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ARKANSAS SECURITIES DEPT.

**BEFORE THE ARKANSAS SECURITIES COMMISSIONER  
CASE NO S-17-0058  
ORDER NO. S-17-0058-19-OR01**

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**IN THE MATTER OF:  
WILSHIRE-PENNINGTON GROUP, INC.  
BENJAMIN DANIEL KENNEDY III, AND  
BENJAMIN DANIEL KENNEDY IV**

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**RESPONDENTS**

**CONSENT ORDER**

This Consent Order is entered pursuant to the Arkansas Securities Act, codified at Ark. Code Ann. §§ 23-42-101 through 23-42-509 (“Act”), the Rules of the Arkansas Securities Commissioner (“Rules”) promulgated under the Act, and the Arkansas Administrative Procedures Act, codified at Ark. Code Ann. §§ 25-15-201 through 25-15-219, in accordance with an agreement by and between the Staff of the Arkansas Securities Department (“Staff”) and Wilshire-Pennington Group, Inc. (“Wilshire-Pennington”), Benjamin Daniel Kennedy III, (“Danny Kennedy”), and Benjamin Daniel Kennedy IV (“Benjamin Kennedy”), in full and final settlement of all claims that could be brought against Wilshire-Pennington, Danny Kennedy and Benjamin Kennedy by the Staff on the basis of the facts set forth herein.

Wilshire-Pennington, Danny Kennedy and Benjamin Kennedy admit the jurisdiction of the Act and the Arkansas Securities Commissioner (“Commissioner”), neither admit or deny the findings of fact made herein, and solely for the purpose of entry of this order, waive its and his right to a formal hearing and appeal, consent to the entry of this order, and agree to abide by its terms in settlement of any possible violations committed by Wilshire-Pennington, Danny Kennedy and Benjamin Kennedy concerning the matters detailed in this order.

## FINDINGS OF FACT

1. Wilshire-Pennington, CRD no. 127465, has been registered with the Arkansas Securities Department (“Department”) as an investment adviser since September 25, 2012. Wilshire-Pennington’s principle place of business is Oklahoma City, Oklahoma.

2. Danny Kennedy, CRD no. 1744933, has been registered with the Department as an investment adviser representative of Wilshire-Pennington since September 25, 2004.

3. Benjamin Kennedy, CRD no. 5023746, has never been registered with the Department in any capacity. However, Benjamin Kennedy has been registered with the Oklahoma Securities Department as an investment adviser representative of Wilshire-Pennington since July 1, 2006. From February 3, 2013, until on or about February 26, 2014, Benjamin Kennedy engaged in securities trading in this account.

4. As an investment adviser, Wilshire-Pennington, and as representatives of an investment adviser, Danny Kennedy and Benjamin Kennedy, owed a fiduciary duty to AR1. Between January 2012 and September 2015, Wilshire-Pennington, Danny Kennedy and Benjamin Kennedy purchased and held inverse and/or leveraged exchange traded funds (“ETFs”) in Arkansas resident one’s (“AR1”) account. AR1 is a married couple. Although the various prospectuses for said inverse and/or leveraged ETFs clearly stated that these inverse and/or leveraged ETFs were designed to be held for only one day, Danny Kennedy and Benjamin Kennedy held these ETFs in AR1’s account for days, or in some instances weeks. The prospectuses further stated that the funds “may not be suitable for all investors and should be used only by knowledgeable investors who understand the potential consequences of seeking daily leveraged investment results. Shareholders should actively monitor their investments”.

5. On September 24, 2012, AR1 signed a Wilshire-Pennington Memorandum, which authorized Danny Kennedy and Benjamin Kennedy to purchase inverse and/or leveraged ETFs. By the time AR1 signed said Memorandum, Wilshire-Pennington, Danny Kennedy and Benjamin Kennedy had already been purchasing and holding inverse and/or leveraged ETFs in AR1's account for over eight months.

