THE REAL ESTATE BAR ASSOCIATION
for Massachusetts

OVERNIGHT MAIL

August 8, 2011

John L. O'Brien, Register
Essex South District Registry of Deeds
45 Congress Street, Suite 4100
Salem, MA 01970

Re: Essex South District Registry of Deeds

Dear Register O'Brien:

This letter is a follow-up to our exchange of emails of July 14, 2011 relating to an article in the *Boston Globe*. We want to offer you a comprehensive response on behalf of REBA and its 2500 members. REBA believes that your recent actions, particularly public statements and web site postings, may damage the confidence of the public and the bar in the integrity of the real estate records in the Southern Essex District.

In the last several months you have brought attention to the "Robo-Signing Crises," which received national attention in those states with judicial foreclosures. It became known that multiple employees of document preparation companies were signing the names of corporate officers to affidavits in the foreclosure process. In many cases they were swearing to statements under oath, with no knowledge of the underlying facts recited within the affidavit. Perhaps because Massachusetts is not a judicial foreclosure state, you do not focus your current concerns on foreclosure related documents, but rather on assignments and discharges.

Working with a consultant, Marie McDonnell of McDonnell Property Analytics, you have prepared a list of "approved Robo-Signers." McDonnell styles herself as a "Mortgage Audit and Forensic Analyst," pursuant to her web site www.mcdonnellanalytics.com, and consults to those parties wishing to challenge mortgage foreclosures. In reliance upon her list, which you have posted to your Registry website www.salemdeeds.com (which list we assume may grow without notice) [See Attachment No.1], you have stated that you will refuse any document executed by a listed party [See press release dated June 7, 2011 – Attachment No. 2]. You will return the document with a "rejection letter" [See Attachment No. 3] and blank affidavit [See Attachment No. 4] prepared for the purpose of certifying the authenticity of the signatures on the document. You state that if the law firm or lender submitting the document signs the affidavit under "pains and penalties of perjury" and

includes an additional $75.00 fee to record the affidavit along with the original document, you will record them forthwith. The Affidavit is not a simple document. It must be made by a licensed attorney, who has personally verified the information in the document, including receiving and reviewing all supporting documentation. The Affidavit further states:

> "7. Based on such communications, review of documents and my own personal inquiry into the Client's past and current standards of practices, I affirm that underlying filing(s) contain no false or questionable statements of fact or law.
>
> 8. Should any of the statements made herein be incorrect and the Recording corrupt or cloud the homeowner's chain of title, I will indemnify and hold anyone in the chain thereafter harmless."

You have recently rejected several documents, all believed to be assignments or discharges rather than the foreclosure related affidavits referenced above, and returned them to the submitting lender. In many of the cases, the lenders provided new documents, signed by parties not on the robo-signers list. In no circumstance, to our knowledge, has any attorney completed the "Affidavit in Support of Filing." In our opinion, no attorney would expose him or herself to the potential liability, even if remote, that might arise out of execution of such an affidavit.

In a June 29, 2011 press release, you reference "key findings" from an audit of your Registry prepared by McDonnell Property Analytics. You delivered the results of this audit at a national conference of The International Association of Clerks, Recorders, Election Officials and Treasurers (IACREOT) in June, 2011. The audit examined 565 Assignments and discloses that McDonnell determined that "75% of mortgage assignments are invalid" and "9% of mortgage assignments are questionable." There is no detail to explain how McDonnell arrived at these conclusions, or even what she means by "defective." However, when you asked McDonnell what this means for your constituents, she replied:

> "It is vitally important for your constituents to know that if they are in foreclosure now or if their homes have been foreclosed upon, they can stop the foreclosure from proceeding, or institute a court action to vacate a completed foreclosure. . . I can tell you that every single assignment of mortgage that was recorded for the purpose of foreclosing the homeowner is invalid, overtly fraudulent, or criminally fraudulent. My findings also show that your constituents who are not in foreclosure, and have never been delinquent in their payments also have clouds on title due to the recording of defective and invalid discharges and assignments of mortgage."

