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**Hearing Date and Time:**  
**May 19, 2004 at 10:00 a.m. Eastern**  
**Objection Date:**  
**May 13, 2004 at 5:00 p.m. Eastern**

-and-

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Attorneys for Transamerica Realty Investment Properties, LLC

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

**In re:**

**ALLEGIANCE TELECOM, INC., et al.,  
Debtors and Debtors-in-Possession**

**Chapter 11**

**Case No.: 03-13057 (RDD)**

**Jointly Administered**

**MOTION OF TRANSAMERICA REALTY INVESTMENT PROPERTIES, LLC  
TO COMPEL IMMEDIATE PAYMENT OF POST-PETITION ADMINISTRATIVE  
EXPENSES ARISING FROM UNEXPIRED LEASE OF NONRESIDENTIAL  
REAL PROPERTY PURSUANT TO 11 U.S.C. § 365(d)(3)**

Transamerica Realty Investment Properties, LLC (successor-in-interest to Pyramid Investment Corporation), a California limited liability company (“Transamerica”), through its attorneys, Pillsbury Winthrop LLP, hereby submits its Motion to Compel Immediate Payment of Post-petition Administrative Expenses Arising from Unexpired Lease of Nonresidential Real Property Pursuant to 11 U.S.C. § 365(d)(3) (the “Motion”).

## **INTRODUCTION**

By this Motion, Transamerica seeks to compel the Debtors to pay post-petition unpaid rent and other obligations arising under an unexpired lease of non-residential real property pursuant to Bankruptcy Code § 365(d)(3).

## **STATEMENT OF FACTS**

### **The Lease and Background Information**

On November 18, 1999, Allegiance Telecom, Inc., a debtor in these proceedings (“Debtor”), entered into a lease (“Lease”) with Pyramid Investment Corporation (“Pyramid”) (predecessor in interest to Transamerica) for office space at 505 Sansome Street, San Francisco, California (the “Premises”). A copy of Section 3 of the Lease is attached hereto as Exhibit A. The salient Lease provisions are highlighted below.

Pursuant to the terms of the Lease, the Debtor agreed to pay base rent of \$39,875 per month for February and March 2004, and \$40,672.50 for April 2004, as well as additional amounts for operating expenses, certain taxes, and other charges. Additionally, upon execution of the Lease, and pursuant to Section 3(e) of the Lease, Debtor paid to Pyramid a cash security deposit in the amount of \$37,482.50 (the “Security Deposit”). At the same time, Debtor provided Pyramid an irrevocable standby letter of credit with the Bank of America (the “Bank”) in the amount of \$112,447.50 (the “Letter of Credit”). Pursuant to Section 3(e) of the Lease, Pyramid is entitled to draw upon the Letter of Credit at any time within sixty days of the expiration date of the Letter of Credit, unless the Debtor has provided Pyramid with a replacement letter of credit that meets the requirements of the Lease. Pursuant to Section 3(e) of the Lease, Pyramid (and by succession, Transamerica) “may (but shall not be obligated to) use, apply or retain all or any portion of . . . the proceeds of a draw under the Letter of Credit for the payment of any Rental in default or for the payment of any other sum to which [Transamerica] may become entitled by reason of [Debtor’s] default, or to compensate [Transamerica] for any loss or damage which [Transamerica] may suffer thereby.” Lease § 3(e).

On May 14, 2003 (the “Petition Date”), the Debtor (and several other related debtor companies) filed with this Court voluntary petitions for relief under the Bankruptcy Code. The Debtors’ chapter 11 cases (the “Chapter 11 Cases”) have been consolidated for procedural purposes only and are being jointly administered pursuant to Bankruptcy Rule 1015(b).

On September 29, 2003, the Bank sent Transamerica a notice of non-renewal of the Letter of Credit (the “Non-Renewal Notice”), which stated that the Bank had elected not to renew the Letter of Credit issued for the benefit of Transamerica under the Lease. In a letter dated November 4, 2003, Transamerica notified the Debtor that Section 3(e) of the Lease required the Debtor to maintain a letter of credit in effect during the entire term of the Lease (the “November 4 Letter”) and that, if Transamerica did not receive a replacement letter of credit by December 1, 2003, it would make a draw under the Letter of Credit in accordance with Section 3(e) of the Lease. A copy of the November 4 Letter is attached hereto as Exhibit B.

On November 25, 2003, Transamerica filed a proof of claim in the Debtor’s Chapter 11 Case (the “Proof of Claim”). A copy of the Proof of Claim is attached hereto as Exhibit C. Transamerica asserted a claim for unpaid rent and building services for the Premises totaling at least \$3,516,655.35, plus interest (to the extent permitted under the Bankruptcy Code) and all other charges, fees and expenses and other amounts provided in or due under the Lease. Transamerica’s claim was calculated in anticipation of the Debtor’s rejection of the Lease. As limited by Bankruptcy Code § 502(b)(6), Transamerica’s Proof of Claim consists of: (i) a claim for an amount equal to 15% of rent for the remaining term of the Lease following the date of the filing of the bankruptcy petition in the amount of \$570,348.62, plus (ii) an amount equal to the unpaid pre-petition obligations of the Debtor under the Lease in the amount of \$36,846.61, which amounts total at least \$607,195.23 (the “Lease Termination Claim”). To date, the Debtor has not sought to assume or reject the Lease. On January 9, 2004, the Court entered an order extending the period of time during

which the Debtor may assume or reject the Lease to and including the date on which an order is entered confirming a plan of reorganization in the Debtor's Chapter 11 case.

