

EXHIBIT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FREDDIE FAIRLEY

CIVIL ACTION

VERSUS

NO. 17-3988

BP EXPLORATION &
PRODUCTION INC., *et al.*

SECTION M (4)

ORDER & REASONS

Before the Court is a motion by plaintiff Freddie Fairley to deem admissible the opinions of his purported general causation expert, Dr. Jerald Cook, because of the defendants' alleged spoliation of evidence related to the oil-spill clean-up workers' exposure to oil and other chemicals.¹ Defendants BP Exploration & Production Inc., BP America Production Company, BP p.l.c., Halliburton Energy Services, Inc., Transocean Holdings LLC, Transocean Deepwater, Inc., and Transocean Offshore Deepwater Drilling, Inc. (collectively, "Defendants") respond in opposition.² Having considered the parties' memoranda, the record, and the applicable law, the Court denies Fairley's motion because there simply was no spoliation of existing evidence.

I. BACKGROUND

This case is one of the "B3 cases" arising out of the *Deepwater Horizon* oil spill that occurred on April 20, 2010.³ The B3 plaintiffs all make "claims for personal injury and wrongful death due to exposure to oil and/or other chemicals used during the oil spill response (e.g. dispersant)."⁴ These cases were originally part of a multidistrict litigation ("MDL") pending in another section of this court before Judge Carl J. Barbier. When Judge Barbier approved the

¹ R. Doc. 79.

² R. Doc. 83.

³ R. Doc. 6 at 1-2, 50.

⁴ *Id.* at 50.

Deepwater Horizon medical benefits class action settlement agreement, the B3 plaintiffs either opted out of the settlement or were excluded from the class definition.⁵ Judge Barbier then severed the B3 cases from the MDL, and those cases were reallocated among the judges of this court.⁶

Fairley alleges that he was employed to perform onshore oil-spill response activities on various beaches in Mississippi.⁷ Fairley alleges that he was exposed to crude oil and dispersants while engaged in the cleanup efforts and had adverse health conditions or symptoms including, but not limited to, headaches, breathing problems, stomach problems, eye problems, rashes, and dizziness.⁸ Fairley opted out of the medical benefits class action settlement agreement.⁹ In this action, he asserts claims for negligence, negligence *per se*, and gross negligence with respect to the oil spill and cleanup.¹⁰

In the case management order for the B3 bundle of cases, Judge Barbier noted that, to prevail, “B3 plaintiffs must prove that the legal cause of the claimed injury or illness is exposure to oil or other chemicals used during the response.”¹¹ He further observed that causation “will likely be the make-or-break issue for many B3 cases,” and “the issue of causation in these toxic tort cases will require an individualized inquiry.”¹²

Fairley, like all of the other B3 plaintiffs to have appeared before this Court, relies on Cook to provide expert testimony as to general causation, *i.e.*, that exposure to oil and dispersants was capable generally of causing the kind of health issues he alleges.¹³ Cook issued an omnibus, non-

⁵ *Id.* at 51 n.3.

⁶ *Id.* at 1-58.

⁷ R. Doc. 1-1 at 5.

⁸ *Id.*

⁹ *Id.* at 2.

¹⁰ R. Doc. 1 at 5.

¹¹ R. Doc. 6 at 53.

¹² *Id.* at 53-54.

¹³ R. Doc. 70-4.

case-specific general causation expert report that has been used by many B3 plaintiffs and has evolved over time. Fairley produced in discovery, and relies upon, Cook's May 31, 2022 report.¹⁴

This Court has found all iterations of Cook's report lacking. *See Thompson v. BP Explor. & Prod. Inc.*, 2022 WL 3924579, at *1 n.5 (E.D. La. Aug. 30, 2022) (concluding that "Version 4.0" of Cook's report, dated June 21, 2022, did not cure the previously identified deficiencies in Cook's prior report and did not provide admissible general causation opinions). Specifically, Cook's reports all fail to provide a reliable expert opinion on general causation because "Cook fails to identify the harmful dose of any chemical to which [a plaintiff] was exposed that would cause the development in the general population of the adverse health conditions or symptoms allege[d]." *Carpenter v. BP Exploration & Production Inc.*, 2022 WL 2757416, at *5 (E.D. La. July 14, 2022). Expert evidence establishing the dose-response relationship is one of the "minimal facts necessary to sustain the plaintiff's burden in a toxic tort case." *Id.* at *6 (quotation omitted).

