UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

IN RE: DEEPWATER HORIZON BELO CASES

Case No. 3:19-cv-963

Judge M. Casey Rodgers
Magistrate Judge Hope Thai Cannon

This Document Relates to:

Edward Dunklin, 5:19-cv-231
Jackie Feagin, 3:19-cv-424
Phillip B. Gander, 3:19-cv-1983
Nicole Mills, 3:19-cv-426

PLAINTIFFS' MOTION FOR ADMISSION OF PLAINTIFFS' EXPERT OPINIONS BECAUSE OF BP DEFENDANTS' SPOLIATION OF EVIDENCE OF PLAINTIFFS' EXPOSURE

MAY IT PLEASE THE COURT:

Plaintiffs, Edward Dunklin, Jackie Feagin, Phillip B. Gander and Nicole Mills, submit this memorandum in support of their Motion for Spoliation of Evidence regarding BP's lack of preservation of evidence of exposure to toxic chemicals by clean-up workers on the Deepwater Horizon Oil Spill and BP's decision not to do biomonitoring and dermal monitoring of clean-up workers. There is cumulative circumstantial evidence that BP chose not to preserve this exposure evidence in bad faith. The relief sought by Plaintiffs is simple and reasonable, and it

relates directly to BP's spoliation of evidence. BP seeks exclusion of Plaintiffs' causation expert, Dr. Jerald Cook, because he does not quantify exposure to a specific chemical or chemicals. Similarly, BP criticizes Plaintiffs' industrial hygiene expert, Rachel Jones, Ph.D., and Plaintiff's dermal exposure expert, John Cherrie, Ph.D., because they do not base their exposure assessments on quantitative exposure data. Yet neither Plaintiffs' experts, nor the scientists publishing peer reviewed epidemiological and exposure studies on BP Oil Spill clean-up workers have quantified exposures in the way BP demands. They have not done so because there is no exposure data from the time of the spill response that could be used to quantify the exposures. This is because BP chose to not preserve the data. As such, Plaintiffs simply request that Dr. Cook's opinions, and those of Drs. Jones and Cherrie, and the peer reviewed studies being published by the GuLF STUDY and Coast Guard Cohort programs on which they rely, be deemed reliable and admissible under *Daubert.*

INTRODUCTION

There are three issues to be decided on this spoilation motion. First, whether BP had a duty to preserve evidence of the cleanup-workers' actual toxic exposure to specific chemicals in the weathered oil which could have been done with biomonitoring and dermal monitoring. Second, whether BP's decision to not do biomonitoring and dermal monitoring was made in "bad faith". Third, whether

Plaintiffs' case has been damaged by BP's conduct. There is no dispute that BP decided against doing such monitoring. BP made this decision even though exposure experts with the Institute of Medicine, the National Institute of Environmental Health and Safety ("NIEHS"), the National Institute of Occupational Safety and Health ("NIOSH") and the National Research Council[1] ("NRC") all prepared protocols for biological monitoring of BP Oil Spill response cleanup ("OSRC") workers which were given to BP. There is no dispute that BP was aware of these proposals. There is no dispute that BP, as the "Responsible Party", was providing financial support and directing worker monitoring efforts. In fact, BP spent tens of millions of dollars to conduct environmental air monitoring for the alleged purpose of protecting workers and the public, while BP knew that air monitoring would find no airborne chemical hazards. A BP "confidential" document states that late-July 2010 at the height of the spill response effort, BP's primary purpose in doing air monitoring was to build a cache of "zero" exposure data points for use in defending against this litigation. Yet BP's own occupational medicine lead for the spill response, David Flower, M.D., testified that BP could have done biomonitoring if it had decided to, but it simply decided not to. BP also chose to not take any action on biomonitoring proposals presented to it by three different government agencies. Nor did BP do dermal exposure monitoring, despite the fact that BP's own MSDS states

[1] The NRC is one of the National Academies. The Reference Manual on Scientific Evidence is prepared by the NRC and the Federal Judicial Center. See Ref. Man. 3rd at ii.

that dermal exposure is the primary hazard and NIOSH had issued a bulletin recommending both dermal monitoring and biomonitoring. In sum, BP chose to preserve evidence that it could use to defend itself in this litigation but chose not to preserve evidence which could directly quantify worker exposures and dose.

The brief factual summary above contains all the legal elements of duty, failure of duty, bad faith, and an adverse effect on the plaintiff's case, which are necessary to prove up spoliation. The case for BP's bad faith is further supported by its attempts to obstruct discovery of its knowledge of biological and dermal monitoring of workers in corporate depositions. First, BP's counsel instructed the representative to not answer questions on biological and dermal monitoring. After being ordered to answer questions on this subject matter by Judge North, BP put forth a witness who was not prepared. Finally, after BP was sanctioned by Judge North, BP put forth a representative witness whose testimony is convoluted, and as shown below, demonstrably false.

The case for BP's bad faith becomes stronger in light of BP's strategy in defending OSRC worker cases like this one. BP seeks exclusion of Plaintiff's exposure and causation experts because they do not quantify exposure and dose to specific chemicals. Further, BP contests the validity of the peer reviewed publications of the OSRC worker epidemiological and exposure study programs, the GuLF STUDY and the Coast Guard Cohort, because they utilize qualitative

exposure measures rather than quantitative exposure and dose. Courts in the Eastern District of Louisiana have agreed with BP, and excluded Dr. Cook's causation opinions which are based on the qualitative exposure measures from the GuLF STUDY and Coast Guard Cohort programs.

