

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

Alexander Gray,	)	
	)	
<i>Plaintiff,</i>	)	
	)	
-vs-	)	No. 23-cv-1931
	)	
City of Evanston, Evanston Police	)	
Officers Kubiak, Kane, Popp, Ros-	)	
enbaum, and Pogorzelski,	)	( <i>Judge Seeger</i> )
	)	
<i>Defendants.</i>	)	

**PLAINTIFF'S RESPONSE TO DEFENDANT'S  
RULE 56.1(a)(2) STATEMENT ON  
CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff submits the following in response to defendant's Local Rule 56.1(a)(2) statement on its cross-motion for summary judgment.

Many of defendants' numbered paragraph contain multiple asserted facts requiring separate responses. Accordingly, plaintiff uses brackets ([a], [b], [c], etc.) to denote the separate contentions in a single numbered paragraph. Plaintiff employs *italics* to identify the disputed matter.

1. Plaintiff Alexander Gray is a 50-year-old, (Exhibit 2, Gray Dep. 4:17), resident of Evanston, Illinois. (Exhibit 3, EPD Report at 1)

**Admit.**

2. Defendant City of Evanston is an Illinois municipal corporation. (Exhibit 1, Answer to Amended Complaint, ¶ 3)

**Admit.**

3. Defendants Marcin Kubiak, Michael Kane, Kyle Popp, Daniel Rosenbaum, and Pauline Pogorzelski were police officers of the City of Evanston on March 31, 2021. (Exhibit 1, Answer to Amended Complaint, ¶ 4.

**Admit.**

4. On March 31, 2021, at or about 2:35 p.m. the Evanston Police Department (“EPD”) received a 911 call from a *citizen* who reported seeing a man with a gun in his right hand *at a lakefront public park located in the 500-block of Sheridan Square, Evanston*. (Exhibit 3, EPD Report, Exhibit 4, CAD ticket, Exhibit 7, Kane Dep. 30:13-16, Exhibit 8, Popp Dep. 14:5-8, Exhibit 9, Kubiak Dep. 35:6-17)

**Admit save for the following:**

**A. The assertion that the caller was a “citizen” is immaterial.**

**B. The assertion that the caller saw the man with a gun “*at a lakefront public park located in the 500-block of Sheridan Square, Evanston*” is incorrect.**

**The dispatcher informed the responding officers about a man “just north of the beach on the trail.” (ECF No. 40-3 at 2) The beach is at 501 Sheridan Square; plaintiff’s interaction with the police occurred in the park east of 572 Sheridan Square, more than 300 feet north of the beach. See response to contention 12(b) below.**

5. On March 31, 2021, it was unlawful for any person to carry a firearm in a public park in Evanston Illinois. (Exhibit 6, Kubiak Dep. 36:7-24, 37:1-14)

**Admit.**

6. The 911 caller described the man as white male, approximately 5 to 6 feet tall, and wearing a dark coat and jeans. (Exhibit 3, EPD Report, Exhibit 12, Kubiak Video at 14:40:10)

**Admit.**

7. Police were later able to identify the 911 caller as Madeline Pitman. Ms. Pitman was located by Officer Svendsen at *approximately 2:40 p.m.* and interviewed *to reconfirm the report*. (Exhibit 3, EPD Report, Exhibit 15, Pitman Video 14:49:23)

**Objection: Any information that the police obtained from Ms. Pitman after the incident is not material to this lawsuit, which turns on the reasonableness of police actions, based on the facts then known to the officers. *Carmichael v. Village of Palatine*, 605 F.3d 451, 548 (7th Cir. 2010). Information acquired after a search “has no bearing on the probable cause analysis.” *United States v. Bell*, 925 F.3d 362, 372 (7th Cir. 2019).**

**Dispute that Svendsen interviewed Pitman “at approximately 2:40 p.m.” Svendsen’s body worn camera shows that she began her conversation with Pitman at 2:49 p.m. (Defendants’ Video Exhibit 15.)**

**Dispute that the purpose of the conversation was “to reconfirm the report.” There is no direct evidence of the purpose for interviewing Pitman. An equally plausible scenario is that the police were investigating a potential violation of the Illinois statute prohibiting the making of a false police report. 720 ILCS 5/26-(a)(5).**

