

**IN THE CIRCUIT COURT OF THE COUNTY OF ST. CHARLES  
STATE OF MISSOURI**

PEOPLES BANK & TRUST CO.,	)	
A Missouri Trust Company,	)	
	)	Cause No. 1611-CC01202
Plaintiff/Counterclaim Defendant,	)	
	)	The Honorable Richard Kevin Zerr
v.	)	
	)	
<b>THETAP L.L.C., D/B/A THE TAP, et al.</b>	)	
	)	
Defendants/Counterclaimants.	)	

**COUNTERCLAIM PETITION**

**COME NOW** Defendants/Counterclaimants TheTap, L.L.C. d/b/a The Tap, Jerome J. Berhorst and Maria A. Berhorst, and for their cause of action against Plaintiff/Counterclaim Defendant Peoples Bank & Trust Co. state:

1) Neither Jerome J. Berhorst nor Maria A. Berhorst ("Berhorsts") missed a loan payment, and yet 3803 Elm Street, St. Charles, Missouri 63301 ("Tap Property") was foreclosed by Peoples on November 10, 2016. Peoples also foreclosed on 626 Dunmore Place Drive, St. Charles, Missouri 63304 ("Berhorsts' Residence") on March 20, 2017.

2) Peoples is a company registered with the Missouri Division of Finance.

3) On or about November 13, 2013, TheTap L.L.C. purchased the Tap Property. The

legal description of the Tap Property is:

LOT 19B-2 of RESUBDIVISION OF LOT 19B OF  
RESUBDIVISION OF LOT 19 OF FOUNTAIN LAKES  
COMMERCE CENTER, PLAT FOUR, according to the plat  
thereof recorded in Plat Book 42 page 180 of the St. Charles  
County Records

4) The Tap Property housed a restaurant and brewery known as The Tap, which was run by Berhorsts

5) Berhorsts were enticed into purchasing the Tap Property based on large part of an appraisal provided by Peoples showing the Tap Property was worth \$2.2 million dollars in 2009. See Exhibit 1 attached hereto. In addition, Peoples represented that it would provide funding for capital expenditures in the amount of approximately \$400,000.00.

6) A portion of the purchase price was made with funds TheTap L.L.C. borrowed from Peoples.

7) TheTap L.L.C. executed a Promissory Note, the face amount which was \$890,000.00, with future advances not to exceed a total of \$950,000.00. Indeed, a total of \$950,000.00 was loaned to TheTap L.L.C. The loan number assigned was 6226353 (the "353 Note"). At the closing, Peoples presented to Berhorsts an unsigned check in the amount of \$75,912.87.

8) Berhorsts guaranteed the 353 Note. The guarantee was secured by a \$200,000.00 Deed of Trust on the Berhorsts' Residence. The legal description of the Berhorsts' Residence is:

LOT 10 OF THE COURT AT TREYMORE, A SUBDIVISION  
IN ST. CHARLES COUNTY, MISSOURI, ACCORDING TO  
THE PLAT THEREOF RECORDED IN PLAT BOOK 41 PAE  
171 OF THE ST. CHARLES COUNTY RECORDS

9) The 353 Note was secured by a Deed of Trust on the Tap Property, the Berhorsts' Residence, and a Security Agreement securing all equipment owned by TheTap L.L.C.

10) The repayment of the 353 Note was for 21 years (252 months).

a) The first year appears to provide for interest only payments.

b) The following 20 years (240 months) provided payments based on a 5.25% interest rate amortized over the 240 month repayment period.

c) The 353 Note provided that the interest rate could be modified.

i) As per ¶ 4 of the 353 Note, interest was subject to modification on 11/08/2016 (change date).

ii) As per ¶ 8 of the 353 Note, the interest rate was subject to change 36 months after the initial 36 month period. The initial 36 month period commenced on 12/08/2014; accordingly, as per ¶ 8, the first change date would be 12/08/2020, i.e. 36 months after initial 36 month period commencing 12/08/2014. The 353 Note required payments of \$6,441.56 commencing 12/08/2014.

iii) Payments of \$6,441.56 amortized over 20 years at 5.25% represents a principal sum of \$956,000.00, not \$950,000.00.

iv) The 353 Note could be prepaid, however, the 353 Note did not provide that it could be prepaid without penalty.

v) The interest rate at which the 353 Note could be changed on the "change dates" was based at the total discretion of Peoples.

