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Variscite, Inc. and Kenneth Gay

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

VARISCITE, INC.; AND KENNETH
GAY,

Plaintiffs,

vs.

CITY OF LOS ANGELES; LOS
ANGELES DEPARTMENT OF
CANNABIS REGULATION; AND
MICHELLE GARAKIAN,

Defendants.

Case No.:

COMPLAINT FOR

**1. 42 U.S.C. § 1983 Dormant
Commerce Clause**

2. Declaratory Judgment

**3. 42 U.S.C. § 1983 Dormant
Commerce Clause**

4. Declaratory Judgment

1 **INTRODUCTION**

2 Plaintiffs Variscite, Inc. and Kenneth Gay (“Plaintiffs”) bring this action
3 against defendants City of Los Angeles (the “City”); Los Angeles Department of
4 Cannabis Regulation (the “DCR”); and Michelle Garakian (collectively,
5 “Defendants”).

6 **PARTIES**

7 1. Plaintiff Variscite, Inc. is a corporation organized under the laws of
8 the State of California.

9 2. Plaintiff Kenneth Gay is a citizen of Michigan.

10 3. Defendant City of Los Angeles is a municipal corporation located in
11 the County of Los Angeles, State of California.

12 4. Defendant Michelle Garakian is the Interim Executive Director of the
13 Department of Cannabis Regulation. Plaintiffs sue Ms. Garankian in her official
14 capacity.

15 5. Upon information and belief, at all relevant times mentioned in this
16 Complaint, Defendants, and each of them, were acting in concert and active
17 participation with each other in committing the acts alleged herein, and were the
18 agents of each other and were acting within the scope and authority of that agency
19 and with the knowledge, consent and permission of one another.

20 **JURISDICTION AND VENUE**

21 6. The Court has subject matter jurisdiction over the matters asserted
22 herein under 28 U.S.C. section 1331 because the action involves questions under
23 the United States Constitution.

24 7. The Court has personal jurisdiction over the City because it is a
25 citizen of California.

1 Social Equity Individual Applicant that were selected by the Los Angeles City
2 Council.

3 13. Defendants will award the remaining Licenses through two processes
4 Plaintiff challenges in this lawsuit. First, in Phase Three Round Two, Defendants
5 will select applicants through a lottery (the “Lottery”). Second, Defendants will
6 open a second PCN process. Both the Lottery and the PCN Process are
7 unconstitutional, as discussed below.

8 **A. The Phase Three Round Two Lottery**

9 **a. The Lottery Favors California Residents**

10 14. Defendants will award storefront retail cannabis business licenses
11 through the Lottery. LAMC § 104.06.1(c)(1). The requirements to participate in
12 the Lottery favor California residents over residents of other states in violation of
13 the dormant Commerce Clause of the United States Constitution.

14 15. To be eligible to participate in the Lottery, an applicant must be at
15 least 51% owned by an individual who is a “Social Equity Individual Applicant.”
16 LAMC § 104.06.1(c)(3); 104.20(b)(2)(i). A Social Equity Individual Applicant is
17 an individual who has (1) a prior California Cannabis Arrest or Conviction and (2)
18 either (a) Low-Income or (b) ten years’ cumulative residency in a
19 Disproportionately Impacted Area. LAMC § 104.06.1(c)(3).

20 16. California Cannabis Arrest or Conviction means “an arrest or
21 conviction in California for any crime under the laws of the State of California or
22 the United States relating to the sale, possession, use, manufacture, or cultivation
23 of Cannabis that occurred prior to November 8, 2016.” LAMC §
24 104.20(a)(1)(i)(1).

25 17. Disproportionately Impacted Area means “Police Reporting Districts
26 as established in the Expanded Social Equity Analysis, or as established using the

1 same methodology and criteria in a similar analysis provided by an Applicant for
2 an area outside of the City.” LAMC § 104.20(b)(1)(ii)(4).

3 18. The Expanded Social Equity Analysis is a report prepared by Wood
4 Environment & Infrastructure Solutions, Inc. presented to the Los Angeles City
5 Council on May 27, 2020. It identified as Disproportionately Impacted Areas 151
6 police reporting districts in Los Angeles that have greater than the mean number of
7 cannabis-related arrests for the City of Los Angeles and 60 percent or greater Low-
8 Income households.

9 19. If an applicant wants to have an area outside of the City of Los
10 Angeles designated as a Disproportionately Impacted Area, the applicant must
11 provide an analysis similar to the Expanded Social Equity Analysis at the
12 applicant’s own expense.

