IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

CLINT DAMRON, *individually and on behalf of all others similarly situated,*	)	
Plaintiff,	)	
v.	)	Case No. 1:10-cv-01210-JDB-egb
ATM CENTRAL LLC,	)	
Defendant.	)	

ORDER DENYING PLAINTIFF'S MOTION TO STRIKE

On referral for determination is Plaintiff's September 13, 2010, Motion to Strike [D.E.6]. Plaintiff seeks to strike certain affirmative defenses raised by Defendant in its Answer. Defendant has responded in opposition to this Motion [D.E.10]. For the following reasons, Plaintiff's Motion is DENIED.

BACKGROUND

On August 10, 2010, Plaintiff filed a Class Action Complaint, alleging, inter alia, violations of the Electronic Fund Transfers Act ("EFTA") [D.E. 1]. Defendant filed its Answer on September 10, 2010 [D.E. 5]. In its Answer, Defendant asserted seven affirmative defenses. On September 13, 2010, Plaintiff filed a Motion to Strike [D.E. 6] Defendant's second and third affirmative defenses which asserted the defenses of waiver, ratification, estoppel, and comparative fault. Plaintiff contends that the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), require a heightened pleading standard for affirmative defenses and that Defendant's affirmative defenses are "plainly deficient" under this standard. Defendant counters that Plaintiff's Motion to Strike should be denied since post-*Twombly*

and *Iqbal* decisions in both the Sixth Circuit, as well as District Courts herein, uphold the fair notice pleading standard for affirmative defenses. No discovery has been conducted by the parties at this stage of the proceedings.

ANALYSIS

Rule 12(f) allows a district court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). A Rule 12(f) motion serves as "the primary procedure for objecting to an insufficient defense." 5C Charles Alan Wright & Arthur Miller, Federal Practice and Procedure § 1380 (3d ed. 2004). To grant a Rule 12(f) motion, the court must determine that the challenged allegations are "so unrelated to the plaintiff's claims as to be unworthy of any consideration as a defense and that their presence in the pleading throughout the proceeding will be prejudicial to the moving party." 5C Wright & Miller § 1380 (3d ed. 2004). Motions to strike are "disfavored remedies to be used sparingly only when the ends of justice require it." *Overnite Transp. Co. v. Int'l Broth. of Teamsters, Chauffeurs, Warehousemen, & Helpers of Am., AFL-CIO*, 168 F. Supp. 2d 826, 850 (W.D. Tenn. 2001) (citations omitted). As the Sixth Circuit has noted, striking a pleading "is a drastic remedy to be resorted to only when required for the purposes of justice." *Brown & Williamson Tobacco Corp. v. U.S.*, 201 F.2d 819, 822 (6th Cir. 1953). Therefore, even if a court grants a Rule 12(f) motion, "the general practice is to grant the defendant leave to amend." *Id*. (citing 5C Wright & Miller § 1381 (3d ed. 2004)).

The Magistrate Judge notes that there has been much debate on whether *Twombly* and *Iqbal* apply to affirmative defenses, both in the Sixth Circuit District Courts and in courts around the country; courts are split on the issue. As recently noted in *Ruffin v. Frito-Lay, Inc.*:

> The Sixth Circuit has yet to decide whether the new pleading standards announced in *Twombly* and *Iqbal* apply to affirmative

> defenses and the district courts are divided on the issue. Some district courts within the circuit have held that the *Twombly/Iqbal* standards apply to affirmative defenses because of the underlying rationale behind those standards, i.e., requiring clarity in pleadings and avoiding needless discovery costs. *See, e.g., HCRI TRS Acquirer, LLC v. Iwer*, No. 3:09 CV 2691, 2010 U.S. Dist. LEXIS 41552, 2010 WL 1704236, at * 3 (N.D. Ohio April 28, 2010) (and cases cited therein). Other district courts have noted that the *Twombly* and Iqbal decisions did not mention affirmative defenses and that Rule 8(b) and (c) do not require that the defendant "show" he is entitled to prevail and thus, have thus held that the standards set forth in *Twombly* and *Iqbal* do not apply to affirmative defenses. *See, e.g., McLemore v. Regions Bank*, Nos. 3:08-cv-0021, No. 3:08-cv-1003, 2010 U.S. Dist. LEXIS 25785, 2010 WL 1010092, at * 13 (M.D. Tenn. Mar. 18, 2010) (and cases cited therein). Still other district courts have chosen "not to weigh in on this issue because even assuming *Twombly* applies . . . [defendant's] affirmative defense sufficiently meets that standard." *Del-Nat Tire Corporation v. A to Z Tire & Battery, Inc.*, No. 2:09-cv-02457-JPM-tmp, 2009 U.S. Dist. LEXIS 114332, 2009 WL 4884435, at * 2 (W.D. Tenn. Dec. 8, 2009).

Ruffin v. Frito-Lay, Inc., 2010 U.S. Dist. LEXIS 66268, 5-6 (E.D. Mich. June 10, 2010). However, as Defendant correctly notes, there is a Sixth Circuit case post-*Twombly* and *Iqbal* that, while not discussing these cases directly, does state that "[t]he Federal Rules of Civil Procedure do not require a heightened pleading standard for . . . defense[s]." *Montgomery v. Wyeth*, 580 F.3d 455, 468 (6th Cir. 2009). In that case, the court discussed the required pleading standard as follows:

> The Federal Rules of Civil Procedure do not require a heightened pleading standard for a statute of repose defense. Rule 8(b)(1) provides generally that "[i]n responding to a pleading, a party must . . . state in short and plain terms its defenses to each claim." Rule 8(d)(1) requires that averments in pleadings be "simple, concise, and direct," and that "[n]o technical form is required." Fed. R. Civ. P. 8(b)(1).

Id.

Here, this Court finds that Defendant's affirmative defenses have been sufficiently pled to give fair notice to the Plaintiff. In addition, Plaintiff has failed to show that the inclusion of these defenses will cause him any prejudice. *SEC v. Toomey*, 866 F. Supp. 719, 722 (S.D.N.Y. 1992)

citing 5A C. Wright & A. Miller, Federal Practice & Procedure § 1381, at 672 (1990) (a plaintiff must show that it is prejudiced by the inclusion of the defense).

Further, as Defendant points out, no discovery has been conducted as of the date of this Motion. Plaintiff's Motion to Strike is particularly inappropriate at this early stage, before any discovery has occurred. Motions to strike should not be used to decide substantive issues of law or disputed fact, and granting Plaintiff's motion at this stage in litigation would have such an effect. *See, e.g., Glenside West Corp. v. Exxon Co., U.S.A., Div. of Exxon Corp.*, 761 F. Supp. 1100, 1115 (D.N.J. 1991). In deciding a motion to strike at the pre-discovery stage, "prudence dictates denying . . . preemptive Motion[s] to Strike . . . prior to the completion of any discovery." *Canadian St. Regis Band of Mohawk Indians v. New York*, 278 F. Supp. 2d 313, 323 (N.D.N.Y 2003). In the instant case, the parties have not yet conducted any discovery and the factual record remains undeveloped; prudence dictates denying Plaintiff's Motion.

For all these reasons, Plaintiff's Motion is DENIED.

IT IS SO ORDERED.

s/Edward G. Bryant
EDWARD G. BRYANT
UNITED STATES MAGISTRATE JUDGE

Date: **October 29, 2010**

ANY OBJECTIONS OR EXCEPTIONS TO THIS ORDER MUST BE FILED WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THE ORDER. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE THEM WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.