SUPREME COURT OF THE UNITED STATES

DELAWARE, *Plaintiff*

v. Nos. 22O145 & 22O146 (Consolidated)

ARKANSAS, *et al.*, *Defendants*

DEFENDANT STATES' COMMENTS IN RESPONSE TO THE SPECIAL MASTER'S OCTOBER 26 ORDER

ROB BONTA
California Attorney General
MICHAEL J. MONGAN
Solicitor General
JONATHAN L. WOLFF
Chief Assistant Attorney General
TAMAR PACHTER
Senior Assistant Attorney General
JOSHUA PATASHNIK
Deputy Solicitor General
MOLLY K. MOSLEY
Supervising Deputy Attorney General
CRAIG D. RUST
MICHAEL SAPOZNIKOW
Deputy Attorneys General
CALIFORNIA DEPARTMENT OF JUSTICE
1300 I Street
Sacramento, California 95814

JOSHUA L. KAUL
Wisconsin Attorney General
KARLA Z. KECKHAVER
Assistant Attorney General
WISCONSIN DEPARTMENT OF JUSTICE
P.O. Box 7857
Madison, Wisconsin 53707

LESLIE RUTLEDGE
Arkansas Attorney General
NICHOLAS J. BRONNI*
Arkansas Solicitor General
DYLAN L. JACOBS
Deputy Solicitor General
ASHER L. STEINBERG
Senior Assistant Solicitor General
HANNAH L. TEMPLIN
Assistant Solicitor General
OFFICE OF THE ARKANSAS ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-6302
nicholas.bronni@arkansasag.gov
**Counsel of Record*

KEN PAXTON
Texas Attorney General
PATRICK K. SWEETEN
Associate Deputy Attorney General for Special Litigation
RYAN D. WALTERS
Special Counsel for the Special Litigation Unit
OFFICE OF THE TEXAS ATTORNEY GENERAL
P.O. Box 12548 (MC 001)
Austin, Texas 78711

[Complete Counsel Listing on Inside Cover]

STEVE MARSHALL
Alabama Attorney General

MARK BRNOVICH
Arizona Attorney General

PHILIP J. WEISER
Colorado Attorney General

ASHLEY MOODY
Florida Attorney General

LAWRENCE WASDEN
Idaho Attorney General

TODD ROKITA
Indiana Attorney General

TOM MILLER
Iowa Attorney General

DEREK SCHMIDT
Kansas Attorney General

DANIEL CAMERON
Kentucky Attorney General

JEFF LANDRY
Louisiana Attorney General

BRIAN FROSH
Maryland Attorney General

DANA NESSEL
Michigan Attorney General

AUSTIN KNUDSEN
Montana Attorney General

DOUG PETERSON
Nebraska Attorney General

AARON D. FORD
Nevada Attorney General

DREW WRIGLEY
North Dakota Attorney General

DAVE YOST
Ohio Attorney General

JOHN O'CONNOR
Oklahoma Attorney General

ELLEN F. ROSENBLUM
Oregon Attorney General

ALAN WILSON
South Carolina Attorney General

SEAN REYES
Utah Attorney General

JASON MIYARES
Virginia Attorney General

BOB FERGUSON
Washington Attorney General

PATRICK MORRISEY
West Virginia Attorney General

BRIDGET HILL
Wyoming Attorney General

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INTRODUCTION

Over a year ago, the Supreme Court "received and ordered filed" the Special Master's Report in this case. *Delaware v. Pennsylvania*, 142 S. Ct. 64 (2021). The Court then issued a briefing schedule for exceptions, received and reviewed that briefing, and heard oral argument on the matter. The Special Master now proposes to substitute a new, supplemental report. Defendant States understand that the Special Master wants to assist the Court. But there appears to be no precedent for a special master submitting a new report at this stage. And it is doubtful that the Court will view such a report—coming months after briefing and oral argument—as assistance. Prudence counsels strongly against the apparently unprecedented approach the Special Master now proposes.

That is especially so because on the merits, the Special Master got it right the first time. We aren't alone in thinking so. Delaware also has rejected the rationale the Special Master proposes as the basis for a revised report. The Special Master has suggested recommending that, by definition, banks cannot be liable on money orders. But as Delaware itself told both the Supreme Court at argument and the Special Master in response to his October 27 email, as a matter of historical fact that just isn't so; banks frequently issued money orders when the FDA was enacted.