There was only a limited time window in which to preserve quantitative OSRC worker data, and it was while the OSRC efforts were ongoing. After that, the exposures stopped, and biological indicia human of exposure were processed out of the workers' bodies. The juxtaposition of BP's inclusion ubiquitous air monitoring for the stated purpose of litigation defense and its omission of biological and dermal OSRC worker monitoring creates a strong implication of ill motive. BP's own witnesses admit that preservation of biological and dermal monitoring exposure data would have supported the scientific robustness of the long-term health impact studies on BP OSRC workers. These studies are now showing a significant increase in pulmonary, upper respiratory, dermatological, and cardiovascular illnesses among BP OSRC workers. Yet BP challenges these findings based on a lack of quantitative OSRC worker exposure data.

But there is no "smoking gun" document or "whistle blower" witness here to easily establish BP's plan or its bad faith. Yet, in a situation like this where the evidence shows that BP was orchestrating its legal defense in the midst of the spill response, none should be expected. Rather, there is a path of circumstantial evidence

which runs from BP's decision against biological and dermal monitoring during the spill response directly to BP's causation defense in these and all other OSRC worker cases. The circumstantial evidence connecting BP's decision to its current defense creates a line that is too direct, and a plot that is too linear, for it to be the result of coincidence or chance. Instead, the most reasonable conclusion is that BP chose against recording OSRC worker biological and dermal exposure data to deprive the workers of direct evidence of their toxic exposures during the BP Oil Spill response in order to defeat their injury claims.

FACTUAL BACKGROUND

The timeline relevant to this motion actually begins years before the April 20, 2010, BP Oil Spill. In the decades following the March 1989 Exxon Valdez oil spill, with the continued occurrence of significant oil spills which required workers to clean-up the oil, the scientific community had been studying the utility of biological monitoring of cleanup workers. These numerous studies were reviewed by a group of Spanish scientists who published in a peer reviewed article just before the BP Oil Spill. Exhibit 1 hereto is the paper by Francisco Aguilera, *et al.*, titled *Review on the effects of exposure to spilled oils on human health*, which was published online in the Journal of Applied Toxicology on April 14, 2010, six days before the BP Oil

Spill.[2] The statements made in this article are both prescient and instructive for future oil spills:

> In summary, most of the studies collected in this review provide evidence on the relationship between exposure to spilled oils and the appearance of acute physical, psychological, genotoxic and endocrine effects in the exposed individuals. Considering **the relatively high frequency of this kind of environmental disaster**, it seems **necessary to establish detailed intervention protocols that include some mechanisms to detect and control the possible harmful health effects that exposure can induce, including performing the immediate collection of biological samples from the beginning of the cleanup work**, **in order to establish the levels of individual internal exposure effects at the acute and chronic level**, especially those related to genotoxicity. This will permit not only determination of **the risk that exposure may involve**, but also evaluation of whether protective devices used by the individuals in each case adequately fulfilled their function, or on the contrary they did not exert the required protection and therefore require to revision of material characteristics and improved briefing sessions on their correct use.

Id. at 10 (emphasis added). Moreover, the article's abstract states:

> The results of the reviewed articles clearly support the need for **biomonitoring** human populations exposed to spilled oils, **especially those individuals involved in the cleanup**, in order to evaluate not only the **possible immediate consequences for their health but also the medium- and long-term effects**, and the effectiveness of the protective devices used.

[2] J. Appl. Toxicol. 2010; 30: 291–301. The paper was actually accepted for publication on February 26, 2010 and would have been publicly available at that time or shortly thereafter, well before the April 20, 2010 oil spill.

Id. at 1 (emphasis added). BP was aware of this article in the midst of the spill response but did not implement the recommendation of immediate implementation of a biomonitoring protocol at any time during the spill response.[3]

Following the publication of the Aguilera article, with the spill response ongoing, there was no attention paid to OSRC worker biomonitoring. However, this completely changed in the third week of June 2010. On June 22-23, 2010, the Institute of Medicine ("IOM")[4] held a workshop meeting in New Orleans to assess the health effects of the spill. Exhibit 3, Assessing the Effects of the Gulf of Mexico Oil Spill on Human Health: A Summary of the June 2010 Workshop (2010), hereto is the summary of the presentations and discussions which occurred during the meeting. BP's Health/Medical Lead for the spill response, Richard Heron, M.D., was present at the IOM workshop.[5] The BP Oil Spill IOM Workshop was convened by the IOM at the request of the Secretary of the U.S. Department of Health and Human Services, Kathleen Sebelius. Exhibit 3 at 11. Secretary Sebelius asked that the workshop be conducted "inform efforts to monitor the health effects of the Gulf oil spill and to communicate information concerning these risks to the public."

One of the presenters at the IOM Workshop was Blanca Laffon, Ph.D. Dr. Laffon was also one of the authors of the Aguilar study. Dr. Laffon is a professor at

[3] Exhibit 2, BP's September 15, 2022, Rule 30(b)(6) deposition, at 117:9-25.
[4] The IOM is one of the National Academies. See Reference Manual on Scientific Evidence, 3rd Edition at iv.
[5] Exhibit 2 at 117:6.

the University of Coruna in Spain, and she specializes in the study of the effects pollutants on living organisms, especially at the molecular and cellular level. See Exhibit 3 at 172-3. According to the IOM Workshop summary, Dr. Laffon discussed health studies and biomonitoring in relation to past oil spills:

> Laffon summarized results of the handful of previous studies on the human health effects of exposure to oil spills and described in detail the human health biomonitoring activities that occurred (and are still occurring) following another major oil disaster (the Prestige spill).

