

# NOT FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA  
RIVERSIDE DIVISION

In re: )  
6 )  
7 INLAND GLOBAL MEDICAL GROUP, )  
8 INC., )  
9 Debtor. )  
10 RICHARD K. DIAMOND, )  
11 CHAPTER 7 TRUSTEE, )  
12 Plaintiff, )  
13 v. )  
14 INLAND CARDIOLOGY MEDICAL )  
15 ASSOCIATES, )  
16 Defendant. )

Case No. RS 02-26263 PC

Adversary No. RS 04-02194 PC

Chapter 7



Date: May 30, 2006  
Time: 9:00 a.m.  
Place: U.S. Bankruptcy Court  
Courtroom #303  
3420 Twelfth Street  
Riverside, CA

## MEMORANDUM DECISION

18 In this adversary proceeding, Plaintiff, Richard K. Diamond, Chapter 7 Trustee  
19 (“Diamond”) seeks a judgment declaring that a transfer to or for the benefit of  
20 Defendant, B. Don Ahn, M.D. Inc., a California corporation doing business as Inland  
21 Cardiology Medical Associates (“ICMA”), made within 90 days before an involuntary  
22 petition was filed in the above referenced case constitutes a preference avoidable under  
23 § 547(b). ICMA asserts the affirmative defenses afforded by § 547(c)(2) and (c)(4).  
24 Trial was conducted on May 30, 2006, at which Sandor T. Boxer appeared for Diamond  
25 and Stephen R. Wade appeared for ICMA. After closing arguments, the matter was  
26 taken under submission pending the receipt of post-submission briefs by Diamond and  
27 ICMA. The court, having considered the pleadings, evidentiary record, trial briefs, post-

1 submission briefs and arguments of counsel, makes the following findings of fact and  
2 conclusions of law<sup>1</sup> pursuant to Fed. R. Civ. P. 52, as incorporated into Fed. R. Bankr.  
3 P. 7052.

#### 4 I. STATEMENT OF FACTS

5 On October 4, 2002, an involuntary chapter 7 petition was filed against Inland  
6 Global Medical Group, Inc. ("Inland Global"), in Case No. RS 02-26263 PC, styled  
7 Inland Global Medical Group, Inc., Debtor, in the United States Bankruptcy Court,  
8 Central District of California, Riverside Division. An order for relief under chapter 7 was  
9 entered on December 27, 2002. Diamond is the duly elected chapter 7 trustee of the  
10 bankruptcy estate of Inland Global, and has standing to pursue the causes of action  
11 alleged in the complaint filed in this adversary proceeding on behalf of such estate.

12 During the 90-days preceding the petition date, ICMA received three payments  
13 from Inland Global totaling \$115,565.50: (1) Check # 70678 in the amount of  
14 \$51,073.80 dated July 24, 2002; (2) Check # 70719 in the amount of \$16,296.10 dated  
15 August 8, 2002, and (3) Check # 71374 in the amount of \$48,195.60 dated September  
16 12, 2002.

17 On or about July 24, 2002, Inland Global wrote Check # 70678 in the amount of  
18 \$51,073.80, payable to ICMA dated July 24, 2002. The check was paid or honored on  
19 July 29, 2002. At trial, Diamond conceded that Check # 70678 was a "capitation  
20 payment" that was made for capitated services rendered by ICMA for Inland Global  
21 during the month of July 2002, and that ICMA had an affirmative defense under §  
22 547(c)(2) to his recovery of Check # 70678. Diamond acknowledged that the July  
23 capitation check was paid by Inland Global to ICMA in the ordinary course of business  
24

---

25 <sup>1</sup> To the extent that any finding of fact is construed to be a conclusion of law, it is hereby adopted as such.  
26 To the extent that any conclusion of law is construed to be a finding of fact, it is hereby adopted as such.  
27 The court reserves the right to make additional findings and conclusions as necessary or as may be  
requested by any party.

1 pursuant to ordinary business terms.

2 On or about August 8, 2002, Inland Global wrote Check # 70719 in the amount of  
3 \$16,296.10 dated August 8, 2002. The check was paid or honored on August 19, 2002.

4 At trial, Diamond conceded that Check # 70719 was a “fee for service” payment and  
5 that ICMA had an affirmative defense to his recovery of Check # 70719 under §  
6 547(c)(4), *i.e.*, that ICMA provided services on behalf of Inland Global after receiving  
7 Check # 70719 which constituted “new value” in excess of the transfer sought to be  
8 avoided.

