

October 19, 2017

Delivered

Office of the Secretary to the Commission
Ontario Securities Commission
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Our reference
0010011099

Dear Ms. Knakowski:

Application for Hearing and Review of a Decision of the TSX Relating to Agellan Commercial Real Estate Investment Trust

We are counsel for Sandpiper Real Estate Fund Limited Partnership, Sandpiper Opportunity Fund 3 Limited Partnership and Sandpiper GP Inc. (collectively, **Sandpiper**) which apply for a hearing and review of a decision of the TSX conditionally approving the listing of units of Agellan Commercial Real Estate Investment Trust (**Agellan**). A copy of the Notice of Application, which has been served on both the TSX and counsel for Agellan, is enclosed.

We request that an urgent hearing be scheduled before the Commission the afternoon of Monday October 23, 2017 to consider our request for a stay of the TSX decision pending the determination of Sandpiper's appeal.

A copy of Agellan's press release announcing the decision of the TSX also is enclosed.

Yours very truly,



for: Linda Fuerst
Senior Partner

LF/ks

cc: Walied Soliman, Norton Rose Fulbright Canada LLP
Orestes Pasparakis, Norton Rose Fulbright Canada LLP
Heidi Reinhart, Norton Rose Fulbright Canada LLP
Naizam Kanji, Director, Officer of Mergers and Acquisitions, Ontario Securities Commission

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IN THE MATTER OF A HEARING AND REVIEW UNDER SECTIONS 8, 21.7 AND
127 OF THE SECURITIES ACT, R.S.O. 1990, c. S.5

AND

IN THE MATTER OF AGELLAN COMMERCIAL REAL ESTATE INVESTMENT TRUST

NOTICE OF APPLICATION

TAKE NOTICE that, pursuant to sections 8, 21.7 and 127 of the *Securities Act*, R.S.O. 1990, c. S. 5 (the **Act**), Sandpiper Real Estate Fund Limited Partnership, Sandpiper Opportunity Fund 3 Limited Partnership and Sandpiper GP Inc. (collectively, **Sandpiper**) apply for a hearing with respect to the decision of the Toronto Stock Exchange (the **TSX**) made on or about October 16, 2017 granting conditional approval for the listing of trust units (the **New Units**) of Agellan Commercial Real Estate Investment Trust (**Agellan** or the **Trust**). In its decision, the TSX failed to impose a condition that Agellan postpone closing of the Transaction (as defined below) until after the meeting of the unitholders of the Trust (**Unitholders**) requisitioned by Sandpiper (the **TSX Decision**).

FURTHER TAKE NOTICE that Sandpiper seeks the following relief:

- (a) an order varying the TSX Decision pursuant to sections 8(3) and 21.7 of the Act by imposing a condition to the listing of the New Units that Agellan postpone closing of the Transaction until after the meeting of Unitholders requisitioned by Sandpiper (the **Additional Condition**);
- (b) an order pursuant to section 127(1)2.1 of the Act that any acquisition of the New Units by any person associated with any of Agellan, ACPI, Frank Camenzuli (**Camenzuli**), Daniel Millett (**Millett**), Terra Attard (**Attard**), Chris Caswell

(**Caswell**) and Rosalia Lau (**Lau**) is prohibited until such time as the meeting of Unitholders requisitioned by Sandpiper is held;

- (c) an order for an expedited hearing;
- (d) an order staying the TSX Decision pursuant to sections 8(4) and 21.7(2) of the Act until such time as the Ontario Securities Commission (the **OSC**) determines the issues herein; and
- (e) such further and other relief as counsel may advise and the OSC may deem appropriate.

The Parties

1 Sandpiper GP Inc. is the general partner of Sandpiper Real Estate Fund Limited Partnership and Sandpiper Opportunity Fund 3 Limited Partnership and is a Vancouver-based private equity firm focused on investing in real estate.