Subsequently, you added a data base to the Registry web site which states: "To search 25,187 'Robo-Signed' documents, Click Here." When one clicks on the link, the following language appears: "To see whether or not you have a potential robo-signed document in your chain of title, please enter your name and/or street name." After entering in specific information, if a list of "hits" comes up, it is accompanied by the following language: "Should you find a potential robo-signed document in your chain of title, we advise you to contact the Massachusetts Attorney General's Office at 617-727-8400 between the hours of 10am and 4pm and file a consumer complaint since this may or may not affect the title to your property." REBA's efforts to review anecdotal examples

led to one document where the alleged robo-signer was merely a witness to the actual signatories (who were not listed "robo-signers") [See Attachment No. 5] and one document where none of the signatures were on the list, but the document was prepared by DocX [See Attachment No.6]. Strangely, DocX appears on your robo-signers list, implying that you may reject any document prepared by the company, regardless of the actual signatures on the document.

In the various newspaper and media articles that have appeared within the last few weeks, you have consistently referred to your office as a "crime scene" and you suggest that those parties who are in the foreclosure process should be using these "fraudulent documents" to halt the foreclosure process. However, you acknowledge in a recent AP story that none of the 1,300 documents recorded in the Registry under the signature of Linda Green (the most notable "robo-signer") involve foreclosures.

In your July 14, 2011 email to me expressing your surprise that REBA may not support your activities, you attached a Memorandum prepared by Attorney Jamie Ranney, who practices law in Nantucket, as your support for a Register's authority to reject robo-signed documents for recording [See Attachment No.7].

After review of Attorney Ranney's Memo, REBA does not believe that it presents any judicial or statutory support for the conclusion that a Register of Deeds has the authority to reject a "robo-signed" or alleged "robo-signed" document. The Memo never addresses the possibility that the documents are properly authorized under the laws of agency, but assumes that the documents are all "forgeries" and defective. It further presumes that the Register can act without actual knowledge, but based on a "subjective good faith belief." REBA's comments on the representations and conclusions made in Attorney Ranney's Memo follow.

Memo of Jamie Ranney, Esq.

In Ranney's Summary [*supra*, pg 2], he highlights the Register's obligations with respect to "assuring, maintaining and promoting the integrity, transparency, accuracy and consistency of a County's land records," while acknowledging that "the Register's work and supervision of his registry most often revolves around tasks and responsibilities that are generally ministerial in nature." He goes on to conclude that "the Register's fiduciary duty goes well beyond these usual ministerial acts in circumstances where the Register has actual knowledge *or a subjective good-faith belief/basis* (emphasis added) for believing that the document(s) and/or instrument(s) being presented for recording or registration in the registry for which he has responsibility are fraudulent or otherwise not executed or acknowledged under applicable law. In such cases the Register may lawfully refuse to record such document(s) and/or instrument(s)."

In the body of the Memo that follows, Ranney never explains how a Register might have "actual knowledge" of a fraudulent document, which would be virtually impossible without being a party to the questionable transaction. Instead, Ranney continually applies a standard of "subjective good-faith belief/basis," without ever providing statutory or judicial authority for the application of a "subjective" standard.

In the next section "SUMMARY OF AUTHORITY" [*supra*, pg 3], Ranney outlines the circumstances under which he believes a Register may reject a document/instrument, again based on actual knowledge or "a good faith belief/basis." They are essentially as follows:

- The document is a *forgery*, and by the attempted recording constitutes the additional crime of *uttering* (or attempted uttering).

- The document does not comply with the requirements of the following sections of the Massachusetts General Laws:

    1. G.L. c. 36, s. 12A, which simply recites: "A Register of Deeds may refuse to accept an instrument for recording if it cannot be properly duplicated or a proper record cannot be made thereof."

