UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	:	
Plaintiff,	:	
v.	:	**10 Civ. 457 (GLS/CFH)**
McGINN, SMITH & CO., INC., et al.,	:	
Defendants.	:	

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT DAVID L. SMITH'S MOTION TO MODIFY THE ASSET FREEZE TO ALLOW THE RELEASE OF CERTAIN PROPERTY

Plaintiff Securities and Exchange Commission respectfully submits this brief in opposition to the Motion to Modify Asset Freeze to Allow the Release of Certain Property filed by Defendant David L. Smith ("D. Smith") (Dkt. 1039) ("Smith Br.").

For the following reasons, the Motion should be denied and the assets in the accounts at issue turned over to the Court-appointed Receiver, William J. Brown, Esq., for distribution to the victims.

I. The D. Smith Account Should Be Turned Over to the Receiver

The D. Smith retirement account was established under Section 401(k) of ERISA as part of the McGinn Smith Incentive Savings Plan (the "MS Plan"), and the Receiver, serves as the MS Plan's Administrator. The account holds approximately $132, 648. Ex. A. The Receiver was informed late last year of the need for a required minimum distribution ("RMD") from the MS Plan, and advised D. Smith of the RMD by letter. Smith Br. at 7 (12.27.18 letter from the Receiver to D. Smith). D. Smith's motion followed.

D. Smith's motion should be denied and the funds in the D. Smith account should be applied to the unpaid payment obligation in the Final Judgment entered against him in 2015. Dkt. 835. The Final Judgment, among other things, ordered D. Smith to pay disgorgement of $87,433,218, representing profits from the massive McGinn Smith fraud, which victimized over 800 investors, plus $11,668,132 in prejudgment interest, for a total of $99,101,350. *Id*. at 6. To date, neither D. Smith nor his co-Defendant Timothy McGinn, who is jointly and severally liable with D. Smith, have made any payments toward satisfaction of their obligations. Investors are highly unlikely to be made whole.[1]

This is not the first time D. Smith has sought to access his frozen IRA account. On December 15, 2010, Judge Homer denied a motion by D. Smith to unfreeze this account, finding that "[i]f a disgorgement order is ultimately granted, the amount of money in Smith's 401(k) account will be important in [] facilitating repayment[.]" Dkt. 221 at 5. Now that such a disgorgement order has been entered, the time has come to apply those funds to D. Smith's payment obligation for the benefit of his victims.

The Final Judgment authorizes the Receiver to retain the RMD that he currently holds: "The Receiver is authorized to liquidate and monetize any assets recovered from or on behalf of or in connection with Defendant Smith and to deposit the proceeds thereof in an appropriate account." Dkt. 835 at 9. *See also SEC v. Neto*, 27 F. Supp.3d 434, 442 (S.D.N.Y 2014) (in Second Circuit, creditors can pursue claims "once the benefits have been distributed").

As for the balance of the account, D. Smith argues that the account is exempt under New York Civil Practice Law and Rules (CPLR) § 5205. Smith Br. at 18. State

[1] In a December 30, 2015 filing, the Receiver estimated "total investor claims" to be approximately $124.1 million. Dkt. 847-2 at 5 n.1. As of September 2018, the assets of the Receivership estate totaled $15.2 million after deduction of $6.3 million distributed to investors. Dkt. 1026 at 4.

law exemptions such as CPLR § 5205, however, may be disregarded in the enforcement of a disgorgement judgment. *See SEC v. Aragon Capital Advisors, LLC*, 2011 WL 3278907 at *9 (S.D.N.Y. July 26, 2011) (directing incarcerated defendant "to turn over all of the funds in his IRA accounts"); *SEC v. Musella*, 818 F. Supp. 600, 602 (S.D.N.Y. 1993) (state law exemptions do not alter defendant's payment obligation).

