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United States Court of Appeals for the Fifth Circuit 1 (1989), 47 pages.

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-4954

INTERNATIONAL PAPER COMPANY,

Plaintiff-Appellant

v.

RODOLFO GONZALEZ, CANDIDO DE LEON, GUADALUPE MORENO,

ALBINO TREVIZO, JESUS COBARRUBIAS, BERNARDO RIOS,

RICARDO RIOS, and SOUTHPINE, INC.,

Defendants-Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
BILOXI DIVISION

The Hon. Walter J. Gex, III, Judge Presiding

BRIEF OF APPELLEES
RODOLFO GONZALEZ, CANDIDO DE LEON, GUADALUPE MORENO,
ALBINO TREVIZO, and JESUS COBARRUBIAS

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CERTIFICATE OF INTERESTED PERSONS PURSUANT TO LOCAL RULE 28.2.1

International Paper Co. v. Rodolfo Gonzalez et al.
(No. 88-4954)

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal, to wit:

I. Parties

A. Plaintiff

International Paper Company
IP Timberlands, Ltd.

B. Defendants

Rodolfo Gonzalez
Candido De Leon
Guadalupe Moreno
Albino Trevizo
Jesus Cobarrubias
Buford Smith
Southpine, Inc.
Ricardo Rios
Bernardo Rios

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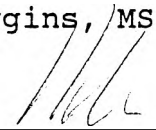
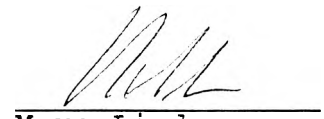


Marc Linder
Attorney of Record
For Defendants-Appellees
Gonzalez et al.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary to resolution of this appeal. The abusive forum shopping that the International Paper Co. seeks to vindicate has never been condoned by any court. Since the sole issue on appeal is a question of law supported by the record on appeal, the briefs adequately inform the Court.



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I. ISSUE ON APPEAL

Whether the International Paper Co. engaged in abusive anticipatory forum shopping when it filed a declaratory judgment action in Mississippi under the Migrant and Seasonal Agricultural Worker Protection Act, which affords agricultural employers no substantive rights vis-à-vis farmworkers, against its indigent migrant agricultural employees in order to preclude its workers from prosecuting their own lawsuit against the International Paper Co. in Texas.

II. STATEMENT OF THE CASE

A. Course of the Proceedings Below

In the summer of 1988, the Appellees, Gonzalez,[1] De Leon, Moreno, Trevizo and Cobarrubias, migrant farmworkers from South Texas (hereinafter "Migrant Farmworkers"), sought, through counsel, to negotiate a settlement of their employment-related claims with the International Paper Company (hereinafter "IP"), Buford Smith (hereinafter "Smith"), Ricardo Rios (hereinafter "R. Rios"), and Bernardo Rios (hereinafter "B. Rios"). After sending several letters setting forth these claims (R. I, 19-22), their attorney spoke with the general counsel for the Woodlands Division of IP, Robert Kriscunas, whose headquarters are in Texas. The workers were thereby complying with their obligation under the Migrant and Seasonal Agricultural Worker Protection Act ("Migrant Act"), 29 U.S.C. §§ 1801-1872, to negotiate before litigating. Congress wrote into that Act its intent that farmworkers seek to resolve their disputes with their employers amicably before embarking upon litigation; failure to do so can result in reduced recoveries. 29 U.S.C. § 1854(c)(2).

---

[1]As International Paper Co. itself concedes, Brief of Appellant at 3 n.1, Mr. Gonzalez released International Paper Co. from all claims raised in its declaratory judgment action. In spite of the payment to him of $2,500, International Paper Co. has failed to dismiss Mr. Gonzalez from its action and has made him the lead defendant in this appeal. This action and inaction constitute retaliatory harassment and a breach of the release. Mr. Gonzalez is, at the very least, not properly before this Court.

Late in the afternoon of August 5, 1988, Mr. Kriscunas and the workers' counsel spoke for about an hour; at that time Mr. Kriscunas informed the latter that IP would not resolve any of the claims; counsel for the employees stated that his clients would then be compelled to file suit. Very briefly the migrants' counsel spoke to Mr. Kriscunas again on August 8, 1988. On neither occasion did Mr. Kriscunas inform counsel that IP had filed a declaratory judgment action in Mississippi federal court on August 5, 1988 or even contemplated taking any legal action. (R. I, 90-91; R. II, 4-5.)

IP filed its complaint in the U.S. District Court for the Southern District of Mississippi, Biloxi Division, on August 5, 1988, requesting a declaratory judgment that it was, for purposes of the Migrant Act, §§ 1801(a), 1811(b), 1821(b), 1821(d)(2), 1841 and 1842, not the employer of Migrant Farmworkers. (R. I, 1.)

On August 12, 1988, and before learning of the Mississippi action, the workers filed a class action lawsuit in the United States District Court for the Southern District of Texas, McAllen Division, against IP, IP Timberlands, Ltd., and Smith, alleging a much broader range of violations of the maximum hours provision of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 207; the registration, disclosure, pay receipt, payment, working arrangement and transportation provisions of the Migrant Act, 29 U.S.C. §§ 1801-1872 ; the Federal Insurance Contributions Act (FICA), 26 U.S.C. §§ 3101-3126; the Federal Unemployment Tax Act (FUTA), U.S.C. §§ 3301-3311; the Mississippi Employment Security Law; and

the contract of employment between Plaintiffs and Defendants. The employees brought the Texas action on behalf of all migrant agricultural workers who, within the past three years, had been or were currently being recruited in South Texas to plant pine seedlings or to perform other forestry practices for any of the defendants. (Supp. R. 5-6.)

Not until IP had been served with process in that action did counsel for IP notify the workers' attorney (on August 16, 1988) that IP had already filed a declaratory action in Mississippi on August 5, 1988. Brief of Appellant at 5.

The farmworkers moved the Texas court to enjoin IP preliminarily from litigating in Mississippi, while IP moved the Texas court to dismiss the action. The Texas court has yet to rule on these motions.

On September 9, 1988, the workers also moved the Mississippi court to dismiss the declaratory judgment action on the grounds of lack of in personam jurisdiction, improper venue, and insufficiency of service of process. (R. 49.) On November 22, 1988, the district court granted the motion to dismiss on the grounds that IP had abused the Declaratory Judgment Act as a device for impermissible forum shopping in order to anticipate the Texas action. (R. II, 8-11.)

