

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2004-008349

01/21/2005

HONORABLE CATHY M. HOLT

CLERK OF THE COURT
E. Schneider
Deputy

FILED: 01/25/2005

PEGGY JEAN WISE

DARICE MICHELLE COLLINS

v.

CHERYL ANNE WILTROUT

MICHAEL C JOHNSON

BRIAN SWANSON
SPECIAL COMMISSIONER
FIRST USA REALTY
3549 W MC ARTHUR
PHOENIX AZ 85085-7839

ORDER FOR APPOINTMENT OF SPECIAL COMMISSIONER
FOR SALE OF REAL PROPERTY

Regarding Plaintiff's Motion for Clarification,

THE COURT FINDS the parties have an interest in real property, which property shall be sold in conjunction with proceedings now before the Court.

Good cause appearing,

IT IS ORDERED:

1. Brian Swanson is appointed Special Commissioner for Sale of Real Property (hereinafter, Special Commissioner), said real property located at: 6801 North 32nd Avenue, Phoenix, Arizona 85017.

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2. The Special Commissioner shall maintain a policy of Errors and Omissions Insurance equal to at least three times the market analysis or appraised value (as applicable) of the subject property during the pendency of this appointment.

3. **COOPERATION AND ACCESS.** The parties and their attorneys shall cooperate in good faith in providing access to the property by the Special Commissioner. The party in possession of the premises shall provide the Special Commissioner with a key to the property within 48 hours after a request by the Special Commissioner. The Special Commissioner shall attempt to give reasonable notice to the parties before gaining access to the premises at reasonable times.

4. **MARKET ANALYSIS AND APPRAISAL.** The Special Commissioner shall, within ten days of being granted access to the premises, cause a market analysis of said property to be made, and shall deliver copies of said market analysis to the parties and (if applicable) to the parties' attorneys. Within ten days after receipt of the market analysis, either party may provide written comments about the market analysis to the Special Commissioner, and either party or the Special Commissioner may request an appraisal. The cost of the appraisal shall be paid by the requesting party(ies) upon demand. The Special Commissioner shall have no obligation to obtain an appraisal unless the parties advance the appraisal fee except in those cases when the Special Commissioner is requesting the appraisal. In such cases, the Special Commissioner shall advance the appraisal fee to be reimbursed from the proceeds of sale after close of escrow. The Special Commissioner shall select an appraiser agreed to by both parties except that if the parties are unable to agree, the Special Commissioner shall select an independent appraiser.

5. **LISTING.** The subject real property shall be listed for sale in a commercially reasonable manner at the value estimated by the market analysis or, if applicable, at the appraised value. The Special Commissioner shall execute a listing agreement substantially consistent with the current model listing agreement approved by Arizona Association of Realtors. As used in this Order, the term "commercially reasonable manner" includes, but is not limited to [a] listing the property on the Multiple Listing Service (hereinafter, MLS), [b] stating a fair description of the properties' features, and [c] a statement of terms the sellers and the Special Commissioner will, and (as appropriate) will not, consider. The listing shall contain a provision that "the sale is subject to Court approval".

6. **REPORTS.** The Special Commissioner shall upon request by either party or the Court report, in writing, the efforts made to sell the property. The Special Commissioner shall deliver copies of said report to both parties and (if applicable) their counsel, every 30 days. Said report shall include recommendations, if any, for changes to the offering terms. The report shall not be filed directly with the Court, however, either party may submit any or all reports for the Court's consideration in further proceedings.

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7. The parties shall consider all written offers for purchase of the subject real property. Approval of terms of offer shall not be unreasonably withheld; approval, rejection, or counter-offer shall be made timely and in the manner necessary to consummate an arms-length real property transaction.

8. The Special Commissioner shall determine if reasonable changes are necessary to the terms of listing the property for sale if, after a period of not less than 90 days from the date of first publication in the MLS, the property remains unsold. As applied herein, "unsold" means the parties have not accepted a written offer for sale. The Special Commissioner shall make a recommendation in writing to the parties, and, if applicable, to their attorneys. If either party fails, neglects or refuses to deliver a written approval to/of changes to the terms of listing recommended by the Special Commissioner, the Special Commissioner or either party may petition the Court for hearing. Pending hearing, changes to the terms of listing suggested by the Special Commissioner shall be the terms which the property is offered for sale; the MLS listing shall note stated terms under these conditions to be "subject to Court approval". If neither party has requested a hearing within 10 days of mailing to their last known address or delivery of notice of the change recommended by the Special Commissioner, the recommendation shall be deemed accepted by the parties, and the phrase "subject to Court approval" may be removed from the MLS.

9. **OFFER REJECTED: REQUEST FOR HEARING.** If the Special Commissioner receives a written offer to purchase the subject real property which the parties, or either of them, reject, the Special Commissioner may petition the Court for an emergency or accelerated hearing and for acceptance of the offer. If, after emergency or accelerated hearing, the Court determines the offer should be accepted, the Court may direct the Special Commissioner or the Clerk of Court, pursuant to Arizona Rules of Civil Procedure, Rule 70, to make, execute and deliver the appropriate documents for consummation of sale. The Court shall impose sanctions against the party having unreasonably withheld approval of sale.

10. Net proceeds of sale shall be impounded by the title company engaged by the Special Commissioner, pending written agreement of the parties or Order of the Court.

11. Upon close of escrow, the Special Commissioner and the selling broker shall be paid a commission consistent with the reasonable and customary fees paid to Realtors in similar transactions in Maricopa County, Arizona.

12. **PURCHASE OF PROPERTY BY A PARTY.** In the event either owner wishes to purchase the subject real property, the purchasing owner shall submit an offer to the other owner, in writing with a copy to the Special Commissioner. All such offers that are rejected may be submitted to the Court for approval. No party shall reject an offer unless that party can make a factual showing as to a reasonable basis for the rejection. In the event of an owner purchase or property withdrawal from sale based upon an agreement of the parties, Special Commissioner compensation shall be paid as follows:

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a. Offers made and accepted prior to an executed listing agreement that are approved by the Court or agreed to by the parties shall result in a reasonable fee for the time expended, including preparation of the market analysis;

b. Agreements to sell by the parties or agreements approved by the Court after the listing agreement shall subject the offering owner to payment of a fee to the Special Commissioner. The fee shall be the greater of one percent (1%) of the total selling price or a reasonable hourly fee for the efforts expended by the Special Commissioner based upon reasonable hourly rates to be approved by the Court. In all such cases, the out-of-pocket expenses of the Special Commissioner shall be paid directly by the purchasing owner. All such fees and costs shall be paid from the proceeds of sale. In the event the proceeds of sale are insufficient to pay the Special Commissioner costs and fees, those fees shall be paid by the purchasing owner prior to close of escrow.

c. If, after receipt by the Special Commissioner of a bona fide offer to purchase the real property from a third party, either owner makes a written offer to purchase the real property, which offer is approved by the Court, the purchasing owner shall pay a commission to the Special Commissioner in the amount of three and one-half percent (3.5%) of the total selling price. A bona fide offer means an offer from a qualified purchaser presenting commercially reasonable terms. Payment of the Special Commissioner's fee shall be part of the Court's Order of approval requiring the payment as a contingency to the close of escrow.

13. SANCTIONS. The Court may impose additional sanctions for a party's unreasonable behavior under this order, including, but not limited to, adding an additional 1% of the selling price as compensation for services rendered as Special Commissioner, over and above the reasonable and customary fees paid for similar services not involving a Special Commissioner within Maricopa County. Other sanctions may include contempt, an award of attorney's fees, or removal from the premises.