In *SEC v. Garber*, *et al*., No. 12-Civ-9339-AT (S.D.N.Y. Jan. 10, 2017), Judge Torres rejected a similar argument based on CPLR § 5205. Ex. B at 6 ("Given the Court's broad discretion to fashion and enforce disgorgement orders, the Court will not exclude [Defendant's] IRAs from the turnover proceedings"). Judge Torres found that:

> Federal courts ordering disgorgement may disregard state law exemptions protecting property from attachment. In *S.E.C. v. Huffman*, the Fifth Circuit explained, '[t]he district court had broad discretion in fashioning the equitable remedy of a disgorgement order. I may decide that some property should be exempt from such an order, and may take state law as its guide.' 996 F.2d 800, 803 (5th Cir. 1993); *see also S.E.C. v. AMX, Int'l, Inc.*, 7 F.3d 71, 75-76 (5th Cir. 1993) (extending *Huffman* to judgments for disgorgement reached on consent); *see also S.E.C. v. Solow*, 682 F. Supp. 2d 1312, 1325 (S.D. Fla. 2010) ('This Court has broad equitable powers to reach assets otherwise protected by state laws to satisfy a disgorgement. For example, a district court can ignore state law exemptions as well as other state law limitations on the ability to collect a judgment in fashioning a disgorgement order.' (citation omitted)), *aff'd*, 396 F. App'x 635 (4th Cir. 2010).

Ex. B at 5.

Finally, D. Smith argues that the Supreme Court's decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017) supports his argument that state law exemptions should apply. Smith Br. at 11, 28. This argument is without merit. In *Kokesh*, the Supreme Court decided that disgorgement in SEC cases is a "penalty" for the purposes of determining the statute of limitations under 28 U.S.C. § 2462. *Id*. at 1643. This narrow holding was confined to

the statute of limitations context, and nothing in *Kokesh* supports extending that decision to this context.

D. Smith also relies on *Kokesh* to attack "the entirety of the disgorgement order" in the Final Judgment entered in 2015, two years before the *Kokesh* decision. Smith Br. at 5. *Kokesh*, however, does not apply retroactively. In any event, the Supreme Court expressly stated that it did not question the authority of courts to order disgorgement in SEC enforcement cases. *Id.* at 1642, n.3.

Since *Kokesh*, the Second Circuit has upheld a disgorgement award, and numerous courts across the country have imposed disgorgement orders. *SEC v. Metter*, 706 F. App'x 699, 702 (2d Cir. 2017) (affirming disgorgement order); *SEC v. Ahmed*, 343 F. Supp. 3d 16, 26-27 (D. Conn. 2018) (collecting cases upholding disgorgement awards post-*Kokesh*); *SEC v. Amerindo Inv. Advisors Inc.*, No. 05 Civ. 5231, 2017 WL 3017504, at *8 (S.D.N.Y. July 14, 2017) (rejecting argument that *Kokesh* rendered enforcement of disgorgement awards "inequitable or detrimental to the public interest"); *SEC v. Mapp*, No. 16 Civ. 246, 2018 WL 3570920, at *7 (E.D. Tex. July 25, 2018) (same).

II. The L. Smith Accounts Should Be Turned Over to the Receiver

The Final Judgment as to Lynn A. Smith voided a number of transfers made by D. Smith and L. Smith under New York's fraudulent conveyance statute, and ordered that D. Smith and L. Smith "shall be jointly and severally liable" for the return of such assets, which in the aggregate total $600,368. Dkt. 837 at 2-3.

Lynn Smith has two frozen accounts: an IRA account (RMR-XXXX12), which contains $29,951.39, and an individual account (RMR-XXXX16), which contains $161,663.23. Ex. C.

