

**NASDAQ PHLX LLC
LETTER OF ACCEPTANCE, WAIVER AND CONSENT
NO. 2018057172902**

TO: Nasdaq PHLX LLC
c/o Department of Enforcement
Financial Industry Regulatory Authority (“FINRA”)

RE: Sumo Capital, LLC, Respondent
Member Firm
CRD No. 146310

Pursuant to Rule 9216 of Nasdaq PHLX LLC (“Phlx”) Code of Procedure,¹ Sumo Capital, LLC (“Sumo” or the “Firm”) submits this Letter of Acceptance, Waiver and Consent (“AWC”) for the purpose of proposing a settlement of the alleged rule violations described below. This AWC is submitted on the condition that, if accepted, Phlx will not bring any future actions against the Respondent alleging violations based on the same factual findings described herein.

I.

ACCEPTANCE AND CONSENT

A. Respondent hereby accepts and consents, without admitting or denying the findings, and solely for the purposes of this proceeding and any other proceeding brought by or on behalf of Phlx, or to which Phlx is a party, prior to a hearing and without an adjudication of any issue of law or fact, to the entry of the following findings by Phlx:

BACKGROUND

The Firm became a member of Phlx in February 2009, and its registration remains in effect. The Firm is a broker-dealer headquartered in Chicago, IL, employs approximately 55 registered individuals, and engages in market making and proprietary trading.

RELEVANT PRIOR DISCIPLINARY HISTORY

The Firm has relevant disciplinary history with respect to Regulation SHO Rule 200(f). In a Decision issued on August 29, 2016, Cboe Exchange, Inc. accepted an Offer of Settlement in which the Firm was censured and fined \$10,000 for violating Regulation SHO Rule 200(f) by maintaining a deficient aggregation unit plan that improperly listed one individual in two separate aggregation units. The violative activity occurred from on or about February 1, 2013 through on or about March 31, 2013.

¹ Series 9000 of The Nasdaq Stock Market LLC Rules are incorporated by reference into Phlx Rule General 5, Section 3, and are thus Phlx Rules and thereby applicable to Phlx members, member organizations, persons associated with member organizations, and other persons subject to the Exchange’s jurisdiction.

On August 23, 2017, the Firm was issued a summary fine of \$3,500 under the NYSE Arca, Inc. Minor Rule Violation Plan related to various supervisory violations. Specifically, the Firm's supervisory system was not reasonably designed to achieve compliance with certain securities laws and regulations, including Regulation SHO Rule 200(f).

SUMMARY

This matter originated from a 2018 Cycle Examination of the Firm conducted by the Trading and Financial Compliance Examinations ("TFCE") section of FINRA's Market Regulation Department, on behalf of Phlx and other options exchanges. The examination reviewed for, among other things, the Firm's compliance with Regulation SHO, promulgated under the Securities Exchange Act of 1934 (the "Exchange Act"), during the month of April 2018 (the "Review Period"). The examination also reviewed the Firm's related supervisory systems, including its written supervisory procedures ("WSPs"), from April 2018 through the present (the "Supervisory Review Period").

This examination found that, as described further below, the Firm violated Regulation SHO Rules 200(f) and (g). In addition, the Firm failed to establish, maintain, and enforce WSPs, and systems for applying such procedures, that were reasonably designed to detect and prevent, insofar as applicable, violations of the applicable federal securities laws and regulations and Phlx rules, including Regulation SHO Rules 200(f) and (g), 203(b), and 204(a), in violation of Phlx Rule 748, and subsequently Phlx Rule General 9, Section 20.²

