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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION**

**In re:** § **Chapter 11**  
§  
**PREFERRED CARE INC., et. al.** § **Case No.: 17-44642**  
§  
**Debtors.** § **Jointly Administered**  
§

**DEBTORS’ OMNIBUS RESPONSE TO THE MOTIONS FOR RECONSIDERATION  
OF THE KENTUCKY TRANSFER ORDER, SCOTT SETTLEMENT ORDER, AND FC  
DOMINO SETTLEMENT ORDER, AND BRIEF IN SUPPORT THEREOF**

**[Relates to Docket Nos. 973, 974, and 975]**

Preferred Care Inc. and its debtor affiliates, as debtors and debtors in possession (collectively, the “**Debtors**”)<sup>1</sup> hereby submit this their *Omnibus Response* (the “**Response**”) to the following motions (collectively, the “**Reconsideration Motions**”) filed by “Certain Personal Injury Claimants” (referred to herein as the “**Wilkes Parties**”):

- (i) *Motion for Reconsideration and Reconsideration of Debtors’ Kentucky Transfer Motion [Docket No. 814] and Order Granting Kentucky Transfer Motion [Docket No. 937]* (the “**Kentucky Transfer Reconsideration Motion**”);
- (ii) *Motion for Reconsideration and Reconsideration of Debtors’ Motion to Approve Scott Settlement Agreement [Docket No. 702] and Order Approving the Scott*

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<sup>1</sup> A list of the Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, is attached hereto.

*Settlement Agreement [Docket No. 953 and 954]* (the “**Scott Settlement Reconsideration Motion**”); and,

- (iii) *Motion for Reconsideration and Reconsideration of Debtors’ Motion for Approval of FC Domino Compromise and Settlement [Docket No. 815] and Order Granting Approval of FC Domino Settlement [Docket No. 938]* (the “**FC Domino Settlement Reconsideration Motion**”).

**I.**  
**EXECUTIVE SUMMARY**<sup>2</sup>

1. The Wilkes Parties ask the Court to reconsider the Orders because the transfer to Sapphire was unable to close on August 1, 2018, as originally planned (closing is now scheduled for September 1, 2018). The Court should deny the Reconsideration Motions for the reasons set forth below.

**A. Kentucky Facility Leases and Section 365(d) Deadline**

2. Preferred Care, Inc. (“**Preferred Care**”) leases twenty-one (21) facilities in Kentucky (the “**Kentucky Facilities**”) pursuant to two master leases (the “**Master Leases**”) with FC Domino Acquisition, LLC and its affiliates (collectively, “**FC Domino**”). Preferred Care subleases the Kentucky Facilities (the “**Subleases**”) to twenty-one (21) of the Debtors (the “**Kentucky Debtors**”). The Kentucky Debtors are the current operators of the Kentucky Facilities.

3. Section 365(d) of the Bankruptcy Code provides that the Debtors’ real property leases are deemed rejected if not assumed within 120 days of the Petition Date. The Court extended that deadline for cause for an additional 90 days to June 11, 2018. Any additional extensions of the deadline require the lessor’s consent pursuant to Section 365(d) of the Bankruptcy Code.

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<sup>2</sup> All capitalized terms not defined in the Executive Summary shall carry the meanings ascribed later in the Response.

4. Pursuant to a Stipulation and Agreed Order approved by this Court on June 11, 2018, FC Domino agreed to extend the deadline solely to reject (but not to assume) the leases of the Kentucky Facilities to August 1, 2018. Accordingly, after June 11, 2018, the Kentucky Debtors had no ability to assume and assign their leases; any proposed new operator must be approved by FC Domino as a new lessee of FC Domino.

**B. The Kentucky Transfer Motion and FC Domino Settlement Motion**

5. The Kentucky Debtors entered into Operations Transfer Agreements (“OTAs”) with certain purchasers (collectively referred to as “**Sapphire**”) in which they agreed, subject to Court approval, to transfer the operations of the Kentucky Facilities to Sapphire on August 1, 2018. In addition, the Kentucky Debtors agreed to reject their leases on August 1, 2018, thereby allowing Sapphire to enter into new leases with FC Domino for the Kentucky Facilities. FC Domino supports the transfer of the Kentucky Facilities to Sapphire.

6. The Kentucky Debtors filed their Kentucky Transfer Motion on June 27, 2018, requesting authority of this Court to transfer their operations to Sapphire and to reject their leases effective August 1, 2018. In addition, the Debtors entered into a compromise and settlement agreement with FC Domino and Thomas Scott providing, in part, for the release of the lease rejection claims of FC Domino against the Debtors (the “**FC Domino Settlement**”). The FC Domino Settlement Motion was filed with this Court on June 7, 2018. The Kentucky Transfer Motion and the FC Domino Settlement Motion were scheduled for hearing on July 23, 2018.

