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STATE OF ARIZONA

DEPARTMENT OF INSURANCE

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By llc

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| In the Matter of |) | Docket No. 8474 |
| |) | |
| MALCOLM GILES dba TIS/TAX |) | |
| & INVESTMENT STRATEGIES, |) | ORDER |
| INC., |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

The hearing in this matter began on October 5, 1994. Assistant Attorney General Peter H. Schelstraete appeared on behalf of the Arizona Department of Insurance ("Department"). Donald Loose represented the Respondent, Malcolm Giles dba TIS/Tax & Investment Strategies, Inc. ("Mr. Giles"). References to "TIS/TAX & Investment Strategies, Inc. will be abbreviated as "TIS/TAX".

The proceedings continued on October 6 and October 11, 1994. Mr. Giles was present on October 5 and October 6. Mr. Giles did not appear for the hearing on October 11, 1994. The parties rested and presented closing arguments on October 11, 1994. The record remained open until October 19, 1994.

The Department presented testimony from the following witnesses: Harold Eirnbaum, Maureen Catalioto, JoLynn Clemens, Marguerite Daniels, Jody DeMark, Donna Dietle, Brad Hahn, Gladys Maxson, John Maxson, Archie Neill, Judy Neill, and Les Nesmith. Mr. Giles did not testify and called no witnesses.

Based upon the entire record in this matter, including all pleadings, motions, testimony, and exhibits admitted during the hearing of this matter, and the record made at the July 25, 1994 pre-hearing proceeding, Administrative Law Judge Gregory Y.

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1 Harris has prepared the following Findings of Fact, Conclusions
2 of Law, and Order for the Director's consideration and approval.
3 Based upon these recommendations, the Director makes the
4 following Findings of Fact, Conclusions of Law and enters the
5 following Order:

6 FINDINGS OF FACT

7 1. Mr. Giles holds license number 636867 issued by
8 the Director ("the "License"). The License authorizes Mr. Giles
9 to transact disability, life, and variable annuity business.

10 2. On or about June 10, 1993, Mr. Giles met with
11 Marguerite Daniels ("Mrs. Daniels") to discuss her purchase of
12 an annuity, an insurance product. On that date, Mrs. Daniels
13 signed applications to purchase two annuity insurance policies
14 (collectively referred to as the "Annuity Policies") through Mr.
15 Giles from U.S.G. Annuity and Life Company ("U.S.G.").

16 3. Shortly after his meeting with Mrs. Daniels, Mr.
17 Giles submitted applications for both Annuity Policies to U.S.G.

18 4. U.S.G. assigned policy number 152137 to the
19 policy which Mrs. Daniels purchased for the transfer of a
20 portion of her retirement portfolio (the "Retirement Policy").

21 5. U.S.G. assigned policy number 152136 to the
22 policy which Mrs. Daniels bought to transfer a portion of the
23 assets of a trust administered by Mrs. Daniels (the "Trust
24 Policy"). Mrs. Daniels' late brother, Arthur Grimm,
25 established this trust before his death. When he died, Mrs.
26 Daniels became both the trustee and a beneficiary of the trust
27 and its assets.

28 6. U.S.G. issued the Trust Policy in August 1993.

1 7. The Trust Policy had a cost basis of
2 \$136,620.46.

3 8. Mr. Giles received a commission of \$14,345.15
4 from U.S.G. for his sale of the Trust Policy to Mrs. Daniels.

5 9. U.S.G. issued the Retirement Policy in November
6 of 1993.

7 10. The Retirement Policy had a cost basis of
8 \$47,431.37.

9 11. Mr. Giles received a commission of \$4,090.80 from
10 U.S.G. for his sale of the Retirement Policy to Mrs. Daniels.

11 12. Between Thanksgiving and mid-December, 1993, Mrs.
12 Daniels had several conversations concerning the delivery of the
13 Annuity Policies with Jody DeMark, an employee of Mr. Giles. In
14 these conversations, Mrs. Daniels sought to arrange to have Mr.
15 Giles deliver the Annuity Policies to her.

16 13. Mrs. Daniels planned to vacation away from
17 Arizona beginning in mid-December, 1993. Mrs. Daniels wanted to
18 receive advice from an accountant before the start of her
19 vacation about whether the Annuity Policies would satisfy or
20 were consistent with her investment goals and obligations.
21 Thus, Mrs. Daniels wanted to receive delivery of the Annuity
22 Policies from Mr. Giles before leaving for her vacation.

