

1 Leonard J. Porto III  
2 xxxxxxxx  
3 P.O. Box 354  
4 Corona Del Mar, CA 92625  
5 xxxxxxxx  
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  
15 entity;  
16 **CITY of LAGUNA BEACH MARINE**  
17 **SAFETY DEPARTMENT**, a political  
18 entity;  
19 MARINE SAFETY CHIEF MARK  
20 KLOSTERMAN,  
21 LIFEGUARD TRAVIS LOWREY,  
22 LIFEGUARD THOMAS F. McGERVEY,  
23 LIFEGUARD MIKE SCOTT,  
24 individually and in their official capacity;  
25 **CITY of LAGUNA BEACH POLICE**  
26 **DEPARTMENT**, a political entity;  
27 POLICE OFFICER ALFRED COLLAZO,  
28 POLICE OFFICER RYAN DOMINGUEZ,  
POLICE OFFICER ZACH MARTINEZ,  
individually and in their official capacity,  
POLICE OFFICER MICHAEL DONOHUE,  
in his individual capacity;  
**DOES** 1 through 10,  
Defendants.

**Case Number:**  
**SA CV 08547 DOC (MLGX)**

**PLAINTIFF'S  
SECOND AMENDED  
COMPLAINT  
FOR:**

**DAMAGES;  
INJUNTIVE RELIEF.**

**DEMAND FOR JURY TRIAL**

COMES NOW the Plaintiff, Leonard J. Porto III, In Propria Persona,  
and hereby complains of the Defendants, and each of them, jointly and

1 severally, upon information and belief, and respectfully alleges before this  
2 honorable Court:

3  
4 **JURISDICTION and VENUE**

5 1. This Complaint is for damages in an amount to be decided at trial,  
6 and injunctive relief, against Defendants for violation of Plaintiff's **Fourth,**  
7 **Fifth,** and **Fourteenth** Amendment federal constitutional, state  
8 constitutional, civil, and common law rights pursuant, but not limited to:

9 42 U.S.C § 1983 (civil action for deprivation of rights)

10 42 U.S.C § 1985 (3) (conspiracy)

11 42 U.S.C § 1986 (negligence).

12 2. Jurisdiction is based on 28 U.S.C. § § 1331, & 1343, 1 through 4.

13 3. Supplemental jurisdiction of this honorable Court is invoked to hear  
14 and decide claims arising under state law pursuant to 28 U.S.C § 1367.

15 4. Venue is proper under 28 U.S.C. 1391, as a substantial part of the  
16 events or omissions giving rise to the claim occurred within this honorable  
17 court's judicial district.

18  
19 **STATE NOTICE OF CLAIM**

20 5. "Notice-of-claim rules are neither universally familiar nor in any  
21 sense indispensable prerequisites to litigation, and there thus is no reason  
22 to suppose that Congress intended federal courts to apply such rules, which  
23 significantly inhibit the ability to bring federal actions".

24 *Felder v. Casey*, 487 U.S. 131 (1988).

25 6. "State claim presentation requirements cannot be applied to federal  
26 civil rights actions" *Ford v. Long Beach Unified School District*, 461 F.3d 1087  
27 (9<sup>th</sup> Cir. 2006).

28 7. Defendants had been aware of Plaintiff's good faith attempts to

1 warn them of intent to sue over several years in conversation with Marine  
2 Safety Officer Calla Allison, lifeguards, and police, on two or more  
3 occasions.

4 8. Plaintiff warned Defendants of litigation, recorded on police audio  
5 files, in the city's possession for almost one year, prior to the filing of this  
6 complaint. (EXHIBIT E: audio file DM-10023\_238 at time index 1:20)

7 **PARTIES**

8 **Plaintiff**

9 9. Plaintiff Leonard J. Porto III is a U.S. citizen residing in Orange  
10 County, California. Mr. Porto is an experienced rescue certified scuba diver.

11 **Defendants**

12 10. Defendant City of Laguna Beach is a political entity in the County of  
13 Orange, California, that on information and belief, receives federal funds.

14 11. Defendant City of Laguna Beach Police Department is a political  
15 entity in the County of Orange, California.

16 12. Defendants Alfred Collazo, Ryan Dominguez, Michael Donohue, and  
17 Zach Martinez are City of Laguna Beach Police Officers.

