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

THE DEL-NAT TIRE CORPORATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**No.09-2457 Ml/P**
A TO Z TIRE & BATTERY, INC.,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION ON PLAINTIFF'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

Before the court is plaintiff Del-Nat Tire Corporation's ("Del-Nat") Motion to Strike Affirmative Defenses. (D.E. 6.) The motion was referred to the Magistrate Judge for a report and recommendation. For the reasons below, the court recommends that the motion be denied.

On June 12, 2009, Del-Nat filed a Verified Complaint for Money Damages in the Chancery Court of Shelby County for the Thirteenth Judicial District in Memphis, Tennessee. The complaint alleges that Del-Nat and A to Z Tire & Battery, Inc. ("A to Z") are companies in the vehicle tire business, and that from December 16, 2008 through May 29, 2009, the parties entered into agreements whereby A to Z agreed to purchase tires from Del-Nat. The complaint alleges that Del-Nat delivered these tires to A to Z as required by their agreements, but that A to Z breached these

agreements by refusing to make full payment on the tires. According to the complaint, A to Z currently owes Del-Nat over $2,793,992.00 under the agreements.

A to Z filed a Notice of Removal on July 14, 2009, and filed its answer to the complaint on July 20, 2009. In its answer, A to Z asserts the following affirmative defense:

> 23. A to Z is entitled to a credit and/or offset against any recovery awarded Plaintiff for all principal and interest Plaintiff owes to A to Z pursuant to specific debentures issued by Plaintiff in favor of A to Z, for all amounts Plaintiff owes to A to Z as a result of manufacturers' volume sales credits, for the value of A to Z's ownership in the Del-Nat Tire Corporation, for the value of A to Z's interest in certain real estate jointly owned with other shareholders of Plaintiff in a limited liability company, and for credits due for returned merchandise and warranty claims.

(D.E. 3, Answer ¶ 23.) In response to this affirmative defense, Del-Nat filed the present Motion to Strike Affirmative Defenses. Del-Nat contends that the "plausibility standard" set forth in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), applies to affirmative defenses, and that paragraph 23 of A to Z's answer should be stricken because it does not meet this standard.[1]

A "court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Rule 8(a) provides that a pleading that states a claim for relief must contain "a short and

[1]For purposes of this motion, the court assumes without deciding that being owed credits and/or offsets may be properly raised as an affirmative defense, as opposed to a counterclaim.

plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). Rules 8(b) and (c) provide that, in responding to a pleading, a party must "state in short and plain terms its defenses to each claim asserted against it" and "a party must affirmatively state any avoidance or affirmative defense." Fed. R. Civ. P. 8(b)(1)(A) & (c).

In Twombly, the Supreme Court explained that a complaint must state sufficient facts to show not just a possible claim of relief, but a "plausible" claim of relief. 550 U.S. at 562. Thus, in order for a complaint to survive a motion to dismiss under Rule 12(b)(6), the complaint must contain sufficient facts to demonstrate a plausible claim, or that from the facts alleged there is a "'reasonably founded hope' that a plaintiff would be able to make a case." Id.

In the present case, Del-Nat argues that Twombly's plausibility standard applies equally to affirmative defenses and that A to Z must plead sufficient facts to demonstrate a plausible affirmative defense under Rules 8(b) and (c). Neither the Sixth Circuit Court of Appeals nor any of the other Courts of Appeals have addressed this issue, and the district courts have reached different conclusions. Compare Tracy v. NVR, Inc., No. 04-CV 6541L, 2009 WL 3153150, at *7 (W.D.N.Y. Sept. 30, 2009) (holding that Twombly plausibility standard applies to affirmative defenses), Shinew v. Wszola, No. 08-14256, 2009 WL 1076279, at *3-5

(E.D. Mich. Apr. 21, 2009) (same), Safeco Ins. Co. of Am. v. O'Hara Corp., No. 08-CV010545, 2008 WL 2558015, at *1 (E.D. Mich. June 25, 2008) (same), Aspex Eyewear, Inc. v. Claritti Eyewear, Inc., 531 F. Supp. 2d 620, 622 (S.D.N.Y. 2008) (same), Greenheck Fan Corp. v. Loren Cook Co., No. 08-cv-335-jps, 2008 WL 4443805, at *1-2 (W.D. Wis. Sept. 25, 2008), report and recommendation adopted by 2008 WL 4756484 (W.D. Wis. Oct. 29, 2008) (same), Stoffels ex rel. SBC Tel. Concession Plan v. SBC Commc'ns, Inc., No. 05-cv-0233-wwj, 2008 WL 4391396, at *1-2 (W.D. Tex. Sept. 22, 2008) (same), United States v. Quadrini, No. 2:07-CV 13227, 2007 WL 4303213, at *4 (E.D. Mich. Dec. 6, 2007) (same), and Home Mgmt. Solutions, Inc. v. Prescient, Inc., No. 07-20608-CIV, 2007 WL 2412834, at *3 (S.D. Fla. Aug. 21, 2007) (same), with Romantine v. CH2M Hill Eng'rs, Inc., No. 09-973, 2009 WL 3417469, at *1 (W.D. Pa. Oct. 23, 2009) (holding that Twombly plausibility standard does not apply to affirmative defenses), First Nat'l Ins. Co. of Am. v. Camps Servs., Ltd., No. 08-cv-12805, 2009 WL 22861, at *2 (E.D. Mich. Jan. 5, 2009) (same), and Westbrook v. Paragon Sys., Inc., No. 07-0714-WS-C, 2007 U.S. Dist. LEXIS 88490, at *2-3 (S.D. Ala. Nov. 29, 2007) (same).

In the present case, this court does not need to weigh in on this issue because even assuming, *arguendo*, that Twombly applies to affirmative defenses, A to Z's affirmative defense sufficiently meets that standard. While A to Z's affirmative defense may lack specific details surrounding the bases for the credits and/or

offsets, it identifies five discrete sources for these credits and/or offsets and thus sufficiently provides Del-Nat with "fair notice of the defense that is being advanced" and "the grounds for entitlement to relief." Stoffels, 2008 WL 4391396, at *1. Therefore, it is recommended that the motion be denied.

Respectfully submitted,

s/ Tu M. Pham
TU M. PHAM
United States Magistrate Judge

November 23, 2009
Date

NOTICE

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN TEN (10) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE THEM WITHIN TEN (10) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.