23 14. Mrs. Daniels did not receive a direct answer from
24 Mr. Giles regarding her request for the delivery of the Annuity
25 Policies before she began her vacation. Instead, on December 1,
26 1993, Mr. Giles told Ms. DeMark that he would not deliver the
27 Annuity Policies to Mrs. Daniels until after January 1, 1994.

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1 15. In response to Mrs. Daniels' requests for the
2 delivery of the Annuity Policies, Ms. DeMark agreed to make the
3 policies available for Mrs. Daniels to pick up. On December 16,
4 1993, Ms. DeMark placed the Annuity Policies in an envelope and
5 left the envelope with the receptionist at the office suite
6 complex where Mr. Giles leased space (the "Esplanade Office").

7 16. On December 16, 1993, Mrs. Daniels retrieved both
8 the Trust Policy and the Retirement Policy from the Esplanade
9 Office.

10 17. Mrs. Daniels did not sign a policy delivery
11 receipt for either of the Annuity Policies when she retrieved
12 the Annuity Policies from the Esplanade Office.

13 18. Consistent with A.R.S. §20-1233, and pursuant to
14 the provisions of the policies issued by U.S.G., Mrs. Daniels
15 received a 20 day free look (the "Free Look Period") to examine
16 the Trust Policy and the Retirement Policy.

17 19. During the Free Look Period, Mrs. Daniels had
18 both the statutory and contractual right to return the Annuity
19 Policies and receive a refund of all monies paid without a
20 surrender charge.

21 20. If Mrs. Daniels cancelled either of the Annuity
22 Policies during the Free Look Period, Mr. Giles would lose the
23 commission paid to him by U.S.G. for the sale of the cancelled
24 policy.

25 21. The Free Look Period began on December 16, 1993
26 when Mrs. Daniels retrieved the Annuity Policies from the
27 Esplanade Office.

28

1 22. Mrs. Daniels elected to maintain the Retirement
2 Policy and to cancel the Trust Policy after she consulted with
3 an accountant and a financial planner. On December 17, 1993,
4 Mrs. Daniels provided notice to U.S.G. of her intent to cancel
5 the Trust Policy within the Free Look Period.

6 23. Mr. Giles learned that Mrs. Daniels had exercised
7 her statutory and contractual right to cancel the Trust Policy
8 within the Free Look Period. After receiving this information,
9 Mr. Giles asked Ms. DeMark to schedule a meeting with Mrs.
10 Daniels. On January 10, 1994, Ms. DeMark arranged for this
11 meeting to be held on January 18, 1994 at Mrs. Daniels' home.

12 24. Mr. Giles also directed Ms. DeMark to create and
13 transmit a billing statement to Mrs. Daniels. Mr. Giles
14 instructed Ms. DeMark to have the billing statement show that
15 Mrs. Daniels owed Mr. Giles \$2,776.25 for services he performed
16 in connection with his sale of the Annuity Policies to Mrs.
17 Daniels.

18 25. Ms. DeMark prepared the billing statement working
19 backward from the figure given to her by Mr. Giles. She used
20 the log sheets maintained in Ms. Daniels' file as the source
21 document for the billing statement. The billing statement
22 showed dates of services rendered, the amount of time spent on
23 each task, and an hourly billing rate for both Mr. Giles
24 (\$125.00/hour) and Ms. DeMark (\$85.00/hour).

25 26. The log used by Ms. DeMark to create the billing
26 statement did not include contemporaneously created time
27 records. Instead, when she prepared the billing statement, Ms.
28

1 DeMark guessed how much time had been spent on the tasks listed
2 in the billing statement.

3 27. All items listed on the billing statement related
4 to Mr. Giles' solicitation, inducement, effectuation,
5 negotiation, or transaction of matters subsequent to or arising
6 out of Mrs. Daniels' purchase of the Annuity Policies.

7 28. Ms. DeMark sent the billing statement dated
8 January 14, 1994 to Mrs. Daniels. The billing statement,
9 printed on TIS/TAX letterhead, represented that Mrs. Daniels
10 owed Mr. Giles or TIS/TAX \$2,776.25 for 22.5 hours of work
11 performed in connection with the sale of the Annuity Policies.

12 29. At no time before the creation of the billing
13 statement had Mr. Giles or any employee or agent of Mr. Giles
14 advised Mrs. Daniels that she would be subject to an hourly rate
15 for Mr. Giles' services in connection with his sale of the
16 Annuity Policies if she sought to cancel either of the Annuity
17 Policies.

18 30. On January 18, 1994, Mr. Giles met with Mrs.
19 Daniels at her home. During this meeting, Mr. Giles asked Mrs.
20 Daniels to sign policy delivery receipts for the Annuity
21 Policies in blank. These policy delivery receipts were printed
22 on TIS/TAX letterhead.

