IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MADELEINE CONNOR, Plaintiff, v. LEAH STEWART, ERIC CASTRO, and CHUCK MCCORMICK, Defendants.	§ § § § § § § § § § §	1:17-CV-827-RP

ORDER

Before the Court are Defendants Leah Stewart, Eric Castro, and Chuck McCormick's (collectively, "Defendants") Amended Motion for Attorneys' Fees, (Dkt. 59), and Motion for Additional Sanctions, (Dkt. 60). Having considered the parties' briefing, the record, and the relevant law, the Court will grant both motions.

I. BACKGROUND

Plaintiff Madeleine Connor ("Connor") lives in the Lost Creek Municipal Utility District ("Lost Creek") and Defendants Leah Stewart, Eric Castro, and Chuck McCormick (collectively, "Defendants") are all directors of Lost Creek. (Compl., Dkt. 1, at 1–2). Connor has now sued Defendants three times in this Court for the same cause of action. *See McIntyre v. Castro*, No. 1-15-CV-1100 RP, 2016 WL 1714919, at *4 (W.D. Tex. Apr. 8, 2016), *aff'd*, 670 F. App'x 250 (5th Cir. 2016), *reh'g denied* (Dec. 9, 2016) ("*McIntyre I*"); *McIntyre v. Castro*, No. 1:16-CV-490 RP, 2017 WL 1483572, at *3 (W.D. Tex. Apr. 25, 2017), *aff'd in part sub nom. Connor v. Castro*, 719 F. App'x 376 (5th Cir. 2018) ("*McIntyre II*"); *Connor v. Stewart*, No. 1:17-CV-827-RP, 2018 WL 2994644, at *1 (W.D. Tex. June 14, 2018), *aff'd*, 770 F. App'x 244 (5th Cir. 2019). In all three cases, the Court determined

that Connor's claims were not well-grounded in law or fact and dismissed Connor's lawsuits for failure to state a plausible claim for relief. *See id.*

In *McIntyre I,* Connor alleged that Defendants sent a "pejorative" email with "evil intent" to Lost Creek residents "purporting to be an 'update' about" a lawsuit she filed against Defendants. (*McIntyre I*, Compl., Dkt. 5, at 1). Upon reviewing the email, the Court determined that it was not pejorative, but rather that it "simply state[d] the basis of Plaintiffs'[1] claims and that Defendants rebut them." *McIntyre I*, 2016 WL 1714919, at *4. The Court dismissed Connor's claim, holding that her allegations fell "well short of supporting a claim for First Amendment retaliation." *Id.* Connor appealed. The United States Court of Appeals for the Fifth Circuit ("Court of Appeals") affirmed the Court's opinion, specifically finding that Connor's allegations did "not constitute retaliation." *McIntyre v. Castro*, 670 F. App'x 250, 251 (5th Cir. 2016), *reh'g denied* (Dec. 9, 2016).

One week after the Court issued its order in *McIntyre I*, and while her appeal remained pending, Connor sued Defendants again. (*See McIntyre II*, Notice of Removal, Dkt. 1, at 3). Connor's *McIntyre II* complaint—her seventh amended petition in state court—alleged a First Amendment retaliation claim "nearly identical" to her claim in *McIntyre I*. *McIntyre II*, 2017 WL 1483572, at *4. The Court again dismissed the claim. *Id.* Connor then moved to amend her complaint to add another First Amendment retaliation claim; the Court denied her motion. *Id.* at *6. Connor appealed that decision. *Connor v. Castro*, 719 F. App'x 376, 379 (5th Cir. 2018). The Court of Appeals affirmed this Court's decision, agreeing that it would have been futile to permit her to add the claim. *Id.* at 380.

In *McIntyre II*, the Court found that the record gave "the impression that the current litigation may be motivated as much or more by animosity between Connor and the Defendants

[1] There were two named plaintiffs in *McIntyre I* and *McIntyre II*—Madeleine Connor and David McIntyre. *See McIntyre I*, 2016 WL 1714919; *McIntyre II*, 2017 WL 1483572.

than any legally cognizable injury Plaintiffs may have suffered." *McIntyre II*, 2017 WL 1483572, at *6. The Court stated that Connor's conduct, which included her "presentation of an objectively benign e-update as defamatory," was troubling. *Id.* In continuing "to engage in motion practice to add allegations that [were] plainly insufficient"—particularly in light of this Court's prior order, which was subsequently affirmed by the Court of Appeals—this Court found that her conduct fell "well short of what this Court expects of its officers." *Id.* While the Court declined to sanction Connor at that time, it warned her it would "not hesitate to consider sanctions—whether on motion or on its own initiative" should Connor continue to litigate this issue in the future. *Id.*

