

309.1 IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
Brownsville Division

CHRIS PARACHINI, §
and Others Similarly Situated, §
Plaintiffs, §
VS. § C. A. NO. B- 09-228
TOWN OF SOUTH PADRE ISLAND, §
A Municipal Corporation, et al. §
Defendants. §

**PLAINTIFF CHRIS PARACHINI'S MOTION FOR LEAVE TO AMEND - SECOND
(OPPOSED)**

I Introduction

1. COMES NOW plaintiff Chris Parachini and files this motion requesting an order granting him leave to file his second amended complaint, attached as Exhibit A. In support hereof plaintiff submits for the court's consideration the matters stated herein.

II Amended Complaint - Second : Substantive Changes

2. This 'Amended Complaint - Second' makes two significant changes - it responds to defendants' motion to dismiss by adding detailed facts in support of plaintiff's claims, and deletes all but one of the state pendent claims. Plaintiff still requests any documents he requested pursuant to the Texas public information statute. Most of the added text is taken from plaintiff's response in opposition to defendants' motion to dismiss. Almost all of

these additional matters were discussed at the hearing on the motion held Friday, October 30, 2009 at 1:30 p.m.

III Prayer

4. **WHEREFORE, PREMISES CONSIDERED**, plaintiff prays the court order such relief as includes that stated below.

5. ORDER that plaintiff be given leave to file his *Amended Complaint - Second*.

6. ORDER such other and further relief as is proper and just.

Respectfully Submitted,

/s/ George Powell

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Attorneys for Plaintiffs

CERTIFICATE OF CONFERENCE - LOCAL RULE 7.1.D

I conferred with defendants' counsel prior to filing this motion. Defendants oppose this motion.

/s/ David Horton
David Horton

CERTIFICATE OF SERVICE

I certify a copy of this document was served on opposing counsel on November 3, 2009, pursuant to the Federal Rules of Civil Procedure through electronic service. I also served a copy on such counsel stated below:

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by First Class mail on Tuesday, November 3, 2009.

/s/ George P. Powell
GEORGE P. POWELL

309.2

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
Brownsville Division

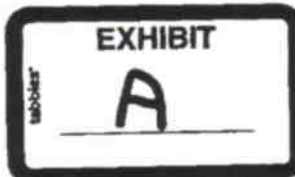
CHRIS PARACHINI,	§	
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VS.	§	C. A. NO. B- 09-228
	§	
TOWN OF SOUTH PADRE ISLAND,	§	
A Municipal Corporation, et al.	§	
	§	
Defendants.	§	

AMENDED COMPLAINT - SECOND
A Class Action Pursuant to Rule 23 - FRCP

I INTRODUCTION

A. Nature of the Case

1. This is a case brought pursuant to the Constitution of the United States of America through 42 USC §1983, based on the First, Fifth and Fourteenth amendments thereto, and the laws of the State of Texas including Article 1 §19 of the Constitution of the State of Texas. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, plaintiff brings this case on behalf of himself and others similarly situated. Plaintiff challenges the constitutionality of various ordinances of the Town of South Padre Island (Texas), both as written and as applied, including ordinances regulating 'signs', and 'commercial activity'.



2. Plaintiff alleges the town engages in a pattern and practice of unlawful conduct that violates the civil rights of inhabitants. Among other things, plaintiff contends the town unlawfully restricts 'Freedom of Expression', including 'commercial speech', the Right to Travel, and acts in ways to deny plaintiffs Due Process and Equal Protection of the law. Plaintiff seeks judicial review as to the constitutionality of the subject ordinances and conduct, a preliminary injunction, and a permanent injunction.

3. The parties have agreed to separate trials on the merits for the individual plaintiffs. The parties also have agreed to consolidated pretrial proceedings including discovery.

**B. Amended Complaint - Second :
Changes Substantive and Procedural**

4. This 'Amended Complaint - Second', pleads plaintiff Chris Parachini's claims with more specificity than the original and first amended complaint. Plaintiff pleads only one state claim - requests he has made under the Texas public information statute.

