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ASSIGNMENTS OF BUYER RIGHTS UNDER PURCHASE AGREEMENTS

Often times in the course of a real estate transaction, the named buyer under the purchase agreement will seek to assign its rights as buyer to another party, referred to as the assignee. In connection with such assignment, the assignor/buyer transfers any and all rights as buyer under the subject purchase agreement to the assignee, usually in exchange for payment or other consideration given by the assignee to the assignor. As a result, the initial “buyer” is making its profit as of or prior to the closing of the sale, rather than having to take ownership and resell the property to a new buyer. This practice is often referred to as “wholesaling,” and is growing more and more prevalent, including in “short sale” transactions in which the existing mortgage holders agree to accept less than the full amount owed on the mortgage(s) and the seller does not receive any proceeds from the sale (other than those funds paid toward commissions, closing costs, and the mortgage(s)).

The general rule under Arizona law is that a buyer’s interest in a real estate purchase agreement is freely assignable, absent restrictions or prohibitions in the underlying purchase agreement to the contrary. Many real estate purchase agreements, especially those drafted in a seller-oriented fashion, will contain such restrictions or prohibitions, such as restrictions against assignments to any other party except for affiliated or related entities, or a flat out prohibition against any assignments without seller’s prior written consent. Many other real estate purchase contract forms, however, including the standard form AAR purchase agreements (including the one used for residential real estate transactions with the “short sale” addendum) contain no such prohibition or restriction.

CAUTION: A buyer who assigns its rights under a purchase contract for residential property to another party likely qualifies as a “Wholesale Buyer” under A.R.S. § 44-5101(D). This statute requires the wholesale buyer to have previously given written disclosure to the seller, prior to entering into the purchase contract or other binding agreement. A.R.S. § 44-5101(A). Failure to comply renders the underlying contract cancellable by the seller, and forfeits any earnest money paid by the wholesale buyer. A buyer should first determine its liability and potential penalties under this statute before entering into an assignment. I have addressed the “wholesale buyer and seller” statute in a separate article.

In the absence of restrictions or prohibitions against assignment in the underlying purchase agreement (but see “CAUTION” paragraph above), and assuming there are no grounds for the seller to object or condition such an assignment (*id*), an assignment may be accomplished in as simple as one sentence to the effect that the buyer assigns any and

all rights, title, and/or interest in the underlying purchase agreement, the escrow, and the underlying real property, to the named assignee. In many cases, however, there may be various reasons, both due to concerns of the buyer/assignor and the new assignee/buyer, that make various additional provisions in an assignment document advisable. Following is a sample format that addresses various issues that would be of concern to the assignor (original buyer) when assigning its rights over to an assignee buyer. This sample format should not be used, however, without first analyzing assignor's liability under the "wholesale buyer" statute, A.R.S. § 44-5101, and the consequences that may follow.

***CAUTION: AN ASSIGNMENT SHOULD NOT BE DONE WITHOUT FIRST
DETERMINING THE POTENTIAL EFFECT OF THE WHOLESALE BUYER /
SELLER STATUTE, A.R.S. § 44-5101***

[SAMPLE] ASSIGNMENT AND ASSUMPTION OF BUYER'S RIGHTS

THIS ASSIGNMENT AND ASSUMPTION OF BUYER'S RIGHTS UNDER PURCHASE CONTRACT AND SELLER'S CONSENT ("ASSIGNMENT") is entered into between _____, ("Assignor"); and _____ ("Assignee"), for Ten Dollars (\$10.00) and other valuable consideration, with the consent of the undersigned Seller, and on the following terms and conditions:

1. This Assignment shall be effective as of _____, _____ ("Assignment Effective Date").
2. This Assignment pertains to that certain Real Estate Purchase Contract dated as of _____, and any Addenda or Amendments thereto (hereinafter together the "Purchase Contract"), under which Assignor is Buyer and _____ are Seller; and under which Buyer has the right to purchase that real property identified as the "Property" therein. The Purchase Contract is being administered pursuant to an escrow (the "Escrow") established by Assignor and Seller _____ (the "Escrow").
3. Assignor hereby nominates Assignee as the substitute "Buyer" under the Purchase Contract. Assignor further assigns to Assignee Assignor's entire right, title and interest in, to and under the Purchase Contract, the Property and the Escrow.
4. Assignor further assigns to Assignee any of its right, title and interest in or to any and all "Earnest Money" deposited in the Escrow pursuant to the Purchase Contract.
5. Seller acknowledges and agrees that Assignor is not in default under the Purchase Contract, and that the Purchase Contract remains enforceable in accordance with its terms.
6. Assignee hereby accepts the foregoing assignment and agrees to be bound by the terms and conditions of the Purchase Contract and assume the obligations of Buyer under the Purchase Contract.
7. This Assignment **shall [OR] shall not** relieve Assignor of any and all duties, obligations or liabilities under the Purchase Contract.

8. Except as otherwise expressly modified herein, the terms and provisions of the Purchase Contract shall remain in full force and effect.

9. By its signature hereto, Seller consents to the terms of this Assignment, and represents and warrants that to the best of Seller's knowledge there are no grounds to claim a default of Buyer under the Purchase Contract, and that the Purchase Contract remains enforceable in accordance with its terms as of the Assignment Effective Date.

10. Seller further expressly acknowledges that in connection with this Assignment, Assignor is acting on its own account and not on behalf of Seller, and is receiving separate consideration from Assignee, and therefore is receiving a profit from this transaction. Seller claims no interest in such consideration.

[Signatures of parties to follow]