PRE-NEGOTIATION OR PRE-WORKOUT AGREEMENTS

By Steven M. Alden and John M. Nolan

As one of our panelists succinctly asked, “If it’s called a pre-negotiation agreement, why does it take so long to negotiate?” Indeed, the pre-negotiation agreement should not require any negotiation. Attached are two Annexes -- Annex 1 is a “standard” Pre-Negotiation Agreement drafted by Lender’s Counsel. Annex 2 is a Discussions Agreement which accomplishes the primary purpose of the pre-negotiation agreement and should require little or no negotiation prior to signing. (The language in bold face type in italics contained in the Annexes is language which may prove controversial and is therefore not always included.)

Standard Provisions

A pre-negotiation agreement should include several standard provisions which readily evidence the purpose of the pre-negotiation agreement.

1. **Discussions.** The parties – the borrower, the lender and the guarantor – plan to meet and conduct discussions about the loan and the loan documents, in the hope of resolving and settling issues which have arisen. No party shall incur any liability by reason of these discussions, and participating in the discussions shall not constitute or be deemed to be a waiver of any rights.

2. **Non-Binding.** All discussions will be non-binding. The parties will be bound only by agreements in writing signed by all parties.

3. **Not Admissible.** The discussions may not be used or quoted in any legal proceeding and are not admissible as evidence.

4. **Termination.** Any party may terminate the discussions at any time.

5. **Voluntary.** All parties have voluntarily agreed to conduct discussions on these terms, and no party has been coerced into participating.

6. **Governing Law.** The law of a designated State, which may or may not be the State where the real estate is located, governs the pre-negotiation agreement.

7. **Loan Documents.** It is also common to add that the only obligations of the parties are those set forth in the Loan Documents and the Loan Documents are in full force and effect. Even this seemingly innocuous addition can, however, become controversial and it is not always included.

8. **No Waiver.** Lenders are often anxious about signing any agreement with a defaulting borrower. Accordingly, they seek to add a no waiver paragraph providing that the pre-negotiation agreement and the discussions do not effect a waiver or forbearance or constitute an agreement by the lender to delay the exercise of its rights or
remedies or to amend or otherwise affect the rights or obligations of any party under any of the loan documents.

**Additional Lender Provisions**

Lenders typically request additional provisions, including

1. **Confirmation of Debt.** A statement by the borrower and guarantor confirming the outstanding amount of the debt and listing the instruments evidencing, securing and guaranteeing the indebtedness.

2. **Acknowledgement of Default.** An acknowledgment that the loan is in default and specifically identifying the monetary defaults.

3. **No Defenses.** A statement by the borrower that it has no defenses, offsets or counterclaims to its obligations under the loan documents and a waiver of any defenses, offsets or claims that may exist. If the borrower is unwilling to waive any defenses or claims, the lender will typically ask the borrower to identify any such defenses or claims. If the lender has completed its due diligence and “perfection check”, it may have discovered issues it would like to clean up. Unfortunately for the lender, these issues may have to wait for the next step -- the forbearance agreement.

4. **Compensation.** Lenders sometimes require compensation – at least reimbursement of lender’s counsel fees and expenses – for participating in the discussions. We have, however, participated in discussions where the borrower absolutely refuses to pay lender’s counsel fees.

**Additional Borrower Provisions**

Borrowers may request additional provisions, including

1. **Standstill; Forbearance.** The borrower may seek some relief or temporary forbearance on current payments while the parties are holding discussions. If the lender agrees to a standstill, it should be mutual and the lender should include a carveout for the pursuit of relief in the event of threatened or actual damage or injury to or waste of the collateral security.

2. **Access to Property Receipts.** The borrower may seek some release of funds from the lockbox or cash management agreement while the parties are holding discussions.

3. **Communication with Third Parties.** All parties may request the right to communicate with third parties, e.g. loan purchasers, equity providers and additional guarantors, while the discussions are proceeding.

**Conclusion**
The primary purpose of the pre-negotiation agreement is to foster an open, protected dialogue among the parties. This is accomplished by establishing a simple principle – that the parties’ discussions are not binding, not discoverable and not admissible, and will not be used against any party.
NEGOTIATION LETTER

ADDRESS FOR BORROWER
Attention: ____________

ADDRESS FOR GUARANTOR
Attention: ____________

Re: ___________________________ ("Lender") loan (the "Loan") to
_______________ ("Borrower") concerning the property located at
______________, as more particularly described in that certain [PICK ONE]
[Loan Agreement between Borrower and Lender dated ____________ (the
"Loan Agreement"); initially capitalized terms used herein but not defined
have the meanings set forth in the Loan Agreement] [Deed of Trust executed
by Borrower in favor of Lender dated ____________ (the "Deed of Trust");
initially capitalized terms used herein but not defined have the meanings set
forth in the Deed of Trust]

