

EXHIBIT 89



**U.S. Department of Housing and Urban
Development**

New York State Office
Jacob K. Javits Federal Building
26 Federal Plaza
New York, New York 10278-0068

Via E-Mail

September 24, 2014

James E. Johnson, Esq.
Debevoise & Plimpton, LLP
919 Third Avenue
New York, New York 10022

Re: *United States ex rel. Anti-Discrimination Center v. Westchester County*
06 civ. 2860 (DLC) – Monitor’s Analysis of Westchester County Municipal
Zoning

Dear Mr. Johnson:

We are in receipt of your draft report of September 8, 2014, Monitor’s *Huntington* Analysis of Westchester County Municipal Zoning (the “Monitor’s Analysis”). We appreciate your having undertaken the effort to conduct an analysis of local restrictive zoning practices, at the request of the Chairman of the Westchester County Board of Legislators, to investigate whether, under the legal standard articulated in *Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926 844 F.2d 926 (2d Cir.), *aff’d per curiam*, 488 U.S. 15 (1988) (“*Huntington*”), municipal zoning codes in Westchester County (the “County”) have a disparate impact on black and Hispanic persons and potentially violate Title VIII of the Civil Rights Act of 1964, 42 U.S.C. § 3604 *et al.* (the “Fair Housing Act”). The 120-page report and voluminous exhibits display the seriousness with which you have approached this task.

As stated in the Methodology (Monitor’s Analysis, Exhibit 11), the Monitor’s Analysis is intended, if adopted by the County as its own, to replace portions of the Analysis of Impediments to Fair Housing Choice (the “AI”) prepared and submitted by the County to HUD that pertained to exclusionary zoning. We provide the following comments pursuant to your invitation to do so by September 24, 2014.

I. The *Huntington* standard

The Fair Housing Act prohibits a broad range of discriminatory activities, including discrimination based on race, color, religion, sex, familial status, disability or national origin in the sale, rental or financing of housing or the provision of brokerage or realtor services.

In *Huntington*, the court considered the Fair Housing Act claims of a plaintiff class consisting of blacks, Hispanics and lower-income persons in need of housing opportunities in the

James E. Johnson, Esq.
September 24, 2014
Page 2

Town of Huntington, New York and the surrounding areas, all of whom would qualify for residency in proposed projects subsidized under the federal Section 8 program and who sought to reside in racially and economically integrated housing. *Id.* at 928, n. 2. At the time of the lawsuit, Huntington had 200,000 residents, 95% of which were white and only 3.35% (or approximately 6,700) were black. *Id.* at 929. Seventy-percent of the black population resided in 6 census tracts. The black population in 30 of the 48 census tracts in the Town in 1980 was less than 1%. *Id.* Another plaintiff in the case was a private developer interested in fostering residential integration, who proposed to build a subsidized, multifamily project outside of the areas where the black and Hispanic populations were concentrated. The Town refused to approve the zoning changes needed for the project to proceed. *Id.*

The decision held that, in order to establish a *prima facie* violation of Section 3604 of the Fair Housing Act, a plaintiff in an exclusionary zoning case need only show that the challenged action has a discriminatory effect on members of a protected class. It further explained that discriminatory effect could be established in either of two ways: (1) by showing that the defendant's actions had a disparate impact on members of the protected class; or (2) by showing that the defendant's actions perpetuated segregation. *Id.* at 934-37.

A. Prohibited bases of discrimination and use of appropriate comparison group

When conducting a discriminatory effect or disparate impact analysis, “[w]hether using statistics or some other analytical method, [analysts] must also utilize the appropriate comparison groups. They must first identify members of a protected group that are affected by the neutral policy and then identify similarly situated persons who are unaffected by the policy.” *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 576-77 (2d Cir. 2003).

The Monitor's Analysis compares a municipality's "minority" population to its "total" or "overall" population. *See* p. 18. It purports to define "minority" "in the same way that the Settlement [does]" and cites paragraph 7. *Id.* at 22, fn. 9. However, the word "minority" is not used in the Settlement at all. The protected classes identified in the Settlement are single race African-American, or what the census data terms black, and Hispanic. Similarly, the Methodology (as defined below) describes the populations to be examined as "African Americans" and "Hispanics" (§ 2), and endeavors to "conduct a race- and national-origin Hispanic based demographic analysis" (Task 3).