23 31. The policy delivery receipts given to Mrs.
24 Daniels did not identify the name of the insured, the policy
25 number, the date on which delivery occurred, or any other
26 information relating to Mrs. Daniels' December 16, 1993 receipt
27 of the Annuity Policies.

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1 32. Mrs. Daniels signed more than one policy delivery
2 receipt. Mr. Giles had not signed the policy delivery receipts
3 which he gave to Mrs. Daniels. Mrs. Daniels signed her name,
4 and dated the receipts December 13, 1993, the date she
5 mistakenly believed to have been the date on which she retrieved
6 the Annuity Policies from the Esplanade Office. Mr. Giles did
7 not correct Mrs. Daniels' mistake, did not complete the policy
8 delivery receipts signed by Mrs. Daniels, and did not leave or
9 provide her with a copy of the incomplete delivery receipts
10 which she had signed.

11 33. Before Mr. Giles met with Mrs. Daniels on January
12 18, 1994, Mr. Giles knew that Mrs. Daniels had not received the
13 Annuity Policies until December 16, 1993.

14 34. On February 1, 1994, Mr. Giles gave Ms. DeMark a
15 policy delivery receipt bearing what appeared to be the
16 signature of Mrs. Daniels. The policy delivery receipt bore
17 the date November 13, 1993. Mr. Giles instructed Ms. DeMark to
18 falsely complete this delivery receipt by adding detail,
19 including the name of the insured and the policy number, to the
20 receipt. Ms. DeMark complied with Mr. Giles' instructions and
21 filled in blanks on the policy delivery receipt so that the
22 policy delivery receipt falsely appeared or purported to
23 represent that Mrs. Daniels had received the Trust Policy on
24 November 13, 1993. With this, Mr. Giles directed the creation
25 of the "Falsely Completed Delivery Receipt".

26 35. Mr. Giles further directed Ms. DeMark to fax the
27 Falsely Completed Delivery Receipt to U.S.G. U.S.G. had asked
28 Mr. Giles for proof of delivery of the Trust Policy in

1 connection with U.S.G.'s evaluation of whether Mrs. Daniels had
2 cancelled the Trust Policy within the Free Look Period.

3 36. When Mr. Giles instructed Ms. DeMark to complete
4 the Falsely Completed Delivery Receipt, he knew both that
5 delivery of the Trust Policy had occurred on December 16, 1993
6 and that any representation that delivery of the Trust Policy
7 had occurred on November 13, 1993 was false.

8 37. U.S.G. denied Mrs. Daniels' request to cancel the
9 Trust Policy without a surrender charge. Instead, U.S.G. sought
10 to assess a \$13,105.93 surrender charge to cancel the policy.
11 U.S.G. relied upon the False Delivery Receipt in support of its
12 decision to reject Mrs. Daniels' request to cancel the Trust
13 Policy without a surrender charge.

14 38. Mrs. Daniels has incurred \$1,215.00 in attorneys
15 fees directly in connection with her efforts to cancel the Trust
16 Policy without a surrender charge.

17 39. Mrs. Daniels began to receive benefits from
18 U.S.G. before Mr. Giles delivered the Annuity Policies to her.
19 However, Mrs. Daniels' Free Look Period for the Trust Policy
20 began upon actual delivery of the policy on December 16, 1993.
21 Neither Mr. Giles' delay in effecting delivery of the Trust
22 Policy nor U.S.G.'s pre-delivery payment of benefits to Mrs.
23 Daniels deprived Mrs. Daniels of the right to examine or cancel
24 the Trust Policy without a surrender charge.

25 40. In connection with his sale of the Annuity
26 Policies to Mrs. Daniels, Mr. Giles represented that he
27 transacted business under the name TIS/TAX & Investment
28 Strategies, Inc.

1 41. On or about May 26, 1994, the Director, by and
2 through his duly authorized Executive Assistant Director, issued
3 an Order ("Director's Order") requiring Mr. Giles to produce
4 documents and appear and give testimony under oath before the
5 Department on June 15, 1994 at 10:00 a.m. In the Director's
6 Order, Mr. Giles was advised that:

7 FAILURE to comply with the Director's Order
8 will constitute a wilful violation of, or
9 wilful noncompliance with an Order of the
Director, and may result in disciplinary
action being taken.

10 42. Mr. Giles, through counsel, stipulated with the
11 Department to appear on June 24, 1994 at 10:30 a.m. to produce
12 documents and to testify before the Department.