Ladies and Gentlemen:

The parties desire to initiate communications (the "Communications") about (a) the rights
and obligations under the documents evidencing, securing or otherwise pertaining to the Loan
(the "Loan Documents") and (b) a possible modification, amendment, forbearance, additional
collateral pledge or other resolution of current Loan issues (a "Resolution"). To facilitate and to
induce Lender to commence Communications, the parties hereby agree that the following terms
and conditions govern the Communications:

1. No party is under any obligation to agree to any Resolution. Any party may
terminate Communications at any time, for any reason or no reason, in its sole discretion, with
no liability. No party shall have any rights or liabilities, either express or implied, on account of
(a) the commencement, continuation, or termination of Communications or (b) any oral
understanding, unless and until the parties have (in their sole and absolute discretion) approved,
signed, and exchanged a written agreement specifically addressing a Resolution, and all required
consents have been obtained (an "Agreement"). This letter does not reflect an intention to

Annex 1
authorize agreements by electronic means. No party shall rely on the pendency of Communications or the possibility or hope of a Resolution.

2. If the parties discuss any proposed Resolution, any party may, in its sole discretion, prepare a term sheet or other proposed Resolution (a "Term Sheet") for further discussion and perhaps prepare draft Agreements. Any Term Sheet is for discussion only. Neither any Term Sheet nor the preparation, distribution, response or failure to respond to it shall constitute Lender’s offer, agreement, or commitment to enter into a Resolution.

3. Any Term Sheet, and any Communications, including any statement that could be deemed an admission of any fact, liability, or other matter, or of the satisfaction of any condition, except as this letter expressly states, shall: (a) constitute settlement discussions; (b) not be discoverable or disclosable; (c) not be admissible in evidence for any purpose; (d) not be deemed an admission; and (e) not affect the parties’ rights and obligations.

4. Nothing in this letter or any Communications shall: (a) modify, amend, limit, suspend, toll, or waive any right, remedy, covenant, condition, or obligation under the Loan Documents, all of which remain in full force and effect; (b) impair any notice of default Lender has delivered (or will deliver); (c) toll or suspend any cure period, notice period, or other period; (d) prevent Lender from exercising any right or remedy under the Loan Documents at any time or from time to time; (e) commit Lender to agree to a Resolution; or (f) limit the effect or admissibility of any written notice, delivery of information or other communication by any party to any other party(ies), which states that it is given or delivered under the Loan Documents.

5. Each party confirms that it: (a) is represented by legal counsel of its choice, (b) has consulted with counsel about this letter; (c) is fully aware of the terms of this letter; and (d) has entered into this letter voluntarily and without coercion or duress of any kind.

6. Communications may not lead to a Resolution. Borrower should not rely upon the existence of the Communications or a Term Sheet. Therefore, Borrower should not forgo any attractive alternative opportunities during Communications, such as a refinancing, sale, lease or admission of additional partners, subject, however, to the terms of the Loan Documents.

7. Borrower authorizes Lender, at its option, to communicate (the "Third Party Communications") with any guarantor of the Loan (a "Guarantor"), any equity investor having an interest in Borrower (an "Equity Investor"), and affiliates of Borrower, any Guarantor or any Equity Investor, or any tenant, manager, service provider, insurance carrier, governmental authority, or any other third party relevant to the Loan (all of the foregoing, the "Third Parties"), about the Loan, any collateral, Borrower’s credit status, or any related matters. Lender may, in its sole discretion, terminate any Third Party Communications at any time.

8. Each party waives and releases any and all claims, actions, causes of action, suits, and defenses that such party might have against the other for or by reason of any matter, cause or thing whatsoever arising from any Communications or Third Party Communications. [Borrower acknowledges and reaffirms that Borrower has no claim, counterclaim, defense, concession, offset, abatement, or deduction against its obligations under the Loan Documents.] The above
waiver and release does not release a party from any of its obligations under this letter, the Loan Documents, or any written Agreement the parties may execute and deliver.

9. Borrower acknowledges and agrees that all costs of Lender in connection herewith and with any Communication, including but not limited to expenses for inspection of the property, legal fees and the fees of other professionals, constitute reimbursable expenses under the Loan Agreement and shall be promptly paid by Borrower.

10. This letter shall: (a) fully apply to all Communications whether or not they refer to this letter; (b) survive termination of Communications; (c) benefit the parties, all Loan co-lenders, loan participants and each of their respective successors and assigns; (d) constitute the entire agreement about Communications; (e) be governed by [_________] law without giving effect to conflicts of laws rules; (f) not be construed more strictly against the drafter; and (g) not adversely affect, diminish or impair any rights or remedies that any party has under the Loan Documents. This letter may be executed in counterparts. Each party executing this letter represents that it has the full authority and legal power to do so.