B. Statement of Facts

Defendants are Mexican permanent resident alien and Mexican-American migrant farmworkers residing in the Rio Grande Valley of

Texas, who perform both fruit and vegetable hand-harvest work and forestry planting work; for three to four weeks in the winter of 1988 they planted pine trees for IP in Mississippi. During that period both IP and the crewleaders, Bernardo Rios, Ricardo Rios, and South Pine, Inc. (aka Buford Smith [R. 8, 12, 17. 70]), whom IP also named as Defendants in the action below, refused to treat Migrant Farmworkers as employees in order to reduce their costs of doing business. Thus the workers did not receive statutory overtime under the Fair Labor Standards Act; no employer paid taxes for them pursuant to the Social Security Act, the Internal Revenue Code or the Mississippi Employment Security Law. In addition, all their rights were violated under the Migrant Act. (Supp. R. 4.)

IP, "the world's largest papermaking organization," U.S. Bureau of Labor Statistics, Bulletin 1788: Wage Chronology: International Paper Co., Southern Kraft Division December 1937--May 1973 at 1 (1973), controlling 7,000,000 acres of timberlands, International Paper, 1987 Annual Report 1 (1988), has publicly expressed a lack of satisfaction with its return on equity of ten per cent. Having set a goal of fifteen per cent, IP has announced a program of improving profit margins by reducing costs. Id. at 2. One vital area in which IP has sought to implement such cost reductions involves "scientific tree-farming."[2] The method by

[2]For more than forty years IP has proudly proclaimed that its employees are "teachers and exponents of scientific tree farming" because "trees are a crop. They can be grown as a crop. Tree-farms are as practical as farms for wheat, or corn, or cotton." International Paper Company, International Paper Company After Fifty Years: 1898-1948 at 21, 108 (1948).

which IP has in recent years elected to achieve that objective consists in "contracting out" the woodlands work--on the 130,000 acres it reforests annually in the South, IP Timberlands, Ltd., 1987 Annual Report 10 (1988)--to labor recruiters and supervisors, such as Smith, who can perform such work more cheaply by employing Mexican-American and Mexican migrant agricultural workers without complying with applicable Federal and State protective labor laws. In this context IP and their labor recruiters have sought to evade their statutorily imposed obligations by treating their employees as independent contractors, thus depriving them of minimum wages, overtime compensation, unemployment compensation, employers' contributions to social security and protection under the Migrant Act. (R. I, 19-20; II, 3.)

IP has used Defendants Smith and Ricardo Rios and Bernardo Rios to recruit migrant agricultural workers for several years, during which time they have been on notice concerning their violations of FLSA, the Migrant Act and other Federal and State labor laws. (R. 20.)

The U.S. forestry industry is in the grip of an historic transformation associated with a shift of holdings and operations from the Northwest to the South. The massive acquisition of forest land in the South has been motivated by three factors. First, "[t]he forests of the South grow faster than those of the North." International Paper Company, International Paper Company After Fifty Years: 1898-1948 at 67 (1948). Second, the predominance of small private forest land ownership in the South, id. at 67-68,

entails fewer environmental restrictions than in the North, where concentrated federal ownership of forest land has traditionally meant more restrictive environmental policies. And third, the considerably lower degree of union organization and wage level in the South reduces the costs of doing business.

IP has been at the forefront of this revolution, with two-thirds of its forestry land holdings in the South. IP Timberlands. Ltd., 1987 Annual Report at 10, 12, 14. In connection with its efforts to take advantage of the most advanced scientific techniques of reforestation, including "second-generation genetic improvements" and "sophisticated economic analysis models for timberland management," id. at 10, especially on the roughest terrain, least accessible to mechanized forestry practices, IP--like the other large timber companies operating in the South--has had to face the problem of securing an adequate work force for the very labor-intensive practice of hand-planting pine seedlings.

Even as recently as a few years ago, as Migrant Farmworkers allege in their complaint in the Texas action, many companies performed the bulk of this work with payroll crews consisting of seasonal employees recruited locally and paid on an hourly basis. The timber companies' refusal to pay these workers more than the minimum wage created the appearance of an exhaustion of local labor reserves. At the same time the companies were eager to shed these payroll employees for fear that incipient attempts by labor unions to widen the scope of their collective bargaining units from pulp mills and permanent year-round woodlands employees to such seasonal

employees might ultimately be successful. Finally, becoming subject to increased foreign, especially Canadian, competition, forestry companies began casting about for cost-cutting innovations.

Prominent among these practices, as alleged in Migrant Farmworkers' complaint in the Texas case, has been the wholesale adoption by IP and the other integrated timber and paper companies of the inherently abusive crewleader system as it has developed in agriculture, including the fictitious "contracting out" of hand-planting (and injecting) work to former hand-planters who had saved enough money to buy a truck or van in which to transport other hand-planters. The chief function and sole competitive advantage of such "contractors" has consisted in their ability to recruit desperately poor and hence vulnerable Mexican-American and Mexican migrant agricultural workers, whom they could subject to unlawful exploitation.[3] (See Supp. R. 11-12, 14-15.)

---

[3]IP seeks to avoid liability on the grounds that:

> Unlike Weyerhaeuser's operations in Bracamontes, IP did not employ a labor contractor to recruit migrant workers to plant pine seedlings. Instead, IP contracted with a reputable independent forestry contractor, Southpine, to perform IP's planting requirements. Southpine, in turn contracted with a labor contractor, Rios and Rios, to perform part of Southpine's obligations.

Brief of Appellant at 23. Apart from the disputed and self-serving nature of this claim, what IP fails to indicate is that R. Rios was Buford Smith's (aka Southpine's) payroll foreman, with whom Smith entered into a sham sub-contract with the sole purpose of reducing costs and increasing profits by virtue of R. Rios's treating Migrant Farmworkers as independent contractors in order to save employment taxes, which amounted to fifteen to twenty per cent of wages--the dominant cost component in planting.

Such exploitation has taken the form of not paying: a. the minimum wage; b. overtime compensation; c. travel time; d. FICA, FUTA or state unemployment taxes; e. workers compensation premia; f. contractually stipulated piece-rates; or g. wages for all the acres actually planted or injected. By engaging in these unlawful practices, crewleaders have been able to reduce the timber companies' planting costs, which consist largely of wages, to the point at which larger, law-abiding forestry contractors, employing hundreds of hand-planters, can no longer compete with such labor agents for work with timber companies. (R. I, 19-20.)

IP has been on the cutting edge of such illegal cost-cutting practices. By systematically cultivating "contractors" whose livelihood crucially hinges on such practices, IP has virtually precluded law-abiding contractors from working for them in certain areas. In a variant of the aforementioned scenario, Buford Smith (aka Defendant Southpine) has sought to insulate himself from liability by fictitiously sub-contracting part of his work to former payroll employees such as Ricardo Rios. (R. II, 3.)