13 20. Defendants allowed individuals to apply to be verified as Social
14 Equity Individual Applicants from May 26, 2022, to July 25, 2022. Defendants
15 announced whether the individuals were verified as Social Equity Individual
16 Applicants by a website post on October 24, 2022, on
17 [https://cannabis.lacity.org/social-equity-program/program-requirements-and-](https://cannabis.lacity.org/social-equity-program/program-requirements-and-resources/eligibility-verification-individual)
18 [resources/eligibility-verification-individual.](https://cannabis.lacity.org/social-equity-program/program-requirements-and-resources/eligibility-verification-individual)

19 21. Also on October 24, 2022, Defendants opened the registration period
20 for the Lottery. The registration period will remain open until November 23, 2022.

21 22. On approximately November 28, 2022, Defendants announced that
22 they will hold the Lottery on December 8, 2022 at 2:00 pm.

23 **b. Defendants Refused to Register Mr. Gay for the Lottery in**
24 **Violation of the U.S. Constitution**

25 23. As noted above, to be verified as a Social Equity Individual
26 Applicant, individuals were required to submit documentation that they had (1) a

1 prior California Cannabis Arrest or Conviction and (2) either (a) Low-Income or
2 (b) ten years' cumulative residency in a Disproportionately Impacted Area.

3 24. Mr. Gay submitted an application to be verified as a Social Equity
4 Individual Applicant during the May 26, 2022, to July 25, 2022 application
5 window. Mr. Gay satisfies all three requirements, except that the relevant events
6 occurred in Michigan rather than California. Mr. Gay submitted documentation
7 that he was convicted of a cannabis crime under Michigan law. He submitted
8 documentation that he lived for more than ten years in an area the State of
9 Michigan identified as a Disproportionately Impacted Area. He submitted
10 documentation that he has a Low Income.

11 25. Plaintiffs checked Defendants' Accela system for updates on whether
12 Defendants had approved Mr. Gay as a Social Equity Individual Applicant, but no
13 updates appeared in the system. On October 24, 2022, Plaintiffs learned that
14 Defendants had not verified Mr. Gay as a Social Equity Individual Applicant.

15 26. Defendants provided a link to register for the Lottery only to
16 individuals who were verified Social Equity Individual Applicants as of October
17 24, 2022. Without Court intervention, Defendants will exclude Mr. Gay from the
18 Lottery in violation of the dormant Commerce Clause of the U.S. Constitution.

19 **B. The PCN Process**

20 ***a. The PCN Process Favors California Residents***

21 27. Defendants will award storefront retail cannabis business licenses
22 through the PCN Process. LAMC § 104.06.1(d). The requirements to participate
23 in the PCN Process favor California residents over residents of other states in
24 violation of the dormant Commerce Clause of the United States Constitution.

1 28. To be eligible to participate in the PCN Process, an applicant must be
2 partially owned by an individual who is a Social Equity Individual Applicant.
3 LAMC § 104.06.1(d)(1).

4 29. As of the filing of this litigation, Section 104.06.1(d)(1) of the Los
5 Angeles Municipal Code states only that the Social Equity Individual Applicant
6 must qualify under Section 104.20 of the Los Angeles Municipal Code. It is not
7 clear whether Defendants will apply the Original Eligibility Verification
8 requirements of 104.20(a) or the Expanded Social Equity Requirements of Section
9 104.20(b).

10 30. The requirements for an individual to qualify as a Social Equity
11 Individual Applicant under the Expanded Social Equity Requirements are
12 described above for the Lottery.

13 31. Under the Original Eligibility Verification, Disproportionately
14 Impacted Areas are defined by zip codes rather than police reporting areas. LAMC
15 § 104.20(a)(1)(i)(2). Disproportionately Impacted Area “means eligible zip codes
16 based on the ‘More Inclusive Option’ as described on page 23 of the ‘Cannabis
17 Social Equity Analysis Report’ commissioned by the City in 2017 and referenced
18 in Regulation No. 13 of the Rules and Regulations.” *Id.*

19 32. Defendants published a list of qualifying zip codes within the City of
20 Los Angeles. As with the Expanded Social Equity Requirements, if an applicant
21 wants to have an area outside of the City of Los Angeles designated as a
22 Disproportionately Impacted Area under the Original Social Equity Requirements,
23 the applicant must provide an analysis similar to the study commissioned by the
24 City. LAMC § 104.20(a)(1)(i)(2).

