IN THE SECOND DISTRICT COURT OF APPEAL
IN AND FOR THE STATE OF FLORIDA

LEONARDO DIGIOVANNI,

Appellant,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee for Vendee Mortgage Trust 1999-3,

Appellee.
_____/

Case No.: 2D15-4180

L.T. No.: 2012-CA-52826

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

On May 3, 2012, Appellee, Deutsche Bank National Trust Company, as Trustee for Vendee Mortgage Trust 1999-3 ("Deutsche"), initiated this lawsuit against Appellant, Leonardo DiGiovanni ("DiGiovanni"), by suing for mortgage foreclosure.

In its Complaint, Deutsche conceded it lacked possession of the original Note, as it sued to re-establish the lost Note. A copy of the Note was attached to the Complaint; it was payable to the Secretary of the U.S. Department of Veterans Affairs ("VA"), not Deutsche, and bore no endorsement. R.1-11.

In his Answer, DiGiovanni denied Deutsche had the requisite standing to foreclose and all other, pertinent allegations. R.89-93. DiGiovanni also specifically denied Deutsche's compliance with the notice requirements of Fla. Stat. § 559.715. R.90, ¶ 10. Notably, Deutsche never challenged the sufficiency of this pleading in any way at any time. R.1-379.

This case proceeded in a non-descript way towards trial. At trial, just one witness testified, Tangeia Harrell ("Ms. Harrell"), a "mortgage resolution associate" with Bank of America, N.A. ("BANA" or "Bank of America"). T.5. Ms. Harrell was not a percipient witness to any of the events in question but testified based on her review of four business records: the Note, Mortgage (both a short form mortgage

and master form mortgage), default letter, and a payment history. R.187-220.

The exhibits introduced into evidence at trial are more notable for what they lack than what they contain. On the issue of standing, for instance, there was no bailee letter, screenshot, notes log, assignment of mortgage,[1] power of attorney, pooling and servicing agreement, or any other document reflecting the Bank ever possessed the Note. R.278-379.

The closest Deutsche came to showing it had the requisite standing was Ms. Harrell's testimony that BANA had possession of the endorsed Note from October 29, 1999 until whatever unspecified time it lost the Note. T.13. Significantly, however, Ms. Harrell did not testify BANA possessed the Note on behalf of Deutsche, BANA was an agent for Deutsche, or anything of that ilk. Moreover, Deutsche did not introduce a power of attorney, pooling and servicing agreement, or any other document reflecting BANA was authorized to act on its behalf. R.187-220. The lack of any agency relationship between Deutsche and BANA was perhaps best illustrated by the following portions of Ms. Harrell's testimony:

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[1] The Bank attempted to introduce an assignment of mortgage into evidence. However, when DiGiovanni objected, pointing to an interrogatory answer where the Bank asserted under oath that it was not relying on an assignment of mortgage as proof of its standing, the lower court sustained the objection. The assignment of mortgage was hence proffered into evidence but was not part of the Bank's *prima facie* case. T.23-25.

Q: You don't have a pooling and servicing agreement here today to illustrate that Bank of America is the servicer of the loan, correct?
A: No, we do not have the pooling and servicing agreement here today.
Q: You don't have a limited power of attorney here with you today to illustrate that Bank of America is the servicer of the loan?
A: No.
Q: You don't have either of those documents here today to show that Bank of America was the servicer of the loan at the inception of this lawsuit, do you?
A: No.

T.32. Quite simply, the evidence did not show BANA was authorized to act as an agent for Deutsche, much less that it ever had possession of the Note on behalf of Deutsche.

At the conclusion of Deutsche's *prima facie* case, DiGiovanni moved to strike Ms. Harrell's testimony, asserting Deutsche failed to show BANA was an agent of Deutsche or authorized to act/testify on its behalf. In support, DiGiovanni pointed to controlling precedent from this Court and the lack of a power of attorney or any other proof of the requisite agency relationship. T.43-44. The lower court acknowledged Deutsche's lack of documentary evidence, T.54 ("Bank of America appearing as servicer without any documentation of that"), yet denied this motion on the basis that it had already allowed Ms. Harrell to testify. T.45.

Meanwhile, the copy of the Note introduced into evidence included a special

endorsement payable not to Deutsche, but to "Bankers Trust Company of California, N.A., as Trustee for Vendee Mortgage Trust 1999-3, Without Recourse, Except as Provided in a Loan Sale Agreement Dated October 1, 1999" (hereinafter "Bankers"). R.188. DiGiovanni objected to the admission of this Note because this endorsement was absent from the copy of the Note attached to the Complaint,[2] but it was the content of the endorsement itself that became the focus of this trial.

After Deutsche rested its case and DiGiovanni argued for an involuntary dismissal, the lower court was obviously troubled by the special endorsement on the Note to Bankers. T.55 ("What about the fact that the plaintiff … was Deutsche Bank and there's no endorsement to Deutsche Bank?"). This prompted the court to ask Deutsche's counsel if it had "any proof" Deutsche was the trustee of the trust that filed this lawsuit. Tellingly, counsel admitted Deutsche had no such evidence. T.56. The lower court agreed, T.57 ("that hasn't been introduced into evidence"), relegating Deutsche to arguing the special endorsement was sufficient even though it made the Note payable to a different trustee. T.72-73. During this exchange, the lower court *sua sponte* noted how the style of the Complaint reflected Deutsche was

[2] DiGiovanni contemporaneously objected to the introduction of the Note, asserting the Bank had not attached the endorsed version thereof to its Complaint. The lower court overruled that objection and admitted the Note as Exhibit 1. T.9-11.

"f/k/a" Bankers, T.72-73, an issue that had not previously been mentioned.

Despite its obvious concerns about the lack of evidence linking Deutsche and Bankers, the lower court did not grant DiGiovanni's motion for involuntary dismissal. Instead, it took the motion under advisement, then gave DiGiovanni a chance to present evidence. T.73-74. Cognizant of the lower court having brought up the "f/k/a" in the style of the case, DiGiovanni's counsel called Ms. Harrell back to the stand for one simple but important question:

> Q: Do you have any document here today to illustrate that Deutsche Bank National Trust Company was formerly known as Bankers Trust Company of California?
> A: No.

T.74.

DiGiovanni then renewed his motion for involuntary dismissal, but the lower court again declined to rule, at least *vis a vis* the issue of standing.[3] Instead, the court took the motion under advisement, indicating it was going to "go up to my office where I can look on my computer and see what I can do." T.76.

At the point the court took a recess, it was clear Deutsche had rested its case.