The B3 plaintiffs have continually argued that Cook could not identify the harmful levels of particular chemicals involved because BP did not perform biomonitoring or dermal monitoring¹⁵ of oil-spill clean-up workers. In granting BP's *Daubert* motions, this Court noted that the lack of "dose-response data related to the BP oil spill (regardless of the alleged reason)" was irrelevant because "[t]he point of an expert opinion on general causation is to explain whether the exposure to a particular chemical is capable of generally causing certain health issues in the general population [and] is not dependent on data for the particular incident at issue." *Id.* The Court reiterated these points in denying various B3 plaintiffs' motions to continue the submission dates of the Defendants' *Daubert* motions and motions for summary judgment pending discovery concerning BP's alleged failure to monitor the health of oil-spill clean-up workers. *See, e.g., Davis*

¹⁴ *Id.*

¹⁵ Hereinafter, the Court will refer to biomonitoring and dermal monitoring collectively as "monitoring."

v. BP Expl. & Prod. Inc., No. 17-3140, R. Doc. 63 (E.D. La. Aug. 11, 2022); *Summers v. BP Expl. & Prod. Inc.*, 2022 WL 2953035, at *1 n.5 (E.D. La. July 25, 2022).

II. PENDING MOTION

Fairley, faced with Defendants' *Daubert* and summary-judgment motions,¹⁶ takes a new approach by filing the instant spoliation motion.¹⁷ Fairley argues that BP spoliated evidence by failing to undertake a monitoring program to develop evidence of the clean-up workers' actual toxic exposures to the specific chemicals that were in the weathered oil.¹⁸ Fairley argues that the evidence was "created" when the workers were exposed and BP had a duty to preserve it.¹⁹ He also argues that there is "circumstantial" evidence that BP, a sophisticated entity, acted in bad faith in failing to develop and retain evidence related to the future B3 plaintiffs' claims.²⁰ Fairley argues that the appropriate remedy for BP's alleged spoliation of evidence is for the Court to deem Cook's opinions to be relevant, reliable, and, ultimately, admissible.²¹

In opposition, Defendants argue that BP did not spoliolate any existing evidence and had no duty to create evidence by monitoring the clean-up workers.²² They point out that the federal government coordinated the oil-spill response and never told BP that it was obligated to conduct monitoring.²³ Defendants further argue that there is no evidence of bad faith as Judge Barbier found in *Backstrom v. BP Exploration & Production Inc.*, 2022 WL 2342390, at *5 (E.D. La. June 29, 2022).²⁴ Finally, Defendants argue that Fairley's proposed remedy for the alleged spoliation – deeming Cook's opinions admissible – is illogical because general causation opinions are not

¹⁶ R. Docs. 70; 71.

¹⁷ R. Doc. 79.

¹⁸ R. Doc. 79-1 at 1-27.

¹⁹ *Id.* at 20-21.

²⁰ *Id.* at 21-26.

²¹ *Id.* at 27.

²² R. Doc. 83 at 13-18.

²³ *Id.* at 15-18.

²⁴ *Id.* at 18-22.

dependent upon data from the incident at issue and Cook failed to provide any reliable and relevant opinions that the chemicals at issue are capable, generally, of causing in the general population the plaintiff's complained-of health concerns.²⁵

III. LAW AND ANALYSIS

A federal court has the inherent power to sanction a party that has abused the judicial process. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991). The spoliation of evidence is a sanctionable abuse. *Coastal Bridge Co. v. Heatec, Inc.*, 833 F. App'x 565, 573 (5th Cir. 2020). "Spoliation is the 'destruction or material alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.'" *Ashton v. Knight Transp., Inc.*, 772 F. Supp. 2d 772, 799 (N.D. Tex. 2011) (quoting *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001)). "A party seeking the sanction of an adverse-inference instruction based on spoliation of evidence must establish that: (1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the evidence was destroyed with a culpable state of mind; and (3) 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." *Coastal Bridge*, 833 F. App'x at 574.

"A plaintiff alleging spoliation must establish that the defendant *intentionally* destroyed the evidence for the purpose of depriving opposing parties of its use." *Id.* at 573 (emphasis in original). In other words, "an adverse inference against the spoliator or sanctions against the spoliator [is permitted] only upon a showing of 'bad faith' or 'bad conduct.'" *Guzman v. Jones*, 804 F.3d 707, 713 (5th Cir. 2015) (quoting *Condrey v. SunTrust Bank of Ga.*, 431 F.3d 191, 203

²⁵ *Id.* at 22-24.

(5th Cir. 2005)). “Bad faith, in the context of spoliation, generally means destruction for the purpose of hiding adverse evidence.” *Id.*

In this case, Fairley has not sustained his burden of proving spoliation. First and foremost, there is no allegation that BP destroyed, altered, or failed to preserve any *existing* evidence. Instead, Fairley argues that BP failed to *develop* evidence that might at some future day have aided potential plaintiffs in making claims against BP. In an attempt to circumvent this fact, Fairley absurdly argues that the evidence of exposure was “created” and “existed” when the future B3 plaintiffs were exposed to weathered oil and BP failed to “preserve” it by conducting a monitoring program.²⁶ Courts have held that “the duty to preserve evidence does not include the duty to *create* evidence. Since the duty to preserve evidence implies a duty not to alter or destroy *existing* evidence, ‘spoliation does not encompass a defendant’s failure to photograph an accident site Thus, the absence of after-the-fact photographs ... cannot support a spoliation claim.’” *De Los Santos v. Kroger Tex., LP*, 2015 WL 3504878, at *6 n.4 (N.D. Tex. June 3, 2015) (quoting *Bertrand v. Fischer*, 2011 WL 6254091, at *4 (W.D. La. Dec.14, 2011)) (emphasis in original; internal citation and alteration omitted). Said differently, “[a] failure to *collect* evidence that may or may not have been available for collection is very different from the intentional destruction of evidence that constitutes spoliation.” *United States v. Greco*, 734 F.3d 441, 447 (6th Cir. 2013) (emphasis added). Under these authorities, BP’s alleged failure to collect evidence was not a failure to preserve evidence, and as such, was not spoliation. Defendants argue that Fairley’s position that BP had a duty to create evidence by bringing monitoring data into existence has no limiting principle but would cause parties and courts to “go down the bottomless hole” of capturing the next untaken photograph, interviewing the next uninterviewed witness, or testing the next

