

1 Leonard J. Porto III
2 xxxxxxxxxxxxxxxxxxxxxx
3 P.O. Box 354
4 Corona Del Mar, CA 92625
5 xxxxxxxxxxxxxxxxxxxxxx
6 In Propria Persona
7

8 United States District Court
9 Central District of California
10 Southern Division

11 Leonard J. Porto III,
12 Plaintiff,
13 v.
14 CITY of LAGUNA BEACH, a political entity;
15 CITY of LAGUNA BEACH MARINE
16 SAFETY DEPARTMENT, a political entity;
17 MARINE SAFETY CHIEF MARK
18 KLOSTERMAN,
19 LIFEGUARD TRAVIS LOWREY,
20 LIFEGUARD THOMAS F. McGERVEY,
21 LIFEGUARD MIKE SCOTT,
22 individually and in their official capacity;
23 CITY of LAGUNA BEACH POLICE
24 DEPARTMENT, a political entity;
25 POLICE OFFICER ALFRED COLLAZO,
26 POLICE OFFICER RYAN DOMINGUEZ,
27 POLICE OFFICER MICHAEL DONOHUE,
28 POLICE OFFICER ZACH MARTINEZ,
individually and in their official capacity;
DOES 1 through 10,
Defendants.

Case Number:
SA CV 08547 DOC (MLGX)

PLAINTIFF'S
FIRST AMENDED COMPLAINT
FOR:
DAMAGES
DECLARATORY RELIEF
INJUNCTIVE RELIEF

DEMAND FOR JURY TRIAL

25 COMES NOW the Plaintiff, Leonard J. Porto III, In Propria Persona,
26 and hereby complains of the Defendants, and each of them, jointly and
27 severally, upon information and belief, and respectfully alleges before this
28 honorable Court:

1 12. DOES 1 through 10 refer to persons or entities that engaged in, were
2 aware of, participated in, and/or directed the acts alleged herein. Plaintiff is
3 unaware of the true names and capacities of Defendants DOES 1 through
4 10, therefore sues those defendants by fictitious names. Plaintiff will seek
5 leave to amend this Complaint to reflect true names and capacities.

6 13. At all times relevant to this complaint, including several years prior,
7 all Defendants were acting within the scope of their employment for the
8 City of Laguna Beach, and under color of law. They are sued in both their
9 official and individual capacity for damages. They acted recklessly and in
10 bad faith, knowing their conduct violated well established and settled law,
11 and demonstrated a callous indifference to the state and federally protected
12 rights of Plaintiff. Plaintiff is entitled to recover punitive damages against
13 them individually. As a result of deprivation of constitutional rights by
14 these “stalking horses”, Plaintiff suffered damages in the form of pain and
15 suffering, for which he seeks compensatory damages against defendants in
16 their official as well as individual capacity. All Defendants are persons.

17 **FACTUAL ALLEGATIONS**

18 14. During a span of several years prior to this Complaint, Plaintiff has
19 consistently warned City lifeguards and police officers “as stalking horses”
20 that their custom, policy, and practice of issuing citations to divers and
21 harassing divers by confrontational questioning, were in violation of
22 Plaintiff’s constitutional and civil rights. Marine Safety Officer Calle Allison
23 was present during at least two of these incidents, joining in courteous and
24 polite conversation with Plaintiff in length concerning those rights.

25 15. On Monday, July 2nd, 2007, at approximately 4 p.m., nearing low
26 tide, Plaintiff and a friend, Mr. James Dodge, travelled underwater from
27 Boater’s Canyon (also known as Fisherman’s cove) to Shaw’s cove in
28 Laguna Beach, California. Plaintiff and Mr. Dodge are both advanced and

1 rescue certified divers, trained by multiple internationally recognized
2 agencies, and are insured members of the Divers Alert Network (DAN).
3 Each has completed over 300 dives. Plaintiff and Mr. Dodge initiated
4 contact with and advised the lifeguard on duty they would not be returning
5 to boater's canyon after their dive, and would be exiting at Shaw's cove.