11) In March 2015, Peoples insisted the 353 Note be modified in order to properly qualify for an SBA guarantee (the "Modification"). See Plaintiff's Exhibit C.

12) Under the terms of the Modification, Peoples acknowledged that the unpaid balance of the 353 Note was \$600,000.00 as of 03/16/2015. The term of the modified 353 Note was reduced from 252 months to 236 months. The monthly payments, as reflected in the Modification, were to be \$4,082.00 per month.

a) Peoples sent Berhorsts a monthly payment statement requiring payments of \$4,294.80 per month, not \$4,082.00.

b) Loan Payments of \$4,294.80 per month at 5.25% interest amortized over 236 months represents a principal sum of \$631,215.00, not \$600,000.00.

c) As per the SBA guarantee, TheTap L.L.C. was to receive debenture proceeds of \$420,000.00 for total project costs. The SBA debenture guarantee is attached hereto as Exhibit 2. TheTap L.L.C. never received the proceeds of a \$420,000.00 debenture, and the loan was never guaranteed by SBA.

13) In March 2015, Peoples, as part of the representation of acquiring an SBA guarantee, insisted TheTap L.L.C. execute a Note in the amount of \$420,000.00. The Note was assigned the loan number 6237221 (the "221 Note"). TheTap L.L.C. never received the proceeds of \$420,000.00.

a) The interest charged was 5.25% and was to be an interest only payment. Peoples billed Berhorsts for a monthly payment of \$1,898.75. The term of the 221 Note was represented to be the same as the 353 Note.

b) A monthly payment of \$1,898.75, interest only, at 5.25%, represents a principal sum of \$434,000.00, not \$420,000.00.

14) The total overage of the Notes is \$51,215.00.

\$51, 215 Berhorsts  
OVERCHARGED

**Count I - Fraud**

Fraud is our charge

15) Berhorsts and TheTap L.L.C. incorporate by reference all preceding allegations as if fully set forth herein.

16) Peoples enticed Berhorsts to purchase the Tap Property using Exhibit 1, which is a \$2.2 million appraisal, when in fact Peoples knew that the Tap Property was not worth \$2.2 million.

17) On Monday, March 16, 2015 John Armstrong ("Armstrong") of Peoples came to the Tap Property during lunchtime, unannounced, in order to have Berhorsts execute the modified 353 Note and 221 Note.

18) Peoples, by and through Armstrong, represented that the new documents, i.e. the 221 Note and the modified 353 Note, were to secure an SBA loan under the terms set forth in Exhibit 2.

19) The representations of Peoples were false.

a) The represented loan amounts were incorrect, the 221 Note was not for \$420,000.00, rather it was for \$434,000.00 and the \$600,000.00 modification was actually for \$631,250.00.

b) There was no SBA loan, even though the 221 Note states that its purpose, "is to paydown loan #6226353 [the 353 Note] SBA loan."

c) The 221 Note was not for the same term as the 353 Note, but rather for 12 months.

d) The 221 Note was not for a period of 236 months, but rather for 12 months.

20) Peoples knew that the representations were false at the time they were made.

21) Peoples knew that the representations were material in having Berhorsts pursue the purchase and finance of the Tap Property and TheTap L.L.C.

22) Peoples knew that Berhorsts had no ability to re-pay \$420,000.00, the 221 Note, because:

a) Peoples were provided with a quarterly financial statement from Berhorsts, which showed Berhorsts had never taken a salary and had used their personal monies to fund the restaurant and brewery and upgrade the premises.

b) Peoples knew that Berhorsts had not taken a salary and had depleted nearly all of their personal assets.

23) Peoples intended that the statements would be acted upon by Berhorsts in having Berhorsts renegotiate loans which were disadvantageous and misrepresentative, as Berhorsts signatures were acquired during the busiest time of their business day with a representative of Peoples coming unannounced and with no ability to provide copies.

24) Berhorsts were ignorant of the falsity of the statements and were further induced by Peoples promising to negotiate the \$75,912.87 check Berhorsts were initially given when the Tap Property closed in November 2013. Armstrong of Peoples promised that he would negotiate the \$75,912.87 check when he came to the restaurant on 03/16/2015. He did not.

