

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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RUDOLPH MILLS,

Plaintiff,

v.

STEBEN FOODS, INCORPORATED, *et al.*,

Defendants.

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**DECISION  
and  
ORDER**

**19-CV-1178-WMS-LGF**

APPEARANCES:

RUDOLPH MILLS, *Pro Se*  
P.O. Box 834  
Bronx, New York 10455

BOND, SCHOENECK & KING, PLLC  
Attorneys for Defendants  
ADAM P. MASTROLEO, of Counsel  
One Lincoln Center  
110 West Lafayette Street  
Suite 1800  
Syracuse, New York 13202-1355

and

MARK A. MOLDENHAUER, and  
PETER H. WILTENBURG, of Counsel  
Avant Building  
200 Delaware Avenue  
Suite 900  
Buffalo, New York 14202

In this employment discrimination case based on Plaintiff's race, the court in a Decision and Order filed September 18, 2024 (Dkt. 145) ("the September 18, 2024 D&O"), granted Defendants' motion to strike and preclude (Dkt. 97) Plaintiff's expert report and trial testimony based on Plaintiff's unexcused failure to comply with the First Amended Scheduling Order's September 22, 2022 deadline for such expert disclosure. See September 18, 2024 D&O at 2-6, 13. The September 18, 2024 D&O also found

that Plaintiff's then counsel Seamus Barrett, Esq. ("Barrett"), and the Derek Smith Law Group PLLC ("Derek Smith Law Group") (together, "Plaintiff's former counsel")<sup>1</sup> should be sanctioned pursuant to Fed.R.Civ.P. 16(f)(1)(C) with an award, jointly and severally, of Defendants' expenses incurred in connection with bringing Defendants' motion to strike and preclude, including reasonable attorney fees, based on the court's further finding that Plaintiff's failure to timely disclose Plaintiff's testifying expert as required by the First Amended Scheduling Order was not substantially justified and non-prejudicial, nor that an award of such expenses would, under the circumstances, be unjust. See September 18, 2024 D&O at 6-13. Accordingly, the court directed Plaintiff and Plaintiff's counsel to show cause within 20 days why Defendants' expenses should not be awarded pursuant to Rule 16(f)(1)(C) ("the OTSC"). Although Plaintiff filed a timely appeal of the September 18, 2024 D&O pursuant to Fed.R.Civ.P. 72(a), which is pending before Judge Skretny, neither Barrett nor the Dereck Smith Law Group has, to date, filed any opposition to the September 18, 2024 D&O as required by the OTSC.

It is well-established that where a party fails to timely respond to an OTSC such failure may be deemed to concede the court's determination of such motion or OTSC as correct. See *Roytlander v. D. Malek Realty, LLC*, 2024 WL 2891749, at \* 4 (E.D.N.Y. June 10, 2024) (holding non-party witness's failure to respond to order to show cause why she should not be required to pay defendants' attorney fees incurred in connection with non-party witness's failure to attend deposition and to provide requested documents supported awarding the defendants the requested fees). The court therefore finds that Plaintiff's former counsel's failure to comply with the OTSC

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<sup>1</sup> By Decision and Order filed September 18, 2024 (Dkt. 145), the court granted motions by Barrett and Derek Smith Law Group to withdraw as counsel. Plaintiff has appealed this Decision and Order.

concedes the court's determination with regard to Plaintiff's failure to timely disclose Plaintiff's putative testifying expert as required by the First Amended Scheduling Order thereby warranting an award, in accordance with Rule 16(f)(1)(C), of Defendants' expenses incurred in connection with Defendant's motion to strike and preclude.

### **CONCLUSION**

Accordingly, based on the foregoing, Defendants shall, within 10 days of this Decision and Order, submit an affidavit of expenses incurred in connection with the filing of Defendants' motion to strike Plaintiff's expert report and preclude such expert's testimony (Dkt. 97); the response of Seamus Barrett, Esq., and the Derek Smith Law Group PLLC shall be filed not later than five days thereafter; oral argument shall be at the court's discretion.

The Clerk of Court is directed to serve copies of this Decision and Order by First Class U.S. Mail on Seamus Barrett, Esq., at 45 Broadway, Suite 430, New York, New York 10006, and Zachary Holzberg, Esq., at Derek Smith Law Group PLLC, 1 Penn Plaza, Suite 4905, New York, New York 10119.

SO ORDERED.

*/s/ Leslie G. Foschio*

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LESLIE G. FOSCHIO  
UNITED STATES MAGISTRATE JUDGE

DATED: January 29, 2025  
Buffalo, New York