8. [a] Ms. Pitman re-confirmed that on 3/31/21 she was walking northbound on the east side of the 500 block of Sheridan Square when she observed *Plaintiff* ahead of her, standing in the path facing westbound [b] with what she believes to have been a gun in his right hand. (Exhibit 3, EPD Report, Exhibit 15, Pitman Video 14:49:23)

**[a] Admit other than the assertion that Pitman stated that she had seen Plaintiff. The video (Defendants’ Exhibit 16) shows that Pitman did not make any identification of plaintiff as the person she claims to have seen with a gun.**

**[b] Disputed. Pitman stated that the object she observed “could have been headphones.” (Exhibit 15, Pitman Video 14:50:45-50.)**

9. At about 2:38 p.m., an EPD dispatcher radio broadcast) that *a 911 caller* reported a white male, approximately 5 to 6 feet tall, wearing a dark coat and jeans *was at the lakefront public park in the 500-block of Sheridan Square*, Evanston with a gun in his right hand. (Exhibit 1, Answer to Amended Complaint ¶ 5, Exhibit 3, EPD Report, Exhibit 4, Cad Ticket, Exhibit 6, Kubiak Dep. 6:19-24, 7:1-7, Exhibit 7, Kane Dep. 9:12-18, 11:18-24, Exhibit 8, Popp Dep. 26:8-24, 27:1-3, 29:5-11, Exhibit 5, Rosenbaum Dep. 11:18-22) (emphasis added).

**Admit other than the italicized two assertions:**

- A. Dispute that the dispatcher referred to “a 911 caller.” The admitted allegation of the complaint refers to “an anonymous caller.” (Answer to Complaint, ¶ 5, ECF No. 40-1 at 2.) Nothing in the cited deposition testimony refers to “a 911 caller.”**
- B. Dispute that the dispatcher stated that the suspect “*was at the lakefront public park in the 500-block of Sheridan Square.*” The admitted allegation of the amended complaint is that the message to the officers was that a man had been seen carrying a handgun “north of the beach at 501 Sheridan Square in the City of Evanston.” (Answer to Complaint, ¶ 5, ECF No. 40-1 at 2.)**

10. Officer Kubiak was on patrol in a police vehicle in the area at the time and drove to the location. (Exhibit 9, Kubiak Int Ans at ¶ 15, Exhibit 12, Kubiak Video 14:39:11)

**Admit.**

11. At 2:40 p.m., as Officer Kubiak was pulling *up to the location*, he asked the dispatcher to repeat the description of the subject. The dispatcher responded “male, white 5’-6’, dark coat with jeans, the gun is in his right hand, it should be a black handgun. [inaudible background noise] Also, he’s supposed to be north of the beach ... on the trail.” (Exhibit 12, Kubiak Video 14:40:10)

**Response: Admit other than pulling “up to the location” (which is vague and undefined) and to the ellipses. This form of punctuation is used to signal that something has been omitted; the video does not include any omissions.**

**Kubiak asked the dispatcher to repeat the description at 14:40:07, as shown on his body worn camera, Plaintiff’s Exhibit V1.**

**Kubiak received the retransmitted description starting at 14:40:10 and parked his car at 14:41:10. He then walked slowly past about nine diagonal parking spaces before reaching plaintiff at 14:42:17. Although neither party has measured this distance, plaintiff estimates it to be 45 feet.**

**Plaintiff was on the ground, arms outstretched, with his headphones in front, under his head. (Plaintiff’ Exhibit 3 at 30, ECF No. 31-1 at 42; Plaintiff’s Exhibit V1, Kubiak’s Body Worn Camera, 14:41:10-14:42:17.)**

12. [a] *Less than one minute later*, [b] Officer Kubiak observed Plaintiff in the *same location provided by the dispatcher*. (Exhibit 6, Kubiak Dep. 12:16-19). [c] Plaintiff was wearing a dark coat and jeans. [d] Kubiak parked and exited his police vehicle and [e] proceeded toward the man from behind a non-police vehicle that was parked between him and the subject. (Exhibit 12, Kubiak Video 14:41:19)

**Response: [a] Object to “less than one minute later.” This contention does not identify the starting time for this alleged one-minute period. Assuming that the “later” relates to the amount of time that elapsed from Kubiak’s request to repeat the description to when he parked his vehicle: Admit.**