The Special Master has also suggested recommending that, by definition, banks cannot be liable on "other similar written instruments." But having correctly acknowledged that banks could be liable on both specific classes of instruments listed in the FDA, Delaware didn't make that argument to the Court either. Instead, it barely disputed similarity and instead staked its arguments on the "third party bank check" exclusion—a phrase the Special Master explained exhaustively is best read to only embrace ordinary checks. Whatever new insights the Special Master might offer on MoneyGram Teller's Checks' status as bank checks don't bear on that reading of "third party bank check," nor on the undisputed fact that MoneyGram Teller's Checks don't satisfy that definition. The Special Master should adhere to his original Report and await the Court's decision on Delaware's exceptions.

ARGUMENT

I. Submitting a supplemental report would be improper.

The Special Master invited comment on "the propriety of a Special Master filing a change of recommendation" with the Supreme Court. Tr. 14 (Oct. 26, 2022). Offering a definitive answer to that question is complicated by the novelty of the proposal. To Defendant States' knowledge, no special master in an original action has filed a supplemental report modifying recommendations in a prior report while the Court was considering that report, so

the Court has had no occasion to address the propriety of a special master's doing so. Likewise, the Supreme Court's Rules are silent on the subject; the only Supreme Court Rule that addresses original actions doesn't mention special masters. Sup. Ct. R. 17. It is thus doubtful the Court would even accept an unsolicited supplemental report at this stage—but in any event, a supplemental report that is based on legal arguments the parties have already made to the Court and that does not arise out of any new facts would not materially assist the Court. It would only lead to unnecessary delay and the waste of the parties' and the Court's resources.

In his remarks, the Special Master said this "situation is quite different" from that of a district court whose decision is on appeal, where, he acknowledged, the court's role "end[s] with the appeal from [its] judgment." Tr. 7. With respect, we think the situations are very similar. To be sure, a special master does not lose jurisdiction when he files his report, as a district court does when a party appeals; the division of labor between special masters and the Court is not jurisdictional. But for the same reasons district courts cannot modify their judgments on appeal, it is doubtful the Court would entertain a new report while the Court reviews his original one. The district-court "divestiture of jurisdiction rule is not based upon statutory provisions or the rules of civil or criminal procedure." *United States v. Salerno*, 868 F.2d 524, 540

(2d Cir. 1989). Rather, "[i]t is a judicially crafted rule rooted in the interest of judicial economy, designed 'to avoid [the] confusion or waste of time'" posed by two-track proceedings. *United States v. Rodgers*, 101 F.3d 247, 251 (2d Cir. 1996) (quoting *Salerno*, 868 F.2d at 540). The Special Master's proposal poses the same concerns.

To start, one of the reasons district courts may not modify their judgments on appeal is to "spare[] the trial court from passing on questions that may well be rendered moot by the . . . Court of Appeals." *Shewchun v. United States*, 797 F.2d 941, 943 (11th Cir. 1986). That rationale applies equally here. The Supreme Court heard argument in this case over a month ago, and, under its procedures, tentatively voted on the case and assigned the opinion later that week. There is no guarantee that the Court will wait to issue that opinion until it has seen the Special Master's proposed supplemental report, and the Special Master's efforts drafting that report might well be wasted.

On the other hand, suppose the Court did wait for and accept a supplemental report. That would implicate another concern that motivates the divestiture-of-jurisdiction rule: a waste of the reviewing court's resources. *See United States v. Diveroli*, 729 F.3d 1339, 1343 (11th Cir. 2013). The parties have already briefed exceptions to the original report, and the Court has already heard oral argument and begun to prepare an opinion. If the Court were

to accept a new report, some or all of that effort might have to be repeated. Like a district court that modifies its decision on appeal, a supplemental report would be "motivated by a desire to assist th[e] [C]ourt." *Ced's Inc. v. U.S. EPA*, 745 F.2d 1092, 1095 (7th Cir. 1984). But like the district court in that scenario, such assistance would "c[o]me too late." *Id.* For the parties "are entitled to have a stable set of conclusions of law on which they can rely in preparing their briefs." *Id.* And the Court is "entitled to review a fixed, rather than a mobile, record." *Kern Oil & Refin. Co. v. Tenneco Oil Co.*, 840 F.2d 730, 734 (9th Cir. 1988).