The Monitor's Analysis use of "minority" represents a combination of the black and Hispanic populations. *See* p. 22, fn. 9.

In *Huntington*, the black and Hispanic populations were examined together because it was alleged that both of these classes were similarly impacted. In order to base a disparate impact claim on data that combines race and ethnicity, it must be shown that the two groups share commonalities and face similar discrimination. *See Keyes v. Sch. Dist.*, 413 U.S. 189, 197-198 (1973); *Coalition of Bedford-Stuyvesant Block Assoc. v. Cuomo*, 651 F. Supp. 1202, 1209 fn. 3 (E.D.N.Y. 1987) (court considered data that combined Hispanic and black residents but noted that the "better practice" is to consider the groups separately.)

James E. Johnson, Esq.
September 24, 2014
Page 3

The Monitor's Analysis is intended to assist the County in determining whether the black population, Hispanic population, or both are being disparately impacted by municipal zoning. No assumption has been made that either class has been impacted or that both classes have been similarly impacted. It is possible that certain zoning practices may have a discriminatory effect on one protected class but not the other. The data presented in the Housing Consultants' Report (as defined below) shows that the two groups are represented in very different percentages among the various municipalities of the County. *See* Table 1, p. 3. Some municipalities that have very small percentages of black residents have considerably larger percentages of Hispanic residents. *Id.* For example, Rye Brook is only 1.5% black but is 11.1% Hispanic. *Id.* This data suggests that black and Hispanic residents may face different obstacles in obtaining housing. A proper analysis would consider black and Hispanic data separately.

Additionally, in examining whether "minorities" have been disparately impacted, the Monitor's Analysis compares a "minority" population to "total" population. However, as the *Tsombanidis* court explained, the appropriate comparison group is "similarly situated persons who are unaffected" by zoning in the various municipalities. 352 F.3d at 576-77. Given the data, it appears that the appropriate comparison group for the analysis of exclusionary municipal zoning practices in Westchester County is non-Hispanic whites. The Monitor's Analysis currently does not compare black and Hispanic population data to white population data.

B. Departure from the *Huntington* standard: Analysis of "clusters" instead of patterns of segregation

In applying the *Huntington* standard, the Monitor's Analysis substitutes the word "clustering" for the word "segregation." The Monitor's Analysis proposes that it will be appropriate to use the term "segregation" only if a *prima facie* case of disparate impact is established and the municipality cannot present a "legitimate governmental interest and no less discriminatory alternative." Fn. 8, pp. 21-22. However, this is not the standard articulated in *Huntington*. That decision makes no distinction between the result of a pattern of concentration before and after a jurisdiction has had an opportunity to defend its practices. Before the *Huntington* court turns to the question of possible justifications it finds that Huntington's actions "significantly perpetuated segregation." 844 F.2d at 938.

By focusing on "clusters" of minorities within the bounds of individual municipalities, the Monitor's Analysis does not examine whether municipalities that have very small populations of black or Hispanic residents, or both, may be segregated because they exclude these populations. While it is true that "clusters" of persons of a protected class in one area should raise Fair Housing Act concerns, so too should a pattern of near total exclusion. Both patterns are evidence of discrimination. For these reasons, the Methodology provided for a regional approach, which is the subject of a discussion below.

James E. Johnson, Esq.
September 24, 2014
Page 4

C. Departure from the *Huntington* standard: Application of the undefined “*Huntington* threshold”

The Monitor’s Analysis applies the “*Huntington* threshold” when discussing perpetuation of segregation and disparate impact. *See* Monitor’s Analysis, pp. 18-20. Although no numerical “threshold” is established by the *Huntington* decision, the “threshold” is evoked throughout the Monitor’s Analysis to both “trigger *Huntington* concerns” (*see, e.g.*, Larchmont analysis, p. 64) and to find that there is no concern. (*See, e.g., id.*, Mamaroneck analysis, p. 70: “These levels approach, but do not surpass, *Huntington* thresholds.”) The Monitor’s Analysis must define the “*Huntington* threshold.”

II. Departures from the agreed-upon Methodology

A. No regional analysis

There are various analytical approaches that can be employed to conduct a disparate impact analysis, and deciding which method will produce statistically relevant and reliable results is a case-specific inquiry. *See Tsombanidis*, 352 F.3d at 576 (2d Cir. 2003).