6. Although AR1 signed said Wilshire-Pennington Memorandum, AR1 was not experienced with or fully understood the nature of inverse and/or leveraged ETFs. In addition, AR1 did not fully understand the risks involved in purchasing inverse and/or leveraged ETFs. Also, AR1 are investors with a stated conservative to moderate risk tolerance. Therefore, inverse and/or leveraged ETFs were not a suitable investment for AR1's account. The unsuitability of the purchase of inverse and/or leveraged ETFs in AR1's account is compounded by the fact that inverse and/or leveraged ETFs comprised 30% or the number one investment in AR1's account in October 2012. In January 2015 inverse and/or leveraged ETFs comprised 18% or the third highest investment in AR1's account. These examples of the concentrations of the investments in inverse and/or leveraged ETFs were far too aggressive and risky for conservative to moderate investors, like AR1.

7. In addition to the previously stated ETF transactions, between January 2012 and January 2016, Wilshire-Pennington, Danny Kennedy and Benjamin Kennedy purchased and held exchange traded notes ("ETNs") and/or inverse ETNs in AR1's account. However, AR1 never signed any written authorization similar to the authorization for the purchase of inverse or leveraged ETFs detailed above. In addition, AR1 were not experienced with or fully understood the risks involved in purchasing ETNs and/or inverse ETNs. Also, AR1 are investors with a stated conservative to moderate risk tolerance. Further, none of the ETNs and/or inverse ETNs paid any interest to AR1.

In many cases a conservative investor may want income or slow growth of their investments. Therefore, ETNs and/or inverse ETNs were not a suitable investment for AR1's account. The unsuitability of the purchase of ETNs and/or inverse ETNs in AR1's account is compounded by the fact that inverse ETNs comprised 53% and 40% of the number one investment in AR1's account in October and December 2014. Also, in November 2014 inverse ETNs comprised 20% of the second highest investment in AR1's account. In November and December 2015 inverse ETNs comprised 27% and 24% of the second highest investment in AR1's account. Finally, in January 2016 inverse ETNs comprised 17% of the second highest investment in AR1's account. These examples of the concentrations of the investments in inverse ETNs were far too aggressive and risky for conservative to moderate investors, like AR1.

8. The only written risk disclosure AR1 received from Wilshire-Pennington, Danny Kennedy and Benjamin Kennedy concerning inverse and/or leveraged ETFs was contained in a Wilshire-Pennington Memorandum dated September 24, 2012. The only risk disclosure in this Memorandum consists of one sentence. "These ETF's are intended to be very short term investments and pose unique risks." This disclosure is wholly inadequate and omits to provide any detail about the "unique risks". These risks include that inverse and/or leveraged ETFs are a speculative investment. Therefore, an investor may lose some or all of their investment. In addition, it does not disclose that inverse and/or leveraged ETFs are designed for one trading day and are subject to long term holding risk. Therefore, holding inverse and/or leveraged ETFs for days or weeks can present greatly increased risk to any amount invested.

9. ETNs and Inverse ETNs have similar risks to inverse or leveraged ETFs, as well as unsecured debt or obligation risk and possible concentration risk. Wilshire-Pennington, Danny Kennedy and Benjamin Kennedy have not provided any memorandum to the Staff, similar to the

memorandum discussed above, signed by AR1 authorizing the purchase of ETNs and/or inverse ETNs. In spite of the fact that Danny Kennedy and Benjamin Kennedy omitted to provide any written disclosure of the risks involved in purchasing and holding ETNs and/or inverse ETNs, Danny Kennedy and Benjamin Kennedy repeatedly purchased and held such investments in AR1's account for days or weeks.

10. As stated in paragraphs four and seven, between January 2012 and January 2016, Danny Kennedy and Benjamin Kennedy repeatedly purchased and held inverse and/or leveraged ETFs and ETNs in the AR1's account. Even though the Staff has repeatedly requested a copy of Wilshire-Pennington's written supervisory or compliance policy, Wilshire-Pennington has produced no comprehensive written supervisory or compliance policy for the Staff's review. Wilshire-Pennington has only produced a series of internal memoranda and a white paper in response to the Staff's requests. The last line of the Wilshire-Pennington Memorandum dated July 2012 and titled Regulatory Notice 09-31 states, "Wilshire-Pennington must have adequate supervision procedures in place to ensure that these obligations are met". This memorandum concerns the sale of inverse or leveraged ETFs and the need to make certain that recommendations to customers are suitable and based on a full understanding of the terms and features of the product. Although this memorandum clearly indicates the need for supervisory procedures, none of the other memoranda nor the white paper provided by Wilshire-Pennington to the Staff address supervisory or compliance policies or procedures in any way.