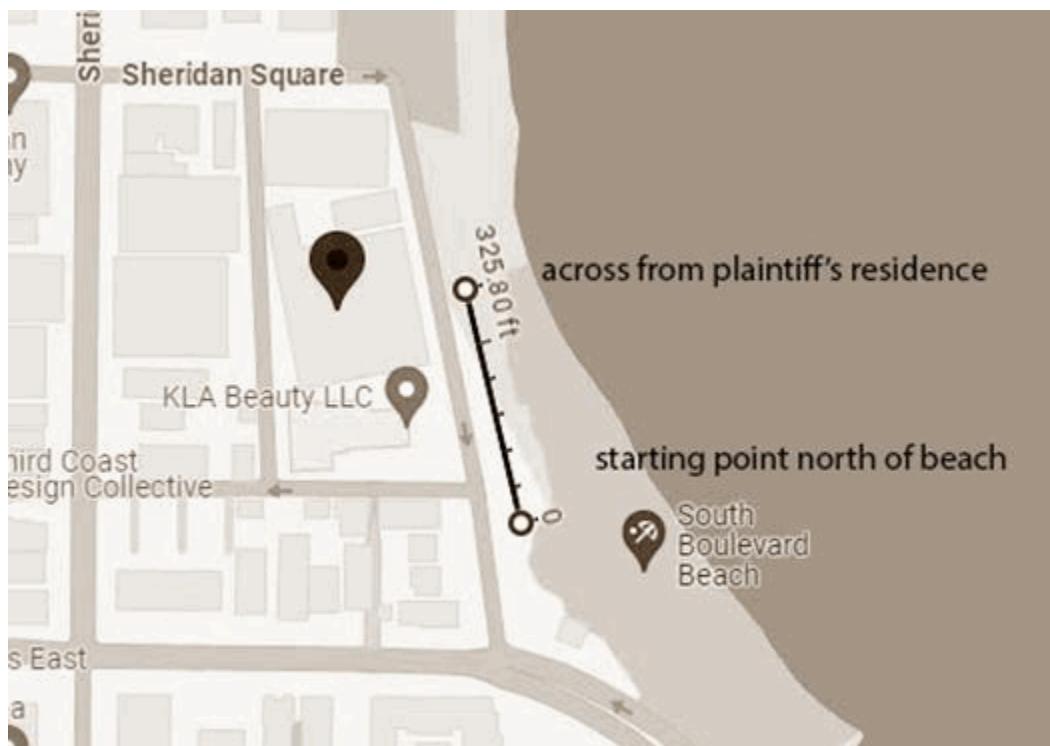
**[b] Disputed. The dispatcher provided the “location of incident” as 501 Sheridan Road (Incident Report, ECF No. 40-3) or “just north of the beach on the trail” each of Sheridan Square. (CAP Report, ECF No. 40-4.) The beach is at the south end of the park, as shown in the frame grab from Officer Brown’s body worn camera video:**



**Brown Body Worn Camera, 14:44:48  
Plaintiff's Video Exhibit V4**

Google Maps, which are the proper subject of judicial notice for estimates of distance, *United States v. Julius*, 14 F.4th 752, 756 (7th Cir. 2021), shows a distance of 325 feet from “just north of the beach” to where plaintiff was detained (across the street from his residence, as recorded on Kubiak Body Worn Camera, Plaintiff's Exhibit V1 at 14:41:4):





[c] Admit.

[d] Admit.

[e] Admit.

13. [a] Officer Kubiak observed Plaintiff holding a black object in his hand. (Exhibit 6, Kubiak Dep. 14:7-21) [b] Officer Kubiak, believing the man was armed, [c] radioed that he had “eyes on him” upon which, [d] he unholstered and drew his firearm, [e] pointed it in the direction of man and ordered him to remove his hands from his pocket and put his hands up. (Exhibit 6, Kubiak Dep. 18:1-12, Exhibit 12, Kubiak Video 14:41:22)

[a] Admit.

[b] **Objection: Kubiak’s subjective belief is irrelevant. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 404 (2006); *Thompson v. Clark*, 596 U.S. 36, 52 (2022).**

[c] Admit.