The Monitor engaged the team of John Shapiro and Brian Kintish, experts from the Pratt Graduate Center for Planning and the Environment (collectively, the “Housing Consultants”), to develop a methodology that could be used to conduct this disparate impact analysis of municipal zoning in the County (the “Methodology”). Monitor’s Analysis, p. 3 and Exhibit 11. A key component of the Methodology is that it directs a regional analysis which compares individual municipalities to “Westchester County as a whole.” *See* Methodology ¶ 2 and Task 3 (requiring the Housing Consultants to “compare the municipality to the region as a whole”). This approach is consistent with HUD’s Fair Housing Planning Guide, which provides guidance to recipients of federal funding on conducting a proper AI. *See* Fair Housing Planning Guide at 5-6 – 5-8 (discussing relevant inquiries recipients should make regarding issues within their “geographic area,” here the County as a whole). The appropriateness of designating the County as the “region” for purposes of a zoning analysis is supported by case law. *See, e.g., MHANY Mgmt. v. County of Nassau*, 843 F. Supp. 2d 287 (E.D.N.Y. 2012)(finding a restriction on the development of multifamily housing perpetuated segregation in a municipality where minorities constituted 2.6% of the population as compared to the County where municipalities constituted 19.7% of the population).¹

However, the methodology applied in the Monitor's Analysis deviates from the agreed-upon regional Methodology as set forth below.

¹ In discussing the development of the Methodology, and for the purposes of this analysis only, HUD agreed that the region would be defined as the County. Depending on the purpose, what defines the “region” may be subject to change.

James E. Johnson, Esq.
September 24, 2014
Page 5

The Monitor's Analysis examines two issues – (1) whether zoning “perpetuates racial and ethnic clustering;”² and (2) whether zoning has a disparate racial and ethnic impact on “minorities”. P. 21. In describing the analysis, it is noted that the Monitor's Analysis “does not make findings with respect to whether any municipality drafted its zoning code with the *intent* to discriminate against minorities.” P. 4 (emphasis in original). While intent is not required to find a Fair Housing Act violation, if potential intent was observed during this analysis, HUD would expect that the Monitor's Analysis would make that known.

To analyze whether a municipality's zoning code “perpetuates racial and ethnic clustering,” the Monitor's Analysis compares the minority household population percentage in multifamily zones to the municipality's total minority household population. If these two percentages are “in line” then no “clustering” is found. *See, e.g.*, Ardsley analysis, Monitor's Analysis at p. 33. If there is a “disparity” between the two percentages, “clustering” is found and the municipality is said to “violate *Huntington*.” *See, e.g.*, Larchmont analysis, Monitor's Analysis at p. 64. To determine whether a municipality's zoning code has a “disparate impact,” the most common data points referenced were the percentage of occupied housing units which are multifamily, the percentage of occupied units which are renter-occupied, and whether the municipality has passed the “model ordinance.” *See, e.g.*, Harrison analysis, Monitor's Analysis at pp. 57-59.

A municipality-centered analytical approach was used in *Huntington* to elicit statistically relevant results under a very different fact pattern. In Westchester, a larger geographic and demographic area must be used for comparative purposes.

At the time the Second Circuit considered the claims in *Huntington*, the title town was home to 200,000 people, 6,700 who were identified as Black. 844 F.2d at 929 (2d Cir. 1988). Because Huntington's population is several times larger than that of the municipalities being examined here, a municipality-centered analysis can produce statistically meaningful results. Not so in Westchester, a County of significantly smaller municipalities, some of which, like Buchanan, are nearly 1/100th the size of Huntington in terms of population. *See* Monitor's Analysis, Ex. 1, Report on the Black and Hispanic Populations in the Westchester County Municipalities Subject to the Settlement (the “Housing Consultants' Report”), Table 1, p. 3.

For those municipalities with small total populations and even smaller numbers of black and Hispanic residents, like many in the County, relying upon this municipality-centered methodology will produce statistically unreliable results. Take, for example, the Village of Ardsley, which has a total household population of 4,444, including 105 African American households and 286 Hispanic households. *Id.* at Table 9, p. 17. The Monitor's Analysis determines that Ardsley's minority population is not “clustered” because minorities constituted 6.3% of the household population of the multifamily district in 2010, which is “in line” with Ardsley's minority household percentage of 8.8%. Monitor's Analysis, p. 33. This determination fails to take into account that the County's minority household percentage is 36.1%, or more than

² Our comments regarding the examination of clusters are set forth above.