13 43. On June 24, 1994, Mr. Giles appeared before the
14 Department, but refused to give testimony under oath in
15 accordance with the Director's Order.

16 44. The Director's Order, required Mr. Giles to
17 produce:

18 [D]ocuments relating to the sale of
19 insurance to Marguerite Daniels, including,
20 but not limited to, applications, original
21 policy delivery receipts, ledger books,
appointment logs, and all memos and
correspondence.

22 45. On June 24, 1994, Mr. Giles failed to produce all
23 of the documents designated in the Director's Order. The
24 documents which Mr. Giles failed to produce included policy
25 delivery receipts involving the Annuity Policies. Further, Mr.
26 Giles did not produce either the original or a copy of the
27 Falsely Completed Delivery Receipt.
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1 46. The policy delivery receipts for the Annuity
2 Policies and the Falsely Completed Delivery Receipt constitute
3 records Mr. Giles had the obligation to maintain and produce in
4 response to the Director's Order pursuant to A.R.S. §20-302.

5 47. Mr. Giles' refusal to testify on June 24, 1994 in
6 response to the Director's Order deprived the Director of the
7 opportunity to receive and review information relevant to Mr.
8 Giles' sale of the Annuity Policies to Mrs. Daniels. As a
9 consequence, the Director did not receive either Mr. Giles'
10 explanation of the creation and transmission of the Falsely
11 Completed Delivery Receipt or an explanation of Mr. Giles'
12 failure to maintain or produce the Falsely Completed Delivery
13 Receipt in response to the Director's Order.

14 48. Following Mr. Giles' failure to give testimony
15 under oath and his failure to produce records pursuant to the
16 Director's Order, the Director ordered the summary suspension of
17 the insurance license issued by the Director to Mr. Giles.

18 49. On August 30, 1993, Mr. Giles met with Archie
19 Neill and Judy Neill to discuss the possible creation of a
20 living trust to be called the "Neill Family Trust". Mr. Giles
21 proposed the Neills' purchase of an annuity contract as an asset
22 of the proposed trust. The Neills signed applications provided
23 to them by Mr. Giles to buy an annuity contract as an asset of
24 the proposed trust.

25 50. On August 30, 1993, Mr. Giles received a \$600.00
26 check from Judy Neill toward the creation of a living trust, an
27 asset of which was to be an annuity, applications for which the
28 Archie Neill and Judy Neill signed.

1 51. The Neills became dissatisfied with the lack of
2 progress toward the creation of the living trust, an element of
3 which included the purchase on an annuity contract in the name
4 of the trust. Thus, on October 14, 1994, the Neills sought to
5 cancel the application and stop Mr. Giles' creation of a living
6 trust. In addition, the Neills sought a refund from Mr. Giles.

7 52. Mr. Giles refused to give the Neills a refund of
8 the \$600.00 given to him by Judy Neill.

9 53. In his dealings with the Neills, Mr. Giles
10 represented that he transacted business under the name TIS/TAX &
11 Investment Strategies, Inc.

12 54. Mr. Giles submitted an application in April 1993
13 to the Department to renew the License (the "Renewal
14 Application"). Mr. Giles identified his employer as "TIS/TAX &
15 Investment Strategies, Inc." on the Renewal Application.

16 55. Individuals seeking to transact business under an
17 assumed business name must file a Certificate for Assumed
18 Business Name with the Department pursuant to A.R.S. §20-318.

19 56. Mr. Giles has not submitted a Certificate For
20 Assumed Business Name to the Department to transact business
21 under the name of TIS/TAX.

22 57. Mr. Giles has not satisfied his obligation to
23 submit a Certificate For Assumed Business Name to the Department
24 with his submission of the Renewal Application in which he
25 identified his employer as TIS/TAX.

26 58. TIS/TAX does not hold a license to transact the
27 business of insurance in Arizona.

28

1 59. Mr. Giles appeared with his counsel during the
2 first two days of the formal hearing of this matter. At the
3 close of the second day of hearing, the parties agreed that the
4 proceedings would reconvene on October 11, 1994 for the third
5 hearing. The parties agreed upon this date based upon the
6 unavailability of Mr. Giles' counsel on October 7, 1994, and Mr.
7 Giles' unavailability on October 13 and 14, 1994.

8 60. Mr. Giles chose to not appear on October 11,
9 1994, the final day of the hearing. His counsel rested without
10 calling any witnesses, including Mr. Giles, to testify in this
11 matter. Thus, Mr. Giles presented no evidence concerning or
12 explaining: a) the creation, transmission and maintenance of
13 the Falsely Completed Delivery Receipt; b) the insurance related
14 transaction with the Neills; and c) Mr. Giles' use of the name
15 TIS/TAX in connection with his transaction of insurance.

