

# EXHIBIT 5

Case No. 11 Civ 5843 (JPO)

DECLARATION OF JAY WARD BROWN IN SUPPORT OF  
DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS  
DEFENDANTS' COUNTERCLAIM

(*People v. Gilman*, Indictment No. 4800-05, Hr'g Tr. 88, Apr. 17, 2008  
[NYDOI/Gilman-00115])

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1 SUPREME COURT NEW YORK COUNTY  
 2 TRIAL TERM PART 31  
 3 -----X  
 4 THE PEOPLE OF THE STATE OF NEW YORK  
 5 INDICTMENT #  
 6 4800-05  
 7  
 8 AGAINST : CHARGE  
 9 :  
 10 WILLIAM GILMAN, [REDACTED] : GDL  
 11 :  
 12 Defendants :  
 13 -----X  
 14 Sentence  
 15  
 16 100 Centre Street  
 17 New York, New York  
 18 10013  
 19 April 17, 2008

20  
 21 B E F O R E:  
 22  
 23 HONORABLE JAMES YATES,  
 24 JUSTICE OF THE SUPREME COURT  
 25  
 26 APPEARANCES: (Same as previously noted)  
 27  
 28 -----X  
 29 THE CLERK: Number seven, William  
 30 Gilman and [REDACTED]  
 31 THE COURT: Okay, you have  
 32 appearances?  
 33 Before we move to sentencing, the  
 34 first issue is the 330 motion. Anything  
 35 either of you want to say or you want to

1 law. Previously, when we discussed it 11  
 2 months ago or whatever, I think I denied it  
 3 and I think the only ground I gave was I  
 4 accepted the People's argument that brokers  
 5 were not included.

6 But, in looking back at it after  
 7 that, there is another thing that troubled  
 8 me. That is it looked to be there are only  
 9 civil remedies. In other words, the  
 10 superintendent of insurance promulgated  
 11 regulations for unlawful combinations, and  
 12 the superintendent has the authority to  
 13 impose fines.

14 It cannot be, and I don't think it  
 15 was the Legislative intent that preempted  
 16 the Penal Law. The penal consequences  
 17 written into the Donnelly Act.

18 So, even if there was a temporary  
 19 overlap, the superintendent could have  
 20 imposed a fine.

21 I don't see how that in any way  
 22 preempted the Donnelly Act during the period  
 23 of time charge in the indictment.

24 So unless I'm wrong and I missed  
 25 something, it is only the civil penalties.

1 just rest on the papers?  
 2 MR. DEVEREAUX: We will rest on  
 3 the papers.  
 4 MR. CLEARY: The same with us.  
 5 MS. SAS: We also rest on the  
 6 papers.  
 7 THE COURT: There are several  
 8 points you raised in the 330, if I can find  
 9 them.  
 10 One, is that the horizontal  
 11 conspiracy was not proven.  
 12 I think under the caselaw,  
 13 notwithstanding the finding of the New  
 14 Jersey civil case where there was a  
 15 conscious awareness of a larger arrangement  
 16 and participation in it, that is sufficient  
 17 for circumstantial evidence for the  
 18 horizontal conspiracy.  
 19 I think that is pretty much what I  
 20 said during summations when you objected, so  
 21 I'll abide by that ruling. The  
 22 circumstantial inference can be drawn, so  
 23 I'll deny that aspect.  
 24 On the insurance -- the question  
 25 whether it is superseded by the insurance

1 right?  
 2 MS. SAS: I believe so, your  
 3 Honor.  
 4 MS. NOCHLIN: I don't want --  
 5 there might --  
 6 THE COURT: That is all I saw.  
 7 MS. NOCHLIN: There might be an A  
 8 misdemeanor, I don't want to speak without  
 9 having another look at it.

10 THE COURT: It is true somewhere  
 11 in the law any violation or regulation is a  
 12 misdemeanor or something like that, but I  
 13 don't read just because they gave the  
 14 superintendent of insurance temporary  
 15 authority to levy fines without going to  
 16 court, I don't think that was meant to  
 17 supersede the Donnelly act, so I denied it.

18 If I can find the other point.  
 19 Oh, on the intent count. I think the  
 20 intent, I think we talked about this ad  
 21 nauseam. That was in a per se prosecution,  
 22 the intent is to advance the acts, so I  
 23 don't think it is inconsistent with my  
 24 finding there was no intent or the People  
 25 failed to prove beyond a reasonable doubt an

1 will go through, and I ask defense be  
 2 afforded an opportunity to address that  
 3 process.

4 MR. CLEARY: I join.

5 THE COURT: Do I have the  
 6 authority to order a forfeiture of their  
 7 license as part of the Penal Law sentence if  
 8 there is an insurance law procedure?

9 I know I have the authority not to  
 10 grant the certificate of relief which I'm  
 11 not doing, but can I order a forfeiture of  
 12 an insurance broker's license as part of the  
 13 penalty? I can make it a condition of  
 14 probation they not practice in that field.

15 MS. NOCHLIN: That is correct, you  
 16 can do that, and we would ask that you do do  
 17 that in light of the nature of the crime and  
 18 the license.

19 MR. CLEARY: Can I be heard?

20 THE COURT: Yes.

21 MR. CLEARY: I think that is over  
 22 the top. All these guys know are the  
 23 insurance industry. You are taking away the  
 24 only way they can make a living. That is  
 25 all they have done for their entire adult

1 life.

2 THE COURT: Doesn't the  
 3 superintendent of insurance have authority  
 4 to suspend?

5 MR. DEVEREAUX: He has a whole  
 6 bunch of things he can do, and --

7 THE COURT: The real issue for me  
 8 is do I take it out of the hands of the  
 9 superintendent or do I leave it in the hands  
 10 of the superintendent.

11 MS. NOCHLIN: One thing we ask you  
 12 to do either way is make a recommendation on  
 13 the record, number one.

14 Number two, there is a procedure  
 15 for the superintendent to follow, that is  
 16 going to be a procedure that takes time and  
 17 a suspension or at least a suspension as a  
 18 condition of probation would put that into  
 19 effect now.

20 THE COURT: I have to say one  
 21 thing, by the way, I don't think you are  
 22 authorized to speak.

23 MS. NOCHLIN: I am cross  
 24 designated, your Honor.

25 THE COURT: All right, okay.

1 MS. NOCHLIN: Thank you for  
 2 pointing it out, but I am not trying to  
 3 perpetrate a fraud.

4 MR. DEVEREAUX: The disciplinary  
 5 committee of the Department of Insurance  
 6 handles all sorts of disciplinary matters  
 7 all the time.

8 The spectrum they deal with and  
 9 how this falls on that spectrum is something  
 10 they can --

11 THE COURT: How does the stay of  
 12 execution of sentence affect the license  
 13 proceeding in the department?

14 MR. DEVEREAUX: Not at all, I  
 15 believe they will go ahead if they deem fit.

16 THE COURT: I don't know.

17 MS. NOCHLIN: We are going to have  
 18 the answer to that at the control date.

19 THE COURT: Wednesday the 23rd.

20 MS. NOCHLIN: We will have an  
 21 answer.

22 THE COURT: I'm taking no action  
 23 one way or another until the 23rd.

1 I, Randy Berkowitz, a senior court  
 2 reporter in and for the State of New York,  
 3 do hereby certify that the foregoing  
 4 transcript is true and accurate to the best  
 5 of my knowledge, skill and ability.

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Randy Berkowitz,  
 Senior Court Reporter