Because the Debtor failed to provide Transamerica a replacement letter of credit by December 1, 2003, Transamerica drew down on the Letter of Credit in its full amount in compliance with the terms of the Letter of Credit and the Lease (the "Letter of Credit Proceeds"). As permitted by Section 3(e) of the Lease, Transamerica is holding the Letter of Credit Proceeds. Pursuant to the Lease, Transamerica is not obligated to, and indeed has not, applied the Letter of Credit Proceeds to the Lease Termination Claim or the Post-Petition Rent Claim. Until the Debtor gives notice of the assumption or rejection of the Lease, Transamerica will not be in a position to determine the application of the Letter of Credit Proceeds. In any event, the Lease gives only Transamerica the right to make this determination.

#### **Unpaid Post-Petition Rent and Other Post-Petition Charges**

Transamerica has filed the instant motion because the Debtor has failed to pay certain amounts for post-petition rent, operating expenses, and other charges that are currently due and owing under the Lease. Specifically, the Debtor has failed to pay any base rent charges for February 2004 and March 2004, and has paid only a portion of the base rent charge for April 2004. The aggregate amount of unpaid base rent for the period from February 2004 through April 2004 is \$104,669.46 (the "Unpaid Base Rent"). The Debtor has also failed to pay (i) certain operating expenses for the period from January 2004 through April 2004 in the amount of \$10,612.94 (the "Unpaid Operating Expenses"); (ii) certain other charges that have been incurred during the period from December 2003 through April 2004 in the amount of \$356.09 (the "Unpaid Charges"); and (iii) late fees and interest that have accrued on the foregoing charges in the amount of \$8,061.86 (the "Unpaid Late Fees"). Taken in the aggregate, the Unpaid Base Rent, Unpaid Operating Expenses, Unpaid Charges, and Unpaid Late Fees give rise to a claim under Bankruptcy Code § 365(d)(3) in the amount of \$123,770.35, payable immediately (the "Post-Petition Rent

Claim”). A copy of Transamerica’s calculation of the Post-Petition Rent Claim is attached hereto as Exhibit D.

After several attempts to contact Allegiance with respect to the unpaid Post-Petition Rent Claim, Transamerica’s counsel was informed by the Debtor’s counsel that the Debtor had unilaterally decided to apply the Letter of Credit Proceeds to the Post-Petition Rent Claim.

### ARGUMENT

**A. Pursuant to Bankruptcy Code § 365(d)(3), Debtor Must Pay to Transamerica the Unpaid Base Rent, Unpaid Operating Expenses, Unpaid Charges and Unpaid Late Fees Because Such Obligations Arose Under the Lease Post-Petition.**

In a bankruptcy, a commercial landlord, unlike any other creditor, is *forced* to provide ongoing services to the debtor (e.g., the use of its property, utilities, security, and other services) until such time as the debtor assumes or rejects its lease. Section 365(d)(3) of the Bankruptcy Code was enacted to ameliorate this disparate treatment by requiring the debtor-tenant to timely perform its rent obligations under an unexpired lease. Section 365(d)(3) provides, in pertinent part, as follows:

The Trustee shall timely perform all the obligations of the debtor ... arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title.

Here, the obligations of Debtor which arose during the post-petition period described in § 365(d)(3) include payment of the above-referenced Post-Petition Rent Claim.

“The clear and express intent of § 365(d)(3) is to require the trustee to perform the lease in accordance with its terms. To be consistent with this intent, any interpretation must look to the terms of the lease to determine both the nature of the ‘obligation’ and when it ‘arises.’” In re Montgomery Ward Holding Corp., 268 F.3d 205, 209 (3d Cir. 2001). Accord 130 Cong. Rec. S8894, S8895 (daily ed. June 29, 1984) (statement of Sen. Hatch) (Section 365(d)(3) requires the “trustee [or debtor-in-possession] to perform all the obligations of the debtor under a lease of nonresidential real property *at the time required in the lease.*”) (emphasis added).

A lease obligation arises at the time it must be paid by the tenant, even if the obligation relates to pre-petition events. See Urban Retail Properties v. Loews Cineplex Entertainment Corporation, 2002 WL 535479, at \*6 (S.D.N.Y. 2002) (holding that obligation of debtor-lessee to reimburse landlord for construction expenses upon completion of the construction work arose post-petition – even though landlord incurred expenses in both prepetition and post-petition periods – because the reimbursement trigger, *i.e.*, the completion of the work, occurred post-petition); In re R.H. Macy & Co., Inc., 152 B.R. 869, 873 (Bankr. S.D.N.Y. 1993), *aff'd*, No. 93 Civ. 4414, 1994 WL 482948 (S.D.N.Y. Feb. 24, 1994) (finding that a debtor-lessee’s reimbursement obligation for reassessed taxes which arose under the lease post-petition must be paid under section 365(d)(3) even though the reassessed taxes related to primarily prepetition tax periods).

