

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

<p>In re:</p> <p>TRIAD GUARANTY INC.,¹</p> <p style="text-align: center;">Debtor.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Chapter 11</p> <p>Case No. 13-11452 (MFW)</p> <p>Hearing Date: December 30, 2013 at 10:30 a.m. (ET)</p> <p>Obj. Deadline: December 23, 2013 at 4:00 p.m. (ET)</p>
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**DEBTOR’S MOTION FOR ENTRY OF AN ORDER COMPELLING THE TURNOVER
OF DOCUMENTS FROM ERNST & YOUNG LLP**

Triad Guaranty Inc., the debtor and debtor-in-possession (the “Debtor”) in the above-captioned case, by and through its undersigned counsel, files this motion (this “Motion”) for the entry of an order (the “Order”), substantially in the form attached hereto as Exhibit A, compelling Ernst and Young, LLP (“Ernst & Young”) to turn over the Debtor’s tax related documents pursuant to sections 105(a) and 542(e) of the of title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. (the “Bankruptcy Code”). In support of this Motion, the Debtor respectfully states as follows:

JURISDICTION

1. The United States Bankruptcy Court for the District of Delaware (the “Court”) has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).
2. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.
3. The statutory bases for the relief requested herein are sections 105(a) and 542(e) of the Bankruptcy Code.

¹ The last four digits of the Debtor’s federal taxpayer identification number are 8519. The location of the Debtor’s headquarters and the Debtor’s service address is 1900 Crestwood Blvd., Birmingham, AL 35210.

INTRODUCTION

4. On June 3, 2013 (the "Petition Date"), the Debtor filed a petition with this Court under chapter 11 of the Bankruptcy Code. The Debtor is operating its business as debtor in possession pursuant to Bankruptcy Code sections 1107(a) and 1108. No request for the appointment of a trustee or examiner has been made in this chapter 11 case, and no committees have been appointed or designated.

5. An in-depth description of the Debtor's business, the reasons for commencing this bankruptcy case, and the relief sought from the Court to allow the Debtor to smoothly transition into Chapter 11 is set forth in the First Day Declaration of William Ratliff, III in Support of the Debtor's Chapter 11 Petition and First Day Motions [D.I. 3], which is incorporated herein by reference.

6. On July 31, 2013, the Debtor filed its Application for an Order Authorizing the Retention and Employment of Ernst & Young as Tax Services Provider for the Debtor and Debtor in Possession Pursuant to 11 U.S.C. § 327(a), Nunc Pro Tunc to July 23, 2013 [D.I. 97]. On August 20, 2013, this Court entered that certain Order Authorizing the Retention and Employment of Ernst & Young LLP as Tax Services Provider for the Debtor and Debtor in Possession Pursuant to 11 U.S.C. § 327(a), Nunc Pro Tunc to July 23, 2013 [D.I. 123].

7. During the course of Ernst & Young's engagement as tax services provider for the Debtor, there emerged conflicting professional views between the Debtor's tax counsel and Ernst & Young on a significant issue. As a consequence of these differing views, the Debtor and its Chief Executive Officer did not believe they could sign the Debtor's 2012 tax returns.

8. For this reason, after discussion with Ernst & Young, the Debtor determined that retention of KPMG LLP ("KPMG") to render tax advice on the significant issue, tax compliance,

and tax consulting services independent of Ernst & Young is in the best interests of the Debtor and its estate.

9. Accordingly, on October 23, 2013, the Debtor filed its Application for an Order Authorizing the Retention and Employment of KPMG LLP as Tax Compliance and Tax Consulting Services Provider for the Debtor and Debtor in Possession Pursuant to 11 U.S.C. § 327(a), Nunc Pro Tunc to October 22, 2013 [D.I. 192]. On November 11, 2013, the Court entered that certain Order Authorizing the Debtor and Debtor-In-Possession to Retain and Employ KPMG LLP as Tax Compliance and Tax Consulting Services Provider Nunc Pro Tunc to October 22, 2013 [D.I. 210].

10. By retaining KPMG, the Debtor believes it can resolve the conflict in favor of one of the two differing views on the significant tax issue. The Debtor anticipates accepting KPMG's advice on this issue, and then upon KPMG's completion of the 2012 tax returns, signing and filing these tax returns.

11. However, Ernst & Young has refused to provide to the Debtor all of the Debtor's records and documents necessary for the preparation of the Debtor's 2012 tax returns, as well as the work product related to such documents (collectively, the "Documents") in Ernst & Young's possession, which Documents are essential to completion of the Debtor's 2012 tax returns.

12. Ernst & Young has refused to turn over the Documents in spite of numerous requests made by the Debtor to Ernst & Young. Ernst & Young's refusal to turn over the Documents has prevented the Debtor and KPMG from completing the preparation and filing its 2012 tax returns, and therefore is causing harm to the Debtor and its estate.

RELIEF REQUESTED

13. By this Motion, pursuant to sections 105(a) and 542(e) of the Bankruptcy Code, the Debtor seeks entry of an order compelling Ernst & Young to turn over the Debtor's

Documents that Ernst & Young possesses and/or created on the Debtor's behalf in connection with its preparation of the Debtor's tax returns.

