

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CYNTHIA ARTIS, et al.,

Plaintiff,

v.

ALAN GREENSPAN, CHAIRMAN OF THE
BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM,

Defendant.

Civil Action No. 01-0400 (EGS)

PARTIES' JOINT RESPONSE
TO COURT ORDER OF APRIL 28TH, 2005

Plaintiff's Remaining Inquiries/Court Authorization	Defendant's Response*
1. PRODUCE COUNSELING REPORTS AND NOTICES TO COMPLAINANTS FOR THE TWO 1997 GROUP SESSIONS: Produce written notices of complainants' rights and Counseling Reports for the group counseling sessions held on January 15th, 1997, and February 13th, 1997. Counselor Rosemarie Nelson attended these sessions. Fourteen of the Nineteen Plaintiffs attended. The other five Plaintiffs, unavoidably absent, were represented by an authorized agent (Ms. Cynthia Artis), and/or counsel, (Walter T. Charlton, Esq.).	All responsive documents have been produced. Plaintiffs have on numerous occasions, including with Defendant's December 15, 2003, Response to Plaintiffs' Request for Production of Documents No. 5, received complete copies of all Counselor Reports for the sessions held in January and February 1997. The Counselor Reports were for both the group and individual sessions. There are no separate reports for the two group sessions. In 1997 it was not the Board's practice to include a notice of complainants' rights with EEO counselor reports, and thus, the reports as provided do not include these notices.
<u>Authorization:</u> The Court authorized (Ref page 2 paragraph 1) Discovery "Should concentrate on...the two group sessions held in January and February 1997. Relevant inquiries may focus on the content of the actual sessions..." (Order of 9/26/2002 at 17.)	

* The Court's Order of April 28, 2005, directed plaintiffs to provide "a concise list of remaining inquiries that they contend are necessary, accompanied by a short description of why each item satisfies the extremely narrow scope contemplated by the September 2002 Order and could support a conclusion that the administrative process is futile." Defendant was to respond to this "concise list" by stating why each item "is either outside the scope of the September 2002 Order or not relevant to the issue of futility." Defendant has attempted to provide this information in the concise manner sought by the Court without resort to argument. For this reason, there are numerous blank spaces on the right side of the chart. These blank spaces do not, however, indicate defendant's agreement with the arguments made by plaintiffs in the corresponding left column.

Plaintiff's Remaining Inquiries/Court Authorization	Defendant's Response*
<u>Plaintiffs' Position:</u> During Counseling, Plaintiffs wanted to discuss what appeared to be severe racial imbalances in employee promotions and related practices. Plaintiffs also sought to review Board statistics in that regard. The Board, during counseling, consistently refused to discuss these issues and denied Plaintiffs access to any personnel statistics. The Board, in defense of this case, alleged that Plaintiffs failed to Counsel. In reality, Defendant Board never had an interest in meaningful counseling or resolution of differences. It therefore acted in bad faith in all of its subsequent conduct of this action. This discovery seeks to expose the inconsistencies of the Board's position. That is of claiming "no counseling" while at the same time refusing to discuss Defendant's practices of discriminatory personnel conduct or revealing relevant Board statistics.	
One required content of counselor's reports must be a written notice to complainants of complainants rights and duties (Required by 29 CFR 1614.105(b)(1)). This was never done nor produced. To date there has been neither production of counseling records for either group session in 1997 nor production of underlying documents.	
The fact that one Plaintiff (Hardy) was actually individually counseled in the second group session was also unreported.	

* See footnote on page 2.

Plaintiff's Remaining Inquiries/Court Authorization	Defendant's Response*
Also unreported was the order by management to the Counselor, Nelson, in which she repeated to the entire assembled group on January 15th, 1997, that she was "prevented from discussing class issues and statistics" "by the EEO's instructions to its Counselors". This refusal by the Board violated the spirit and essence of the entire counseling scheme established by the EEOC pursuant to its power as delegated by Congress and contained in Federal Regulations at 29 CFR Part 1614. Section 105 et seq.	
The refusal also violates the objective of giving an employer the opportunity to resolve all claims through the counseling process. The order by the Board to its Counselors, not to counsel on the essence of Plaintiffs' claims, effectively waived Plaintiffs' duty to further participation in essentially a meaningless and futile exercise. Plaintiffs, however, did not stop their efforts to complete counseling in order to exhaust their administrative remedies. They continued to seek counseling despite the fact that it was obviously a futile exercise.	
Plaintiffs actually attended both group and individual counseling sessions and responded to all questions put by counselors in the two group counseling sessions and in the individual counseling sessions. Plaintiffs' position, consistent throughout this response, is that whatever shortcoming may have occurred in the counseling process was caused entirely by the bad faith actions of the Board and its subordinates.	