Exhibit 3 at 19. The Prestige spill was a 2002 oil tanker spill that occurred 100 miles off the coast of Spain for which response worker biomonitoring was done. Dr. Laffon noted that biological monitoring had found significant DNA damage ("genotoxicity") among oil spill cleanup workers was directly related to the amount of time worked, but that with continued monitoring the damage seemed to repair itself over time. *Id.* at 22-3. Dr. Laffon also noted that the research indicated that worker personal protective equipment ("PPE") did not actually protect the clean-up workers from exposure. *Id.* at 24. Notably, the Aguilera paper also states that for future spills worker biomonitoring should be done to assess the efficacy of the PPE. Exhibit 1 at 1. The points made about PPE efficacy are important here because BP is defending these cases based on the assumption of the efficacy of PPE, without ever actually having tested its efficacy. Instead of testing, BP relied on the manufacturers' "recommendations". Exhibit 4 at 100. Though in its corporate

deposition, BP could not identify the manufacturers on whose recommendations it relied. Exhibit 5 at 20:1-3.

Another presenter at the IOM Workshop was Brenda Eskenazi, Ph.D. Dr. Eskenazi is a professor of neuropsychology at the University of California, Berkely School of Public Health. Exhibit 3 at 169. While Dr. Eskenazi's IOM Workshop presentation focused on fetal exposure monitoring, but she made the point that it is incredibly important to collect biomonitoring specimens immediately during the exposure event, even though it is not known at the time how the specimens will be used in future studies:

> Eskenazi emphasized the importance of collecting biomonitoring data immediately. She reported that, immediately following a 1976 dioxin explosion in Italy, blood samples were collected. Although it was not clear at the time which chemical to measure, researchers were able to examine associations between exposure to that dioxin and adverse health outcomes a decade later.

Exhibit 3 at 56. Another presenter was Scott Barnhart, M.D., M.P.H., a professor of medicine at the University of Washington. *Id.* at 166. Dr. Barnhart made a recommendation similar to Dr. Eskenazi's, but in relation to OSRC workers and also stressed the importance of importance of immediate sample collection to reduce exposures and to establish causation of future injuries:

> To capitalize on what is known, it is important to collect data immediately, to account for confounding factors, and to reduce anticipated exposures, said Barnhart. Causation is multifactorial, and there is often a latent period between

> the time of exposure and the presentation of a disease or condition. To link possible exposures to adverse health effects, Barnhart proposed gathering data, maintaining registries, and banking samples to better determine causation.

Id. at 34. Clearly, the concept of biomonitoring data being linked to proving causation of future injuries was being discussed at the IOM Workshop. Dr. Heron was present at the meeting and presumably privy to this discussion. Also noteworthy is the IOM Summary's section on questions from the audience respecting data collection. The following question and answer were posed regarding biospecimen banking:

> *Is biospecimen banking being done adequately?*
>
> While the panelists agreed that biospecimen banking is important, none of them had enough information to know if it was being done adequately at the time of the workshop.

Id. at 38. The fact of the matter is that biospecimens were not being collected, much less banked (adequately or otherwise) for future study as the IOM Workshop panel pondered. Importantly, though Dr. Heron was present at the Workshop on behalf of BP, no evidence that BP's medical leadership or anyone within BP took note of the IOM Workshop's recommendations for initiation of immediate initiation of biomonitoring and biospecimen banking. From BP's perspective, it is as though the IOM Workshop panel's recommendations for biomonitoring never happened. BP's lack of any record or documentation of the panel's recommendations is striking.

Outside of BP, the reaction to the panel's recommendations were was completely different. Starting on the day after the IOM Workshop, there was a flurry of activity regarding biomonitoring of BP Oil Spill OSRC workers. During the six weeks following the IOM Workshop, worker biomonitoring program proposals were prepared by NIOSH, the NIEHS and the NRC. Each of these proposals was given to BP during this six-week period but none of them were implemented by BP. This stands in stark contrast to the ubiquitous air monitoring program that BP initiated on its own immediately after the spill. Exhibit 2 at 125:20-25. Notably, there is no documentation in BP's records memorializing its decision for not doing OSRC worker biomonitoring. Exhibit 2 at 120:2-15.

A. THE NIOSH BIOMONITORING PROPOSAL

The IOM Workshop's impact on the biomonitoring discussion was immediate and clear. On June 25, 2010, NIOSH Director John Howard noted that as "a result of the IOM and other conversations and reading, I am concerned that we may not have a comprehensive approach to exposure monitoring Gulf workers." Exhibit 6 at 1. He further noted that biomonitoring should be considered "so that we are not criticized for missing exposure through the dermal route." *Id.* NIOSH personnel had already prepared a statement of the reasons biomonitoring was needed and an initial biomonitoring plan the day before Director Howard signaled his concern. In the

timeline of events, the IOM Workshop concluded on June 23 and by June 24, NIOSH scientists had already come up with an initial biomonitoring proposal.

The NIOSH biomonitoring proposal was prepared by NIOSH exposure science experts, Gayle DeBord, Ph.D. (Manager Exposure Assessment Program) and John Snawder, Ph.D., D.A.B.T.[6] (Co-program Leader, Biomonitoring Program, DART[7]). Drs. DeBord and Snawder explained the reasons was biomonitoring was warranted for BP OSRC workers. First, they noted that the workers were exhibiting symptoms indicative of toxic exposure:

> Workers are reporting symptoms such as conjunctival irritation, nose and throat discomfort, headaches, allergic skin reactions and nausea. These can be signs of volatile organic compound (VOC) exposure. Polycyclic aromatic hydrogen (PAHs) can cause irritation to eyes and skin, which is also being reported by workers.

