

# PAYOFF LETTERS- LEGAL AND BUSINESS CONSIDERATIONS

**March 20, 2018**

Sidney O. Simms Jr.

*Counsel*

© 2019 Eversheds Sutherland (US) LLP

All Rights Reserved. This communication is for general informational purposes only and is not intended to constitute legal advice or a recommended course of action in any given situation. This communication is not intended to be, and should not be, relied upon by the recipient in making decisions of a legal nature with respect to the issues discussed herein. The recipient is encouraged to consult independent counsel before making any decisions or taking any action concerning the matters in this communication. This communication does not create an attorney-client relationship between Eversheds Sutherland (US) LLP and the recipient. Eversheds Sutherland (US) LLP is part of a global legal practice, operating through various separate and distinct legal entities, under Eversheds Sutherland. For a full description of the structure and a list of offices, please visit [www.eversheds-sutherland.com](http://www.eversheds-sutherland.com).

# Payoff Letters- Generally

- Letter typically requested by a borrower from its current lender in connection with a refinance/payoff of obligations owed to such current lender
- Lenders will typically have their own form of payoff letter
- A payoff letter is more than a payoff statement
  - an invoice/statement of amounts due only
- A payoff letter will typically specify not only the amounts due to a lender (or an agent/lenders if loan is syndicated), but also the *conditions upon which a lender will terminate the underlying loan documents and release its security interest in collateral owned by the underlying borrower*

## Payoff Letters-Generally (cont.)

- Upon satisfaction of the conditions specified in the payoff letter (payment of outstanding amounts due, applicable legal fees), the current lender agrees to release its security interests, and terminate the underlying loan documents (other than those indemnification/other obligations which, by their express terms, survive any termination)
- Any refinancing or incoming lender will look for the specific release of security interests/termination of loan documents to provide comfort that any credit extended by a new lender can be secured by the collateral of the borrower without the lien of the prior lender encumbering such collateral

# Contents of a Payoff Letter

- Addressed to existing borrower- though sometimes the new or incoming agent/lender may require that the payoff letter be addressed to such agent/lender
- Statement of amounts owed to current lender:
  - outstanding interest (through the payoff date)
  - principal due
  - legal fees due to lender's counsel
  - any related breakage costs (if applicable)
  - prepayment, exit or other fees due to lender

Amounts set out as being due in connection with the payoff should be confirmed.

## Contents of a Payoff Letter (cont.)

- “Release conditions” are also specified:
  - receipt of fully executed payoff letter
  - tender of the “Payoff Amount” by a time/date certain (could be subject to negotiation- latest time possible)
  - depending on transaction, certain other conditions may be included:
    - evidence of the consummation of a related transaction (acquisition or merger for example)
    - deposit of funds to cash collateralize outstanding letters of credit

## Contents of a Payoff Letter (cont.)

- Per Diem amount is specified
  - In the event the time for payment of the “Payoff Amount” under a payoff letter has expired, the Per Diem amount is the amount of additional fees/interest that will accrue on the outstanding balance of the loan until the full “Payoff Amount” is tendered
  - Setting out the Per Diem amount eliminates the need to re-execute payoff letters in the event that the date for loan payoff changes, however, all parties should confirm whether the form of payoff letter includes an expiration date

# Contents of the Payoff Letter (cont.)

## Release/termination language

- One of the more significant differences between a payoff statement and a payoff letter.
- Most significant for borrower and new lenders
- Release/termination language should cover:
  - the termination of any commitments
  - confirmation that the loan paid in full/satisfied
  - release of all security interests and liens on the assets of the underlying borrower securing the loan

## **Contents of the Payoff Letter (cont.)**

- termination and release of any guarantees
- return of any pledged collateral under the control of the lender (stock or membership interest certificates)
- authorization of the underlying borrower (or its designee) to file UCC terminations
- obligation on the part of an agent (or lender), at the cost of the underlying borrower, to tender such other release documents as may be required to evidence the termination of any commitment, the loan documents, and the liens granted to any existing lender

