

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION

ALEXANDER MEDINSKI, et.al., :
Derivatively on behalf :
of Central Executive Committee :
of ODWU, Inc., :
Plaintiffs :

v. :

ALEXANDER PROCIUK, individually :
and as President of the CENTRAL :
EXECUTIVE COMMITTEE of ODWU, :
INC., :
Defendant :

No. 15-1361

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PROTHONOTARY
BY: _____

Jane Sebelin, Esquire
Robert T. Yurchak, Esquire

Counsel for Plaintiffs
Counsel for Defendant

MEMORANDUM OPINION

Matika, J. - December 5, 2017

Before this Court is a Motion for Judgment on the Pleadings filed by Defendant, Alexander Prociuk, individually and (formerly)¹ as President of the Central Executive Committee of ODWU, Inc. (hereinafter "Prociuk"), in response to the Complaint filed by twenty-four (24) original Plaintiffs (hereinafter "Plaintiffs")² alleging that Prociuk should be removed as President of the Central Executive Committee of ODWU, Inc., a/k/a ODWU (hereinafter

¹ According to Prociuk's Answer and New Matter and the Motion for Judgment on the Pleadings, he is no longer President of the Central Executive Committee of ODWU, Inc.

² Pursuant to the Order of Court dated June 7, 2016 addressing the Preliminary Objections of Prociuk, six (6) of the original Plaintiffs were removed as parties.

"ODWU"), due to breaches of his fiduciary duties and that he should be required to produce an accounting of all income and expenses during his service as President. Additionally, Plaintiffs requested that a receiver be appointed for the "protection of Defendant and Plaintiffs."³ For the reasons stated within this opinion, the Motion for Judgment on the Pleadings is **GRANTED**.

FACTUAL AND PROCEDURAL BACKGROUND

On June 23, 2015, a stockholder derivative action was filed against "Alexander Prociuk, individually and as President of the Central Executive Committee of ODWU, Inc. a/k/a ODWU" by Plaintiffs. In this three (3) count Complaint, Plaintiffs claim Prociuk breached his fiduciary duty to the corporation and should be removed as President, and that he should "produce a complete accounting of all monies received and monies spent along with tax returns." Additionally, Plaintiffs claim that, as a result of Prociuk's actions, a receiver should be appointed for the corporation. This Complaint was served on Prociuk on June 24, 2015. On July 14, 2015, Prociuk filed Preliminary Objections. On July 17, 2015, Plaintiffs filed a motion pursuant to Pennsylvania Rule of Civil Procedure 1506(b), which reads: "A Plaintiff who files a complaint containing an allegation pursuant to subdivision

³ Pursuant to the Order of Court dated June 7, 2016 addressing the Preliminary Objections of Prociuk, this count was dismissed.

(a)(3)(ii) shall forthwith file a motion to maintain the action.^[4] If the plaintiff sustains the allegation, the court shall allow the action to continue."

Accordingly, this Court conducted hearings over several days on the Preliminary Objections⁵ and the 1506(b) motion. These hearings, held on October 6, 2015, October 21, 2015, and November 23, 2015, resulted in an Order dated June 7, 2016 addressing the Preliminary Objections. Six (6) individual Plaintiffs were dismissed and count III was dismissed and stricken from the Complaint. Additionally, on that same date, this Court found that the remaining Plaintiffs sustained their burden of establishing a prima facie case under Rule 1506(a)(3)(ii).

On December 8, 2016, Plaintiffs filed a Notice of Default Judgment based upon a failure to file an answer to the Complaint. In response thereto, on December 20, 2016, Prociuk filed an Answer and New Matter to the counts that remained. This pleading was endorsed with a "Notice to Defend" and served upon Plaintiffs' counsel.⁶ Pursuant to this Notice to Defend, Plaintiffs were

⁴ Subsection (a)(3)(ii) of Pennsylvania Rule of Civil Procedure 1506 provides one of two pleading options as the third prong of a stockholder derivative action, and reads as follows: "that there is a strong prima facie case in favor of the claim asserted on behalf of the corporation and that without the action serious injustice will result."

⁵ Hearings were required on the Preliminary Objections because of a claim by Prociuk that Plaintiffs lacked standing to sue and that the Court lacked subject matter jurisdiction. See Pa.R.C.P. 1028(a)(1), (a)(5).