9 On or about September 12, 2002, Inland Global wrote Check # 71374 in the  
10 amount of \$48,195.60 dated September 12, 2002. The check was paid or honored on  
11 September 16, 2002. Diamond and ICMA agree that Check # 71374 was made as a  
12 “capitation payment” to compensate ICMA for capitated services rendered during the  
13 month of August 2002, but the parties dispute whether either § 547(c)(4)’s “new value”  
14 defense or § 547(c)(2)’s “ordinary course defense” prevent its recovery as a preference  
15 by the trustee.

16 Both parties focused their post-submission briefs on the issue of whether Check  
17 # 71374 was paid in the ordinary course of business according to ordinary business  
18 terms. ICMA concedes that ultimate payment for its August capitated services was  
19 received nearly three weeks late, but contends that Check # 71374 was paid in the  
20 ordinary course of business according to ordinary business terms, reasoning that:

21 “[t]he capitation check for the month of August, 2002 was originally sent by Inland  
22 Global in late August, 2002, however, it was inadvertently switched with a check  
23 payable to another provider of Inland Global with a similar name in Redlands,  
24 California, such that [ICMA] received that entities [sic] check by mistake. That  
mistake was rectified by the mailing of check number 71374 to [ICMA] when the  
error was brought to the attention of Inland Global.<sup>2</sup>

25 Diamond disagrees, observing that all prior capitation payments were received by ICMA

---

26 <sup>2</sup> ICMA’s Supplemental Trial Brief, p.3, l.12-16.

1 from Inland Global during the month for which the services were rendered at or about  
2 the same date each month and that Check # 71374 was not an ordinary course  
3 payment due to its three-week delay. Thus, the only remaining issues before the court  
4 are (1) whether ICMA provided services to or for the benefit of Inland Global after  
5 receiving Check # 71374 which constituted “new value” in excess of the transfer sought  
6 to be avoided, or alternatively, (2) whether Inland Global’s issuance of Check # 71374  
7 on September 12, 2002, as a replacement check for ICMA’s timely August capitation  
8 payment which had been inadvertently mailed to another creditor, caused the transfer to  
9 fall outside the ordinary course of business.

## 10 II. DISCUSSION

11 This court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C.  
12 §§ 157(b) and 1334(b). This matter is a core proceeding under 28 U.S.C. §  
13 157(b)(2)(A), (F) and (O). Venue is appropriate in this court. 28 U.S.C. § 1409(a).

### 14 A. Section 547(c)(4)

15 Section 547(c)(4) states that the trustee may not avoid under § 547 a transfer to  
16 or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave  
17 new value to or for the benefit of the debtor –

18 (A) not secured by an otherwise unavoidable security interest; and

19 (B) on account of which new value the debtor did not make an otherwise  
20 unavoidable transfer to or for the benefit of such creditor.

21 11 U.S.C. § 547(c)(4). To prevail with the new value defense, a defendant must show  
22 (a) that it gave unsecured new value to or for the benefit of the debtor; (b) after the  
23 preferential transfer; and (c) the debtor did not repay the new value by an otherwise  
24 unavoidable transfer. Mosier v. Ever-Fresh Food Co. (In re IRFM, Inc.), 52 F.3d 228,  
25 231-32 (9th Cir. 1995).

26 “The ‘new value’ defense is grounded in the principle that the transfer of new  
27

1 value to the debtor will offset the payments, and the debtor's estate will not be depleted  
2 to the detriment of other creditors." Rodgers v. Schneider (In re Laguna Beach Motors,  
3 Inc.), 148 B.R. 322, 324 (9th Cir. BAP 1992), quoting In re Auto-Train Corp., 49 B.R.  
4 605, 612 (D.D.C. 1985), aff'd sub nom., Drabkin v. A.I. Credit Corp., 800 F.2d 1152  
5 (D.C. Cir. 1986).