11. Borrower and Guarantor each acknowledge, represent and warrant that their respective present address for all purposes under the Loan Documents is correctly set forth above.

12. [Optional Standstill Provision with carve out: Lender, Borrower, and Guarantor shall refrain from filing any litigation or arbitration against each other unless and until the Party desiring to initiate litigation or arbitration has provided the other Parties to this agreement with five (5) days prior written notice of such Party's termination of this Agreement. Throughout the period from and after the date of this Agreement through the fifth day following the delivery of such written notice (the "Standstill Period"), no Party shall initiate any litigation or arbitration or assert any claim in litigation or arbitration against the other Parties except as expressly provided herein. The Standstill Period shall terminate as to all Parties on the sixth (6th) day following the delivery of a written notice of intent to terminate. Notice of termination may be given for any reason or no reason. Upon such termination, all Parties shall have the right to initiate any litigation, arbitration, or assert any claim in any litigation or arbitration filed by any other Party. Notwithstanding the foregoing, Lender has the right to commence litigation against Borrower and/or the Guarantor without any notice to any other Parties for the purpose of obtaining extraordinary relief including, but not limited to, injunctive relief, sequestration, attachment, garnishment, or the appointment of
receiver in the event that any of the collateral or the proceeds thereof is being dissipated,
hidden or disposed of without Lender's consent or Borrower and Guarantor threatens to
dissipate, hide or dispose of the collateral or any proceeds thereof.

Very truly yours,

___________________________________________

a ________________________________

By: _____________________________________
Name: _________________________________
Title: _________________________________

For good and valuable consideration, the receipt and sufficiency of which is hereby
acknowledged, Borrower agrees to the foregoing:

[Borrower’s signature block]

For good and valuable consideration, the receipt and sufficiency of which is hereby
acknowledged, Guarantor acknowledges and agrees that the Communications shall not modify
the Guaranty or Guarantor’s obligations under the Guaranty.

[Guarantor’s signature block]
DISCUSSIONS AGREEMENT

This DISCUSSIONS AGREEMENT (this “Agreement”) is entered into as of December ___, 2010, by and among AC, LLC, a Delaware limited liability company ("Borrower"), DAVID DEVELOPER, an individual ("Mr. David Developer"), REL ASSOCIATES LP, a New York limited partnership ("Rel"), MEZZ MEMBER LLC, a Delaware limited liability company ("Mezz Member"), and TUCSON SPECIAL OPPORTUNITIES FUND L.P., a Delaware limited partnership ("Agent"; Agent and the lenders and participants with respect to the Loan (as defined below) are collectively referred to as “Lender Parties”). Mr. David Developer, Rel and Mezz Member are collectively referred to as “Guarantors.” Borrower and Guarantors are collectively referred to as “Borrower Parties.” Borrower Parties and Agent are referred to herein collectively as the “Parties” and individually as a “Party.” Capitalized terms used herein and not otherwise defined herein shall have the meanings set forth in the Loan Agreement (as defined below).

RECITALS:

Reference is made to that certain Loan Agreement, dated as of July 8, 2007, by and between Borrower and Agent and the Lenders party thereto (the “Loan Agreement”), pursuant to which Agent (on behalf of Lenders) made a loan to Borrower in the original principal amount of $1,323,000,000 (the “Loan”). The Loan is evidenced by that certain Promissory Note, dated as of July 8, 2007, by Borrower to the order of Agent, in the original principal amount of $1,323,000,000 (the “Note”), and is secured by, among other things, (i) that certain Mortgage and Security Agreement, dated as of July 8, 2007, by Borrower and Guarantors in favor of Agent (the “Mortgage”), (ii) that certain Pledge and Security Agreement, dated as of September 18, 2007, by Borrower, Rel and Mezz Member, in favor of Agent (the “Pledge Agreement”), and (iii) that certain Guaranty Agreement, dated as of July 8, 2007, by Borrower and Guarantors in favor of Agent (the “Guaranty”). As used herein, “Loan Documents” shall mean the Loan Agreement, the Note, the Mortgage, the Pledge Agreement and the Guaranty, together with all other documents or instruments delivered to or for the benefit of Agent for the purpose of evidencing, securing, guaranteeing and/or perfecting the Loan.

At the request of the Borrower Parties, the Parties may commence the Discussions (as defined below).