[d] **Disputed. Kubiak’s body camera shows that he took out his gun before he made the statement “eyes on him”. (Kubiak Video, 14:41:22-24, Plaintiff’s Video Exhibit V1.)**

[e] Admit.

14. [a] *Immediately after Kubiak drew his firearm*, Defendants, Kane, Popp, Rosenbaum, Pogorzelski, and other Evanston police officers responded to the scene based on the dispatch report. (Exhibit 1, Answer to Amended Complaint, ¶¶ 4, 6.) [b] Officer Kane, who had also heard the dispatcher's broadcast arrived at the scene *at or about the time* Officer Kubiak begun his approach toward Plaintiff. (Exhibit 7, Kane Dep. 9:12-18, Exhibit 13, Kane Video 14:41:22)

**[a] Nothing in paragraph 4 or paragraph 6 of the amended complaint supports the contention that Kane, Popp, Rosenbaum, Pogorzelski, and other Evanston police officers arrived at the scene “immediately after Kubiak drew his firearm.” Moreover, this contention is contradicted by the body worn camera videos. Kubiak drew his firearm at 14:41:22-24 (Plaintiff's Video Exhibit V1.) Kane arrived at the scene at 14:41:14. An unidentified officer arrived at the scene at 14:41:46, as shown in Kane's body worn camera video, which is Plaintiff's Video Exhibit V2. (*Id.*)**

**[b] Disputed as to “at or about the time.” Kane's body worn camera shows that he arrived at the scene at 14:41:14 and ran to Kubiak, who was pointing his firearm at plaintiff, at 14:41:38. (Plaintiff's Video Exhibit V2.)**

15. [a] Officer Kane deployed his firearm [b] drawn in a low ready position and [c] assisted in effectuating Plaintiff's compliance with Officer Kubiak's instructions. (Exhibit 7, Kane Dep. 15:19-22, Exhibit 13, Kane Video 14:41:40)

**[a] Admit.**

**[b] Dispute. Kane did not use the phrase “low ready” in his deposition testimony. Kane offered the opinion that “[b]ased on the video, I did not point my handgun at the subject.” (Kane Dep. 15:19-22.) Kane's body worn camera, at 14:42:01-02 (Plaintiff's Video Exhibit V2, Defendants' Video Exhibit 13) shows Kane lifting his firearm toward plaintiff, as shown in the following three videos:**



Kane's Body Worn Camera, 14:42:01



Kane's Body Worn Camera, 14:42:01<sup>1</sup>

---

<sup>1</sup> Although the body worn camera records video at 29.970 frames per second, the time shown on the body worn camera videos is limited to integer seconds. Thus, two events separated by less than one second may appear to have occurred at the same time.





Kane's Body Worn Camera, 14:42:02

**[c] Admit.**

6. “Low ready position” describes when a weapon is held by an officer with the barrel pointing down toward the ground. (Rosenbaum Dep. 49:23-24, 50:1-3, Popp Dep. 22:6-16)

**Admit.**

17. [a] At or about this same time, other Evanston police officers, including Popp, Rosenbaum and Pogorzelski arrived; [b] however, they did not actively assist Officers Kubiak and Kane in engaging Plaintiff, [c] nor did they point their firearm at Plaintiff. (Exhibit 5, Rosenbaum Dep 25:4-12, Exhibit 8, Popp Dep. 22:6-23)

**[a] Objection. Plaintiff cannot determine the meaning of the phrase “at or about this same time.” Admit that Popp, Rosenbaum, and Pogorzelski arrived on the scene after Kubiak; these officers and Kane conferred before handcuffing and searching plaintiff.**



**Brown's Body Worn Camera  
Plaintiff's Video Exhibit V4 14:42:08**

**[b] Disputed. Popp, Rosenbaum, and Pogorzelski participated in searching plaintiff: Popp searched plaintiff's outer clothing and stood by while Kane searched in plaintiff's pockets. (Plaintiff's Video Exhibit V2 at 14:42:25-35; Plaintiff's Video Exhibit V1 at 14:43:25-14:43:49; Plaintiff's Video Exhibit V4 at 14:44:02.) Defendant Pogorzelski assisted by handing her handcuffs to defendant Kane. (Plaintiff's Video Exhibit V4 at 14:42:36-37.) Defendant Rosenbaum held his rifle while defendant Kane and Popp handcuffed plaintiff. (Plaintiff's Video Exhibit V4 at 14:42:36.)**