16 61. An insufficient record was created to demonstrate
17 that Mr. Giles' transaction of insurance business with Gladys
18 Maxson and John Maxson violated the provisions of Title 20.

19 CONCLUSIONS OF LAW

20 1. The conduct described above constitutes a wilful
21 violation of, or wilful noncompliance with the provisions of
22 Title 20 of the Arizona Revised Statutes and violation of an
23 order of the director within the meaning A.R.S. §20-316(A)(2).

24 2. The conduct described above constitutes a failure
25 of the Respondent to maintain records pertaining to transactions
26 under his license and failure to maintain all such records as to
27 any particular transaction for three years immediately following
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1 in the date of completion of such transaction as provided in
2 A.R.S. §20-302(C).

3 3. The conduct described above constitutes the
4 Respondent knowingly making a false or fraudulent statement or
5 representation in or relative to an application for life or
6 disability insurance, or the making of any such statement to
7 obtain a fee as required in A.R.S. §20-458.

8 4. The conduct described above constitutes
9 participation in unfair and deceptive trade practices within the
10 meaning A.R.S. §20-442.

11 5. The conduct described above constitutes
12 misrepresentation in unfair and deceptive trade practices within
13 the meaning of A.R.S. §§20-443 and 20-443.01.

14 6. The conduct described above constitutes fraud
15 within the meaning of A.R.S. §20-463.

16 7. The conduct described above constitutes the
17 transaction of insurance in this state under an assumed name
18 without the Respondent filing in the office of the director a
19 certificate setting forth the name under which insurance is, or
20 is to be, transacted, as required within the meaning of A.R.S.
21 §20-318.

22 ORDER

23 IT IS ORDERED:

24 1. Immediately revoking insurance agent's license
25 number 636867 issued to Respondent Malcolm Giles. This portion
26 of the Order is based upon the findings of fact and conclusions
27 of law relating to Mr. Giles' sale of the Annuity Policies to
28

1 Mrs. Daniels and to the participation in the creation of the
2 Falsely Completed Delivery Receipt.

3 2. Suspending insurance agent's license number
4 636867 issued to Respondent Malcolm Giles for six months,
5 retroactive to July 1, 1994. This portion of the Order is based
6 upon the findings of fact and conclusions of law relating to Mr.
7 Giles' wilful refusal to give testimony under oath and wilful
8 refusal to produce documents pursuant to an order of the
9 Director.

10 3. Directing Mr. Giles to pay restitution and
11 present proof of the payment of restitution within 30 days of
12 the date of this Order in the following amounts to the following
13 individuals:

14 a. \$600.00 to Archie Neill and Judy Neill.

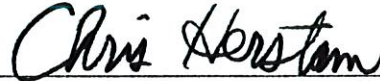
15 b. \$13,105.93, the surrender charge sought to be
16 assessed by U.S.G. in connection with Mrs. Daniels' attempt to
17 cancel the Trust Policy. This amount shall be paid to Mrs.
18 Daniels if, within 30 days of this Order, U.S.G. has not
19 refunded the purchase price of the Trust Policy without
20 assessing a surrender charge.

21 c. \$14,345.15 to U.S.G., representing the
22 commission paid by U.S.G. to Mr. Giles for his sale of the Trust
23 Policy to Mrs. Daniels.

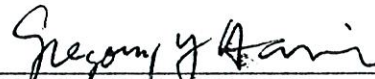
24 d. \$1,215.00 to Mrs. Daniels for attorneys fees
25 incurred by her in connection with her efforts to cancel the
26 Trust Policy without a surrender charge. If, within 30 days of
27 this Order, U.S.G. has paid \$1,215.00 to Mrs. Daniels for
28 attorneys fees incurred by her in connection with her efforts to

1 secure the return of the premium paid to purchase the Trust
2 Policy, Mr. Giles shall pay this amount to U.S.G.

3 EFFECTIVE this 4th day of November, 1994.

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5 

6 CHRIS HERSTAM
7 Director Of Insurance

8 

9 GREGORY Y. HARRIS
10 Chief Administrative Law Judge

11 COPY of the foregoing mailed/delivered
12 this 4th day of November, 1994, to:

13 Gay Ann Williams, Deputy Director
14 Charles R. Cohen, Executive Assistant Director
15 Cathy O'Neil, Assistant Director
16 Maureen Catalioto, Supervisor
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26 
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