**C. The PCI Subs Sale Motion and Scott Settlement Motion**

7. The Kentucky Debtors projected that they would not have sufficient cash available to pay the “transition costs” incurred prior to the proposed transfer to Sapphire but payable thereafter (i.e., “trailing”), including accounts payable and employee obligations. To fund the projected shortfalls, the Debtors:

- (i) agreed to sell the Preferred Care subsidiaries for \$2 million to Mr. Scott, or to any purchaser submitting a higher and/or better qualified offer received pursuant to a Court-approved sale process under 11 U.S.C. § 363, and
- (ii) agreed to compromise and settle the estates causes of action against Mr. Scott for \$3 million.

The Debtors then filed their PCI Subs Sale and Scott Settlement Motion with this Court and set them for hearing on July 23, 2018.

8. The Court conducted hearings on all four (4) of the above referenced, somewhat inter-related motions (the “**Motions**”) on July 23-24, 2018, and approved all four Motions.

**D. Closing Extension**

9. On July 26, 2018, Sapphire informed the Debtors that it could not close on August 1, 2018, and the parties rescheduled the closing of the transfer of the Kentucky Facilities to September 1, 2018. FC Domino agreed, and agreed to extend the Debtors §365(d) deadline to reject the leases of the Kentucky Facilities to September 1, 2018.

**E. Reconsideration Motions**

10. On August 8, 2018, the Wilkes Parties filed the Reconsideration Motions.

11. The Wilkes Parties imply in the Reconsideration Motions that the Debtors created a false emergency for the relief requested in the Motions by misleading the Court at the July 23<sup>rd</sup> hearings. Wilkes implies the Debtors represented that the closing would occur on August 1, 2018, when they knew beforehand that Sapphire would not close on August 1, 2018. The Wilkes Parties claim that the delay in closing from August 1 to September 1 somehow necessitates

reconsideration of the Kentucky Transfer Order, the FC Domino Settlement Order and the Scott Settlement Order.<sup>3</sup>

12. The Wilkes Parties goal with respect to the Reconsideration Motions is unclear. At the Hearing and in their pleadings, they essentially argue that the Court should deny the relief sought by the Debtors, and the Debtors should then either continue operating the Kentucky Facilities indefinitely or look for another transferee. The Wilkes Parties ignore the §365(d) deadline and the fact that FC Domino has to approve and enter into new leases with any new operator, and FC Domino will not extend the Debtors §365(d) deadline except to get the Sapphire transfer closed.

13. The Wilkes Parties claim that their objections are out of concern for the residents, but again, they ignore the Debtors inability to operate indefinitely and the “veto power” §365(d) provides FC Domino over any new proposed operator.

14. Regardless of their intent, the Wilkes Parties are wrong. The Debtors’ did not know at the July 23<sup>rd</sup> hearings that Sapphire could not close on August 1. Debtors’ counsel was informed on July 26, 2018 that Sapphire would not close on August 1. Before that the Debtors believed that Sapphire would close as expected. Debtors’ counsel then informed the Court and all parties present of the delay to September 1 at the next-scheduled hearing on July 30.

15. Additionally:

- (i) The Kentucky Debtors (other than the 2 “HUD Debtors”) intend to close the transfer of their operations to Sapphire on September 1; this transfer and the FC Domino Settlement required Bankruptcy Court approval, whether closed on August 1 or September 1. The Debtors will incur post-closing transition costs that require funding, when closed on August 1 or September 1. Accordingly, the PCI Subs Sale Motion and the Scott

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<sup>3</sup> The orders on which the Wilkes Parties seek reconsideration were entered at Docket Nos. 937, 938, and 953/954 (together, the “**Orders**”).

Settlement motion were necessary to fund those expenses and required Bankruptcy Court approval, whether closed on August 1 or September 1.

- (ii) Transferring the Kentucky Facilities to Sapphire remains in the best interests of the Debtors, their Estates, and their Residents, just as it was when the Court entered the Orders in the first place.

16. Thus, the Bankruptcy Court's approval of the Kentucky Transfer Motion, the FC Domino Settlement Motion, and the Scott Settlement Motion remains appropriate under the circumstances, and the Reconsideration Motions should be denied on their merits. Additionally, by the time the Reconsideration Motions are heard on September 11, they will be moot. With the exception of the two (2) HUD Facilities (for which HUD approval is still pending), the Debtors are scheduled to close on or about September 1, 2018 the transfer of their Kentucky Facilities, the FC Domino Settlement, and the Scott Settlement.