D. Smith argues that L. Smith's IRA account should be "released immediately" because "there were no traceable ill-gotten assets into the account." Smith Br. at 24-25. However, "Courts have ordered disgorgement by defendants even when their compliance would require the liquidation of assets that were not acquired using the 'tainted' funds." *SEC v. Aragon Capital Advisors, LLC*, 2011 WL 3278907, at *9

D. Smith also characterizes L. Smith as a mere relief defendant and argues that the only grounds for turning over the accounts would be if he were a joint owner. Smith Br. at 24-25. However, the Final Judgment as to L. Smith found her liable as a defendant for a number of fraudulent transfers she made with D. Smith and ordered her to disgorge the funds that were transferred.[2] Dkt. 837 at 6-8.

Finally, D. Smith cites to Judge Homer's decision in 2012 finding that the Smiths' Saratoga Springs home was, under CPLR § 5206, "to a certain degree, exempt from the satisfaction of money judgments." Smith Br. at 26. This ruling dealt only with the Saratoga Springs home. In contrast, the Court's view of the frozen accounts, which are covered under CPLR § 5205 (not § 5206), is clear from its 2010 Order. That Order stated that "[i]f a disgorgement order is ultimately granted, the amount of money in Smith's 401(k) account will be important in [] facilitating repayment[.]" Dkt. 221at

[2] In addition to her disgorgement obligations for the fraudulent transfers, L. Smith remains liable to the SEC for $51,232 for attorney fees and costs incurred as a result of the Court's finding that L. Smith acted with "subjective bad faith in failing to disclose the existence of an Annuity Agreement." *See* Dkt. 399 (Judgment); 398 (Order Directing Payment of Money to Receiver).

5. Moreover, it is Section 5205 that Courts have declined to apply to protect the financial assets of judgment-debtors like the Smiths.

CONCLUSION

For the foregoing reasons, the assets in D. Smith's IRA account, and the two L. Smith accounts, should be turned over to the Receiver for inclusion in the Distribution Fund established for the victims.

Dated: New York, NY
April 12, 2019

Respectfully submitted,

s/ David Stoelting
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JOHN HANCOCK LIFE INSURANCE CO
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BUFFALO NY 14201-0600

314025 F003 26779 0OZ 0/0 ------- 0
DAVID SMITH
Redacted
BUFFALO NY 14203

THE TRUSTEES OF MCGINN SMITH INCENTIVE SAVINGS PLAN

Contract Number: Redacted

Retirement Account

Your retirement account value as of 03/31/2019
$132,648.44

January 01, 2019 - March 31, 2019

Your personal rate of return

This period	0.27%
For last 12 months	0.88%
Since your account inception (Annualized)	2.08%

This period

Beginning balance	**$132,291.54**
Money in	
Employee money	0.00
Net change*	356.90
Ending balance	**$132,648.44**
Estimated vested balance	**$132,648.44**

*Gain/loss for your account is net of the fees shown in the "Your summary of charges" section.

Please review your retirement account as your contributions continue to be allocated to the default investment option approved by your plan's Trustee or John Hancock New York has pro-rated the allocation instructions you provided to equal 100%. **IF YOU WISH TO CHANGE THIS, YOU MUST PROVIDE NEW ALLOCATION INSTRUCTIONS** . Please refer to the "What investment options make up your account" section of your statement to view your existing allocation. To make a change to your account, call us at 1-800-395-1113 (English) or 1-800-363-0530 (Español), or go online at **www.jhnypensions.com**.

You want to make sure your contributions continue working for the lifestyle you planned, both at retirement and beyond. Your plan contact can put you in touch with your local John Hancock New York representative to outline the many income-producing options open to you. Remember, you still have access to our website, where you can find a variety of resources, including articles, tools, calculators and more. Visit us online at **www.jhnypensions.com**.

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For questions about your account with John Hancock New York, visit **www.jhnypensions.com** or 1-800-395-1113 (1-800-363-0530 Español) Monday - Friday, 8am - 8pm ET.
Changing jobs or retiring? Call 1-888-695-4472 if you have questions about your distribution options.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

DANNY GARBER, MICHAEL MANIS, KENNETH YELLIN, JORDAN FEINSTEIN, COASTAL GROUP HOLDINGS, INC., THE OGP GROUP LLC, RIO STERLING HOLDINGS LLC, SLOW TRAIN HOLDINGS LLC, and SPARTAN GROUP HOLDINGS LLC,

Defendants.