18 13. Defendant City of Laguna Beach Marine Safety Department is a  
19 political entity in the County of Orange, California.

20 14. Defendant Mark Klosterman is the employed chief of the City of  
21 Laguna Beach Marine Safety Department.

22 15. Defendants Travis Lowrey, Thomas McGervey, and Mike Scott, are all  
23 lifeguards employed by the City of Laguna Beach Marine Safety Dept.

24 16. DOES 1 through 10 refer to persons or entities that engaged in, were  
25 aware of, participated in, and/or directed the acts alleged herein. Plaintiff is  
26 unaware of the true names and capacities of Defendants DOES 1 through  
27 10, therefore sues those defendants by fictitious names. Plaintiff will seek  
28 leave to amend this Complaint to reflect true names and capacities.

1 **INTRODUCTION**

2 17. At all times relevant to this complaint, including the time span from  
3 the year 2002 to the present, all Defendants were acting within the scope of  
4 their employment for the City of Laguna Beach, and under color of law.

5 18. They are sued in both their official and individual capacity for  
6 damages, excluding officer Michael Donohue, who is sued in his individual  
7 capacity only.

8 19. They acted recklessly, negligently, and in bad faith, knowing their  
9 conduct violated well established and settled law, and demonstrated a  
10 callous indifference to the state and federally protected rights of Plaintiff.

11 20. Plaintiff was engaged in the pursuit of happiness, travelling under  
12 the navigable waters of Laguna Beach, in association with another  
13 recreational scuba diver.

14 21. Plaintiff is entitled to recover compensatory and punitive damages  
15 against them individually.

16 22. As a result of deprivation of constitutional rights by these “stalking  
17 horses”, Plaintiff suffered damages in the form of pain and suffering, for  
18 which he seeks compensatory and punitive damages against defendants in  
19 their official as well as individual capacity, excluding officer Michael  
20 Donohue, who is sued in his individual capacity only.

21 23. All Defendants are persons.

22 **FACTUAL ALLEGATIONS**

23 24. On Monday, July 2<sup>nd</sup>, 2007, at approximately 4 p.m., nearing low  
24 tide, Plaintiff and a friend, Mr. James Dodge, travelled underwater from  
25 Boater’s Canyon (also known as Fisherman’s cove) to Shaw’s cove in  
26 Laguna Beach, California. Plaintiff and Mr. Dodge are both advanced and  
27 rescue certified divers, trained by multiple internationally recognized  
28 agencies, and are insured members of the Divers Alert Network (DAN).

1 Each has completed over 300 dives. Plaintiff and Mr. Dodge initiated  
2 contact with and advised the lifeguard on duty they would not be returning  
3 to Boater's canyon after their dive, and would be exiting at Shaw's cove.

4 25. Plaintiff and Mr. Dodge were confronted and detained upon their exit  
5 from the ocean by lifeguards, police, and other individuals. Plaintiff  
6 suggested conversation continue at Laguna Sea Sports, where Plaintiff's  
7 vehicle was parked. After Plaintiff walked to his parked vehicle at Laguna  
8 Sea Sports to remove his scuba gear, the Defendants, and Mr. Dodge,  
9 arrived at Laguna Sea Sports parking lot.

10 26. Four separate demands were made by Plaintiff to contact his  
11 attorney, Mr. Robert A. Garretson, by cell phone. Plaintiff was permitted to  
12 contact his attorney by a police officer after the fourth demand.

13 27. Officer Michael Donohue then removed Plaintiff's cell phone out of  
14 Plaintiff's hand and placed him in a "pain compliance" hold on the hot  
15 trunk lid of a patrol car.

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

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

23 30. At Laguna Sea Sports, Mr. Garretson, a licensed California attorney  
24 and certified diver, observed the citation process. On a subsequent day, a  
25 lifeguard present during the citation process admitted to Mr. Garretson  
26 that Plaintiff was intentionally targeted for citation. (EXHIBIT B).

27 31. The City Police Department refused two requests for a police report  
28 made in person by Plaintiff and Mr. Garretson. Plaintiff has been required

1 to appear at two arraignment hearings; August 15<sup>th</sup>, and October 3<sup>rd</sup>, 2007.  
2 (EXHIBIT C). On both dates, the City did not provide the necessary  
3 paperwork to the court, preventing Plaintiff from “having his day in court”,  
4 resulting in the misdemeanor charge left “as a hanging fire” over Plaintiff.

