COMMONWEALTH OF MASSACHUSETTS
THE SUPERIOR COURT
THREE PEMBERTON SQUARE
BOSTON, MA 02108

BARBARA J. ROUSE
CHIEF JUSTICE

TELEPHONE
(617) 788-7301

March 3, 2006

Honorable Robert A. Mulligan
Chief Justice for Administration and Management
Two Center Plaza, Suite 540
Boston, MA 02108

Dear Chief Justice Mulligan:

I am enclosing a copy of a response to Judge van Gestel's recent report on the Business Litigation Session which was prepared by the four other judges who have sat in the second Business Litigation Session since its inception in 2003. We are meeting next week with Beth Boland and Gael Mahony to discuss various issues related to the Business Litigation Session.

Sincerely,

Barbara J. Rouse
Chief Justice

BJR/bk
Enclosure
cc: Hon. Margot Botsford
Hon. E. Susan Garsh
Hon. Nonnie S. Burnes
Hon. Ralph D. Gants
Hon. Allan van Gestel
Michael B. Keating, Esq.
Beth I.Z. Boland, Esq.
Gael Mahony, Esq.

March 3, 2006

TO: Chief Justice Barbara J. Rouse
FR: Judge Allan van Gestel
CC: Judges Margot Botsford, E. Susan Garsh, Nonnie S. Burnes and Ralph D. Gants
RE: Response of the other BLS Justices

I have read and considered the response of my colleagues in the Business Litigation Session to my recent Report thereon. My appreciation for their efforts and comments is substantial – even, one might say particularly, where the response is critical of some of the points in my Report.

My colleagues' statement, echoed by you, that there is no factual basis for any pessimism I may have expressed about the future of the Business Litigation Session is particularly comforting to me.

I look forward to working with you, and them, in whatever way you feel that I can contribute in the process.

COMMONWEALTH OF MASSACHUSETTS
THE SUPERIOR COURT
BOSTON, MA 02108

March 1, 2006

TO: Chief Justice Barbara J. Rouse

FROM: Judges Margot Botsford, Nonnie Burnes, Ralph Gants, and Susan Garsh

RE: Judge van Gestel's Report on the Business Litigation Session of the Superior Court

Judge Allan van Gestel has written a report of his observations about the Business Litigation Session after five years of operation (the Report). The judges who have served in the Business Litigation Session (BLS) with Judge van Gestel[1] have all reviewed the Report, and we have met with him and Chief Justice Barbara Rouse to discuss it. What follows is our response to the Report and a suggestion for addressing the future of the BLS, informed by our recent meeting.

I. The Report

Judge van Gestel's contributions to the BLS have been extraordinary. We believe there is no one among the lawyers who practice in the BLS, their clients, or Judge van Gestel's judicial colleagues, who would express a different view. He initiated the session with vision and a workable implementation plan, and he has led the session over the past five years with great skill, consistency, and imagination. His work ethic is exemplary. As the "other" BLS judges, we have all benefitted from Judge van Gestel's leadership and his generous provision of substantive and procedural guidance and advice. There are aspects of the Report with which we agree, and some with which we do not agree. The comments below are made with great respect for Judge van Gestel and the work he has done, and with the hope that they will assist all of us in planning the future of the BLS.

A. Continuation of the BLS.

The Report states near the start that its purpose is "to advance the argument as to why the Session ought to remain a permanent part of the Superior Court . . . ." (p. 2), and permeating through the Report as a whole is a sense that the continued existence of the BLS is in doubt. We believe that there is no factual basis for this pessimism. Rather, we perceive a general consensus that the BLS has been a great success, and needs to remain as an active and viable part of the Superior Court. The BLS was given permanent status by then-Chief Justice DelVecchio on March 3, 2003, following the end of the initial two-year pilot period. Chief Justice Rouse has been stalwart in her support of the BLS. Chief Justice for Administration and Management Robert Mulligan has also made clear his ongoing support for the session and appreciation for the valuable work it performs. Nor can we foresee that a future Chief Justice would end or reduce in some way the BLS if, as seems very likely, it continues to perform a very significant service for

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[1] Judges Margot Botsford, Nonnie Burnes, Ralph Gants, and Susan Garsh.

the Superior Court and the litigants and lawyers who bring their business cases to this court.

