

MEMORANDUM

June 28, 2007

From: Akin Gump Strauss Hauer & Feld LLP
Re: End of Term Statistics and Analysis – October Term 2006

This memo presents the firm's annual summary of relevant statistics for the Term:

1. Docket

The Justices decided 68 cases after argument this Term, the lowest number in recent history. The number of decisions after argument for previous Terms are 71 (OT05), 76 (OT04), 74 (OT03), 73 (OT02), 76 (OT01), 79 (OT00), 74 (OT99), 78 (OT98), 92 (OT97), 81 (OT96), 77 (OT95), 84 (OT94), 84 (OT93), 107 (OT92), 107 (OT91), 102 (OT90). The Justices decided 72 cases in total this Term, including four summary dispositions, also a recent low. The numbers for previous terms are 82 (OT05), 80 (OT04), 79 (OT03), 80 (OT02), 81 (OT01), 85 (OT00) and 77 (OT99).

The Court reversed or vacated the lower court decision in 52 of 72 cases (72%) and affirmed the lower court in 18 of 72 cases (25%). In two cases, it affirmed in part or reversed or vacated in part. The previous Term, the Court reversed or vacated the lower court in 59 of 82 cases (72%) and affirmed the lower court in 20 of 82 cases (24%), with three cases being affirmed in part or reversed or vacated in part.

Once again, the Court considered more cases from the Ninth Circuit – 21 of 72 cases (29%) – than any other federal Court of Appeal. The Court vacated or reversed the Ninth Circuit in 18 of 21 cases (86%), versus in 15 of 18 cases (83%) the previous term. The Sixth Circuit came next with seven of 72 cases (10%), and the Second, Fifth and Eleventh Circuits each had five of 72 cases (7%). The Court also resolved four cases (6%) from the Federal Circuit, reflecting a desire to clarify the nation's patent laws. State courts accounted for seven cases this term, versus 15 the previous term.

2. Split and Unanimous Decisions

In OT06, 24 of 72 cases (33%) were decided by a 5-4 margin – the highest share in at least a decade. After the relatively calm Term last year, in which only 11 of 82 cases (13%) cases were decided 5-4, the level of divisiveness returned to levels seen during the OT04 term, when 24 of 80 cases (30%) were decided 5-4. The numbers from previous terms are 21 of 79 cases – 27% (OT03), 15 of 80 – 19% (OT02), 21 of 71 – 26% (OT01), 26 of 85 – 30% (OT00), 21 of 77 –

June 28, 2007

Page 2

27% (OT99), 19 of 80 – 24% (OT98), 16 of 96 – 17% (OT97), 17 of 91 – 19% (OT96), 16 of 85 – 19% (OT95).

At the same time, the share of unanimous opinions fell from the previous term. In OT06, the Court issued fully unanimous decisions in 18 of 72 cases (25%), not including an additional ten cases where the Justices were unanimous in judgment only. By comparison, 37 of 82 (45%) cases were fully unanimous the previous Term. Measured against previous terms, the share of unanimous opinions in OT06 fell below levels seen during most recent years under former Chief Justice William Rehnquist. The number of fully unanimous decisions from previous years are 17 of 80 – 21% (OT04), 25 of 79 – 32% (OT03), 31 of 80 – 39% (OT02), 26 of 81 – 32% (OT01), 25 of 85 – 29% (OT00), 25 of 77 – 32% (OT99), 22 of 80 – 28% (OT98), 34 of 95 – 36% (OT97), 29 of 91 – 32% (OT96), and 28 of 85 – 33% (OT95).

3. Distribution of Justices in 5-4 Decisions

Justice Kennedy voted with the majority in all 24 of the Court's 5-4 decisions. Among the Court's other members, Justice Alito voted with the majority 17 times (71%), the Chief Justice 16 times (67%), and Justices Scalia and Thomas 14 times (58%). Justice Breyer voted with the majority 11 times (46%), Justice Souter nine times (38%), Justice Ginsburg eight times (33%) and Justices Stevens seven times (29%).

Nineteen of the 5-4 cases broke down along ideological lines and, as in most every recent Term, the Court's five more conservative members won a greater share of 5-4 victories than the four more liberal justices. The Roberts-Scalia-Kennedy-Thomas-Alito combination prevailed in 13 of 24 (or 54%) 5-4 decisions, while the Stevens-Souter-Ginsburg-Breyer grouping prevailed in only six of 24 (25%) decisions. Unlike previous terms, members the Court's left-leaning block were unable to pick off anyone beside Justice Kennedy to prevail in a 5-4 case.