Despite that warning, Connor filed a third lawsuit in this Court, again alleging a First Amendment retaliation claim on the basis of an objectively benign litigation update. (Am. Compl., Dkt. 8, at 2). In doing so, she repeated a claim that had been twice rejected by this Court and once by the Court of Appeals. *McIntyre I*, 2016 WL 1714919, at *4; *McIntyre II*, 2017 WL 1483572, at *4; *McIntyre v. Castro*, 670 F. App'x 250, 251 (5th Cir. 2016), *reh'g denied* (Dec. 9, 2016). Her only new theory of retaliation—that Defendants intended to punish her by filing a valid defensive motion in a lawsuit that she brought against them—was one the Court determined Connor, a lawyer, should understand to be frivolous. (Order, Dkt. 31, at 10). Again, this Court dismissed Connor's action as meritless. (*Id.*).

In dismissing Connor's third baseless lawsuit, this Court recited her history of vexatious litigation and found that Connor filed the action for "the improper purpose of harassing and imposing litigation costs on Defendants." (*Id.*). The Court determined that the appropriate Rule 11 sanction was to require Connor to pay Defendants' reasonable attorneys' fees and expenses related to this action. (*Id.* at 11). The Court then ordered Defendants to submit a motion for reasonable attorneys' fees and expenses. (*Id.* at 12). Concluding that a pre-filing injunction might be appropriate to deter Connor from using the courts "as a weapon of harassment" against the Defendants, the

Court also ordered the parties to attend a hearing to consider the proper scope of a pre-filing injunction. (*Id.* at 8, 12).

Pursuant to the Court's order, Defendants filed a motion requesting $16,235.16 in reasonable attorneys' fees and expenses. (Mot. Att'y Fees, Dkt. 32, at ¶ 18). The Court ultimately denied Defendants' motion because they failed to comply with Rule 11's safe harbor provision. (Order, Dkt. 42, at 3). However, after giving Connor the required notice and hearing, (Dkt. 31, 40), the Court imposed a pre-filing injunction against Connor sua sponte, barring her from filing any civil action "against Defendants or other officers of the Lost Creek Municipal Utility District, directly or indirectly, in the Western District of Texas without receiving written leave from a federal district judge for this district." (Order, Dkt. 42, at 9).

Connor appealed that order. (Dkt. 44). Her appeal was dismissed because she didn't timely file her brief. (Dkt. 47). The Fifth Circuit subsequently reinstated her appeal. (Dkt. 48). The Fifth Circuit then affirmed this Court's order without an opinion. (Dkt. 50, Ex. S). She petitioned for rehearing by the panel. (*Id.* at Ex. T). After nearly a year of defending the appeal, Defendants then filed a motion for appellate sanctions. (*Id.* at Ex. U). In that motion, Defendants expressly argued that Connor's entire appeal was frivolous and sought sanctions pursuant to Federal Rule of Appellate Procedure 38 and 28 U.S.C. § 1912. (Dkt. 50, at 1 ("Now come Appellees, Leah Stewart, Eric Castro and Chuck McCormick and file their Motion for Sanctions pursuant to Federal Rule of Appellate Procedure 38" ; "The current appeal is frivolous on its face in that Appellant makes the same arguments that have been previously rejected by the trial court and this honorable Court"; "[T]his Court [should] remand this case to the district court 'to determine the amount of costs and damages to be paid to appellees, as provided by 28 U.S.C § 1912.'")).

The Court of Appeals granted Defendants' motion and remanded to the district court "to determine the amount of costs and damages to be paid to appellees, as provided by 28 U.S.C.

§ 1912." (Dkt. 49 at 1). The Court of Appeals further cautioned Connor, "a lawyer representing herself pro se," that "any further prolongation of this case will likely result in additional sanctions." (*Id.* at 2). Except for "the determination of costs and sanctions by the district court on remand," the Court of Appeals stated, in all caps, "THIS CASE IS OVER." (*Id.*).

On remand, Defendants filed two motions for attorneys' fees and costs, (Dkt. 50, 53), neither of which complied with this Court's Local Rules. W.D. Tex. Loc. R. CV-7(j)(1). The Court ordered Defendants to properly confer with Connor and file an amended motion for attorneys' fees, costs, and sanctions that adhered to the local rules. (Order, Dkt. 56, at 2). The Court further ordered the parties to "advise the Court what other sanctions, if any, they believe to be appropriate." (*Id.* at 1). Defendants then filed an Amended Motion for Attorneys' Fees, (Dkt. 59), and a Motion for Additional Sanctions, (Dkt. 60). Those motions are now before the Court, (Mot. Att'y Fees, Dkt. 59; Mot. Sanctions, Dkt. 60). First, the Court will turn to Defendants' Motion for Attorneys' Fees, (Dkt. 59), which requests attorneys' fees, costs, and expenses incurred defending against Connor's appeal. Second, the Court will address Defendants' Motion for Additional Sanctions, (Dkt. 60), which requests sanctions in the form of attorneys' fees incurred defending this lawsuit before this Court.