B. History and Functioning of the BLS.

The Report reviews the history of the BLS, the way it has functioned over the past five years, and the success it has achieved. The success is real, without question. However, to the extent that the Report suggests the BLS has been the only part of the Superior Court where Rule 16 conferences are held or where active case management techniques are used, the suggestion is incorrect. For a number of years the Superior Court has employed various case management techniques in both civil and criminal sessions. Over the last fifteen months, under Chief Justice Rouse's leadership, the court has embarked on carefully considered initiatives to broaden the use of case management in systemic and focused ways – the firm, fair trial date initiative with respect to civil cases and the implementation of criminal time standards. Great quantifiable and other progress has already been made, evidenced by a significant reduction in the number and age of cases and an increase in the percentage of cases on-track.

C. Needs of the BLS.

At the heart of the Report is a discussion of what Judge van Gestel views as "the most critical needs for" the BLS. (See Report, pp. 15-19). He identifies four of them, and each is discussed below.

1. *"[T]he most significant and critical issue facing the [BLS] relates to the permanency of the judges assigned thereto. The absence of a permanent, non-circuit riding judge in BLS2 has been a hindrance to that session's ability to function effectively." (Report, p. 15).*

Some history here is important. The BLS began in October of 2000 as a single session with Judge van Gestel presiding. The second BLS session began as a part-time overflow or backup session where then Superior Court Judge Gordon Doerfer sat, followed by Judge Nonnie Burnes for a fairly short period of time. In December of 2001, a second full-fledged BLS session was created. Judge Botsford was assigned, and remained as the BLS2 judge for three years – through December of 2004 – although in both 2002 and 2004, she sat in a criminal session in Suffolk County for two months, and continued to handle some BLS work from that venue. Essentially, therefore, she was a "permanently-assigned" judge to BLS2 for most of three years, and not a "circuit-rider."

Beginning in January 2005, two judges (Judge Burnes and Judge Gants) began to share BLS2, each being assigned there for half the year – January through June for Judge Burnes, and July through December for Judge Gants. This was the first time that a team of two "circuit-riding" judges began to share the session. Two judges are sharing the session in 2006 as well – Judge Gants and Judge Garsh.

We agree with Judge van Gestel that it is essential for the BLS to have a "permanent" presiding judge in BLS1 who functions in a manner similar to the regional administrative justices in the counties, and remains in that position for a substantial period of time – at least two but preferably a minimum of three years. We believe, however, that BLS2

can operate just as effectively having the same two judges share that session on a consistent basis over a period of years.

There are four points to be made. First, not every case in the BLS – or certainly not every case that has been assigned to BLS2 – needs a great deal of handling by a single judge, or indeed any judge. For example, most BLS cases about covenants-not-to-compete (and many about alleged theft of trade secrets where no covenant is involved) present at the outset a motion for preliminary injunction to enforce the covenant or to enjoin the use of the confidential trade secrets. Once that motion is resolved, however – whichever way it comes out – there is often little, if any, further activity in the case. Experience in BLS2 also suggests that the session has a fair number of other types of business cases in which the attorneys appear at the outset for a Rule 16 conference, but never appear again until they notify the clerk at some point that the case has settled.

Second, the experience of those of us who have served as members of two-person teams in civil time standards sessions in Boston for several consecutive years indicates that it is very possible for one to evaluate, on an individual case basis, whether a particular case needs or would benefit from staying with one judge, and for those cases that would so benefit, to continue to handle the case during the months that one is assigned elsewhere. As long as the two-person team in BLS2 has a degree of permanence in the session, scheduling trials and dispositive motions – the latter a big feature of BLS cases – can be done to ensure that these events occur when the judge handling the case will actually be sitting in the BLS2, and if there are discovery or other issues that need to be handled in the intervening months, it is not such a hardship on the attorneys to present those motions to the BLS judge wherever he or she may be sitting. There can be no doubt about the capacity of the judges currently assigned to BLS2, and others as well, to evaluate each of the individual cases in BLS2 and its case management needs, and to make reasoned judgments about whether or not the case should stay with the particular judge during his or her non-BLS2 assignments. Indeed, this is the system that the current team of judges in BLS2 have already implemented. The Report is in error insofar as it suggests that having a two-person team "does not engender accountability" (Report p. 16). What is needed on the part of both the judges and the attorneys is a willingness to be flexible and reasonably accommodating.