Exhibit 6 at 1. Second, they noted that BP's air monitoring programs was not sufficiently reliable to detect worker exposures:

> To date air monitoring has not been showing high levels of VOCs or PAHs in the air. However, NIOSH research has shown that winds can affect the accuracy of air monitoring of aerosols, such that exposure is underestimated. If high episodic exposure to VOCs and PAHs are occurring, air monitoring might be missing those as the exposure gets diluted out. Air monitoring does not provide any information on dermal exposures. Glove breakthrough could be a problem so that clean-up workers are exposed to the oil from dermal exposures.

[6] Diplomate of the American Board of Toxicology.
[7] "DART" is NIOSH's Division of Applied Research and Technology.

Id. Drs. DeBord and Snawder pointing out the problem with relying on air monitoring to detect OSRC worker exposures is incredibly important because air monitoring was the only exposure monitoring that was done during the spill response. Notably, David Flower, M.D., BP's occupational medicine leader for the spill response, deferred to Drs. DeBord on air monitoring missing episodic exposures, admitting that he is "not technically competent" to have an opinion. Exhibit 7 at 106:23-107:10. Moreover, Dr. Flower testified that if "a body such as NIOSH say to be they have doubts about the veracity of air sampling alone, then absolutely I agree." *Id.* at 111:5-7. Finally, Drs. DeBord and Snawder conclude:

> As subject matter experts, we are recommending a biomonitoring study to determine if workers are exposed to PAHs and VOCs. We have tools to either confirm or rule out worker exposures to these two classes of chemicals. We also believe that biomonitoring would be beneficial to determine the effectiveness of current PPE[8] practices.

Id. at 2.

In a June 27, 2010, NIOSH internal email, Director Howard summed up the institute's position on air monitoring and biomonitoring:

> Since air sampling does not reflect total exposure, and total exposure may be more associated with longer term health effects, the continuation of our approach without incorporating bio-monitoring (1) represents **only a partial approach to determining exposure**, (2) leaves us **scientifically incomplete**; (3) leaves us unable to address the concerns of those who are in the media now saying that harmful exposures are occurring despite negative air

[8] Personal Protective Equipment.

> sampling results; and (4) **impairs our ability to conduct long term health studies since we have little information on actual total exposure occurring now**.

(emphasis added). Exhibit 8 at 1. It is clear from Director Howard's email that air sampling alone is an insufficient to assess exposure and that without the addition of biomonitoring to the program the quality of long term OSRC worker health studies would be compromised because of a lack of information on the then ongoing OSRC worker exposure. BP is only entity which would benefit from long-term worker health studies being compromised for lack of biomonitoring data, *e.g.*, "quantitative" exposure data as BP now calls it.

Four days after the IOM Workshop, NIOSH is seeing the need for biomonitoring and working on a plan to do it. Meanwhile, at BP, nothing is happening on the biomonitoring front. The next day, June 28, 2010, BP was brought into the biomonitoring discussion by Deputy NIOSH Director Margaret Kitt, when she sent a draft NIOSH biomonitoring program proposal to Dr. Heron. Exhibit 9 at 2. Dr. Kitt's email spurred a discussion within BP's health, safety and environment HSE leadership regarding the worth of doing biomonitoring. While some BP leaders took issue with biomonitoring, BP's occupational medicine lead, Dr. Flower, came down squarely in support of doing biomonitoring for the specific purpose to "confirm (or otherwise) the lack of exposure as indicated by air sampling." Exhibit 10. Thus, in this email Dr. Flower confirmed that biomonitoring was an appropriate

"backstop" to confirm whether or not workers were getting acute toxic exposures during the spill response. In his recent deposition, Dr. Flower testified that he does "stand by" this statement. Exhibit 7 at 140:6-141:4. Additionally, Dr. Flower now agrees that if biomonitoring data had been collected when the OSRC workers were being exposed, it would now be helpful with ensuring the robustness of long-term worker health studies, i.e., the GuLF STUDY and the Coast Guard Cohort. *Id.* at 149:44-20.

On July 4, 2010, NIOSH Deputy Director Kitt sent an email to Dr. Heron with an updated draft of the NIOSH biomonitoring proposal. Deputy Director Kitt implores Dr. Heron that "NIOSH will need the support of you and the rest of BP leadership to meet [] implementation hurdles" to get the dermal and biological monitoring underway. Exhibit 11 at 2. For reasons that are not clear, early in July NIOSH delayed the start of its proposed biomonitoring effort. Then, by the end of July 2010, NIOSH cancelled it altogether because the well had been capped. Exhibit 22, Deposition of NIOSH Director John Howard at 288:11-289:3.

B. THE GuLF STUDY BIOMONITORING PROPOSAL

On the heels of the NIOSH biomonitoring proposal, BP was presented with another biomonitoring program proposal. On July 6, 2010, NIOSH Director Howard forwarded to Dr. Heron an email thread that includes a presentation that had been prepared by Dr. Dale Sandler at the NIEHS, which is one of the institutes within the

National Institute of Health. Exhibit 12. Dr. Sandler's presentation gives an overview of a program called the "NIH Intramural Study", also known as "The GuLF STUDY". "GuLF STUDY" stands for the "Gulf Long-term Follow-up Study". The GuLF STUDY is the program which is doing the long-term study of the health of individuals involved in the BP OSRC efforts.[9] The GuLF STUDY is an expansive program through which numerous peer-reviewed epidemiological and exposure studies have been published regarding the BP OSRC worker population.[10] Dr. Sandler is the GuLF STUDY's principal investigator.