25) Berhorsts relied on the perceived truthfulness of the representations made by Peoples.

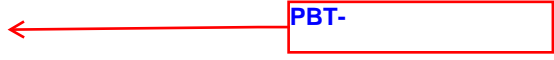
26) Berhorsts had a right to rely on the statements by Peoples because they had made each and every payment and offered on many occasions to come to Peoples in order to review the complete loan package.

27) Berhorsts were damaged. They did not know that the 221 Note matured in 12 months, as they were never provided a copy until the anniversary date when Peoples demanded full repayment. Berhorsts had taken no salary out of the proceeds derived from the restaurant and brewery on the representation that Peoples would provide capital funds in the amount of \$400,000.00.

28) The original \$75,912.87 check was never signed by Peoples. On 11/21/2015, Mrs. Berhorst went to the home office of Peoples demanding that the \$75,912.87 check be negotiated. Peoples took the \$75,912.87 check and exchanged it for another check in a like amount dated 03/21/2015. Mrs. Berhorst immediately deposited the 03/21/2015 check with Peoples.

29) In March 2016, Peoples demanded full payment of the 221 Note, being \$420,000.00. This was the first time Berhorsts were aware that the term of the 221 Note was for only one year. Berhorsts attempted to renegotiate the 221 Note, and continued to pay on the 221 Note and the 353 Note until such time as Berhorsts were served with notice of foreclosure in October 2016.

30) As a direct and proximate result of the fraud perpetrated, the Tap Property has been foreclosed, as has the Berhorsts' Residence. Further, Berhorsts have lost a stream of income, and the potential for future income. Berhorsts have depleted all of their personal savings.

31) The conduct of Peoples was willful, wanton, malicious, premeditated, and purposeful and punitive damages are in order. 

**WHEREFORE**, Berhorsts pray for actual damages in an amount in excess of \$25,000.00, for punitive damages, for their costs herein expended, and for their attorneys fees, and for such other and further relief as this Court deems fair and equitable under the circumstances.

**Count II - Wrongful Foreclosure of The Tap Property**

32) Berhorsts and TheTap L.L.C. incorporate by reference all preceding allegations as if fully set forth herein.

33) On November 10, 2016, Peoples foreclosed the Tap Property, alleging default of the 353 Note.

34) The 353 Note has never been in default. Its purpose of the 353 Note was for the purchase and funding of the Tap Property and The Tap restaurant and brewery, and capital improvement of the same.

35) Peoples alleges that the 353 Note was in default pursuant to ¶ 13 (f) of the original 353 Note. See Exhibits 2, Letters from Peoples dated August 23, 2016.

a) Paragraph 13 (f) states: "(f) **Other Documents.** A default occurs under the terms of any other **loan document.**"

b) Paragraph 1(d) states: "**Loan Documents.** Loan documents refer to all the documents executed as part of or in connection with the **Loan.**"

c) Paragraph 1 (c) states: "**Loan.** Loan refers to this transaction generally, including obligations and duties arising from the terms of all documents prepared or submitted for this transaction such as applications, security agreements, disclosures or notes, and this Note.

36) Peoples demanded that the 221 Note (not the 353 Note) be paid in full on August 23, 2016. See Exhibit 2.

37) Non-payment of the 221 Note does not constitute a default of the 353 Note, as the 221 Note is not "any other loan document" as defined.

a) The 221 Note, signed in March 2015, was not executed as part of or in connection with the 353 Note signed in November 2013.

b) The 221 Note is not an application, security agreement, disclosure, or note. (Please observe that the 221 Note refers to Promissory Notes using a capital N(ote) and to memoranda using a small n(ote)).

c) The 221 Note was obtained fraudulently and fraudulently depicts the principal sum due. The principal sum is not \$420,000.00 as reflected on the face of the Note, rather it is \$434,000.00.

d) The 353 Note was not in default, thus foreclosure of property secured by 353 Note is wrongful and void.



38) Because the 353 Note was not in default, Peoples had no right to foreclose under its terms, and thus the foreclosure of the Tap Property was void and wrongful.