By capitalizing on their familiarity with the farm labor recruiting scene in South Texas and Mexico and by pooling their savings from their farm labor contracting activity, such "contractors" have been able to get in on the ground floor with IP under their new regime of "outside contracting." Especially since the unprecedented freeze of December 1983 destroyed the citrus industry and therewith the main source of winter agricultural employment in the Rio Grande Valley, unemployed farmworkers have

become increasingly reliant on winter planting work in the South. Since that time, Smith and the Rioses, taking advantage of these workers' desperate economic plight, have become a mainstay of IP's hand-planting operations in Mississippi. (See R. I, 20; Supp. R. 11-12, 14-15.)

III. SUMMARY OF ARGUMENT

By filing its declaratory judgment action in Mississippi Federal Court, IP is transparently engaging in impermissible anticipatory forum shopping. But more than that, it is seeking to bootstrap itself into plaintiff-status in order to wrest control of the suit from the migrant farm laborers, the real plaintiffs, thereby depriving them of their right to shape their own litigation. Because the Migrant Act was not intended to protect employers from workers, such a tactic clearly contravenes congressional intent. The unannounced and pre-emptive filing of a declaratory judgment action also undermines the requirement of the Migrant Act that employees seek to resolve their complaints before litigating.

IP assiduously cultivates the fiction that the instant procedural and jurisdictional dispute can be assimilated to the case law governing run-of-the-mill litigation between nationally active corporate entities. It thereby papers over the fact that such formal rules of thumb as "convenience of the parties," Brief of Appellant at 21, when removed from their normal context, lose their original guiding purposes. But where the world's largest

paper company files a declaratory judgment action in order to deprive indigent migrant farmworkers of their day in court under a statute that affords employers no substantive rights vis-à-vis their employees, it is crucial to focus on the perverse consequences of applying the rules controlling corporate litigation.

Thus although the so-called balance of convenience, Brief of Appellant at 17, may be an appropriate criterion in determining which corporate entity must litigate before which forum, it is entirely inappropriate as applied to Migrant Farmworkers, who are the aggrieved parties; here it is not "convenience" that is at stake but the workers' very ability to vindicate their rights. For if IP were to succeed in imposing a Mississippi forum on them, the workers would be unable to litigate their claims at all.

Such an outcome would have significant deleterious consequences for interstate litigation by migrant farmworkers. If the legitimacy of IP's declaratory judgment action were sustained, agricultural employers, especially the large integrated timber companies that are closely monitoring this case, would be encouraged to file declaratory judgment actions in their own states as soon as they received a demand letter from migrant employees in order to pre-empt the filing of a suit by the migrants in their state of residence. For migrant agricultural workers from the Rio Grande Valley working in states with no farmworker legal services programs (e.g., Mississippi, Alabama, and Arkansas), such a scenario would be tantamount to abandonment of their claims

altogether because their only counsel, a federally funded legal services entity, is neither financially nor logistically in a position to conduct litigation outside of Texas. (Supp. R. 16.) Such a result manifestly would contradict Congress's intention that the Migrant Act empower migrant agricultural workers to vindicate their rights.

IV. ARGUMENT

A. AGRICULTURAL EMPLOYERS SHOULD NOT BE PERMITTED TO UNDERMINE MIGRANT FARMWORKERS' RIGHTS UNDER THE MIGRANT ACT BY FILING SHAM DECLARATORY JUDGMENT ACTIONS IN ORDER TO FORCE INDIGENT WORKERS TO ABANDON THEIR LITIGATION

1. IP's Forum Shopping is an Attempt by a Large Employer to Use Its Wealth to Coerce Indigent Employees into Abandoning Their Claims by Forcing Them to Litigate Their Claims Far from Their Place of Residence

A review of hundreds of state long-arm statute cases litigated in the federal courts reveals that this action is unprecedented: in no reported case has an employer (let alone a multi-billion dollar multinational corporate employer) sought to hale into a forum a thousand miles away from their homes a group of indigent, unskilled, uneducated, non-English-speaking workers--in particular under a statute that confers many rights and protections on migrant farmworkers vis-à-vis overreaching agricultural employers, but none on employers against farmworkers.

Only by conjuring up a make-believe world in which the world's largest paper company is the aggrieved party and Migrant Farmworkers the corporate wrongdoers, that is, by standing the

realities of this case on their head, can IP hope to lend a patina of plausibility to its claim that the workers' act of planting pine trees for IP in Mississippi should suffice to compel them involuntarily to litigate their own claims against IP in a forum of IP's own choosing.

The modern jurisprudence of personal jurisdiction is rooted in an analysis of the due process considerations that justify compelling a defendant to defend a lawsuit in a judicial district where it does not reside. Moreover, International Shoe Co. v. Washington, 326 U.S. 310 (1945), and its progeny have focused on the "[d]ue process requirements" that must be "satisfied when in personam jurisdiction is asserted over a nonresident corporate defendant." Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414 (1984) (emphasis added). That analysis has obviously been shaped by the value that, in the interests of justice, an alleged corporate wrongdoer may have to submit to the minor inconvenience attendant upon defending where it does not reside. And even this countervailing consideration weighs less and less as a national corporate economy asserts itself:

> [A] trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. . . . At the same time modern transportation and communication have made it much less burdensome for a party to defend himself in a State where he engages in economic activity.

McGee v. International Life Ins. Co., 355 U.S. 220, 222-23 (1957).

Precisely because none of these forces contributing to an

expansive interpretation of state long-arm statutes vis-à-vis nonresident corporate defendants has any applicability vis-à-vis nonresident indigent plaintiffs, IP filed this sham declaratory judgment action in order to posture as an aggrieved plaintiff seeking its day in court against persons allegedly seeking to avoid accountability.[4]

All the twists and turns of in personam long-arm jurisprudence hinge on the process that is due an alleged wrongdoer. Since a plaintiff by definition chooses the forum, this jurisprudence makes no sense as applied to an aggrieved party. Had Defendants, for example, intentionally set fire to IP's forests in Mississippi, and had IP filed an action against them in Mississippi, then this action might have some claim to legitimacy. But neither Migrant Farmworkers nor IP has done any such thing. On the contrary: the workers have alleged that IP is the wrongdoer whereas IP does not allege that the workers have done anything actionable. It is therefore inappropriate for IP to invoke the language of a jurisprudence designed to deal with wrongdoers' liability in order to justify forcing the aggrieved parties to litigate their grievances in a distant forum.

---

[4]Thus IP adduces as relevant the language of accountability, namely, that it may be "unfair" to allow persons "to escape having to account in other states for consequences that arise proximately from such [interstate] activities." (Supp. R. 59-60 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473-74 (1985)).