⁶ While Pennsylvania Rule of Civil Procedure 1361 explains the necessity of attaching a "Notice to Plead" to pleadings filed after the original Complaint,

notified that they had twenty (20) days to "take action," and that a failure to do so may result, *inter alia*, in a judgment being entered against them. Thus, the deadline to file a reply or answer to the new matter would have been on or about January 9, 2017.

On February 10, 2017, Prociuk filed a Motion for Judgment on the Pleadings. In this Motion, Prociuk requested that the Court enter judgment in his favor for the following reasons: 1) Prociuk was no longer the President of ODWU,⁷ and 2) Prociuk provided in discovery all of the material requested regarding financial records and information sufficient to establish "an accounting." Prociuk argues he is entitled to judgment on the pleadings in his favor on the basis that Plaintiffs failed to file an answer to the New Matter.⁸

On March 13, 2017, Plaintiffs filed an Answer to the Motion for Judgment on the Pleadings. In their Answer, Plaintiffs maintain that one of the Defendants in this case is ODWU, and that ODWU never filed an answer to the Complaint, and to the extent that an Answer and New Matter were filed by someone, that pleading lacked a Notice to Plead and thus Plaintiffs were under no

the Notice to Defend attached to the Answer and New Matter is sufficient for Prociuk's pleading and the rationale for this will be expanded upon later in this opinion.

⁷ Count I of the Complaint.

⁸ On March 9, 2017, Plaintiffs, albeit late, replied to the New Matter.

obligation to respond. Plaintiffs also claim in their Answer to the Motion for Judgment on the Pleadings that Prociuk has not provided a full and complete production of all financial records⁹ and that his status as President is irrelevant.¹⁰

Briefs were lodged and oral argument held on May 22, 2017, and this Motion is now ripe for disposition.

LEGAL DISCUSSION

"After the relevant pleadings are closed, but within such time as not to unreasonably delay the trial, any party may move for judgment on the pleadings." Pa.R.C.P. 1034(a). "Entry of judgment on the pleadings is appropriate when there are no disputed issues of fact and the moving party is entitled to judgment as a matter of law." *Kennedy v. Consul Energy Inc.*, 116 A.3d 626, 631 (Pa. Super. Ct. 2015) (quoting *Sisson v. Stanley*, 109 A.3d 265 (Pa. Super. Ct. 2015) (internal quotation marks omitted)). The first series of questions that must be addressed herein is "what pleadings are required and from whom, were those pleadings filed, and what effect do the parties' respective positions have on this

⁹ Not until March 9, 2017, after the Motion for Judgment on the Pleadings was filed, did Plaintiffs file a Motion for Sanctions claiming Prociuk did not comply with this Court's July 20, 2016 Order directing him to turn over all of these financial records and the other documents requested. Prociuk disputes this claim.

¹⁰ Plaintiffs' claim in their response to the instant motion appears contrary to the prayer for relief sought in Count I and will be discussed further herein.

case?" The answers to these questions will then determine what, if any, impact there is on the motion itself.

The original Complaint in this case was filed on June 23, 2015. In that original Complaint, the named Defendant was Alexander Prociuk, individually and as President of the Central Executive Committee of ODWU, Inc." Timely Preliminary Objections were filed by Prociuk and after numerous hearings, those Preliminary Objections were sustained in part and overruled in part. As a result, Prociuk was then required to file a responsive pleading and he did in fact file an Answer with New Matter on December 20, 2016.¹¹ A certificate of service attached to this pleading indicated that a copy of the pleading was mailed to Plaintiffs' counsel on December 29, 2016. The New Matter filed by Prociuk contained both conclusions of law and factual averments relative to affirmative defenses. Pursuant to Pennsylvania Rule of Civil Procedure 1026(a), "every pleading subsequent to the complaint shall be filed within twenty days after service of the preceding pleading, but no pleading need be filed unless the preceding pleading contains a notice to defend or is endorsed with a notice to plead."

¹¹ By separate Order to be filed in conjunction with this Opinion, this Court orders that a Default Judgment obtained against "Central Executive Committee of ODWU, Inc." be stricken as a nullity on the basis that the sole Defendant is Alexander Prociuk, who is being sued in his individual capacity and as President of the Central Executive Committee of ODWU, Inc.