6 16. Plaintiff and Mr. Dodge were confronted upon their exit from the
7 ocean by lifeguards, police and other individuals. Plaintiff suggested
8 conversation continue at Laguna Sea Sports, where Plaintiff's vehicle was
9 parked. After Plaintiff walked to his parked vehicle at Laguna Sea Sports to
10 remove his scuba gear, the Defendants, and Mr. Dodge, arrived at Laguna
11 Sea Sports parking lot. Plaintiff's first thought was to call an attorney.

12 17. Four separate demands were made by Plaintiff to contact his
13 attorney, Mr. Robert A. Garretson, by cell phone. Plaintiff was permitted to
14 contact his attorney by a police officer after the fourth demand. Officer
15 Michael Donohue then committed assault and battery against Plaintiff by
16 removing Plaintiff's cell phone out of Plaintiff's hand and placing him in a
17 pain compliance hold, effectively and unlawfully arresting Plaintiff.

18 18. After Plaintiff's attorney arrived on the scene, Officer Alfred Collazo
19 cited Plaintiff for violating Laguna Beach Municipal Code (LBMC) §
20 18.21.030B, recorded on the Notice to Appear # LG57510 as "failure to obey
21 lifeguard (diving)", a misdemeanor violation.

22 19. Officer Collazo was not present during the alleged violation at
23 Boater's Canyon. Mr. Thomas F. McGervey, the lifeguard alleging "failure to
24 obey" was not present during issuance of the citation at Laguna Sea Sports.

25 20. After arriving at Laguna Sea Sports, Mr. Garretson, a licensed
26 California attorney and certified diver, observed the citation process. On a
27 subsequent day, a lifeguard present during the citation process admitted to
28 Mr. Garretson that Plaintiff was intentionally targeted for citation.

1 21. The City Police Department refused two requests for a police report
2 made in person by Plaintiff and Mr. Garretson. Plaintiff has been required
3 to appear at two arraignment hearings on August 15th, 2007, and October
4 3rd, 2007. On both dates, the City did not provide the necessary paperwork
5 to the court, preventing Plaintiff from “having his day in court”, resulting in
6 the misdemeanor charge left “as a hanging fire” over Plaintiff.

7 22. Mr. Dodge was not cited, though present with Plaintiff.

8 23. Defendant lifeguard Mr. McGervey signed a Statement of a Private
9 Person’s Citizens Arrest for violation of LBMC § 05.14.105, “Disobeying a
10 lifeguard”. This code section does not exist.

11 24. This contrasts with Defendant Officer Colazzo’s citation for violating
12 LBMC § 18.21.030B, “failure to obey lifeguard (diving)”.

13 25. The County D.A. “declined to prosecute in the interest of justice”.

14 **I**

15 **PLAINTIFF’S CLAIM UNDER 42 U.S.C. §§1983, 1986 AGAINST OFFICER**
16 **MICHAEL DONOHUE IN HIS OFFICIAL AS WELL AS INDIVIDUAL**
17 **CAPACITY AND THE CITY OF LAGUNA BEACH FOR MUNICIPAL**
18 **LIABILITY**

19 26. At all times Defendant officer acted under color of state law, as a City
20 of Laguna Beach Police Officer.

21 27. In his capacity as a police officer, this Defendant, on July 2nd, 2007,
22 intentionally deprived Plaintiff of his fourth amendment constitutional
23 right to be free from unreasonable search and seizure. Defendant subjected
24 Plaintiff to excessive use of force by removing Plaintiff’s cell phone from
25 him while in conversation with his attorney, and inflicting a pain
26 compliance hold upon Plaintiff. Negligence allowed the violation.

27 28. Defendant, by using such unreasonable and excessive force, caused
28 injury and damage to Plaintiff.

1 29. Defendant knowingly interfered with Plaintiff's attorney/client
2 communication.