11. In response to the Staff's requests for copies of AR1's account statements Wilshire-Pennington, Danny Kennedy and Benjamin Kennedy have stated that after February 2016, when AR1 removed Wilshire-Pennington from their Fidelity account, they have not had access to AR1's account records. In addition, in an email dated February 11, 2019, Benjamin Kennedy stated that,

“We called Fidelity and I believe they said they no longer have them (ARI’s account statements) as it has been over 5 years.” However, when the Staff requested Fidelity provide ARI’s account statements from 2012 through 2016, Fidelity provided said account statements to the Staff. Finally, in a letter dated June 13, 2017, from Jeanette Timmons, an attorney representing Wilshire-Pennington, Danny Kennedy and Benjamin Kennedy it states, “Wilshire-Pennington was permitted on-line access to the *ARI* account on the NFS platform, but did not maintain separate records of the transactions in the account after 2012.”

#### APPLICABLE LAW

12. Ark. Code Ann. § 23-42-306 states that every applicant, registered broker-dealer, or registered investment adviser shall make and keep any accounts, correspondence, memoranda, papers, books, and other records which the Securities Commissioner by rule prescribes.

13. Rule 306.02(a) states that all registered investment advisers shall make and keep true, accurate and current books and records relating to their investment advisory business. The records required to be maintained shall be maintained for a minimum of five (5) years from the date on which the transaction occurred shall include the specific record set forth below. The provisions of this rule shall not apply to an investment adviser whose principle place of business is located in a state other than Arkansas, provided that the investment adviser is registered or licensed as an investment adviser in that other state and is in compliance with the applicable books and records requirements of that other state.

14. Rule 306.02(b)(7) states that the business records required to be maintained shall include originals or electronic copies of all written communication received and copies of all written communications sent by such investment adviser relating to the following: (A) Any recommendation made or proposed to be made any advice given or proposed to be given (B) Any

receipt, disbursement, or delivery of funds or securities; or (C) The placing or execution of any order to purchase or sell any security.

15. Rule 306.02(c) states that unless specifically provided otherwise, all books and records shall be maintained and preserved in an easily accessible place for a period of not less than five (5) years from the end of the fiscal year during which the last entry was made on the record.

16. Rule 306.02(d)(1) states that records required to be maintained and preserved may be maintained and preserved for the required time, and immediately produced or reproduced by the investment adviser by: (A) Paper or hard copy form; (B) Electronic storage media; or (C) Other similar medium that meets and complies with the other requirements of this rule.

17. Rule 306.02(b)(18) states that the business records required to be maintained shall include written procedures to supervise the activities of employees and investment adviser representatives that are reasonably designed to achieve compliance with applicable securities laws and regulations.

18. Ark. Code Ann. § 23-42-307(a)(3) states that it is unlawful for any investment adviser or representative to make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading.

19. Ark. Code Ann. § 23-42-308(a)(2)(G) states that the Commissioner may by order suspend or revoke any registration, if he finds the registrant has engaged in dishonest or unethical practices in the securities business.

20. Rule 308.02(a) states that investment advisers have a duty to act primarily for the benefit of their client. Further, it shall be considered grounds for suspension or revocation of an investment adviser representative registration to recommend to a client the purchase, sale or

exchange of any security without reasonable grounds to believe that the recommendation is suitable for the client on the basis of information furnished by the client after reasonable inquiry concerning the client's investment objectives, financial situation and needs.

21. Ark. Code Ann. § 23-42-308(a)(2)(J) states that the Commissioner may by order suspend or revoke any registration, if he finds the registrant has failed reasonably to supervise the agents or employees of the broker-dealer of the representatives or employees of the investment adviser.

#### CONCLUSIONS OF LAW

22. Wilshire-Pennington, Danny Kennedy and Benjamin Kennedy violated Ark. Code Ann. § 23-42-308(a)(2)(G), Rule 308.02(a) and it's and their fiduciary duty, when it and they purchased inverse and/or leveraged ETFs in the account of AR1 as detailed in paragraphs number four through six.