6 In this case, the only evidence of new value given after the date of Check #  
7 71374 is the testimony of ICMA's office manager, Karen Stevens ("Stevens"), who is  
8 responsible for ICMA's billing and accounts receivable. Stevens testified:

9 "In September, 2002, and until October 4, 2002 when this bankruptcy case was  
10 filed, [ICMA] continued to perform capitation services for patients of Inland Global  
11 at the same rate as in the previous two months. [ICMA] has not been paid for  
12 such services from Inland Global or any other source."<sup>3</sup>

13 ICMA did not offer any evidence concerning the nature and extent of the capitated  
14 services actually performed between September 12, 2002 and October 4, 2002, nor  
15 whether such treatment was authorized by Inland Global. Indeed, Stevens admitted on  
16 cross-examination that ICMA did not maintain an internal record of its capitated services  
17 rendered to or for the benefit of Inland Global. On direct examination, Stevens  
18 explained that ICMA relied on Inland Global's accounting of capitated services when it  
19 received payment for such services, stating that:

20 "[ICMA] was usually paid near the end of each calendar month for services  
21 rendered during that month. Included with the check from Inland Global for  
22 capitated services in such month was an accounting which established the  
23 number or patients lives compensated broken down by insurer."<sup>4</sup>

24 Without Inland Global's accounting, there is no way of measuring the value of capitated  
25 services ostensibly rendered by ICMA to Inland Global after September 4, 2002.

---

26 <sup>3</sup> Declaration of Karen Stevens in Lieu of Direct Testimony at Trial, p.4, l.9-12.

27 <sup>4</sup> Declaration of Karen Stevens in Lieu of Direct Testimony at Trial, p.3, l.22-24. The Specialty Capitation  
accountings from Inland Global to ICMA for the months of July 2002 and August 2002 were admitted as  
Defendant's Exhibit C. ICMA did not offer a similar accounting for the period of September 1, 2002  
through October 4, 2002.

1           The defendant in a preferential transfer proceeding has the burden of proving  
2 any exceptions to avoidance under § 547(c). 11 U.S.C. § 547(g). See Marshack v.  
3 Orange Commercial Credit (In re Nat'l Lumber & Supply, Inc.), 184 B.R. 74, 75 (9<sup>th</sup> Cir.  
4 BAP 1995). With respect to § 547(c)(4), creditors have the burden of establishing with  
5 specificity the measure of new value given to the debtor in the exchange. See, e.g.,  
6 Official Unsecured Creditors' Comm. v. Airport Aviation Servs., Inc. (In re Arrow Air,  
7 Inc.), 940 F.2d 1463, 1466 (11<sup>th</sup> Cir. 1991); Creditors' Comm. v. Spada (In re Spada),  
8 903 F.2d 971, 976 (3<sup>rd</sup> Cir. 1990); Jet Florida, Inc. v. Am. Airlines, Inc. (In re Jet Florida  
9 Sys., Inc.), 861 F.2d 1555, 1559 (11<sup>th</sup> Cir. 1988). Creditors relying on § 547(c)(4) must  
10 also prove that the new value has not been repaid by an otherwise unavoidable  
11 transfer. See IRFM, 52 F.3d at 231; Nat'l Lumber, 184 B.R. at 81. Having failed to  
12 establish with specificity the new value given to Inland Global and that the new value  
13 was not repaid by an otherwise unavoidable transfer, ICMA is not entitled to a new  
14 value defense against Diamond's preference claim for recovery of Check # 71374.

15 B.    Section 547(c)(2)

16           Under § 547(c)(2), a trustee may not avoid an otherwise preferential transfer to  
17 or for the benefit of a creditor to the extent that such a transfer was –

18           (A) in payment of a debt incurred by the debtor in the ordinary course of business  
19           or financial affairs of the debtor and the transferee;

20           (B) made in the ordinary course of business or financial affairs of the debtor and  
21           the transferee, and

22           (C) made according to ordinary business terms.

23 11 U.S.C. § 547(c)(2)

24           Section 547(c)(2) is comprised of a subjective test and an objective test. See  
25 Cocolat, Inc. v. Fisher Dev., Inc. (In re Cocolat, Inc.), 176 B.R. 540, 549 (Bankr. N.D.  
26 Cal. 1995). The transferee has the burden of proving the defense and must prove each  
27

1 of the three elements by a preponderance of the evidence. Arrow Elec., Inc. v. Justus  
2 (In re Kaypro), 230 B.R. 400, 404 (9th Cir. BAP 1999), aff'd in part, rev'd in part, 218  
3 F.3d 1070 (9th Cir. 2000).