2 Agellan was formed in 2012 and is a publicly traded real estate investment trust, the units of which trade on the TSX. The Trust is subject to and governed by the Agellan Commercial Real Estate Investment Trust Amended and Restated Declaration of Trust dated March 28, 2017 (the **Trust Declaration**).

3 The Trust is currently managed by an external manager, Agellan Capital Partners Inc. (**ACPI**), pursuant to an external management agreement dated January 25, 2013 (the **External Management Agreement**). ACPI receives fees for providing management services to Agellan. Agellan's management team, including its CEO Camenzuli, CFO Millett and COO Attard, are also shareholders of ACPI.

4 Since the spring of 2017, Sandpiper has been an engaged Unitholder of Agellan advocating for change to increase Agellan's market value. In anticipation of a loss of control, the board of trustees of Agellan (the **Board**) has entered into a transaction that, (a) terminates the External Management Agreement; (b) provides consideration of approximately \$15,000,000 to ACPI (and thus Agellan's current management team); and (c) provides new contracts of employment to Agellan's CEO, CFO and COO.

5 The Board has also simultaneously, (a) delayed a meeting requisitioned by Sandpiper by more than half a year to April 2018; and (b) has taken steps to accelerate the closing of the Transaction to occur before a Unitholder vote.

6 The actions of Agellan are a classic defence tactic implemented days after Sandpiper announced its intention to requisition a meeting to remove the Trustees and are designed to secure benefits for Agellan's management team. The actions of Agellan are clearly contrary to the public interest and the TSX erred in permitting Agellan to take defensive tactics in the face of a Unitholder vote and Board change.

Background to Requisition

7 On January 16, 2017, Sandpiper began acquiring trust units of Agellan. At present, it is the beneficial owner of 3,994,046 trust units, representing approximately 12.16% of all issued and outstanding trust units.

8 Beginning in March 2017, Sandpiper held discussions with Agellan senior management and the Board during which Sandpiper advised Camenzuli that Sandpiper intended to work actively with management to seek to increase Unitholder value but that Sandpiper would consider taking additional steps if Sandpiper was not satisfied with Agellan's strategy and performance. These discussions continued through the spring and summer of 2017.

9 It was also at this time that Sandpiper was instrumental in effecting a change of three trustees on the board of trustees of a different real estate investment trust (REIT), Granite Real Estate Investment Trust (**Granite REIT**). Sandpiper's leading role on behalf of the dissatisfied Granite REIT unitholders was widely reported and well known in the Canadian REIT market generally and to Agellan specifically, as it was raised in discussions between Sandpiper and Agellan in the spring of 2017.

10 It is in this context that in August 2017, Agellan and ACPI appear to have agreed to a term sheet setting out in principle a transaction that would transfer significant value from the Trust and Unitholders to the principals of ACPI, including Camenzuli, while increasing their holdings in the Trust and diluting the holdings of dissatisfied Unitholders.

Discussions between Agellan and Sandpiper stalled

11 On September 12, 2017, Sandpiper proposed to Agellan strategic changes and changes to the composition of the Board and confirmed that it would be requisitioning a meeting of Unitholders subject to satisfactory discussions with the Board regarding these matters.

12 On September 14, 2017, Sandpiper filed its first early warning report with respect to Agellan, announcing that it had acquired approximately 10% of the outstanding trust units of Agellan. Sandpiper also announced its intention to requisition a meeting of Unitholders for the purpose of reconstituting the Board if consensual discussions with the Board were unsuccessful.

13 Also on September 14, 2017, Sandpiper announced that it had the support of several significant unitholders and by September 19, 2017, Sandpiper confirmed that it had the support of well over 30% of the outstanding units of the Trust. Given past support for the Trustees at the last annual general meeting of Unitholders held on June 12, 2017, the Board was well aware that Sandpiper was in a meaningful position to effect a change at the next Unitholder meeting.

The Transaction

14 On September 18, 2017, Agellan announced, without notice to Sandpiper, that it was entering into an asset purchase agreement with ACPI to internalize the Trust's asset management function (the **Transaction**). As at September 18, 2017, Sandpiper had received no substantive response to the proposals that it made to Agellan on September 12, 2017.

