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## PRELIMINARY STATEMENT

Defendant DeVry, Inc. (“DeVry”), misidentified as DeVry Corp., respectfully submits this reply memorandum of law in further support of its motion pursuant to Rule 56(b) of the Federal Rules of Civil Procedure for summary judgment in its favor dismissing with prejudice the Amended Complaint of plaintiff Carlos Melendez (“Melendez”) in its entirety.

Melendez’s opposition papers make it more apparent than ever that there is no basis in fact or law for his disability discrimination claim. First, Melendez has failed to respond to DeVry’s Local Rule 56.1 Statement of undisputed material facts (“DeVry’s Rule 56.1 Statement”). Under the circumstances, DeVry respectfully submits that the Court should deem these facts to be admitted for purposes of this motion. These facts demonstrate that DeVry not only met but far exceeded its obligations by offering Melendez numerous accommodations at considerable cost, whereas Melendez failed to take full advantage of the accommodations afforded him.

Second, Melendez failed to produce in discovery most of the “evidence” he attached to his opposition papers -- including two audiotapes -- although DeVry had specifically requested this information. DeVry respectfully submits that the Court should not consider this information. Third, there is no basis for the admission of this information into evidence, as Melendez cannot authenticate the documents and audiotapes in question and they should be disregarded. Fourth, assuming without conceding that these documents and audiotapes are admissible, they are unavailing because they support DeVry’s Rule 56.1 Statement or are irrelevant or merely conclusory.

Melendez has failed to marshal specific issues of fact for trial by way of affidavits and authenticated documents that controvert the facts DeVry asserted in its moving papers. Therefore, DeVry respectfully submits that it is entitled to summary judgment as a matter of law.

## ARGUMENT<sup>1</sup>

### POINT I.

#### MELENDEZ'S FAILURE TO RESPOND TO DEVRY'S RULE 56.1 STATEMENT REQUIRES DISMISSAL OF HIS CLAIM

Pursuant to Local Civil Rule 56.1(a), DeVry annexed to its notice of motion a separate statement in numbered paragraphs of the material facts as to which DeVry contends there is no genuine issue to be tried. As discussed at length in DeVry's moving brief, these facts -- which are all established by the record -- show that:

- DeVry offered Melendez numerous accommodations at considerable cost;
- Melendez failed to take full advantage of these accommodations;
- Melendez failed to meet the essential requirements of his academic program at DeVry;
- Melendez was dismissed from his academic program at DeVry for good cause; and,
- Melendez is not entitled to any damages, nor has he incurred any monetary damages as a result of his dismissal from DeVry.

Melendez was required to include in his opposition papers, at a minimum, "*a correspondingly numbered paragraph responding to each numbered paragraph*" in DeVry's Rule 56.1

Statement. L. Civ. R. 56.1(b) (emphasis in original). Melendez failed to do so in any form.

Therefore, DeVry's Rule 56.1 Statement must be "deemed to be admitted *for purposes of the motion . . .*" L. Civ. R. 56.1(c) (emphasis in original).

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<sup>1</sup> For the Court's convenience, copies of all LEXIS decisions cited herein are attached hereto in alphabetical order.

The Second Circuit consistently has either affirmed summary judgment or vacated a denial of summary judgment when the nonmoving party failed to comply with Rule 56.1. See, e.g., Millus v. D'Angelo, 224 F.3d 137, 138 (2d Cir. 2000) (summary judgment in favor of defendants appropriate when plaintiff failed to deny defendant's material allegations); Gubitosi v. Kapica, 154 F.3d 30, 31 n.1 (2d Cir. 1998) (material facts contained in moving party's Local Rule 3(g)<sup>2</sup> statement accepted as true and denial of summary judgment vacated because the nonmoving party failed to respond to the statement).

The district courts have consistently held likewise. For example, in EQ Transportation, Inc. v. TNT Transportation, Inc., 2005 U.S. Dist. LEXIS 12318 (E.D.N.Y. June 24, 2005), the court deemed plaintiff's statement of undisputed facts to be admitted and granted plaintiff summary judgment because defendants failed to submit a counter statement of disputed material facts in opposition to plaintiff's motion. Id. at \*6. Similarly, where plaintiff did not respond to defendants' factual assertions, which were all established by the record, the court deemed them to be uncontroverted. Sterbenz v. Attina, 205 F. Supp.2d 65, 68 (E.D.N.Y. 2002).

The Court has given the pro se plaintiff in this case ample latitude. DeVry, too, has extended to him every conceivable courtesy. Melendez is not entitled to ignore Rule 56.1. The Court should accept DeVry's statement of undisputed material facts as true.