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[3] The court denied the motion on all other grounds, including the absence of any evidence Deutsche gave DiGiovanni written notice of the assignment of the debt before filing suit, as required by Fla. Stat. 559.715. Notably, in the process of arguing this issue, Deutsche did not allege DiGiovanni's pleadings were in any way inadequate. R.239-277.

Deutsche gave no hint of wanting to re-open the evidence, introduce additional evidence, or anything of that ilk. All that was left was for the lower court to rule. T.76.

Upon returning to the courtroom, the court noted how it had gone through DiGiovanni's answer, *sua sponte*, to ascertain which matters, if any, he had admitted. T.78-79. This was odd, to say the least, because no party had mentioned any admissions in the pleadings at any point in the trial. T.1-89.

As if the lower court's *sua sponte* review of the pleadings and *sua sponte* raising of the "f/k/a" in the style of the case were not bad enough, things then got truly bizarre. The trial court explained how it had *sua sponte* conducted a Google search on the internet, found the evidence the Bank was missing, printed out the results of that search, *sua sponte* indicated it would take judicial notice thereof, and handed that missing piece of evidence to the Bank. When DiGiovanni's counsel objected to the court injecting itself into the proceeding in such a manner, the court gave that internet printout to the Bank, *sua sponte* suggested the Bank re-opened the evidence to admit it, and used that printout as the basis of its ruling against DiGiovanni.

That synopsis of the facts may sound too incredible to believe, so here is a verbatim recitation of the trial transcript:

The Court: … So the only thing I believe that that leaves is the issue, which really I thought as this developed probably I would be ruling in favor of the defendant on that because the endorsement is to Bankers Trust. Actually, I went back and read it, it's Bankers Trust of California, when I looked at it again, and the plaintiff in the prior suit, in this suit is Deutsche Bank and it says formerly -- not formerly known as --

[Bank Counsel]: It's F/K/A actually.

The Court: Formerly known as?

[Bank Counsel]: It is formerly known as, yes.

The Court: I keep forgetting the language, and I thought, you know, well, there's no documentation, I think I have to rule in favor of the defendant because it's a different entity. And then I got to thinking, well, [Bank counsel] was arguing, well, it's really the trust is the plaintiff and Deutsche Bank is alleging that they're the trustee and that was the same language in the original endorsement to Bankers Trust of California, that they were the trustee. I did double check the language, it is the same trust, trustee for Vindee Mortgage Trust, 1999-3 and that consistently had been there all the way along. So then I thought in practical terms my experience is probably this is something developed from a merger maybe and that -- that I considered it really is a pretty technical thing because it is the same trust and they've alleged that all the way along. And I have had cases where the -- one of the parties has – as the plaintiff, normally, of course, has submitted something through the Federal research that actually shows if there's been a change of name or something, and of course I didn't know it was merger, there was no evidence, and [DiGiovanni's counsel] made that clear from his calling Mr. Harrell. And -- but I thought, do I need to consider, in the interest of justice, allowing the plaintiff, if there is something that is virtually public record, to ask me to take judicial notice if that's the only failing. And that's where I came down to, that's the only thing that I think failed in the plaintiff's proof and so I just thought, you know, if it really is that obvious, something like that, or that clear, I'll Google it. So I Google Bankers Trust Company of California and I printed out what came up, National Information Center, United States Federal Reserve System, and this is what usually comes up. And I've taken judicial

notice in other cases when somebody's submitted something like that and institution history for Deutsche Bank National Trust Company. See, I put in Bankers Trust Company and this is what came up, institutional history for Deutsche Bank and what it shows, 1986 BT Trust Company of California National Association 1987, renamed Bankers Trust Company of California National Association 1993. It shows they moved their address to Los Angeles, California, 2002; Bankers Trust Company of California was renamed Deutsche Bank National Trust Company. And then it shows later 2011 moved to a different address in Los Angeles. I think that's the type of thing that I should take judicial notice of. Since that's something new, I'll give [DiGiovanni's counsel] a shot at anything he wants to say about that, but it's so obvious that I think I should take notice of it.

[DiGiovanni counsel]: Yes, Your Honor. Thank you. One, Your Honor, this was -- a couple of things. One, that was never brought up by the plaintiff. It was plaintiff's burden of proof to do all of this.

The Court: That's true.

[DiGiovanni counsel]: It was not in their witness list or discovery. Even when asked about the pooling and servicing agreement they objected to even providing that in their discovery, Your Honor, so respectfully, on those grounds, that. And, in addition, I would respectfully indicate that Your Honor providing and doing your own due diligence on the matter, it was outside of the purview of the Court because that's what plaintiff's case was intended for them to do. They present the evidence, we present our evidence, and then that's what is to be in front of Your Honor. Your Honor isn't the fact finder, it's the fact trier and respectfully that is not taking -- basically guiding the hand of the plaintiff to make a ruling. And I think Your Honor was right on the first part prior to your Googling it, that they failed to prove that evidence and that you've attached -- you haven't made your actual ruling, you've allowed me to comment on it, but if you're going to rely on that evidence as the key evidence to establish what was their failure, I think that would be improper of the Court by finding the fact itself. It's not a fact finder, it's the trier of fact, Your Honor, and so respectfully, we'd ask that you not admit it into evidence, not take that into consideration in making your ruling, and go based on your prior explanation that it came down to. It's two separate

> entities, they have to prove what they've alleged, what their theory is. They haven't done that today.
>
> The Court: Do you wish to reopen your case to admit this document?
>
> [Bank Counsel]: Yes, Your Honor …
>
> The Court: Okay. I grant the motion. I do that only technically. I believe I can do something like this because it is so straightforward and black and white that it was a change of name that is in the repository of the government, Federal governmental agency whose task it is to keep track of all of that and it is a very technical thing to say, well, they've said they – they've said we were formerly Bankers Trust Company and for their suit to fail because they didn't present that, I don't think would really be just.
>
> I do have to note also that, you know, the defendant is not here, there are certain things that the defendant could or should testify to which would be were there payments or notices that they received, so it is just a purely technical thing, and for that reason, I'm going to take judicial notice of this. I'll mark it as Exhibit … No. 7, and I will rule in Plaintiff's favor based on that.

T.80-85.

As this transcript reflects, the lower court used its own Google search, and the internet printout obtained therefrom, as the basis for its Final Judgment of Foreclosure and the scheduling of a 30-day sale date. R.182-186.

