IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KRYSTAL LARSON, On behalf of
herself and all others similarly situated,

Plaintiff,

v. Case No. 2:14-cv-02277-JTM

FGX INTERNATIONAL, INC.,

Defendant.

MEMORANDUM AND ORDER

Plaintiff Krystal Larson filed this action under the Fair Labor Standards Act (FLSA) on behalf of employees who have worked for FGX International as "Merchandisers." (Merchandisers go to retail stores to set up and take down product displays and collect information about the products.). The matter is now before the court on plaintiff's motion to strike numerous affirmative defenses from FGX's answer.

I. Summary

The second amended complaint alleges that FGX requires Merchandisers to perform various uncompensated tasks, including reviewing and printing daily schedules, reading emails, and reporting data about store visits. Dkt. 63. Count I alleges an FLSA claim for willful nonpayment of minimum wages, straight time and overtime pay for work performed by past, present and future Merchandisers. Count II alleges a claim for unpaid straight time wages under Kansas law. Count III alleges a Rule 23 class

action claim on behalf of current and former FGX Merchandisers for unpaid minimum wages under Missouri law.

Plaintiff moves to strike numerous defenses alleged by FGX in its answer to the second amended complaint. Plaintiff argues that the defenses "contain threadbare allegations without any factual support" and that they should be stricken under the standards of *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Dkt. 72 at 3.

II. Legal Standards – Rule 12(f) Motion to Strike

Under Fed.R.Civ.P. 12(f)"[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." A defense is insufficient "if no circumstances exist under which it can succeed as a matter of law." *Falley v. Friends Univ.*, 787 F.Supp.2d 1255, 1257 (D. Kan. 2011). Striking a pleading is a drastic measure, and may often be brought as a dilatory tactic, thus motions to strike under Rule 12(f) are generally disfavored. *RMD, L.L.C. v. Nitto Americas, Inc.*, No. 09–2056, 2012 WL 1033542, at *2 (D. Kan. Mar. 27, 2012) (citing *Thompson v. Jiffy Lube Int'l, Inc.*, No. 05–1203, 2005 WL 2219325, at *1 (D.Kan. Sept. 13, 2005)). Because motions to strike are disfavored, a court "'should decline to strike material from a pleading unless that material has no possible relation to the controversy and may prejudice the opposing party.' " *Falley*, 787 F.Supp.2d at 1257 (quoting *Wilhelm v. TLC Lawn Care*, Inc., No. 07–2465, 2008 WL 474265, at *2 (D.Kan. Feb. 19, 2008)). The decision to grant a motion to strike is within the district court's sound discretion. *Id. See Kendall State Bank*

v. W. Point Underwriters, L.L.C., No. 10-2319-JTM, 2012 WL 3890264, at *2 (D. Kan. Sept. 7, 2012).

III. Analysis

The court first rejects plaintiff's argument that *Twombly* and *Iqbal* provide the standard for determining whether a defense is insufficient. As plaintiff acknowledges in her reply, there is no Tenth Circuit authority on this issue and the judges in this district are divided on the question. *See RES-MO Springfield, LLC v. Tuscany Properties, LLC*, 2013 WL 3991794, *3, n. 26 (D. Kan., Aug. 5, 2013) (listing cases). The reasons against applying *Twombly* standards to affirmative defenses were succinctly stated by Judge Murguia in *Falley v. Friends Univ.*, 787 F.Supp.2d 1255, 1257-58 (D. Kan. 2011). The reasons include differences in the respective rules governing claims for relief versus defenses; the short time for filing a responsive pleading and the risk of waiver from leaving out affirmative defenses; the drastic nature of striking defenses; and the delay and procedural wrangling likely to result from encouraging challenges to the pleading of affirmative defenses. *Falley*, 787 F.Supp.2d at 1259. Although there are contrary arguments to be made, on balance the reasoning in *Falley* is persuasive. The court finds that *Twombly* and *Iqbal* do not govern the pleading of affirmative defenses.

Having said that, the underlying purpose of Rule 8 generally is to require fair notice of the pleader's position. *Falley*, 787 F.Supp.2d at 1257 (answer must provide the plaintiff with fair notice of the defense). To that end, a defendant responding to a complaint must "state in short and plain terms its defenses to each claim…." Fed. R. Civ. P. 8(a)(b)(A). A defendant must also "affirmatively state any avoidance or

affirmative defense…." Fed. R. Civ. P. 8(c). Even if these rules do not incorporate the plausibility standard of *Twombly* and *Iqbal*, they do require a defendant to give adequate notice of a defense in short and plain terms.

Having reviewed the particular paragraphs in the answer objected to by plaintiff, the court concludes that the motion to strike should be denied in its entirety. The first group of objected-to paragraphs (Dkt. 67 ¶¶ 5-6, 8) spells out good-faith defenses under the Portal-to-Portal Act, the FLSA, and state law. These clearly give plaintiff sufficient notice of a good faith defense. Paragraph 10 claims an offset "to the extent further investigation and discovery reveal" monies owed to defendant or payments made to plaintiff or other putative class members. This provides plaintiff reasonable notice of a potential offset defense should discovery indicate such payments. The next group of paragraphs (¶¶ 14, 16-18) all challenge whether collective or class action relief is appropriate. To the extent these paragraphs constitute defenses, they are adequately set forth. Likewise the next group (¶¶ 18-20, 23) alleges that some of the claims may be barred by accord and satisfaction, a prior court-approved settlement, a release of claims, or an arbitration agreement. With the defenses thus clearly set forth, plaintiff can easily ascertain in discovery whether the defenses will have any application to the claims. Finally, the last group (¶¶ 22, 25) alleges an estoppel to the extent that discovery reveals putative class members misrepresented material facts about their job performance. Again, this sufficiently advises plaintiff of a potential defense in the event discovery produces such evidence.

In any case, the course of discovery depends in significant part on the professionalism of the attorneys involved. Notwithstanding the importance of this case to their respective clients, the court expects counsel to resolve as many issues as possible in a collaborative manner before resorting to motion practice. Of course, if those efforts are unsuccessful, the court will resolve the issues.

IT IS THEREFORE ORDERED this 4th day of November, 2015, that plaintiff's Motion to Strike Affirmative Defenses (Dkt. 71) is denied.

s/ J. Thomas Marten
J. THOMAS MARTEN, JUDGE