In her July 5 email, Dr. Sandler states that she hoped to obtain "cross-sectional baseline data and biological samples from currently deployed workers" and to follow the health of these workers over time. Exhibit 12 at 3. The attached presentation states that data collection would include "repeat collection of biosamples". *Id.* The study cohort would include 21,000 OSRC workers total, with sub-groups of workers with greater exposures. There is a page in the presentation dedicated to describing a "Biorepository and Data Coordinating Center" to "facilitate biomarker and health studies". The health outcomes to be studied included genotoxicity, biological aging, "biomarkers of exposure and effect", cancer and mortality. The cost of the 21,000 participant GuLF STUDY was estimated to be $25,000,000 over five years. *Id.* at 11.

[9] https://gulfstudy.nih.gov/en/index.html
[10] https://gulfstudy.nih.gov/en/publications.html

There is an interesting comparison to see in the $25,000,000 cost of the GuLF STUDY. For this sum, 21,000 subjects would be studied for five years with health follow-ups and a bank of biological samples. Those biological samples could have provided the foundation for scientific study for decades, as Dr. Laffon told the IOM Workshop in June. Dr. Flower testified that during the time following the IOM meeting, "biological monitoring was certainly a topic of discussion over a number of weeks." Exhibit 7 at 112:19-22. Though it was a topic of discussion and BP made the decision not to do biomonitoring, there is no documentation to memorialize its analysis or decision. As Dr. Heron testified, "we don't document all the things we don't do". Exhibit 2 at 68:21-25. Not documenting everything one does not do is understandable, but not documenting the supporting analysis and decision to not preserve quantitative exposure data is suspect at best. But when coupled with the fact that the lack of quantitative exposure data is the foundation of BP's efforts to exclude Plaintiffs' experts, BP's failure to document is alarmingly suspicious.

While BP did not preserve or document anything regarding biomonitoring data, it did make sure to preserve and document air monitoring data on a massive scale. There are three BP documents which reveal the purpose and cost of BP's massive air monitoring program. Two of the documents come from the July 2010 time-window, at the same time Dr. Flower says there was a lot of undocumented discussion going on within BP about biomonitoring. The first is a July 13, 2010,

email from BP health superintendent, Matt McGuire, to BP IH Lead, Fred Tremmel, recommending cessation of the air monitoring program because the ongoing testing has still "not found a significant exposure". Exhibit 13 at 1. Tremmel overrules McGuire, stating that the air monitoring is "**not really about exposure assessment", instead it is about "perceptions**". The second is an internal BP HSE team email with the subject of "Pulling the IH Monitoring Plug", which again address stopping air monitoring because it is "documenting zero exposures" from the air. Exhibit 14 at 1. But it is noted that air "monitoring itself still adds value in the eyes of public perception, and **zeros add value in defending potential future litigation**."[11] How much value in defending future litigation does it add? No document says so directly, but a BP document does show that it spent over $13,000,000 on air sampling as of December 2010. Exhibit 15 at 3. That's more than half the cost of Dr. Sandler's 5-year, 21,000-member cohort, GuLF STUDY program, paid just for air samples. The clear take away is that BP will spend millions of dollars solely to cache evidence that will help it in defending this litigation while allowing real worker exposure data to be lost forever.

C. THE NRC BIOMONITORING PROPOSAL

[11] Notably, when testifying as BP's corporate representative, Dr. Dutton testified that during July 2010 BP's IH team had no involvement with litigation: "I'm not aware of any litigation at that point in time. These people were industrial hygienists. They were part of the industrial hygiene program, and they're pa -- involved in the collection of the data…." Exhibit 4 at 91:2-13.

On July 28, 2010, three days before the "Pulling the IH Monitoring Plug" email was sent within BP, yet another federal official reached out to Dr. Heron about initiating worker biomonitoring. This time, it was Dr. David Michaels, the United States Assistant Secretary of Labor for the Occupational Safety and Health Administration. Dr. Michaels sent an email to Dr. Heron with a proposal for OSRC worker exposure assessment prepared by the National Research Council ("NRC"). Exhibit 16 at 3. The NRC proposal specifically included "biomonitoring". *Id.* at 3. During BP's corporate deposition, Dr. Heron was questioned directly about communications with Dr. Michaels regarding biomonitoring. Dr. Heron testified clearly that Dr. Michaels told him that BP should not conduct biomonitoring: "He said you should not do biological monitoring. He and his team said you should not do biological monitoring." Exhibit 2 at 170:8-12.

Undersigned counsel contacted Dr. Michaels and asked him to review this testimony. Dr. Michaels has executed an affidavit which contradicts Dr. Heron's testimony. Dr. Michaels states that he would not have told Dr. Heron BP should not do biomonitoring and that he would not have recommended against doing biomonitoring. Exhibit 16 at 2. This pits the testimony of the former Assistant Secretary of Labor against the testimony of BP's representative on a critical issue. BP has sought cover from OSHA for not doing biomonitoring claiming that OSHA's director advised against doing biomonitoring. OHSA's then director says it is not so.

Under normal circumstances, this could be written off as an error. But here, BP has consistently and improperly blocked access to information regarding biomonitoring and dermal monitoring. This is indicative of a pattern of conduct which is relevant to the issue of BP's bad faith.