5 32. Mr. Dodge was not cited, though present with Plaintiff. (EXHIBIT D)

6 33. Defendant lifeguard Mr. McGervey signed a Statement of a Private  
7 Person’s Citizens Arrest for violation of LBMC § 05.14.105, “Disobeying a  
8 lifeguard”. This code section does not exist. (EXHIBIT F).

9 34. This contrasts with Defendant Officer Colazzo’s citation for violating  
10 LBMC § 18.21.030B, “failure to obey lifeguard (diving)”. (EXHIBIT A)

11 35. The County D.A. “declined to prosecute in the interest of justice”.  
12 (EXHIBIT G).

### 13 CUSTOM, POLICY, AND PRACTICE ALLEGATION

14 36. From the year 2002 to the present, Plaintiff has consistently warned  
15 City tower lifeguards, that are not required to be trained or certified as  
16 scuba divers, and police officers acting “as stalking horses”, that their  
17 **custom, policy, and practice** of issuing citations to trained and certified  
18 scuba divers engaged in the pursuit of happiness while travelling under  
19 navigable waters, were in violation of Plaintiff’s federal and state  
20 constitutional, civil, and common law rights.

21 37. Defendants as a **custom, policy, and practice** harass and  
22 unlawfully detain divers by confrontational questioning, lacking definably  
23 clear and compelling safety reasons to do so.

24 38. Plaintiff was cited, lacking any legitimate reason.

25 39. Laguna Beach Marine Safety Officer Calla Allison was present during  
26 at least two of these incidents, joining in courteous and polite conversation  
27 with Plaintiff in length concerning those rights.

28 40. Defendants have had previous contacts with Plaintiff and each other.

1 41. Defendant's are aware of Plaintiff's criticisms of their enforcement  
2 activities against divers from the year 2002 to the present.

3 42. Tower lifeguards, untrained or certified as divers, are not qualified as  
4 a **custom, policy, or practice** to decide for a trained and certified diver  
5 what unacceptable hazardous conditions are, as diving is a hazardous  
6 recreational sport in and of itself.

7 43. No diver can receive air fills for their scuba tank at any facility without  
8 showing a certification card from a known agency. All student divers have a  
9 minimum of several hours pool training and screening prior to entering the  
10 ocean for the first time, not including classroom time.

11 **I**

12 **PLAINTIFF'S CLAIM UNDER 42 U.S.C. §§1983 AGAINST**  
13 **OFFICER MICHAEL DONOHUE IN HIS INDIVIDUAL CAPACITY**  
14 **FOR EXCESSIVE FORCE**

15 44. Plaintiff alleges again and incorporates herein by reference all prior  
16 paragraphs in this Complaint.

17 45. At all times Defendant officer acted under color of state law, as a City  
18 of Laguna Beach Police Officer.

19 46. In his individual capacity as a police officer, this Defendant, on July  
20 2<sup>nd</sup>, 2007, intentionally deprived Plaintiff of his Fourth Amendment  
21 constitutional right to be free from unreasonable search and seizure.

22 47. Defendant subjected Plaintiff to excessive use of force by inflicting a  
23 pain compliance hold upon Plaintiff, and forcibly placing Plaintiff face  
24 down on the hot trunk lid of a patrol car. (EXHIBIT H).

25 48. Plaintiff had been given permission by another officer present to call  
26 his attorney by cell phone, after the fourth demand by Plaintiff to do so, and  
27 was in conversation when officer Donohue forcibly intervened.

28 49. Plaintiff was accused of a relatively minor offense of disobeying a

1 lifeguard, and offered no physical resistance to the arrest.

2 50. This unjustified conduct is “shocking to the conscience”, and violates  
3 well settled law, as Plaintiff’s action posed no threat to the officer or others.

4 51. Officer Donohue knew Plaintiff was speaking specifically to an  
5 attorney. (EXHIBIT H)

6 52. “Under the Fourth Amendment, officers may only use such force as is  
7 “objectively reasonable” under the circumstances.”

8 *Jackson v. City of Bremerton*, 286 F.3d 646, 651 (9<sup>th</sup> Cir. 2001), quoting  
9 *Graham v. Conner*, 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed.2d 443  
10 (1989).

