

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

DERON MCCOY, JR.,

Plaintiff,

v.

Case No. 17-3139-JWB

JAMES HEIMGARTNER, et al.,

Defendants.

**MEMORANDUM AND ORDER**

The court has before it Defendants' Motion to Dismiss, or in the alternative motion for summary judgment, and brief in support. (Docs. 25, 26.) A review of Defendants' motion shows that although it is based in part on Fed. R. Civ. P. 12(b)(6), it relies heavily on exhibits from the *Martinez* report that were not attached to the motion. (*See* Doc. 26.) In such circumstances, "[i]f ... matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56," and "[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d). The court concludes the best course is to treat Defendants' motion as one for summary judgment.

On July 18, 2018, Plaintiff filed a response to the motion. (Doc. 38.) Plaintiff also filed a motion for copies of sealed documents cited in Defendants' motion which was referred to Magistrate Judge Sebelius. (Doc. 41.) Based on the filings and the orders entered by the magistrate judge, Plaintiff did not receive the *Martinez* report or exhibits referred to in the motion for summary judgment until recently. (Docs. 48, 56.) As Plaintiff did not have access to the

exhibits that were referred to and relied on in the motion and the court has determined that it will treat the motion as one for summary judgment, the court must give Plaintiff an opportunity to file a supplemental brief.

Accordingly, Plaintiff is granted 30 days after the filing of this order to file a supplemental response brief and any exhibits. Defendants' supplemental reply will be due 14 days after service of Plaintiff's response.

**IT IS SO ORDERED** this 30th day of October, 2018.

s/ John W. Broomes  
JOHN W. BROOMES  
UNITED STATES DISTRICT JUDGE