AGREEMENT

NOW THEREFORE, in consideration of the mutual promises and covenants contained herein, and intending to be legally bound thereby, the Parties agree as follows:

1. Discussions. The Parties presently plan to enter into discussions concerning or relating to the Loan Documents and the obligations of Borrower Parties to Agent and the other Lender Parties under the Loan Documents, which may be in their respective interests or their mutual interest (the “Discussions”). Agent may involve other Lender Parties in the Discussions. No Party hereto and no Lender Parties shall have any liability for engaging, or failing to engage, in the Discussions. Any Party and any of the Lender Parties, in its sole and absolute discretion,
may suspend, terminate or re-institute the Discussions, or its involvement in the Discussions, at any time and for any reason.  [The Parties’ and Lender Parties’ respective obligations to one another shall be only as set forth in the Loan Documents and in any other executed written formal agreements relating to the Loan Documents signed by the respective Parties and/or Lender Parties to such written agreement.]  It is understood that the Discussions, and correspondence or drafts of documents relating to the Discussions, shall be made with a view towards compromise and settlement, and that all such Discussions, correspondence and drafts shall be protected accordingly and shall not be admissible as evidence or otherwise referred to by any Party on any issue that is or may be before any court or administrative body or in any other proceeding or hearing under Rule 408 of the Federal Rules of Evidence or any other applicable law, rule or regulation.

2. **Only Written Agreements.** Notwithstanding that the Parties and/or Lender Parties may reach one or more oral understandings or agreements on one or more issues which the Parties and/or Lender Parties are discussing or trying to resolve, no Party or Lender Parties shall be bound by any oral agreement of any kind (including, without limitation, any waiver of any right or remedy), and no rights, claims, obligations or liabilities of any kind, either express or implied, shall arise or exist in favor of or be binding upon any Party, any Lender Party or any other Person, except to the extent (if any) expressly set out in a written, formal, legally binding agreement signed by the Persons which are to be bound thereby.

3. **Loan Documents Remain in Force.** Notwithstanding any other provision of this Agreement or any claim of any Party or any other person to the contrary, the Loan Documents are and shall remain in full force and effect and unmodified, unless and until amended or modified by (and only to the extent provided in) a definitive written formal agreement executed by the Parties and the other parties thereto.

4. **No Waiver of Rights.** This Agreement, the Discussions, and any other actions taken or statements made [either before or] after the date of this Agreement in connection with the Discussions, shall not (a) constitute or evidence any waiver, estoppel, release, modification, limitation or forbearance, or any agreement by Agent or any Lender Parties to delay the exercise of Agent’s and other Lender Parties’ rights or remedies, or (b) amend, modify, supplement, limit or otherwise affect the rights or obligations of any Party or Lender Party under any of the Loan Documents.  This Agreement is delivered without prejudice to Agent, any other Lender Parties or Agent’s and Lender Parties’ right to collect all sums and to enforce all rights and remedies now or hereafter accruing under the Loan Documents.

5. **Survival.** The provisions of this Agreement shall survive any termination of the Discussions.

6. **Voluntary Agreement.** Borrower Parties represent and warrant to Agent that Borrower Parties are represented by legal counsel of their choice, that they have consulted with such counsel regarding this Agreement, that they are fully aware of the terms and provisions contained herein and of their effect, and that they have voluntarily and without coercion or duress of any kind entered into this Agreement.
7. Miscellaneous. This Agreement constitutes the entire agreement concerning the subject matter hereof, and it supersedes any prior or contemporaneous representations, statements, understandings or agreements (whether written or oral) concerning the subject matter of this Agreement. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and assigns. This Agreement may not be modified, amended or terminated, in whole or in part, except by an agreement in writing signed by the Parties. This Agreement shall be governed by and construed in accordance with New York law, without giving effect to the principles of conflicts of law. Section headings used in this Agreement are for convenience only and shall not be used to interpret any term or provision of this Agreement. This Agreement may be executed in one or more counterparts, each of which shall constitute an original and all of which taken together shall constitute one agreement. Each person executing this Agreement represents that such person has full authority and legal power to do so and bind the Party on whose behalf he or she has executed this Agreement. This Agreement may be signed by any one or more of the Parties by facsimile transmission, any such facsimile transmission to be treated for all purposes as an original. [note: email is not authorized]

IN WITNESS WHEREOF, the Parties have caused this Agreement to be duly executed as of the date first above written.

BORROWER:

AC, LLC,
a Delaware limited liability company

By:

_________________________________________
David Developer
President

GUARANTORS:

DAVID DEVELOPER, an individual

REL ASSOCIATES LP,
a New York limited partnership

By:

_________________________________________
DAVID DEVELOPER
General Partner
MEZZ MEMBER LLC,
a Delaware limited liability company

By: _______________________
   DAVID DEVELOPER
   President

AGENT:

TUCSON SPECIAL OPPORTUNITIES FUND L.P.,
a Delaware limited partnership

By: TUCSON SPECIAL OPPORTUNITIES FUND GP, LLC
   a Delaware limited liability company,
   its general partner

   By: _______________________
   Name: _______________________
   Title: _______________________