* See footnote on page 2.

Plaintiff's Remaining Inquiries/Court Authorization	Defendant's Response*
2. PRODUCE ALL UNDERLYING COUNSELORS' NOTES AND MATERIALS-INCLUDING COUNSELORS NELSON'S AND WIGGINS' NOTES AND SUPPORTING MATERIALS FOR ALL COUNSELING SESSIONS IN 1997: Produce all of the Counselors' contemporaneous notes and any other supporting documents regarding the Board's Counseling of the Plaintiffs. Furnish this material for the two 1997 group sessions and the various individual counseling sessions for the Plaintiffs who completed counseling and for which counseling reports were in fact prepared. No contemporaneous notes or materials have been furnished despite EEOC regulations requiring preservation of these materials.	No counselors' notes presently exist. Ms. Wiggins testified that she destroyed her notes after finalizing her counselors' reports. Wiggins Dep. at 71-73. Ms. Nelson also did not keep her notes when she left her office in the EEO Programs Office for another position. Nelson Dep. At 8, 48-49. Neither Mr. Taylor, Ms. Clark, nor Mr. Thomas, who occupied Ms. Nelson's office after her departure, had any knowledge of the whereabouts of Ms. Nelson's notes. This issue was fully briefed in Defendant's Opposition to Plaintiffs' Motion to Compel Compliance with Court Ordered Discovery ("Defendant's Opposition"), filed January 26, 2005, at 10-12. With respect to other records requested in this item, defendant has produced all such documents to the extent they existed at the time of the discovery request and could be located after a reasonable search. With respect to plaintiffs' request that defendant "reconstruct" oral instructions that may have been given to counselors, defendant notes that this is beyond the scope of a document request and that plaintiffs have taken the depositions of all relevant personnel who would have information regarding this matter, including the EEO Programs Director, the individual with overall responsibility for the counseling program, and both counselors involved in this matter.
Also furnish files containing writings, whether paper or electronic, describing scheduling of counseling and events and communications including emails during counseling sessions. Also produce all counselors records, including instructions from any management person or entity regarding counseling the Plaintiffs whether communicated by standardized orders or regulations, printed memorandum, emails, email attachments, or orally.	
If transmitted orally, and no record of any written instructions are available, reconstruct as nearly as possible the directive transmitted to each counselor as to the scope of their counseling tasks and procedures to be followed in counseling.	

* See footnote on page 2.

Plaintiff's Remaining Inquiries/Court Authorization	Defendant's Response*
<u>Authorization:</u> The Court authorized (Ref Order 4/28/05, page 2 ¶ 1) inquiries “should concentrate on the two group sessions held in January and February 1997. Relevant inquiries may focus on the content of the actual [counseling] sessions, any follow-up communications between the parties and Board policy or practices that would support a conclusion that the counseling process was a futile exercise....(Order of 4/28/05, page 2, Referencing Order of 9/26/2002 at 17). (As a factual matter, two group sessions and about eleven individual counseling sessions took place for these Plaintiffs. Attendees from the Board at the session of February 13th, 1997 included Counselor Rosemarie Nelson, Supervisor of Counselor's Barry Taylor, and private counsel representing the Board, Wm Bransford, Esq.)	
The Court also authorized Plaintiffs to obtain discovery on the content of “any counseling sessions” and the “alleged futility of the administrative counseling process” (Order of 9/26/02, at 17, 18).	
It should be noted that preservation of counselor's notes is required by federal regulations for three years following the end of litigation.	
<u>Plaintiffs' Position:</u> This request seeks information as to any counselors' written notices to Plaintiffs, counselors' notes detailing the content of the counseling sessions, calendars, and memoranda regarding the scope and guidance of the Board's counseling of plaintiffs.	

* See footnote on page 2.