    2. G.L c. 183, s. 54B, which is a section entitled: "Mortgage release, assignment, etc.; execution before officer entitled to acknowledge instruments; effect"

    3. G.L. c. 183, s. 30, which is a section entitled: "Method of making acknowledgment"

    4. G.L. c. 183 s. 33, which is a section entitled: "Certificates of authority"

    5. G.L. c. 183 s. 41, which is a section entitled: "Proof of deed made outside commonwealth"

After a recitation of "Public Policy," [*supra*, pg 4] with which we have no dispute, Ranney addresses the "I. LEGAL AUTHORITY FOR REGISTERS OF DEEDS" [*supra*, pg 5]. After reciting the various statutes that create the office of "Register of Deeds," his comment is:

"There is a paucity of both statutory and case law on the legal authority of Registers of Deeds to reject document(s) and or instrument(s) for recording or registration in Massachusetts."

Ranney goes on to list four Massachusetts cases which address unrelated disputes with Registers of Deeds but makes no effort to connect them with his analysis. However, in *S &H Petroleum Corp. v. Register of Deeds*, 46 Mass. App. Ct. 535 (1999), one of the cases cited by Ranney, the Court concludes with the following statement:

> "The function of a Registry of Deeds is to record documents. It is essentially a ministerial function, and the personnel of registries cannot be expected to – and are not required to – dispense legal advice." [See Attachment No. 8, pg 2].

One might infer that the Appeals Court, based on the foregoing decision, would not expect a Register to make a "subjective" analysis of the legal validity or impact of an instrument that appears proper on its face.

Ranney moves on to analyze the relevant statutory law in the following sections of his Memo beginning with: "II. DIRECT STATUTORY AUTHORITY TO REJECT DOCUMENT(S) AND/OR INSTRUMENT(S) FOR FILING" [*supra*, pg 5]. In this section, Ranney addresses G.L. c. 36, s. 12A, which states:

> "A register of deeds may refuse to accept an instrument for recording if it cannot be properly duplicated or a proper record cannot be made thereof."

While Ranney indicates that he cannot find any reported cases on the application of this section, he continues with his own interpretation of what is seemingly plain language. He states [*supra*, pg 6]:

> "Although this section might be interpreted to refer to the physical condition of the document(s) and/or instrument(s) sought to be recorded, this is the only section of G.L. c. 36 – or section of the Massachusetts General Laws – that appears to deal squarely with the legal authority of a Register to unilaterally, and in his discretion, reject document(s) and/or instrument(s) for recording or registration."

After acknowledging that there is no other statutory authority for a Register to "unilaterally and in his discretion reject documents" and that this section "might be interpreted to refer to the physical condition of the document," he goes on to comment:

> "Consistent with the plain language of G.L. c. 36, s. 12A, where a Register who has a subjective good faith belief that a document(s) and/or instrument(s) presented for recording or registration on the land records are invalid, forgeries or otherwise fraudulent and/or defective (as discussed herein), that Register may logically determine that a 'a proper record cannot be made thereof' and the Register may reject the document(s) and/or instrument(s) for recording. As a practical matter, recording such a document(s) and/or instrument(s) may, based on the Register's subjective good faith belief, result in creating a cloud on the title of the property to which the allegedly fraudulent document(s) and/or instrument(s) relate as well as degrade the reliability, accuracy and integrity of the public land records which the Register manages for the public benefit.
>
> To hold otherwise would require the Register to knowingly participate in possible fraudulent and illegal conduct thereby subjecting himself and his Registry to possible civil and criminal liability."

Somehow the "plain language" of this one sentence statute allows Ranney to speculate that the Register has the right to reject a document based upon the Register's "subjective good faith belief" that an instrument is fraudulent or defective. Rather than reading the statute to allow rejection when a "proper record" cannot be made of the "instrument," (in other words, a good photocopy), Ranney interprets the language to extend to a proper record of the *underlying title* to the property. By applying the standard of a "subjective good faith belief" to this scenario, he has given the Register more power than the Land Court, which would require the expertise of Land Court title examiners and justices to insure that a proper record is made of the underlying title. Ranney further suggests that failure to reject documents that, while otherwise proper on their face, might affect underlying

title would subject the Register to "possible civil and criminal liability." This is a far cry from the "ministerial function" ..."to record documents" suggested by the Court in the *S&H Petroleum* case cited above.

In his next section, "III. FORGERY AND UTTERING," Ranney addresses the two Massachusetts crimes of Forgery and Uttering [*supra*, pg. 6] and suggests that they apply to "robo-signed" documents.