## POINT II.

### **THE COURT SHOULD DISREGARD THE DOCUMENTS MELENDEZ IMPROPERLY WITHHELD IN DISCOVERY**

Even if the Court were to overlook Melendez's failure to comply with Rule 56.1, the Court should disregard the documents Melendez has submitted in opposition to this motion because he did not produce most of them, including the audiotapes, in discovery -- although

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<sup>2</sup> Local Rule 3(g) was the predecessor to Rule 56.1.

DeVry had specifically requested them. Rule 37(c)(1) provides that a party who fails to disclose information required by the discovery rules, or to amend a prior response to discovery, when necessary, may not use such information on a motion. Fed. R. Civ. P. 37(c)(1). Preclusion under this rule is an automatic sanction that requires no motion. Fed. R. Civ. P. 37 advisory committee's note (1993 amends., subdiv. (c)).

In Wapnick v. United States, 2001 U.S. Dist. LEXIS 22866 (E.D.N.Y. Dec. 20, 2001), the court entered a preclusion order against a pro se plaintiff because the plaintiff had not complied with discovery requests in a timely manner, despite “having been given many additional chances to respond to the discovery requests and court orders and numerous extensions of time . . . .” Id. at \*2, \*15. The court explained that, while courts should give pro se litigants extra leeway, even pro se litigants “have a duty to comply with discovery requests and court orders. When parties flout that obligation they . . . must suffer the consequences of their actions.” Id. at \*14-15 (citations omitted).

Here, the Court has extended the discovery period on four separate occasions and afforded Melendez numerous opportunities to respond to DeVry's discovery requests. As early as October 31, 2003, DeVry's counsel requested that Melendez produce copies of all documents in his possession upon which he intended to rely in this matter, pursuant to Rule 26(a)(1). See October 31, 2003 letter from Rachel A. Davis, Esq. to Melendez, attached as Exhibit A to the Reply Declaration of Alix R. Rubin, Esq. (the “Rubin Reply Declaration”). Melendez acknowledged this obligation to DeVry's counsel. See id. It is indisputable, however, that Melendez improperly withheld from DeVry the audiotapes and the United States Department of Education (“DOE”) documents he has submitted in opposition to this motion.

Moreover, in its first request for the production of documents, DeVry specifically

requested relevant audiotapes and DOE documents. See Defendant's First Request for the Production of Documents, Request Nos. 5-7, 17, attached as Exhibit B to the Rubin Reply Declaration. In its second request for the production of documents, DeVry specifically requested documents the DOE produced to Melendez. See Defendant's Second Request for the Production of Documents, attached as Exhibit C to the Rubin Reply Declaration. Melendez did not respond to these specific requests.

Notwithstanding his pro se status, Melendez must be held accountable for this clear failure to meet his discovery obligations. Where an incarcerated prisoner failed to comply with a discovery order, the Second Circuit affirmed the district court's dismissal of his pro se action because

the "special solicitude for the difficulties that a *pro se* plaintiff must face does not extend to the wilful [sic], obstinate refusal to play by the basic rules of the system upon whose very power the plaintiff is calling to vindicate his rights."

McDonald v. Head Crim. Ct. Supervisor Officer, 850 F.2d 121, 124 (2d Cir. 1988) (citation omitted). Here, Melendez has also refused to play by the basic rules of litigation, of which he has been made aware on numerous occasions by both the Court and DeVry. The Court should preclude Melendez from using the audiotapes and any of the DOE documents to oppose this motion.

### POINT III.

#### **THE COURT SHOULD NOT CONSIDER THE UNAUTHENTICATED DOCUMENTS MELLENDEZ HAS SUBMITTED**

Even if the Court were to excuse Melendez's noncompliance with his discovery obligations, it should preclude the documents and audiotapes he has submitted as inadmissible because Melendez has failed to authenticate them. Rule 56(e) provides that affidavits in

opposition to a summary judgment motion must be made on personal knowledge, must set forth facts that would be admissible in evidence and must show that the affiant is competent to testify to the matters stated therein. Fed. R. Civ. P. 56(e). The court may consider only admissible evidence in ruling on a motion for summary judgment. See Quoka v. City of West Haven, 64 Fed. Appx. 830, 832 (2d Cir. 2003).