15 As part of the Transaction, Agellan entered into an Asset Purchase Agreement (**APA**) with Agellan Diversified Inc. and Agellan Management Limited Partnership (**Management LP**), a Canadian operating limited partnership of Agellan, dated September 18, 2017.

16 Pursuant to the Transaction, Agellan is terminating the External Management Agreement with ACPI for aggregate consideration of \$15,000,000, comprised of \$3,000,000 in cash and \$12,000,000 of securities exchangeable into trust units of Agellan.

17 The key terms of the Transaction are as follows:

- (a) Agellan will terminate the External Management Agreement with ACPI;
- (b) current executives and employees of ACPI will become employees of Agellan or its subsidiaries. Agellan's senior management, including Camenzuli, Attard and Millett, will continue in their current roles but as employees of Agellan or its subsidiaries;
- (c) Agellan will acquire certain assets of ACPI to enable Agellan to internalize management of the Trust; and
- (d) Agellan will provide total consideration of \$15,000,000 to ACPI, comprised of (1) \$3,000,000 in cash, and (2) 1,045,296 Class B LP Units of Management LP, exchangeable on a one-for-one basis with Agellan trust units and carrying an

entitlement to distributions equal to those paid on those trust units. Agellan will also issue to ACPI one special voting unit of the Trust for each Class B LP Unit issued.

18 Once exchanged for the New Units, the Class B LP Units to be issued to ACPI will represent an approximate 3% voting interest in the Trust at an effective price of \$11.48 per unit.

19 ACPI and its shareholders, which include Agellan's senior management team of Camenzuli, Millett and Attard, stand to benefit significantly from the Transaction:

- (a) current senior management will be firmly embedded directly as employees of the Trust or its subsidiaries. The terms of their new employment contracts have not been made public as of yet;
- (b) ACPI and its shareholders, including Agellan's current senior management, will receive a financial benefit as a result of the \$15,000,000 consideration payable under the Transaction;
- (c) the voting interest of ACPI in Agellan will more than double and provide ACPI with enhanced rights under the Trust Declaration; and
- (d) the holdings of Sandpiper and other Unitholders will be diluted.

20 Agellan has announced that it expects to close the Transaction in the fourth quarter of 2017.

The Requisitioned Meeting

21 On September 19, 2017, consistent with its prior press release of September 14, 2017, Sandpiper requisitioned a meeting of Unitholders (the **Meeting**) for the purpose of (1) reconstituting the Board, and (2) holding an advisory vote of Unitholders with respect to the

Transaction (the **Requisition**). Sandpiper requested that the Meeting take place by no later than November 7, 2017.

22 On September 28, 2017, Agellan revised the expected closing date of the Transaction from the fourth quarter of 2017 to “as early as mid-October 2017”. Agellan signalled its intention to accelerate closing of the Transaction – to ensure that it was completed before a Unitholder vote.

23 On October 10, 2017, a full 21 days after the Requisition and the very last day under the Trust Declaration for Agellan to call the Meeting, Agellan issued a press release stating that in response to the Requisition, the Board had called an annual and special meeting of Unitholders to be held on April 17, 2018 – an unreasonable and unprecedented 7 months after the date of the Requisition and well after the expected closing date of the Transaction.

The Transaction as a Defensive Tactic

24 There is no reason or justification for (1) the timing of the Transaction, (2) delaying the Meeting by several months after it was requisitioned, or (3) rushing the closing of the Transaction to occur prior to the Meeting. These are defensive tactics by the Board.