D. BP's DISCOVERY OBSTRUCTION

As the Court knows, undesigned counsel represents hundreds of B-3 and BELO plaintiffs. As most of the courts in this district have decided that hundreds of B-3 cases should be worked up simultaneously, the undersigned have focused discovery applicable to all similar cases a single case. To get the Rule 30(b)(6) deposition testimony of BP regarding its knowledge of biomonitoring and dermal monitoring of OSRC workers, the effort was focused in *Torres-Lugo v. BP* (20-0210), which is pending in the Eastern District of Louisiana. During 2022, undersigned counsel has deposed BP three times on areas of inquiry related to biomonitoring and dermal monitoring of BP Oil Spill OSRC workers.

At the first deposition on February 17, 2022, Dr. David R. Dutton was BP's corporate representative. Though biological and dermal monitoring of OSRC workers was clearly set forth in the deposition notice, BP did not move to quash the notice but, instead, during the deposition its counsel instructed Dr. Dutton to not answer questions on behalf of BP. A motion to compel ensued and was granted by Magistrate Judge North. See Exhibit 17, Minute Entry from oral argument before

Judge North dated March 30, 2022. Subject to Judge North's order, Dr. Dutton was deposed as BP's representative a second time on May 19, 2022. At the second deposition, Dr. Dutton's testimony established that he did not have the requisite knowledge to testify as BP's representative and had not done any meaningful preparation to obtain BP's knowledge in compliance with BP's Rule 30(b)(6) obligations. Undersigned counsel then filed a motion for sanctions which was granted after extensive briefing and two hearings. Judge North granted sanctions against BP, ordered it to put of a prepared representative witness for deposition and, further, prohibited BP from designating Dr. Dutton as its representative again. See Exhibit 18 at 24. At BP's cost, undersigned counsel traveled to London to depose BP's current designee, Dr. Richard Heron. As Dr. Flower also resides in the U.K., undersigned counsel also took his deposition during that trip. As noted above, Dr. Heron testified that he was told by then Assistant Secretary of Labor, Dr. David Michaels, that BP should not do OSRC worker biomonitoring. Dr. Michaels has reviewed that testimony and executed an affidavit which contradicts this testimony. Yet this is not the only instance of BP giving less than credible testimony and making questionable representations in order to defend these cases.

For instance, BP's testimony has been that it was not necessary to do biomonitoring or dermal monitoring to protect OSRC workers because BP had tested the chemical constituents of the weathered crude oil and determined that that they

were not harmful. Both Dr. Dutton, and his replacement Dr. Heron, testified to this.[12] Yet neither could identify documents withing BP's records which would corroborate this conclusion.[13] Dr. Heron was being deposed under a sanction order to answer questions about dermal and biomonitoring, but could not name the studies that BP relied upon for its decision to not do dermal monitoring. This is indicative of BP's discovery obstruction through lack of preparation.

Moreover, Dr. Dutton maintained that chemical analysis would be shown in the MC 252 the material safety data sheet ("MSDS") for MC 252 weathered crude oil. This is flatly wrong, as the MC 252 Weathered Crude Oil MSDS states that it is based on "similar materials", not the actual oil that was coming from the well. Exhibit 20 at 4. The MSDS says, "Specific toxicity tests have not been conducted on this material. Our hazard evaluation is based on information from similar materials, the ingredients, technical literature, and/or professional experience" The MSDS is dated May 18, 2010, nearly one month after the spill began and has not been updated. It is suspect that the primary safety information document for the millions of gallons of MC 252 weathered crude oil pouring into the Gulf would not contain a chemical analysis of the actual oil on which it is purportedly providing toxicological, chemical composition and safety information.

[12] Dr. Heron, Exhibit 2 at 90:21-97:6; Dr. Dutton, Exhibit 19 at 316:7-319:5.
[13] Exhibit 2 at 93:10-18; Exhibit 19 at 319:1-5.

The MC 252 Weathered Crude Oil MSDS is significant for another reason. It states that the primary exposure pathway hazard is dermal contact: "The primary exposure hazard of weathered crude is by physical contact with the skin." Exhibit 20 at 1. It further states that because of the weathering process, MC 252 Weathered Crude does not present an inhalation hazard: "Potential for toxic vapor exposures is very low: with the loss of the highly volatile components,weathered oil does not present an inhalation hazard. *Id.* This raises the question as to why BP would so extensively monitor the air, yet not monitor the OSRC workers for dermal exposure and the presence of toxic chemicals in the workers' bodies?

That question becomes more pointed in light of a NIOSH document produced from BP's records. On July 2, 2010, NIOSH issued an Interim Information Bulletin titled "Chemical Exposure Assessment Considerations for Use in Evaluating Deepwater Horizon Response Workers and Volunteers". Exhibit 21. The monitoring NIOSH recommends includes dermal wipe sampling and bioassay blood testing of workers for polycyclic aromatic hydrocarbons ("PAHs") and other toxic chemical exposure to see if workers are being exposed and to assess the efficacy of their personal protective equipment. *Id.* at 5. This document was produced by BP in this litigation but BP's corporate representative, Dr. Dutton, had no information about how BP came into its possession or if BP ever considered acting on its recommendations, nor did he do anything to find out. Exhibit 19, BP's May 19, 2022

Rule 30(b)(6) deposition at 102:12-105:6. All that is known is that BP did nothing in response to this NIOSH bulletin.

LAW ON SPOLIATION

A. LAW ON SPOLIATION

Spoliation is defined as "the destruction or the significant and meaningful alternation of evidence." *United States v. E.R.R.*, LLC, No. 19-2340, 2020 WL 4732218 at *3 (E.D. La. Aug. 14, 2020). Spoliation also includes "the failure to preserve property for another's use in pending or reasonably foreseeable litigation." *Ashton v. Knight Transp., Inc*., 772 F. Supp. 2d 772, 779 (N.D. Tex. 2011) (quoting *Silvestri v. Gen. Motors Corp*., 271 F.3d, 583, 590 (4th Cir. 2001).