²⁶ R. Doc. 79-1 at 20-21.

untested person, place or thing, with no idea of where the proposed duty ends.²⁷ Defendants say that the existence of the evidence provides the appropriate limit. The Court agrees, which is why courts have consistently held that the failure to create evidence is not spoliation.

Secondly, Fairley has not proved that BP had a duty to conduct a monitoring program to create evidence in order to preserve it. He makes some noises about BP's knowledge that such monitoring was useful and that it received recommendations for certain monitoring programs. Suggestions and proposals do not equate to an affirmative duty, especially where, as here, the federal government, not BP, was in charge of the spill response,²⁸ and the federal government decided against conducting or requiring monitoring.²⁹ In short, Fairley identifies no statute, regulation, or affirmative governmental order that required BP to undertake such an endeavor. Hence, BP had no duty to initiate on its own a monitoring program to avoid a spoliation claim.

Thirdly, there is no evidence that BP acted in bad faith. In *Backstrom*, 2022 WL 2342390, at *5, another section of this court found no evidence of bad faith when examining the same spoliation arguments made here. The court noted that, although the National Institute of Occupational Safety and Health ("NIOSH") sent to BP a proposal for a monitoring program, BP personnel testified that NIOSH decided not to implement the program for which BP would have provided logistical support. *Id.* The *Backstrom* court concluded that there was not enough

²⁷ R. Doc. 83 at 14.

²⁸ See *Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co.*, 704 F.3d 413, 418 (5th Cir. 2013) (discussing federal government's role, through the designated Federal On-Scene Coordinator, of "direct[ing] and coordinat[ing] all efforts at the scene of the discharge," and citing 33 U.S.C. § 1321(c)(1)(A), (2)(A)); *Norris v. BP Expl. & Prod. Inc.*, 2022 WL 6549304, at *1 (E.D. La. Sept. 22, 2022) (referencing a sister court's finding that "the *Deepwater Horizon* oil spill Unified Area Command, which was comprised of several federal and state agencies, 'engaged in extensive and coordinated data collection and environmental monitoring efforts, in what has been characterized as the largest environmental investigation of an oil spill ever undertaken'" (quoting *In re Deepwater Horizon Belo Cases*, 2020 WL 6689212, at *4 (N.D. Fla. Nov. 4, 2020), *aff'd*, 2022 WL 104243 (11th Cir. Jan. 11, 2022)).

²⁹ R. Doc. 83 at 15-17.

evidence that “BP acted with a culpable state of mind to suppress the truth and deprive future parties of this data.” *Id.* Fairley has not met his burden on this point either.


Finally, even if there were evidence of spoliation, the proposed remedy – deeming Cook’s opinions relevant – does not solve the inherent problem in Cook’s report. Thus, the report (even Version 4.0) still fails to provide evidence of general causation as is required by the Fifth Circuit for toxic tort cases. As this Court has repeatedly stated, a general causation opinion is not dependent upon data from the incident at issue, but does require an explanation of whether the exposure to a particular chemical is capable generally of causing certain health issues for the general population.³⁰ Cook’s report fails in this respect and the inference requested does not save it.

IV. CONCLUSION

Accordingly, for the reasons stated above,

IT IS ORDERED that Fairley’s spoliation motion (R. Doc. 79) is DENIED.

New Orleans, Louisiana, this 3rd day of November, 2022.


BARRY W. ASHE
UNITED STATES DISTRICT JUDGE

³⁰ Judge Barbier recently explained the same point this way:

[E]ven assuming that BP had an affirmative duty to conduct dermal testing or biomonitoring after the oil spill, the lack of this information is not what renders Dr. Cook’s expert report unreliable, unhelpful, and inadmissible. The general causation inquiry in toxic tort cases is not limited to environmental sampling data taken as part of the incident at issue. Instead, an expert may consult all relevant scientific and medical literature on the harmful effects of the chemicals at issue to determine whether a relevant chemical has the capacity to cause the harm alleged by the plaintiff in the general population. Dr. Cook’s expert report failed to identify a single chemical which could cause the particular medical injuries alleged by each Plaintiff.

Fairley v. BP Expl. & Prod. Inc., No. 17-3188, R. Doc. 63, at 4 (E.D. La. Oct. 12, 2022).