The plain meaning of § 365(d)(3) requires that the Debtor make payments of lease obligations immediately when they become due. See In re Pudgie’s Development of NY, Inc., 239 B.R. 688, 694 (S.D.N.Y. 1999); see also In re Pudgie’s Development of NY, Inc., 223 B.R. 421, 426 (Bankr. S.D.N.Y. 1998) (quoting In re Coastal Dry Dock & Repair Corp., 62 B.R. 879, 882 (Bankr.E.D.N.Y.1986)) (“The command of Section 365(d)(3) is clear and unambiguous. It means exactly what it says.”). The obligation to pay post-petition rent on a timely basis is critical because “(i)n many bankruptcy cases, when a claim is paid makes the difference as to whether it will be paid at all.” In re Virginia Packaging Supply Co., 122 B.R. 491, 495 (Bankr.E.D.Va.1990). Accordingly, the Debtor must be compelled to pay in full the Post-Petition Rent Claim, because the Unpaid Base Rent, Unpaid Operating Expenses, Unpaid Charges and Unpaid Late Fees all accrued and arose under the Lease post-petition, and the Debtor was therefore required to pay them all when they came due.

**B. Transamerica Is Not Required to Offset the Security Deposit or the Letter of Credit Proceeds Against the Post-Petition Rent Claim.**

Transamerica cannot be required to apply the Letter of Credit Proceeds to the Post-Petition Rent Claim. See In re PYXSYS Corp., 288 B.R. 309, 319 (Bankr. D. Mass. 2003) (holding that post-petition claims are not subject to offset by the amount of a security deposit); Elliot v. Leounes, 39 B.R. 575, 578 (Bankr. D. Del. 1984) (holding that a post-petition debt may not be set-off against a security deposit); In re Far West Corp. of Shasta County, 120 B.R. 551, 552 (Bankr. E.D. Cal. 1990) (“The parties are in agreement that a security deposit generally cannot be applied against a landlord’s post-petition administrative rent claim but, rather, must be applied against any pre-petition, unsecured claim the landlord might have against the debtor/tenant.”). Thus, in the instant case, Transamerica should not be required to offset either the Security Deposit or the Letter of Credit Proceeds against the Post-Petition Rent Claim, since Bankruptcy Code § 365(d)(3) is abundantly clear with respect to both the Debtor’s liability (absolute and not subject to offset) and the timing of payment (immediately when due). Moreover, as set forth herein, the Lease clearly grants Transamerica the sole right to determine the application of the Letter of Credit Proceeds. Lease, ¶ 3(e). Pursuant to Bankruptcy Code § 365(d)(3), the Debtor should be compelled to pay all of the outstanding Post-Petition Rent Claim.

**CONCLUSION**

Transamerica respectfully requests the entry of an Order in the form submitted herewith compelling the Debtor to immediately pay all post-petition obligations due under the Lease with Transamerica in accordance with section 365(d)(3), and granting such other relief as this Court deems proper.

Dated: April 29, 2004  
New York, New York

By: /s/ Karen B. Dine  
Karen B. Dine (KD 0546)  
Harry E. Garner (HG 6717)  
Pillsbury Winthrop LLP  
1540 Broadway  
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and

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**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

**In re:**

**ALLEGIANCE TELECOM, INC., et al.,  
Debtors and Debtors-in-Possession**

**Chapter 11**

**Case No.: 03-13057 (RDD)**

**Jointly Administered**

**ORDER GRANTING MOTION OF TRANSAMERICA REALTY INVESTMENT  
PROPERTIES, LLC TO COMPEL IMMEDIATE PAYMENT OF POST-PETITION  
ADMINISTRATIVE EXPENSES ARISING FROM UNEXPIRED LEASE OF  
NONRESIDENTIAL REAL PROPERTY PURSUANT TO 11 U.S.C. § 365(d)(3)**

Upon consideration of the motion (the “Motion”) of Transamerica Realty Investment Properties, LLC (“Transamerica”) to compel immediate payment of post-petition administrative expenses arising from an unexpired nonresidential real property lease (the “Lease”) with Allegiance Telecom, Inc., a debtor in these proceedings (“Debtor”), pursuant to section 365 of title 11 of the United States Code (the “Bankruptcy Code”), and any response thereto, and for good cause shown,

NOW THEREFORE, the Court having found that Bankruptcy Code § 365(d)(3) requires the Debtor to pay to Transamerica the total sum of \$123,770.35 as post-petition rent and other obligations (the “Post-Petition Rent Claim”) arising under the Lease;

ACCORDINGLY, after due deliberation, and sufficient cause appearing therefor, and all objections having been resolved or overruled for the reasons stated on the record, it is hereby

ORDERED that the Motion be, and hereby is, granted; and it is further

ORDERED that the Debtor shall, within \_\_\_ days from the date of this Order, pay to Transamerica the Post-Petition Rent Claim in the total sum of \$123,770.35 pursuant to 11 U.S.C. §365(d)(3) as post-petition obligations arising under the Lease; and it is further

ORDERED that Transamerica shall not be required to apply or offset the Security Deposit or the Letter of Credit Proceeds (as defined in the Motion) against the Post-Petition Rent Claim; and it is further

ORDERED that Transamerica shall receive such other and further relief as is just and proper.