James E. Johnson, Esq.
September 24, 2014
Page 6

four times Ardsley's minority household percentage. Additionally, the Monitor's Analysis gives considerable weight to the number "6.3%" without putting that number into context.³ Here, the multifamily zone being discussed is home to a total of 16 households. There are no African American households and one, single Hispanic household. Housing Consultants' Report, Ardsley Table 9, p. 12. Ardsley "passes" under this municipality-centered analysis based on the presence of one Hispanic household among 4,444.⁴

Appropriate comparison to County data would give context to certain comments contained within the Monitor's Analysis which appear, at first blush, indicative of integration. For example, this analysis notes "[a]s a result of the opportunities created by Bedford's zoning code...20% of the occupied housing units in Bedford were in multifamily or two-unit housing[.]" Monitor's Analysis, p. 38. However, juxtaposed against the percentage of occupied units Countywide which are multifamily or two-unit – 48.3% - this statistic is far less compelling.

The Housing Consultants' Report collects a great deal of relevant information supportive of the regional approach that was not considered in the Monitor's Analysis. The color-coded maps of Westchester County found at pages 5 and 6 satisfy the Methodology's mandate to identify "zoning patterns where African Americans and Hispanics live within the County." Methodology ¶ 2; *see also* Monitor's Analysis at p. 16. These maps clearly depict a pattern of concentration of African Americans and Hispanics in certain municipalities, including Mount Vernon, New Rochelle, White Plains and Peekskill. However, because of the municipality-centered approach used in the Monitor's Analysis, these maps were not considered.

Although the Methodology and the Monitor's Analysis acknowledge the requirement to conduct a regional analysis, comparison of municipal data to County data is made only twice within the 120 page report. The first regional comparison is made at page 92:

"[a]s evidence of the barriers Pelham Manor's zoning code imposes on the County's minorities, minority residents constituted 9.0% of Pelham Manor's total household population in 2010 compared with 36.1% of the County's total household population."

Based at least in part on this evidence, the Monitor's Analysis concludes that "Pelham Manor's zoning code does not provide meaningful opportunities for the development of affordable, multifamily, or rental housing and disparately impacts the County's minority residents who use those housing types." *Id.* at 91. A nearly identical analysis is conducted for Pound Ridge. *Id.* at 98. This is precisely the type of comparison contemplated by a regional analysis and would be

³ The Monitor's Analysis may also benefit from consideration of "absolute numbers." It avoids the use of absolute numbers rather than proportional statistics, stating that the methodology is "at odds with *Huntington*." P. 20. However, although *Huntington* states that proportional statistics produced the relevant results in that case, it does not preclude a methodology which considers absolute numbers in conjunction with proportional statistics if the method produces statistically reliable results. *Huntington*, 844 F.2d at 938.

⁴ This is not to say that HUD considers Ardsley, or any Westchester County municipality, to be exclusionary. It is only to say that the evidence presented is not statistically relevant to conclude otherwise.

James E. Johnson, Esq.
September 24, 2014
Page 7

beneficial if applied to the other municipalities analyzed, several of which contain fewer than the 9.0% minority population found to be evidence of disparate impact in Pelham Manor.⁵

B. Consideration should be given to restrictive practices other than those applicable to multifamily housing

The Methodology stated that this analysis would consider, at a minimum, the following zoning requirements:

- Restrictions that limit or prohibit multifamily housing development;
- Limitations on the size of a development; i.e., number of units;
- Limitations directed at Section 8 or other affordable housing, including limitations on such developments in a municipality;
- Restrictions that directly or indirectly limit the number of bedrooms in a unit;
- Restrictions on lot size or other density requirements that encourage single-family housing or restrict multifamily housing; and
- Limitations on townhouse development.