After trial concluded, and upon learning of these facts, DiGiovanni strongly considered a motion to disqualify Judge Starnes, believing such a motion would be well-taken. That said, DiGiovanni's undersigned counsel believed the lower court would, upon reflection and upon review of the authorities cited in the Motion for

Rehearing and/or Stay Pending Appeal ("Motion for Rehearing and Stay"), realize the impropriety of His Honor's conduct and reconsider its denial of the motion for involuntary dismissal.[4] R.221-224. Unfortunately, that did not happen.

At the hearing on the Motion for Rehearing and Stay, the lower court admitted "there was a gap" in the Bank's evidence, yet denied rehearing. Surprisingly, Judge Starnes concluded it was "acceptable" for His Honor to *sua sponte* bring the internet printout to the Bank, after it rested, to fill this "gap" in the evidence. R.239-277 ("I feel pretty confident that I was within my rights as a judge to do what I did.").[5]

The foregoing facts bear repeating and a moment of reflection. When the parties rested and concluded all closing arguments, Deutsche was missing requisite evidence. The presiding judge admits as much, but instead of ruling based on the evidence presented, took a recess to "go up to my office where I can look on my computer." T.76. During that recess, His Honor *sua sponte* conducted a Google

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[4] A Motion to Disqualify Judge Starnes "may" have resulted in a new trial. See Fla.R.Jud.Admin. 2.330(h). On the facts at bar, however, the possibility that the Final Judgment would remain in place, notwithstanding Judge Starnes' disqualification, was not a tenable result. For that matter, anything short of dismissal is insufficient. See Argument, infra.

[5] Notably, Deutsche did not address the propriety of His Honor's conduct at the rehearing, limiting its arguments to the admissibility of the internet printout. R.239-277. Hence, the only individual defending the manner in which Deutsche obtained the internet printout was/is Judge Starnes.

search (attempting to find the evidence missing from Deutsche's case), printed out the results of that search, gave it to the Bank, and *sua sponte* suggested the Bank re-open its case to introduce the missing evidence. Even when DiGiovanni vociferously objected, the lower court permitted the internet printout into evidence and used that printout as the basis to rule against DiGiovanni. Weeks later, even after review of appropriate case citations and judicial canons and an opportunity to reflect, the judge still deemed these actions "appropriate" and denied rehearing. R.269.

To His Honor's credit, the court did grant a stay pending appeal without the need for a bond, noting the facts at bar were "different" and the court "found [no cases] exactly like this." R.238; 270.

On these facts, DiGiovanni timely appeals the Final Judgment of Foreclosure.

SUMMARY OF THE ARGUMENT

The parties had rested their respective cases and concluded all arguments. Clearly, the requisite evidence was missing; the presiding judge acknowledged as much. Yet instead of dismissing the case, the judge deemed it "appropriate," even after rehearing, to *sua sponte* conduct a Google search for the missing evidence, print out the results of that search, give that internet printout to Deutsche in open court, *sua sponte* suggest Deutsche re-open its evidence, admit that document into evidence over objection, and use that printout as the basis for its ruling against DiGiovanni.

The facts at bar should shock the conscience of this Court. If that sounds like hyperbole, can this Court imagine such facts in any other context? "Hold on, prosecution. You don't have the requisite evidence to convict this defendant; let me go find the requisite proof on the internet and print it out for you so you can introduce it into evidence before I rule." Under legions of controlling cases, this was not an "acceptable" way for a judge to decide a lawsuit in a Florida courtroom.

Reversal is also required irrespective of the lower court's actions. After all, the internet printout in question should not have been admitted into evidence even if Deutsche had brought it to trial on its own accord, as it was not authenticated via a records custodian and was not a certified copy.

This Court should also reverse because Deutsche failed to prove it was entitled to enforce the Note at the time it was lost. Though BANA may have possessed the endorsed Note, there was no evidence (e.g. a power of attorney or pooling and servicing agreement) showing BANA was authorized to act on Deutsche's behalf. Without proof of an agency relationship, BANA's possession of the Note did not help Deutsche prove its case.

This Court's precedent requires dismissal on remand where a foreclosing lender fails to prove its *prima facie* case at trial. Many other Florida courts have agreed. As such, and regardless of the basis upon which this Court reverses the Final Judgment of Foreclosure, it should remand with instructions to enter an involuntary dismissal.

STANDARD OF REVIEW

The sufficiency of the evidence at trial in a foreclosure case is subject to a *de novo* standard of review. Gonzalez v. BAC Home Loans Servicing, LP, 2015 WL 7781746, ___ So. 3d ___ (Fla. 5th DCA 2015); Lacombe v. Deutsche Bank Nat'l Trust Co., 149 So. 3d 152 (Fla. 1st DCA 2014). *De novo* is hence the standard of review for such issues.

This Court has treated a departure from judicial neutrality as fundamental error. See Lyles v. State, 742 So. 2d 842 (Fla. 2d DCA 1999). That is the lens through which this Court should adjudicate that portion of the instant appeal.

ARGUMENT

I. THE LOWER COURT ERRED BY ENTERING THE FINAL JUDGMENT OF FORECLOSURE.

This case was over. Deutsche failed to meet its burden of proof, and an involuntary dismissal was required. The presiding judge knew it and admitted as much yet refused to rule accordingly. Instead, the court took a recess, went to its Chambers, *sua sponte* conducted a Google search to procure the missing evidence for Deutsche, resumed court, handed that internet printout to Deutsche, suggested Deutsche re-open its case, admitted the internet printout into evidence over objection, and used that internet printout as the basis for its ruling. T.80-85.

DiGiovanni asserts three grounds for reversal in this Initial Brief. That said, this appeal is about more than an erroneous legal ruling. The facts at bar should shock the conscience of this Court. Reversal is required not only to uphold the law, but the integrity of the entire judicial system.

Even if the internet printout had been admitted into evidence appropriately, the evidence adduced at trial was still inadequate for Deutsche to prove its *prima facie* case. After all, Deutsche failed to prove it (as opposed to BANA) was entitled to enforce the Note at the time it was lost. See § 673.3091(1)(a). BANA may have had possession of the endorsed Note since October 29, 1999, but such evidence was

of no moment without proof of an agency relationship between BANA and Deutsche. A February, 2016 decision of this Court and basic principles of agency law require reversal on this basis as well.

A. The lower court erred by conducting a "Google" search, *sua sponte* and after the parties had rested, printing out the results of that search, giving that internet printout to Deutsche, and suggesting Deutsche re-open the evidence to introduce the internet printout so it could fix a fatal flaw in its *prima facie* case.