2. IP's Choice of Venue is an Abuse of the Legal Process in General and of the Declaratory Judgment Act in Particular

The sole reason IP chose to lay the venue of its declaratory judgment action in Mississippi was to deprive its former workers of their day in court by making it in effect impossible for them to litigate their claims at all. A wealthy corporate defendant should not, however, be permitted disingenuously to beat indigent migrant farmworkers to the courthouse in order to deprive them of the only forum in which they can litigate.

Even in the absence of the oppressive geographic forum shopping characteristic of the instant action, it has been held that:

> to compel potential personal injury plaintiffs to litigate their claims at a time and in a forum chosen by the alleged tortfeasor would be a perversion of the Declaratory Judgment Act. The primary purpose of that Act is "to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage had accrued."

Cunningham Bros. v. Bail, 407 F.2d 1165, 1167-68 (7th Cir. 1969), cert. denied, 395 U.S. 959 (1969) (citation omitted). This prophylactic purpose of the Declaratory Judgment Act is aimed at enabling litigants to "'settle the controversy before an accumulation of differences and hostility [] engendered a wide and general conflict, involving numerous collateral issues.'" National R.R. Passenger Corp. v. Consolidated Rail Corp., 670 F. Supp. 424, 427 (D.D.C. 1987) (citing S.Rep. No. 1005, 73d Cong., 2d Sess. 3 [1934]).

To the instant dispute prophylaxis cannot be brought to bear, however, because the Migrant Farmworkers sued by IP in Mississippi no longer work for it; the alleged actionable events belong to the past. Consequently, what IP in fact seeks to accomplish is "[t]he anticipation of defenses," which "is not ordinarily a proper use of the declaratory judgment procedure" precisely because "[i]t deprives the plaintiff of his traditional choice of forum and timing, and . . . provokes a disorderly race to the courthouse." Hanes Corp. v. Millard, 531 F.2d 585, 592-93 (D.C. Cir. 1976). Under these circumstances: "To so reverse the roles of the parties would affect more than merely the form of action, but would jeopardize those procedures which the law has traditionally provided to injured parties by which to seek judicial relief." Cunningham Bros. v. Bail, 407 F.2d at 1168.

The case law reveals that the courts of appeals,[5] including this Court, disapprove of the use of the Declaratory Judgment Act as a device for forum shopping. The standard procedure in such cases is to dismiss the declaratory action even where it was filed first. This approach is exemplified by Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215 (2nd Cir. 1978), cert. denied, 440 U.S. 908 (1979), in which, like the instant case, the declaratory action

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[5] The Second, Fourth, Fifth, Seventh, Eleventh and D.C. Circuits disapprove of the use of the Declaratory Judgment Act as a forum shopping device. This case law is summarized in Wright & Miller's comment on anticipatory declaratory judgment: "The courts properly decline relief if the declaratory judgment procedure, and the federal forum, is being used for 'procedural fencing' or 'in a race for res judicata.'" 10A Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d § 2759 at 651 (1983).

was filed before the underlying lawsuit. The plaintiff, that is, the party who suffered an injury, sent a notice letter to the defendant warning it that if it did not cease its illegal conduct, it would be subject to a lawsuit. Instead of ceasing its conduct, the injuring party filed a declaratory judgment action in federal court. The plaintiff did not file its action for damages in federal court until five days after the declaratory judgment action was filed.

The Second Circuit held that when a declaratory action is triggered by a notice letter, "this equitable consideration may be a factor in the decision to allow the later filed action to proceed to judgment in plaintiffs' chosen forum," adding that "[t]he federal declaratory judgment is not a prize to the winner of a race to the courthouse." Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d at 219 (citing Perez v. Ledesma, 401 U.S. 82, 119 n.12 (1971) (Brennan, J., dissenting)). The Second Circuit upheld the district court's decision to dismiss the declaratory action, even though it was filed before the action for damages.

This Court also takes a dim view of the use of the declaratory action as a forum shopping device to beat plaintiffs to the courthouse. This Court has held that the fact that a declaratory judgment action was filed in anticipation of another suit for damages is an equitable consideration that a district court may take into account in deciding whether or not to entertain a declaratory action. Amerada Petroleum Corp. v. Marshall, 381 F.2d 661, 663 (5th Cir. 1967), cert. denied, 389 U.S. 1039 (1968). In

a later case, this Court noted that "[a]nticipatory suits are disfavored because they are an aspect of forum shopping." Mission Ins. Co. v. Puritan Fashions Corp., 706 F.2d 599, 602 n.3 (5th Cir. 1983).

The time of service is another factor that a court may consider in deciding whether or not the party filing the declaratory action was trying to manipulate the forum. In a recent case, this Court noted with approval that the district court was persuaded to dismiss a declaratory action, even though it was filed two months prior to the suit for damages, in part because of a delay in service: "The district court was also influenced in its decision by Pacific's unexplained delay in serving the defendant U.K. Club until after the second suit was filed. The court concluded that the delay indicated an abuse of judicial procedure in trying to control the forum of the plaintiff's action." Pacific Employers Ins. Co. v. M/V Capt. W.D. Cargill, 751 F.2d 801, 804 (5th Cir.), cert. denied, 474 U.S. 909 (1985). IP engaged in a similar delay in service of its declaratory action. Although IP had filed its declaratory action on August 5, 1988, it did not notify Migrant Farmworkers' counsel, let alone try to effect service on the workers, until after it had been served with its workers' Texas suit. Counsel for the farmworkers had no knowledge of the declaratory action until August 16, 1988, the day after IP was served with the Texas action. The migrants' lawyer spoke with counsel for IP on two separate occasions between August 5, 1988 and August 16, 1988. Brief of Appellant at 4, 6. On neither of those

occasions did IP's counsel even hint that he had filed or even contemplated filing a declaratory action against the workers in Mississippi.

The secrecy surrounding the filing of the declaratory suit in combination with its having been filed while the parties were still engaged in negotiations supports Migrant Farmworkers' contention that IP was acting in bad faith in filing its Mississippi suit. For clearly IP filed its declaratory action simply to manipulate the forum in which the controversy would be heard--precisely the kind of forum shopping that this Court has proscribed.

Prohibiting the use of the Declaratory Judgment Act as a forum shopping device assumes additional urgency in light of the relative positions and resources of the parties in this case. In exercising its discretion, a court must "properly balance the [party's] need for declaratory relief against 'the consequences of giving the desired relief.'" State Farm Fire & Casualty Co. v. Taylor, 118 F.R.D. 426, 428 (M.D.N.C. 1988) (citing 10A Wright & Miller, § 2759 at 645-46). In State Farm, an insurance company filed a declaratory judgment action seeking an adjudication of its liabilities under a policy three days before it sent the insured individual notice of denial of their claim under that policy. The instant action involves a similar situation insofar as a large, multinational corporation has sought to use a declaratory action to "win the race to the courthouse" and thereby to deprive the real plaintiffs of their own suit.