11 53. As a proximate cause of said deprivation of constitutional rights, the  
12 Plaintiff suffered damages in the form of pain and suffering, for which he  
13 seeks compensatory and punitive damages against officer Donohue.

14 54. The conduct of officer Donohue was reckless, negligent, and  
15 demonstrated a callous indifference to the federally protected rights of  
16 Plaintiff, entitling Plaintiff to recover punitive damages against him  
17 individually.

18 **II.**

19 **PLAINTIFF’S CLAIM UNDER 42 U.S.C. §§1983, 1986**  
20 **AGAINST OFFICER MICHAEL DONOHUE IN HIS INDIVIDUAL**  
21 **CAPACITY, AND ALL OTHER DEFENDANTS IN THEIR**  
22 **OFFICIAL AND INDIVIDUAL CAPACITY FOR NEGLIGENCE**

23 55. Plaintiff alleges again and incorporates herein by reference all prior  
24 paragraphs in this Complaint.

25 56. Officer Donahue was negligent in causing pain to Plaintiff with the use  
26 of a “pain compliance hold”, lacking any justifiable reason to do so.

27 57. Defendants, by negligently allowing the use of such unreasonable  
28 and excessive force, and failing to intervene, allowed injury and damage to

1 Plaintiff, in violation of the Fourth , Fifth, and Fourteenth Amendments.

2 58. Defendants were negligent in allowing a citation for violating a non  
3 existent LBMC § 05.14.105, allowing multiple arrests of Plaintiff, and  
4 ignoring the lack of any reason to cite or arrest Plaintiff.

5 59. Defendants negligently allowed interference with Plaintiff’s  
6 attorney/client communication and right to privacy by officer Donohue.

7 60. Defendants, with plain view of the ocean from two coves, could  
8 visually identify the lack of any present reason for Plaintiff to be forbidden  
9 to dive.

10 61. At least two Defendants were aware of the obvious conflict with Mr.  
11 McGerveys citation listing an ordinance that does not exist, and the  
12 ordinance listed on the citation issued by officer Collazo.

13 62. Mr. McGervey’s supervisor was negligent in failing to prevent this  
14 cascade of events from unfolding. Approximately one hour passed between  
15 Mr. McGervey’s citizen’s arrest of Plaintiff, and Plaintiff’s surfacing at  
16 Shaw’s cove, allowing supervisory inquiry and verification of a legitimate  
17 reason to cite Plaintiff.

18 63. Failure to require tower lifeguards to be trained and certified as scuba  
19 divers in a city that is the diving capital of coastal southern California is  
20 negligent.

21 64. The investigation by Defendants’ questioning of Plaintiff and Mr.  
22 Dodge clearly indicated a conflict with Mr. McGervey’s claims.

23 65. “California statutes immunizing municipalities and public employees  
24 from liability for acts arising from execution of law did not apply to  
25 arrestees claim against county for negligence arising from negligent  
26 investigation that resulted in false arrest, where no lawful process was ever  
27 instituted.”

28 *Drakeford v. County of Orange*, 213 Fed. Appx. 542 (9<sup>th</sup> Cir. 2006).

1 66. As a proximate cause of said deprivation of constitutional rights, the  
2 Plaintiff suffered damages in the form of pain and suffering, for which he  
3 seeks compensatory and punitive damages against the Defendants.

4 67. The conduct of Defendants was reckless, negligent, and  
5 demonstrated a callous indifference to the federally protected rights of  
6 Plaintiff, entitling Plaintiff to recover compensatory and punitive damages  
7 against them individually.

### 8 III

#### 9 PLAINTIFF'S CLAIM UNDER 42 U.S.C. §§1983 FOR 10 FALSE ARREST AND IMPRISONMENT

11 68. Plaintiff alleges again and incorporates herein by reference all prior  
12 paragraphs in this Complaint.

13 69. Defendants violated Plaintiff's Fourth, Fifth, and Fourteenth  
14 Amendment guarantees against false arrest, imprisonment, and  
15 deprivation of liberty without due process of law.

16 70. Plaintiff was placed under citizen's arrest by Lifeguard Thomas F.  
17 McGervey, based on false accusations of disobeying a lifeguard, and  
18 violating a non existent LBMC § 05.14.105. (EXHIBIT F) .