**[c] Disputed. The two frame grabs below show defendant Rosenbaum (third officer from the left, wearing jeans and a hat) raising his right hand from a "low ready" position:**





**Conley's Body Worn Camera  
Plaintiff's Video Exhibit V5 14:42:20**



**Conley's Body Worn Camera  
Plaintiff's Video Exhibit V5 14:42:28  
(the white circle is around Rosenbaum's upraised right arm)**

Plaintiff's Exhibit 5, previously filed as ECF No. 31-1 at 45, shows Kubiak pointing his firearm at plaintiff who is on the ground, arms outstretched, headphones in front.

18. Officer Kane maintained his firearm in “low ready” position but did not at any point in time point his firearm at Plaintiff. (Exhibit 7, Kane Dep. 15:19-21, Exhibit 13, Kane Video 14:42:03)

**Disputed. See response to contention 15[b] above,**

19. [a] When Officers Kubiak and Kane approached Plaintiff, he was wearing a dark coat and jeans, [b] holding a black object in his hand. (Exhibit 12, Kubiak Video 14:41:45, Exhibit 2, Plaintiff Dep. 8:20-24, 9:1-4)

**[a] Admit.**

**[b] Disputed. Plaintiff’s Exhibit 5, previously filed as ECF No. 31-1 at 45, shows plaintiff on the ground, arms outstretched, hands open on the ground, and black headphones in front of him.**

20. [a] As Kane and Kubiak approached, Plaintiff was holding *a black cell phone in his hand*. (Exhibit 2, Plaintiff Dep. 8:20-24, 9:1-4) [b] Plaintiff also had a pair of black headphones on his person at this time. (Exhibit 12, Kubiak Video 14:42:17)

**[a] Disputed. Plaintiff followed Kubiak’s order to put his hands up (Plaintiff’s Video Exhibit V1, filed as ECF 31-1 at 27-29), and to get on the ground. (Id. at 30-34, 36-42.)**

**[b] Admit.**

21. Officer Kubiak instructed plaintiff to put his hands up (Exhibit 12, Kubiak Video 14:41:24) and to get on the ground. (Exhibit 12, Kubiak Video 14:41:30)

**Admit.**

22. Plaintiff *voluntarily complied* with Officer Kubiak’s direction. (Exhibit 12, Kubiak Video 14:41:51, Exhibit 2, Plaintiff Dep. 17:17-24)

**Admit other than “voluntarily complied.” Acquiescing in a police order of “Do what we tell you and you won’t get hurt.” (Kubiak Interrogatory Answers, ¶ 14, ECF 31-1 at 75), accompanied by “a gun pointed to the head,” is not voluntary. *Midcoast Aviation, Inc. v. General Elec. Credit Corp.*, 907 F.2d 732, 743 n.9 (7th Cir. 1990). “[T]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or convert force.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 229 (1973).**

23. Officers Popp, Pogorzelski and Rosenbaum and other Evanston police officers, had responded to the scene and were present as Plaintiff was complying with Kubiak’s directive. (Exhibit 12, Kubiak Video 14:43:31)



**Disputed. There is no evidence that officers other than Kubiak and Kane and the unknown officer depicted in Kane's body worn camera video at 14:41:46 (Plaintiff's Video Exhibit V2) were on the scene before plaintiff complied with Kubiak's order to "Do what we tell you and you won't get hurt." Kubiak's body worn camera (Plaintiff's Video Exhibit V1 at 14:43:31) shows plaintiff on the ground and being searched by Kane and Popp while Pogorzelski stood by.**

24. Defendant Officers are depicted via bodycam footage as follows:

- a. Officer Rosenbaum is holding a rifle and standing with his back to the camera. (Exhibit 7, Kane Dep. 28:24-29:3)
- b. Defendant Kane is the officer without a mask standing to plaintiff's left. (Exhibit 7, Kane Dep. 28:5-7)
- c. Defendant Popp is the officer wearing a mask, crouching to plaintiff's right. (Exhibit 8, Popp Dep. 15:17-22)
- d. Defendant Kubiak is wearing a dark uniform and no hat, standing to the right of defendant Rosenbaum. (Exhibit 5, Rosenbaum Dep. 40:13-17)
- e. Defendant Pogorzelski is wearing a hat, standing up, and close to the tree toward the left of the frame. (Exhibit 5, Rosenbaum Dep. 35:12-17)