3. IP's Geographically Oppressive Forum Shopping Undermines the Remedial Purposes of the Migrant Act

The Migrant and Seasonal Agricultural Worker Protection Act was unambiguously intended by Congress to confer rights on a class of workers who would otherwise be unable to defend themselves against exploitative employers. In light of the enormous disparity in power between migrant farmworkers and their employers, Congress consciously chose to structure the Act so that employers were not afforded any rights as against their employees. Cf. Davis Forestry Corp. v. Smith, 707 F.2d 1325, 1329 (11th Cir. 1983).[6] It would constitute a perversion of this congressional intent if the world's largest paper company were permitted to wrest control over this controversy from its former workers by filing a sham declaratory judgment action under a statute that does not afford it or any other agricultural employer any rights vis-à-vis migrant farmworkers. IP is thereby trying to bootstrap itself into plaintiff-status in order to deprive the real plaintiffs of their right to shape their own litigation. Given this impermissible purpose and result, the formalistic first-to-file, beat-them-to-the-courthouse rule must fail.

Only one reported case involves a similar abuse of a declaratory judgment action by an employer seeking to forum-shop

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[6]Although the plaintiff in Davis sought damages from the workers, whereas IP seeks only a declaratory judgment, since imposition of a Mississippi forum would be tantamount to preventing the aggrieved workers from litigating their claims against IP, the underlying labor-protective policy of Davis applies with full effect to the instant case.

under a labor-protective statute. In that case AT&T filed a declaratory judgment action against an employee who had sent it a demand letter for back wages under the Fair Labor Standards Act. In response to his threat to file suit in state court, AT&T filed suit in federal court, beating the employee to the courthouse by four days. In dismissing AT&T's action, the federal court held that:

> The proceeding for declaratory judgment is not intended to afford a defendant an opportunity to choose the forum nor [sic] to defend an imminent action by the opposite party by an affirmative action for declaratory judgment in another forum, unless it appears that only thus may his rights be fully protected.
>
> . . .
>
> To sanction a suit for declaratory judgment in a case of this kind would encourage an unseemly race by a defendant against a claimant to select the jurisdiction in which the case is to be tried.

American Tel. & Tel. Co. v. Henderson, 63 F. Supp. 347, 348 (N.D.Ga. 1945).

The equities in the instant case weigh even more heavily in favor of the workers; for whereas the forum-shopping in the AT & T case involved merely a state and federal court in the same locality, here the employees would be forced to litigate many hundreds of miles from home in another state.

Finally, the unannounced and pre-emptive filing of the declaratory judgment action also undermines the requirement of the Migrant Act that farmworkers seek to resolve their complaints before litigating. 29 U.S.C. § 1854(c)(2). In an effort to support its claim that IP was merely protecting itself against harassment, IP charges that the Migrant Act "does not envision the

Claimants' use of settlement as a device to bring a systematic series of claims and then [sic] file suit when settlement is no longer fruitful." Brief of Appellant at 25. In point of fact, that is precisely what the Migrant Act envisions and mandates. What Congress did not sanction was agricultural employers' taking advantage of migrant farmworkers' obligation to negotiate so that they could file declaratory judgment actions while farmworkers in good faith engaged in fruitless negotiations. Of such machinations the courts strongly disapprove:

> Potential plaintiffs should be encouraged to attempt settlement discussions (in good faith and with dispatch) prior to filing lawsuits without fear that the defendant will be permitted to take advantage of the opportunity to institute litigation in a district of its own choosing before plaintiff files an already drafted complaint.

Columbia Pictures Indus. Inc. v. Schneider, 435 F. Supp. 742, 747 (S.D.N.Y. 1977).

4. This Declaratory Judgment Action was Unnecessary

IP alleges that "IP was required to have this court determine its legal obligations" because it suspected that counsel for Migrant Farmworkers "was attempting to harass IP with repeated claims." (Supp. R. 60,48.) IP adduces the uncertainty arising from the fact that the events at issue occurred before this Court ruled that forestry workers are protected by the Migrant Act, in Bracamontes v. Weyerhaeuser Co., 840 F.2d 271, reh'g denied, 845 F.2d 1022 (5th Cir. 1988), cert. denied, 57 U.S.L.W. 3233 (U.S. Oct. 4, 1988), as a further reason why it "had no other remedy or

procedural option available to define its obligations under" the Migrant Act. Brief of Appellant at 15, 23. Since this Court did not offer merely prospective relief vis-à-vis the first defendant, Weyerhaeuser, applicability of the Act to IP was a certainty.[7]

IP's claim of harassment is not only factually false, but logically inconsistent. Counsel for Migrant Farmworkers repeatedly told counsel for IP and the other parties in June and July of 1988 that, once some clients received monetary settlements, others would probably find the courage to make claims. Indeed, the workers' attorney urged the parties to agree to a class action settlement in order to avoid precisely that problem. IP and the crewleaders expressed a preference to gamble that other claimants would not come forward. Although IP alleges that it "was not involved in any of these negotiations," it fails to explain how and why it came to be included in the releases. Brief of Appellant at 2. Since IP was allegedly not involved and yet was released from liability by virtue of Migrant Farmworkers' negotiations with the crewleaders, it is difficult to understand exactly what sort of "harassment" drove IP to file its declaratory judgment action.[8]

IP insists that venue is proper in Mississippi because it is

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[7]IP has now apparently abandoned its earlier untenable claim that the Migrant Act "was held to apply to forestry operations after the purported claims of the Defendants were alleged to have occurred." (Supp. R. 94.) In point of fact, federal courts so held several years before the events at issue. Davis Forestry v. Smith, 707 F.2d 1325, 1328 n.3 (11th Cir. 1983); Bresgal v. Brock, 637 F. Supp. 271 (D. Or. 1985).

[8]The named Plaintiff-Migrant Farmworkers in the Texas action settled with the crewleaders, Bernardo Rios and Ricardo Rios.

"the most efficient forum to litigate the issue of 'joint employment,'" Brief of Appellant at 22, "and is the only forum where the obligations of all the parties can be adjudicated." (Supp. R. 65.) It bases this claim on a number of false allegations. First, it is not true that "Southpine is not subject to the jurisdiction of the Texas court." Id. The Texas long-arm statute, Tx. Civ. Prac. & Remedies Code, § 17.042(3), specifically provides for jurisdiction over those who recruit residents of Texas in Texas to work in other jurisdictions. By showing that Bernardo Rios and Ricardo Rios were acting as the employees or agents of Southpine (aka Buford Smith) when they recruited Migrant Farmworkers, the latter will have met their burden under the long-arm statute.