FACTS AND VIOLATIVE CONDUCT

1. During all relevant periods, Regulation SHO Rule 200(f) provided, in relevant part, that "Independent trading unit aggregation is available only if: (1) The broker or dealer has a written plan of organization that identifies each aggregation unit, specifies its trading objective(s), and supports its independent identity; (2) Each aggregation unit within the firm determines, at the time of each sale, its net position for every security that it trades; (3) All traders in an aggregation unit pursue only the particular trading objective(s) or strategy(s) of that aggregation unit and do not coordinate that strategy with any other aggregation unit; and (4) Individual traders are assigned to only one aggregation unit at any time."
2. During all relevant periods, Regulation SHO Rule 200(g) provided, in relevant part, that broker-dealers shall mark all sell orders of any equity security as "long," "short," or "short exempt." Sell orders may be marked "long" only if the seller is deemed to own the security being sold.
3. During all relevant periods, Regulation SHO Rule 203(b) provided, in relevant part, that a broker or dealer may not accept a short sale order in an equity security from

² Phlx Rule 748 was superseded and replaced by Phlx Rule General 9, Section 20 as of February 3, 2020. The Firm therefore violated Phlx Rule 748 from April 2018 through February 2, 2020, and Phlx Rule General 9, Section 20 from February 3, 2020 to the present.

another person, or effect a short sale in an equity security for its own account, unless the broker or dealer has: (i) borrowed the security, or entered into a bona-fide arrangement to borrow the security; or (ii) reasonable grounds to believe that the security can be borrowed so that it can be delivered on the date delivery is due; and (iii) documented compliance with this requirement.

4. During all relevant periods, Phlx Rule 748, and subsequently Phlx Rule General 9, Section 20, required a member organization to establish, maintain, and enforce WSPs, and a system of supervision for applying such procedures, that are reasonably designed to supervise the types of businesses and activities in which they and their associated persons engage in order to achieve compliance with, and to prevent and detect violations of, applicable securities laws and regulations, including the By-Laws and Rules of Phlx.³

Regulation SHO

5. During the Review Period through the present date, the Firm's Regulation SHO Aggregation Unit Plan ("AGU Plan") was deficient in that the Firm's AGU Plan did not reasonably identify each aggregation unit, specify each unit's trading objective, or support its independent identity, and the Firm permitted an individual assigned to one aggregation unit to supervise other aggregation units.
6. During the Review Period, the Firm mismarked one order out of 23 sampled orders in one Regulation SHO aggregation unit as sell long rather than sell short.
7. The conduct described in paragraphs 5 and 6 constitute violations of Regulation SHO Rules 200(f) and 200(g), respectively.

Supervision

8. During the Supervisory Review Period, the Firm's WSPs regarding Regulation SHO Rule 200(f) provided that annually or as aggregation units change, the Firm will document a written plan of organization demonstrating that each aggregation unit is independent and engaged in separate trading strategies without regard to other aggregation units. The WSPs further stated that the Firm will establish and maintain written records for each aggregation unit that include: the account number of each trading account designated as part of an aggregation unit; any permanent or temporary changes in the accounts designated as part of an aggregation unit; the name of each trader assigned to an aggregation unit; any transfer of securities between aggregation units and the reasons for the transfer; and unusual activities that were reviewed.
9. During the Supervisory Review Period, the Firm failed to establish, maintain, and enforce WSPs, and a system of supervision for applying such procedures, that were

³ As set forth above, Phlx Rule 748 was superseded and replaced by Phlx Rule General 9, Section 20 as of February 3, 2020.

reasonably designed to prevent and detect violations of Regulation SHO Rule 200(f). The Firm's WSPs failed to identify the individual who was responsible for their maintenance and enforcement. Further, the Firm failed to enforce its WSPs because the Firm's AGU Plan did not demonstrate the independence of each aggregation unit, did not, on a consistent basis, accurately identify the traders assigned to each aggregation unit, did not reasonably identify the trading objective(s) of each aggregation unit, and assigned one individual to an aggregation unit who was also assigned to supervise other aggregation units.