The Court's procedures in original cases also suggest it would not entertain a supplemental report. The Court's *Guide for Special Masters in Original Cases* ("*Guide*") directs special masters "to move the case along in a reasonably expeditious fashion," *Guide* at 3, and encourages them to provide the parties "an opportunity to review and comment on the Report before submitting it," as the Special Master did here. *Id.* at 11-12. We think that is the appropriate time for a special master to modify his recommendation—which the Special Master did. But once the Court orders a report filed and sets a briefing schedule for exceptions to the report, as it did here over a year ago, the time to modify the report is over. Otherwise, special masters could respond to the exceptions, which would either force the Court to modify its

briefing schedule or deprive the parties of an opportunity to respond.

After the Court has heard oral argument on the exceptions to a report, new reports are even more untimely. It seems unlikely that the Court would schedule oral argument on whether to adopt a report if it believed that report could be withdrawn in reaction to the argument. And while the Court certainly benefits from the Special Master's analysis of the briefing and arguments before he submits a report, we do not believe that the Court would be assisted by a report discussing arguments that the Court itself heard, considered, and could deal with in an opinion.

As a result, it's not surprising that nothing supports the suggestion that the Special Master may submit such a report. While the Special Master cites the *Guide*'s statement that "a Master exercises the judicial management responsibility at all times and in many ways," that means only that a Master has "the same responsibility as a U.S. District Court judge to manage the litigation" at all times, *Guide* at 3. As to reports, the *Guide* states that a "Special Master concludes the proceedings, or a definable portion of them, by filing a Report with the Court." *Id.* at 10. The First Interim Report thus concluded the liability stage of proceedings before the Special Master in this action.

II. MoneyGram Teller's Checks are money orders.

At the October 26 teleconference, the Special Master stated that he now believes MoneyGram Teller's Checks are not money orders because the selling banks may in some circumstances be liable on them. But contrary to the Special Master's suggestion, banks are commonly liable on money orders. Indeed, Section 2503's reference to instruments "on which a banking or financial organization . . . is directly liable" reflects as much. Consequently, bank liability does not mean an instrument isn't a money order—especially under the FDA. And in its Supreme Court briefing, Delaware agreed, and thus waived any argument that money orders cannot be issued by banks. And finally, even if that weren't true, ultimate liability here rests with MoneyGram—not selling institutions that "act[] as Moneygram's agent." Report 29. The Special Master should adhere to his initial recommendation.

A. *Bank money orders existed in 1974 and still exist*. The American Bankers Association's 1956 report on "Money Order Services," included in Delaware's Supreme Court appendix, describes bank money orders as "official check[s] or instrument[s] of the issuing bank" and reproduces several. Del. App. 389-93.[1] It reported that "sales of money orders issued by banks" were "steadily increasing," *id.* at 384, with "thousands of banks selling either

[1] All appendix cites are to the Supreme Court appendices.

bank money orders or the more recently developed personal money orders," *id.* at 385, and that "many banks" generated "a substantial volume of business," *id.* at 386. In 1967, the ABA said this report remained "a generally accurate indication of current banking practices." *Id.* at 429 n.3.

In the years immediately preceding and following the FDA's 1974 enactment, seven separate dictionaries, banking encyclopedias and treatises published between 1969 and 1979 said money orders were issued by banks, often mentioning banks first among their issuers. *Id.* at 365, 374, 380, 382, 383, 485, 489. No source cited by the parties from this period says otherwise. Reported decisions also reflect bank money orders' common use. For example, *Cory v. Golden State Bank*, 157 Cal. Rptr. 538, 539 (Cal. Ct. App. 1979), which Defendant States cited in their opening summary-judgment brief, reproduces a bank money order.