Second, it is manifestly untrue that "[t]he only contact the Texas forum has to this dispute is that it is the Claimants' residence" and that "all . . . fact witnesses having knowledge of IP's actions are located in Mississippi, and all the parties have substantial contacts with the forum." Brief of Appellant at 19, 22. In point of fact, the crewleaders, Ricardo Rios and Bernardo Rios, reside in Texas. (R. 27, 31, 79.) Migrant Farmworkers and the alleged class were recruited in Texas and transported from Texas. Moreover, none of the numerous class members lives in Mississippi. Apart from three weeks of work in Mississippi, the workers have no contacts with Mississippi.

5. This Declaratory Action Will Not Settle All Issues

Another factor to be considered in determining whether to entertain declaratory judgment actions is whether the suit for damages will completely settle the disputed issues raised in the declaratory judgment action. Mission Ins. Co. v. Puritan Fashions Corp., 706 F.2d at 603. If the declaratory judgment action cannot settle the controversy between the parties, a court may deny declaratory relief. State Farm Fire & Casualty Co. v. Taylor, 118 F.R.D. at 429. The Declaratory Judgment Act is not to be used by parties to try a case piecemeal. See 10A Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d § 2759 at 648 (1983). Because the declaratory judgment action filed by IP cannot completely settle the disputed issues between it and its former workers, IP is attempting to litigate this controversy piecemeal. The action filed by Migrant Farmworkers is based both on the Migrant Act and FLSA and alleges that IP failed to treat them as employees for purposes of social security and unemployment insurance taxes. Moreover, the workers have alleged a user violation of the Migrant Act, 29 U.S.C. § 1842, which is entirely independent of whether an employer-employee relationship existed between the IP and its migrant farmworkers, and was not raised in the declaratory judgment action. In addition, the Texas case contains a pendent state claim for breach of contract. The declaratory action filed by IP, in contrast, asks only for declaratory relief under the Migrant Act.

6. Migrant Farmworkers Do Not Deny the Permissibility of Declaratory Judgment Actions under Labor-Protective Statutes

In order to obscure the impermissible reason for its forum-shopping, IP has erected a straw man: "Defendants have inferred [sic] that a declaratory judgment action is unavailable under MSPA." (Supp. R. 65.) In point of fact, Migrant Farmworkers have not implied that a declaratory judgment is never appropriate under the Migrant Act; on the contrary, protected workers might well avail themselves of such a procedure. The workers do not even assert that an employer could never properly file such an action. Rather, the workers argue that, where the purpose of the employer's action is to forum-shop in order to pre-empt farmworkers' anticipated litigation with regard to past actionable events and thus to wrest control of the lawsuit from them, a declaratory judgment action is an impermissible sham.

Not only does such employer action contravene the purpose of the Migrant Act as a statute specifically designed to protect migrants against entities such as IP, it also undermines the purpose of the Declaratory Judgment Act, which was "designed to give the parties the opportunity to . . . avoid future trouble and litigation." 69 Cong. Rec. 1687 (1928) (statement of Rep. Celler).[9] Congress expressly intended the Act as an instrument of:

> avoiding the necessity . . . of having to act at one's

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[9]The bill that was debated in 1928, H.R. 5623, was identical to H.R. 4337, which was eventually enacted in 1934. Compare H. Rep. No. 288, 70th Cong., 1st Sess. 1 (1928) and H. Rep. No. 366, 70th Cong., 1st Sess. 1 (1928) with H. Rep. No. 1264, 73d Cong., 2d Sess. 1 (1934).

> own peril or to act on one's own interpretation of his rights, or abandon one's rights because of a fear of incurring damages. So now it is often necessary, in the absence of the declaratory judgment procedure, to violate or purport to violate a statute in order to obtain a judicial determination of its meaning or validity. . . . There seems little question that in many situations in the conduct of business serious disputes occur between parties, where, if there were a possibility of obtaining a judicial declaration of rights in a formal action, much economic waste could be avoided and social peace promoted.

S. Rep. No. 1005, 73d Cong., 2d Sess. 2, 3 (1934). More graphically still Rep. Gilbert described the purpose of the Declaratory Judgment Act as follows:

> There is an old conundrum as to how to tell a mushroom from a frogstool. They say eat it and if it kills you it is a frogstool and if it does not it is a mushroom. That is largely the situation of the law now. You must go and try it. But that is not the way it should be. You ought to be able to find out whether it is a mushroom or a frogstool before you eat it, and that is all in the world this declaratory judgment law is. . . . Under the present law you take a step in the dark and then turn on the light to see if you stepped into a hole. Under the declaratory law you turn on the light and then take a step.

69 Congressional Record 2030 (1928).[10]

IP's actions in the instant case, however, do not conform to this clear congressional intent; for IP is not seeking "preventive relief," H. Rep. No. 288, 70th Cong., 1st Sess. 2 (1928). Rather, in a dispute concerned solely with past acts, it is attempting to beat its workers to the courthouse--a courthouse in which it knows

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[10]In his testimony before the Senate Judiciary Committee on the proposed bill, Prof. Edwin Borchard of Yale Law School said of Rep. Gilbert's analogy: "That seems to me a pretty neat description of the purpose of the declaratory judgment law." Declaratory Judgments: Hearings before a Subcommittee of the Senate Committee on the Judiciary on H.R. 5623, 70th Cong., 1st Sess. 41 (1928).

its workers are financially unable to litigate.[11]

B. IMPOSITION OF A NOMINAL $100 RULE 11 SANCTION WAS NOT AN ABUSE OF DISCRETION BECAUSE IP'S MOTION TO RECONSIDER BROUGHT NO NEW RELEVANT FACTS TO THE COURT'S ATTENTION

The district court imposed on IP a nominal sanction in the amount of $100 for having violated Fed. R. Civ. P. 11 by virtue of having filed "a motion to reconsider which does not present to the Court newly discovered evidence or arguments and/or issues previously omitted . . . ." (R. I, 98.) Since IP nowhere denies that imposition of Rule 11 sanctions is appropriate where a party has used the motion to reconsider merely to reargue its case, the propriety of the Rule 11 sanction reduces to the question of whether IP merely reargued its case.