With respect to "forgery," he provides the following definition:

> "'Falsely making' document(s) and/or instrument(s) with knowledge that such document(s) and/or instrument(s) have been executed with an 'intent to injure or defraud' is a crime in Massachusetts typically reviewed under the 'forgery' statute at G.L. c.267 s.1."

He further quotes the Model Penal Code:

> "See Model Penal Code § 224.1(1980) ('A person is guilty of forgery if . . . the actor (a) alters any writing of another without his authority, or (b) makes . . . any writing so that it purports to be the writing of another who did not authorize the act' (emphasis supplied);"

With respect to the crime of "uttering," he provides the following definition:

> "Where document(s) and/or instrument(s) have been fraudulently or 'falsely made' and are thereafter published (i.e. recorded or registered on the public land records), the crime of 'uttering' has been committed and may be punished under G.L. c. 267, s. 5."

Ranney acknowledges that the crime of "uttering" also requires the intent to injure or defraud. He goes on to end this section with the following conclusion [*supra*, pg. 8]:

> "Robo-signed document(s) and/or instrument(s) are forgeries under Massachusetts law where the document(s) and/or instrument(s) were knowingly executed by someone other than the individual whose name is stated on the document(s) and/or instrument(s). The recording of such document(s) and/or instrument(s) on the public land records where the intent can only be to injure or defraud by recording such forged document(s) and/or instrument(s) for the purpose of attempting to induce reliance on what the document(s) and/or instrument(s) state, is uttering."

Ranney never addresses the probability that the "robo-signatures" were made with the authority of the actual officers whose signatures were affixed. Neither does he address how affixing signatures to simple assignments or discharges, which contain information that is substantively accurate, evidences "intent to defraud." REBA is not aware of any circumstance where the "grantor" Bank has attempted to disavow the validity of an assignment or discharge because of a "robo-signature," nor do we expect that such an attempt would be successful.

In this next section, "IV. DOCUMENT(S) AND/OR INSTRUMENT(S) RECORDING REQUIREMENTS," Ranney addresses G.L. c. 183 s. 54B, and the Notary requirements and Acknowledgements.

Relevant portions of G.L. c. 183 s. 54B, as cited by Ranney [*supra* pg.8], read as follows:

> "Notwithstanding any law to the contrary, (1) a discharge of mortgage; (2) a . . .partial release or assignment of mortgage . . . if executed before a notary public, justice of the peace or other officer entitled by law to acknowledge instruments, whether executed within or without the commonwealth, by a person **purporting** (emphasis added) to hold the position of president, vice president, treasurer, clerk, secretary, cashier, loan representative, principal, investment, mortgage or other officer, agent asset manager, or other similar office or position, including assistant to any such office or position, of the entity holding such mortgage, or otherwise purporting to be an authorized signatory for such entity, . . ., acting in its own capacity or as general partner or co-venturer of the entity holding such mortgage, **shall be binding upon such entity** (emphasis added) and **shall be entitled to be recorded**, (emphasis added) and no vote of the entity affirming such authority shall be required to permit recording."

While the language of said statute would appear to have plain meaning, Ranney does not believe that "entitled" really means "entitled," but only provides a "presumption of recordability." He further states that the statute does not "require that the Register actually record the document(s) and/or instrument(s)." As the rationale for his comments, Ranney returns to his unsupported standard of "subjective good faith belief that the 'person purporting to hold the position' of various offices . . . does not in fact hold such an office; . . . and is known to have executed said document(s) and/or instrument(s) fraudulently " [*supra* pg.9].

Not only does Ranney suggest that the Register may lawfully reject assignments and discharges based on his "subjective good faith belief" that documents were executed fraudulently, but he states:

> "To hold otherwise would force the Register to abandon his fiduciary duties to the electorate and the public and subject the Register to possible criminal liability under the forgery and uttering statutes."

This conclusion would seem to contradict the Court's view of the Register's ministerial duties, as discussed in the *S &H Petroleum Corp.* case cited above.

Ranney spends the next several pages discussing the statutes that address requirements for acknowledgements, G.L. c. 183 s. 30, 33 and 41 [*supra* pgs. 10-13].