BASIS FOR RELIEF

14. Bankruptcy Code section 542(e) provides:

Subject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to turn over or disclose such recorded information to the trustee.

11 U.S.C. § 542(e).²

15. The Debtor's entitlement to the Documents is absolute. As this Court has observed:

The Bankruptcy Code creates a 'two-part scheme for turnover of property of the estate and other information related to the debtor's property or financial affairs.' Section 542(a) requires anyone holding property of the estate to deliver it to the trustee. 11 U.S.C. § 542(a). Section 542(e) allows the Court to order "an attorney, accountant or other person that holds recorded information . . . relating to the debtor's property or financial affairs" to turn over such information to the trustee, 11 U.S.C. § 542(e). Although an action for turnover under § 542(a) requires that the information requested be property of the estate, there is no such requirement in § 542(e). Therefore, whether the Attorney Files constitute property of the estate is irrelevant to the Court's determination of whether turnover is proper under § 542(e).

Am. Metrocomm Corp, v. Duane Morris & Heckscher, L.L.P. (In re Am. Metrocomm Corp.), 274 B.R. 641, 652 (Bankr. D. Del. 2002). See also Official Comm. of Unsecured Creditors v. Fleet Retail Fin. Group (In re Hechinger Inv. Co.), 285 B.R. 601, 606 (D. Del. 2002) ("Section 542(e) of the Bankruptcy Code mandates that [the debtors' pre-petition law firm] turn over all files in its possession relating to the Debtors since those files became the property of the Debtors' estates upon the filing of the Chapter 11 petitions") (emphasis added). The Debtor's right to

² "A debtor in possession shall have all the rights . . . and powers . . . of a trustee serving in a case under this chapter." 11 U.S.C. § 1107(a). Accordingly, the rights of a trustee under Bankruptcy Code section 542(e) equally are available to the Debtor.

obtain copies of all books, documents, records and papers extends to all professionals employed by the Debtor, including Ernst & Young. 11 U.S.C. § 542(e); see also In re Beef N' Burgundy, Inc., 21 B.R. 69, 70 (Bankr. N.D. Ga. 1982) (the court may require an attorney, accountant or other professional to turn over all recorded information relating to the debtor); Am. Metrocomm, 274 B.R. at 652 (same).

16. The Debtor has a right to the immediate turnover of all the Documents because they are documents “relating to the debtor’s property or financial affairs.” 11 U.S.C. § 542(e). In re Hechinger, 285 B.R. at 606. Indeed, this Court is not required to analyze whether the Documents are property of the Debtor’s estate. To the contrary, the Debtor is entitled to the Documents because they relate to the financial affairs of the Debtor’s estate. In re McKenzie, 716 F.3d 404, 419 (6th Cir. 2013) (citing In re Am. Metrocomm Corp., 274 B.R. at 652); see also In re Touch Am. Holdings, Inc., Civ. No. 09-084 (SLR), 2009 WL 453107, *2 (D. Del. 2009) (affirming Bankruptcy Court order requiring law firm to turn over documents relating to the debtor’s property and financial affairs)). Accordingly, E&Y should be ordered immediately to turn over the Documents to the Debtor.

17. As the Supreme Court has observed, the purpose of Bankruptcy Code section 542(e) is to restrict the ability of an accountant or attorney to withhold documents from the trustee. See Commodity Futures Trading Comm’n v. Weintraub, 471 U.S. 343, 351 (1985); see also Citibank, N.A. v. Andros, 666 F.2d 1192, 1195 (8th Cir. 1981) (“The legislative history to section 542(e) indicates that Congress enacted that provision to prevent attorneys and accountants from exercising the leverage of withholding documents and claiming liens under state law to obtain priority in payment of their claims over other creditors.”) (citing S.Rep. No. 95-989, 95th Cong., 2d Sess. 84 (1978), U.S. Code Cong. & Admin. News 1978, p. 5787). There is no basis for Ernst & Young to persist in its refusal to turn over the Documents to the Debtor. Bankruptcy Code section 542(e) unambiguously provides for the turnover obligation.

Ernst & Young's ongoing refusal also is harmful to the Debtor and its estate because it is impeding the Debtor in its performance of its obligation to prepare and file its 2012 tax returns.

NOTICE

18. No trustee, examiner, or statutory creditors' committee has been appointed in this chapter 11 case. The Debtor has provided notice of the Motion to: (a) the Office of the United States Trustee; (b) Ernst & Young; and (c) parties requesting notice pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested, the Debtor respectfully submits that no further notice is necessary.

WHEREFORE, the Debtor respectfully requests that the Court enter an order, substantially in the form attached hereto as Exhibit A, granting the relief requested herein and granting such further relief as is just.

[Signature page follows.]

Dated: December 5, 2013

**WOMBLE CARLYLE SANDRIDGE
& RICE, LLP**

/s/ Francis A. Monaco, Jr.

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