4 1. Ordinary Course of Business

5 Section 547(c)(2)(A) & (B), which together form the subjective test, require a  
6 creditor to demonstrate that the debt and its payment are ordinary in relation to past  
7 practices or a prior course of dealing between the debtor and the creditor. See, e.g.,  
8 Sulmeyer v. Suzuki (In re Grand Chevrolet, Inc), 25 F.3d 728, 732 (9th Cir. 1994); Bell  
9 Flavors & Fragrances, Inc. v. Andrew (In re Loretto Winery, Ltd.), 107 B.R. 707, 709  
10 (9th Cir. BAP 1989); Cocolat, 176 B.R. at 549.

11 Section 547(c)(2)(A) focuses on whether the incurrence of debt was ordinary,  
12 i.e., whether the debt was incurred by the debtor in the ordinary course of business.  
13 See Cocolat, 176 B.R. at 549. Section 547(c)(2)(B) requires the court to examine the  
14 following factors to determine if payment of the debt was ordinary in light of past  
15 practices between debtor and creditor: (1) the length of time the parties were engaged  
16 in the transactions at issue; (2) whether the amount or form of tender differed from past  
17 practices; (3) whether the debtor or creditor engaged in any unusual collection or  
18 payment activity; and (4) whether the creditor took advantage of the debtor's  
19 deteriorating financial condition. See Grand Chevrolet, 25 F.3d at 732; Cocolat, 176  
20 B.R. at 549.

21 In this case, the first prong of § 547(c)(2) is satisfied. There is no material  
22 dispute that Check # 71374 was in payment of a debt incurred by Inland Global in the  
23 ordinary course of Inland Global's business. 11 U.S.C. § 547(c)(2)(A). The court  
24 further finds that ICMA has met the second prong of § 547(c)(2)'s subjective test, i.e.,  
25 that payment of the debt was ordinary in light of past practices between ICMA and  
26 Inland Global. Generally, capitation payments were made by Inland Global to ICMA  
27

1 during the month for which the services were rendered, and such payments were  
2 received by ICMA on or about the same date each month. In July 2002, for example,  
3 Inland Global paid ICMA for its capitated services that month by Check # 70678 dated  
4 July 24, 2002. Neither party disputes that such payment was ordinary in light of past  
5 practices between the parties.

6 In August 2002, ICMA rendered capitation services to Inland Global and Inland  
7 Global followed the same practice to pay for such services. According to the evidence,  
8 Inland Global issued a check to ICMA toward the end of August 2002 in payment of  
9 capitated services rendered by ICMA to Inland Global during the month. In August,  
10 ICMA received a check from Inland Global for the August capitation services. The  
11 amount and form of tender did not differ from past practices, except that the check  
12 received was payable to another provider and ICMA's check was sent to an incorrect  
13 address. Stevens testified that Inland Global's original capitation check for the month of  
14 August 2002 was inadvertently switched with a check payable to another provider with a  
15 similar name.<sup>5</sup> Inland Global rectified the mistake by sending Check # 71374 to ICMA  
16 on September 12, 2002.

17 Diamond correctly observes that the August 2002 capitation payment was the  
18 only capitation payment received by ICMA outside the normal billing practice between  
19 the parties. But Inland Global's initial payment of ICMA's August capitation services  
20 was consistent with the prior course of dealing between the parties. Inland Global's  
21 original check was issued timely. The original check was timely received by ICMA. The  
22 delay in actual payment was caused by the misdirection of the original check  
23 necessitating the mailing a second check. Except for the mistake in mailing the original  
24

---

25 <sup>5</sup> According to Stevens' testimony at trial, a check for the August 2002 capitation payment was received  
26 around August 24 or 25, 2002. However, it was addressed to "Inland Cardiology Group" or something  
27 similar. Ms. Stevens further testified that since that check was addressed to a different entity, that check  
was returned to Inland Global "and it took'em [until mid-September] to get another check." FTR  
Transcript, 10:54:00.



1 check, there is no evidence of unusual collection or payment activity nor is there any  
2 evidence that ICMA sought to take advantage of Inland Global's deteriorating financial  
3 condition.<sup>6</sup> Weighed in light of the subjective test set forth in Grand Chevrolet, the court  
4 finds that the foregoing factors tip narrowly in favor of ICMA.