Plaintiff's Remaining Inquiries/Court Authorization	Defendant's Response*
No contemporaneous notes or materials have been furnished despite EEOC regulations requiring preservation of these materials. Mr. Taylor testified that draft reports are furnished to the EEO office for review before being finalized. No instructions to counselors from management have been furnished. No draft reports have been furnished. (Board Counselor Mildred Wiggins testified in her deposition that her notes and materials went into the "burn bag" in accordance with her normal practice (Wiggins Depo, Pg. 72-74). Board Counselor Rosemarie Nelson testified in her deposition that her notes and materials related to counseling did exist when she left the department. Her materials were left in her desk drawer in the EEO Department when she was terminated as a counselor (Nelson Depo. Pg. 37, 38, 295)).	
These materials are necessary to demonstrate that: (1) Plaintiffs actually counseled multiple times; (2) that any meaningful counseling was prevented by Defendant and (3) that all counseling attempts which actually did occur were futile exercises because what actually occurred in counseling sessions was not properly memorialized in the final report. Plaintiffs contend that if these notes by counselors of oral and written instructions from management were furnished, those documents would demonstrate with the Board's own documents the futility of the entire counseling process.	
Further, without these notes, Defendant has no probative evidence to support its claims. The Court is requested to note that the movant, here the Board, has the burden of proof of the alleged Plaintiffs' failure to exhaust administrative remedies i.e. the counseling requirement.	
The only contemporaneous evidence of what occurred during the two group counseling sessions in 1997 is contained in the counselors' notes. (If the Board claims any such evidence has been destroyed provide a full explanation as to how it came to be destroyed).	

* See footnote on page 2.

Plaintiff's Remaining Inquiries/Court Authorization	Defendant's Response*
3. PRODUCE ALL OF DEFENDANT'S INSTRUCTIONS TO COUNSELORS Produce all directives from management to the counselor's and the counselor's supervisor, Mr. Taylor, disclosing the control, scope and/or conduct of Board counselors in dealing with Plaintiffs as to the counseling process. "Management" herein is defined as any person whose rank or authority, including delegated authority, was higher than the counselors. The information sought is any information by whatever means conveyed to counselors Nelson and Wiggins from management of the Board to the EEO department head (Clark) and/or her deputy, Mr. Taylor. Furnish these instructions whether oral, written, electronic (like emails or email attachments) or other means conveyed exactly as contained in communications from the source. If such information was conveyed orally and no recordation has survived, reconstruct those instructions by the most complete and accurate means possible.	There are no responsive documents. No written instructions were given to the counselors regarding "dealing with the Plaintiffs as to the counseling process." Also, plaintiffs have had the opportunity to depose the two counselors; the EEO Program Director, Sheila Clark; and Mr. Taylor regarding any instructions that may have been given.
<u>Authorization:</u> The Court authorized Plaintiffs to obtain discovery to "afford plaintiffs the opportunity to 'support their contention that the Board counseling sessions are being used as a means of preventing plaintiffs from instituting a civil action in a federal district court.'" See Order of September 26th, 2002 at 15-16 (citing principle that "[a] plaintiff may be excused from exhausting administrative remedies if she presents "objective and undisputed evidence of administrative bias that would render pursuit of an administrative remedy futile").	

* See footnote on page 2.

Plaintiff's Remaining Inquiries/Court Authorization	Defendant's Response*
The Court also authorized discovery on the content of "any counseling sessions" (Order at 17, 18) and the "alleged futility of the administrative counseling process". (Order at 17, 18). (Maintenance intact of all counselor's notes and communications are required by federal regulations).	
<u>Plaintiffs' Position:</u> Plaintiffs contend that this material will demonstrate that instructions given by management of the Board to the EEO Director adversely affected the counseling process, which was essentially a sham. (See deposition testimony of counselor Nelson that instructions from the EEO Department Director not to counsel as a group had occurred. See, also, the notation on each counseling report disclosing that no data was to be furnished to Plaintiffs). The lack of such data prevented any meaningful discussion of the overall claims of racial bias, which is the essence of the Plaintiffs' across the board discrimination claims. Plaintiffs submit that withholding this critical data is evidence that the Board never intended to pursue purposeful counseling. These matters must have originated with Board management since it is improbable that the EEO Director determined on her own authority to hinder counseling.	
Such conduct by the Board should be considered as fundamental violations of the equal opportunity laws and regulations which frustrates the entire counseling process and renders the entire exercise futile. The instructions "not to counsel" on class issues solely to prevent Plaintiffs from filing a class action is also supported by the affidavit and deposition testimony of counselor Nelson.	