DATED :

UNITED STATES BANKRUPTCY JUDGE

**EXHIBIT A**  
**RELEVANT LEASE PROVISIONS**

505 SANSOME STREET

OFFICE LEASE  
SUMMARY OF LEASE TERMS

505 Sansome Street

San Francisco, California

- A. Date: November 18, 1999
- B. Landlord: PYRAMID INVESTMENT CORPORATION, a California Corporation
- Landlord's address for notices:  
[Paragraph 24(j)]
- Transamerica Center  
Property Management Office  
600 Montgomery Street  
4th Floor  
San Francisco, CA 94111  
Attention: General Manager
- C. Tenant: ALLEGIANCE TELECOM, INC., a Delaware corporation
- Tenant's address for notices  
[Paragraph 24(j)]: 4 Westbrook Corporate Center  
Suite 400  
Westchester, Illinois 60154
- Tenant Contact Person Patricia E. Koide
- D. Floor(s) on which Premises situated:  
[Paragraph 1(g)] 20<sup>th</sup> Floor
- E. Rentable area of Premises:  
[Paragraph 1 (g)] Approximately 9,570 rentable square feet  
(must give notice with respect to space that becomes available on 19<sup>th</sup> floor pursuant to Paragraph 26)
- F. Tenant's Percentage Share:  
[Paragraph 1(l)] 5.26%
- G. Base Expense Year:  
[Paragraph 1(a)] 2000
- H. Base Tax Year: 2000

substantial completion of the Tenant Improvements, whichever is later, or prior to the Target Commencement Date in accordance with Paragraph 2(d), and Tenant shall accept such delivery of the Premises, which acceptance shall constitute agreement by Tenant that the Premises are in the condition required by this Lease, subject to normal punch list items specified by Tenant in a written notice to Landlord within fifteen (15) business days after such acceptance. Landlord shall correct or complete the items on such punch list promptly after such written notice from Tenant; provided that any dispute as to such punch list items shall be resolved as determined in the reasonable judgment of Landlord's architect or engineer. If Landlord is delayed in substantially completing the Tenant Improvements by any cause of delay for which Tenant is responsible as described in the Work Letter, then Tenant shall pay to Landlord, as additional rent, an amount equal to the Basic Monthly Rental specified in Paragraph J of the Summary of Lease Terms (the "Interim Rent"), calculated on a per diem basis, multiplied by the number of days of such delay proximately caused by Tenant's acts or omissions, which shall be due and payable on the Target Commencement Date for such delay before such date and monthly in arrears on the first day of each month thereafter for such delay after such date.

(c) If Landlord for any reason whatsoever cannot deliver possession of the Premises to Tenant on the Target Commencement Date, this Lease shall not be void or voidable, no obligation of Tenant shall be affected hereby except as otherwise provided herein and Landlord shall not be liable to Tenant for any loss or damage resulting therefrom.

(d) In the event the Premises are or will be, in Landlord's judgment, ready for occupancy prior to the Target Commencement Date, Landlord may deliver possession of the Premises on such date (the "Early Occupancy Date") as Landlord specifies by written notice to Tenant not less than ten (10) days prior to such specified date, and notwithstanding the Commencement Date, such early occupancy shall be on and subject to all of the covenants in this Lease, all of which shall be binding on and apply to Tenant during such early occupancy, except Tenant shall pay to Landlord, as additional rent, the Interim Rent, calculated on a per diem basis, pro rata in the proportion that the area in the Premises so delivered to Tenant bears to the total area in the Premises, for the period from the Early Occupancy Date to the Commencement Date. Tenant shall pay the Interim Rent in respect of early occupancy to Landlord on the Early Occupancy Date.

### 3. RENTAL; SECURITY DEPOSIT.

(a) Tenant agrees to pay to Landlord as Basic Monthly Rental for the Premises the sum specified in Paragraph J of the Summary of Lease Terms.

(b) Basic Monthly Rental shall be paid to Landlord, in advance, on or before the first day of each and every successive calendar month during the term hereof. In the event the term of this Lease commences on a day other than the first day of a calendar month, or ends on a day other than the last day of a calendar month, then the Basic Monthly Rental for the first and/or last fractional months of the term shall be appropriately prorated. All such prorations shall be made on the basis of a 360-day year consisting of twelve 30-day months.

(c) Intentionally Omitted.

(d) Rental shall be paid to Landlord without notice, demand, deduction or offset in lawful money of the United States in immediately available funds or by good check as described below at the office of Landlord at Landlord's address for notices specified in the Summary of Lease Terms, or to such other person or at such other place as Landlord from time to time may designate by reasonable advance written notice to Tenant. Payments made by check must be drawn either on a California financial institution or on a financial institution that is a member of the federal reserve system. All amounts of Rental, if not paid when due, shall bear interest from the due date until paid at an annual rate of interest (the "Interest Rate") equal to the lesser of (i) the maximum annual interest rate allowed by law on such due date for business loans (not primarily for personal, family or household purposes) not exempt from the usury law, or (ii) a rate equal to the sum of three (3) percentage points over the publicly announced reference rate (the "Reference Rate") charged on such due date by the San Francisco Main Office of Bank of America NT & SA (or any successor bank thereto) (or if there is no such publicly announced rate, the rate quoted by such bank in pricing ninety (90) day commercial loans to substantial commercial borrowers). In addition, Tenant acknowledges that late payment by Tenant to Landlord of Rental will cause Landlord to incur costs not contemplated by this Lease, the exact amount of such costs being extremely difficult to fix. Such costs include, without limitation, processing and accounting charges, and late charges that may be imposed on Landlord by the terms of any encumbrance and/or note secured by an encumbrance covering the Premises. Therefore, if any installment of Rental due from Tenant is not received within ten (10) days of when due, Tenant shall pay to Landlord an additional sum of five percent (5%) of the overdue Rental as a late charge; provided that, if Rental is not paid when due four (4) times during the term of this Lease, then thereafter Tenant shall not be entitled to such ten (10) day grace period, and such late charge shall be assessed on any Rental not paid by 5:00 p.m. on the date due. The parties agree that this late charge represents a fair and reasonable estimate of the costs that Landlord will incur by reason of late payment of Rental by Tenant. Acceptance of any late charge shall not constitute a waiver of Tenant's default with respect to the overdue amount, or prevent Landlord from exercising any of the other rights and remedies available to Landlord.