On February 10, 2017, Prociuk filed the subject Motion for Judgment on the Pleadings. Thereafter on March 9, 2017, Plaintiffs filed their "Reply and New Matter" to Prociuk's Answer filed on December 20, 2016. Subsequently, on March 13, 2017, Plaintiffs filed their Answer to the Motion for Judgment on the Pleadings. In order to properly address this motion, the Court must first sift through the myriad of sub-issues raised as a result of the motion. The Court has adduced the following questions, the answers to which will ultimately become dispositive of the motion. These questions are:

- I) Were the Plaintiffs required to file an answer to Prociuk's New Matter, which was endorsed with a "Notice to Defend" as opposed to a "Notice to Plead?"
- II) If Plaintiffs were required to file an answer in response to the Notice to Defend, were they obliged to file answers either to conclusions of law, factual averments, or both?
- III) What are the consequences of not filing a required answer to Prociuk's New Matter, if Plaintiffs were required to file an answer to any or all of that pleading?
- IV) Do Plaintiffs maintain any causes of action against Prociuk if the Complaint's prayers for relief are satisfied either by affirmation in the factual averments made by Prociuk in his Answer and New Matter or by virtue of admissions based on the answers to the preceding questions?

V) Is Judgment on the Pleadings warranted in favor of Prociuk individually and/or as President of the Central Executive Committee of ODWU, Inc. if, based on Plaintiffs failing to maintain a controversy against him, there are no disputed issues of fact?

Prociuk filed his Answer and New Matter endorsed with a Notice to Defend. Plaintiff argues that because Prociuk's pleading contained a Notice to Defend and not a Notice to Plead, Plaintiffs have no obligation to answer the New Matter.

Pennsylvania Rule of Civil Procedure 1026(a) reads as follows: "Except as provided by Rule 1042.4 or by subsection (b) of this rule, every pleading subsequent to the complaint shall be filed within twenty days after service of the preceding pleading, but no pleading need be filed unless the preceding pleading contains a notice to defend or is endorsed with a notice to plead." Further, the form of the notice to plead is outlined in Pennsylvania Rule of Civil Procedure 1361 and appears as follows:

The notice to plead shall be directed to the adverse party and shall be in substantially the following form:

To: _____
(Name of Adverse Party)

You are hereby notified to file a written response to the enclosed (name of pleading) within twenty (20) days from service hereof or a judgment may be entered against you.

(Party Filing Pleading or the Party's Attorney)

Note: A responsive pleading is not required to be filed unless a notice to plead has been endorsed on the prior pleading other than a complaint. The notice to defend prescribed by Rule 1018.1 shall appear on all complaints.

This rule would appear on its face to support Plaintiffs' contention. However, this Court believes that as long as the endorsement contains certain obligatory language, whether it is labeled a "notice to defend" or a "notice to plead" is irrelevant. Comparatively speaking, both notices must advise the adverse party of their obligation to either "take action" or file a "written response" within twenty (20) days. Failure to do so, as outlined in either notice, could result in a judgment being entered against the defaulting party. Further, the Court finds that the notice to defend is substantially similar to the notice to plead and accordingly required Plaintiffs to affirmatively respond to Prociuk's Answer and New Matter. If anything, the endorsement of a notice to defend on the Answer and New Matter is harmless error. See *Schreiber v. Pa. Lumberman's Mut. Ins. Co.*, 19 Pa. D.&C.3d 109, 113 (C.P. Philadelphia 1980). Therefore, the Court finds that the Plaintiffs were obligated to file a responsive pleading to Prociuk's Answer and New Matter within twenty (20) days of service of that pleading. The Court must now determine what effect, if any, the failure to do so has on the Motion for Judgment on the Pleadings.

Pursuant to Pennsylvania Rule of Civil Procedure 1026, Plaintiffs were required to respond within twenty (20) days of service of Prociuk's Answer and New Matter. Prociuk's Answer and New Matter was filed on December 20, 2016. A certificate of

service evidencing that a copy of the Answer and New Matter was sent to Plaintiffs' counsel was filed on December 29, 2016. Plaintiffs therefore had until January 18, 2017 to file a responsive pleading to Prociuk's Answer and New Matter. Unfortunately, a reply to Prociuk's New Matter was not filed by Plaintiffs until March 9, 2017, approximately one (1) month after Prociuk filed his Motion for Judgment on the Pleadings. This Court must now determine whether or not this March 9, 2017 reply is timely and should be considered by the Court in addressing the Motion for Judgment on the Pleadings.