That understanding persists to the present day.[2] Indeed, the UCC's comments say that some "money order[s] fall[] within the definition of a teller's check"—i.e., a check drawn by a bank on another bank, U.C.C. 3-104 cmt. 4—contrary to the Special Master's suggestion that if an instrument

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[2] *See, e.g.*, *Wellan v. Comfort Innovations, LLC*, 305 So. 3d 883, 887 (La. Ct. App. 2020) (describing money orders issued by banks); *Danvers Sav. Bank v. Alexander (In re Alexander)*, 427 B.R. 183, 190 (Bankr. D. Mass. 2010) (same).

meets the UCC's definition of a teller's check it cannot be a money order, Tr. 7. While the Special Master suggested in his comments that, today, "it's not the usual practice for banks to issue money orders," Tr. 10, the record doesn't support such a conclusion. To the contrary, the record reflects that it was a common practice when the FDA was enacted, and nothing in the record shows it has since become rare.

B. *Bank money orders are money orders under the FDA.* Even if it were rare today to find money orders on which banks are liable, the FDA unambiguously covers them. The FDA applies to any "money order, traveler's check, or other similar written instrument (other than a third party bank check) on which a banking or financial organization or a business association is directly liable." 12 U.S.C. 2503. As the Special Master explained in his Report—to no exception from Delaware in the Supreme Court—"the text and structure of the FDA make clear that the 'directly liable' limitation applies to 'money orders and 'traveler's checks,' as well as 'other similar written instruments.'" Report 71. Indeed, under the FDA one can only determine where an instrument escheats by reviewing "the books and records of such banking or financial organization or business association" that is "directly liable" on the instrument. 12 U.S.C. 2503. So the FDA contemplates that a "banking . . . organization" may be "directly liable" on a "money order." And Section

2502 defines "banking organization" as a bank. 12 U.S.C. 2502(1). The FDA, then, contemplates that banks can be liable on money orders.

The Special Master's proposed reading cannot be squared with this reality. If a bank cannot be liable on a money order by definition, *see* Tr. 10, the statute is a contradiction in terms. Whether or not a narrower definition of "money orders" might exist in the abstract, the FDA's text makes plain that it applies to money orders on which banks are liable.

C. *Delaware agrees banks can be liable on money orders*. Delaware affirmatively argued to the Supreme Court that bank money orders are "money orders" under the FDA. In an attempt to defeat Defendant States' definition of "money order," which provided that money orders are drafts, Delaware asserted that in the 1960s bank money orders could sometimes be notes. It then argued that an interpretation under which "bank money orders are not included within the FDA" would be "inconsistent with the FDA's text, which refers simply to 'money orders.'" Sur-reply 8; *see also* Exceptions 24. We agree. Whatever the merits of the Special Master's proposed interpretation, the Court would not rule for Delaware on a ground Delaware has affirmatively argued against in that Court.

D. MoneyGram is directly liable on its Teller's Checks. Even if it were true that financial institutions aren't liable on money orders, that wouldn't

matter here because MoneyGram is directly liable on its Teller's Checks. When a MoneyGram Teller's Check is redeemed, the clearing bank is responsible for paying the funds. Defs. App. 79, 222, 225, 443-44. If the clearing bank ever failed to pay (and nothing in the record suggests that has ever occurred), the contracts between MoneyGram and the selling banks provide that MoneyGram is responsible for ensuring payment, and not the selling bank. *Id.* at 485. The selling banks stand third in line and the parties ahead of them—MoneyGram's clearing bank and MoneyGram itself—are extremely unlikely to default. The selling banks therefore face virtually no risk of liability. Thus, as the First Interim Report correctly stated, MoneyGram is "ultimately liable" for payment on its so-called Teller's Checks. Report 71.

Though nominally listed as a drawer, the selling bank has no account or relationship with the clearing bank. *See* Defs. App. 330-31, 393-94. Once the selling bank issues a MoneyGram Teller's Check, "it plays no role whatsoever in the check collection [or] payment" process. *Id.* at 222 (Gillette report); *see also id.* at 432-33 (MoneyGram witness's testimony that selling bank's only role is to sell official checks and report sales to MoneyGram). MoneyGram Teller's Checks therefore are not bank checks or teller's checks as those terms were used in 1974. *See* Exceptions 37 (explaining that a bank draft is a check a bank draws on *its* account); *see also* Del. App. 459. Hence,

as the Special Master previously explained, MoneyGram is ultimately—or as the FDA says, directly—liable on its Teller's Checks. Report 71. The Special Master should adhere to his original recommendation.