25 33. Under the Original Eligibility Verification, an individual may qualify
26 under two classifications. A “Tier 1 Social Equity Individual Applicant” is an

1 individual who meets the following criteria at the time of applying for a license:

2 (1) Low-Income and prior California Cannabis Arrest or Conviction; or (2) Low-
3 Income and a minimum of five years' cumulative residency in a Disproportionately
4 Impacted Area. A "Tier 2 Social Equity Individual Applicant" is an individual
5 who meets the following criteria at time of applying for a license: (1) Low-Income
6 and a minimum of five years' cumulative residency in a Disproportionately
7 Impacted Area; or (2) a minimum of 10 years' cumulative residency in a
8 Disproportionately Impacted Area. LAMC § 104.20(a)(4-5).

9 **b. Mr. Gay Intends to Apply Under the PCN Process**

10 34. Mr. Gay intends to apply for a License under the PCN Process when
11 the application period opens.

12 **FIRST CAUSE OF ACTION**

13 **(Dormant Commerce Clause, 42 U.S.C. § 1983 – Lottery)**

14 **(All Plaintiffs Against All Defendants)**

15 35. Plaintiffs reallege and incorporate herein by reference each of the
16 allegations set forth in the preceding paragraphs of the Complaint as though fully
17 set forth herein.

18 36. A state, including its subdivisions, may not enact laws that
19 discriminate against citizens of other states. *See, e.g., Tennessee Wine & Spirits*
20 *Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019); *Fulton Corp. v. Faulkner*, 516
21 U.S. 325, 116 S. Ct. 848 (1996); *Oregon Waste Sys., Inc. v. Dep't of Env'tl. Quality*
22 *of State of Or.*, 511 U.S. 93 (1994); *Dean Milk Co. v. Madison*, 340 U.S. 349
23 (1951).

24 37. Defendants enacted laws and regulations that provide a preference to
25 California residents over out-of-state residents for the Lottery. In doing so,
26

1 Defendants violated the dormant Commerce Clause of the United States
2 Constitution.

3 38. Defendants violated Plaintiffs' rights by depriving Mr. Gay of the
4 ability to participate in the Lottery in violation of the dormant Commerce Clause.
5 Plaintiffs have been harmed by Defendants depriving them of the opportunity to
6 obtain and benefit from a License through the Lottery.

7 39. Injunctive relief is necessary to prevent Defendants from proceeding
8 with the unconstitutional Lottery that favors California residents over out-of-state
9 residents.

10 **SECOND CAUSE OF ACTION**

11 **(Declaratory Relief, 28 U.S.C. § 2201 - Lottery)**

12 **(All Plaintiffs Against All Defendants)**

13 40. Plaintiffs reallege and incorporate herein by reference each of the
14 allegations set forth in the preceding paragraphs of the Complaint as though fully
15 set forth herein.

16 41. The Lottery violates the dormant Commerce Clause of the United
17 States Constitution. An actual controversy exists between Plaintiffs and
18 Defendants as to whether Defendants may proceed with the residency preferences
19 and whether Mr. Gay should be in the Lottery.

20 42. Declaratory relief is necessary to resolve this dispute.

21 **THIRD CAUSE OF ACTION**

22 **(Dormant Commerce Clause, 42 U.S.C. § 1983 – PCN)**

23 **(All Plaintiffs Against All Defendants)**

24 43. Plaintiffs reallege and incorporate herein by reference each of the
25 allegations set forth in the preceding paragraphs of the Complaint as though fully
26 set forth herein.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for relief as follows:

1. For the first claim, an injunction prohibiting Defendants from enforcing any portion of the Los Angeles Municipal Code or any Regulations that favor California citizens over citizens of other states in eligibility or participation in the Lottery.
2. For the second claim, a declaration that the Los Angeles Municipal Code sections referenced herein regarding the Lottery favor California citizens over citizens of other states and cannot be enforced.
3. For the third claim, an injunction prohibiting Defendants from enforcing any portion of the Los Angeles Municipal Code or any Regulations that favor California citizens over citizens of other states in eligibility or participation in the Public Convenience or Necessity process.
4. For the fourth claim, a declaration that the Los Angeles Municipal Code sections referenced herein regarding the Public Convenience or Necessity process favor California citizens over citizens of other states and cannot be enforced.
5. An award of attorneys' fees and costs.
6. For such other and further relief as this Court shall deem appropriate.

1 DATED: November 29, 2022 KERNKAMP LAW APC

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4 By: /s/ Christian Kernkamp
5 Christian Kernkamp
6 Attorney for plaintiffs Variscite, Inc. and
7 Kenneth Gay
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