fails to close. In such  
23 event, Win Win or its designee is confirmed as the  
24 purchaser, and the Trustee is authorized to sell and  
25 transfer to Win Win the Alexandria Property pursuant to  
26 the terms, including the original purchase price of  
27 \$4,500,000, as set forth in the Motion. If Vista fails  
28 to close its purchase of the Alexandria Property, such  
back-up sale can be consummated without further order  
of this Court, but the parties may lodge an amended  
order if and/or as necessary.

27 Sale Order (June 10, 2013) at ¶ 5.

28 We give significant deference to the bankruptcy court's

1 interpretation of its own orders. In re Wallace, 490 B.R. at 906  
2 (citing Marciano v. Fahs (In re Marciano), 459 B.R. 27, 35 (9th  
3 Cir. BAP 2011)). Hujazi has not offered any reasoned argument  
4 why it was an abuse of discretion for the bankruptcy court to  
5 interpret the sale order in the manner it did, nor are we aware  
6 of any such argument. In sum, we hold that the bankruptcy court  
7 did not abuse its discretion when it ruled that the backup sale  
8 to Win Win was in compliance with the sale order.

### 9 **3. Denial of Additional Time for Discovery**

10 Hujazi also argues on appeal that the bankruptcy court  
11 should have extended the reconsideration motion proceedings to  
12 permit additional time for discovery. Hujazi never filed a  
13 motion requesting an extension of time; however, the bankruptcy  
14 court apparently denied Hujazi's oral request for more time at  
15 the February 2015 post-remand status conference.

16 In order to determine whether bankruptcy courts have abused  
17 their discretion in denying requests for more time to conduct  
18 discovery, we typically look at all relevant facts and usually  
19 focus on the following four considerations: (1) whether lack of  
20 diligence necessitated the request; (2) whether the continuance,  
21 if granted, would have satisfied the stated need for the  
22 continuance; (3) the impact of the continuance on the court and  
23 the adverse parties and (4) whether the requesting party was  
24 prejudiced by the denial. In re La Sierra Fin. Serv., Inc.,  
25 290 B.R. at 726; see also United States v. Pope, 841 F.2d 954,  
26 956 (9th Cir. 1988); United States v. 2.61 Acres of Land,  
27 791 F.2d 666, 671 (9th Cir. 1985).

28 However, we need not look at those factors in order to

1 uphold the bankruptcy court's denial here. We cannot and will  
2 not disturb a denial of a continuance sought for purposes of  
3 discovery unless the appellant has made the "'clearest showing'  
4 of actual and substantial prejudice." Martel v. County of Los  
5 Angeles, 56 F.3d 993, 995 (9th Cir. 1995) (en banc).

6 Under Martel, Hujazi's speculation that, if she had been  
7 given additional time to take some unspecified discovery, she  
8 might have uncovered some evidence tending to support her  
9 unsubstantiated allegations of bad faith is patently insufficient  
10 to meet her heavy burden of proof. Id. at 996-97. Moreover,  
11 Hujazi's lack of diligence by not requesting any discovery on the  
12 good faith issue either before or after our remand and her  
13 failure to file a written motion requesting a continuance for  
14 discovery purposes further bolster our conviction that Hujazi has  
15 not made the requisite showing of prejudice.<sup>4</sup>

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17 <sup>4</sup>Nearly two years elapsed between the entry of the  
18 bankruptcy court's June 2013 sale order and the May 2015 hearing  
19 on Hujazi's motion seeking reconsideration of the good faith  
20 issue. During that entire time, Hujazi knew or should have known  
21 that the bankruptcy court's § 363(m) good faith finding was a  
22 substantial and likely fatal impediment to her obtaining  
23 appellate review of the sale order. Hujazi also has known, since  
24 at least August 2013, that the Kravitz-Vista sale never closed  
25 and that the backup sale to Win Win took place. And Hujazi  
26 further has known, since at least March 2014, that an affiliate  
27 of Vista's - Alex Court LLC - purchased the Alexandria property  
28 from Win Win for \$6.8 million. Yet there is nothing in the  
record indicating that Hujazi ever made any effort to propound  
discovery to flesh out her theory why the post-sale-order events  
evidenced bad faith. There are a number of procedures that  
Hujazi potentially could have employed at various times between  
March 2014 and May 2015 to collect evidence regarding the good  
faith issue. See, e.g., Rules 2004, 7027, 9014(c). We express  
no opinion as to which of these discovery devices Hujazi  
appropriately could have utilized. It suffices for us to say

(continued...)