23. Wilshire-Pennington, Danny Kennedy and Benjamin Kennedy violated Ark. Code Ann. § 23-42-308(a)(2)(G), Rule 308.02(a) and it's and their fiduciary duty, when it and they purchased ETNs and/or inverse ETNs in the account of AR1 as detailed in paragraph number seven.

24. Wilshire-Pennington, Kennedy III and Kennedy IV violated Ark. Code Ann. § 23-42-307(a)(3) when it and they failed to discuss all of the risks involved in investing in inverse and/or leveraged ETFs with AR1 as detailed in paragraph number eight.

25. Wilshire-Pennington, Kennedy III and Kennedy IV violated Ark. Code Ann. § 23-42-307(a)(3) when it and they failed to discuss all of the risks involved in investing in ETNs inverse and/or inverse ETNs with AR1 as detailed in paragraph number nine.

26. Wilshire-Pennington violated Ark. Code Ann. § 23-42-308(a)(2)(J), when Wilshire-Pennington failed to reasonably supervise its registered representatives Danny Kennedy and Benjamin Kennedy in order to detect or prevent the violations as detailed in paragraphs four through seven, as well as purchasing securities through the use of misstatements or omissions of material information as detailed in paragraphs eight and nine. Also, in violation of Rule 306.02(b)(18), the supervisory failings of Wilshire-Pennington were the result of a lack of an adequate written supervisory or compliance policy concerning the purchase or sales of inverse or leveraged ETFs and ETNs as detailed in paragraph ten.

27. Wilshire-Pennington violated Ark. Code Ann. § 23-42-306 and Rules 306.02(a), (b)(7), (c) and (d), when Wilshire-Pennington failed to reasonably retain AR1's account statements as detailed in paragraph eleven.

28. Pursuant to Ark. Code Ann. § 23-42-308(g), the Commissioner should impose appropriate fines against Wilshire-Pennington, Danny Kennedy and Benjamin Kennedy.

#### OPINION

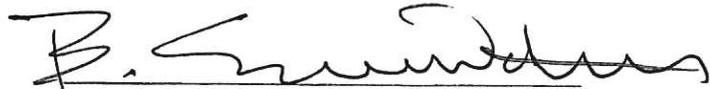
This order is in the public interest. The facts as set out in paragraphs 4 through 11 support the violations of the Act and the Rules as set out in paragraphs 22 and 27.

#### ORDER

IT IS THEREFORE ORDERED that Wilshire-Pennington, Danny Kennedy and Benjamin Kennedy shall be jointly and severally liable and responsible for the payment of a fine in the amount of \$12,500 to the Arkansas Securities Department. Said fine shall be paid as follows: \$2,500 at the time this order is entered by the Commissioner with the remaining balance of \$10,000 being paid in regular monthly installment payments of at least \$2,000. Said installment payments are due no later than the last day of each month, beginning in September, with the final payment

being due and payable no later than December 31, 2019. Should the Respondents fail and/or refuse to make any installment payment, then the balance of the entire fine amount shall immediately become due and payable. If said fine amount is not paid in full within 10 days of any default in an installment payment, then the Staff shall be free to pursue any and all administrative or collection remedies against the Respondents. These remedies shall include, but not be limited to, the immediate suspension of any registrations with the Department held by the Respondents.

WITNESS MY HAND AND SEAL on this 5<sup>th</sup> day of August, 2019.



B. Edmond Waters  
Arkansas Securities Commissioner

APPROVED AS TO CONTENT  
AND FORM:

  
\_\_\_\_\_  
Wilshire-Pennington Group, Inc.  
Respondent

8/5/2019  
\_\_\_\_\_  
Date

  
\_\_\_\_\_  
Benjamin Daniel Kennedy III  
Respondent

8/5/2019  
\_\_\_\_\_  
Date

  
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Benjamin Daniel Kennedy IV  
Respondent

8/5/2019  
\_\_\_\_\_  
Date

  
\_\_\_\_\_  
Scott Freydl  
Staff Attorney  
Arkansas Securities Department

8/5/19  
\_\_\_\_\_  
Date