(e) Upon signing this Lease, Tenant shall pay to Landlord (a) an amount equal to the Basic Monthly Rental for the first month of the term of this Lease, which amount Landlord shall apply to the Basic Monthly Rental for such first month, and (b) the amount of the security deposit specified in Paragraph L of the Summary of Lease Terms (the "Deposit"). In addition, upon signing this Lease, Tenant shall also provide to Landlord, at Tenant's sole cost and expense, an irrevocable standby letter of credit in the amount of one hundred twelve thousand four hundred forty-seven and 50/100 dollars (\$112,447.50) (the "Security Amount"), in form and substance satisfactory to Landlord and issued by a bank that is satisfactory to Landlord (including replacements thereof permitted hereunder, the "Letter of Credit"). The Letter of Credit shall: (1) name Landlord as beneficiary; (2) allow Landlord to make partial and multiple draws thereunder up to the face amount, as determined by Landlord; (3) require the issuing bank to pay to Landlord the amount of a draw upon receipt by such bank of a sight draft signed by Landlord and presented at a location within San Francisco; and (4) provide that Landlord can freely transfer it upon an assignment or other transfer of its interest in this Lease to the assignee or transferee, without charge and without recourse, and without having to obtain the consent of Tenant or the issuing bank. Landlord shall be entitled to draw upon the Letter of Credit in accordance with this paragraph or at any time within sixty (60) days of the expiration date of the Letter of Credit, unless Tenant shall have delivered to Landlord a replacement Letter of Credit

meeting the requirements of this Paragraph 3(e) and with an expiration date not less than twelve (12) months after the date of delivery. The Letter of Credit (or a replacement thereof satisfactory to Landlord) shall remain in effect during the entire term of this Lease.

As of March 1, 2007 (the "Reduction Date"), Tenant shall have the right to reduce the Security Amount to thirty-seven thousand four hundred eighty-two and 50/100 dollars (\$37,482.50), provided that, as of such Reduction Date, all of the following conditions are satisfied: (1) no Event of Default has occurred and is continuing; (2) the net worth of Tenant during the immediately preceding fiscal year is greater than Tenant's net worth during the fiscal year that immediately preceded the date of this Lease; and (3) Tenant shall have delivered to Landlord the financial statements of Tenant for the immediately preceding fiscal year and detailed calculations demonstrating to Landlord's reasonable satisfaction that the condition set forth in clause (2) above is satisfied.

The Deposit and the Letter of Credit (including any proceeds of a draw thereunder) shall be held by Landlord as security for the faithful performance by Tenant of all of the provisions of this Lease to be performed or observed by Tenant. If Tenant fails to pay any Rental, or otherwise defaults with respect to any provision of this Lease, Landlord may (but shall not be obligated to) use, apply or retain all or any portion of the Deposit and/or the proceeds of a draw under the Letter of Credit for the payment of any Rental in default or for the payment of any other sum to which Landlord may become entitled by reason of Tenant's default, or to compensate Landlord for any loss or damage which Landlord may suffer thereby. If Landlord so uses or applies all or any portion of the Deposit and/or the proceeds of a draw under the Letter of Credit, Tenant shall within ten (10) business days after demand therefor deposit cash with Landlord in an amount sufficient to restore the Deposit and/or amend or replace the Letter of Credit, whichever is applicable, to the full amount thereof, and Tenant's failure to do so shall, at Landlord's option, be an Event of Default (as defined in Paragraph 18(a)) under this Lease. Landlord shall not be required to keep the Deposit separate from its general accounts. The Deposit and the Letter of Credit, or so much thereof as has not theretofore been applied (or can thereafter be applied in connection with any outstanding default by Tenant) by Landlord, shall be returned, without payment of interest or other increment for their use, to Tenant (or, at Landlord's option, to the last assignee, if any, of Tenant's interest hereunder) at the expiration of the term hereof and after Tenant has vacated the Premises; provided that Landlord may retain an amount up to the amount of the Basic Monthly Rental until the Operating Expense reconciliation pursuant to Paragraph 4(c) shall have been completed for the calendar year in which the lease expiration occurs. Landlord's return of the Deposit or the Letter of Credit or any part thereof shall not be construed as an admission that Tenant has performed all of its obligations under this Lease. No trust relationship is created herein between Landlord and Tenant with respect to the Deposit or the Letter of Credit.

#### 4. TENANT'S SHARE OF OPERATING EXPENSES AND REAL PROPERTY TAXES.

(a) In addition to the Basic Monthly Rental payable during the term of this Lease, Tenant shall pay to Landlord, as additional rent, Tenant's Percentage Share of (i) the amount, if any, by which Operating Expenses paid or incurred by Landlord in any calendar year subsequent to the Base Expense Year exceed the amount of Operating Expenses paid or incurred by

**EXHIBIT B**  
**NOVEMBER 4 LETTER**





**Low e Enterprises Real Estate Group**

600 Montgomery Street, 4th Floor  
San Francisco, California 94111-2790  
Telephone: (415) 983-4100  
FAX: (415) 983-4109

November 4, 2003

Ms. Patricia E. Koide  
ALLEGIANCE TELECOM, INC.  
4 Westbrook Corporate Center  
Suite 400  
Westchester, Illinois 60154

Re: Office Lease dated November 18, 1999 between Transamerica Realty Investment Properties, LLC, successor in interest to Pyramid Investment Corporation (the "Landlord"), and Allegiance Telecom, Inc. ("Allegiance") for premises located in 505 Sansome Street, San Francisco, California (the "Lease")

Dear Ms. Koide:

The Letter of Credit issued by Bank of America in the amount of One Hundred Twelve Thousand Four Hundred Forty Seven Dollars and Fifty Cents (\$112,447.50) that Landlord is holding pursuant to the terms of the Lease is scheduled to expire on December 15, 2003. We have been notified by Bank of America that they will not be renewing this Letter of Credit.