Third, there is a positive value – to both the judges assigned to BLS2 and the litigants and lawyers using the BLS – to have the opportunity to sit in other, non-BLS sessions, including criminal sessions. A judge who regularly spends some of his or her time handling busy civil time standards sessions and busy criminal sessions gains experience and skill at juggling and resolving many different issues and problems at the same time; this capacity to juggle and to decide different issues quickly when necessary can also be of great value to the handling of complex cases in the BLS. Moreover, the substantive knowledge and experience that a judge obtains through working in regular civil and criminal sessions can and does inform the judge's approach to business litigation in the BLS in a way that often makes for better decisions.[2]

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[2] Sitting in regular civil and criminal sessions also gives the judge an opportunity to try jury cases on a very frequent basis; trials, and jury trials in particular, have not been a customary feature of BLS2. It helps both the judge and litigants appearing in BLS for the judge's skill in handling a trial not to rust from lack of use.

Finally, the BLS is still relatively new, and the experience of having a team of judges handle BLS2 is newer still. As discussed below, this is a very good time for the Superior Court to evaluate the BLS and to begin to plan for its future. The benefits and detriments of the BLS2 team of judges should be assessed as part of the evaluation, and in particular, actual data about the handling of cases in BLS1 versus BLS2 needs to be examined. We should not be drawing conclusions about the effectiveness of BLS2 based on chance remarks of attorneys or anecdotal experience. We should instead review data relating to a variety of performance measures in comparing the sessions, such as trial continuance rates, time from filing to disposition, throughput rates, percentage of cases that settle, number of preliminary injunctions heard and resolved and time involved, number of dispositive motions heard and resolved and time involved, etc. For the present, however, we think it is important to continue to have a team of two judges handle BLS2.

2. *"Next in importance to the permanency of the Justices serving in the [BLS] is the need to more effectively make the Session itself permanent." (Report, p. 16).*

As indicated at the outset, there is no reason to think the BLS lacks permanency. Accordingly, we fail to see the necessity of a rule or order of the Supreme Judicial Court to give the BLS some type of formal designation as a permanent division or even session of the Superior Court, and also disagree with the suggestion that the Court Management Advisory Board become specifically involved in the determination of how the BLS should run. (See Report, pp. 16-17). No other division or session of any department of the Trial Court exists as a result of a Supreme Judicial Court rule or order[3] or has the Advisory Board directly involved, and there is no need to restrict the authority and discretion of the Chief Justice of the Superior Court in these ways.

3. *"A third serious need is to establish ways and means to attract judges, either from among those already sitting on the Superior Court or to apply to and be appointed by the Governor to the Superior Court, to be particularly assigned, on a permanent basis, to the Session. (Report, p. 17).*

The Report may be suggesting here that the Superior Court judges currently sitting do not wish to serve as BLS judges because of the work load, although Judge van Gestel made clear when we met that his focus was on the nature of the work, not its quantity or the hours required. We do not believe workload is the issue. The Superior Court enjoys jurisdiction over a rich variety of civil and criminal cases. Judges may not seek assignments to the BLS because, as suggested above, they affirmatively wish to have a broader experience that an exclusive diet of the BLS on a permanent basis would offer – not because of the workload.

Further, we respectfully but strongly disagree with the apparent suggestion in the Report that there needs to be some unique or special appointment process for the BLS that will short-circuit the usual JNC review and permit essentially business lawyers to be appointed to the BLS exclusively, with no need for them to participate in the broad range of cases and issues that

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[3] For example, the recent creation of specific "gun court" sessions in the Boston Municipal Court and the District Court Departments was done without the benefit of any directive or rule of the Supreme Judicial Court.

characterize the Superior Court generally. It is essential for a person who is appointed as a Superior Court judge to experience this range because it teaches positive lessons about judging, and provides such a beneficial opportunity to understand and, one hopes, to learn from an amazingly wide range of human problems that appear in the form of legal disputes. We believe deeply that one is a better judge, and better able to serve in the BLS, as a result of having the chance to share in this broad range of experiences.