II. DISCUSSION

A. Motion for Attorneys' Fees, Costs, Expenses

Pursuant to the Court of Appeals' mandate, Defendants seek $13,636.50 in attorneys' fees, $276.27 in expenses, and double costs in the amount of $58.00 for damages incurred in defending against Connor's appeal from October 1, 2018, the date Connor filed her Notice of Appeal, (Dkt. 44), and June 21, 2019, the date the Court of Appeals granted Defendants' motion for sanctions and remanded to the District Court for a determination of the amount of costs and damages, (Dkt. 49). (Mot. Att'y Fees, Dkt. 59, at 4–5).

Connor contends that the Court should deny Defendants' request for attorneys' fees and costs because it "does not comply with this District's rule concerning the form, content, timeframe, or conference provisions of a request for attorney's fees." (Pl.'s Resp., Dkt. 61, at 2 (citing W.D. Tex. Loc. R. CV-7(j)(1)-(3).). Alternatively, Connor asks that the Court limit Defendants' fees and costs to those associated with the delay caused by her filing a motion for rehearing rather than awarding Defendants the fees and costs accrued in defending against the appeal as a whole. (*Id.* at 12). The Court finds both of these arguments lacking and discusses each of them in turn below.

1. Defendants' Motion Complies with the Local Rules

Connor contends that Defendants' motion for attorneys' fees should be denied—"save perhaps double costs, which 28 U.S.C. § 1912 permits, presumably without any form of motion being timely and compliantly filed"— because it does not comply with Local Rule CV-7(j). On this point, Connor makes three arguments. First, she contends that Defendants did not satisfy the "meet and confer" requirement under the local rules because "Defendants' counsel refused to have any substantive discussions with Plaintiff regarding their request for fees and sanctions and walked out of the conference after the passage of only fifteen minutes." (Dkt. 61 at 3–5). Second, she argues that Defendants' motion did not certify her specific objections to Defendants' requested attorneys' fees, objections she alleges she could not specifically articulate "because only an oral number was proposed, with no detail." (Dkt. 61 at 6). Third, Connor contends that while Defendants' motion includes a billing document, it does not comply with the drafting and certification requirements; specifically, she argues that attaching a 22-page billing statement without "a more easily readable table" skirts the simplicity the local rules "seem to encourage." (*Id.*).

The Court concludes that Defendants' motion properly complies with the local rules. *See* W.D. Tex. Loc. R. CV-7(j). It is undisputed that Defendants' counsel met in person with Connor on July 30, 2019 to discuss their intention to seek attorneys' fees. (*See* Pl.'s Resp., Dkt. 61, at 4). During

that meeting, Defendants "repeatedly asked" for Connor's objections to the fee amount, but Connor only offered a specific objection to one eight-hour billing entry. (Defs.' Reply, Dkt. 59, at 6). Defendants noted this objection in their motion and properly "certified the reason why the matter could not be resolved by agreement." W.D. Tex. Loc. R. CV-7(j); (*see also* Mot Att'y Fees, Dkt. 59, at 5–7 ("The parties could not reach an agreement because Plaintiff offered [an amount] inconsistent with Defense counsel's authority."")). And Rule 7(j) imposes no time requirement for a conference. *See* W.D. Tex. Loc. R. CV-7(j). From the Court's perspective, fifteen minutes is sufficient to entertain that single objection.

Moreover, Connor's contention that she "could not articulate a specific objection" to "an oral request for $40,000" because Defendants tendered the fee-bill to her "only 30 minutes before the meeting convened" is a flagrant misrepresentation of the facts. (Pl.'s Resp., Dkt. 61, at 5). Defendants provided statements and draft bills with their Motion for Attorneys' Fees and Costs pursuant to the order from the Court of Appeals, (Dkt. 49), on June 25, 2019. (Orig. Mot. Att'y Fees, Dkt. 50). Defendants emailed Connor with an updated set of statements on July 24, 2019, a full six days before the conference. (Email, Dkt. 63-1, at 1). In that same email, Defendants' counsel expressly indicated that Defendants intended to seek attorneys' fees and costs incurred for the entire appeal and additional sanctions in the form of attorneys' fees and costs related to the rest of the case. (*Id.* at 1). Connor had the time and the information necessary to formulate her objections ahead of the conference and did not do so. She cannot now misrepresent the record to manufacture noncompliance with the local rules in an attempt to evade sanctions.