C. Exhibits

5. There is one exhibit, Exhibit A - Photographs showing Parachini's use of the 'South Padre Island' brand on his merchandise.

II JURISDICTION

6. This Court has jurisdiction pursuant to 28 USC §1330 and §1343; and the Constitution of the United States.

III PARTIES

A. Plaintiff Chris Parachini

7. Plaintiff Chris Parachini and his wife owned a retail shop in and lived in the town during 2006 - 2008. During such time his business was subject to the various challenged sign ordinances. If he decides to resume operating a shop in the town he will be subject to the regulations again.

B. Defendants

8. Defendant Town of South Padre Island, Texas is a municipal corporation under the laws of Texas. Defendants Robert Pinkerton Jr., mayor of South Padre Island, and the City Manager, are sued in their official capacities. Dewey Cashwell is no longer City Manager; resigned in or about September 2009.

IV SERVICE OF PROCESS

9. All defendants have been served and filed an answer.

V STATEMENT OF THE CASE

A. Introduction

1. The Town of South Padre Island, Texas

10. The Town of South Padre Island is located on South Padre Island, a barrier island in the Gulf of Mexico, about three miles east of the southern tip of Texas. South Padre Island is a small town, a village only three (3) blocks wide and about five (5) miles long. There are about 2000 permanent residents. The town is part

of the Rio Grande Valley, an area that includes three counties on the Texas - Mexico border.

11. The village on the island was incorporated as a town in 1974. Under Texas law it is a 'general law' town, rather than a 'home rule' city. This means the town government is controlled by the Texas Local Government Code, rather than a local Charter. As a general law town, the local government can do only what is specifically permitted by statute and the state's constitution. The Board of Aldermen in 2009 declared the town has more than 5000 residents and therefore is entitled to 'home rule'. The proposed city charter is on the ballot for the November 3, 2009 election.

2. The Local Economy : Real Estate and Tourism

12. The island has a fragile economy because of two factors, its location and its limited economic base. The town's economy depends on two industries, real estate and tourism. The island is located in an area prone to natural disasters - hurricanes. A major hurricane (Dolly) struck the island in July 2008, causing extensive property damage and devastating the local economy. The economy still struggles to recover.

13. The island is a regional recreation area. Tourism and real estate are the island's economy. Tourism is vital, but it is seasonal. The warm months are the peak season. These events bring thousands of tourists and millions of dollars to the island.

14. As local businesses struggle to survive, the business environment is very competitive. Local businesses must aggressively advertise in an effort to compete successfully. The 'seasonal' nature of the economy makes advertising all the more important.

3. The Town Strictly Regulates Business Activity.

15. The town strictly regulates business activity. The restrictive ordinances adversely affect plaintiff and persons similarly situated. Plaintiff's claims are based on regulatory ordinances and how the town enforces them. Some of these ordinances are reviewed below.

a. Sign Regulations

16. Among the commercial matters regulated by such ordinances are signs, paint schemes on commercial buildings ('one base and two trim' colors), the definition of 'art' (what is and is not 'art'), prohibition of murals on walls, the amount sign space (square feet) a merchant can display *inside* his store, the content of the information a shop can display on its door, portable signs in front of stores (for example, signs show the 'daily specials' at restaurants), banners, flags ('ariel' signs), and outdoor merchandise displays (prohibited).

17. The town even regulates the type of structure to which signs can be attached. Signs must be mounted on a rectangular box (a 'monument' sign), not a pole. 'Pole signs' are against the law.

At present the town is considering making merchants use shorter rectangular boxes.

18. The Development Design Review Board ('DPRB') is the town's body that reviews sign permits and building plans. The DPRB routinely applies the 'paint scheme' ordinance to give it the power to approve or reject the actual color the applicant can use. Historically the DPRB has engaged in a pattern and practice of conduct in violation of the constitutions and the Texas Open Meetings Act.

b. Other Regulations : No Handbills or Coupons

19. Local ordinances prohibit individuals from passing out handbills. Although businesses are not allowed to pass out handbills, town officials allow young people during Spring Break to pass out pamphlets advertising free rides, food and religious activities affiliated with the local Baptist Church¹.