4. *"The fourth [need] relates to resources, both personnel and otherwise." (Report, p. 18).*

The Report mentions permanent, experienced law clerks, a dedicated secretary for the BLS so that BLS judges would not be required to type their own decisions, enhanced computer research capability, and better library facilities. The Superior Court has two permanent, experienced law clerks, and is currently in the process of hiring two more; additionally, the court has a small cadre of second year clerks. Our collective experience in the BLS teaches that there are some law clerks – especially the permanent and second year ones but also individual clerks who come right from law school – can be and have been very helpful on individual cases. Having law clerks with more experience, and experience with business and business issues would be very helpful, of course, and our hope is that this type of experience will serve as a relevant criterion in the hiring of the new permanent clerks. However, to the extent that the BLS is modeled on the Federal District Court, there are very few Federal District Court judges who have experienced law clerks; the Federal judges, like the Superior Court judges, generally hire law clerks right out of law school. The same is true of the Appeals Court and the Supreme Judicial Court.

As for secretaries, we have many secretaries who work in Suffolk Superior Court; the pool was greatly increased about one year ago. These secretaries are generally quite skilled, and very willing to work on just about any task. At this time, there does not seem to be a lack of secretarial help for any judge who sits in Suffolk County, including those in the BLS. Many judges prefer to type their own work because they write (compose) their decisions directly on the computer.

Computer-assisted research, including access to Delaware and New York law, is available. Having a better library of actual books – as opposed to computerized versions of them – would be helpful, but the materials are indeed available in computerized form, so the analogy to a plumber without a wrench or carpenter without a saw (Report, p. 19) is not accurate.

Finally, no one would disagree that having real-time Reporting would be wonderful, but in fact, cases tried in the BLS tend to have this service more than anywhere else in the Superior Court, because the litigants there are able to pay for it – this is not true in most other sessions.[4]

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[4] We do not mean to suggest that any litigants in the Superior Court should be required to pay for real-time reporting services. The point is simply that the resource is probably more available to the users of the BLS than other litigants.

D. Conclusion.

The creation of the BLS in 2000 was an experiment that has been very successful, in large part because of the skill, dedication and unstinting efforts of Judge van Gestel. The BLS has become an accepted and important part of the Superior Court, enhancing its capacity to serve an important constituency in an effective way. We perceive no risk that the BLS is going to disappear or wither away. On the contrary, we understand that Chief Justice Rouse and the Superior Court are committed to the continued, successful existence of the BLS as a strong and vital session. Nevertheless, it is essential that the BLS continue as an integral part of the Superior Court, not a specially created, specially chosen entity that is a world unto itself. That would be contrary to the Superior Court's history and continued purpose to serve as a great trial court for all the people of Massachusetts.

II. Planning for the Future of the BLS

As of January 2006, Judge van Gestel serves the BLS as a retired judge on recall status with periodic appointments for a period of up to two years. His continued presence as the presiding judge of the BLS is obviously a great benefit to the BLS in particular and the Superior Court in general. However, as Judge van Gestel has repeatedly emphasized, we must plan for a future of the BLS when he is not longer at its helm, and this would be a very appropriate time to begin the planning process, with Judge van Gestel being available to participate in it.

As the discussion above of the Report suggests, the planning process should include an examination of available data that can inform us about the functioning of BLS1 and BLS2 in the past five years, in an effort to understand better how the sessions compare with each other and to assess the use of a two-judge team in BLS2. We should also look at the relationship of the BLS to counties outside of Suffolk – the waiver of venue system that is currently in place. In addition, it would be helpful to look at the experience of business litigation sessions and divisions in the courts of other states, and to consider whether there are improvements to be made to our approach based on what these other states have done.

To initiate this planning process, we suggest the formation of a small group, composed of all the judges who have sat in the BLS during the past five years and perhaps some representative judges who are working on the broader civil trial and criminal time standards initiatives. That group would be charged with conducting whatever reviews and assessments it thought appropriate, and with preparing for Chief Justice Rouse a report concerning this effort and setting out its recommendations for the future of the BLS in the Massachusetts.

Respectfully submitted,

Margot Botsford Nonnie Burnes Ralph Gants Susan Garsh