Per Section 3 (e) of the Lease, Allegiance is required to maintain the Letter of Credit in effect during the entire term of the Lease. Bankruptcy Code Section 365(d)(3) requires Allegiance to "timely perform all the obligations" under the lease until the lease is assumed or rejected. Please provide a replacement Letter of Credit that complies with the terms of Section 3(e) of the Lease immediately.

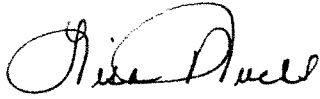
If we do not receive such a replacement Letter of Credit by December 1, 2003, the Landlord shall make a draw under the Letter in accordance with the terms of Section 3(e) of the Lease.

Please call me at your earliest convenience at (415) 983-4107 as we would like to schedule a conference with counsel present to discuss the expiration of your Letter of Credit and your future plans for your suite at 505 Sansome Street.

Should you have any additional questions, please do not hesitate to contact me.

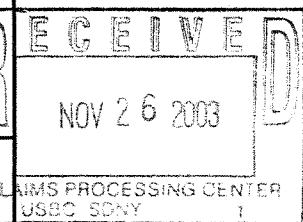


Sincerely,

A handwritten signature in black ink, appearing to read "Lisa Rucks". The signature is fluid and cursive, with a large loop at the beginning.

Lisa Rucks  
Property Manager  
Lowe Enterprises Real Estate Group

**EXHIBIT C**  
**PROOF OF CLAIM**

<b>UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF NEW YORK</b>		<b>PROOF OF CLAIM</b>
In re <b>ALLEGIANCE TELECOM, INC.</b>		Case Number <b>03-13057 (RDD)</b>
NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.		
Name of Creditor: <b>TRANSAMERICA REALTY INVESTMENT PROPERTIES, LLC</b>		<input type="checkbox"/> Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars. <input type="checkbox"/> Check box if you have never received any notices from the bankruptcy court in this case. <input type="checkbox"/> Check box if the address differs from the address on the envelope sent to you by the court.
Name and address where notices should sent: <b>TRANSAMERICA REALTY INVESTMENT PROPERTIES, LLC</b> c/o Aegon USA Realty Advisors, Inc. 4333 Edgewood Road NE Cedar Rapids, IA 52499-5223 Attn.: Laurie Bergren, Esq. Telephone number: (319) 398-8008		
and a copy to: <b>Pillsbury Winthrop LLP</b> P.O. Box 7880 San Francisco, CA 94120-7880 Attn.: Ana N. Damonte, Esq. Telephone number: (415) 983-1000		
<b>TRANSAMERICA REALTY INVESTMENT PROPERTIES, LLC</b> c/o Lowe Enterprises 600 Montgomery Street, 4th Floor San Francisco, CA 94111 Attn.: Jeannine Layland Telephone number: (415) 983-4134		THIS SPACE IS FOR COURT USE ONLY
Creditor Tax I.D. # 95-1060502	Account or other number by which creditor identifies debtor:	Check here <input type="checkbox"/> replaces if this claim <input type="checkbox"/> amends a previously filed claim, dated: _____
<b>1. Basis for Claim</b> <input type="checkbox"/> Goods sold <input type="checkbox"/> Services performed <input type="checkbox"/> Money loaned <input type="checkbox"/> Personal injury/wrongful death <input type="checkbox"/> Taxes <input checked="" type="checkbox"/> Other <u>Amounts owing under unexpired nonresidential real property lease. See Exhibit A.</u>		<input type="checkbox"/> Retiree benefits as defined in 11 U.S.C. § 1114(a) <input type="checkbox"/> Wages, salaries, and compensation (fill out below) Your SS #: _____ Unpaid compensation for services performed From _____ to _____ (date) (date)
<b>2. Date debt was incurred: See Exhibit A.</b>		<b>3. If court judgment, date obtained:</b>
<b>4. Total Amount of Claim at Time Case Filed:</b> <u>\$569,712.73</u> <u>\$37,482.50</u> <u>\$ 647.50</u> at least <u>\$607,842.73</u> (unsecured) (secured) (unsecured priority) total If all or part of your claim is secured or entitled to priority, also complete Item 5 or 6 below. <input type="checkbox"/> Check this box if claim includes interest or other charged in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.		
<b>5. Secured Claim.</b> <input checked="" type="checkbox"/> Check this box if your claim is secured by collateral (including a right of setoff). Brief Description of Collateral: <input type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input checked="" type="checkbox"/> Other: <u>\$37,482.50 - Security Deposit - See Exhibit A</u>  Value of Collateral: _____  Amount of arrearage and other charges at time case filed included in secured claim, if any: \$ _____		<b>6. Unsecured Priority Claim.</b> <input checked="" type="checkbox"/> Check this box if you have an unsecured priority claim Amount entitled to priority: Specify the priority of the claim: <input type="checkbox"/> Wages, salaries, or commissions (up to \$4,650)* earned within 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. § 507(a)(3). <input type="checkbox"/> Contributions to an employee benefit plan - 11 U.S.C. § 507(a)(4). <input type="checkbox"/> Up to \$2,100* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(6). <input type="checkbox"/> Alimony, maintenance, or support owed to a spouse, former spouse, or child - 11 U.S.C. § 507(a)(7). <input type="checkbox"/> Taxes or penalties owed to governmental units - 11 U.S.C. § 507(a)(8). <input checked="" type="checkbox"/> Other - Specify applicable paragraph of 11 U.S.C. § 507(a)(1). * Amounts are subject to adjustment on 4/1/04 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.
<b>7. Credits:</b> The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim. <b>8. Supporting Documents:</b> Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary. <b>9. Date-Stamped Copy:</b> To receive an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.		THIS SPACE IS FOR COURT USE ONLY
Date <u>11/25/03</u>	Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any): <b>TRANSAMERICA REALTY INVESTMENT PROPERTIES, LLC</b> , by <u>Lowe Enterprises</u> , as authorized representative by <u>Jeanine Layland</u> , Vice President  <i>Jeanine Layland</i>	
Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.		