"A judge must not independently investigate facts in a case and must consider only the evidence presented." Wilson v. Armstrong, 686 So. 2d 647 (Fla. 1st DCA 1996) (citing Fla.Code.Jud.Conduct Cannon 3B(7) cmt.). In this same vein, judges must remain neutral arbiters and cannot help a litigant prosecute its case. See Asbury v. State, 765 So. 2d 785 (Fla. 4th DCA 2000). In 1939, the Florida Supreme Court summarized these principles in an oft-cited passage:

> This Court is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of Courts to scrupulously guard this right and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought in question. The exercise of any other policy tends to discredit the judiciary and shadow the administration of justice.
>
> It is not enough for a judge to assert that he is free from prejudice. His mien and the reflex from his courtroom speak louder than he can declaim on this point. If he fails through these avenues to reflect justice and square dealing, his usefulness is destroyed. The attitude of the judge and the atmosphere of the courtroom should indeed be such that no matter what charge is lodged against a litigant or what cause he is

> called on to litigate, he can approach the bar with every assurance that he is in a forum where the judicial ermine is everything that it typifies, purity and justice. The guaranty of a fair and impartial trial can mean nothing less than this.

State ex rel. Davis v. Parks, 194 So. 613, 615 (Fla. 1939).

Here, the lower court departed from these requirements in an egregious way. To wit, the court realized Deutsche had not introduced requisite evidence, i.e. proof Bankers and Deutsche were the same entity, and acknowledged dismissal was required. Yet instead of ruling on the evidence before His Honor and dismissing the case, the court took a recess, *sua sponte* conducted a Google search for the missing evidence, printed out the results of that search, gave that internet printout to Deutsche in open court, *sua sponte* suggested Deutsche re-open its evidence, admitted that document into evidence over objection, and used that printout as the basis for its ruling against DiGiovanni. T.80-85.

Established precedent requires reversal where the trial court injects itself into a proceeding in such a manner.[6] In J.F. v. State, for instance, both parties had rested

[6] Disqualification undoubtedly would have been required, had DiGiovanni brought such a motion. See In re. Guardianship of O.A.M., 124 So. 3d 1031 (Fla. 3d DCA 2013); Shore Mariner Condo. Assn., Inc. v. Antonious, 722 So. 2d 247 (Fla. 2d DCA 1998). The problem with judicial disqualification, however, is that it permits but does not mandate a rehearing. See Fla.R.Jud.Admin. 2.330(h) (the successor judge "may" reconsider the rulings of a disqualified judge). As such,

their respective cases, but the trial judge *sua sponte* ordered a continuance to enable the state to introduce additional evidence. Upon reversing the ensuing judgment, the Fourth District explained:

> While it is permissible for a trial judge to ask questions deemed necessary to clear up uncertainties as to issues in cases that appear to require it, the trial court departs from a position of neutrality, which is necessary to the proper functioning of the judicial system, when it *sua sponte* orders the production of evidence that the state itself never sought to offer in evidence.

718 So. 2d 251, 252 (Fla. 4th DCA 1998).

Similarly, in Lee v. State, the Fourth District reversed a final judgment emanating from a trial in which the presiding judge helped the state prosecute its case, explaining:

> The law in Florida expressly prohibits a judge from becoming an advocate for either party's position. J.F. v. State, 718 So. 2d 251, 252 (Fla. 4th DCA 1998); see also Chastine v. Broome, 629 So. 2d 293 (Fla. 4th DCA 1993). …
>
> The case law is replete with examples where this court has found reversible error when the trial court improperly assisted the state in proving its case. [internal citations omitted]
>
> In this case, the prosecutor had finished asking the state's eyewitness about appellant's tattoos and had not asked the eyewitness to identify them on appellant's forearm in court. After the prosecutor had indicated that direct examination of the witness was concluded, the trial court *sua sponte* called a sidebar conference. During the sidebar conference, the trial court asked the prosecutor whether he intended to

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DiGiovanni did not seek disqualification, but instead sought rehearing (and now pursues appellate relief) based on these same principles of law.

> have the eyewitness identify appellant's tattoos and scars in court, which the prosecutor had not indicated he would do prior to this point. …
>
> It is apparent from the record that the trial court departed from its position of neutrality by prompting the prosecutor to have the witness identify the scar and tattoos on appellant's forearm in from of the jury. But for the court's prompting during the sidebar conference, the prosecutor would not have embarked on that line of questioning. Based on these facts, the trial court reversibly erred because it became an active participant by 'prompting the State' to present evidence of appellant's tattoos and scars.

789 So. 2d 1105, 1106-1107 (Fla. 4th DCA 2001); see also Williams v. State, 160 So. 3d 541 (Fla. 4th DCA 2015).

This Court has followed this principle of law in this very context. In Williams v. State, for instance, this Court reversed a final judgment where the trial court *sua sponte* suggested to the prosecution that it amend the information to better fit the crime charged. 901 So. 2d 357 (Fla. 2d DCA 2005). Similarly, in Lyles, this Court reversed a final judgment where the trial court "gave the appearance of partiality" where it *sua sponte* continued a hearing and required the defendant to submit to fingerprinting. 742 So. 2d at 843; see also Seago v. State, 23 So. 3d 1269 (Fla. 2d DCA 2010); Edwards v. State, 807 So. 2d 762 (Fla. 2d DCA 2002).

This Court's ruling in Lyles is noteworthy because it treats a trial court's departure from judicial neutrality as fundamental error, depriving the defendant of "one of the essentials of due process, an impartial magistrate." 742 So. 2d at 843;

see also Sparks v. State, 740 So. 2d 33 (Fla. 1st DCA 1999) (fundamental error where trial court injected itself in the proceedings). DiGiovanni lodged a lengthy, contemporaneous objection, T.80-85, so preservation is not an issue here. See F.B. v. State, 852 So. 2d 226, 227 (Fla. 2003) ("sole exception to the contemporaneous objection rule applies when the error is fundamental"). That said, the "fundamental" nature of this legal principle cannot go unmentioned.

As this is a foreclosure case, DiGiovanni's reliance on criminal cases might appear unusual. That said, the instant case (like many foreclosure cases) was tried in the way many criminal cases are tried: by the defendant, DiGiovanni, forcing Deutsche to meet its burden of proof. In fact, in that sense, foreclosure trials are more similar to criminal trials than other types of civil trials. Hence, there is no reason why the rationale of the foregoing cases applies with equal force here.

Lest there be any ambiguity in that regard, this Court has applied the foregoing line of cases in the civil context. In In re T.W., this Court relied upon Lyles, supra, in reversing an order terminating parental rights where "the trial judge gave the appearance of partiality by *sua sponte* reopening the case after the parties had rested." 846 So. 2d 581, 581 (Fla. 2d DCA 2003).