4. Plaintiff Chris Parachini

20. Plaintiff Chris Parachini was subject to all of the challenged ordinances while his wife and he operated a retail gem shop in the town in or about 2007 - 2008. If he reopens his shop he will be subject to the regulations again.

a. Plaintiff Seeks to Protect Commercial Speech.

21. Plaintiff and others similarly situated engage in commercial speech to advertise their businesses. The town's

¹ The town's attorney belongs to the local Baptist Church.

ordinances and conduct including the actions of the Development Plan Review Board, restrict commercial speech and violate plaintiff's rights under the First Amendment. They have reason to believe and do believe that the town may prosecute them for violations, otherwise limit their right to advertise, or both in the future.

b. Plaintiff Seeks to Protect The Right to Freedom of Expression.

22. Plaintiff and others similarly situated rely on their right to Freedom of Expression to advertise their businesses. The town's ordinances and conduct including the actions of the Development Plan Review Board, restrict commercial speech and violate plaintiff's rights under the First Amendment. They have reason to believe and do believe that the town may prosecute them for violations, otherwise limit their right to advertise, or both in the future.

c. Retaliation : Plaintiff's First Amendment Rights

23. Plaintiff alleges the enforcement of local ordinances by the town is often selective and frequently punitive. Enforcement is often more a matter of local politics than the Rule of Law. Plaintiff fears the town will retaliate against him because he has complained to officials regarding matters of public importance and filed this case. With this in mind, plaintiff requests the court to order defendants not to retaliate against him because he has asserted his rights under the Constitution of the United States.

B. Specific Matters Re Chris Parachini's Claims

1. The Parachinis Come to Town.

24. Chris Parachini and his wife moved to the Town of South Padre Island in December 2006. In February 2007 they opened Paradise Gems, a store selling semiprecious gems and jewelry². Chris Parachini still owns and operates the South Padre Island Pearl Company and Paradise Gems (www.southpadrepearlsandgems.com). He is a Texas resident and maintains a business address in the Town of South Padre Island. He regularly solicits sales from retailers on South Padre Island.

25. Parachini produces a line of jewelry called the 'North Beach Collection'. He has invested a significant amount of time and money using the name 'South Padre Island' to 'brand' his products (See attached Exhibit A.). Given his efforts to brand his merchandise with the association to 'South Padre Island', he wants to return to the island as part of his business plan. Even though he does not now have a 'brick and mortar' shop in the town, he regularly does business there.

26. In December 2007 a local police officer came to their store to buy a gift for his fiancée. The officer told them he would like to be friends, and even offered to "protect" their store

² The Parachinis moved the store to Port Isabel in January 2008 because of the illegal activities near their store and perceived public corruption in the Town of South Padre Island. They continued to live in the Town of South Padre Island until September 2008.

while on duty. Parachini asked him about the three illegal gambling casinos near his store.

27. The officer told them there was much organized crime on the island and having him for a friend would give them "special protection" from "problems." The officer told him order was kept on the island using "different than normal means." He even stated the Chief of Police had said "Who cares if some little old lady wants to blow her Social Security check on slot machines?"

28. In time the police officer and the Parachinis became friends. The officer even helped them move their store to Port Isabel in January 2008. He used a police department vehicle and trailer to move the safe.

29. The ordinances Parachini challenges restrict the merchant's ability to advertise his business. Among them are ordinances that (1) mandate what messages (words, as in 'speech') a merchant can be put on his store's front door, (2) limit the square feet on advertising *inside* the store, (3) define what is and is not 'art', (4) mandate the shop's paint scheme, (5) regulate what type of lighting can be used both inside and outside the store, (6) prohibit murals, (7) prohibit passing out handbills to advertise, and (8) prohibit 'portable' signs outside (e.g, to advertise the 'daily special'). One ordinance is applied, although not so written, to let the town select the colors a person can use to paint his store. Parachini's business was and is subject to the

challenged ordinances.

30. Parachini was given a citation for violating the 'interior lighting' ordinance. Other merchants with the same lighting were allowed to use it. Parachini tried to distribute coupons advertising his merchandise, but a Code Enforcement officer told him he could not do so because such was prohibited. Parachini observed and suffered selective enforcement.