# Payoff Letter-Sample Release/Termination Language

Upon the occurrence of the [r]elease [c]onditions, (a) the [Loans] shall be paid in full and all other indebtedness of the [b]orrower under the [Loan Agreement] shall be satisfied in full, (b) the [c]ommitments under the [Loan Agreement] shall be terminated, and [Lender] shall have no further obligation to make any [Loans] or any other obligations, duties, or responsibilities in connection with the [Loan Agreement] and the [Loan Documents], (c) all security interests, mortgages, liens, pledges, charges and other encumbrances in favor of the [lender] to secure the [o]bligations shall be automatically released with no further action on our part, (d) all of the other respective obligations on the part of the [b]orrower or any of their subsidiaries or affiliates under the [Loan Agreement] and the [Loan Documents] shall be released with no further action on our part and (e) the [Loan Agreement] and related [Loan Documents] shall be terminated, canceled and of no further force and effect; provided that, [b]orrower shall remain liable for any and all indemnification and other provisions of the [Loan Agreement] and the other [Loan Documents] which by their terms survive the payment of the [Loans] and the termination of the [c]ommitments.

## Payoff Letter-Sample Release/Termination Language (cont.)

In consideration of the payment in full of the [o]bligations and upon the occurrence of the [r]elease [c]onditions, the [Lender] hereby agrees to promptly deliver to the [b]orrower, in each case at the expense of [b]orrower, the following: (a) all certificates delivered to [Lender] representing stock pledged by the [b]orrower or any of their subsidiaries or affiliates in favor of the [Lender] under the [Loan Agreement] or any of the [Loan Documents] together with related stock powers delivered to [Lender]; (b) uniform commercial code releases and/or terminations and other terminations and intellectual property releases in form acceptable for recording, terminating all of the [Lender's] liens and security interests in the [c]ollateral]...

# Additional Considerations Regarding Release Language

- Lender consideration- care must be taken to make sure that liens with respect to the subject loan documents are the only liens being released
- Language regarding termination of UCCs is sometimes a negotiated point- will the exiting lender control the process, or will the borrower be authorized to do so?
  - addition of “designee” language broadens scope of who can file terminations
- Additional specificity can be included in payoff letters regarding UCC terminations by attaching as an exhibit the specific UCCs to be released/terminated

## **Additional Considerations- UCC Terminations**

- Payoff letters typically include an authorization by the secured party of record to prepare and file UCC termination statements
- UCC-3 termination statements can be:
  - prepared and filed by the existing lender
  - prepared by a lender and sent to the borrower to file
  - prepared and filed by the borrower/secured party with lender's authorization

## **Additional Considerations- UCC Terminations**

- UCC-3 will set forth the authorizing party, which should be the lender of record (even when prepared by the borrower)
- Per the UCC, a grantor can only be the authorizing party to file a UCC termination if there are (i) no longer any grantor obligations outstanding to the lender, (ii) the grantor has sent a demand to the lender to release the UCC-1 and (iii) the lender did not file, or send to the grantor to file, the UCC-3 within 20 days of such demand by grantor
- Obtaining authorization via payoff letters is important for new lenders reviewing lien search records to confirm whether the UCC-3 was appropriately authorized to be terminated

## Other considerations- Additional Documents

- Does intellectual property secure the transaction? If so, filing applicable release documents with the USPTO may be required
- Loans secured by real estate collateral (leasehold or fee interests) will require an applicable mortgage release
- Any accounts subject of account control agreements may need to have such control agreements terminated
- Return of original stock/membership interests should also be coordinated in connection with the payoff
- As noted earlier, pursuant to the terms of your payoff letter, a lender would be required to provide such documents- at the expense of the Borrower



EVERSHEDS  
SUTHERLAND

**Sidney O. Simms Jr.**

*Counsel*

[SidneySimms@eversheds-Sutherland.us](mailto:SidneySimms@eversheds-Sutherland.us)

999 Peachtree Street N.E.  
Suite 2300  
Atlanta, Georgia 30309

**eversheds-sutherland.com**

© 2019 Eversheds Sutherland (US) LLP  
All rights reserved.