Section 30 states: "The acknowledgement of a deed or other written instrument required to be acknowledged shall be by one or more of the grantors or by the attorney executing it." Ranney suggests that this precludes an individual who was robo-signing the document from making the acknowledgement, which may be correct, but the actual officer may have appeared before the notary and acknowledged the document (or a large pile of documents) to be her free act and deed. The

Register, being removed from the actual facts, has no authority to "guess" based on his "good faith belief" that a document is defectively acknowledged.

Section 30 (b) addresses out of state acknowledgements. Ranney's interpretation of this section is that acknowledgements made before out of state notaries require a "certificate of authority" under section 33. The section 33 "Certificate" is essentially a certificate from the Secretary of State of the state where the notary or justice of the peace resides indicating that said "officer" was duly authorized in said state. This interpretation is in contradiction of the practice of the Land Court, every Registry of Deeds in the Commonwealth (as evidenced by the Deed Indexing Standards adopted by the Registers of Deeds) and the case of *Ashkenazy v. R.M. Bradley & Co., Inc.*, 328 Mass. 242 (1952) [See Attachment No. 9.] As there is no indication that you (or any other Register) have decided to change your long-standing practice with respect to out of state acknowledgements, we will not address this issue further.

Ranney addresses issues particular to the Register's rights (as assistant recorder) with respect to Registered Land in the section entitled "V. DISPUTED DOCUMENT(S) AND/OR INSTRUMENT(S) FOR REGISTERED LAND". [See Attachment 7, pg 13].

Ranney cites G.L. c. 185, s. 60:

> "If the assistant recorder is in doubt upon any question, or if any party in interest does not agree as to the proper memorandum to be made in pursuance of any deed, mortgage or other voluntary instrument presented for registration, the question shall be referred to the court for decision, either on the certificate of the assistant recorder stating the question in doubt, or upon the suggestion in writing of any party in interest; and the court, after notice to all parties and a hearing, shall enter an order prescribing the form of memorandum to the assistant recorder, who shall make registration in accordance therewith."

REBA is not aware if you have asked for the Land Court's view on the issue of "robo-signed" documents, or whether your proposed "Affidavit of Authenticity" is acceptable for filing in Registered Land (Registered Land does not generally accept affidavits relating to title), but Ranney states:

> "In the alternative, the Register may reject the document(s) and/or instrument(s) for recording or registration and wait for the party who sought recording or registration of the document(s) and/or instrument(s) to pursue a judicial determination that the Register be required to record it/them."

REBA has informally corresponded with Ed Williams, Chief Title Examiner of the Land Court, and asked for a Land Court determination on this issue. Mr. Williams has assured us that the Court will respond appropriately when a case or controversy comes before it.

In conclusion, we find no persuasive argument that "robo-signed" documents are "forgeries." Lacking the "intent to defraud", they are more than likely being signed with the "authority" of the

named signatory. Were they found to be forgeries, there is no legal support for a Register to reject a document based on a "good faith belief" that a document may cloud title.

By suggesting, without adequate support, that the Registries are full of fraudulent and defective documents, clouding thousands of titles, you are adding to the public's confusion and hesitancy to re-enter the real estate market. You are also giving unwarranted support and hope to parties in foreclosure by suggesting that a robo-signed assignment in their chain of title may prevent the foreclosure. At the moment, to the best of our knowledge, conveyancing attorneys and title examiners in Massachusetts are not treating "robo-signed" documents as defective.

The Association plans to seek the support of the Attorney General's office and the Land Court in requesting that you retract your current practice of refusing to record said documents. We ask that you cease this practice immediately.

Very truly yours,

Edward M. Bloom
REBA President

Cc: Board of Directors
The Real Estate Bar Association for Massachusetts

Hon. Karyn Faith Scheier
Chief Justice
Land Court Department of the Trial Court of Massachusetts

Attorney General Martha Coakley

William Francis Galvin
Secretary of the Commonwealth

Barry J. Amaral
President
Massachusetts Registers and Assistant Registers of Deeds Association

All by overnight mail