2. A Police Affair

31. While Parachini was traveling on business in May 2008, he asked the officer to help his wife with a project. The officer was more than helpful. Parachini's wife and the police officer began an intimate affair which continued during May - August 2008. In August 2008 Parachini's wife finally told him about the affair with the police officer. She also told him many things the officer had told her during the affair. Some of these matters are relevant and are reviewed below.

C. Illegal Activity in the Town: Casino Gambling, Drugs and Public Corruption

1. Casino Gambling : Las Vegas Offshore

32. The Parachinis observed what to them appeared to be illegal gambling in the 'game rooms' near their store. There were three such 'casinos' within a block of his store - one in Jake's Restaurant, one in the same complex with Jake's, and another in the building in which Parachini's store was located. Once while eating

in Jake's Restaurant Parachini observed the door to the 'game room' open and he saw what appeared to be people gambling³

33. Parachini observed what appeared to him to be pervasive open and notorious illegal gambling. He observed every or almost every day, town employees in a town vehicle would park in front of his store, exit the vehicle, and go into the 'game room' in his building. The driver would then park the vehicle around the corner and go into the 'game room'. Mayor Pinkerton would often park directly in front of Parachini's store, and walk across the street to Jake's restaurant⁴.

2. Drugs - Allegations of Dealing, Trafficking and Public Corruption

34. During the time Parachini lived on the island there was constant talk among residents about illegal drug activity. Drug paraphernalia sometimes littered the streets. Taxis were seen going to houses and making deliveries at all hours.

35. While explaining "How things really work in the Town of South Padre Island," the officer told the Parachinis about an incident in which he was involved when he was still a rookie. In or about 2005 or early 2006 two well known and respected local

³ In or about September 2009, after much public complaining about the illegal gambling, a local television news reporter conducted a 'hidden camera' interview in one of the 'game rooms'. The employee told the reporter the gambling was "just like Las Vegas" and winners are paid in cash.

⁴ The owner of Jake's Restaurant (Jake Falgout) and the Mayor Pinkerton are long-time friends. Mr. Falgout was and is an active supporter of the mayor.

residents, man and wife, were walking on the beach in or near the Isla Blanca Park early one morning. They observed a 'zodiac' boat land on the beach in the park, and its crew began unloading packages from the boat and loading them into an SUV. The woman called 911 and requested police assistance ⁵.

36. The SPIPD dispatched a patrol car. The rookie officer was in the vehicle, being trained by a senior officer. The police officer told the Parachinis that when they reported what they observed at the scene - an SUV leaving the scene, and man and woman on the beach - 'headquarters' told them to 'stand down', let the SUV go, and to proceed to question the witnesses. The SUV with the 'unknown' cargo drove away unimpeded.

37. She told him the officer arranged for her to obtain illegal drugs from a drug dealer living below the officer in the officer's apartment building which is across the street from city hall and the mayor's house. The officer told her he was 'protecting' the drug dealer, and that she could obtain drugs from the dealer as long as she was having sex with the officer.

38. According to Parachini's wife, the police officer would often brag about the corruption within the police department. He told her his job was secure because he knew so much about misconduct within the department. Such matters included sex at the

⁵ The woman advised a member of the town's Board of Aldermen about the incident at the time it occurred. This corroborates in part the police officer's statement to the Parachinis.

workplace between a senior officers and a female employee, the chief's extramarital affair with the daughter of a member of the Board of Aldermen⁶, and the dismissal of a DWI case against a city official who he had stopped and arrested⁷.

39. The police officer suggested to Parachini's wife that she call the police department and make a report of 'domestic violence' so he could arrest her husband. He also asked her to take gold, silver and loose unmounted gemstones to his apartment⁸. But instead of complying she told Parachini.

40. Parachini complained to town officials regarding what he believed to be public corruption related to drug trafficking. Both Parachini and his wife reported their concerns about illegal drug dealing, gambling and public corruption to town officials. They filed formal written complaints with the police department, city manager, and the Board of Aldermen including the defendant mayor. They also filed detailed written complaints. Because of their complaints regarding this matter of public concern, they were - and

⁶ After much public discussion about Parachini's allegations, the town's Chief of Police resigned by taking early retirement in September 2009.

