

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

MARK D. PETIT,  
et al.

Plaintiffs,

vs.

DIEBOLD INC.,

Defendant.

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CIVIL ACTION NO. 09-cv-12107

DISTRICT JUDGE ARTHUR J. TARNOW

MAGISTRATE JUDGE MONA K. MAJZOUB

**OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DIEBOLD  
INCORPORATED'S MOTION FOR ISSUANCE OF AN ORDER REQUIRING  
EFMARK SERVICE, EFMARK PREMIUM ARMORED AND PENDUM LLC TO  
APPEAR BEFORE THIS COURT TO SHOW CAUSE WHY AN ORDER FOR  
CONTEMPT SHOULD NOT BE ENTERED AND SETTING DATE FOR CONTEMPT  
HEARING (DOCKET NO. 9)**

Before the Court is Defendant Diebold Incorporated's Motion For Issuance Of An Order Requiring EFMARK Service, EFMARK Premium Armored and Pendum LLC To Appear Before This Court To Show Cause Why An Order For Contempt Should Not Be Entered And Setting Date For Contempt Hearing filed on November 30, 2009. (Docket no. 9). No Response was filed. On December 18, 2009 the Court entered the parties and Pendum's Stipulation And Order To Extend Deadline For Third-Party Subpoena Recipient, Pendum LLC, To File Response To Motion. (Docket no. 14). The Stipulation And Order extended the deadline for third-party Responses to December 22, 2009. (Docket no. 14). No timely Response was filed with this Court. On January 12, 2010 the Court entered an Order For Pendum LLC To Show Cause For Failure To Obey Subpoena And Order For Parties To File Joint Statement Of Resolved And Unresolved Issues. (Docket no. 15). The parties and Pendum filed a Joint Statement Of Resolved And Unresolved Issues. (Docket no. 16). Defendant and counsel for Pendum appeared for hearing on January 20, 2010. This matter was

referred to the undersigned for hearing and determination pursuant to 28 U.S.C. § 636(b)(1)(A). (Docket no.10).

Defendant served a subpoena duces tecum on non-party Pendum LLC<sup>1</sup> in care of its resident agent The Corporation Company, 30600 Telegraph Road, Suite 2345, Bingham Farms, Michigan 48025 on July 20, 2009 directing appearance with documents identified in “Exhibit A- Duces Tecum Attachment” on August 12, 2009 at 10:00 a.m. at the offices of Plunkett Cooney, 38505 Woodward Avenue, Suite 2000, Bloomfield Hills, Michigan 48304. (Docket no. 9-5). Defendant argues that Pendum produced documents responsive to only three of the nine paragraphs of documents and things identified on the Duces Tecum attachment at Exhibit A. (Docket no. 23). The documents and things are relevant, limited in scope of time and limited to documents related to the Plaintiff, his injury and the alleged ATM machine which caused the injury. Fed. R. Civ. P. 26(b)(1). Defendant's "Exhibit A -Duces Tecum Attachment" further states that "\*Financial, competitive information and trade secrets may be blacked out to prevent disclosure." (Docket no. 16-3).

Pendum did not move to quash or otherwise modify the subpoena. Defendant therefore asks the Court to Order Pendum to show cause why the Court should not enforce the subpoena and hold Pendum in contempt for failing to obey the subpoena and ordering Pendum to produce all subpoenaed records and things. Fed. R. Civ. P. 45(e). Rule 45(e), Fed. R. Civ. P., provides that the “issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena.”

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<sup>1</sup>Pendum LLC is named on the face of the subpoena and on the exhibit Pendum LLC is identified as including “merged entities EFMARK Premium Armored and/or EFMARK Service/Pendum LLC and all former related entities and sister corporations.” (Docket no. 9-5).

Defendant in the Joint Statement of Resolved and Unresolved Issues states that Pendum has not produced full responsive documents to subpoenaed document Request Nos. 1, 3, 4, 5, 7, 8, and 9. (Docket no. 16). As stated on the record, Defendant and Pendum have resolved several issues related to Defendant's subpoena and in accordance with the same and for the reasons stated on the record, the Court will grant Defendant's Motion (docket no. 9) in part and order Pendum to produce responsive documents and things and an affidavit as set forth below.

**IT IS THEREFORE ORDERED** that Defendant Diebold Incorporated's Motion (docket no. 9) is **GRANTED** in part and Pendum LLC will produce the following on or before January 29, 2010:

- a. An amended written response to request nos. 1, 3, 4, 5, 7, 8, and 9 and accompanying affidavit stating that Pendum LLC has produced all responsive documents and items in its possession, custody or control, including language in response to request no. 9 consistent with Pendum's explanation in the Joint Statement regarding the ATM parts and language in response to request no. 3 confirming that the contract produced is the contract which was in effect during the time period in question. This written response and affidavit will be served on the parties and filed with this Court;
- b. In response to request no. 3, all additional contract amendments; and
- c. In response to request no. 7, all contact information for named individuals who worked on the subject ATM.

**IT IS FURTHER ORDERED** that Defendant's request to hold Pendum LLC in contempt is denied without prejudice.

Pursuant to Fed. R. Civ. P. 72(a), the parties have a period of fourteen days from the date of this Order within which to file any written appeal to the District Judge as may be permissible under 28 U.S.C. § 636(b)(1).

Dated: January 25, 2010

s/ Mona K. Majzoub  
MONA K. MAJZOUB  
UNITED STATES MAGISTRATE JUDGE

**PROOF OF SERVICE**

I hereby certify that a copy of this Order to Show Cause was served upon Pendum LLC's Resident Agent and Attorney of Record, as shown below, and Counsel of Record on this date:

Pendum LLC  
c/o The Corporation Company, Resident Agent  
30600 Telegraph Road, Suite 2345  
Bingham Farms, Michigan 48025

David A. Tonini  
Holme Roberts & Owen, LLP  
1700 Lincoln, Suite 4100  
Denver, Colorado 80203

Dated: January 25, 2010

s/ Lisa C. Bartlett  
Case Manager