**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**
**WEST PALM BEACH DIVISION**
**www.flsd.uscourts.gov**

FINANCE ERC LLC,

Plaintiff,

vs. Civil Action No. _____

LEE GAUSE DDS PC and
LEE GAUSE,

Defendants.
_____/

# COMPLAINT FOR DAMAGES

The plaintiff, Finance ERC LLC ("Plaintiff," "Finance ERC," or "Purchaser"), sues the defendants, Lee Gause DDS PC ("Gause DDS" or "Seller") and Lee Gause ("Gause" or "Guarantor," and with Gause DDS, the "Defendants"), and in support, states as follows:

## PARTIES, JURISDICTION, VENUE, AND GOVERNING LAW

1. This is an action for damages arising out of (i) Gause DDS's breach of contract; (ii) Gause's breach of his guaranty that Gause DDS will provide truthful and accurate information to Finance ERC; and (iii) Defendants' fraudulent inducement of Finance ERC to enter into the relevant contract.

2. This Court has diversity jurisdiction over this action under 28 U.S.C. § 1332.

3. The amount in controversy exceeds $75,000.00 (exclusive of attorneys' fees, costs, and interest).

4. Plaintiff Finance ERC is a Delaware limited liability company. Its three members – David Goldin, Jeff Rubin, and Gregory Zink – are natural persons who are citizens of Florida and are otherwise *sui juris*.

5. Defendant Gause DDS is a New York Professional Service Corporation with a principal place of business in New York County, New York.

6. Defendant Gause is a natural person who is a citizen of New York and is otherwise *sui juris*.

7. Venue is proper in this judicial district pursuant to the forum selection clause contained in the parties' Employment Retention Credit (ERC) Purchase and Sale Agreement (the "Purchase Agreement") dated December 21, 2022, attached hereto as Exhibit 1, providing:

> Seller and Guarantor agree that any suit, action or proceeding to enforce or arising out of or relating to this Agreement shall be brought in any court in Florida or in the United States District court for the Southern District of Florida (the "Acceptable Forums") . . . .

Ex. 1 (Purchase Agreement) § 4.4.

8. Venue is also properly in this judicial district pursuant to 28 U.S.C. § 1391(b)(2) because the events and omissions giving rise to Plaintiff's claims occurred (or did not occur as the case may be) in Boca Raton, Florida.

9. Under the Purchase Agreement, Florida provides the governing law:

> This Agreement and any claim, dispute or controversy (whether in contract, tort, or otherwise) at any time arising from or relating to this Agreement is governed by, and this Agreement will be construed in accordance with Florida law (to the extent not preempted by federal law) without regard to internal principles of conflict of laws. The legality, enforceability and interpretation of this Agreement and the amounts contracted for under this Agreement will be governed by the laws of Florida.

Ex. 1 (Purchase Agreement) § 4.4.

## GENERAL ALLEGATIONS

10. Finance ERC is a financial services industry provider that offers innovative solutions for businesses affected by the COVID-19 pandemic and related economic shutdown.

11. Relevant here, Finance ERC provides businesses a means to gain access to needed capital by purchasing a portion of the business's expected Employee Retention Tax Credit ("ERC").

12. The ERC was created as part of the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), a $2.2 trillion economic stimulus bill passed to address the fallout from the COVID-19 pandemic.

13. The ERC is a refundable tax credit offered to businesses for maintaining their payroll during 2020 and 2021. For most employers, the ERC is in excess of the payroll taxes paid.

14. Given the benefits of the ERC, many eligible businesses take advantage of the program, resulting in large Internal Revenue Service ("IRS") backlogs and long wait times for refund checks to be issued.

15. Finance ERC helps businesses hindered by this delay by purchasing a portion of the business's expected ERC. Finance ERC provides the business with money before the ERC is fully processed by the IRS. In exchange, Finance ERC receives the portion of the business's ERC that it purchased, when ultimately later issued by the IRS.

16. Gause DDS, founded and operated by Gause, is a business that took advantage of Finance ERC's offer to purchase a portion of its ERC.

17. Gause DDS markets itself as a premier dental practice in New York City. It provides implant and cosmetic dentistry to its customers, which include various celebrities, professional athletes, and other noteworthy clientele.

18. On or around November 12, 2022, Finance ERC received through a referral source an application to purchase Gause DDS's ERC. The application was dated November 2, 2022.

19. In the application, Gause, through Gause DDS, represented to Finance ERC that it had filed amended payroll tax returns (the "Amended Tax Returns") entitling Gause DDS to an ERC of $662,118.54 (the "Gause ERC").

20. The Amended Tax Returns, which were provided as part of the application, were dated September 30, 2022.

21. On or about December 9, 2022, Gause reiterated to Finance ERC that Gause DDS had filed the Amended Tax Returns.

22. Based on a review of the amended tax returns and Gause and Gause DDS's representations that Gause DDS filed the Amended Tax Returns, on December 21, 2022, Finance ERC entered into the Purchase Agreement whereby it agreed to buy $559,665.70 (the "Purchase Amount") of the Gause ERC for $456,861.79 (the "Purchase Price"), minus administrative fees ("Net Proceeds").