Federal courts have the power to issue sanctions for spoliation based upon either their inherent power or applicable statues or rules. See *Rinkus Consulting Group, Inc. v. Cammarata*, 688 F.Supp. 2d 598, 611-12 (S.D. Tex. 2010). Sanctions for alleged spoliation are addressed under Rule 37(b) of the Feral Rules of Civil Procedure or the court's inherent power to sanction misconduct. *Union Pump Co. v. Centrifugal Tech. Inc.*, 404 Fed.Appx. 899, 906 (5th Cir. 2010). However, "[t]he sanction should be designed to (1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party." West v. Goodyear Tire

& Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999). The authority for District Courts to issue sanctions for spoliation is "based upon either their inherent power or applicable statutes or rules." *Valley View Rentals, LLC v. Colonial Pipeline Co.*, No. CV 11-00688, 2013 WL 12182682, at *2 (M.D. La. May 28, 2013) (Bourgeois, Mag. J.) (citing *Rimkus Consulting Group., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 611-12 (S.D. Tex. 2010)). Generally, these sanctions are considered under either Rule 37(b) or the Court's inherent power to sanction misconduct. Id. (citing *Union Pump Co. v. Centrifugal Tech. Inc.*, 404 Fed.Appx. 899, 905 (5th Cir. 2010)).

"A party seeking the sanction of an adverse inference instruction based upon spoliation of evidence must establish the following three elements: (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a 'culpable state of mind,' and (3) that the destroyed evidence was 'relevant' to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense." Consol. Aluminum Corp. v. Alcoa, Inc., 244 F.R.D. 335, 340 (M.D. La.2006) (citing Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212 (S.D.N.Y.2003)).

B. PLAINTIFFS CAN ESTABLISH EACH OF THREE ELEMENTS OF A SPOLIATION OF EVIDENCE CLAIM

1. BP HAD AN OBLIGATION AND DUTY TO PRESERVE EVIDENCE

In this case, plaintiffs do not allege that BP failed to preserve evidence by shredding or destroying documents, but this is nonetheless a set of facts ripe for a spoliation motion. Evidence did exist that was not preserved, namely the biomonitoring and dermal monitoring data that could only have been recorded and preserved while plaintiffs were doing OSRC work. BP will likely argue that this evidence was never created, and therefore, cannot be spoliated. To the contrary, the evidence was created when the Plaintiffs were exposed. BP was presented with scientific evidence by the IOM and NIOSH that workers were developing the symptoms of toxic chemical exposure to crude oil. It was presented with expert opinion and biomonitoring proposals by NIOSH, the NIEHS and the NRC that biomonitoring was necessary and could be done. BP possessed the July 2, 2010, recommendations in NIOSH's Interim Information bulletin that biomonitoring and dermal monitoring should be done to confirm PPE efficacy and detect toxic hazard that were not airborne. BP's knowledge created a duty for it to preserve biomonitoring and dermal monitoring exposure data.

2. BAD FAITH/CULPABLE STATE OF MIND OF BP

a. Law on Point

There is no bright-line test for evaluating a culpable state of mind; instead, the Court should look to the facts of this case to evaluate BP's bad faith:

> [T]o sanction a party for spoliation of evidence, the party who destroyed evidence must have a "culpable state of mind." Culpability is not established

> by any bright-line test but rather analyzed on a case-by-case basis. Therefore, culpability ranges from bad faith or intentional destruction of evidence by a party, to the gross negligence of a party to preserve evidence once the party knew or should have known that litigation was imminent.

Blank v. Tomorrow PCS, L.L.C., 2018 WL 3136002, at *3 (E.D. La. June 27, 2018). It is rare to find direct evidence of spoliation or bad faith, but rather circumstantial evidence is often used to come to an affirmative decision on spoliation and bad faith. *Ashton v. Knight Transp. Inc*., 772 F. Supp. 772, 795 (N.D. Tex. 2011). In *Rimkus Consulting Group Inc. v. Cammarata*, 688 F. Supp. 2d 598, 614 (S. D. Tex. 2010), the court found that the type of evidence that leads to a conclusion of bad faith includes obstructing discovery. *Rimkus* 688 F. Supp. 2d at 644.

All of the circumstances mentioned in *Rimkus* are present here to establish BP's bad faith. BP was aware of litigation because it was collecting zero exposure air samples for the purpose of defending future litigation, while at the same time it consciously chose not to preserve biological and dermal monitoring data. BP has obstructed efforts to discover its knowledge of such monitoring in *Torres-Lugo*. BP cannot identify documentation of the chemical analyses on which it purportedly relied for its decision to not do biomonitoring or dermal monitoring. Also, BP's corporate testimony that Assistant Secretary of Labor David Michaels advised Dr. Heron against biomonitoring is now shown to be false.

b. BP had the requisite "culpable state of mind"

In this case and with these facts, plaintiff can prove that BP operated with a culpable state of mind, whether the standard be bad faith or gross negligence. This burden can be met by combining BP's knowledge at the time with its decision to act as it did, based in part on the following:

1. BP made a choice to only do air monitoring when its own MSDS identified the primary exposure pathway as dermal, not airborne. Exhibit 20, BP's MSDS for MC 252 Weathered Crude Oil. See also Exhibit 21, the July 2, 2010 NIOSH Interim Information.