## 5 2. Ordinary Business Terms

6 Section 547(c)(2)(C)'s objective test requires a creditor to prove that the payment  
7 was ordinary in relation to prevailing business standards. See, e.g., Ganis Credit Corp.  
8 v. Anderson (In re Jan Weilert RV, Inc.), 315 F.3d 1192, 1197 (9<sup>th</sup> Cir. 2003); In re Food  
9 Catering & Housing, Inc., 971 F.2d 396, 398 (9th Cir, 1992). In other words, §  
10 547(c)(2)(C)'s objective standard requires proof of "practices common to businesses  
11 similarly situated to the debtor and the transferee." Loretto Winery, 107 B.R. at 709. It  
12 is not enough to prove what past practices were between the particular creditor and the  
13 debtor. Id. The focus of the inquiry is whether the payment practice at issue comports  
14 with industry standards. See Jan Weilert, 315 F.3d at 1197.

15 Section 547(c)(2)(C)'s objective test requires consideration of both the creditor's  
16 and the debtor's industries, *i.e.*, "the broad range of terms that encompasses the  
17 practices employed by those debtors and creditors, including terms that are ordinary for  
18 those under financial distress." Jan Weilert, 315 F.3d at 1198 (citations omitted).

19 According to the Ninth Circuit:

20 [T]he creditor must show that the payment he received was made in accordance  
21 with the ordinary business terms in the industry. But this does not mean that the  
22 creditor must establish the existence of some single, uniform set of business  
23 terms . . . . We conclude that "ordinary business terms" refers to the range of  
24 terms that encompasses the practices in which firms similar in some general way  
to the creditor in question engage, and that only dealings so idiosyncratic as to  
fall outside that broad range should be deemed extraordinary and therefore  
outside the scope of [the ordinary course of business].

---

25 <sup>6</sup> There is also no evidence that the original check to ICMA was dishonored for insufficient funds. Checks  
26 dishonored for insufficient funds generally do not fall within the ordinary course of business. See, e.g.,  
27 Matter of Anderson-Smith & Assocs., Inc., 188 B.R. 679, 686 (Bankr. N.D. Ala. 1995); Pressman v.  
Rodemich (In re So Good Potato Chip Co.), 137 B.R. 330, 331 (Bankr. E.D. Mo. 1992).

1 Id., quoting In re Tolona Pizza Prods. Corp., 3 F.3d 1029, 1033 (7th Cir. 1993).

2 With respect to the third element of § 547(c)(2), Diamond correctly points out that  
3 ICMA was required to offer some evidence of industry standards to sustain its burden  
4 under § 547(c)(2)(C). In re Hessco Indus., Inc., 295 B.R. 372, 376 (9<sup>th</sup> Cir. BAP 2003);  
5 Loretto Winery, 107 B.R. at 709. ICMA did not offer evidence concerning the normal  
6 practices in the industry with regard to payment, including late payments and  
7 misdirected payments. In particular, ICMA did not offer any evidence upon which the  
8 court could base a finding that Inland Global's issuance of Check # 71374 on  
9 September 12, 2002, as a replacement check for ICMA's timely August capitation  
10 payment that had been inadvertently mailed to another creditor, was consistent with  
11 ordinary business practices among capitation medical providers in the profession.<sup>7</sup>

12 The purpose and policy underlying § 547(c)(2)(C)'s evidentiary requirement was  
13 explained in the Eleventh Circuit's decision reversing Miller v. Florida Mining & Materials  
14 (In re A.W. Assocs., Inc.), 196 B.R. 900 (Bankr. N.D. Fla. 1996), a bankruptcy court  
15 decision cited by ICMA.<sup>8</sup> In that case, the trustee sought to avoid as a preferential  
16 transfer a payment of \$6,131.05 made by the debtor within 90 days prior to bankruptcy  
17 in payment of five invoices dated January 29, 1993 through February 4, 1993. Each  
18 invoice stated that payment was due on the tenth of the month following the month of  
19 the deliveries identified in the invoice. Therefore, the first invoice dated January 29,  
20 1993, in the amount of \$2,626.29 was due on February 10, 1993, and payment for the  
21 remaining invoices was due not later than March 10, 1993. The debtor, however, had a  
22 consistent history of late payments to the creditor. Indeed, the evidence established  
23 that the debtor had timely paid only 13 of 61 invoices sent by the creditor between April  
24

---

25 <sup>7</sup> Nor was there testimony or other evidence explaining the ultimate disposition of the original check issued  
26 by Inland Global to ICMA.

27 <sup>8</sup> ICMA's Supplemental Trial Brief, p.5, l.5-7.