19 71. Both Plaintiff and Mr. Dodge had voluntarily communicated their  
20 dive plan to Mr. Gervey out of courtesy, yet received no order forbidding  
21 them to dive. (EXHIBIT D).

22 72. Officer Donohue stated in the police report dated May 5<sup>th</sup>, 2008,  
23 Plaintiff was placed under citizen's arrest by Mr. McGervey. (EXHIBIT H).

24 73. Lifeguard Thomas F. McGervey's filing of a citizen's arrest was the  
25 primary proximate cause leading to a "domino effect" of abuses against  
26 Plaintiff's rights.

27 74. Plaintiff was unlawfully detained in a very threatening manner by  
28 a swarm of half a dozen Defendants at both Shaw's Cove and Laguna Sea

1 Sports' parking lot.

2 75. Plaintiff and Mr. Dodge had no choice but to stop and speak to  
3 Defendants during arrest at Shaw's cove before proceeding to Laguna Sea  
4 Sport's parking lot.

5 76. Plaintiff was arrested by Officer Donohue's "pain compliance hold".

6 77. Plaintiff was detained by and yielded to authority in all three contacts  
7 with Defendants.

8 78. "To establish a seizure within the meaning of the Fourth Amendment,  
9 there must be an intentional acquisition of physical control, with the state  
10 actor restraining the freedom of a person to walk away"

11 *McCoy v. Harrison*, 341 F.3d 600, 601 (7<sup>th</sup> Cir. 2003).

12 79. The conduct of Defendants was reckless, negligent, and demonstrated  
13 a callous indifference to the federally protected rights of Plaintiff, entitling  
14 Plaintiff to recover compensatory and punitive damages against them  
15 individually.

16 **IV**

17 **PLAINTIFF'S CLAIM UNDER 42 U.S.C. §§1983**  
18 **INTENTIONAL AND NEGLIGENT INFLICTION OF**  
19 **EMOTIONAL DISTRESS**

20 80. Plaintiff alleges again and incorporates herein by reference all prior  
21 paragraphs in this Complaint.

22 81. Defendant's actions and operation as "stalking horses" caused  
23 Plaintiff to suffer severe mental distress and humiliation by:

- 24 a. Obstructing Plaintiff's movements after exiting the ocean, while  
25 Plaintiff was wearing over 75 pounds of scuba gear.  
26 b. Surrounding and detaining Plaintiff at Laguna Sea Sports and  
27 refusing Plaintiff's first three requests to contact an attorney.  
28 c. Forcibly removing Plaintiff's cell phone without warning or reason,

- 1 knowing Plaintiff was in contact with his attorney.
- 2 d. Committing assault and battery with a “pain compliance hold”,
- 3 while searching Plaintiff in public view.
- 4 e. Refusing to provide a police report to Plaintiff or his attorney.
- 5 f. Requiring Plaintiff to appear for two arraignments.
- 6 g. Failing to advise Plaintiff that the District Attorney would not
- 7 prosecute “in the interest of justice”.
- 8 h. Requiring Plaintiff to resort to litigation to prevent further abuse.
- 9 i. Intimidating Plaintiff with a show of force by Defendants on
- 10 several occasions, resulting in deep anxiety, vulnerability, and loss
- 11 of reputation, if Plaintiff chose to continue diving in the City.
- 12 j. Causing the anxiety, anguish, and humiliation, since the year
- 13 2002, of facing confrontational City lifeguards and police.
- 14 k. Damaging Plaintiff’s passion for diving in the City’s unique coves.
- 15 l. Causing Plaintiff to cease diving regularly in the City while the
- 16 criminal charge against Plaintiff remained as a “hanging fire” over
- 17 Plaintiff’s head for one year.
- 18 m. Punishing Plaintiff for criticizing lifeguards.

19 82. Although we agree that emotional damages may be based on

20 “humiliation and emotional distress established by testimony or inferred

21 from the circumstances, whether or not Plaintiffs submit evidence of

22 economic loss or mental and physical symptoms...” *Johnson v. Hale*, 13 F.3d

23 1351, 1352 (9<sup>th</sup> Cir. 1994).