3 30. As a proximate cause of said deprivation of constitutional rights, the
4 Plaintiff suffered damages in the form of pain and suffering, for which he
5 seeks compensatory damages against the defendant in his official as well as
6 individual capacity.

7 31. The conduct of this defendant was reckless and demonstrated a
8 callous indifference to the federally protected rights of Plaintiff, entitling
9 Plaintiff to recover punitive damages against him individually.

10 **II**

11 **CLAIM AGAINST THE CITY OF LAGUNA BEACH**

12 **FAILURE TO TRAIN POLICE OFFICERS**

13 32. Plaintiff repeats and re alleges paragraphs 6 through 13, as if
14 expressly set forth at length.

15 33. The training program of the City of Laguna Beach Police Department
16 was not adequate to prevent its officers from using excessive force or
17 violating Plaintiff's rights.

18 34. The failure to provide proper training was a proximate cause setting
19 into motion the deprivation of the Plaintiff's rights protected by the Fourth
20 Amendment of the Constitution, as set forth in claim one.

21 **III**

22 **CLAIM UNDER 42 U.S.C. §§ 1983, 1985, & 1986 AGAINST LIFEGUARD**

23 **THOMAS McGERVEY IN HIS OFFICIAL AS WELL AS INDIVIDUAL**

24 **CAPACITY AND THE CITY OF LAGUNA BEACH FOR MUNICIPAL**

25 **LIABILITY**

26 35. Plaintiff repeats and re alleges paragraphs 6 through 13, as if
27 expressly set forth at length.

28 36. Plaintiff was unlawfully placed under citizen's arrest by Mr.

1 McGervey, and falsely accused of disobeying Mr. McGervey, who lacked any
2 definably clear and compelling reason for arresting Plaintiff based on a non
3 existent LBMC § 05.14.105. Negligence allowed the violation.

4 **IV**

5 **CLAIM AGAINST THE CITY OF LAGUNA BEACH**

6 **FAILURE TO TRAIN LIFEGUARDS**

7 37. Plaintiff repeats and re alleges paragraphs 6 through 13, as if
8 expressly set forth at length.

9 38. The training program of the City of Laguna Beach Marine Safety
10 Department was not adequate to train Defendant lifeguards in how and
11 when to close beaches or perform citizen's arrests based on specific written
12 or published guidelines.

13 39. City of Laguna Beach Marine Safety Department Chief Mark
14 Klosterman was deliberately indifferent to the need to train and certify his
15 tower lifeguards as divers. It is custom, practice, or policy to not require
16 dive certification for tower lifeguards. The failure to provide proper training
17 was a proximate cause setting into motion the deprivation of the Plaintiff's
18 constitutionally protected rights.

19 **V**

20 **VIOLATIONS OF THE FIRST AMENDMENT**

21 *"Congress shall make no law . . . abridging the freedom of speech . . . or the right*
22 *of the people peaceably to assemble, and to petition the Government for a redress of*
23 *grievances". (U.S.C.A. Const. Amend. 1)*

24 40. Plaintiff repeats and re alleges paragraphs 6 through 13, as if
25 expressly set forth at length.

26 41. Plaintiff's right of free association is violated by the prohibition of
27 solo diving in LBMC § 18.21.030.

28 42. Plaintiff was punished for exercising free speech by criticizing

1 the City lifeguard's actions for several years, while enjoying the pursuit of
2 ocean related recreational activity.

3 43. Forcibly removing Plaintiff's cell phone without warning or reason,
4 knowing Plaintiff was speaking with his attorney, violates free speech.

5 44. Plaintiff is forbidden to assemble with others to instruct or teach,
6 specifically in diving, during the hours most conducive to instruction on
7 City beaches for four summer months every year by LBMC § 18.21.050,
8 lacking any clearly defined or compelling reason for these restrictions.

9 45. Plaintiff's right to travel between coves in the City was violated by
10 LBMC § 18.21.030.