25 These tactics are a response to:

- (a) Sandpiper’s success at effecting a board change at another REIT;
- (b) Sandpiper having the support of over 30% of the outstanding units of Agellan and its ability to effect change of the Trustees of the Board;
- (c) the discussions between Sandpiper and Agellan which took place over an extended period prior to the announcement of the Transaction and which

concerned the strategic direction of the Trust and the composition of the Board;
and

- (d) the perceived threat to a change to the majority of the Trustees and the management of the Trust.

a) The Transaction

26 The Transaction is a clear attempt to entrench management of the Trust, to provide management with material benefits and to monetize the External Management Agreement.

27 The timing of the Transaction raises serious concerns.

28 First, it would appear that the Trust could terminate the External Management Agreement for a fraction of the \$15,000,000 being paid to its management team. Article 5.2 of the External Management Agreement provides that:

- (a) Agellan may terminate the External Management Agreement on January 25, 2018, within a matter of weeks of the proposed closing of the Transaction, for a one-time payment of approximately \$5,000,000; and
- (b) this right may be exercised if ACPI fails to achieve for Agellan an adjusted funds from operations (**AFFO**) of \$0.99 per unit as of December 31, 2017.

29 Market evidence indicates ACPI will not achieve this target. Even if Agellan had a legitimate purpose in terminating the External Management Agreement, it likely already has the right to do so at one third of the cost.

30 Second, while the concept of internalizing Agellan's management function has been a matter of discussion for approximately 16 months, it was only implemented with the emergence of Sandpiper. It appears clear that the Board, fearing a loss of control, is determined to

“hardwire” benefits to Agellan’s management team that Unitholders cannot undo. These benefits include:

- (a) Agellan effectively paying \$15,000,000 to its own senior management team to maintain the *status quo* but terminate the External Management Agreement; and
- (b) new employment agreements being entered into which benefit and protect current senior management.

b) Delaying the Meeting

31 In September 2017, Sandpiper exercised its right under the Trust Declaration to requisition the Meeting to allow the Unitholders to have a say on the Transaction. In response, the Board called the Meeting for April 17, 2018, months after the planned closing of the Transaction in the fourth quarter of this year and 7 months after the date of the Requisition. This was an obvious attempt to insulate the Board from Unitholder scrutiny.

32 Neither the Board nor Agellan has provided any credible reason for this delay and the delay serves no purpose but to (1) deny the Unitholders a say on the Transaction, (2) render moot Sandpiper’s right under the Trust Declaration to call a meeting for the consideration of a particular item of business, (3) delay Sandpiper and other supporting Unitholders in implementing their desired changes to the Board and Agellan, thereby giving the Board time to protect and reward current management and solidify control of the Board.

c) Rushing the Closing

33 The “Drop Dead Date” for the closing of the Transaction is January 31, 2018. The Meeting can be held before that time. There is no justification for the closing of the Transaction to occur before the Meeting, and Agellan management is the only beneficiary of a rushed closing.

It is contrary to the public interest to permit the Transaction to close before the Meeting

34 The OSC has stated that it has jurisdiction over a change of control effected by way of a proxy contest. It has recognized that a defensive measure in the face of a contest for control which can influence the outcome in management's favour is subject to review and must be carefully scrutinized and evaluated, particularly in light of the public interest in ensuring fairness in contested shareholder meetings.

35 It is widely recognized that the use of "golden parachutes" and other contracts designed to entrench management or provide benefits to management in the context of a takeover bid are defensive measures contrary to the public interest.

36 The Transaction and the events that followed are clear defensive tactics – a fact not considered or understood by the TSX. With knowledge of Sandpiper's impending change to the Board and the Trust, the Board has taken steps to ensure current management will stay in place and that they financially benefit immediately from their positions.

37 The TSX wrongly focused on the issuance of units and did not consider how the Transaction as a whole – including the management benefits being "hardwired" – effects the quality of the marketplace.

The TSX Decision and jurisdiction

38 On or about October 16, 2017, pursuant to section 603 of the TSX Company Manual, the TSX granted conditional approval for the listing of the New Units without imposing the Additional Condition.

39 Agellan has advised Sandpiper that:

- (a) as a result of the TSX Decision, the earliest date the Transaction can close is Tuesday October 24, 2017; and
- (b) Agellan intends to close the Transaction as soon as practicable after it is permitted to do so.