The Third District has ruled similarly in the foreclosure context. In Nationstar Mortg., LLC v. Marquez, the lower court *sua sponte* questioned the sufficiency of

the evidence in support of the lender's lost note claim. Citing this Court's decision in Antonious, supra, the Third District explained how such actions were impermissible and, upon reversing, evaluated the sufficiency of the evidence without regard for what happened after the court interjected. 180 So. 3d 219, 220-222 (Fla. 3d DCA 2015).

The foregoing authorities plainly here. If anything, the lower court's actions in the instant case are more egregious than those which required reversal in the above-cited cases. After all, the lower court did not merely help Deutsche by suggesting a course of action; His Honor *sua sponte* obtained the evidence Deutsche needed to avoid dismissal, handed the results of the court's own Google search to Deutsche in open court, suggested Deutsche re-open the evidence, admitted the internet search into evidence over objection, and used that internet printout as the basis for its ruling against DiGiovanni. T.80-85.

On these facts, and under the foregoing authorities, there can be no doubt that reversal of the Final Judgment is required. It is that simple.

B. The internet printout was not admissible irrespective of the lower court's actions.

Even if, *arguendo*, this Court somehow takes no issue with the manner in which the lower court procured the internet printout for Deutsche, it is still not

something this Court should consider as it assesses the sufficiency of the evidence in Deutsche's *prima facie* case. Put differently, even if Deutsche's counsel had pulled the internet printout out of its own file, its contents should not be considered.

Discussion regarding the internet printout began with the lower court expressing the belief it could take judicial notice thereof. T.80-85. The problem with that tact (aside from the *sua sponte* nature of the court's actions) was that even if DiGiovanni had been given adequate notice of the request, which he was not, see Fla. Stat. § 90.203, taking judicial notice of the internet printout did not render the content thereof admissible.

In Tomlinson v. State, this Court reversed a foreclosure judgment where the lower court relied on a request for judicial notice, explaining how said request "would not make the contents of the documents admissible if they were subject to challenge, such as when a document is protected by privilege or constituted hearsay." 173 So. 3d 1121, 1123 (Fla. 2d DCA 2015). In the words of this Court:

> GMAC points to a January 2007 letter from GMAC informing the property owners that the mortgage account had been transferred from the original lender to GMAC. This letter is hearsay and was not admitted as a business record with a proper foundation; in fact, GMAC did not attempt to present this letter at trial. Therefore, we cannot consider it.

Id. In so ruling, this Court followed Dufour v. State, where the Florida Supreme Court explained how documents which have been judicially noticed must comply with the rules of evidence before they can be admitted. 69 So. 3d 235, 254 (Fla. 2011).

Under Tomlinson and Dufour, the lower court's taking of judicial notice of the internet printout would not have helped Deutsche; the document had to be admissible in evidence. Here, the internet printout should not have been admitted (not just by the court, but at all), as it was not a certified copy and had not been authenticated by a records custodian. In the words of the First District:

> The trial court should have sustained Appellant's objection to the printout. For a document to be properly admitted under the business record hearsay exception, it must be created at or near the time of the event, from information transmitted by a person with knowledge, and must be kept in the ordinary course of a regularly conducted business. See § 90.803(6)(a), Fla. Stat. (2007). These requirements must be shown "by the testimony of the custodian or other qualified witness" or must be properly certified. Id. In the instant case, the State did not introduce the testimony of a records custodian, and the printout from the website was not certified. Therefore, the trial court erred in admitting the printout from the Department of Corrections' website under the business record exception to the rule against hearsay.

Whitley v. State, 1 So. 3d 414, 415 (Fla. 1st DCA 2009); see also Campbell v. State, 949 So. 2d 1093 (Fla. 3d DCA 2007); Saadi v. Maroon, 2009 WL 3736121 (M.D.

Fla. 2009); St. Luke's Cataract and Laser Institute, P.A. v. Sanderson, 2006 WL 1320242 (M.D. Fla. 2006).[7] [8]

Here, as in Whitley, the internet printout was not a certified copy and was not introduced via a records custodian. Moreover, none of the four prongs to the business records exception were satisfied, see Fla. Stat. § 90.803(6), as Deutsche did not testify regarding the website printout in any way. As such, even if this Court could somehow overlook the manner in which the lower court procured the internet

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[7] Saadi explains the difference between taking judicial notice of an internet posting and admitting that posting into evidence to prove the contents thereof. 2009 WL 3736121 (M.D. Fla. 2009). Under that analysis, if all Deutsche wanted to do was show the internet posting existed on the internet, then perhaps judicial notice would have been sufficient. Id. Clearly, however, Deutsche wanted to admit the internet posting for the truth of what it contained, i.e. to prove Deutsche and Bankers were the same entity. Under all of the cases cited herein, and as Saadi explains, such proof could not be established via judicial notice.

[8] Deutsche may argue (or this Court may wonder whether) this argument is waived because DiGiovanni did not interpose a contemporaneous objection on these grounds. However, DiGiovanni objected at length to the *sua sponte* nature of the court's actions. T.80-85. Under the circumstances in which the lower court acted, i.e. procuring the internet printout *sua sponte* and indicating it was admitting it into evidence without discussion, any further objection would have been futile. See State v. Walker, 923 So. 2d 1262, 1265 (Fla. 1st DCA 2006) ("A more specific objection on this point would have been futile and the law does not require futile acts."). Quite simply, the lower court had already made up its mind; the internet printout was being admitted regardless of how DiGiovanni felt about it.

Perhaps more significantly, the lower court's departure from judicial neutrality is fundamental error, see Lyles, 742 So. 2d at 843; Sparks, 740 So. 2d at 34, so a contemporaneous objection was unnecessary. F.B., 852 So. 2d at 227.

printout, that document was not competent, substantial evidence upon which a judgment could be entered.

As the trial court indicated, the internet printout was critical. After all, without that document, there was no evidence of a relationship/link between Deutsche and Bankers, relegating Deutsche to argue it had standing even though the Note bore a special endorsement to Bankers, a third party. Under established precedent, this was an argument Deutsche could not win. See Rincon v. HSBC Bank USA, 2016 WL 742612, ___ So. 3d ___ (Fla. 5th DCA 2016) (reversing final judgment of foreclosure where plaintiff lacked standing because note bore special endorsement to third party); Gorel v. Bank of New York Mellon, 165 So. 3d 44 (Fla. 5th DCA 2015); Dixon v. Express Equity Lending Group, LLP, 125 So. 3d 965 (Fla. 4th DCA 2013); Khan v. Bank of America, N.A., 58 So. 3d 927 (Fla. 5th DCA 2011).