11 **VI**

12 **VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS**

13 *"No Person shall be deprived of life, liberty, or property, without due process*
14 *of law. . . ."* (U.S.C.A. Const. Amend. 5)

15 *No state shall ". . . . deny to any person within its jurisdiction the equal protection*
16 *of the laws."* (U.S.C.A. Const. Amend. 14)

17 46. Plaintiff repeats and re alleges paragraphs 6 through 13, as if
18 expressly set forth at length.

19 47. Plaintiff has been charged with a misdemeanor for allegedly
20 violating an unconstitutionally vague LBMC § 18.21.030b, as applied to
21 Plaintiff, and a non existent LBMC § 05.14.105. Plaintiff suffered an
22 unjustified citizen's arrest, lacking definably clear or compelling safety
23 concerns.

24 48. The City attempted to inflict an excessive penalty upon Plaintiff,
25 given the minor nature of alleged violation.

26 49. City dive ordinances are unconstitutionally vague, as applied to
27 divers trained and certified by internationally recognized agencies.

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1 **II**

2 **FALSE ARREST AND IMPRISONMENT**

3 50. Plaintiff repeats and re alleges paragraphs 6 through 13, as if
4 expressly set forth at length.

5 51. Plaintiff was placed under citizen's arrest based on false accusations
6 of disobeying a lifeguard, violating a non existent LBMC § 05.14.105 and
7 unconstitutionally vague LBMC § 18.21.030b, as applied to Plaintiff.

8 52. Plaintiff was unlawfully detained in a very threatening manner by
9 Defendants at both Shaw's Cove and Laguna Sea Sports parking lot.

10 53. Plaintiff was arrested by Officer Donohue's "pain compliance hold".

11 **VIII**

12 **INTENTIONAL AND NEGLIGENT INFLICTION OF EMOTIONAL**

13 **DISTRESS**

14 54. Plaintiff repeats and re alleges paragraphs 6 through 13, as if
15 expressly set forth at length.

16 55. Defendant's actions and operation as "stalking horses" caused
17 Plaintiff to suffer severe mental distress and humiliation by:

- 18 a. Obstructing Plaintiff's movements after exiting the ocean, while
19 Plaintiff was wearing over 75 pounds of scuba gear.
- 20 b. Surrounding and detaining Plaintiff at Laguna Sea Sports and
21 refusing Plaintiff's first three requests to contact an attorney.
- 22 c. Forcibly removing Plaintiff's cell phone without warning or reason,
23 knowing Plaintiff was in contact with his attorney.
- 24 d. Committing assault and battery with a "pain compliance hold",
25 while searching Plaintiff in public view.
- 26 e. Refusing to provide a police report to Plaintiff or his attorney.
- 27 f. Requiring Plaintiff to appear for two arraignments.
- 28 g. Failing to advise Plaintiff that the District Attorney would not

1 prosecute “in the interest of justice”.

2 h. Requiring Plaintiff to resort to litigation to prevent further abuse.

3 i. Intimidating Plaintiff with a show of force by Defendants on
4 several occasions, resulting in deep anxiety, vulnerability, and loss
5 of reputation, if Plaintiff chose to continue diving in the City.

6 j. Causing the anxiety, anguish, and humiliation, over several years,
7 of facing confrontational City lifeguards and police.

8 k. Damaging Plaintiff’s passion for diving in the City’s unique coves.

9 **IX**

10 **SELECTIVE AND VINDICTIVE ENFORCEMENT, CONSPIRACY**

11 56. Plaintiff repeats and re alleges paragraphs 6 through 13, as if
12 expressly set forth at length.

13 57. Plaintiff and Mr. Dodge were associating as divers to travel under
14 the navigable waters of the City between two adjacent coves.

15 58. Plaintiff and Mr. Dodge entered and exited the ocean together, were
16 both confronted at Shaw’s Cove and the parking lot of Laguna Sea Sports
17 together, yet Plaintiff only was placed under citizen’s arrest and cited.

18 59. On a subsequent day, a lifeguard present at Laguna Sea Sports
19 during the citation process admitted to Mr. Garretson that Plaintiff was
20 specifically and intentionally targeted for citation.