Connor's argument that Defendants' motion should be denied because it "does not comply with the drafting and certification requirements of the rule" is likewise baseless. (Pl.'s Resp., Dkt. 61, at 6). Defendants' motion contains the requisite chronological billing activity, affidavit, and memorandum setting forth the method by which fees were computed. W.D. Tex. Loc. R. CV-

7(j). There is no requirement that a movant for reasonable attorneys' fees include "a more easily readable table," (Pl.'s Resp, Dkt. 61, at 6); billing records provide sufficient support for the legal services rendered by Defendants in defending this action. *People's Capital & Leasing Corp. v. McClung*, No. 5:17-CV-484-OLG, 2018 WL 7291447, at *2 (W.D. Tex. Aug. 20, 2018) ("Plaintiff's attorney's fees request is properly supported by copies of the invoices for legal services."). Moreover, Defendant's counsel attested to the reasonableness of these rates in an affidavit attached to the motion. (Tschirhart Aff., Dkt. 59-2, at 1–2); W.D. Tex. Loc. R. CV-7(j).

Thus, the Court concludes that Defendants' Motion for Attorneys' Fees complies with the local rules and Connor's arguments to the contrary are, predictably, without merit. The Court will now turn to Connor's next argument pertaining to the scope of the Court of Appeals' mandate.

2. Defendants are Entitled to Fees and Costs for the Entire Appeal

Connor contends that Defendants' request for attorneys' fees and costs incurred for the entire appeal should be denied because the Court of Appeals "rejected" Defendants' "repeated requests in the appellate court to award fees and sanctions for frivolous appeal." (Pl.'s Resp., Dkt. 61, at 8). In support of this argument, Connor cites to the text of the Court of Appeals' order, which she notes omits the words "frivolous" and "Rule 38" and cites only to 28 U.S.C. § 1912. *Id.* Connor interprets these omissions to mean the Court of Appeals denied Defendants' request for sanctions pursuant to Rule 38 and instead limited the scope of sanctions on remand to the delay associated with Connor's decision to file a motion for panel rehearing. (*Id.*).

Under Federal Rule of Appellate Procedure 38, "[i]f a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." Meanwhile, 28 U.S.C. § 1912 provides that "[w]here a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and

single or double costs." 28 U.S.C. § 1912. Importantly, the rule—unlike the statute—allows a court to order damages and costs for a frivolous appeal without finding that the appeal resulted in delay. *See* Fed. R. App. P. 38 advisory committee notes to 1967 adoption; *see also State of Tex. v. Gulf Water Benefaction Co.*, 679 F.2d 85, 87 n.1 (5th Cir. 1982); *Hagerty v. Succession of Clement*, 749 F.2d 217, 222 (5th Cir. 1984) ("[T]he courts of appeals quite properly allow damages, attorney's fees and other expenses incurred by an appellee if the appeal is frivolous without requiring a showing that the appeal resulted in delay."). An award of damages and double costs as sanctions for the filing of a frivolous appeal "may be made against an appellant under 28 U.S.C. § 1912 and Fed. R. App. P. 38." *Olympia Co. v. Celotex Corp.*, 771 F.2d 888, 893 (5th Cir. 1985). Thus, if a frivolous appeal results in delay, courts may use Rule 38 and 28 U.S.C. § 1912 interchangeably. *See Exhibitors Poster Exch., Inc. v. Nat'l Screen Serv. Corp.*, 78 F.R.D. 192, 195 (E.D. La. 1978).

Having reviewed the Court of Appeals' order and the appellate record as a whole, the Court concludes that it may determine costs and damages related to the entire appeal; that is, the Court of Appeals' mandate does not limit apportionable damages to the delay associated with Connor's motion for panel rehearing. As an initial matter, the Court of Appeals *granted* Defendants' motion for appellate sanctions. (*See* Fifth Cir. Order, Dkt. 49, at 1 ("**IT IS ORDERED** that appellees' motion for sanctions, attorney fees, and costs . . . is **GRANTED**.")). Defendants based their appellate motion for sanctions on the frivolousness of Connor's entire appeal, not on the delay associated with her filing a motion for panel rehearing. (Defs.' App. Mot. Sanctions, Dkt. 50, Ex. U, at 2 ("[T]he current appeal is frivolous on its face in that Appellant makes the same arguments that have been previously rejected by the trial court and this honorable Court"). Throughout the motion, Defendants specifically argued for sanctions pursuant to Rule 38, cited cases pertaining to frivolous appeals within the purview of Rule 38, and sought relief pursuant to Rule 38. (*See id.* ("Sanctions under Rule 38 are appropriate"); *id.* (citing cases pertaining to sanctions imposed pursuant to Rule