* See footnote on page 2.

Plaintiff's Remaining Inquiries/Court Authorization	Defendant's Response*
4. PRODUCE ALL ELECTRONIC FILES NOT PREVIOUSLY REQUESTED BY DEFENDANT FROM RESPONSIBLE PERSONNEL AT THE BOARD OF GOVERNORS Produce all non-privileged emails, email attachments, or other electronic files containing any references to Plaintiffs and/or the class they seek to represent. Also, produce a copy of any policy or practice of the Board including counseling procedures, which have influenced the conduct of the Board or the Board's EEO department, in the process of counseling Plaintiffs, during the relevant period.	All responsive documents within the scope of the Court's Order have been produced. Plaintiffs' request for <u>any</u> document containing <u>any</u> reference to plaintiffs or the class they seek to represent is outside the scope of the limited jurisdictional discovery authorized by the Court. Plaintiffs' second request, for a copy of any "policy or practice of the Board including counseling procedures," is a new request and outside of the scope of this Court's April 28, 2005, Order, which relates to plaintiffs' motion to compel responses to plaintiffs' outstanding discovery requests. In any event, the only responsive document is the EEOC's Management Directive ("MD") 110, which is available on the EEOC's web site at http://www.eeoc.gov/federal/md110.html
<u>Authorization:</u> The Court's authorization for this item is the same as listed foregoing in points 1-3.	

* See footnote on page 2.

Plaintiff's Remaining Inquiries/Court Authorization	Defendant's Response*
<u>Plaintiffs' Position:</u> Plaintiffs have reason to believe that the Board did not request electronic files from the supervisor of counselors (Mr. Taylor) before his deposition. Mr. Taylor's deposition was the final deposition taken and all depositions were well after documents were due to be produced. Mr. Taylor, the supervisor of the EEO counselors, testified in his deposition that no one asked him to produce any notes, files (electronic and/or written) for this discovery order. Based upon this information there was no actual good faith search for requested electronic materials. No other electronic files or emails have been furnished related to Plaintiffs, or containing instructions to the EEO department as to how to treat Plaintiffs and/or their class claims. Surely, such files must exist as they are routinely used in all aspects of the Board's normal business practices.	Mr. Taylor testified that he met with defendant's counsel the day before his deposition and provided them with a document from his computer that related to this case. Taylor Dep. at 98. That document was produced as Taylor Exhibit 5. <u>See</u> Item 6 at p. 13 hereof. Mr. Taylor testified that "that is the only document on my PC" that related to this case. Taylor Dep at 116; see also Taylor Dep. at 123 (Question: "[I]s there anything else in your computer with the exception of these two redactions on the subject matter that we have been exploring here today? All the subjects." Answer: "No.").
All such Board files should be furnished mentioning Plaintiffs' names, the existence of a class complaint the conduct of counseling and/or the maintenance of counseling records. When record retention regulations are violated by responsible officials, and no records can be produced when requested, as here, incident to a Court Ordered inquiry, neither party can prove their case. Here, it prevents the Plaintiffs from complying with the Court's Order, but it also prevents the Board from prevailing in its Motion to Dismiss because the necessary evidence in support of its position is also missing. See point following.	

* See footnote on page 2.

Plaintiff's Remaining Inquiries/Court Authorization	Defendant's Response*
5. PRODUCE EVIDENCE OF PLAINTIFFS' FAILURES TO COUNSEL: Produce any and all documentary evidence supporting the Board's position that Plaintiffs failed to seek counseling and/or exhaust their administrative remedies regarding their complaints. <u>Authorization:</u> The Court authorized inquiry into "Board policy or practices that would support a conclusion that the administrative counseling process was a futile exercise." (Order at 17). Also, F.R.Civ. P. 26(a)(1) requires a party to disclose any defenses which it may possess prior to any discovery. This principle should also be applied here.	All responsive documents were produced in December 2003 in response to Plaintiffs' Document Request No. 2. Defendant's response to that request stated that "All responsive, non-privileged documents demonstrating plaintiffs' failure to exhaust administrative remedies, of which defendant is aware at this time, are produced for inspection and copying herewith."
<u>Plaintiffs' Position:</u> Plaintiffs are entitled to any materials and all relevant evidence adverse to their own, and supporting the Board's position. No evidence whatsoever supporting the Board's position has yet been furnished. If in fact any such documents, or phrases in a particular document which Defendant intends to rely upon, do exist, they should be produced with particularity, now.	
Plaintiffs have jumped through every hoop put in front of them by the Board. The Board first demanded that they be counseled individually in order to adhere to the Board's EEO regulations. Plaintiffs then did that only to be told that they did not counsel on class-wide issues, despite the fact that each Plaintiff furnished the written specification of each Plaintiffs claims as requested by the counselor. But definitive materials and documents supporting the Board's official conclusory position that Plaintiffs have somehow failed to give the Board the opportunity to counsel on their claims have not yet been furnished.	