In 5-4 cases during previous terms, the five most conservative justices – which formerly included Chief Justice Williams Rehnquist and Justice Sandra Day O'Connor – prevailed in 6 of 11 cases – 55% (OT05), 5 of 24 cases – 21% (OT04) 10 of 21 cases – 48% (OT03), 6 of 15 cases – 40% (OT02), 8 of 21 cases – 38% (OT01), 14 of 26 cases – 54% (OT00), 14 of 21 cases – 66% (OT99), 10 of 19 cases – 53% (OT98), and 6 of 16 cases – 38% (OT97). By comparison, the four more liberal justices prevailed in 4 of 11 cases – 36% (OT05), 8 of 24 cases – 33% (OT04), 7 of 21 cases – 33% (OT03), 5 of 15 cases – 33% (OT02), 6 of 21 cases – 29% (OT01), 8 of 26 cases – 31% (OT00), 1 of 21 cases – 5% (OT99), 6 of 19 cases – 32% (OT98), and 6 of 16 cases – 38% (OT97).

Among the 5-4 cases not decided along liberal-conservatives lines in OT06, two featured the Chief Justice and Justices Kennedy, Souter, Breyer and Alito in the majority (*Phillip Morris* and

June 28, 2007

Page 3

James); one featured the Justices Stevens, Kennedy, Ginsburg, Breyer and Alito in the majority (*Zuni*); and one featured the Chief Justice and Justices Scalia, Kennedy, Thomas and Breyer in the majority (*Limtiaco*). *Watters v. Wachovia*, which we believe would have been decided 5-4 had Justice Thomas not recused himself, featured Justices Kennedy, Souter, Ginsburg, Breyer and Alito in the majority.

Justice Kennedy wrote for the majority in six 5-4 opinions this term, followed by Justices Stevens, Thomas and Alito with four, the Chief Justice with three. Justice Breyer with two, and Justice Ginsburg with one. Justice Souter authored no 5-4 decisions last term, nor did Justice Scalia, who had authored four 5-4 decisions in OT05.

4. Levels of Agreement Between Pairs of Justices

In OT06, the Chief Justice and Justice Alito found themselves in agreement more than any other pair of Justices. The two Bush appointees agreed in full in 88% of the cases they both heard, essentially equal to their 89% rate the previous Term. Among the other conservative members of the Court, Justices Scalia and Thomas agreed in full in 80% of the cases they heard, versus 88% in OT05.

Factoring in agreements in part and in judgment only, both the Chief Justice and Justice Alito and Justices Scalia and Thomas agreed in more than nine of 10 cases. The Chief Justice and Justice Alito agreed in judgment or more in 94% of cases they both heard, and Justices Scalia and Thomas agreed in judgment or more in 93% of the cases they both heard (almost equal to the 95% rate for both pairs in OT05). Justices Kennedy and Alito also agreed in judgment or more in 91% of cases they both heard (like their 92% rate the previous Term).

Among the Court's more liberal members, Justices Stevens and Ginsburg and Justices Souter and Breyer each agreed in full 79% of the time. Justice Ginsburg maintained similar full agreement rates with Justice Souter (81%) and Justice Breyer (76%), while Justice Stevens agreed in full less often with Justice Souter (71%) and Justice Breyer (67%) than he did with Justice Ginsburg. After including agreements in part and in judgment, Justices Stevens and Ginsburg and Justices Souter and Breyer again share the same rates of agreement – 89%.

Overall, Justice Stevens enjoyed the lowest rates of full agreement with other members of the Court. He agreed in full with Justice Thomas in only 32% of the cases they both heard, the lowest rate of any pair of Justices. He also agreed in full only 36% of the time with Justice Scalia, 41% of the time with the Chief Justice, and 42% of the time with Justice Alito. Justice Kennedy, who found himself in the minority only twice all Term, agreed in full more often than not with all other members of the Court. Justice Kennedy's full agreement rates ranged from 82% with the Chief Justice and Justice Alito to 52% with Justice Stevens.

June 28, 2007

Page 4

5. Dissents

Justice Stevens was in the minority 26 times during the Term, more frequently than any other Justice. He was followed by Justice Ginsburg with 20 dissents, Justice Breyer with 17 dissents, Justices Souter and Thomas with 16 dissents, and Justice Scalia with 14 dissents. Justice Alito dissented 10 times, the Chief Justice dissented eight times, and Justice Kennedy dissented twice during OT06. Justice Thomas dissented alone four times, followed by Justice Stevens with three and Justices Scalia and Souter with one solo dissent each.