23. Finance ERC paid Gause DDS the Purchase Price on December 27, 2022.

24. Article II of the Purchase Agreement contains various representations, warranties, and covenants made by Gause DDS.

25. In Section 2.4, Gause DDS represented, warranted, and covenanted that it

> has filed all returns and has paid all taxes due, except as disclosed to Purchaser. Seller has complied with all IRS filing and other requirements related to receiving the ERC.

Ex. 1 (Purchase Agreement) § 2.4.

26. Gause DDS also represented, warranted, and covenanted in Section 2.4 that it

> will take no action to reduce or impair the ERC currently due to Seller. The ERC due to Seller as represented in this Agreement is correct and accurate and not subject to any set off or reduction by the IRS. Seller will file all required tax forms and pay all taxes as they become due.

Ex. 1 (Purchase Agreement) § 2.4.

27. In Section 2.14, Gause DDS represented, warranted, and covenanted as to the accuracy of the information provided to Finance ERC:

> All information provided by Seller and Guarantor to Purchaser in the Transaction Documents, including the application, in all other Seller forms and in response to any request by Purchaser for information whether oral or in writing, is true, accurate and complete in all respects. Seller will promptly notify Purchaser of any change in any information provided, including information provided as part of the application process and including, but not limited to, any payroll processing provided that manages employee payroll taxes and any form submitted to the IRS authorizing the IRS to share information with Purchaser (Form 8821).

Ex. 1 (Purchase Agreement) § 2.14.

28. Per the Purchase Agreement, a lockbox account was created for the receipt of the Gause ERC. Ex. 1 (Purchase Agreement) § 1.3 & pages 22-38.

29. After several months, the IRS had not deposited any of the Gause ERC into the lockbox, so Finance ERC began investigating.

30. Finance ERC reviewed Gause DDS's IRS tax transcripts and had telephone conversations with the IRS. The documents and conversations revealed that Gause DDS never filed the Amended Tax Returns that established Gause DDS's entitlement to the Gause ERC and formed the basis for the Purchase Agreement.

31. The Purchase Agreement provides that the "following events shall constitute an 'Event of Default'":

> a. any representation or warranty by Seller in the Transaction Documents, including the application and any documents submitted in connection with the application, shall prove to have been incorrect, false or misleading in any material respect when made;
>
> b. Seller or Guarantor performs any act that reduces the value of the ERC.

Ex. 1 (Purchase Agreement) § 3.1(a)-(b).

32. Gause DDS agreed that "upon any Event of Default: (a) as liquidated damages, the full uncollected Purchased Amount and any unpaid fees due shall become due and payable in full immediately." Ex. 1 (Purchase Agreement) § 3.2(a).

33. Gause DDS also agreed that it

> shall pay to Purchaser all reasonable costs associated with (a) a beach by Seller of the Transaction Documents and the enforcement thereof, and (b) the enforcement of Purchaser's remedies set forth herein, including but not limited to (i) expenses, court costs and attorneys' fees and (ii) such other amount as allowed by law"

Ex. 1 (Purchase Agreement) § 3.3

34. Gause agreed to personally guaranty Gause DDS's representations, warranties, and covenants. The Guaranty signed by Gause, as a material inducement of the purchase, provides:

> Each undersigned Guarantor hereby unconditionally guarantees to Purchaser the truthfulness, accuracy and completeness of all of the representations, warranties and covenants made by Seller in the application, Agreement, Security Agreement and Guaranty, (collectively, the "Transaction Documents"), as each may be modified from time to time (the "Guaranteed Declarations"). Guarantor shall be liable for and Purchaser may charge and collect all costs and expenses, including but limited to attorneys' fees and court costs, which may be incurred by Purchaser in connection with any Guaranteed Declaration being false, inaccurate, incompleteness or otherwise breached, including the enforcement of Purchaser's rights under the Transaction Documents.

Ex. 1 (Purchase Agreement) at 11.

35. On November 28 or 29, 2023, Finance ERC member David Goldin spoke with Gause and informed him that after a thorough review of the Gause DDS files, Finance ERC learned that Gause DDS did not file the Amended Tax Returns and thus was in default under the Purchase Agreement and Gause's personal guaranty.

36. On December 1, 2023, Finance ERC emailed Gause and reiterated the points discussed on the November 28 or 29 call, namely that Gause DDS was in default under the Purchase Agreement and that Finance ERC was invoking the guaranty against Gause. *See* December 1, 2023 email between Finance ERC and Gause, attached hereto as Exhibit 2 (the "Finance ERC-Gause Email").

37. Finance ERC requested that Gause contact Finance ERC to informally resolve the dispute. Ex. 2 (Finance ERC-Gause Email).

38. Gause did not respond to the Finance ERC-Gause Email.

39. As of the date of this filing, Gause DDS has not filed the Amended Tax Returns.

40. Defendants have breached and defaulted under the Purchase Agreement and Guaranty, which were induced by Defendants' material misrepresentations.