* See footnote on page 2.

Plaintiff's Remaining Inquiries/Court Authorization	Defendant's Response*
6.VERIFY CONTENT AND COMPLETENESS OF BARRY TAYLOR EXHIBIT No.5: Provide any and all notes, drafts, any previous versions, disk back-up and other supporting documents to Mr. Barry Taylor's Exhibit Number 5 (Mr. Taylor's purported contemporaneous computerized history of the Plaintiffs' counseling). Also provide a sworn authentication by Mr. Taylor of that Exhibit and such supporting materials as to correctness and completeness. (During the deposition of Mr. Taylor, a print out of his personal electronic file of what purports to be the complete history of this counseling was furnished. Deposition testimony was to the effect that it was never requested by the Board, but was brought to the attention of the Board's attorney's just one day prior to the scheduled deposition of Mr. Taylor.	A complete version of Taylor Exhibit 5 has been provided to plaintiffs and the Court. See Attachment 1 to Defendant's Opposition, filed January 26, 2005. There are no notes, drafts, previous versions, disk back-ups or other supporting documents. There is no authority requiring a "sworn authentication by Mr. Taylor."
The print out of the electronic record as furnished (Taylor # 5) contained redactions. Plaintiffs then and there demanded a complete version of that document. Later, after the completion of the deposition, a purportedly complete document was furnished. But the Plaintiffs have never yet had the opportunity to question Mr. Taylor as to whether the latest version was still incomplete or was in fact a full unedited version of that document. Interestingly, that revised document appears to have begun only in December of 1996, when it is known based on other documents that the actual counseling process which culminated in the two group sessions in 1997 actually started, at least, as early as October 1996. Also, interestingly, this document is the only document furnished by the Board which purports to record the counseling events in a contemporaneous manner at the time counseling events occurred).	

* See footnote on page 2.

Plaintiff's Remaining Inquiries/Court Authorization	Defendant's Response*
<u>Authorization:</u> The Court authorized inquiry into “any counseling sessions,” (September 25, 2002, Order Pg. 17, 18). Mr. Taylor’s record purports to comment on all counseling sessions.	
<u>Plaintiffs’ Position:</u> Mr. Taylor’s computerized record falls within the discovery authorization of the Court in that it purports to be contemporaneous record starting with the beginning of counseling by the Artis group in December 1996 and continuing through the final events of the counseling process in 1997. However, the actual counseling is known and evidence of record shows that the actual counseling began in 1995, and continued in 1996 and 1997. These two sets of dates are therefore in conflict and resolution of these discrepancies is important to an understanding of the respective positions of the parties. Moreover, this document was the only electronic record produced or identified during this discovery process.	
7. PRODUCE THE STATISTICS REQUESTED DURING COUNSELING ON THE DISCRIMINATORY EMPLOYMENT PATTERN AND PRACTICE ALLEGED: Produce the Statistics on the Racial Make-Up of the Board’s staff and promotions including eligibility from 1995 to present. Also provide all data, reports and statistics on racial make-up of the Board’s clerical staff which exist or existed pursuant to EEOC regulations during the relevant period. (Plaintiffs repeatedly requested this material <u>during the counseling process</u> and in both 1997 group sessions but were denied access by counselors acting upon instructions of the EEO Office).	This request is beyond the scope of the limited jurisdictional discovery authorized by the Court. As noted by plaintiffs, the Court authorized discovery regarding the content of the counseling sessions. It is undisputed that during the counseling process plaintiffs demanded and the Board refused to provide statistical data. Plaintiffs are not entitled to such data the counseling process. <u>See Artis v. Greenspan</u>, 158 F.3d 1301, 1306, 1307 (D.C. Cir. 1998). The underlying data is not relevant to the Court’s jurisdictional determination and is not subject to disclosure pursuant to the limited jurisdictional discovery authorized by the Court.