⁷ According to the wife, the officer told her his knowledge of such matters served to protect him within the department.

⁸ The officer learned the contents of the safe and inventory of jewelry when he moved the safe to the new store in Port Isabel (See page 4, ¶9, above.). These are also items without any identifying serial numbers.

are - afraid for their safety.⁹ The town officials did not respond to their complaints.

41. Parachini called the chief of police and asked the status of the complaint regarding the police officer. The chief told him a "dishonorable citation" had been placed in the officer's personnel file. When Parachini questioned the apparent leniency, the chief told him the officer was an "honorable police officer," and demanded Parachini go directly to the police station to take a lie detector test. Parachini began to fear for his family and his own safety¹⁰.

D. Selective Enforcement

42. Parachini observed many examples of selective enforcement of the law, including the 'sign' ordinances. They observed some merchants could violate the sign ordinances, while others, including them, were held to strict compliance. Examples are given below.

43. The "game room" two doors west of Parachini's shop had on its door the sign 'AAA Lock & Key'. But the place was a 'game room' not a locksmith shop. The 'locksmith' shop contained slot

⁹ During their affair Ms. Parachini says the officer bragged to her about beating two handcuffed suspects on the same shift on two separate occasions. He told her there was so much blood he had to change into a new uniform.

¹⁰ Parachini notified the members of the Board of Aldermen regarding his fear of retaliation by the police department. He also volunteered to take a polygraph test before the Board.

machines. Local ordinance prohibits advertising goods or services where such are in fact not available. The proprietor served food and drinks without a town permit to do so.

44. In the spring of 2007 Parachini installed a flashing light inside his store in order to attract customers from among the persons parking in the building's parking lot. A Code Enforcement office told Parachini the flashing light was a violation of an ordinance, and gave him a citation. In contrast, at the same time other businesses were allowed to use flashing lights to attract customers¹¹.

45. Parachini and his wife were active in local civic affairs while he had his store on the island. Parachini served on the Planning and Zoning Board; his wife served on the Food Services committee. They were nominated and appointed by the three (3) person majority of the Board of Aldermen that was viewed as the opposition to the mayor.

E. Fear and Fear of Retaliation - Past and Present

46. In fear that the police officer and local officials would arrest him, Parachini gave \$3000.00 cash to a local minister, asking him to post bail for him if he were arrested. The police officer learned of Parachini's contact with the local minister, and

¹¹ These include Jake's Restaurant and 'game room', the two other 'game rooms' near Parachini's store, and a large beach wear shop on Padre Boulevard near the Post Office.

told Parachini's wife the minister's church would not be 'protected' if 'something bad' were to happen at the church.

47. Local citizens warned the Parachinis of their dangerous circumstance in the town. After consulting with legal counsel, the Parachinis returned to their home state of Nebraska temporarily in October 2008. In September 2009 they returned to Texas, where they now live. Chris Parachini does business throughout Texas, including the Town of South Padre Island.

48. Parachini is a source of irritation and embarrassment to local government officials. He has made public complaints regarding both matters of personal concern - an intimate affair between his wife and an SPIPD police officer, and public concern - illegal gambling and drug trafficking¹². He has opposed what he perceived to be unethical conduct by a police officer, the police chief and the city manager.

49. Chris Parachini wants to return to the Town of South Padre Island to operate his business. But he fears town officials may retaliate against his family and him if he returns. If the Parachinis could be assured of their safety and equal treatment under the law, they would return to the town of South Padre Island.

¹² Parachini has many email messages sent to and received from town officials and community leaders contemporaneous with the events.

Because of fear of retaliation, the Parachinis do not want to disclose their current residence¹³.

VI CLAIMS

A. Federal Claims

50. Plaintiff alleges the defendants have acted and continue to act with deliberate indifference to violate plaintiff's recognized civil rights, including their rights to Free Expression, Due Process, and Equal Protection of the law under the First, Fifth and Fourteenth Amendments to the Constitution of the United States, and similar provisions in the Constitution of the State of Texas.