The federal courts are in agreement that a motion to reconsider is "not intended to be a vehicle for obtaining a rehearing or the relitigation of old matters." American Train Dispatchers Ass'n v. Norfolk & W. Ry. Co., 627 F. Supp. 941, 947 (N.D. Ind. 1985). Accord, Fontenot v. Mesa Petroleum Co., 791 F.2d 1207, 1219 (5th Cir. 1986); United States v. Anderson, 591 F. Supp. 1, 3-4 (E.D. Wash. 1982). Because IP's motion to reconsider[12]

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[11] IP has conceded that it was racing its workers to the courthouse by admitting that it informed counsel for the crewleaders of its filing this action before Migrant Farmworkers filed their action in Texas, but did not inform the latter's counsel until after the latter action was filed. Its incomprehensible reason for waiting was "to review the complaint" in the Texas action. (Supp. R. 64.)

[12] IP purported to bottom its motion on Fed. R. Civ. P. 52(e). (R. 86.) No such provision exists. Presumably IP meant to refer to Fed. R. Civ. P. 52 (b), 59(e) or 60(b).

merely re-urged a position it had already briefed repeatedly before judgment was rendered, the court below correctly refused to reconsider its order dismissing the cause: "The alleged 'mistaken facts' asserted by the plaintiff as a basis for reconsideration are in fact nothing more than disputed facts which were fully briefed by the parties on the original motion." (R. I, 97.) Where IP "just disagrees with the findings of the court [i]t has that right, but its remedy is by appeal." Rosen v. Dick, 83 F.R.D. 541, 544 (S.D.N.Y. 1979), modified, 639 F.2d 82 (2d Cir. 1980). IP concedes that it "did not attempt to present the Court with newly discovered evidence, arguments, or issues which were previously omitted." Brief of Appellant at 34. Instead, it seeks to justify its motion for reconsideration on the grounds that the district court's ruling "was based on a mistaken perception of the facts." Id. at 32. This argument will not withstand scrutiny.

First, in its motion to reconsider, IP incorrectly characterized the district court's ruling that IP abused the Declaratory Judgment Act as based on the court's alleged incorrect perception that IP had engaged in negotiations with Migrant Farmworkers' counsel. Second, even assuming arguendo that the account of events contained in IP's Memorandum Brief in Support and the attached affidavit of IP's division counsel, Robert Kriscunas, were the simon-pure truth, there was no reason for the district court to reconsider its order. Finally, both the brief and the affidavit distorted the actual course of events leading to the instant litigation.

Although the district court held that the "secrecy and manipulation surrounding the filing of the declaratory suit" constituted "[f]urther evidence of this impermissible use of the Declaratory Judgment Act" (R. II, 10), these circumstances merely aggravated the fact of anticipatory forum shopping, which the court had already found on other grounds. Id. at 8-9. The district court thus adopted Migrant Farmworkers' position that IP's use of the Declaratory Judgment Act is so inherently oppressive that even if IP had filed this action in an aboveboard manner--rather than surreptitiously and underhandedly--this cause should still have been dismissed. In other words, even if Mr. Kriscunas had, immediately upon receipt of the first demand letter, informed the workers' counsel that he intended to file a declaratory judgment action in Mississippi, such an action would have been impermissible forum shopping designed to make it impossible for the real aggrieved parties to pursue their remedy.

The conversation between Mr. Kriscunas and opposing counsel on August 5, 1988 took place very late in the day and lasted perhaps as long as an hour. It was not their first extended conversation; on July 29, for example, they had spoken for 81 minutes.[13] (R. I, 90.) Presumptively the Division Counsel, Woodlands and Wood Products Operations, for the world's largest paper company has more cost-effective uses of such large blocks of his time than shooting the breeze with rural legal services

[13]Counsel for Migrant Farmworkers had also previously spoken to Rose Murphy, another attorney in that division. (R. I, 90 n.2.)

lawyers. Although counsel for the workers made it clear at that time to Mr. Kriscunas that Migrant Farmworkers would definitely file suit, at no time did Mr. Kriscunas state or even hint that IP would take any legal action whatsoever.

Since the conversation between counsel was not terminated until almost 5:00 p.m., and since IP concedes that the action "was filed late in the afternoon on Friday, August 5, 1988" (Supp. R. 84), Mr. Kriscunas's sworn statement that "[l]ater that day [i.e., after the telephone conversation with the undersigned], I instructed IP's counsel to file a Declaratory Judgment action in the Federal Court in the Southern District of Mississippi" (Supp. R. 101), either is incredible or indicates that the complaint must have been prepared and ready to be filed long before that conversation took place. This sequence of events thus supports the lower court's finding that IP filed the declaratory judgment action "while the parties were still negotiating." (R. II, 10.)

Although the conversation with Mr. Kriscunas on August 8, 1988 was brief, it did provide Mr. Kriscunas with another opportunity to inform counsel for Migrant Farmworkers that the declaratory judgment action had been filed the previous Friday. Mr. Kriscunas again chose to withhold this information. See Brief of Appellant at 30.

It is also false, as IP alleged, that IP never engaged in any negotiations with the workers, through counsel, before or after filing this action. (R. 87 and Brief of Appellant at 14-15.) Counsel for Migrant Farmworkers, at the suggestion of IP's Texas

counsel, O.C. Hamilton, sent a lengthy letter outlining a possible settlement to IP's counsel in the instant action. (R. 95-96.) IP has, throughout these proceedings, been using counsel for Smith, Jack Parsons, as a telephonic shuttle diplomat to explore possible avenues of settlement. The day the district court read its opinion, counsel for Migrant Farmworkers and counsel for IP, Mr. Dallas, again discussed a possible settlement. During the pendency of this appeal, Mr. Dallas has offered to settle Migrant Farmworkers' claims for $21,000.

The Ninth Circuit recently affirmed a Rule 11 sanction in a setting very similar to the instant facts. In that case the trial judge imposed the sanction where a party filed a motion to reconsider based on the court's alleged failure to consider a material fact presented to it. There, as here, the judge had in fact considered the disputed evidence. Unioil, Inc. v. E.F. Hutton & Co., 809 F.2d 548, 559 (9th Cir. 1986), cert. denied, 56 U.S.L.W. 3243 (1987) The propriety of the sanction should also be sustained here.[14]

Although this chain of reasoning in itself refutes IP's

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[14]The nominal nature of the sanction meets this Court's "principle that the sanction imposed should be the least severe sanction adequate to the purpose of Rule 11." Thomas v. Capital Sec. Serv., Inc. 836 F.2d 866, 878 (5th Cir. 1988). Similarly, the district court's justification for the nominal sanction fully meets this Court's requirement that it "must correspond to the amount, type, and effect of the sanction applied." Id. at 883. Given the insubstantial impact of a $100 sanction on a firm with $10 billion in annual sales, appellate review will be correspondingly less rigorous. Id. Finally, this Court has held that "[o]nce a violation of Rule 11 is established, the rule mandates the application of sanctions." Id. at 876.

argument, it is necessary to dispose of a further argument IP has made, which incorrectly states Rule 11 law in this Circuit. IP seeks to defeat the imposition of a Rule 11 sanction on the grounds that it filed its motion to reconsider "with an objective belief" in its propriety. Brief of Appellant at 34. IP's choice of language was apparently designed to track the standard for review in Rule 11 cases, which IP alleges "is an objective standard." Id. at 33.