* See footnote on page 2.

Plaintiff's Remaining Inquiries/Court Authorization	Defendant's Response*
<u>Authorization:</u> The Court Authorized (Pg. 17 of 9/25/02 Order, ¶ 1: “Relevant inquiries may focus on the content of the actual sessions, any follow-up communication between the parties, and Board policy or practices that would support a conclusion that the administrative counseling process was a futile exercise.”	
<u>Plaintiffs' Position:</u> Plaintiffs, even before retaining counsel, began requesting statistics on bonuses and promotions and the racial make up of the Board's staff. These materials are readily available. The Board's employment statistics were repeatedly requested during counseling over the years 1995, 1996 and 1997, and also in this discovery. During both group sessions in 1997 Plaintiffs requested statistics again. The Board has at no time furnished this critical information. And never given any reason for its refusal. Each of the Counselor's reports contains the statement that: “Conclusion of Counseling did not include a data review due to instructions by the EEO Office” (Wiggins Statements in all of her Counseling Reports). (See Counseling Reports, Taylor Exhibit # 5, Defendant's Bates #'s DR3-028, 038, 054, 082, 092, 103); and “Data was not collected per EEO Programs Office instruction “ (Nelson's Statement, See Taylor # 5, Bates #'s 151, 164, 189, et cetera).	
The Board, Plaintiffs contend, simply could not and can not disclose the racial data for fear of admitting the validity of the heart of Plaintiffs' class claims and force a reasonable resolution of the substance of Plaintiffs' claims.	

* See footnote on page 2.

Plaintiff's Remaining Inquiries/Court Authorization	Defendant's Response*
If furnished, the statistics would confirm, or refute with certainty, Plaintiffs allegations. Any good faith counseling must have necessarily considered the factual statistics as a part of any attempted resolution of Plaintiffs' claims. Moreover, if the data is anywhere near as striking as Plaintiffs have alleged, the definitive information on racial patterns described by that data would furnish the motive for the Board's actions in falsely alleging failures to counsel by the Plaintiffs. Accordingly, Defendant, since January 1, 1995 has stonewalled production of the existing statistics and data on the racial make-up of the staff, bonuses and promotions. Defendant's refusal to provide the requested information in order to address Plaintiffs allegations, and which would also provide them with an opportunity to resolve this matter, further adds to the evidence of the futility of the counseling process.	

* See footnote on page 2.

Plaintiff's Remaining Inquiries/Court Authorization	Defendant's Response*
8. PRODUCE ALL DOCUMENTS OR OTHER MATERIALS THAT CONTAINS INSTRUCTIONS TO COUNSELORS OR OTHER BOARD PERSONNEL NOT TO COUNSEL ON CLASS ISSUES AND WHO AUTHORIZED THESE INSTRUCTIONS Provide all documentary or other evidence containing the “instructions by the EEO Office”, not to disclose the statistics or counsel any of the Plaintiffs on the relevant statistical data requested, and not to discuss class issues. (Nelson affidavit ¶ 47, Nelson Deposition Pg 139 L6-8). (The testimony of Counselor Nelson was “However, I was specifically instructed not to discuss those class issues with those [6 plaintiffs that I counseled] persons”. (Nelson Depo Pg 139 L 6-8) Sheila Clark gave those instructions (Nelson depo, Pg. 140 L 9-12)). (Each of the Counselor’s reports contains the phrase “Conclusion of Counseling did not include a data review due to instructions by the EEO Office” (Wiggin’s Statement). (See Counseling Reports, Taylor Exhibit # 5, Defendant’s Bates #’s DR3-028, 038, 054, 082, 092, 103); and “Data was not collected per EEO Programs Office instruction “ (Notation included on each completed counselor’s report)(See Taylor # 5, Bates #’s 151, 164, 189,)).	There are no responsive documents. Counselors never received instructions not to counsel class issues. <u>See</u>, Nelson Deposition at 52:22 – 54:18.
<u>Authorization:</u> This inquiry is authorized by the Court’s Order of September 26, 2002, allowing inquiry into “Board policy or practices that would support a conclusion that the administrative counseling process was a futile exercise.”(Order at 17).	