In light of the foregoing, this Court should reverse the Final Judgment at bar.

C. Deutsche failed to prove it (as opposed to Bank of America) was entitled to enforce the lost Note.

To prevail on its claim to re-establish the lost Note, Deutsche had to prove it was entitled to enforce the Note when loss of possession occurred.[9] See Fla. Stat. §

[9] § 673.3091(1)(a) requires proof the foreclosing lender was "entitled to enforce" the note at the time it was lost or "has directly or indirectly acquired

673.3091(1)(a); Correa v. U.S. Bank, N.A., 118 So. 3d 952 (Fla. 2d DCA 2013). Deutsche tried to do this by advancing a "holder" theory, but there was no evidence establishing Deutsche (as opposed to BANA) ever possessed the original Note.[10] Many foreclosure judgments have been reversed on such facts. See e.g. May v. PHH Mortg. Corp., 150 So. 3d 247, 249 (Fla. 2d DCA 2014) (reversing foreclosure judgment where "none of the evidence adduced at trial demonstrated when, if at all, the bank came into possession of the note").

That said, the inquiry cannot end there. On February 26, 2016, this Court decided Phan v. Deutsche Bank Nat'l Trust Co., 2016 WL 746400, ___ So. 3d ___ (Fla. 2d DCA 2016). Characterizing the issue as one of first impression ("We have not found a published Florida court decision that applies the principle…"), this Court

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ownership of the instrument from a person who was entitled to enforce" the note when it was lost. Deutsche litigated this case by trying to prove the former, i.e. that it was the "holder" of the Note, and made absolutely no mention of the concept of ownership. For instance, there was no purchase and assumption agreement, R.187-220, as in Stone v. BankUnited, 115 So. 3d 411 (Fla. 2d DCA 2013). DiGiovanni's arguments regarding standing hence address the former portion of § 673.3091(1)(a), not the latter. That said, if Deutsche somehow disagrees, and believes it proved some type of ownership theory, then DiGiovanni will address that concept in the Reply Brief.

[10] The closest Deutsche came to proving it was the holder of the Note was Ms. Harrell's testimony that BANA possessed the endorsed Note as of October 29, 1999 (through, ostensibly, the time it was lost). T.13. BANA's possession of the Note, however, did not *ipso facto* make Deutsche the holder. See Argument, infra.

held a foreclosing lender could prove the requisite standing via "constructive possession" if its agent possessed the endorsed note on its behalf. 2016 WL 746400, *5.

In Phan, an employee of the servicer gave extensive testimony establishing a principal-agent relationship between itself and the lender. The borrower "never objected" to this testimony, nor did she dispute the alleged agency relationship, "either below on appeal." Id. at *1. On those facts, this Court concluded the foreclosing lender was the holder of the note via its agent, the servicer. Id. at *2-4.

The facts at bar are much different. Here, Ms. Harrell never testified BANA was the agent for Deutsche; in fact, she never even mentioned Deutsche during her testimony.[11] Tellingly, Deutsche's counsel never argued BANA was the agent for Deutsche, was acting on its behalf, or anything of that ilk. T.1-89. Quite simply, "agency" was not a theory Deutsche advanced below.

Meanwhile, DiGiovanni challenged any purported agency relationship between Deutsche and BANA throughout the trial proceedings. During cross-examination, DiGiovanni questioned Ms. Harrell on this very issue, eliciting

[11] The word index attached to the trial transcript reflects the term "Deutsche" was mentioned when the lower court called the case, T.4, but was not mentioned again until DiGiovanni cross-examined Ms. Harrell. T.39.

testimony that BANA lacked a power of attorney or pooling and servicing agreement showing it was authorized to act on Deutsche's behalf. T.32. DiGiovanni then moved to strike Ms. Harrell as a witness based on this lack of evidence. T.43-44. Suffice it to say that, unlike Phan, this Court cannot conclude BANA was the agent for Deutsche based on DiGiovanni's failure to object.

Under Phan, the question at bar is whether the evidence adduced at trial was sufficient to show BANA was the holder of the Note (at the time it was lost) in its capacity as an agent for Deutsche. In answering this question, this Court should look to general principles of agency law, i.e. cases existing outside the foreclosure context, just as Phan did.[12] 2016 WL 746400, *2-4.

In Florida State Oriental Medical Assn. v. Slepin, the First District ruled an agent did not have actual authority to bind a principal under the following, three-prong standard:

> A finding of actual authority would require evidence that the principal acknowledged the agent's power, that the agent accepted the responsibility of representing the principal, and that the principal retained control over the agent's actions. See Villazon v. Prudential Health Care Plan, Inc., 843 So. 2d 842 (Fla. 2003); Goldschmidt v. Holman, 571 So. 2d 422 (Fla. 1990); Restatement (Second) of Agency § 1 (1957).

[12] Phan discusses concepts of agency law by citing Florida Supreme Court decisions from the 1930s. 2016 WL 746400, *4. Respectfully, more recent case law exists.

971 So. 2d 141, 144 (Fla. 1st DCA 2007). In so ruling, the First District followed two recent Florida Supreme Court decisions which set forth these same three elements. Villazon v. Prudential Health Care Plan, Inc., 843 So. 2d 842 (Fla. 2003); Goldschmidt v. Holman, 571 So. 2d 422 (Fla. 1990).[13]

Under Phan, Slepin, Villazon, and Goldschmidt, the evidence introduced at trial was insufficient to establish an agency relationship. After all, Ms. Harrell's testimony and the documentary evidence did not prove: (1) Deutsche acknowledged the power of BANA; (2) BANA accepted the responsibility of representing Deutsche; and (3) Deutsche retained control over BANA's actions. It is really that simple.

The most Deutsche can argue is that BANA attended trial and acted as servicer for the loan. Those facts, however, without more, are plainly inadequate to establish a principal-agent relationship. After all, Ms. Harrell did not testify BANA was the servicer "for Deutsche," merely that BANA was "the servicer." T.5. Moreover, when DiGiovanni challenged the purported agency relationship on cross-

[13] Villazon, Goldschmidt and Slepin are, admittedly, not foreclosure cases. However, Phan was a foreclosure case, and Phan makes clear that general principles of agency law, as set forth in non-foreclosure cases, act as precedent in deciding whether a foreclosing lender has standing as a result of the actions of its agent/servicer. 2016 WL 746400, *1-5.

examination, Ms. Harrell conceded she had no documents showing BANA was the agent of Deutsche. T.32. BANA's attendance at trial (or other such actions in connection with this case) was not sufficient, either, just as such actions were not sufficient in Slepin. 971 So. 2d at 144. Quite simply, BANA being the servicer (on behalf of some unidentified principal) and showing up at trial did not prove the three elements necessary to establish an agency relationship. See Goldschmidt, 571 So. 2d at 426, n.1; Slepin, 971 So. 2d at 144.