# EXHIBIT A

**Case Name:** In re Allegiance Telecom, Inc.  
**Debtor:** Allegiance Telecom, Inc.  
**Creditor:** Transamerica Realty Investment Properties, LLC  
**Case No.:** 03-13057 (RDD)

**Exhibit A**  
**to**  
**Proof of Claim**

**No. 1 Basis for Claim; No. 2 Date debt was incurred; No. 4. Total Amount of Claim at Time Case Filed.**

Transamerica Realty Investment Properties, LLC (successor-in-interest to Pyramid Investment Corporation) ("Creditor") asserts a claim for unpaid rent and building services for the premises located at 505 Sansome Street, San Francisco, California (the "Premises") totaling at least \$3,516,655.35, plus interest (to the extent permitted under the Bankruptcy Code) and all other charges, fees and expenses and other amounts provided in or due under that certain Lease, dated November 18, 1999, between Creditor, as landlord, and Allegiance Telecom, Inc. ("Debtor"), as tenant (and as subsequently amended from time to time, the "Lease"). The Lease is attached hereto as Exhibit B.

Debtor has not sought authorization from the Court to assume or reject the Lease. To the extent this Claim is reduced by Debtor's payment of postpetition rent and other charges under the Lease and/or the Lease is assumed, Creditor will amend its Claim accordingly.

As limited by Bankruptcy Code section 502(b)(6), Creditor's claim consists of an amount equal to 15% of rent reserved under the Lease following the date of the filing of the bankruptcy petition in the amount of at least \$607,195.23. An itemized calculation of Creditor's claim is attached hereto as Exhibit C.

**No. 5. Secured Claim.** Creditor has a right of offset on account of a security deposit in the amount of \$37,482.50. Creditor's claim is secured by the foregoing security deposit and is unsecured to the extent that its claim exceeds the foregoing security deposit.

**No. 6. Unsecured Priority Claim.** Pursuant to Bankruptcy Code section 365(d)(3) or, in the alternative, section 503(b), Creditor asserts an administrative claim for at least \$647.50 for outstanding postpetition charges for tenant services in November 2003.

Creditor reserves the right to amend or supplement this Claim in any respect, and to file additional proofs of claim for additional claims. The execution and filing of this Claim is not a waiver of any of Creditor's rights including, without limitation, the right to move to withdraw the reference with respect to the subject matter of this Claim or otherwise, and any right to trial by jury that Creditor may have in any civil proceeding arising in or related to this case, nor is it a consent to jurisdiction of this or any court except with respect to the allowance of the claims asserted herein.

**EXHIBIT D**

**POST-PETITION RENT CLAIM CALCULATION**

Unpaid Charges  
 Allegiance Telecom, Inc. (65822000) - Post Petition Rent  
 505 Sansome Street

Date	Description	Charges	Balance
	Balance Forward		0
12/1/03	TSR #16882- Light replacement	\$ 423.43	\$ 423.43
1/1/04	Add'l HVAC for 02/03	\$ 32.84	\$ 456.27
1/1/04	TSR #16929- Access card overcharge	\$ (240.00)	\$ 216.27
1/1/04	TSR #17197- Light replacement	\$ 67.70	\$ 283.97
1/1/04	Op Exp Esc Office (01/2004)	\$ 216.77	\$ 500.74
2/1/04	TSR# 17271-Flickering Lights	\$ 37.32	\$ 538.06
2/1/04	Base Rent Office (02/2004)	\$ 39,875.00	\$ 40,413.06
2/1/04	Op Exp Esc Office (02/2004)	\$ 3,465.39	\$ 43,878.45
3/1/04	TSR# 17601-Assemble Furniture	\$ 34.80	\$ 43,913.25
3/1/04	Base Rent Office (03/2004)	\$ 39,875.00	\$ 83,788.25
3/1/04	Op Exp Esc Office (03/2004)	\$ 3,465.39	\$ 87,253.64
4/1/04	Base Rent Office (04/2004)	\$ 24,919.46	\$ 112,173.10
4/1/04	Op Exp Esc Office (04/2004)	\$ 3,465.39	\$ <b>115,638.49</b>