Where an employee's opposing declaration failed to "provide any basis for her personal knowledge of the facts and circumstances" of three similarly situated male employees' promotions, the Second Circuit affirmed summary judgment dismissing her failure to promote claim. Torrel v. City of New York, 114 Fed. Appx. 14, 16 (2d Cir. 2004) (citation omitted). Judge I. Leo Glasser precluded from consideration information and documents on motions for summary judgment where nothing in the affidavits reflected that the affiants had any personal knowledge of the information or documents. EQ Transp., Inc., 2005 U.S. Dist. LEXIS at \*8; Stepheny v. Brooklyn Hebrew School for Special Children, 356 F. Supp.2d 248, 258 (E.D.N.Y. 2005).

Here, Melendez does not indicate in his opposition affidavit that he has any personal knowledge of or can authenticate the documents and audiotapes he has attached. The Court should not consider them on this motion.<sup>3</sup>

#### POINT IV.

#### **MELLENDEZ HAS FAILED TO MEET THE STANDARD REQUIRED TO PROCEED TO TRIAL**

To defeat DeVry's motion, Melendez must set forth specific facts showing that there is a genuine need for a trial in order to resolve material factual disputes. See Fed. R.

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<sup>3</sup> In its moving papers, DeVry properly authenticated two of the documents Melendez submitted in opposition. DeVry respectfully submits that the Court should consider these documents, which are described in Point IV. A.

Civ. P. 56(e); Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). Mere conclusory allegations or denials will not suffice. Blesedell v. Mobil Oil Co., 708 F. Supp. 1408, 1411 (S.D.N.Y. 1989).

Melendez's opposition papers do not specifically deny DeVry's contentions. Melendez's affidavit consists of one conclusory statement that DeVry "acted with malice and total disregard for the federal laws . . . ." Attached are inadmissible documents and audiotapes which, even were the Court to consider them, support DeVry's Rule 56.1 Statement or are irrelevant or merely conclusory. Melendez has raised no genuine issue of material fact that would preclude entry of judgment in DeVry's favor.

**A. Most of the Documents Melendez Submitted Support DeVry's Contentions**

Melendez maintains in his opposition papers that the DOE found that DeVry "violated Mr. Melendez's civil rights . . . ." However, a review of the record as well as the documents Melendez has submitted reveals the contrary. The September 9, 2002 letter from the DOE Office for Civil Rights ("OCR") to Melendez -- which is also attached as Exhibit N to the Declaration of Nireata D. Seals ("Seals Decl.") in DeVry's moving papers -- states that the OCR found insufficient evidence to support Melendez's allegations that DeVry had not provided him with the tactile symbols he needed for class or with proper training or instruction in the use of the JAWS program. See Seals Decl., ¶ 39, Ex. N. The OCR made no finding with respect to Melendez's claim that DeVry did not provide him with books on tape. Rather, DeVry voluntarily agreed to implement a resolution agreement that addressed this allegation without admitting any liability. Id. Melendez neglected to attach a copy of the resolution agreement to his affidavit.

In addition, three of the four file memoranda from the OCR investigation upon which Melendez relied actually support the following undisputed material facts:

- DeVry offered Melendez numerous accommodations. See OCR memorandum regarding on-site interview with Kizzy Brown-Glasgow (“Brown-Glasgow interview”) at pp. 2, 3, 4; OCR memorandum regarding on-site interview with Lili Rodriguez-Langner (“Rodriguez-Langner interview”) at pp. 1, 2, 3; OCR memorandum regarding on-site interview with Nereata [sic] Seals at pp. 2-3.
- Melendez failed to take full advantage of these accommodations. See Brown-Glasgow interview at p. 4; Rodriguez-Langner interview at pp. 2, 3.
- Melendez failed to meet the essential requirements of his academic program at DeVry. See Rodriguez-Langner interview at p. 3.

Other documents Melendez submitted also support DeVry’s statement of undisputed facts. The invoice from Recording for the Blind and Dyslexic -- which is also attached as Exhibit I to the Seals Declaration -- shows that DeVry joined this organization to order books on tape for Melendez’s use. See DeVry’s Rule 56.1 Statement, ¶ 45; Seals Decl., ¶ 31, Ex. I. Melendez’s transcript from Monroe College shows that Melendez transferred at least eighteen credits from DeVry to Monroe College and therefore has incurred no monetary damages. See DeVry’s Rule 56.1 Statement, ¶ 70; Seals Decl., ¶¶ 42-43.

**B. The Remaining Documents and Audiotapes Are Irrelevant or Merely Conclusory**

The DOE Student Financial Assistance Proceeding decision and order dated February 19, 1997 upon which Melendez relied has no bearing whatsoever on this case. The judge who heard the matter held that DeVry had improperly waived the Selective Service registration requirement for a particular student -- not Melendez -- and ordered DeVry to repay federal student grants to the DOE and repurchase all federal student loans disbursed to the