51. Both as to enacting and enforcing the various sign ordinances, the pattern and practice of violating citizens rights under the First, Fifth and Fourteenth Amendments to the Constitution is well known to the members of the town's governing authority, the Board of Aldermen.

52. The defendants and other officials of the town have acted individually and collectively under color of state law to violate plaintiffs' rights guaranteed by the First, Fifth and Fourteen Amendments to the Constitution of the United States, 42 USC §1983 and Art. 1 §19 of the Constitution of the State of Texas.

VII CLASS ACTION

¹³ Chris Parachini continues to be the object of belligerence on the town's 'blog', the South Padre Island Forum (southpadreislandforum.com). Mayor Pinkerton is a frequent contributor to the forum.

53. Pursuant to Rule 23 of the Federal Rules of Civil Procedure plaintiff brings this case on behalf of himself and others similarly situated. Plaintiffs allege the matters at issue meet the requirements of Rule 23(a).

54. Plaintiff alleges the requirements of Rule 23(b)(2) are satisfied in that the town has in fact "acted ... on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole"

55. Plaintiff alleges the requirements of Rule 23(b)(3) are satisfied in that the "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

VIII CONCLUSION

56. Based on his complaint and matters stated herein, Parachini has shown how he was and is affected by the challenged ordinances, selective enforcement and the town's refusal to enforce state law. He does business in and wants to return to the Town of South Padre Island. He resides in Texas, but fears retaliation by town officials if he returns. If he were to return and reopen his store, he believes it is likely he will suffer the same harm as before - restrictions on advertising his goods and punitive

selective enforcement of local ordinances. A favorable decision and order by the court would remedy his concerns.

IX PRAYER FOR RELIEF

57. WHEREFORE, plaintiffs pray the court award such relief as includes that stated below.

58. REVIEW the subject ordinances for the purpose of determining their constitutionality.

59. ORDER the certification of appropriate classes.

60. ORDER the town to enforce state law regarding illegal gambling.

61. ORDER the town to cease and desist in its practice of selective enforcement of the law.

62. ORDER the town not to retaliate against Chris Parachini and his wife because they have asserted their rights under the Constitutions of the United States and the State of Texas.

63. ORDER defendants to pay monetary damages to plaintiff as provided by law.

64. ORDER defendants to pay compensatory damages to plaintiff as provided by law.

65. ORDER defendants to pay plaintiff's court costs and reasonable attorney's fees.

66. ORDER that the court maintain continuing jurisdiction over this case for four (4) years from the date of the court's final judgement.