40 Section 603 gives the TSX discretion to accept notice of a transaction and to impose conditions on a transaction. Section 603 requires the TSX to consider the effect that the Transaction may have on the quality of the marketplace, which is a broad concept of market quality and integrity. Fair treatment of Unitholders and the public interest are relevant considerations in the assessment of the impact of the Transaction on the quality of the marketplace.

Sandpiper's standing to bring this Application

41 Pursuant to section 21.7 of the Act, Sandpiper is a party directly affected by the TSX Decision and has standing to bring this application given that:

- (a) Sandpiper is a Unitholder in the Trust;
- (b) Sandpiper has requisitioned the Meeting with respect to, among other things, the Transaction; and
- (c) Sandpiper is involved in an ongoing proxy fight with respect to Agellan to which the Transaction relates.

42 As this Application concerns matters affecting the public interest, as set out below, and as Sandpiper is materially affected by the TSX Decision, Sandpiper seeks standing from the OSC to pursue relief under section 127 of the Act.

The OSC should intervene

43 The failure of the TSX to impose the Additional Condition warrants the intervention of the OSC under section 21.7 of the Act. In particular:

- (a) the TSX proceeded on an incorrect principle and erred in law in its interpretation and application of section 603 of the TSX Company Manual;
- (b) the TSX did not consider the Transaction as a defensive tactic with an adverse effect on the quality of the marketplace;
- (c) the TSX failed to consider material evidence as it relates to the Transaction and the issuance of the New Units, including the Trust's decision to delay acting on Sandpiper's Requisition for an unprecedented period of 7 months; and
- (d) the OSC is concerned with protecting the public interest by ensuring that:
 - (i) defensive tactics that entrench a board of trustees, and which are abusive of the rights of security holders, are not condoned;
 - (ii) fair and legitimate security holder activism is not impeded; and
 - (iii) the justified expectations of security holders in (a) security holder democracy, and (b) board accountability, are protected.

The TSX Decision conflicts with the OSC's perception of the public interest.

44 The TSX Decision also warrants the OSC's intervention under section 127 of the Act to protect and advance the public interest. As set out above, the Transaction is contrary to the public interest and the principles governing a fair and efficient marketplace.

A stay is necessary

45 A stay of the TSX Decision is warranted for the following reasons:

- (a) There is a serious issue to be tried, as set out above, and this Application is neither vexatious nor frivolous.
- (b) To allow the Transaction to close and the New Units to be listed prior to the Meeting will cause Sandpiper irreparable harm. An important item of business to be dealt with at the Meeting will be rendered moot and Sandpiper will have been deprived of its rights under the Trust Declaration. Moreover, if the OSC varies the TSX Decision after the Transaction has closed, the OSC's decision will have no effect as it will not be possible to "unscramble" the Transaction or undo the harm to Sandpiper.
- (c) The balance of convenience favours Sandpiper. It is imperative that the status quo be maintained to the greatest extent possible, which favours granting a stay. The fair treatment of Unitholders must be preferred to the commercial interests of the Respondents, which will suffer no material harm if the closing of the Transaction is postponed until the conclusion of the hearing and review.

Conclusion

46 For the foregoing reasons, Sandpiper submits that the protection of the public interest requires that a stay of the TSX Decision be granted and a hearing be convened by the OSC at the earliest opportunity to consider the TSX Decision.

47 Sandpiper intends to rely upon affidavit evidence, to be sworn, and written submissions to be delivered in advance of the hearing.

48 Sandpiper requests the record of the TSX Decision and any reasons for said decision for filing with the OSC. Sandpiper reserves the right to amend or supplement this Notice once the TSX Decision, Reasons for Decision and the TSX Record have been made available to it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of October, 2017.