III. MoneyGram Teller's Checks are "similar written instruments."

In addition to suggesting that banks cannot be liable on money orders, the Special Master also proposed recommending that bank liability means an instrument isn't similar to money orders and traveler's checks. Tr. 10-11. That argument fails at the outset because, as explained, banks can be liable on money orders. As a result, to the extent banks might be liable on MoneyGram's so-called Teller's Checks, that doesn't make them dissimilar from money orders. Section 2503 plainly indicates that bank liability doesn't exclude an instrument since it expressly covers "other similar written instrument[s] (other than a third party bank check) on which a banking or financial organization . . . is directly liable." Concluding otherwise, as the Special Master suggests, would render the reference to bank liability a nullity in the context of other similar written instruments.

Besides, as Delaware's own sources acknowledge, banks are liable on types of traveler's checks. *See* Del. App. 363 (Black's Law Dictionary, defining traveler's checks as a "bill of exchange drawn by the issuing bank upon itself" in 1968); *see also id.* at 366, 378, 382. Hence, even if banks were never

liable on money orders, the fact that bank liability exists for traveler's checks indicates bank liability alone doesn't make an instrument dissimilar from the two instruments listed in the statute. *Cf.* Report 59 ("[T]he characteristics [that define "similar written instruments"] are those features that are common to a 'money order' and a 'traveler's check'. . . ." (citing *Rousey v. Jacoway*, 544 U.S. 320, 329-31 (2005))).

Moreover, focusing on such distinctions about which entity or entities listed in the statute are liable to define similarity makes little sense here. For as the Special Master previously explained, "whether . . . items are 'similar' to one another within the meaning of a particular statute" depends on "what features have greater or lesser significance for the purposes of the statute." *Id.* at 57-58. The same fact could be a "crucial dissimilarity" under one statute, and "have zero significance" under another. *Id.* at 58. The Supreme Court has since said precisely the same thing. *See N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2132 (2022) (explaining that similarity in the law is about whether things are "relevantly similar" and that the same characteristic can be relevant for some purposes and not others). Here, whether a bank is liable on an instrument is not "of significance to the purposes of the FDA." Report 59 (explaining that a characteristic must be of such significance to define similar instruments).

At the October 26 teleconference, the Special Master explained that bank liability on an instrument makes commercial and legal differences; primarily, merchants are more likely to accept payment with bank-issued instruments, and bank-issued instruments have next business day availability. Tr. 10-11. Defendant States don't disagree that these are meaningful differences for some purposes. For example, if a contract forbade payment by "non-bank-issued money orders, non-bank-issued traveler's checks, or other similar written instruments," we wouldn't interpret "similar written instruments" to include an instrument on which a bank was liable.

But nothing in the FDA suggests that its applicability turns on these distinctions. Rather, as the FDA declares, its purpose was to solve the escheatment problem under the common law rule posed by prepaid instruments whose issuers didn't keep a record of their purchasers' addresses, resulting in a windfall for the issuers' states of incorporation. 12 U.S.C. 2501. So what makes an instrument "relevantly similar," *Bruen*, 142 S. Ct. at 2132, is principally whether it too is a prepaid instrument for which purchasers' addresses usually aren't kept—as the Special Master previously indicated. Report 62-63. MoneyGram Teller's Checks implicate that problem. Other distinctions "relating to a subject matter other than unclaimed property," i*d.* at 40 n.28, however relevant in other contexts, are not relevant dissimilarities under the

FDA—as the Special Master specifically concluded in response to Delaware's arguments about next day business availability, *id.*

Ultimately, MoneyGram Teller's Checks are "purchased in a manner substantially similar" to the other instruments at issue, *id.* at 28, and "cleared in the same manner as the other instruments at issue," *id.* at 29. And like the other instruments at issue, when a bank sells a MoneyGram Teller's Check, "no personal information regarding the purchaser or payee is transmitted to Moneygram," *id.*, creating the escheat problem the FDA was enacted to solve. The Special Master nevertheless proposes now that if banks aren't liable on money orders and have some secondary liability on MoneyGram's so-called Teller's Checks, those instruments are materially different. But even if it were true that banks are never liable on money orders and banks are liable on MoneyGram Teller's Checks, that dissimilarity would "have zero significance" under this statute. *Id.* at 58. Thus, the Special Master's proposed revision lacks merit and an amendment would, at most, simply unnecessarily delay resolution of this matter.