24 **V**

25 **PLAINTIFF’S CLAIM UNDER 42 U.S.C. §§1983, 1985(3) FOR**

26 **SELECTIVE AND VINDICTIVE ENFORCEMENT, CONSPIRACY**

27 83. Plaintiff alleges again and incorporates herein by reference all prior

28 paragraphs in this Complaint.

1 84. Defendant's actions were obviously discriminatory against Plaintiff in  
2 both their "effect and purpose."

3 85. Plaintiff was cited, his "dive buddy" standing nearby, was not.

4 86. Plaintiff and Mr. Dodge both came into contact simultaneously with  
5 Defendants three times, yet Plaintiff was the only one cited.

6 87. Mr. Garretson, present on the rocks adjacent to Boater's cove prior to  
7 Plaintiff entering the water, was not cited for any safety violations, though a  
8 temporary white plastic sign stating "rocks closed" was present.

9 88. Mr. McGervey filed a citizens arrest naming Plaintiff, and excluding  
10 Mr. Dodge.

11 89. Officer's Michael Donohue and Zach Martinez were involved with this  
12 filing of a citizen's arrest, and knew, or should have known, LBMC §  
13 05.14.105 does not exist.

14 90. Defendant's continued in bad faith, knowing unsafe conditions were  
15 not present, and that Mr. Dodge was not placed under citizen's arrest or  
16 going to be cited as Plaintiff was.

17 91. Defendant's stated in police audio file DM-10023\_238 at time index  
18 4:10 that "We know all about this guy" in reference to Plaintiff, indicating a  
19 "meeting of the minds" by Defendants. (EXHIBIT E).

20 92. Plaintiff was in engaged in the pursuit of happiness derived from  
21 recreational sport activity while travelling under navigable waters from  
22 Boater's cove to Shaw's cove, in association with another diver.

23 93. Defendants have had previous contacts with Plaintiff and each other.

24 94. All Defendant's are aware of Plaintiff's criticisms of their enforcement  
25 activities against divers from the year 2002 to the present.

26 95. Defendants were present at both Boater's and Shaw's cove during this  
27 incident, and were able to observe a lack of clearly defined or compelling  
28 safety reasons to cite Plaintiff.

1 96. Defendants collectively work together to cite divers as a **custom ,**  
2 **policy, and practice,** lacking any clearly defined or compelling safety  
3 reason.

4 97. This ongoing and continuing violation of divers engaged in the  
5 pursuit of happiness is the proximate cause of the violation of Plaintiff's  
6 state and federally protected rights.

7 98. Further discovery will clearly indicate citations against divers are  
8 routinely declined for prosecution by the court or District Attorney.

9 99. Plaintiff and Mr. Dodge were associating in the pursuit of happiness  
10 as divers to travel under the navigable waters of the City between two  
11 adjacent coves.

12 100. Plaintiff and Mr. Dodge entered and exited the ocean together, were  
13 both confronted at Shaw's Cove and the parking lot of Laguna Sea Sports  
14 together, yet Plaintiff only was placed under citizen's arrest and cited.

15 101. On a subsequent day, a lifeguard present at Laguna Sea Sports during  
16 the citation process admitted to Mr. Garretson that Plaintiff was specifically  
17 and intentionally targeted for citation.

18 102. Several Defendants knowingly conspired to have Plaintiff cited by  
19 police, lacking any legitimate public safety issue at the time.

20 103. Plaintiff was targeted for punishment for exercising free speech in  
21 criticizing lifeguard and police actions spanning several years.

22 104. Plaintiff was required under threat of arrest to face two arraignments.

23 105. The County D.A. had refused to prosecute "in the interests of justice."

24 106. Defendants were aware that at the time of this incident that Mr.  
25 James Dodge stated a lifeguard was not disobeyed.

26 107. Mr. James Dodge and Mr. Robert Garritson had stated there were no  
27 safety concerns present at the time of this incident.