Pursuant to Pennsylvania Rule of Civil Procedure 1017(a): "the pleadings in an action are limited to (1) a complaint and an answer thereto, (2) a reply if the answer contains new matter, a counterclaim or a cross-claim, (3) a counter-reply if the reply to a counterclaim or cross-claim contains new matter, (4) a preliminary objection and a response thereto." In the case *sub judice*, the pleadings were as follows: 1) a Complaint filed on June 23, 2015; 2) Prociuk's Preliminary Objections filed August 17, 2015; and 3) Prociuk's Answer and New Matter filed on December 20, 2016 with an attached certificate of service evidencing service on Plaintiffs' Counsel on December 29, 2016. Thereafter, Plaintiffs had until January 18, 2017 to file a response to Prociuk's New Matter. Plaintiffs did file an Answer to the New Matter, but not until March 9, 2017. In *Fisher v. Hill*, 81 A.2d

860, 862-63 (Pa. 1951), the Pennsylvania Supreme Court addressed the issue of the late filing of a pleading, stating:

Pennsylvania Rules of Civil Procedure Nos. 1026 and 1361 . . . in substance, provide that every pleading subsequent to the complaint shall be filed within twenty days after service of the preceding pleading if notice to plead is endorsed thereon. The word "shall" is not mandatory in the sense that it admits no exception unless an extension of time is secured by agreement of the parties or by leave of court as provided for in Rule No. 1003. Neither under the Practice Act of 1915, 12 P.S. § 382 et seq., where the word "shall" was used nor under the present Rules of Civil Procedure has this Court regarded such provisions as to pleading so mandatory as not to permit exceptions where justice requires. "Procedural rules are not ends in themselves but means whereby justice, as expressed in legal principles, is administered. They are not to be exalted to the status of substantive objectives. It is for this reason that Pa.R.C.P. No. 126, 12 P.S. Appendix (332 Pa. lxvii) provides: 'The rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties.'" *McKay v. Beatty*, 35 A.2d 264, 265 (Pa. 1944). "The Rules are to be interpreted with common sense to carry out the purposes for which they were adopted." *Usner v. Duersmith*, 31 A.2d 149, 150 (Pa. 1943).

Fisher went further to state:

[T]he answer can be filed at any time and without leave of court, even after the 20-day period has expired, if the plaintiff has not yet taken judgment against the defendant for default. It is unnecessary in this case to adopt this interpretation of the Rules. It is sufficient now to hold that dilatory pleadings may be filed if the opposite party is not prejudiced and justice requires. Much must be left to the discretion of the lower court.

Fisher at 863 (internal quotation marks omitted).

In the case before the Court, it was not until approximately six (6) weeks after the date of service that Plaintiffs filed their Reply to New Matter. As noted in *Fisher*, had the opposing party been prejudiced, the outcome in that case may have been different and the dilatory pleading not allowed. Here, Prociuk would be prejudiced by the allowance of the late filing since it occurred after the filing of the Motion for Judgment on the Pleadings. While not necessarily akin to the taking of a default judgment, the end result would be the same—the moving party (Prociuk) could prevail. To allow the late Reply to New Matter would prejudice Prociuk's attempts to succeed on his motion. Thus, he would be prejudiced.

In *Edmond v. Se. Pa. Transp. Auth.*, 651 A.2d 645 (Pa. Commw. Ct. 1994), the Court held that the Appellant's late reply to SEPTA'S new matter denying the allegations had no legal effect because the pleadings were already closed.

Further, for purposes of addressing the Motion for Judgment on the Pleadings in this case, Pennsylvania Rule of Civil Procedure 1034(a) states in pertinent part: "After the relevant pleadings are closed, but within such time as not to unreasonably delay the trial, any party may move for judgment on the pleadings." Consequently, this Court will not consider the March 9, 2017 Reply to New Matter, but must consider the result of having no timely reply filed.