10. During the Supervisory Review Period, the Firm's WSPs regarding Regulation SHO Rule 200(g) provided that each aggregation unit will conduct a review of sell order tickets as requested by the Chief Compliance Officer ("CCO") at least quarterly to identify potentially mismarked orders. The review consisted of a random sample of orders, and any mismarked orders were to be referred to the CCO for further review. The review was to be documented by "[c]hecklist, work papers or electronic document(s) including the dates of the random review and the orders selected for sample."
11. During the Supervisory Review Period, the Firm failed to establish, maintain, and enforce WSPs, and a system of supervision for applying such procedures, that were reasonably designed to prevent and detect violations of Regulation SHO Rule 200(g). The Firm relied on its traders to conduct the actual order marking review, rather than have the review be performed by a supervisor. In addition, the Firm did not document its supervisory reviews in accordance with its WSPs and did not provide adequate evidence that such reviews had been conducted.
12. During the Supervisory Review Period, the Firm's WSPs regarding Regulation SHO Rule 203(b) provided that each aggregation unit will conduct a review of sell order tickets as requested by the CCO at least quarterly to identify evidence of a locate, if it would have been required. The review consisted of a random sample of orders, and any instances where a locate was not obtained were to be directed to the CCO for further review. The CCO was to evidence her review by completing a checklist, or by other work papers.
13. During the Supervisory Review Period, the Firm failed to establish, maintain, and enforce WSPs, and a system of supervision for applying such procedures, that were reasonably designed to prevent and detect violations of Regulation SHO Rule 203(b). The Firm relied on its traders to conduct the actual locate review, rather than have the review be performed by a supervisor. In addition, the Firm did not document its supervisory reviews in accordance with its WSPs and did not provide any evidence that such reviews had been conducted.
14. During the Supervisory Review Period, the Firm's WSPs regarding Regulation SHO Rule 204(a) provided that each aggregation unit had a designated person responsible

for closing out fail to deliver positions allocated by the Firm's clearing firm.⁴ The designated person was to review the allocation notice and consult with the Risk Manger to determine if the Firm qualified for an exception to the close-out provisions. If the Firm did not qualify for an exception, the Risk Manager was to take steps to close out the allocated position by buying the underlying security prior to market open and to confirm that the buy-in order(s) were executed. Documentation of the allocation and the Firm's response was to be maintained by the Risk Manager.

15. During the Supervisory Review Period, the Firm failed to establish, maintain, and enforce WSPs, and a system of supervision for applying such procedures, that were reasonably designed to prevent and detect violations of Regulation SHO Rule 204(a). The Firm relied on its traders to conduct the review for compliance, rather than have the review be performed by a supervisor. In addition, the Firm's WSPs reference an exception to the close-out requirement, although no such exception exists.
16. The conduct described in Paragraphs 8 through 15, above, constitute violations of Phlx Rule 748 from April 2018 through February 2, 2020, and Phlx Rule General 9, Section 20(h) from February 3, 2020 to the present.

B. The Firm also consents to the imposition of the following sanctions:

- a. A censure;
- b. A total monetary fine in the amount of \$57,500, of which \$21,250 (\$10,000 for the Regulation SHO violations and \$11,250 for the supervisory violations) is allocated to Phlx.⁵
- c. An undertaking requiring the Firm to address the deficiencies discussed in this Letter of Consent. Within 45 days of the date of this Letter of Consent, the Firm shall submit to the COMPLIANCE ASSISTANT, DEPARTMENT OF ENFORCEMENT, 15200 Omega Drive, Suite 300, Rockville, MD 20850-3241, a written report, certified by a senior management Firm executive, to MarketRegulationComp@finra.org that provides the following information:
 - (i) a reference to this matter;
 - (ii) a representation that the Firm addressed each of the deficiencies described above, including the specific measure or enhancements taken to address those deficiencies; and
 - (iii) the date the measures or enhancements were implemented.

⁴ During all relevant periods, Regulation SHO Rule 204(a) provided, in relevant part, that if a participant of a registered clearing agency has a fail to deliver position at a registered clearing agency in any equity security, the participant shall, within the prescribed time, close out the fail to deliver position by purchasing or borrowing securities of like kind and quantity.

⁵ The balance of the fine shall be paid to Cboe Exchange, Inc.