## II.

### FACTUAL AND PROCEDURAL BACKGROUND

#### A. The Bankruptcy Filings

3. On November 13, 2017 (the "**Petition Date**"), the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. The resulting cases (the "**Chapter 11 Cases**") were administratively consolidated into Case No. 17-44642.

17. The early stages of the Chapter 11 Cases were devoted to stabilizing the Debtors' operations, obtaining debtor-in-possession financing from Wells Fargo (the "**Wells Fargo DIP Facility**") and FSF DIP, LLC (the "**Scott DIP Facility**"), and identifying new operators to take over the operations of the Kentucky and New Mexico Facilities. The Debtors have consistently maintained their intent to transfer their Facilities to new operators throughout the Chapter 11 Cases. The Debtors' pleadings set forth below were intended to facilitate that process.

**B. The Debtors' Need for Additional Funds**

18. Beginning in early 2018, the Debtors began negotiating the terms of Operating Transfer Agreements (the "OTAs") by which the Debtors transfer the operations and related assets, other than accounts receivable, of their Facilities. Under any scenario, the Debtors would retain existing accounts receivable as of the closing date for a given Facility, collect those pre-closing accounts receivable over time, and use the proceeds to pay down the Wells Fargo DIP Facility. The Debtors would then use the resulting availability to pay accounts payable and employee obligations that arose prior to the closing but did not become due until later. The Debtors refer to these obligations as "trailing payables."

19. During the course of their negotiations with new operators for the Kentucky and New Mexico Facilities, the Debtors determined that additional funds were necessary in order for the Debtors to pay all of their trailing payables on the Facilities being transferred. While the collection and application of pre-closing accounts receivable would create availability under the Wells Fargo DIP Facility, removing the transferred Facilities from the line of credit means that no additional accounts receivable would be generated, reducing the borrowing base. The Debtors had to have additional sources of funds to use to create additional availability.

20. In April 2018, the Debtors began analyzing possible avenues for generating those funds, including the liquidation of estate assets. The Debtors' intent to transfer the operations and related assets of the Facilities, however, left relatively few assets in their estates outside of accounts receivable (which, as discussed above, would not be transferred but would instead already be used to pay down the Wells Fargo DIP Facility), equity interests owned by Preferred Care in certain of its subsidiary entities, and causes of action owned by the estates. The Debtors had few choices for how to raise the money they needed.

### C. The Scott Settlement and PCI Subs Sale

21. Ultimately, the Debtors decided on a two-phase approach to generating additional funds. First, the Debtors would establish a court-approved process for selling Preferred Care's equity interest in certain of its subsidiaries (the "**PCI Subs**"). That process included using Thomas D. Scott ("**Mr. Scott**"), the principal of the Debtors, as a stalking-horse bidder and engaging a broker to identify other interested parties. On April 27, 2018, the Debtors filed their PCI Subs Sale Motion<sup>4</sup> seeking immediate approval of: 1) bid procedures for the sale of the PCI Subs, 2) a form stock purchase agreement, and 3) the form and manner of notices. The Court granted this relief on May 8, 2018 by order entered at Docket Nos. 687 and 688 and set the actual sale hearing for July 23, 2018, allowing for a two month sale process. The total amount of Mr. Scott's stalking-horse bid for the PCI Subs was \$2 million.

22. Next, the Debtors sought approval to settle certain causes of action, including avoidance and derivative claims, against Mr. Scott and his affiliated entities. On May 18, 2018, the Debtors filed the Scott Settlement Motion<sup>5</sup> seeking approval of a proposed settlement agreement with Mr. Scott, and his related entities (the "**Scott Affiliates**"), and Robert J. Riek ("**Riek**," and, together with Mr. Scott and the Scott Affiliates, the "**Scott Parties**") that would settle and release all claims and causes of action owned by the Debtors against the Scott Parties in exchange for, among other things, \$3 million (the "**Settlement Payment**"). The Debtors set the Scott Settlement Motion for hearing on July 23, 2018. Since Mr. Scott is an insider, the Debtors understood that any proposed settlement with him or his entities required heightened

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<sup>4</sup> *Motion for Entry of an Order (I) Authorizing and Approving (A) Bid Procedures; (B) Form of Stock Purchase Agreement; and (C) Form and Manner of Notices; (II) Scheduling an Auction and Sale Hearing; (III) Approving the Sale of Substantially All the Assets of Preferred Care Inc. Free and Clear of All Liens, Claims, Encumbrances and Interests; and (IV) Granting Related Relief* [Docket Nos. 656 and 674].