41. All conditions precedent to commencing this action have either been performed, satisfied, or waived.

42. Plaintiff has agreed to pay undersigned counsel its attorneys' fees and all costs incurred in connection with this action, which pursuant to the Purchase Agreement and Guaranty should be borne by Defendants.

**COUNT I – BREACH OF CONTRACT**
(Against Gause DDS)

43. Finance ERC incorporates by reference the facts alleged in Paragraphs 1 through 42 as though fully set forth herein.

44. In the Purchase Agreement, Gause DDS represented, warranted, and covenanted that it had filed all tax returns necessary to it receiving the Gause ERC and that the information provided to Finance ERC was accurate.

45. Contrary to these representations, Gause DDS never filed the Amended Tax Returns entitling it to the Gause ERC with the IRS. Nor did Gause DDS inform Finance ERC of its failure to file the Amended Tax Returns.

46. By failing to file the Amended Tax Returns, Gause DDS has reduced or impaired Finance ERC's ability to collect the Gause ERC.

47. Gause DDS's actions are Events of Default under the Purchase Agreement.

48. By failing to cure the Events of Default, Gause DDS breached the Purchase Agreement.

49. Gause DDS's breach has caused Finance ERC harm.

50. The harm Finance ERC has suffered is compensable in damages in the amount agreed to by the parties in the Purchase Agreement as liquidated damages – $559,655.70.

51. Finance ERC is also entitled under Section 3.3 of the Purchase Agreement to the costs and attorneys' fees expended in recovering its damages from Gause DDS.

WHEREFORE, the plaintiff, Finance ERC LLC, demands judgment against the defendant, Lee Gause DDS PC, for all damages caused by its breach of the Purchase Agreement, including all incidental damages, consequential damages, attorneys' fees, costs, and interest, as well as such further relief as the Court deems just, fair, and equitable.

**COUNT II – BREACH OF GUARANTY**
(Against Gause)

52. Finance ERC incorporates by reference the facts alleged in Paragraphs 1 through 42 as though fully set forth herein.

53. Gause personally guaranteed the truthfulness, accuracy, and completeness of all of the representations, warranties, and covenants made by Gause DDS to Finance ERC.

54. Gause DDS breached its representations, warranties, and covenants in the Purchase Agreement by providing false information to Finance ERC regarding the returns filed with the IRS and its entitlement to the Gause ERC.

55. Gause DDS's breaches have caused Finance ERC harm.

56. Gause has refused to comply with his guaranty and compensate Finance ERC for the harm caused by Gause DDS, thus compounding the harm caused to Finance ERC.

57. The harm Finance ERC has suffered is compensable in damages in an amount to be determined at trial.

58. Finance ERC is also entitled under the guaranty to the costs and expenses, including attorneys' fees and court costs, expended in enforcing Finance ERC's rights under the Purchase Agreement and guaranty.

WHEREFORE, the plaintiff, Finance ERC LLC, demands judgment against the defendant, Lee Gause, for all damages caused by Lee Gause DDS PC's breach of the representations and warranties in the Purchase Agreement and Gause's independent breach of the guaranty, including all incidental damages, consequential damages, attorneys' fees, costs, and interest, as well as such further relief as the Court deems just, fair, and equitable.

**COUNT III – FRAUDULENT INDUCEMENT**
(Against All Defendants)

59. Finance ERC incorporates by reference the facts alleged in Paragraphs 1 through 42 as though fully set forth herein.

60. On or around November 12, 2022, Gause, on behalf of Gause DDS, submitted an application for Finance ERC to purchase the Gause ERC.

61. The application contained the Amended Tax Returns which are dated September 30, 2022 and establish Gause DDS's entitlement to the Gause ERC.

62. On or around December 9, 2022, Gause, on behalf of Gause DDS, reiterated to Finance ERC that Gause DDS had filed Amended Tax Returns.

63. Gause and Gause DDS's representations were material because the amount of the Gause ERC is what determined the Purchase Amount, Purchase Price, and incentive for Finance ERC to enter into the Purchase Agreement.

64. Gause and Gause DDS's representations were knowingly false when made. Gause had not filed the Amended Tax Returns for Gause DDS.

65. Finance ERC actually and reasonably relied upon Gause and Gause DDS's representations in entering into the Purchase Agreement. Without Gause and Gause DDS's representations that Gause DDS had filed the Amended Tax Returns and was entitled to the Gause ERC, Finance ERC would not have entered into the Purchase Agreement and transmitted the Purchase Price to Gause DDS. Finance ERC had no reason to believe Gause and Gause DDS did not file the Amended Tax Returns.

66. Finance ERC has suffered damages as a result of its reliance on the material misrepresentations made to induce the Purchase Agreement. In reliance, it remitted the Purchase Price to Gause DDS and invested significant resources into the transaction.

67. The harm Finance ERC has suffered is compensable in damages in an amount to be determined at trial.

WHEREFORE, the plaintiff, Finance ERC LLC, demands judgment against the defendants, Lee Gause DDS PC and Lee Gause, for all damages caused by its fraudulent actions, including all incidental damages, consequential damages, costs, and interest, as well as such further relief as the Court deems just, fair, and equitable.

Dated: January 12, 2024

Respectfully submitted,

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