Turning to that issue, pursuant to Pennsylvania Rule of Civil Procedure 1029:

(a) A responsive pleading shall admit or deny each averment of fact in the preceding pleading or any part thereof to which it is responsive. A party denying only a part of an averment shall specify so much of it as is admitted and shall deny the remainder. Admissions and denials in a responsive pleading shall refer specifically to the paragraph in which the averment admitted or denied is set forth.

(b) Averments in a pleading to which a responsive pleading is required are admitted when not denied specifically or by necessary implication. A general denial or a demand for proof, except as provided by subdivisions (c) and (e) of this rule, shall have the effect of an admission.

(c) A statement by a party that after reasonable investigation the party is without knowledge or information sufficient to form a belief as to the truth of an averment shall have the effect of a denial.

(d) Averments in a pleading to which no responsive pleading is required shall be deemed to be denied.

Thus, if the New Matter contains averments that are conclusions of law, they need not be responded to, nor do they require a response if they merely "reiterate[] that which ha[s] already been placed into issue in the Complaint and Answer."¹² *Watson v. Green*, 331 A.2d 790, 792 (Pa. Super. Ct. 1974). Only those averments that are not conclusions of law nor reiterations from a prior pleading need be responded to by Plaintiffs. Those which demand a response but lack the same constitute admissions in

¹² "If a party's new matter does not contain facts supporting an affirmative defense, but rather contains merely conclusions of law, no denial is required because such averments are deemed to be denied." *Gotwalt v. Dellinger*, 577 A.2d 623, 626 (Pa. Super. Ct. 1990) (citation omitted).

accordance with Rule 1029(b). See *Spain v. Vicente*, 461 A.2d 833 (Pa. Super. Ct. 1983).

This Court now turns to Prociuk's New Matter to determine whether or not the averments contained therein, namely Paragraphs 49 through 72, are conclusions of law, reiterations of prior factual averments, denials, admissions, or new factual allegations that require Plaintiffs to respond. Paragraph 49 of the New Matter is a conclusion of law and does not require a response. Paragraphs 50 through 58 are simply defenses asserted by Prociuk, and are therefore conclusions of law to which no responsive pleading is required. Paragraphs 59 through 63 address the issue of whether or not the Central Executive Committee of ODWU, Inc. is a separate party to this action. To the extent these averments as alleged are either conclusions of law or factual averments, even if deemed admitted, they have no bearing on the Motion for Judgment on the Pleadings.¹³

The following paragraphs are all conclusions of law not requiring a responsive pleading and in fact are the relief sought by Plaintiffs and/or the basis for that relief:

¹³ This issue of whether or not the Central Executive Committee of ODWU, Inc. is a separate party is dealt with in the Order referenced in n.11, *supra*, which Order addresses a Petition to Open/Strike a Default Judgment filed on behalf of the Central Executive Committee of ODWU, Inc.

1) Paragraph 65, which reads "Since Defendant is no longer President of Central Executive Committee of ODWU, Inc., Count I of Plaintiffs' complaint is now moot";

2) Paragraph 69, which reads "Because all financial information has been provided to plaintiffs as of September 19, 2016, Count II of their complaint has been rendered moot"; and

3) Paragraph 72, which reads "Defendant, Alexander Prociuk, while President of CEC of ODWU, Inc. acted with the authority of CEC of ODWU, Inc. in all of his actions on behalf of CEC of ODWU, Inc."

Next, the Court determines that Paragraphs 70 and 71, while being factual averments requiring a response, would not impact or affect the outcome of the Motion for Judgment on the Pleadings even if deemed admitted.

The Court now turns to the remaining factual averments: Paragraphs 64, 66, 67, and 68. Pennsylvania Rule of Civil Procedure 1030(a) states, in pertinent part: "A party may set forth as new matter any other material facts which are not merely denials of the averments of the preceding pleading." A review of Prociuk's Answer suggests that these four (4) paragraphs are not "denials" contained in his Answer. In fact, these averments were not even referenced therein. These averments read as follows:

64. Defendant is no longer the President of Central Executive Committee of ODWU, Inc. as of November 19,

2016 as per Defendant's Exhibit "B", a copy of the minutes for said meeting, attached hereto and made a part hereof.