<sup>5</sup> *Motion to Approve Scott Settlement Agreement* [Docket No. 702].

scrutiny. Accordingly, the Debtors provided all parties in interest approximately two (2) months' notice of proposed settlement and the hearing to ensure sufficient time for any requested investigation and discovery.

**D. The Kentucky Transfer and FC Domino Settlement Motions**

23. On June 27, 2018, certain of the Debtors filed the Kentucky Transfer Motion<sup>6</sup> seeking approval of the transfer of the Kentucky Facilities to new purchasers (referred to collectively herein as “**Sapphire**”) pursuant to OTAs. The anticipated closing date for the transfer of the Kentucky Facilities was August 1, 2018.

24. Due to the involvement of FC Domino in approving any new operators/tenants for the Facilities, the OTAs required that the Debtors' existing leases on those Facilities be rejected and terminated. The Debtors and FC Domino agreed to a settlement whereby FC Domino waived any lease rejection claims against the Debtors, the Debtors forfeited a deposit held by FC Domino, and Mr. Scott agreed to certain monetary considerations in exchange for a release of his guaranty of the leases. Approval of the OTAs by FC Domino was conditioned on approval of the FC Domino Settlement by the Court as part of the larger process of transferring the Kentucky Facilities. Accordingly, the Debtors filed the FC Domino Settlement Motion<sup>7</sup> contemporaneously with the Kentucky Transfer Motion and set both for hearing on July 23, 2018.

**E. The Hearing**

25. The Debtors set the four Motions described above for hearing together on Monday, July 23, 2018 (the “**Hearing**”) despite the fact that some were filed months in advance

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<sup>6</sup> *Motion for Order (A) Granting Authority to: (I) Transfer the Operations and Related Assets of the Kentucky Facilities Free and Clear of all Liens Claims, Encumbrances, and Interests; (II) Assume and Assign Certain Executory Contracts and Unexpired Leases; and (III) Reject and Terminate the Kentucky Facility Leases; (B) Approving the Form of Operating Transfer Agreement; and (C) Granting Related Relief and Brief in Support* [Docket No. 824].

<sup>7</sup> *Motion for Approval of FC Domino Compromise and Settlement Agreement* [Docket No. 815].

of that date. Again, the Motions are the PCI Subs Sale Motion, the Scott Settlement Motion, the Kentucky Transfer Motion, and the FC Domino Settlement Motion. Prior to the Hearing, various parties filed objections, responses, and/or joinders to the objections and responses filed by other parties, to the Motions. The Wilkes Parties, in particular, filed joinders to objections filed against all four (4) Motions [Docket Nos. 873-875] and an independent, “supplemental” objection to the Scott Settlement Motion [Docket No. 884].

(i) *The Emergency Motions for Continuance*

26. On July 11, 2018, the Official Committee of Unsecured Creditors (the “**Committee**”) filed its *Emergency Motion for Continuance of Hearing on Debtors’ Motion to Approve Scott Settlement Agreement* [Docket No. 834], which the Court denied at a hearing on July 16, 2018. Three days later, on Thursday, July 19, 2018, the Wilkes Parties filed their own *Emergency Motion for Continuance* at Docket No. 871 for all of the Motions set for the Hearing.

27. On July 23, 2018, the Court first heard and denied the Wilkes Parties’ emergency motion to continue, noting that the “[Wilkes Parties] haven’t filed or sought any kind of discovery respect to the [Motions] that are set for today, no witness and exhibit list has been filed that I know of on behalf of the [Wilkes Parties],” and, as a result, “I’m not sure what Mr. Wilkes would be doing today other than argument.”<sup>8</sup> Furthermore, “it just doesn’t appear that Mr. Wilkes has done much with respect to these motions prior to [the date of his operation], and I don’t know what he could have done since [that date].” The Court then denied the motion to continue and moved on to the Kentucky Transfer and FC Domino Settlement Motions.

(ii) *The Kentucky Transfer Motion and FC Domino Motion*

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<sup>8</sup> *Transcript of Proceedings* dated July 23, 2018 at 31:4-9.

28. Through the Hearing, the Debtors reiterated their intent to transfer the Kentucky Facilities on or before August 1, 2018 because the Debtors fully believed those transfers, if approved alongside the necessary relief, would occur. Closing was set to occur on August 1. To support the Motions, the Debtors and FC Domino offered testimony from David Russ, the managing director of acquisitions of FC Domino, and the Debtors' financial advisor, Alan Weiner. Pursuant to an agreement reached between the Committee, the Debtors, and Mr. Scott, the Committee ultimately supported the Motions.