Task 3. The Monitor's Analysis discusses some, but not all, of these zoning requirements. Each of the municipality narratives describes the number of zoning districts that allow multifamily development as-of-right within the municipality. *See, e.g.*, Monitor's Analysis, Ardsley analysis at p. 33. Each narrative describes alternatives to multifamily housing that could potentially provide affordable housing, including two-family districts and mixed-use districts. *See, e.g., Id.* at p. 34. Finally, each narrative discusses limitations on townhouse development. *See, e.g., Id.*

However, missing from the Monitor's Analysis is discussion of (1) limitations on development size; (2) restrictions that directly or indirectly limit the number of bedrooms in a unit; and (3) restrictions on lot size or other density requirements that encourage single-family housing or restrict multifamily housing. These limitations, although facially neutral, can have a disparate impact on protected classes.

In analyzing the zoning code of Pound Ridge, for example, the Monitor's Analysis does not discuss limitations on the size of multifamily development. The town code limits the number of units permitted to 50 and allows no more than 4 units per building. TOWN OF POUND RIDGE CODE §§ 113-57.E and H. Similarly, the Monitor's Analysis overlooks that certain restrictions on lot size within Pound Ridge's zoning code may discourage multifamily development, such as the requirement that such developments in the R-1A and R-2A zones have a site area of not less than 20 acres and development in the R-3A zone have a site area of not less than 30 acres. *Id.* § 113-57.C.1. Finally, the Monitor's Analysis does not discuss limitations that indirectly limit the number of bedrooms in any municipality. For example, multifamily developments in Bedford must provide for one parking space per unit plus one parking space for every bedroom within the

⁵ For example, Bronxville had a 4.6% minority household population as of the 2010 census. Monitor's Analysis, p. 42. Mount Pleasant's minority household population was 7.4% of its total. *Id.* at p. 73.

James E. Johnson, Esq.
September 24, 2014
Page 8

unit. BEDFORD TOWN CODE § 125-102(A). Therefore, a three-bedroom unit would require four parking spaces. The effect of this requirement on development should be discussed.

III. The Monitor's Analysis treats relevant data inconsistently

As more fully discussed below, the Monitor's Analysis is inconsistent in its treatment of the data presented by in the Housing Consultants' Report because it (1) reaches contradictory conclusions based upon similar data; and (2) ignores seemingly relevant data.

A. The Monitor's Analysis reaches different conclusions based upon similar data

The Monitor's Analysis presents similar data among various municipalities but reaches different conclusions. At times, this contradiction results in finding one municipality has violated *Huntington* standards while another similarly-situated municipality has not.

An example of this issue is seen in the analyses of Scarsdale and Lewisboro. The Lewisboro analysis states that "as a result of [zoning restrictions on multifamily development], 4.2% of Lewisboro's occupied housing units were in multifamily housing, and 93.7% of Lewisboro's occupied housing units were single-family homes." Monitor's Analysis at p. 68, quoting Housing Consultants' Report on Lewisboro, Table 6. Lewisboro's zoning code is found to "disparately impact the countywide minority household population in violation of the *Huntington* standard." *Id.* at 69. "Of Scarsdale's total occupied housing units, 4.6% were in multifamily housing[]" and 94.5% are single-family homes. *Id.* at 108; see also Housing Consultants' Report on Scarsdale, Table 6. However, on these nearly identical facts, the Monitor's Analysis concludes that Scarsdale's zoning code does not have a disparate impact. See p. 108. No reasoning is provided for the contradictory results.

An additional example is seen in the two instances in which the Monitor's Analysis conducts a regional analysis. As discussed above, the Monitor's Analysis makes two references to a regional analysis, at pages 92 and 98, by comparing the minority household populations in Pelham Manor and Pound Ridge to the County's total minority household population. The analysis shows that there is a considerable disparity between the minority household populations of these two municipalities and the County's total minority household population and states that the disparity is "evidence of the barriers" their zoning codes impose upon the County's minorities. However, the Monitor's Analysis draws two opposite conclusions. Pelham Manor, whose minority residents constitute 9.0% of its total household population, is found to have a zoning code that "provides *prima facie* evidence of disparate impact in violation of *Huntington*." Monitor's Analysis, p. 90. Yet, although Pound Ridge has a lower minority household population than Pelham Manor - 5.8% - the Monitor's Analysis concludes that it's zoning code does not violate *Huntington*. *Id.* p. 97.