1 27, 1992 and January 29, 1993. The debtor's practice of "batching" invoices for  
2 payment by a single check contributed to the delay in payment. Notwithstanding the  
3 debtor's chronic late payments, the creditor continued to make deliveries to the debtor.  
4 When checks were returned for insufficient funds, the creditor routinely resubmitted the  
5 checks for payment without suspending deliveries or taking extraordinary action to  
6 collect the debt. The bankruptcy court held that the transfer was excepted from  
7 avoidance under § 547(c)(2), stating that "[g]iven the surrounding facts and  
8 circumstances, the March 10, 1993 payment was made according to ordinary business  
9 terms." Id. at 906. The court further held that "[t]he payment was not received as a  
10 result of extraordinary collection efforts." Id. at 907. In so holding, the bankruptcy court  
11 ruled that § 547(c)(2)'s exception hinges upon "upon the debtor's internal operations  
12 and the circumstances of the transaction in question, not industry standards." Id. at  
13 905. The district court affirmed, holding that the payment was made in the ordinary  
14 course of business even if industry standards are considered. But the record contained  
15 no evidence of industry standards to support the district court's conclusion. Miller v.  
16 Florida Mining & Materials (In re A.W. Assocs., Inc.), 136 F.3d 1439, 1441 n.5 (11<sup>th</sup> Cir.  
17 1998).

18 The Eleventh Circuit reversed and remanded, holding that "[t]he bankruptcy court  
19 erred in failing to consider industry standards in determining whether the disputed  
20 transfer satisfied the provisions of § 547(c)(2). A.W. Assocs., 136 F.3d at 1443. In so  
21 holding, the court explained that § 547(c)(2)(C)'s requirement that the bankruptcy court  
22 examine industry standards serves a two-fold purpose:

23 (1) comparison to industry standards serves the evidentiary function of providing  
24 a basis to evaluate the parties' self-serving testimony that an extraordinary  
25 transaction which was in fact intended as a preference towards a particular  
26 creditor was instead part of a series of transactions within a business  
27 relationship; and (2) reference to industry standards reassures other creditors  
that deals have not been worked out favoring a particular creditor, which would  
permit a preference to slide under the § 547 fence.

1 Id. at 1442 n.10. See Matter of Tolona Pizza Prods. Corp., 3 F.3d 1029, 1032 (7<sup>th</sup> Cir.  
2 1993). The court concluded that:

3 Industry standards do not serve as a litmus test by which the legitimacy of a  
4 transfer is adjudged, but function as a general backdrop against which the  
specific transaction at issue is evaluated.

5 Id. at 1443. The Eleventh Circuit reasoned that “an interpretation of § 547(c)(2)(C)  
6 which focuses exclusively on the relationship between the creditor and the debtor would  
7 deprive subsection (c)(2)(C) of any independent meaning because subsection (c)(2)(B)  
8 already requires that the payment be evaluated in the context of the ongoing  
9 relationship between the debtor and the creditor.” Id. at 1442.

10 In its post-submission brief, ICMA points to Jan Weilert arguing that “[t]his  
11 situation is surely not the type of transaction which is so uncommon, so unusual, so  
12 aberrational, so idiosyncratic and so far outside the range of ordinary terms such as to  
13 subject a physician, who provided services in August, 2002 for which he was paid in the  
14 middle of the following month, to disgorgement [sic] of over \$50,000 as a result of a  
15 simple mistake in addressing his check.”<sup>9</sup> However, other than the narrow exception  
16 carved out for refunds,<sup>10</sup> there is nothing in the Ninth Circuit’s decision in Jan Weilert

17 \_\_\_\_\_  
18 <sup>9</sup> ICMA’s Supplemental Trial Brief, p.6, l.26 to p.7, l.3.

19 <sup>10</sup> In Jan Weilert, Bank of the West mailed a cashier’s check to the debtor after the debtor sold a new RV.  
20 Several days later, the bank mistakenly made a second payment by direct deposit into the debtor’s  
21 account. When the bank discovered the error, it contacted the debtor and requested a refund of the  
22 second payment. Three days later, the debtor issued a refund to the bank. At trial, Bank of the West  
23 presented evidence that the recovery was accomplished according to procedures the bank had  
24 established for recovering such payments. The bankruptcy court held that the refund payment was made  
25 in the ordinary course of business. Jan Weilert, 245 B.R. at 389. The district court reversed, holding that  
26 Bank of the West had failed to produce “evidence of the standard practices other lenders in the industry  
27 use to recover double payments.” Jan Weilert, 315 F.3d at 1200. The Ninth Circuit reversed the district  
court, stating held:

24 While we hold to the rule that evidence as to the range of industry practice is ordinarily required,  
25 the problem of refunds of mistaken payments is exceptional. Like all recipients of mistaken  
26 payments, Debtor was subject to a legal obligation promptly to refund the money. It fulfilled this  
27 obligation by issuing a refund check within three days, which would clearly have fallen within the  
ordinary range no matter what the relevant industry or practice. Here, the ‘ordinariness’ of the  
Debtor’s compliance with its legal obligation is obvious, and additional evidence of industry

1 which relieves a creditor of its burden under § 547(c)(2)(C) to provide some evidence of  
2 industry standards upon which the court can make a finding that a particular transfer  
3 either falls within “the *broad range* of terms that encompasses the practices employed”  
4 by similarly situated debtors and creditors or “is so unusual or uncommon ‘as to render  
5 it an aberration in the relevant industry.’” Jan Weilert, 315 F.3d at 1198. The court  
6 declines ICMA’s invitation to make such a finding under § 547(c)(2)(C) in this case  
7 without evidence of industry standards.

8 Based on the foregoing, the court finds that ICMA did not establish each of §  
9 547(c)(2)’s elements by a preponderance of the evidence, and therefore, is not entitled  
10 to an ordinary course defense against Diamond’s preference claim.

11 CONCLUSION

12 For the foregoing reasons, the court will enter judgment awarding the sum of  
13 \$48,195.60 to Diamond pursuant to § 547(b), together with prejudgment interest from  
14 December 21, 2004, to entry of judgment, and costs of court. A separate judgment will  
15 be entered consistent with this opinion.

16 DATED:

17 \_\_\_\_\_  
18 PETER H. CARROLL  
19 United States Bankruptcy Judge  
20  
21  
22

23 \_\_\_\_\_  
24 practice could not have assisted the court in recognizing that the refund was ‘made according to  
25 ordinary business terms.’ The law does not inflexibly demand form over substance.

25 Jan Weilert, 315 F.3d at 1199, as amended, 326 F.3d 1028, 1029-30 (9<sup>th</sup> Cir. 2003). The Ninth Circuit  
26 held that “additional evidence of industry standards is not necessary under § 547(c)(2)(C), when the  
27 transferee can prove that (1) money was mistakenly transferred to the debtor, (2) the mistake was quickly  
discovered, (3) a refund was immediately requested, and (4) the refund was tendered within three days.  
Jan Weilert, 315 F.3d at 1200. The refund exception is not applicable in this case.

**NOTE TO USERS OF THIS FORM:**

*Physically attach this form as the last page of the proposed Order or Judgment.  
Do not file this form as a separate document.*

In re INLAND GLOBAL MEDICAL GROUP, INC.,  Debtor.	CHAPTER <u>7</u>  CASE NUMBER RS 04-02194 PC
---	--

**NOTICE OF ENTRY OF JUDGMENT OR ORDER  
AND CERTIFICATE OF MAILING**

TO ALL PARTIES IN INTEREST ON THE ATTACHED SERVICE LIST:

1. You are hereby notified, pursuant to Local Bankruptcy Rule 9021-1(a)(1)(E), that a judgment or order entitled *(specify)*: MEMORANDUM DECISION

was entered on *(specify date)*: **SEP - 7 2006**

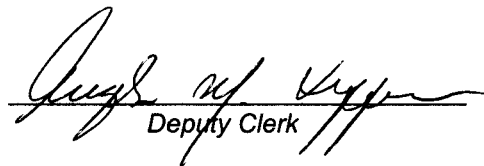
2. I hereby certify that I mailed a copy of this notice and a true copy of the order or judgment to the persons and entities on the attached service list on *(specify date)*:

**SEP - 7 2006**

Dated: **SEP - 7 2006**

**JON D. CERETTO**  
Clerk of the Bankruptcy Court

By:

  
Deputy Clerk

## Service List

Sandor T. Boxer, Esq.  
Law Offices of Sandor T. Boxer  
12400 Wilshire Blvd., Suite 1300  
Los Angeles, CA 90025

Stephen R. Wade, Esq.  
Law Offices of Stephen R. Wade  
400 N. Mountain Avenue, Suite 214B  
Upland, CA 91786