12 Civ. 09339 (AT)

ORDER

ANALISA TORRES, District Judge:

Plaintiff, Securities and Exchange Commission ("SEC"), moves for a turnover order as to Defendant Jordan Feinstein pursuant to Federal Rules of Civil Procedure 69(a) and New York Civil Practice Law and Rule 5225. For the reasons stated below, the SEC's motion is GRANTED.

BACKGROUND

On December 21, 2012, the SEC brought this enforcement action. Compl., ECF No. 1. On August 12, 2014, the SEC filed a second amended complaint alleging that Defendants, including Feinstein, violated Section 5(a) and 5(c) of the Securities Act of 1933, 15 U.S.C. § 77e(a),(c). Second Am. Compl., ECF No. 108. On that same date, the Court entered a final judgment on consent against Feinstein. Final Judgment, ECF No. 113. In relevant part, the final judgment requires Feinstein to disgorge $314,550, representing profit gains from conduct described in the second amended complaint, prejudgment interest of $41,419, and a civil penalty of $25,000. *Id.* Payment of the $380,696 was due within one year from the date of the final judgment, or by August 12, 2015. *Id.*

Feinstein did not pay the judgment. *See* Graubard Decl. ¶ 8, ECF No. 127. On September 28, 2015, the SEC served Feinstein with a restraining notice, pursuant to Rule 69(a) and N.Y.

C.P.L.R. 5222, forbidding him from spending the property in which the SEC had an interest. Graubard Decl. Ex. 5, ECF No. 127-5. Despite the restraining notice, Feinstein proceeded to spend more than $250,000 of the available funds in his Fidelity Investments IRA account ending in 0683 ("Inherited IRA"). SEC Reply 10, ECF No. 134. The SEC now moves for a turnover order for $356,290.2 which includes the disgorgement amount, prejudgment interest, and accrued postjudgment interest of $321.24. Motion for Turnover Order, ECF No. 126; SEC Mem. 2, ECF No. 128. The SEC has not moved for the enforcement of the civil penalty.

Feinstein concedes the validity of the final judgment, but indicates that he is unable to pay the full amount due. Def. Opp. 2, ECF No. 131. Feinstein requests a protective order pursuant to N.Y. C.P.L.R. 5240. Additionally, he contends that his individual retirement accounts ("IRAs") are exempt from turnover pursuant to N.Y. C.P.L.R. 5205(c). [1]

DISCUSSION

A. Disgorgement and Prejudgment Interest

Pursuant to the final judgment, Feinstein agreed to pay disgorgement and prejudgment interest. "Disgorgement is a distinctly public-regarding remedy, available only to government entities seeking to enforce explicit statutory provisions." *F.T.C. v. Bronson Partners, LLC*, 654 F.3d 359, 372 (2d Cir. 2011). An equitable remedy, it is a "a method of forcing a defendant to give up the amount by which he was unjustly enriched." *Id.* (quoting *S.E.C. v. Commonwealth Chem. Sec., Inc.,* 574 F.2d 90, 102 (2d Cir. 1978)). The purpose is to "deter violations of the [ ] laws by depriving violators of their ill-gotten gains." *S.E.C. v. Fischbach*, 133 F.3d 170, 175 (2d Cir. 1997). In addition, "a court has the discretion to award prejudgment interest on the amount of disgorgement and to determine the rate at

[1] Feinstein has offered to pay $150,000 to settle the final judgement. Def. Opp. 2, 6, ECF No. 131.

which such interest should be calculated." *S.E.C. v. Universal Exp., Inc.*, 646 F. Supp. 2d 552, 566 (S.D.N.Y. 2009).