29. The Court announced its oral findings and conclusions in favor of those two motions the following morning, July 24. Among other things, the Court found that "under the unique facts and circumstances of this case ... it was reasonable in their business judgment for the Debtors to rely on the vetting process of FC Domino, a company with substantial experience in this business and with direct knowledge of the lay of the land in Kentucky."<sup>9</sup> The Court recognized that "FC Domino has, in effect, a legal veto on the transfer of Debtors' leases given the status of the leases in the cases."<sup>10</sup> The Court further found that there was "no credible evidence that [Sapphire] is an unacceptable operator," due to the fact that "[a]llegations in a lawsuit that is not even in evidence before the Court is not credible evidence, nor is a news article credible evidence that [Sapphire] is an unacceptable operator."<sup>11</sup> To the extent necessary, "the Court is comforted in knowing that [Sapphire] still has to be approved by the respective governmental agencies before any transfer takes place. If [Sapphire] receives the required

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<sup>9</sup> *Transcript of Proceedings* dated July 24, 2018 at 14:6-11.

<sup>10</sup> *Id.* at 14:11-13.

<sup>11</sup> *Id.* at 15:12-16.

governmental approvals, that will further confirm that the transfer is in the best interests of the residents.”<sup>12</sup>

(iii) *The Scott Settlement Motion*

30. The Court then heard the Scott Settlement Motion, which had been continued from the previous day due to time constraints, and announced its findings and conclusions in favor of the Scott Settlement on July 26. There the Court found that, among other things:

- The fact that the Creditors’ Committee, which is charged with looking out for the best interests of unsecured creditors, was able to negotiate a \$1 million enhancement to the settlement, and now supports the revised settlement, is a significant factor to the Court in making sure that the settlement satisfies the heightened scrutiny of this proposed transaction with an insider who controls the Debtors.<sup>13</sup>

Rejecting the argument of the Wilkes Parties, the Court stated that the Committee’s support of what the Court referred to as the “enhanced settlement” also indicated “that a non-conflicted analysis of the claims being settled” had occurred.<sup>14</sup>

31. Addressing the credibility of the witnesses presented, the Court found that:

As noted in a prior ruling, Mr. Scott appears to have a sincere concern for the care and well-being of the residents. Mr. Scott has spent millions and committed millions of dollars of his personal funds during the Debtors’ bankruptcy cases with the end goal to facilitate the seamless transfer of substantially all of the Debtors’ operations to new operators, primarily for the benefit and wellbeing of the residents.<sup>15</sup>

The Court further found the “[t]he Debtors have consistently represented throughout these cases that the transfer of their operations is necessary to avoid the closure of the facilities” and “a

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<sup>12</sup> *Id.* at 15:17-22.

<sup>13</sup> *Transcript of Proceedings* dated July 26, 2018 at 9:13-19.

<sup>14</sup> *Id.* at 9:20-24.

<sup>15</sup> *Id.* at 11:24-12:5.

closure would not be in the best interests of the Debtors' estates and would be particularly harmful to the residents of those particular facilities."<sup>16</sup>

32. Finally, following extensive findings regarding the claims that the Debtors sought to settle and compromise, including the Debtors' investigation into those claims and the evidence presented in support of the Scott Settlement Motion,<sup>17</sup> the Court addressed the objections raised by the Wilkes Parties in detail before overruling those objections.<sup>18</sup> The Court then concluded that even after applying higher scrutiny, "(a) the proposed settlement is fair and equitable and in the best interests of the Debtors' estates; and (b) the settlement does not come close to falling beneath the lowest point in the range of reasonableness. If anything, the settlement is in the high range of reasonableness."<sup>19</sup>

(iv) *The Orders Granting the Motions*

33. The orders granting Kentucky Transfer and FC Domino Settlement Motions were entered on July 27. The order granting the Scott Settlement Motion was entered on August 1. The orders specifically incorporated the Court's oral findings and conclusions into the findings and conclusions set forth therein. The PCI Subs Sale Motion was continued to July 30, granted in part by agreement announced that hearing, then continued again to August 15 and finally September 7.

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<sup>16</sup> *Id.* at 12:6-11.

<sup>17</sup> *See, e.g., id.* at 12:21-13:2 (discussing the benefit of the settlement proceeds to the estates); 14:6-16:18 (discussing the Debtors' potential avoidance actions and the circumstances thereof); 16:19-20:11 (discussing the Debtors' potential derivative claims); 20:12-21 (again discussing the benefit of the settlement to the estates).

<sup>18</sup> *Id.* at 21:3-24:9.

<sup>19</sup> *Id.* at 24:10-18.