Norton Rose Fulbright Canada LLP
Norton Rose Fulbright Canada LLP
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Agellan Commercial Real Estate Investment Trust Announces Receipt of TSX Conditional Approval

TORONTO--(BUSINESS WIRE)--October 16, 2017--Agellan Commercial Real Estate Investment Trust (the "REIT" or "Agellan") (TSX: ACR.UN) announced today further progress on the REIT's recent announcement regarding the internalization of asset management through the purchase of certain assets of the REIT's external manager, Agellan Capital Partners Inc. (the "Internalization" or the "Transaction").

As previously announced, on closing of the Internalization, a wholly-owned subsidiary of the REIT will issue 1,045,296 exchangeable Class B LP Units (the "Class B LP Units") to the external manager, together with the related special voting units of the REIT. The Class B LP Units are exchangeable into trust units of the REIT on a one-for-one basis at the option of the holder. The Toronto Stock Exchange has conditionally approved the listing of the trust units of the REIT issuable upon exchange of the Class B LP Units. The REIT is not required to obtain unitholder approval in connection with the Transaction.

The REIT expects to close the Transaction in the fourth quarter of 2017 and, in any event, no sooner than the sixth trading day following the date hereof.

Forward-Looking Information:

This news release contains forward-looking information within the meaning of applicable securities legislation. Forward-looking information can be identified by words or expressions including, but not limited to, "plans", "expects", "scheduled", "estimates", "intends", "anticipates", "predicts", "projects", "believes", or variations of such words and phrases or statements to the effect that certain actions, events or results "may", "will", "could", "would", "should", "might", "occur", "be achieved" or "continue" or similar expressions. Forward-looking information is necessarily based on a number of estimates and assumptions that are inherently subject to significant business, economic and competitive risks, uncertainties and contingencies, many of which are beyond the REIT's control, which could cause actual results to differ materially from those that are disclosed in or implied by such forward-looking information. As such, management can give no assurance that actual results will be consistent with the forward-looking information. While such assumptions are considered reasonable by management of the REIT based on the information currently available, any of these assumptions could prove to be inaccurate and, as a result, the forward-looking information based on those assumptions could be incorrect. These risks and uncertainties include, but are not limited to: the REIT's future growth potential; results of operations; future prospects for additional investment opportunities in Canada and the U.S., including access to debt and equity capital at acceptable costs, the ability to obtain necessary approvals and to minimize any unexpected costs or liabilities, environmental or otherwise, relating to any acquisitions or dispositions; demographic and industry trends remaining unchanged, including occupancy levels, lease renewals, the exercise of any early termination rights, rental increases and retailer competition; future levels of the REIT's indebtedness remaining at acceptable levels, including its credit rating; tax laws as currently in effect remaining unchanged, including applicable specified investment flow-through rules; and current economic conditions remaining unchanged, including interest rates and applicable foreign exchange rates. Readers, therefore, should not place undue reliance on any such forward-looking statements, as forward-looking information involves significant risks and uncertainties and should not be read as guarantees of future performance or results, and will not necessarily be accurate indications of whether or not the times at or by which such performance or results will be achieved. All forward-looking information in this news release speaks only as of the date of this news release. The REIT does not undertake to update any such forward-looking information whether as a result of new information, future events or otherwise, except as required by applicable securities laws. All forward-looking statements in this news release are qualified by these cautionary statements. Additional information about these assumptions and risks and uncertainties is contained in the REIT's filings with securities regulators, including its current annual information form and MD&A.

About Agellan Commercial Real Estate Investment Trust

The REIT is an unincorporated, open-ended real estate investment trust established pursuant to a declaration of trust under the laws of the Province of Ontario. The REIT has been created for the purpose of acquiring and owning industrial, office and retail properties in select target markets in the United States and Canada.

The REIT's 44 properties contain approximately 7.0 million square feet of gross leasable area, with the REIT's ownership interest at approximately 6.7 million square feet. The properties are located in major urban markets in the United States and Canada.

Additional information about the REIT is available at www.agellancommercialreit.com or www.sedar.com.

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