Judgments for disgorgement may be enforced by a writ of execution, which is governed by Federal Rule of Civil Procedure 69(a) and Article 52 of the New York Civil Practice Law and Rules. *See S.E.C. v. Colonial Inv. Mgm. LLC*, No. 07 Civ. 8849, 2010 WL 4159276, at *1-2 (S.D.N.Y. Oct. 6, 2010). Rule 69(a) provides, "A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution—and in proceedings supplementary to and in aid of judgment or execution—must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies." New York Civil Practice Law and Rule 5225(a) states, in relevant part:

> Upon motion of the judgment creditor, upon notice to the judgment debtor, where it is shown that the judgment debtor is in possession or custody of money or other personal property in which he has an interest, the Court shall order that the judgment debtor pay the money, or so much of it as is sufficient to satisfy the judgement, to the judgment creditor.

Accordingly, the Court finds that the SEC's motion for a turnover order is a proper method to enforce Feinstein's disgorgement and prejudgment interest obligation.[2] The SEC's motion for a turnover order is GRANTED as to the disgorgement amount and prejudgment interest.

1. Protective Order

Feinstein requests a protective order pursuant to N.Y. C.P.L.R. 5240.[3] "The [C]ourt may at any time, on its own initiative or the motion of any interested person, and upon such notice as it may require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of

[2]Alternatively, the SEC could also seek enforcement through contempt proceedings. *See* Fed. R. Civ. P. 70(e).

[3]Although the Court is addressing the protective order in the disgorgement context, the Court assumes that Feinstein's request for a protective order was intended to encompass the final judgment in its entirety.

any enforcement procedure." N.Y. C.P.L.R. 5240. The Court may consider whether there are "less intrusive means to satisfy judgments." *Sweeny, Cohn, Stahl & Vaccaro v. Kane*, 822 N.Y.S.2d 632, 633 (App. Div. 2006).

Feinstein states that he has been unemployed for three years and is "unable to pay the full amount due under the [f]inal [j]udgment." Def. Opp. 6. Feinstein claims that payment "would force him to declare for bankruptcy and cause severe disadvantage and prejudice for his wife and children." *Id.* Having reviewed the record, the Court does not find evidence that compliance with the order would result in hardship. *See* Graubard Decl.; Feinstein Aff., ECF No. 133.

Of particular importance, the SEC has indicated that on the date Feinstein was served with a restraining notice, the balance in Feinstein's Inherited IRA was $394,000. SEC Reply 10. The SEC claims that the amount in the account would have covered the disgorgement amount, prejudgment interest, and postjudgement interest. *Id.* According to the SEC, Feinstein used more than $250,000 of the funds in the Inherited IRA in next nine months, reducing the available funds considerably. *Id.* Under these circumstances, the equities do not support the Court's issuance of a protective order. As the Court observed in *S.E.C. v. Musella*, "[the Defendant] apparently believes that he is entitled simply to continue living in the style to which he has accustomed himself and, if so doing consumes all his current income, that he is absolved of paying his debt because he is rendered financially unable to do so. This view of the law cannot be condoned." 818 F. Supp. 600, 611 (S.D.N.Y. 1993). Feinstein must pay the amount he owes.

Accordingly, Feinstein's request for a protective order is DENIED.

2. Turnover Order Application

The SEC requests a turnover order as to Feinstein's joint TD bank account ending in 4584, the Hunter Paige bank account and securities account ("Hunter Paige accounts"), the Inherited IRA, and

the Fidelity Investments IRA account ending in 3484 ("Rollover IRA.")[4] Aside from his request for a protective order, Defendant raises legal objections only as to the inclusion of the Rollover IRA and the Inherited IRA.