In Phan, this Court suggested without deciding that proof of the requisite agency relationship would typically have to come from the principal, not the agent. 2016 WL 746400, *4 ("Had the principle been argued, this quantum of evidence might have fallen short of proving an agency relationship, because, as some courts have held, an agency relationship cannot ordinarily be proven solely through the statements of the purported agent."). DiGiovanni steadfastly agrees. After all, it is hard to imagine how Deutsche could prove it "acknowledged the power" of BANA and "retained control" of BANA's actions, as required under Villazon, Goldschmidt and Slepin, without evidence from Deutsche itself.[14] Regardless, this Court need

[14] Ms. Harrell did not so testify in this case. T.1-89. If she had tried to do so (e.g. by asserting "Yes, Deutsche acknowledged BANA as its agent for purposes of the DiGiovanni loan," or "Yes, Deutsche maintains control over BANA's actions"),

not make that distinction here, as the requisite elements of an agency relationship were not shown by Deutsche or BANA.

In light of the foregoing, the evidence adduced at trial may have shown BANA was the holder of the Note, at least some point. However, the evidence did not show Deutsche (as opposed to BANA) was entitled to enforce the Note at the time it was lost. See Correa, 118 So. 3d at 955; § 673.3091(1)(a). Moreover, the evidence did it establish an agency relationship between BANA and Deutsche. See Phan, 2016 WL 746400, *2-4. These failures of proof are fatal. Deutsche did not prove the requisite standing to foreclose, and an involuntary dismissal should have resulted at the end of its *prima facie* case. See May, 150 So. 3d at 249; Correa, 118 So. 3d at 955. As a result, this Court should reverse the Final Judgment of Foreclosure.

D. The Bank failed to prove it gave DiGiovanni written notice of the assignment of debt at least 30 days before filing this lawsuit, as required by Fla. Stat. § 559.715.

DiGiovanni's undersigned counsel has repeatedly argued to this Court, on

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then such testimony would have been excluded as inadmissible hearsay. See Sas v. Fed. Nat'l Mortg. Assn., 112 So. 3d 778 (Fla. 2d DCA 2014) (abuse of discretion to permit testimony about the content of business records where those records had not been admitted into evidence). It would likewise be difficult to see how Ms. Harrell would have laid the requisite predicate to so testify. See Sanchez v. Suntrust Bank, 179 So. 3d 538 (Fla. 4th DCA 2015); Ensler v. Aurora Loan Services, 178 So. 3d 95 (Fla. 4th DCA 2015).

behalf of several different borrowers in mortgage foreclosure cases, that the notice requirement of Fla. Stat. § 559.715 serves as a condition precedent to acceleration and foreclosure. Unfortunately, a 2-1 panel of this Court ruled against the undersigned on this issue, see Brindise v. U.S. Bank, N.A., ___ So. 3d ___ (Fla. 2d DCA 2016), but certified the question to the Florida Supreme Court as one of great public importance. Id.

The facts at bar are materially indistinguishable to those in Brindise. To wit, the Bank was not the original lender yet introduced no evidence at trial that it gave DiGiovanni written notice of the assignment of the debt at least 30 days before filing this lawsuit. Hence, at present, the 2-1 panel decision in Brindise is controlling in the instant appeal and precludes reversal on this ground.

That said, the undersigned is pursuing appellate review of Brindise in the Florida Supreme Court, per this Court's certified question. See Florida Supreme Court Case No. SC16-300. In the event the Court accepts jurisdiction and reverses the majority's ruling in Brindise, said decision would be binding upon this Court and would require reversal of the Final Judgment at bar.[15]

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[15] This Court's non-final decision in Deutsche Bank Nat'l Trust Co. v. Quinion, 2016 WL 166648, ___ So. 3d ___ (Fla. 2d DCA 2016), does not compel a contrary result. In that decision, this Court ruled a borrower did not deny the § 559.715

Under these unique circumstances, DiGiovanni's undersigned counsel sees little reason to re-argue whether Fla. Stat. § 559.715 operates as a condition precedent in a mortgage foreclosure case in the instant Initial Brief. Instead, DiGiovanni notes the facts at bar are materially indistinguishable to those in Brindise and requests as follows: (i) if the Florida Supreme Court reverses this Court's ruling in Brindise, then this Court should follow said decision and reverse the Final Judgment at bar; (ii) if the instant appeal is adjudicated before the Florida Supreme Court issues a ruling in Brindise, and this Court does not reverse the Final Judgment at bar on any other grounds set forth herein, then this Court should issue a citation PCA, citing Brindise, so DiGiovanni can pursue appellate review in the Florida Supreme Court, see Perkins v. State, 845 So. 2d 273 (Fla. 2d DCA 2003) ("The supreme court generally does not have jurisdiction to review decisions issued

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condition precedent with sufficient specificity. Tellingly, however, the lender preserved that issue by arguing it below. Id. Here, by contrast, Deutsche never challenged the sufficiency of DiGiovanni's pleadings or the manner in which he denied compliance with § 559.715, either at trial or otherwise. Rather, Deutsche litigated the issue on the merits at trial. By failing to challenge the sufficiency of DiGiovanni's pleadings before entry of the Final Judgment of Foreclosure, Deutsche waived the issue. See Bank of New York Mellon v. Condo. Assn. of La Mer Estates, Inc., 175 So. 3d 282, 285 (Fla. 2015) (explaining how failure to state a cause of action is waived if not raised before entry of final judgment); Johnston v. Hudlett, 32 So. 3d 700 (Fla. 4th DCA 2010) (failure to state a cause of action cannot be raised for the first time on appeal); Don Mar, Inc. v. Gillis, 483 So. 2d 870 (Fla. 5th DCA 1986) (same).

without opinions. But it may review a 'citation PCA' if the citation is to a decision that either is pending review in or has been reversed by the supreme court.") (citing Jollie v. State, 405 So. 2d 418 (Fla. 1981)); and (iii) if the Florida Supreme Court declines jurisdiction, then this Court should re-consider the § 559.715 question *en banc* and follow Judge Khouzam's dissent in Brindise.

II. DISMISSAL IS REQUIRED UPON REMAND, NOT A NEW TRIAL.

Once this Court concludes reversal is required, the question becomes whether it should remand for a new trial or remand with instructions to enter an involuntary dismissal. Under established precedent, this Court should do the latter.