28 108. "While it is not necessary under § 1983 to prove that each participant

1 in conspiracy knew exact parameters of plan, they must at least share  
2 general conspiratorial objective.” *Fonda v. Gray*, 707 F.2d 435 (9<sup>th</sup> Cir. 1983)  
3 109. [It is also clear that government enforcement intended to discourage  
4 or punish the exercise of a constitutional right, especially the right to  
5 criticize the government, is sufficient basis for § 1983 relief. The availability  
6 of § 1983 relief for what we have called “vindictive enforcement,” *U.S. v.*  
7 *Anderson*, 923 F.2d at 453, seems a necessary corollary to the defense  
8 recognized in free speech cases like *Cf. Wayte v. United States*, 470 U.S. 598.]  
9 *Futernick v. Sumpter Township*, 78 F.3d, 1051 (6<sup>th</sup> Cir. 1996)

10 **VI**

11 **STATE CLAIM PURSUANT TO 28 U.S.C § 1367**  
12 **VIOLATION OF THE CALIFORNIA CONSTITUTION AND**  
13 **CALIFORNIA COASTAL ACT**

14 “...Access to the navigable waters of this state shall be always attainable  
15 for the people thereof”.

16 *Article 10, § 4, California Constitution.*

17 “...Maximize public access to and along the coast and maximize public  
18 recreational opportunities in the coastal zone”.

19 *California Public Resources § 30001.5(c)*

20 110. Plaintiff alleges again and incorporates herein by reference all prior  
21 paragraphs in this Complaint.

22 111. Plaintiff’s rights to access beaches and navigable waters, as protected  
23 by the California Constitution and California Coastal Commission  
24 regulations, were violated when the lifeguards closed the beaches of the  
25 City for an indefinite period of time, lacking any legitimate or definably  
26 clear and compelling safety issue at the time of Plaintiff’s dive, and at other  
27 times spanning several years.

28 112. Plaintiff’s right to access public trust lands was violated by the

1 citation and arrests on July 2<sup>nd</sup>, 2007.

2 113. Plaintiff's right to access public trust lands is violated by the issuance  
3 of a citation for diving, lacking any definably clear and compelling reason.

4 114. The City of Laguna Beach lacks permit authorization from the Coastal  
5 Commission to close beaches for indefinite periods, lacking clear and  
6 compelling safety reasons.

7 115. The Coastal Commission retains original permit jurisdiction over  
8 submerged and public trust lands.

9 **PRAYER FOR RELIEF**

10 **I. Damages**

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

16 **II. Injunctive Relief**

17 Enjoin Defendants from enforcing the following LBMC ordinance:

18 **a. Disobeying a Lifeguard - LBMC (§ 18.04.105)**

19 " No person shall willfully resist, delay, interfere or  
20 disobey any lifeguard in the discharge or attempt to  
21 discharge any duty of his or her position.

22 (Ord. 1369 § 2, 2000)."

23 116. This ordinance is unconstitutionally vague, as it does not identify any  
24 specific safety concerns, nor does it restrict the reach of a lifeguard's  
25 authority.

26 117. Based on this wording, if a lifeguard orders a person to remove his  
27 sandals, or cease throwing a foam football, and they disobey, they are facing  
28 a misdemeanor for a relatively minor infraction!

1 118. A person of ordinary intelligence would interpret this as stifling to any  
2 speech directed at a lifeguard.

3 119. Speaking with a lifeguard for the purpose of clarifying or responding  
4 to a lifeguard's orders could easily be feared as being treated as delay or  
5 interference with that lifeguard. As there is also another ordinance for  
6 disobeying a lifeguard, (LBMC § 18.21.030B), it is confusing to understand  
7 what ordinance would apply in a situation.

8 120. The relaxation of enforcement of dive restrictions referred to in an  
9 Orange County Register article adds further uncertainty.( EXHIBIT I).

10 121. The article states the enforcement of carrying a snorkel or having a  
11 dive buddy will be "relaxed", however, the lifeguard still has unbridled  
12 discretionary authority to order a diver otherwise.

13 122. The article does not identify any specifics.

14 123. Courts have long recognized a person's right to calmly walk away  
15 from a police officer lacking definable probable cause.

16 124. A police officer is known to question or initiate contact with persons  
17 in the performance of their duties, yet that alone is not an absolute  
18 requirement for a person to respond under threat of a misdemeanor!

19 125. A person choosing not to respond to a lifeguard does not have that  
20 option.

21 126. "In short a statute is unconstitutionally vague if a person of  
22 reasonable intelligence would not understand what conduct is prohibited."

23 *United States v. Williams*, 441 F.3d 716,724 (9<sup>th</sup> Cir. 2006).

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Dated December 9<sup>th</sup>, 2008

**DEMAND FOR JURY TRIAL**

Respectfully submitted:

BY \_\_\_\_\_

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