67. ORDER such other relief to which is proper and just.

Respectfully Submitted,

/s/ George Powell

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

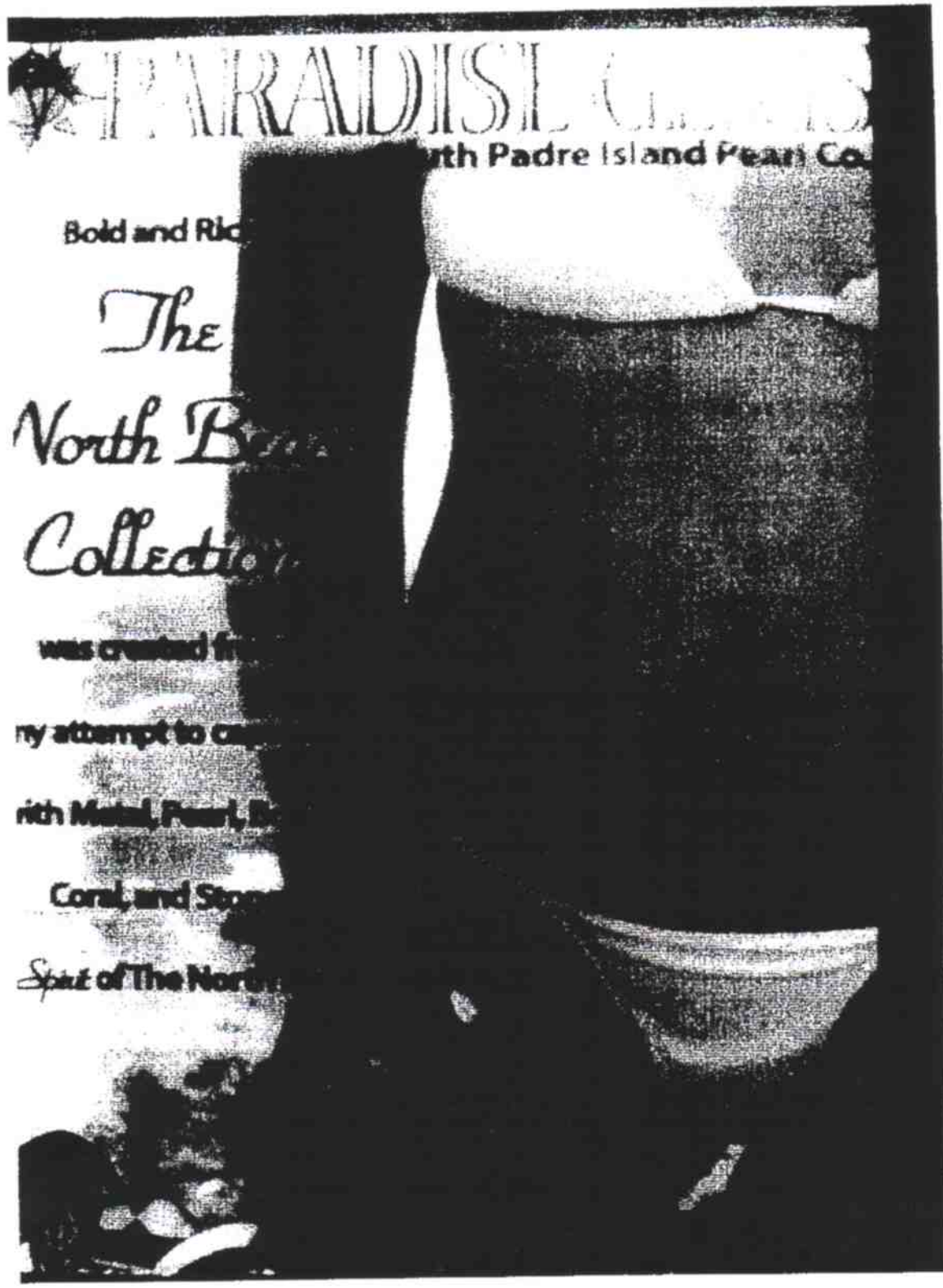
I certify a copy of this document was served on opposing counsel on November 3, 2009, pursuant to the Federal Rules of Civil Procedure through electronic service. I also served a copy on such counsel stated below:

Mr. Jeffrey Roerig
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by First Class mail on Tuesday, November 3, 2009.

/s/ George Powell
GEORGE P. POWELL

Case 1:09-cv-00228 Document 17-2 Filed in TXSD on 11/03/2009 Page 21 of 21



Sent from my iPhone

EXHIBIT
 A

309.0 IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
Brownsville Division

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Defendants. §

O R D E R / O N :
PLAINTIFF CHRIS PARACHINI'S MOTION FOR LEAVE TO AMEND - SECOND

1. On this the _____ day of _____, 2009, this case came on for consideration upon *PLAINTIFF CHRIS PARACHINI'S MOTION FOR LEAVE TO AMEND - SECOND*. Having considered the law, evidence, and arguments of counsel, the court is of the opinion that the motion should be, and hereby is, GRANTED. Accordingly, such relief is awarded as is stated below.

2. ORDERED that plaintiff be, and hereby are, given leave to amend his complaint.

3. ORDERED that the Clerk shall file plaintiff's *AMENDED COMPLAINT - SECOND*, which was attached to plaintiffs motion as an exhibit.

4. The Clerk shall send a copy of this order to all counsel of record.

5. Done this _____ day of _____, 2009 at
Brownsville, Texas.

Felix Recio
United States Magistrate Judge