**F. The Kentucky Transfer Delay**

34. Following the Hearings on July 23 and 24 regarding the Kentucky Transfer and FC Domino Settlement Motions, the Debtors continued to prepare as if they were transferring the Kentucky Facilities on August 1, 2018. On July 25, the day after the Kentucky Transfer Motion was orally granted by the Court, Debtors' counsel sent an email to counsel for Sapphire requesting an update on when the OTAs would be finally executed in advance of the August 1 closing and asking if Sapphire needed anything from the Debtors.<sup>20</sup> The next day, July 26, after having made certain changes to both orders announced on the record on July 23 and circulating the revised orders to the appropriate parties in interest, Debtors' counsel uploaded the orders granting the Kentucky Transfer and FC Domino Settlement Motions for entry. That same day Debtors' counsel received an email from Mike Gavin at the Debtors' management company informing them, for the first time, that Sapphire would not close on August 1.<sup>21</sup>

35. As set forth above, the Court conducted a continued hearing on the PCI Subs Sale Motion on July 30, the following Monday. At the conclusion of that hearing, after the parties had announced an agreement to further continue some of the relief sought in the PCI Subs Sale Motion to a later hearing, Debtors' counsel informed the Court that the Debtors had been asked "late last week by Sapphire if we could continue the closing on the Kentucky Facilities from August 1st to September 1st."<sup>22</sup> Debtors' counsel explained that "[the Debtors] didn't feel like we had a lot of choice but to agree to [the extension]" because FC Domino was involved, and the Debtors "will need FC Domino to sign a stipulation with us that our deadline to reject those

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<sup>20</sup> A true and correct copy of the email from Debtors' counsel to Sapphire dated July 25, 2018 is attached hereto as **Exhibit A**.

<sup>21</sup> A true and correct copy of the email received from Mr. Gavin on July 26 is attached hereto as **Exhibit B**.

<sup>22</sup> *Transcript of Proceedings* dated July 30, 2018 [Excerpt 11:03-11:15 A.M.] at 8:2-15.

leases will be extended from August 1st to September 1st, so that we can continue to have live leases at the Kentucky facilities.”<sup>23</sup> Since that time the Debtors have continued to work with both FC Domino and Sapphire to close the transfers on or about September 1, 2018.

**G. The Reconsideration Motions**

36. Having been overruled on their emergency motion to continue the Hearing and their opposition to the Kentucky Transfer, FC Domino Settlement, and Scott Settlement Motions, the Wilkes Parties seized on the extension to September requested by Sapphire to stage a second challenge to the Orders by filing the Reconsideration Motions on August 8, 2018. The Reconsideration Motions have been set for hearing on September 11, 2018.

37. The Reconsideration Motions are substantially similar and follow a consistent theme: “newly discovered evidence” in the form of the delay to September in closing the transfers of the Kentucky Facilities undermines the Court’s approval of the Kentucky Transfer, FC Domino Settlement, and Scott Settlement Motions. According to the Wilkes Parties, the “significant revelation” that Sapphire needs an extra thirty (30) days to assume operations of twenty-one skilled nursing facilities “calls into question whether the transfers approved by the Court are in the best interests of the Debtors’ estates and whether the Debtors exercised their reasonable business judgment... .”

38. Though they dance around outright accusing the Debtors or FC Domino of lying to the Court, the Reconsideration Motions state that “[t]he reasons underlying [Sapphire’s] failure to close likely were known to the Debtors and Formation at the time of the hearings.” According to the Wilkes Parties, even if the Debtors and FC Domino didn’t know beforehand as they allege, that “lack of awareness” also calls into question the Debtors’ judgment and means

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<sup>23</sup> *Id.*

the Orders should never have been entered. Ultimately, though there is scant discussion of how the underlying delay actually affects the judgment of the Debtors—or the Court—that the transfers to Sapphire are a good idea or what the Debtors should do instead, the Wilkes Parties’ contend that the Court should reconsider and rehear the merits of the Kentucky Transfer, FC Domino Settlement, and Scott Settlement Motions based on “the merits of the previous objections”—all of which had been considered and overruled—“combined with the new evidence” that Sapphire needs another month.

39. The Debtors file this Response both to address the serious allegations made against them and request that the Court deny the Reconsideration Motions given that the circumstances upon which the Debtors and the Court relied have not materially changed.