Not only has IP conflated the standard for appellate review of lower courts' Rule 11 rulings with the standard of reasonableness used to measure compliance by parties with Rule 11, it has also misstated both standards.[15] The standard for review is that of abuse of discretion. Thomas v. Capital Sec. Serv., Inc., 836 F.2d at 872. The standard for compliance with Rule 11 is now one of objective reasonableness. Id. at 873; Vairo, "Rule 11: A Critical Analysis," 118 F.R.D. 189, 205 (1988). While it is unclear what epistemological status IP accords an "objective belief" as contradistinguished from a "subjective belief," whether it was objectively reasonable for IP to believe that rearguing "disputed facts" qualified as compliance with the requirements for filing a motion to reconsider is a question that answers itself in the negative.

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[15] IP, Brief of Appellant at 33, erroneously cites Smith Int'l, Inc. v. Texas Commerce Bank, 844 F.2d 1193, 1197 (5th Cir. 1988), as supporting the proposition that "[t]he standard for reviewing a pleading for compliance with Rule 11 is an objective standard."

C. THE PERSISTENT PATTERN OF IP'S BAD FAITH AND FRIVOLOUSNESS IN FILING AND PROSECUTING THE DECLARATORY ACTION AND APPEAL REQUIRES AN AWARD OF COSTS AND ATTORNEYS' FEES

If IP's real intention in bringing the instant declaratory judgment action in Mississippi--rather than awaiting the suit Mr. Kriscunas knew was on the verge of being filed in Texas--had been to clarify its future obligations rather than to anticipate defenses to claims arising in the past, IP would have named all its contractors as defendants. If IP's chief concern were to clarify the issue of joint employment in the forestry industry under FLSA and the Migrant Act, the Texas action furnishes IP with ample opportunity to do so. If IP believed that it would be more efficient to litigate this matter in Mississippi, it could move the Texas court to transfer the action to Mississippi. The record thus far, however, suggests that IP's only purpose is to intimidate its migrant farmworker tree planters and to cause considerable financial injury to their underfunded legal services lawyers by forcing them to litigate the issue of the lawfulness of declaratory judgment actions such as this one in the U.S. Court of Appeals and the Supreme Court of the United States.

Such a purpose, however, is blatantly inconsistent with a declaratory judgment proceeding, which "assumes that parties having conflicts are honest in intent and ought to have their conflict determined without becoming enemies." Declaratory Judgments: Hearings before a Subcommittee of the Senate Committee on the Judiciary on H.R. 5623, 70th Cong., 1st Sess. 47 (1928).

The district court found not only that IP had engaged in impermissible anticipatory forum shopping, but that the "secrecy and manipulation surrounding the filing of the declaratory judgment suit" indicated "that IP was acting in bad faith in filing its Mississippi suit." (R. II, 10.) That the lower court found it necessary to sanction IP for filing a frivolous motion to reconsider underscores IP's bad faith. IP has persisted in this pattern of bad faith and harassment before this Court by appealing a minuscule $100 sanction.

It is now firmly established that, even absent a statutory warrant for an award of fees, "a court may assess attorneys' fees . . . when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . . .'" Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59 (1975) (citations omitted). Accord, Butler v. United States Dep't of Agriculture, 826 F.2d 409, 414 (5th Cir. 1987). Moreover: "The bad-faith exception for the award of attorney's fees is not restricted to cases where the action is filed in bad faith. '"[B]ad faith" may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation.'" Roadway Express, Inc. v. Piper, 447 U.S. 752, 766 (1980) (citations omitted). As this Court has stated: "The purpose of this exception [to the American rule] is to prevent abuse of the court system by parties which can best their opponents by simply spending time and attorneys' fees in dilatory litigation." In re Owners of Harvey Oil Center v. Sandoz, 788 F.2d 275, 279 (5th Cir. 1986). This

purpose perfectly fits IP's use of its vast resources to file its declaratory judgment action as well as this appeal as a device to force its indigent former workers to abandon their claims.

Several statutory warrants for the awarding of damages, costs and attorneys' fees are also applicable to the instant case. Under 28 U.S.C. § 1912: "Where a judgment is affirmed by . . . a court of appeal, the court in its discretion may adjudge to the prevailing party just damages for this delay, and single or double costs." Pursuant to 28 U.S.C. § 1927: "Any attorney . . . admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." Finally, Fed. R. App. P. 38 provides that: "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." In tandem with Fed. R. App. Proc. 38, this Court has awarded costs and attorneys' fees under both of these statutory provisions. See, e.g., Hagerty v. Succession of Clement, 749 F.2d 217, 221-23 (5th Cir. 1984), cert. denied, 474 U.S. 968 (1985); Coghlan v. Starkey, 852 F.2d 806, 817-18 (5th Cir. 1988).

The bad faith and frivolity underlying and accompanying the declaratory judgment action have been compounded by IP's appeal, which is intended solely to burden Migrant Farmworkers' legal services attorneys financially and to delay the resumption of the litigation in the Texas action. For these reasons, the Court

should order IP and its counsel to pay Migrant Farmworkers' costs and attorneys' fees.[16]

V. CONCLUSION

For all the foregoing reasons Defendant-Migrant Farmworkers urge the Court to:

1. Affirm the District Court's order granting their motion to dismiss;

2. Rule that IP may not use the Declaratory Judgment Act to engage in forum shopping and to hale migrant farmworkers into a court distant from their residence under statutes that confer no substantive rights on employers vis-à-vis their employees; and

3. Award Migrant Farmworkers costs and attorneys' fees under 28 U.S.C. §§ 1912 and 1927 and Fed. R. App. P. 38 on the basis of IP's having filed and conducted this litigation and appeal in bad faith and frivolously.

Respectfully submitted,

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[16]This Court has stated in dictum that the mandatory nature of Rule 11 sanctions also governs appeals. Coghlan v. Starkey, 852 F.2d at 817 n.21.

CERTIFICATE OF SERVICE

I hereby certify that on this __ day of March, 1989, I mailed, by U.S.P.S., certified mail, return receipt requested, copies of the foregoing Brief of Appellees-Migrant Farmworkers, to the following counsel of record and parties:

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