Before the proliferation of foreclosure cases in recent years, Florida has seen many cases where a plaintiff fails to prove its case at trial, the lower court entered judgment for the plaintiff anyway, and a Florida district court reversed. Invariably, when this happens, the remedy has been to remand with instructions for an involuntary dismissal, not a new trial.

For example, in Teca, Inc. v. WM-Tab, Inc., it was clear to an *en banc* Fourth District that the underlying judgment for the plaintiff had to be reversed because the plaintiff failed to prove its breach of contract claim at trial. 726 So. 2d 828 (Fla. 4th DCA 1999) (*en banc*). The issue that prompted *en banc* review was whether a new trial was justified or judgment should be entered in favor of the defendant on remand.

Id. Finding a plaintiff is not entitled to "a second bite at the apple" where there was no proof at trial of the correct measure of damages, the Fourth District reversed and remanded with instructions to enter judgment in favor of the defendant. Id.

Many other courts have followed the rationale of Teca. See Blanton v. Baltuskouis, 20 So. 3d 881 (Fla. 4th DCA 2009); Bayley Prods., Inc. v. Cole, 720 So. 2d 550 (Fla. 4th DCA 1998); Church of Scientology v. Blackman, 446 So. 2d 190 (Fla. 4th DCA 1994); Hosp. Corp. of America v. Assocs. in Adolescent Psychiatry, S.C., 605 So. 2d 556 (Fla. 4th DCA 1992) ("The trial court erred in denying the motion for a directed verdict. We therefore reverse and remand for entry of a judgment in favor of appellant."); Seibert v. Bayport Beach and Tennis Club Ass'n, Inc., 573 So. 2d 889 (Fla. 2d DCA 1990) ("We find that the trial court erred by failing to grant Seibert's motion for a directed verdict. We, accordingly, reverse and remand for the entry of a judgment in favor of Seibert."); Gerlach v. Trepanier, 440 So. 2d 73 (Fla. 5th DCA 1983).

In Correa, this Court first applied this concept in the foreclosure context, refusing to give a lender a new trial upon remand where it failed to prove its *prima facie* case at trial. 118 So. 3d at 955.[16] In the ensuing months, many courts

[16] The undersigned was counsel in Correa and advanced the very cases/arguments set forth herein.

(including this one) have followed suit, requiring an involuntary dismissal upon remand where a foreclosing lender failed to prove its case at trial. See Tomlinson, 173 So. 3d at 1122; Schmidt v. Deutsche Bank, 170 So. 3d 938, 942 (Fla. 5th DCA 2015); Russell v. Aurora Loan Services, LLC, 163 So. 3d 639, 643 (Fla. 2d DCA 2015); Seffar v. Residential Credit Solutions, Inc., 160 So. 3d 122, 127 (Fla. 4th DCA 2015); Wolkoff v. American Home Mortg. Servicing, Inc., 153 So. 3d 280, 283 (Fla. 2d DCA 2014) ("we see no reason to afford AHMSI a second opportunity to prove its case."); Pennington v. Ocwen Loan Servicing, LLC, 151 So. 3d 52 (Fla. 1st DCA 2014); May, 150 So. 3d at 249; Lacombe, 149 So. 3d at 156.

Here, Deutsche failed to prove its *prima facie* case for multiple reasons. See Issues I.A, I.B, I.C, and I.D, supra. If this Court agrees and reverses the Final Judgment on any of those four grounds, the foregoing cases plainly require dismissal on remand, not a new trial.

Deutsche's failure to prove it (as opposed to BANA) was entitled to enforce the Note, as set forth in Issue I.C, supra, obviously requires dismissal on remand, not a new trial, because that ruling turns on a failure of proof. Employing this Court's rationale in Correa, there is simply no basis to give Deutsche a second chance to prove an agency relationship between itself and BANA where it failed to do so the first time. 118 So. 3d at 955; see also Tomlinson, Russell, Wolkoff, and

May, supra.

Deutsche may argue (or this Court may question whether) the lower court's actions *vis a vis* the internet printout, as set forth in Issue I.A, supra, give rise to a new trial, not an involuntary dismissal, because a new trial is the remedy imposed by some of the criminal cases cited herein. See e.g. Lyles, supra. Any such argument would lack merit, as such decisions are plainly distinguishable.

In Lyles, and other cases like it, there was no way to isolate the trial judge's improper conduct and assess the sufficiency of the evidence without regard thereto. 742 So. 2d at 843. In that scenario, a new trial makes sense, as there is no way to tell whether a dismissal would have resulted but for the court's inappropriate actions.

Here, by contrast, if the lower court had not interjected, the evidence would have been insufficient for Deutsche to prove its *prima facie* case. Tellingly, the lower court admitted as much, T.80-85, and the record before this Court plainly so reflects. See Argument, supra. Put differently, if the trial court had not *sua sponte* conducted a Google search and given its internet printout to Deutsche, then Deutsche would have had no evidence of a link/relationship between itself and Bankers,[17] leaving Deutsche with nothing but a Note endorsed to a third party – an obviously

[17] DiGiovanni proved, on cross-examination, that Deutsche had no documents showing Bankers and Deutsche were the same entity. T.74.

fatal flaw. See Rincon, Gorel, Dixon, and Khan, supra. Deutsche should not be rewarded with a new trial simply because the trial court acted improperly after Deutsche had rested. See Rincon, 2016 WL 742612, *2 (reversing foreclosure judgment and requiring dismissal on remand where the note bore a special endorsement to a third party); Marquez, 180 So. 3d at 222 (remanding for judgment, not a new trial, based on a review of the evidence without regard to the lower court's actions after the parties had rested). The fact that Deutsche came to court without any evidence of a relationship between itself and Bankers, T.74, only cements such a conclusion. See Tomlinson, Russell, Wolkoff, May, and Correa, supra.

In light hereof, this Court should remand with instructions to enter an involuntary dismissal, not a new trial.

CONCLUSION

In light hereof, and for all of the foregoing reasons, this Court should reverse the Final Judgment of Foreclosure and remand with instructions to involuntarily dismiss the Bank's lawsuit.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic mail to Anthony R. Smith, Esq., and Julio C. Bertemati, Esq., floridaservice@sirote.com, Sirote & Permutt, P.C., and emailservice@ffapllc.com, William C. Slabaugh, Esq., Florida Foreclosure Attorneys, PLLC, 4855 Technology Way, Suite 500, Boca Raton, FL 33431 on this 3rd day of March, 2016.

/s/ Mark P. Stopa
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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the font used in this brief is Times New Roman 14-point, in compliance with Fla.R.App.Pro. 9.210(a)(2).

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