2. NIOSH called for dermal wipe sampling and bioassay blood testing of BP OSRC workers to assess exposure and determine the efficacy of their personal protective equipment. Exhibit 21.

3. BP's Industrial Hygienist Lead, Fred Tremmel, put in writing that he would not suspend the ineffective air monitoring program because it was "not really about exposure assessment", instead it is about perceptions" and making it appear that BP was "addressing concerns." Exhibit 13.

4. BP's John Fink wrote in an internal email thread called "Pulling the IH Monitoring Plug" that "although we are documenting zero exposures in most monitoring efforts, the monitoring itself adds value in the eyes of public perception, and zeros add value in defending potential future litigation." Exhibit 14.

5. The former Assistant Secretary of Labor for OSHA, Dr. David Michaels, has submitted an affidavit which undercuts the truthfulness of Dr. Heron's testimony that Dr. Michaels advised against doing biomonitoring. Exhibit 16.

The *Rimkus* case provided a preview into the type of evidence that leads to a conclusion of bad faith including evidence that the defendant knew about litigation,

inconsistent explanations for getting rid of evidence, the failure to disclose important evidential information that was later revealed to be relevant and evidence of defendants lying. *Id*. At 644. All of those factors apply to these facts, and the undersigned urges this Honorable Court to find bad faith on the part of BP.

3. THE EVIDENCE THAT BP FAILED TO RETAIN WAS RELEVANT TO THE PLAINTIFF'S CLAIMS

The third factor of the spoliation claim is whether or not the destroyed evidence was "relevant" to the party's claim such that a reasonable trier of fact could find that it would support plaintiff's claims. This "relevance" analysis is generally broken down into three subparts, (1) whether the evidence is relevant to the lawsuit; (2) whether the evidence would have supported the inference sought; and (3) whether the non-destroying party has suffered prejudice from the destruction of the evidence. *Consol. Aluminum Corp*., 244 F.R.D. at 346.

All of the above subparts are easily met in this case and plaintiff would suspect that this prong of the analysis will not be the focus of BP's opposition to this motion. Certainly, quantitative data of the workers' actual total exposure is relevant to this litigation.

C. SOPHISTICATION OF BP

Courts have been more inclined to impose this sanction of an adverse presumption in spoliation cases on sophisticated parties or defendants like BP. For instance, in the *Ashton* case referenced above, the court stated that the duty to

preserve extends to party's or potential party's employees who are likely to have relevant information or the "key players" such as a national common carrier as the defendant Knight Transport. *Ashton*, 772 F.Supp. 2d at 800. Given the same, the Court found that *Knight* had a duty to preserve its communications, data and investigative materials following the accident. Id. At 802. The Court was persuaded by the multitude of circumstantial evidence of spoliation that just didn't add p and pointed towards deception by Knight Transport.

Likewise in *Tantivy Communications Inc. v. Lucent Technologies*, 2005 WL 2860976 (E.D. Tex. 2005), plaintiff requested interoperability testing documents from the defendant on the issue of patent infringement. Defendant Lucent Technologies responded that it was unaware of any such testing documents even though a later 30(b)(6) deposition revealed that the defendant misrepresented its documents and had in fact destroyed many of them. The court found that the failure to retain these relevant documents allowed for a strong adverse inference and also that "Lucent and its counsel are well aware that a party in litigation must suspend its routine document retention/destruction policy and establish a 'litigation hold' to ensure the preservation of relevant documents. *Id*. At *2. The court also found that the defendant offered no credible explanation for why the documents were not retained. *Id*.

Like *Ashton* and *Tantivy*, there is a great deal of circumstantial evidence against BP for its deceptive practice of not preserving this quantitative evidence of exposure. Also similar to the above cases, BP is obviously a sophisticated defendant who still to date has offered no credible explanation for why it never adopted the pertinent dermal testing practices that exposure experts in the scientific community were asking for. BP knew that air sampling was not collecting data on contaminant exposure and that workers were manifesting symptoms of toxic exposure, but it did nothing clearly to avoid creating data that could be used against it in foreseeable litigation by clean-up workers. Once litigation commenced and discovery ensued, BP put forth testimony from its representatives that no exposure experts with NIOSH or IOM ever recommended to it that it needed to conduct biomonitoring and/or dermal monitoring of the response workers. BP continues to maintain that this type of quantitative assessment was not recommended or needed, simultaneously while now successfully arguing that worker cannot satisfy general causation without this type of data. This situation is a prime example of bad faith and warrants an adverse presumption for spoliation of the evidence.

THE APPROPRIATE RELIEF

The relief that Plaintiffs seek for the damage caused by BP's spoliation is not significant and BP's conduct warrants a more severe sanction. All that Plaintiffs seek is that Drs. Cook, Cherrie and Jones, which are based on peer reviewed science from the GuLF STUDY and Coast Guard Cohort study programs, be deemed reliable and admissible under *Daubert.*

CONCLUSION

For the above and foregoing reasons, Plaintiffs pray that they are granted the requested relief.

CERTIFICATE PURSUANT TO RULE 7.1(F)

The undersigned hereby certifies that this motion contains 7,866 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on this 27th day of October, 2022, I electronically filed the foregoing Plaintiff's Motion for Admission of Plaintiffs' Expert Opinions Because of BP Defendants' Spoliation of Evidence of Plaintiff's Exposure with the Clerk of Court by using the CM/ECF system which will send notice of electronic filing to all counsel of record. I further certify that I mailed the foregoing document and the notice of electronic filing by first class mail to any non-CM/ECF participants.

/s/ Jeremiah A. Sprague