Tenant Late Charges/Interest Calculation  
 Retroactive

Property: 505 Sansome

Late Fee 5%  
 Interest Rate 7%

Original Charge Date	Charge Description	Amount	Dec-03	Jan-04	Feb-04	Mar-04	Apr-04	Total
12/1/03	TSR #16882	423.43	21.17					21.17
12/1/03	Late Fee		2.47					12.35
12/1/03	Interest			2.47				3.87
1/1/2004	Op exp/Tenant Reimb	77.31		0.45				1.80
1/1/04	Late Fee			0.45				0.45
2/1/2004	Rent/Opex/Tenant Reimb	43,378.11		2,168.91				2,168.91
2/1/0/2004	Late Fee			253.04				759.12
2/1/2004	Interest			253.04				253.04
3/1/2004	Rent/Opex/Tenant Reimb	43,375.19		2,168.76				2,168.76
3/1/0/2004	Late Fee			253.02				506.04
3/1/2004	Interest			253.02				253.02
4/1/2004	Rent/Opex	43,340.39		2,167.02				2,167.02
4/1/0/2004	Late Fee			252.82				252.82
4/1/2004	Interest			252.82				252.82
TOTAL CURRENT MONTH			APRIL					
				Late Fees				6,529.72
				Interest				1,532.13
				<b>TOTAL</b>				<b>8,061.86</b>

TOTAL UNPAID POST-PETITION RENT CLAIM **123,700.35**



PILLSBURY WINTHROP LLP  
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Karen B. Dine (KD 0546)  
Harry E. Garner (HG 6717)

**Hearing Date and Time:**  
**May 29, 2004 at 10:00 a.m. Eastern**  
**Objection Date:**  
**May 13, 2004 at 5:00 p.m. Eastern**

-and-

PILLSBURY WINTHROP LLP  
50 Fremont Street  
San Francisco, California 94105  
Telephone: (415) 983-1000  
Facsimile: (415) 983-1200  
Gregor C. Baer  
Ana N. Damonte

Attorneys for Transamerica Realty Investment Properties, LLC

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

**In re:**

**ALLEGIANCE TELECOM, INC., et al.,**

**Debtors and Debtors-in-Possession**

**Chapter 11**

**Case No.: 03-13057 (RDD)**

**Jointly Administered**

**NOTICE OF MOTION OF TRANSAMERICA REALTY INVESTMENT  
PROPERTIES, LLC TO COMPEL IMMEDIATE PAYMENT OF POST-PETITION  
ADMINISTRATIVE EXPENSES ARISING FROM UNEXPIRED LEASE OF  
NONRESIDENTIAL REAL PROPERTY PURSUANT TO 11 U.S.C. § 365(d)(3)**

PLEASE TAKE NOTICE that upon the annexed Motion, dated April 28, 2004, of Transamerica Realty Investment Properties, LLC (successor-in-interest to Pyramid Investment Corporation), (“Transamerica”), to Compel Immediate Payment of Post-petition Administrative Expenses Arising from Unexpired Lease of Nonresidential Real Property Pursuant to 11 U.S.C. § 365(d)(3) (the “Motion”), a hearing will be held before the Hon. Robert D. Drain, United

States Bankruptcy Judge, in Room 610 of the United States Bankruptcy Court for the Southern District of New York (the “Bankruptcy Court”), Alexander Hamilton Custom House, One Bowling Green, New York, New York, 10004-1408, on May 19, 2004, at 10:00 a.m. (prevailing Eastern Time), or as soon thereafter as Transamerica may be heard.

PLEASE TAKE FURTHER NOTICE that objections, if any, to the relief requested in the Motion shall be in writing, shall conform to the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules of the Southern District of New York, shall set forth the name of the objectant, the nature and amount of claims or interests held or asserted by the objectant against the Debtors’ estates or property, the basis for the objection, and the specific grounds therefore, and shall be filed with the Bankruptcy Court electronically in accordance with General Order M-242 (which can be found at [www.nysb.uscourts.gov](http://www.nysb.uscourts.gov)) by registered users of the Bankruptcy Court’s case filing system and, by all other parties in interest, on a 3.5 inch disk, preferably in Portable Document Format (PDF), WordPerfect, or any other Windows-based word processing format (with a hard copy delivered directly to Chambers) and served in accordance with General Order M-242, and shall further be served upon (a) Kirkland & Ellis LLP, Citigroup Center, 153 East 53rd Street, New York, New York 10022 (Attn. Samuel S. Kohn, Esq.); (b) the Office of the United States Trustee, 33 Whitehall Street, 21st Floor, New York, New York 10004 (Attn. Pamela J. Lustrin, Esq.); (c) Paul, Hastings, Janofsky & Walker LLP, 600 Peachtree Street, N.E., 24th Floor, Atlanta, Georgia 30308 (Attn. Jesse Austin, III, Esq.); (d) Akin Gump Strauss Hauer Feld LLP, 590 Madison Avenue, New York, New York 10022 (Attn. Ira S. Dizengoff, Esq.); and (e) the undersigned counsel for Transamerica at the address listed below, so as to be actually received no later than May 13, 2004, at 5:00 p.m. (prevailing Eastern Time).

Dated: April 29, 2004  
New York, New York

By: /s/ Karen B. Dine  
Karen B. Dine (KD 0546)  
Harry E. Garner (HG 6717)  
Pillsbury Winthrop LLP  
1540 Broadway  
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and

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