Feinstein argues that the IRAs should be exempt from the turnover order because IRAs are protected from attachment pursuant to N.Y. C.P.L.R. 5205(c).[5] *See* N.Y. C.P.L.R. 5205(c); *Pauk v. Pauk*, 648 N.Y.S.2d 134, 135 (App. Div. 1996) (finding that N.Y. C.P.L.R. 5205(c) was intended to "exempt all IRAs" from attachment). Feinstein argues that because Rule 69(a) requires the Court to "accord with the procedure of the state where the court is located," he should not be required to turn over the contents of the IRA accounts to satisfy the disgorgement order. *See* Fed. R. Civ. P. 69(a).

The Court disagrees. Federal courts ordering disgorgement may disregard state law exemptions protecting property from attachment. In *S.E.C. v. Huffman*, the Fifth Circuit explained, "[t]he district court had broad discretion in fashioning the equitable remedy of a disgorgement order. It may decide that some property should be exempt from such an order, and may take state law as its guide." 996 F.2d 800, 803 (5th Cir. 1993); *see also S.E.C. v. AMX, Int'l., Inc.*, 7 F.3d 71, 75-76 (5th Cir. 1993) (extending *Huffman* to judgments for disgorgement reached on consent); *see also S.E.C. v. Solow*, 682 F. Supp. 2d 1312, 1325 (S.D. Fla.) ("This Court has broad equitable powers to reach assets otherwise protected by state law to satisfy a disgorgement. For example, a district court can ignore state law exemptions as well as other state law limitations on the ability to collect a judgment in fashioning a disgorgement order." (citation omitted)), *aff'd*, 396 F. App'x 635 (4th Cir. 2010).

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[4] It is not necessary for the Court to direct which assets should be applied to the turnover order. *Bronson Partners LLC*, 654 F.3d at 373.

[5] The SEC suggests that the Inherited IRA is not protected from attachment after *Clark v. Rameker*, 134 S.Ct. 2242, 2248 (2014). Because the Court will not exclude either IRA from the turnover order, the Court has no occasion to analyze the impact of *Clark* on N.Y. C.P.L.R. 5205(c).

Given the Court's broad discretion to fashion and enforce disgorgement orders, the Court will not exclude Feinstein's IRAs from the turnover proceedings. Feinstein consented to the final judgment, and the Court will not permit Feinstein to use protections intended for ordinary civil disputes to shirk his disgorgement obligations to the SEC. *See Musella,* 818 F. Supp. at 602 (finding, on motion for contempt to enforce a disgorgement order, "the extent to which [defendant's] assets and income would be exempt from attachment under New York law does not alter his duty to pay the amount he owes under the order"); *see also S.E.C. v. Aragon Capital Advisors, LLC*, No. 07 Civ. 919, 2011 WL 3278907, at *8 (S.D.N.Y. July 26, 2011) (finding on motion for contempt to enforce a disgorgement order, that even if "state law offers some degree of protection for IRA accounts, it still would 'not alter [the defendant's] duty to pay the amount he owes under the [final judgment]'" (quoting *Id.* at 602)).

Feinstein's request to exclude the IRAs from the turnover order is DENIED.

B. Postjudgment Interest

Finally, the SEC requests $321.24 in postjudgment interest from August 12, 2015 to May 18, 2016 pursuant to 28 U.S.C. § 1961. SEC Mem. 2; Graubard Decl., ¶ 8. The Court finds the request to be appropriate. The SEC's motion for a turnover order is GRANTED as to the postjudgment interest.

CONCLUSION

The SEC's motion for a turnover order is GRANTED as to the disgorgement amount of $314,550, prejudgment interest of $41,419, and postjudgment interest of $321.24, for a total amount of $356,290.2.

Feinstein's requests for a protective order and for exclusions of the IRAs are DENIED. Feinstein is directed to turn over sufficient funds to satisfy his obligations in accordance with this order.