* See footnote on page 2.

Plaintiff's Remaining Inquiries/Court Authorization	Defendant's Response*
<u>Plaintiffs' Position:</u> The Board's own records (the Counseling Reports) demonstrate that the EEO department Ordered both Counselors not to discuss employment statistics with Plaintiffs, or to furnish those materials (Taylor Deposition Pg 63, L 16-21). Counselor Nelson also testified that she was instructed not to hold group discussions or discuss statistics. (Nelson Depo Pg 139, L6-8). This occurred during the first group session held on January 15th, 1997 with some 16 persons present. Records retention for counseling sessions is mandatory, thus the material should be produced otherwise adverse inferences may be drawn. Such inference here would be that counseling on the pattern and practice was frustrated by the Board and rendered the entire process futile.	
9. PRODUCE THE DESCRIPTION OF THE SUBSTANTIVE STATISTICS AND EMPLOYMENT DATA SYSTEM AS PREVIOUSLY REQUESTED Produce documents containing a full description of the statistical system which existed during the relevant period as described in the Supervisor of the Counselors Barry Taylor's deposition (Taylor Depo, Pg 63, L 16-21). Those documents would be expected to disclose the process of collecting of data for that system, the data stored in the system, reports emanating from that system so as to disgorge racial facts and employment facts concerning the Board's employees. The relevant period is the time of Plaintiffs' actual attempts to counsel on that subject is from January 1995 to present.	This request is beyond the scope of the limited jurisdictional discovery authorized by the Court. It is undisputed that during the counseling process plaintiffs demanded and the Board refused to provide statistical data. Plaintiffs are not entitled to such data the counseling process. <u>See Artis v. Greenspan</u>, 158 F.3d 1301, 1306, 1307 (D.C. Cir. 1998). The underlying statistics and employment data system are not relevant to the Court's jurisdictional determination and are not subject to disclosure pursuant to the limited jurisdictional discovery authorized by the Court.

* See footnote on page 2.

Plaintiff's Remaining Inquiries/Court Authorization	Defendant's Response*
Also, produce statistical reports from readily available (Taylor depo Pg 64 L 1-6; Pg 66, L 1-13) data and the systems, statistical information which refutes, or affirms, Plaintiffs' contentions of across the board racial discrimination in bonuses, promotions, ratings and staff make-up during the relevant period.	
<u>Authorization:</u> The Authority for this request is contained in the Court's Order of September 25th, 2002 on page 18 as follows: "This discovery may touch on the content of any counseling sessions, the parties responses to each other's requests for information, and the alleged futility of the administrative counseling process." Plaintiffs requested these materials and this information during counseling and again in this discovery.	
<u>Plaintiffs' Position:</u> Plaintiffs anticipate that the substance of the statistical content produced will demonstrate that the Board acted in bad faith during the purported counseling process. It is submitted that the reason no disclosure of these statistical data were made was because such material was favorable to Plaintiffs' claims. Plaintiffs also contend that the Board subjected them to a bogus counseling process knowing that the Board had no intention of addressing Plaintiffs' concerns, never producing requested information and certainly never attempting good faith resolution, although that is a primary purpose of counseling, and the Board was given every chance to do so.	

* See footnote on page 2.

Plaintiff's Remaining Inquiries/Court Authorization	Defendant's Response*
Plaintiffs stated during counseling, and Defendant's counsel (Mr. Bransford) agreed, that there was sufficient time to produce the statistical data requested without the allotment of an extension of time. In addition, Counselor's supervisor, Barry Taylor, testified during his deposition that this information was readily available at any time on the Board's computer system. Mr. Taylor also testified that no EEO counselor, Board official, or Defendant's counsel ever requested that he produce the statistical information at any time during counseling or this discovery process. Again, without this information the entire process was a sham and futile from the start. Plaintiffs' position, consistent throughout this response, is that whatever shortcomings may have occurred in the counseling process was caused entirely by the bad faith actions of the Board and its subordinates. That bad faith conduct continued throughout this discovery also. In contrast, Plaintiffs at all times and in all conduct acted in complete good faith and with honest and forthcoming responses and actions to all counseling duties required of them, both as individuals and as a group.	

* See footnote on page 2.

Respectfully submitted:

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