39) As a direct and proximate result of the void and wrongful foreclosure of the Tap Property, both Berhorsts and TheTap L.L.C. have been damaged as follows:

a) Berhorsts' and TheTap L.L.C.'s credit has been damaged, and neither are capable of obtaining a loan;

b) TheTap L.L.C., which is owned by the Berhorsts, has lost title and possession of the Tap Property;

c) Berhorsts have lost their source of income;

d) Berhorsts have lost substantially all of their personal savings of approximately \$1 million;

e) Berhorsts have been subject to public embarrassment and humiliation;

f) Berhorsts have been traumatized and suffered marital discord.

40) The conduct of Peoples was willful, wanton, malicious, premeditated, and purposeful, and punitive damages are in order.

**WHEREFORE**, Berhorsts pray for actual damages in an amount in excess of \$25,000.00, for punitive damages, for their costs herein expended, and for their attorneys fees, and for such other and further relief as this Court deems fair and equitable under the circumstances.

**Count III - Wrongful Foreclosure of 626 Dunmore Place Drive, St. Charles, Missouri 63304**

41) Berhorsts and TheTap L.L.C. incorporate by reference all preceding allegations as if fully set forth herein.

42) On March 20, 2017, Peoples foreclosed on the Berhorsts' Residence, that being the property commonly known and numbered as 626 Dunmore Place Drive, St. Charles, Missouri 63304, alleging the 353 Note was in default.

The 353 Note has never been in default. Its purpose of the 353 Note was for the purchase and funding of the Tap Property and The Tap restaurant and brewery, and capital improvement of the same.

43) Peoples alleges that the 353 Note was in default pursuant to ¶ 13 (f) of the original 353 Note. See Exhibit 2, Letters from Peoples dated August 23, 2016.

a) Paragraph 13 (f) states: "(f) **Other Documents.** A default occurs under the terms of any other loan document."

b) Paragraph 1(d) states: "**Loan Documents.** Loan documents refer to all the documents executed as part of or in connection with the Loan."

c) Paragraph 1 (c) states: "**Loan.** Loan refers to this transaction generally, including obligations and duties arising from the terms of all documents prepared or submitted for this transaction such as applications, security agreements, disclosures or notes, and this Note.

44) Peoples demanded that the 221 Note (not the 353 Note) be paid in full on August 23, 2016. See Exhibits 2 and 3.

45) Non-payment of the 221 Note does not constitute a default of the 353 Note, as the 221 Note is not "any other loan document" as defined.

a) The 221 Note, signed in March 2015, was not executed as part of or in connection with the 353 Note signed in November 2013.

b) The 221 Note is not an application, security agreement, disclosure, or note. (Please observe that the 221 Note refers to Promissory Notes using a capital N(ote) and to memoranda using a small n(ote)).

c) The 221 Note was obtained fraudulently and fraudulently depicts the principal sum due. The principal sum is not \$420,000.00 as reflected on the face of the Note, rather it is \$434,000.00.

d) The 353 Note was not in default, thus foreclosure of property secured by 353 Note is wrongful and void.

46) Because the 353 Note was not in default, Peoples had no right to foreclose under its terms, and thus the foreclosure of the Berhorsts' Residence was void and wrongful.

47) As a direct and proximate result of the void and wrongful foreclosure of the Berhorsts' Residence, the Berhorsts have been damaged as follows:

a) Berhorsts' credit has been damaged, and they are incapable of obtaining a loan;

b) The Berhorsts have lost title to 626 Dunmore Place Drive;

c) Berhorsts have lost all of their equity and appreciation in 626 Dunmore Place Drive;

e) Berhorsts have been subject to public embarrassment and humiliation;

f) Berhorsts have been traumatized and suffered marital discord.

48) The conduct of Peoples was willful, wanton, malicious, premeditated, and purposeful, and punitive damages are in order.

**WHEREFORE**, Berhorsts pray for actual damages in an amount in excess of \$25,000.00, for punitive damages, for their costs herein expended, and for their attorneys fees,

and for such other and further relief as this Court deems fair and equitable under the circumstances.

Respectfully submitted,



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Gregory P. White #32572  
Attorney for Defendants/Counterclaimants  
8000 Bonhomme, Suite 316  
Clayton, Missouri 63105  
(314) 721-3558  
(314) 721-1858 (facsimile)  
gregorypwhite@yahoo.com

**CERTIFICATE OF SERVICE**

The undersigned certifies that on the \_\_\_ day of April, 2017, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system to all counsel of record.