Respondent agrees to pay the monetary sanction in accordance with its executed payment form.

Respondent specifically and voluntarily waives any right to claim that it is unable to pay, now or at any time hereafter, the monetary sanction imposed in this matter.

The sanctions imposed herein shall be effective on a date set by FINRA staff.

II.

WAIVER OF PROCEDURAL RIGHTS

The Firm specifically and voluntarily waives the following rights granted under Phlx's Code of Procedure:

- A. To have a Formal Complaint issued specifying the allegations against the Firm;
- B. To be notified of the Formal Complaint and have the opportunity to answer the allegations in writing;
- C. To defend against the allegations in a disciplinary hearing before a hearing panel, to have a written record of the hearing made and to have a written decision issued; and
- D. To appeal any such decision to the Exchange Review Council and then to the U.S. Securities and Exchange Commission and a U.S. Court of Appeals.

Further, the Firm specifically and voluntarily waives any right to claim bias or prejudgment of the Chief Regulatory Officer, the Exchange Review Council, or any member of the Exchange Review Council, in connection with such person's or body's participation in discussions regarding the terms and conditions of this AWC, or other consideration of this AWC, including acceptance or rejection of this AWC.

The Firm further specifically and voluntarily waives any right to claim that a person violated the ex parte prohibitions of Rule 9143 or the separation of functions prohibitions of Rule 9144, in connection with such person's or body's participation in discussions regarding the terms and conditions of this AWC, or other consideration of this AWC, including its acceptance or rejection.

III.

OTHER MATTERS

The Firm understands that:

- A. Submission of this AWC is voluntary and will not resolve this matter unless and until it has been reviewed and accepted by FINRA's Department of Enforcement and the Exchange Review Council, the Review Subcommittee, or the Office of Disciplinary Affairs ("ODA"), pursuant to Phlx Rule 9216;
- B. If this AWC is not accepted, its submission will not be used as evidence to prove any of the allegations against the Respondent; and
- C. If accepted:
 - 1. This AWC will become part of the Firm's permanent disciplinary record and may be considered in any future actions brought by Phlx or any other regulator against the Respondent;
 - 2. Phlx may release this AWC or make a public announcement concerning this agreement and the subject matter thereof in accordance with Phlx Rule 8310 and IM-8310-3; and
 - 3. Respondent may not take any action or make or permit to be made any public statement, including in regulatory filings or otherwise, denying, directly or indirectly, any finding in this AWC or create the impression that the AWC is without factual basis. Respondent may not take any position in any proceeding brought by or on behalf of Phlx, or to which Phlx is a party, that is inconsistent with any part of this AWC. Nothing in this provision affects the Respondent's right to take legal or factual positions in litigation or other legal proceedings in which Phlx is not a party.
- D. Respondent may attach a Corrective Action Statement to this AWC that is a statement of demonstrable corrective steps taken to prevent future misconduct. Respondent understands that it may not deny the charges or make any statement that is inconsistent with the AWC in this Statement. This Statement does not constitute factual or legal findings by Phlx, nor does it reflect the views of Phlx or its staff.

The undersigned, on behalf of the Firm, certifies that a person duly authorized to act on its behalf has read and understands all of the provisions of this AWC and has been given a full opportunity to ask questions about it; that the Firm has agreed to the AWC's provisions voluntarily; and that no offer, threat, inducement, or promise of any kind, other than the terms set forth herein and the prospect of avoiding the issuance of a Complaint, has been made to induce the Firm to submit it.

June 28, 2021

Date

Sumo Capital, LLC
Respondent

By: Patricia Cerny

Name: Patricia Cerny

Title: Chief Compliance Officer

Reviewed by:

John Sakhleh

John Sakhleh, Partner
Sidley Austin LLP
1501 K Street, N.W.
Washington, DC 20005

Accepted by Phlx:

July 22, 2021

Date

Andy Hubbartt

Andy Hubbartt
Senior Counsel
Department of Enforcement

Signed on behalf of Phlx, by delegated
authority from the Director of ODA