### **III.** **RESPONSE TO THE RECONSIDERATION MOTIONS**

40. The Wilkes Parties cite to several statutes and cases that they say stand for the general proposition that if a court believes that justice requires an order to be altered or amended, it can be. There is nothing controversial in this proposition; if circumstances exist demonstrating that a court was so wrong in its original determination that it would be unjust to keep the order in place as-is, the order can be changed. The Debtors disagree that those circumstances exist in this case given the Court’s actual findings in the Orders (or as made on the record and incorporated therein by reference). The Debtors also object strongly to the false characterization that they or FC Domino misled the Court in any way.

#### **A. The Debtors Were Unaware of the Need for the Extension at the Hearing**

41. Contrary to the Wilkes Parties’ assertion, prior to July 26, 2018, the Debtors were unaware that Sapphire would be unable to close on or before August 1, 2018 as planned. Indeed, Debtors’ Exhibit A demonstrates that as of July 25, Debtors’ counsel believed that closing would

still occur at that time. This is only the latest in a series of emails and other communications—as well as numerous representations before the Court from counsel and witnesses for both the Debtors and FC Domino—showing that the Wilkes Parties’ allegations are false. The Debtors were not aware that Sapphire would not be able to close on August 1 at the Hearing, and once the Debtors became aware on Thursday, July 26,<sup>24</sup> they informed the Court and all parties-in-interest at the hearing scheduled for the following Monday.

42. Furthermore, to the extent the Wilkes Parties attempt to apply a “knew or should have known” standard to say that the Debtors’ purported failure to know is “troubling,” the Court has already dismissed the argument that it is the Debtors’ burden to independently vet Sapphire’s worthiness to assume operations. Such is the province of the applicable governmental regulatory agencies, who will ultimately make the final decision about whether Sapphire can assume operations, anyway.<sup>25</sup>

**B. The Delay Does Not Change the Necessity and Reasonableness of the Relief Granted.**

43. At their core the Reconsideration Motions argue that Sapphire’s one-month delay in closing calls for reexamination of everything that the Court heard and did at the hearings on July 23-24 in determining that the Motions should be granted. Accordingly, the Wilkes Parties should be given another chance to argue the merits of the Motions, and the Court should set another Hearing. This is incorrect.

44. Nothing about a one-month delay changes the fact that, due in large part to the “veto power” FC Domino has over the continuing existence of their real-property leases in Kentucky, the Debtors have to transfer those facilities. No other party has come forward that is

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<sup>24</sup> See Debtors’ Exhibit B.

<sup>25</sup> See Note 12, *supra*.

(a) willing to assume the Debtors' operations, (b) capable of assuming those operations, and (c) approved by FC Domino. Sapphire remains the only potential purchaser for the Debtors' Kentucky Facilities.

45. Nothing about a one-month delay changes the fact that to transfer the Kentucky Facilities, the Debtors need additional funds. The Debtors continue to incur administrative expenses in the normal operations of the Facilities that will need to be repaid even after those Facilities are transferred. And once that happens and the Kentucky Debtors stop generating new accounts receivable, the availability under the Wells Fargo DIP Facility will diminish. Aside from the Scott Settlement and PCI Subs Sale, the Debtors have no other viable options for creating additional availability.

46. Nothing about a one-month delay changes the fact that the FC Domino Settlement, whereby FC Domino has agreed to waive potentially significant lease rejection claims it would otherwise have as part of the transfer process, is an objectively good thing for Preferred Care and the Kentucky Debtors. The Debtors have real-property leases with FC Domino, the rejection of which would otherwise create claims against their estates. Those claims would be substantial. FC Domino's waiver thus provides substantial benefit to the Debtors' estates.

47. Finally, nothing about a one-month delay changes the fact that the Scott Settlement provides substantial value to the Debtors' estates at minimal cost. The Court found that, "[i]f anything, the settlement is in the high range of reasonableness" based on its review of the claims being settled and the benefit to the estates of that settlement. Those claims did not somehow become more valuable—or the proposed settlement less—by delaying the closing with Sapphire for thirty days. The settlement stands on its merits now just as it did then.

48. At the Hearing, the Debtors presented the Court with four (4) inter-related Motions, all of which the Debtors needed granted in order to transfer their Kentucky Facilities effectively while accounting for trailing payables to vendors and employees. The Orders grant the majority of that relief (with a portion of the PCI Subs Sale Motion still pending), and the underlying rationale for each has not changed. The Debtors still need to transfer their Kentucky Facilities, still need FC Domino's consent to do so, and still need money to make the whole process work.

**IV.**  
**CONCLUSION**

WHEREFORE, based upon the foregoing, the Debtors respectfully request that the Court deny the relief requested in the Reconsideration Motions and keep the Orders in place .