21 60. Several Defendants knowingly conspired to have Plaintiff cited by
22 police, lacking any legitimate public safety issue at the time. Plaintiff’s dive
23 buddy, Mr. Dodge, was not placed under citizen’s arrest, nor was he cited.

24 61. Plaintiff was targeted for punishment for exercising free speech in
25 criticizing lifeguard and police actions spanning several years.

26 62. Plaintiff was required under threat of arrest to face two
27 arraignments.

28 63. The County D.A. had refused to prosecute “in the interests of justice”.

1 **X**

2 **VIOLATION OF THE CALIFORNIA CONSTITUTION AND CALIFORNIA**
3 **COASTAL ACT**

4 “...Access to the navigable waters of this state shall be always attainable for the
5 people thereof”. Article 10, § 4, California Constitution.

6 “Maximize public access to and along the coast and maximize public recreational
7 opportunities in the coastal zone”. California Public Resources § 30001.5(c)

8 64. Plaintiff repeats and re alleges paragraphs 6 through 13, as if
9 expressly set forth at length.

10 65. Plaintiff’s rights to access beaches and navigable waters, as
11 protected by the California Constitution and California Coastal Commission
12 regulations, were violated when the lifeguards closed the beaches of the
13 City for an indefinite period of time, lacking any legitimate or definably
14 clear and compelling safety issue at the time of Plaintiff’s dive, and at other
15 times spanning several years.

16 66. Plaintiff’s right to access public trust lands was violated by the
17 citation and arrest issued on July 2nd, 2007.

18 67. Plaintiff’s right to access public trust lands is violated by the
19 prohibitions of LBMC § 18.21.050 against teaching and instruction.

20 68. The City of Laguna Beach lacks authorization from the Coastal
21 Commission to close beaches for indefinite periods.

22 69. The Coastal Commission retains original permit jurisdiction over
23 submerged and public trust lands.

24 **XI**

25 **VIOLATION OF THE NINTH AMENDMENT**

26 “The enumeration in the Constitution, of certain rights, shall not be construed to
27 deny or disparage others retained by the people”.

28 (U.S.C.A. Const. Amend. 9)

1 70. Participation in, and the pursuit of, recreational sports, such as
2 scuba diving, is protected activity.

3 71. Individual quality of life demands the liberty to pursue the happiness
4 experienced in recreational sport activity.

5 72. Plaintiff was punished, lacking any legitimate or definably clear and
6 compelling reason, by the “stalking horses” of the City while engaging in
7 protected activity.

8 **PRAYER FOR RELIEF**

9 **I. Damages**

- 10 a. Compensatory damages in an amount to be determined at trial.
11 b. Punitive damages in an amount to be determined at trial, sufficient
12 in sum to deter Defendants from further abuse of Plaintiff.
13 c. Costs and reasonable attorney fees.
14 d. Additional and further relief as the Court deems just and equitable.

15 **II. Declaratory Relief**

- 16 a. A declaration that recognizes scuba instruction occurring in a public
17 forum as constitutionally protected free speech.
18 b. A declaration that pursuit of, or engagement in, recreational activity
19 such as scuba diving, is constitutionally protected.
20 c. A declaration recognizing City diving ordinances violate state and
21 federal rights.

22 **I. Injunctive Relief**

23 Enjoin Defendants from enforcing the following LBMC ordinances:

- 24 a. **Disobeying a Lifeguard** - LBMC (§ 18.04.105)
25 b. **Hazardous Skin Diving and Scuba Diving** - LBMC (§ 18.21.030a & b)
26 c. **Scuba and Skin Diving Classes Restricted to Certain Hours** -
27 LBMC (§ 18.21.050)
28 d. **Penalty for Violations** - LBMC (§ 18.21.060)

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Dated September 22nd, 2008

DEMAND FOR JURY TRIAL

Respectfully submitted:

BY _____

Leonard J. Porto III, Plaintiff, *pro se*

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