James E. Johnson, Esq.
September 24, 2014
Page 9

B. The Monitor's Analysis does not utilize all relevant data contained in the Housing Consultants' Report

As previously stated, the Housing Consultants' Report collects a great deal of relevant information that was not considered in the Monitor's Analysis. For example, the Housing Consultants' Report contains tables comparing median income by housing tenure for all municipalities and for the County. Tables 36 and 37, pp. 59-60. This information could have been analyzed in conjunction with information regarding the average purchase price of homes in the County, gathered previously for the Monitor's *Berenson* Report and incorporated by reference into the Monitor's Analysis at footnote 1. However, these tables are not referred to in the analysis.

Additionally, the Monitor's Analysis does not include certain concerns raised by the Housing Consultants' in their Report. Specifically, the Housing Consultants' Report notes that "[i]n 2010 Scarsdale had the lowest minority population percentage and the second lowest minority household population of all Westchester municipalities" and less than 9% of its occupied housing units were rentals. Scarsdale analysis, pp. 1 and 2. Neither of these facts was incorporated into the Monitor's Analysis. The Housing Consultants' Report also noted that Bronxville's minority household population percentage of 4.6% was the lowest percentage of any municipality in Westchester. Bronxville analysis, p. 1. This information was noted by the Monitor's Analysis only in a footnote and did not bear on the results, which found that Bronxville's code does not perpetuate clustering or have a disparate impact on minorities. Page 42 fn. 16.

IV. Portions of the Monitor's Analysis are beyond the scope of the AI

Because the Monitor's Analysis was intended as a document that the County could adopt and incorporate into its AI so that the County would come into compliance with paragraph 32 of the Settlement and HUD program requirement, it should not contain findings or determinations that are not relevant to those needs.

A. Determinations that absolve municipalities of liability are beyond the scope of the AI

As the title denotes, an Analysis of Impediments identifies barriers to fair housing choice and would not contain determinations that purport to absolve municipalities of liability under the Fair Housing Act. Accordingly, all statements that purport to absolve individual municipalities from having practices that can potentially exclude blacks and Hispanics should be deleted from the Monitor's Analysis. These determinations are beyond the scope of the AI and have a chilling effect on potential claimants under the Fair Housing Act. We can also expect that the Monitor's Analysis will be produced by these municipalities as having precedential value and providing authoritative evidence to fend off claims of discrimination in other cases. This will be particularly true if the Monitor's Analysis were to be filed with the Court.

James E. Johnson, Esq.
September 24, 2014
Page 10

We urge the Monitor to withdraw these portions of the Monitor's Analysis and to clearly indicate that the Monitor's Analysis should not receive any deference or given claim preclusive effect in other cases.

B. Demographic shift data is not relevant and beyond the scope of the AI

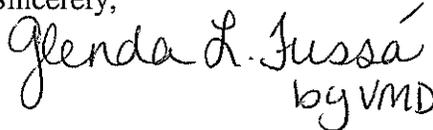
Data regarding demographic changes between the 2000 and 2010 census can be removed. As stated in the Monitor's Analysis, HUD was provided an opportunity to review the Housing Consultants' preliminary reports. P. 17. In providing feedback on these preliminary reports, HUD asked the Monitor to explain how this data would be used. The Monitor indicated that his analysis would not rely on this data, and that he would not include it in the final report. Since the data was in fact not used, we request that the data be removed.

C. References to relative "desirability" should not be included in the AI

Finally, references to the relative "desirability" of a municipality or area should be removed from the Monitor's Analysis. The Monitor's Analysis does not indicate the criteria used to determine desirability.

We thank you for the opportunity to provide this feedback and look forward to continuing to work with you to refine this Analysis.

Sincerely,



Glenda L. Fussá
Deputy Regional Counsel for
New York/New Jersey

cc: Hon. Robert P. Astorino, County Executive
Kevin J. Plunkett, Deputy County Executive
Robert F. Meehan, Westchester County Attorney
Mary J. Mahon, Special Assistant to the County Executive
Hon. Michael B. Kaplowitz, Chairman, Westchester County Board of Legislators
Holly M. Leicht, Regional Administrator, HUD
David J. Kennedy, Assistant U.S. Attorney (S.D.N.Y.)
Benjamin H. Torrance, Assistant U.S. Attorney (S.D.N.Y.)
Lara K. Eshkenazi, Assistant U.S. Attorney (S.D.N.Y.)