DATED: August 29, 2018

Respectfully submitted by:

/s/ Mark C. Moore

Stephen A. McCartin (TX 13374700)

Mark C. Moore (TX 24074751)

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**COUNSEL TO DEBTORS AND**

**DEBTORS-IN-POSSESSION**

**CERTIFICATE OF SERVICE**

I hereby certify that, on August 29, 2018, a true and correct copy of the foregoing document was served electronically by the Court's PACER system.

/s/ Mark C. Moore

Mark C. Moore

**Debtors**

<u>DEBTOR</u>	<u>LAST FOUR DIGITS OF FEDERAL TAX I.D. NO.</u>
Preferred Care Inc.	7040
<b><u>Kentucky LP Debtors</u></b>	
Bowling Green Health Facilities, L.P.	5787
Brandenburg Health Facilities, L.P.	6699
Cadiz Health Facilities, L.P.	7640
Campbellsville Health Facilities, L.P.	4207
Elizabethtown Health Facilities, L.P.	6127
Elsmere Health Facilities, L.P.	7843
Fordsville Health Facilities, L.P.	3299
Franklin Health Facilities, L.P.	7307
Hardinsburg Health Facilities, L.P.	3640
Henderson Health Facilities, L.P.	8067
Irvine Health Facilities, L.P.	7418
Morganfield Health Facilities, L.P.	8320
Owensboro Health Facilities, L.P.	8145
Paducah Health Facilities, L.P.	3350
Pembroke Health Facilities, L.P.	8209
Richmond Health Facilities - Kenwood, L.P.	8235
Richmond Health Facilities - Madison, L.P.	8216
Salyersville Health Facilities, L.P.	8263
Somerset Health Facilities, L.P.	8739
Springfield Health Facilities, L.P.	8310

Stanton Health Facilities, L.P.	8704
<b><u>New Mexico LP Debtors</u></b>	
Artesia Health Facilities, L.P.	5383
Bloomfield Health Facilities, L.P.	7640
Clayton Health Facilities, L.P.	3609
Desert Springs Health Facilities, L.P.	2707
Espanola Health Facilities, L.P.	2102
Gallup Health Facilities, L.P.	2562
Lordsburg Health Facilities, L.P.	1449
Pinnacle Health Facilities XXXIII, L.P.	1389
Raton Health Facilities, L.P.	6759
SF Health Facilities, L.P.	2323
SF Health Facilities-Casa Real, L.P.	0716
Silver City Health Facilities, L.P.	6972

**EXHIBIT A**

**McCartin, Steve**

---

**From:** McCartin, Steve  
**Sent:** Wednesday, July 25, 2018 10:04 AM  
**To:** 'Young, Cindy'  
**Cc:** Mike Gavin - 8111; bob@rwtx.com; Stephen.Pezanosky@haynesboone.com  
**Subject:** KY OTAs

Cindy,

--Court approve the KY Transfer Motion yesterday, so we are good to go;

--can you send me the signature pages now that the holiday has ended?

--do you guys need anything from me to close on Tuesday or Wednesday?

Stephen McCartin

Foley Gardere  
2021 McKinney Ave.  
Suite 1600  
Dallas, TX 75201  
[smccartin@foley.com](mailto:smccartin@foley.com)  
214-999-4945 office  
214-202-4111 cell

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**EXHIBIT B**

## McCartin, Steve

---

**From:** Robert J. Riek <bob.riek@pcitexas.net>  
**Sent:** Thursday, August 09, 2018 3:49 PM  
**To:** McCartin, Steve  
**Subject:** FW: Sapphire

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**From:** Mike Gavin - 8111  
**Sent:** Thursday, July 26, 2018 4:15 PM  
**To:** 'smccartin@foley.com' <smccartin@foley.com>  
**Cc:** Robert J. Riek <bob.riek@pcitexas.net>; Gary Anderson - 8111 <GAnderson@5420mgt.com>; Mindy Provence - 8111 <MProvence@5420mgt.com>; Gene Lunceford - 8111 <GLunceford@5420mgt.com>; TSCOTT <tlsranch@aol.com>; Tom Patterson - 8111 <TPatterson@5420mgt.com>  
**Subject:** Sapphire

Just got off the phone with Aryeh and Hal – They informed me that there is no way they will be able to take over on August 1 – there are still outstanding issues with Formation / HUD (2 bldgs) and internal issues within his organization, I believe to be related to financing – He said they will continue to work diligently and believe they will have everything done in time for a September 1 transfer.

Let me know if you have any questions

Mike

Mike Gavin  
President and CEO  
PCPMG Consulting, LLC  
O: (972) 930 – 8132  
C: (817) 909 – 4789  
[MGavin@5420mgt.com](mailto:MGavin@5420mgt.com)



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