66. By letter dated September 19, 2016, a copy of which is attached hereto and made a part hereof as Exhibit "C", Defendant did provide as per Court Order, a copy of supplemental responses to the Discovery material requested by Plaintiffs along with the complete financial information requested by Plaintiffs.

67. Said letter with its enclosures was never returned to counsel for defendant[.]

68. No action has been taken by plaintiffs to indicate that they never received the financial information or minutes they had requested and which was ordered to be provided by Order of Court since said information had been sent on September 19, 2016.

Clearly, these averments, by rule and by law, require a response from Plaintiffs. Absent such responses, they are deemed admitted. See *Edmond*, 651 A.2d 645; *Spain*, 461 A.2d 833; *Enoch v. Food Fair Stores, Inc.*, 331 A.2d 912 (Pa. Super. Ct. 1974).

The status of the lack of answers to the New Matter having been deemed admissions and judicially determined, this Court now turns to their impact on the Motion for Judgment on the Pleadings. "A motion for judgment on the pleadings is in the nature of a demurrer." *Sejpal v. Corson, Mitchell, Tomhave & McKinley, M.D.'S., Inc.*, 665 A.2d 1198, 1199 (Pa. Super. Ct. 1995). The well-pleaded allegations of the non-moving party are viewed as true, but only those that are specifically admitted, or, as in our case, deemed admitted, may be used against that party. See *Id.* The moving party, in this case Prociuk, has the burden of proving

that no genuine issues exist as to any material facts. See *Spain*, 461 A.2d 833.

Plaintiffs' Complaint consists of two (2) remaining counts,¹⁴ one seeking the removal of Prociuk as President of the Central Executive Committee of ODWU, Inc., and the other directing Prociuk to provide a "complete" accounting of all monies received and spent, along with tax returns. These concurrent prayers for relief are grounded in a simple theory—Prociuk breached his fiduciary responsibility to the Central Executive Committee of ODWU, Inc. As previously referenced in this Opinion, by virtue of Plaintiffs' deemed admission to Paragraph 64, Prociuk is no longer the President of the Central Executive Committee of ODWU, Inc. There being no dispute on this issue, i.e. Prociuk's removal, there remains no genuine issue of material fact as to Plaintiffs' ultimate claim, and accordingly the Motion for Judgment on the Pleadings, albeit in an otherwise unorthodox fashion, mandates being granted.¹⁵

As to the second count, a request for an accounting, by virtue of the deemed admissions to Paragraphs 66, 67, and 68, it is evident that Plaintiffs have been provided with the information

¹⁴ As previously noted in n.3, a third count was dismissed by Order of Court dated June 7, 2016.

¹⁵ Rarely do you see a defendant succumb to the wishes of a plaintiff in the manner in which Prociuk did here. However, because of that removal, there is no issue of fact to send to the jury—it was already accomplished by Prociuk himself.

they sought in their prayer for relief contained in Count II. Similarly, there being no issue of material fact remaining in light of this information having been provided and deemed admitted, the Motion for Judgment on the Pleadings as to Count II must also be granted.¹⁶

CONCLUSION

Based upon the foregoing, this Court enters the following Order:

¹⁶ Not unlike their failure to file a reply to the New Matter until after the Motion for Judgment on the Pleadings was filed, Plaintiffs also did not file a Motion for Sanctions for the production of this financial information until after the Motion for Judgment on the Pleadings was filed. The deemed admission was to the fact that Prociuk had provided this information as late as September 19, 2016, well before the Motion for Sanctions.

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Jane Sebelin, Esquire
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Counsel for Plaintiffs
Counsel for Defendant

ORDER OF COURT

AND NOW, this 5TH day of December, 2017, upon consideration of the Motion for Judgment on the Pleadings filed by Defendant, Alexander Prociuk, individually and as President of the Central Executive Committee of ODWU, Inc., the brief lodged in support thereof, Plaintiffs' Answer to that motion and their brief lodged in opposition thereto, and after argument thereon, it is hereby **ORDERED and DECREED** that said Motion for Judgment on the Pleadings is **GRANTED** in favor of Defendant, Alexander Prociuk, individually and as President of the Central Executive Committee of ODWU, Inc., and against all remaining named Plaintiffs.

BY THE COURT:


Joseph J. Matika, J.