**Admit, assuming that these contentions refer to Plaintiff's Exhibit 5 at 1-2, ECF No. 31-1 at 45-46.**

25. Officers Kane and Popp handcuffed plaintiff. (Exhibit 7, Kane Dep. 32:21-23, Exhibit 8, Popp Dep. 16:5-10)

**Admit.**

26. *Officers* explained to Plaintiff that they had received a call about a man with a gun in the park, with a handgun in his right hand. (Exhibit 12, Kubiak Video 14:42:52)

**Admit other than to the plural "officers." These statements were made only by Defendant Pogorzelski. (Burgers Body Worn Camera, Plaintiff's Exhibit V3, 14:44:40-52.)**

27. Officers Kane and Popp performed a *protective pat-down search* of plaintiff's outer clothing. (Exhibit 12, Kubiak Video 14:42:24, Exhibit 13, Kane Video 14:42:24, Exhibit 14, Brown Video 14:42:24)

Disputed as to “protective pat-down search.” The Supreme Court defined this type of search in *Terry v. Ohio*, 392 U.S. 1 (1968) as patting down the outer clothing of a suspect. *Id.* at 30. Defendant Kane admitted at his deposition that the video shows that he searched plaintiff’s jacket. (Kane Dep. 35:14-17, ECF No. 31-1 at 153.) The body worn camera videos show that the officers searched inside the pockets of plaintiff’s pants and jacket:



**Kane Body Worn Camera, Plaintiff's Video Exhibit V2 14:42:35  
Popp's Hand Going into Pants Pocket**



**Kane Body Worn Camera, Plaintiff's Video Exhibit V2 14:43:38  
Items Removed from Plaintiff's Pockets**



**Burger's Body Worn Camera, Plaintiff's Video Exhibit V3 14:44:15  
Pogorzelski's Hand Going into Inside Pocket of Jacket**

28. [a] Plaintiff was then helped to his feet by officers, [b] upon which Officer Pogorzelski requested Plaintiff's consent to search his person for firearms. Plaintiff replied, "Of course." (Exhibit 12, Kubiak Video 14:43:55)

**[a] Admit.**

**[b] Disputed.** At 14:43:56-48 of Kubiak's Body Worn Camera, Officer Pogorzelski can be heard asking: "Do you mind if we open your jacket?" The subsequent search of the contents of plaintiff's pockets exceeded the scope of any consent. *United States v. Dichiarinte*, 445 F.2d 126, 129 (7th Cir. 1971).

29. After determining Plaintiff did not have a weapon, they released him immediately. (Exhibit 4, Cad Report, Exhibit 3, Field General Report, Exhibit 12, Kubiak Video 14:47:28)

**Disputed.** The officers determined that plaintiff did not have a weapon when they conducted the pat-down search, which concluded at 14:42:36. (Kane's Body Worn Camera, Plaintiff's Video Exhibit V2.)

**Defendant Pogorzelski then gave handcuffs to Defendant Popp, who placed them on plaintiff. (Brown's Body Worn Camera, Plaintiff's Video Exhibit V4 at 14:42:36-39.)**

**After plaintiff was handcuffed, defendant Popp searched the pockets of plaintiff's jacket. See the images offered in response to Contention 27 above.**

30. Officer Kubiak arrived on scene and first encountered Plaintiff at 14:41:23. By 14:47:50 Plaintiff was released. This entire event lasted approximately 7 minutes. (Exhibit 14 Brown Video, Exhibit 12, Kubiak Video, Exhibit 13, Kane Video)

**Admit.**

31. The City of Evanston maintains a policy regarding use of force. This policy is set out in "Policy 300." (Exhibit 10, Evanston Force Policy)

**Admit.**

/s/ Kenneth N. Flaxman  
Kenneth N. Flaxman  
ARDC No. 08830399  
Joel A. Flaxman  
200 South Michigan Ave Ste 201  
Chicago, Illinois 60604  
(312) 427-3200  
*Attorneys for Plaintiff*