Dated: January 10, 2017
New York, New York

ANALISA TORRES
United States District Judge

ENV# CEBGWBCHBBBKWTF_BBBBB
NATIONAL FINANCIAL SERVICES, LLC
PO BOX 28017
ALBUQUERQUE, NM 87125-8017

NFS/FMTC IRA
FBO LYNN A SMITH
Redacted
SARATOGA SPGS NY 12866

STATEMENT FOR THE PERIOD FEBRUARY 1, 2019 TO MARCH 31, 2019

LYNN A SMITH - Premiere Select IRA
Account Number: Redacted12

RR#: 007

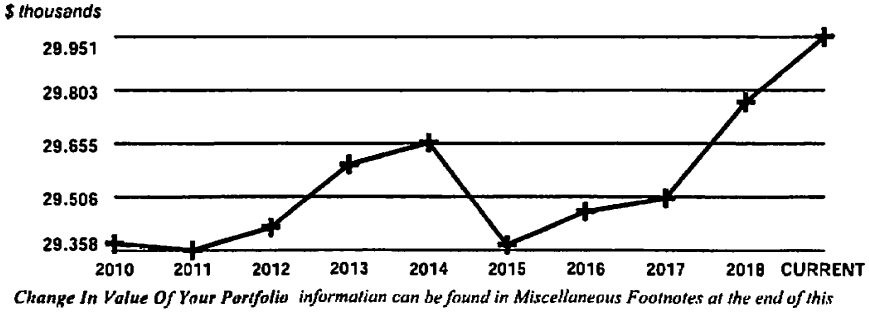
For questions about your accounts:
Local: 800 801 9942
In-State: 800 801 9942
National: 800 801 9942

TOTAL VALUE OF YOUR PORTFOLIO **$29,951.39**

FOR YOUR INFORMATION

Your National Financial Services -NFS- fee schedule and commission schedule information are referenced within the messages and alerts section of this statement.

CHANGE IN VALUE OF YOUR PORTFOLIO



Change In Value Of Your Portfolio information can be found in Miscellaneous Footnotes at the end of this statement.

Account carried with National Financial Services LLC, Member NYSE, SIPC

ENV# CEBGWBCHBBBKWSH_BBBBB
NATIONAL FINANCIAL SERVICES, LLC
PO BOX 28017
ALBUQUERQUE, NM 87125-8017

LYNN A SMITH
Redacted
SARATOGA SPGS NY 12866

STATEMENT FOR THE PERIOD MARCH 1, 2019 TO MARCH 31, 2019

LYNN A SMITH - Individual
Account Number: Redacted16

RR#: 007

For questions about your accounts:
Local: 800 801 9942
In-State: 800 801 9942
National: 800 801 9942

TOTAL VALUE OF YOUR PORTFOLIO **$161,663.23**

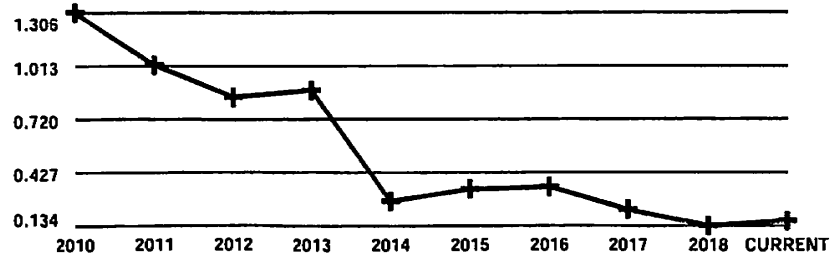
Your portfolio contains unpriced positions. Refer to Holdings in this statement for more information.

FOR YOUR INFORMATION

Your National Financial Services -NFS- fee schedule and commission schedule information are referenced within the messages and alerts section of this statement.

CHANGE IN VALUE OF YOUR PORTFOLIO

$ millions



Change In Value Of Your Portfolio *information can be found in Miscellaneous Footnotes at the end of this statement.*

Account carried with National Financial Services LLC, Member NYSE, SIPC