CONCLUSION

The Special Master should adhere to the First Interim Report.

November 8, 2022

Respectfully submitted,

ROB BONTA
California Attorney General
MICHAEL J. MONGAN
Solicitor General
JONATHAN L. WOLFF
Chief Assistant Attorney General
TAMAR PACHTER
Senior Assistant Attorney General
JOSHUA PATASHNIK
Deputy Solicitor General
MOLLY K. MOSLEY
Supervising Deputy Attorney General
CRAIG D. RUST
MICHAEL SAPOZNIKOW
Deputy Attorneys General
CALIFORNIA DEPARTMENT OF JUSTICE
1300 I Street
Sacramento, California 95814

JOSHUA L. KAUL
Wisconsin Attorney General
KARLA Z. KECKHAVER
Assistant Attorney General
WISCONSIN DEPARTMENT OF JUSTICE
P.O. Box 7857
Madison, Wisconsin 53707

LESLIE RUTLEDGE
Arkansas Attorney General
NICHOLAS J. BRONNI*
Arkansas Solicitor General
DYLAN L. JACOBS
Deputy Solicitor General
ASHER L. STEINBERG
Senior Assistant Solicitor General
HANNAH L. TEMPLIN
Assistant Solicitor General
OFFICE OF THE ARKANSAS ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-6302
nicholas.bronni@arkansasag.gov
Counsel of Record

KEN PAXTON
Texas Attorney General
PATRICK K. SWEETEN
Associate Deputy Attorney General for Special Litigation
RYAN D. WALTERS
Special Counsel for the Special Litigation Unit
OFFICE OF THE TEXAS ATTORNEY GENERAL
P.O. Box 12548 (MC 001)
Austin, Texas 78711

STEVE MARSHALL
Alabama Attorney General

MARK BRNOVICH
Arizona Attorney General

PHILIP J. WEISER
Colorado Attorney General

ASHLEY MOODY
Florida Attorney General

LAWRENCE WASDEN
Idaho Attorney General

TODD ROKITA
Indiana Attorney General

TOM MILLER
Iowa Attorney General

DEREK SCHMIDT
Kansas Attorney General

DANIEL CAMERON
Kentucky Attorney General

JEFF LANDRY
Louisiana Attorney General

BRIAN FROSH
Maryland Attorney General

DANA NESSEL
Michigan Attorney General

AUSTIN KNUDSEN
Montana Attorney General

DOUG PETERSON
Nebraska Attorney General

AARON D. FORD
Nevada Attorney General

DREW WRIGLEY
North Dakota Attorney General

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JOHN O’CONNOR
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ELLEN F. ROSENBLUM
Oregon Attorney General

ALAN WILSON
South Carolina Attorney General

SEAN REYES
Utah Attorney General

JASON MIYARES
Virginia Attorney General

BOB FERGUSON
Washington Attorney General

PATRICK MORRISEY
West Virginia Attorney General

BRIDGET HILL
Wyoming Attorney General

CERTIFICATE OF SERVICE

Counsel of record for Defendant States in Case No. 22O146 certifies that on November 8, 2022, this document was served, as required by Case Management Order No. 5, on the following counsel:

Pennsylvania	Matthew Haverstick	mhaverstick@kleinbard.com
Pennsylvania	Joshua Voss	jvoss@kleinbard.com
Delaware	Neal Kumar Katyal	neal.katyal@hoganlovells.com
Delaware	Katherine B. Wellington	katherine.wellington@hoganlovells.com
Delaware	Jo-Ann Tamila Sagar	jo-ann.sagar@hoganlovells.com
Delaware	Nathaniel A.G. Zelinsky	nathaniel.zelinsky@hoganlovells.com
Delaware	Dana A. Raphael	dana.raphael@hoganlovells.com
Delaware	Steven Rosenthal	srosenthal@loeb.com
Delaware	Marc Cohen	mscohen@loeb.com
Delaware	Tiffany Moseley	tmoseley@loeb.com
Delaware	J.D. Taliaferro	jtaliaferro@loeb.com
Delaware	Patricia Davis	PatriciaA.Davis@delaware.gov
Delaware	Michelle E. Whalen	Michelle.Whalen@delaware.gov