38); *id* at 6 ("For the foregoing reasons, this Court should find that Appellant's arguments are frivolous, that sanctions under Fed. R. App. P. 38 are warranted; that Appellees have incurred attorneys' fees and expenses as a result of Appellant's frivolous litigation."). Even Connor concedes that the appellate motion "largely" "requests sanctions and damages pursuant to Rule of Appellate Procedure 38, and only requests relief under 28 U.S.C. § 1912 on the final page." (Resp., Dkt. 61, at 7). Thus, granting Defendants' motion *was* a finding that Connor's appeal was frivolous.

Connor's textual argument is therefore unavailing. While the Court of Appeals' order does "remand this case to the district court to determine the amount of costs and damages to be paid to appellees, as provided by 28 U.S.C. § 1912," courts often use Rule 38 and 28 U.S.C. § 1912 interchangeably when the appeal is frivolous and resulted in delay. *Exhibitors Poster Exch., Inc. v. Nat'l Screen Serv. Corp.*, 78 F.R.D. 192, 195 (E.D. La. 1978) ("Various courts have referred to and utilized F.R.A.P. 38 and 28 U.S.C. § 1912 interchangeably"; *see also Exhibitors Poster Exch., Inc. v. Nat'l Screen Serv. Corp.*, 543 F.2d 1106, 1107 (5th Cir. 1976) ("The appellees have filed in this Court a motion for damages for frivolous appeal under Rule 38, F.R.A.P. The motion is well taken. . .We remand this case to the district court to determine the amount of costs and damages to be paid to the appellees, as provided by 28 U.S.C. § 1912."); *Olympia Co. v. Celotex Corp.*, 771 F.2d 888, 892–93 (5th Cir. 1985) (noting that an award of damages and double costs for the filing of a frivolous appeal "may be made against an appellant under 28 U.S.C. § 1912 and Fed. R. App. P. 38."). This is especially so when the appeal has resulted in delay; indeed, the only reason to distinguish between the statutory basis for sanctions and the rule would be if the Court of Appeals intended to award sanctions for a frivolous appeal without making a finding that the appeal resulted in delay. *See* Fed. R. App. P. 38 advisory committee's note to 1967 adoption.

Finally, in citing to § 1912, the Court of Appeals did not limit the scope of sanctions to the delay associated with Connor's filing of a motion for panel rehearing, as she contends. Nothing in

Defendants' motion for appellate sanctions, which the Court of Appeals granted, limits the requested relief to the delay associated with one portion of Connor's appeal and nothing in the Court of Appeals' order imposes such a limitation either. (*See* Defs.' Mot. App. Sanctions, Dkt. 50, Ex. U; 5th Cir. Order, Dkt. 49, at 1–2). For nearly a year, Connor prosecuted a meritless appeal with no legitimate prospect of success. After filing her Notice of Appeal, (Dkt. 44), she ignored the transcript order deadline, (Dkt. 50, Ex. A), waited six days after the Clerk sent her an email about missing the deadline to request more time, (*id.* at Ex. C), delayed ordering the transcript again, (*id.* at Ex. D), moved for a fifteen-day extension to file her appellate brief, (Dkt. 50, Ex. F), and then filed for another extension the day before her brief was due, (Dkt. 50 at Ex. G). When the Court of Appeals denied Connor's motion for an extension, (Dkt. 50 at Ex. I), Connor filed a motion to reconsider arguing that "in seventeen years of practice, she had never personally been denied an extension of time to file an opening brief . . ." (Dkt. 50, Ex. J). The Court of Appeals denied her motion and dismissed her appeal for want of prosecution shortly after. (Dkt. 50, Ex. K, L). Then, Connor filed two additional motions, which the Court of Appeals took no action on because it had dismissed her appeal. (Mot. Attorneys' Fees, Dkt. 50, at 4). Connor then filed a motion to reopen the appeal. (Dkt. 50, Ex. O).

The Court of Appeals granted her motion and reinstated her appeal. (Dkt. 50, Ex. Q). After considering Connor's arguments on appeal, the Court of Appeals then affirmed this Court's order without an opinion. (Dkt. 50, Ex. S). In an attempt to further prolong meritless litigation, Connor filed a petition for panel rehearing. (Dkt. 50, Ex. T). At this point, after almost a year of investing time and resources into defending against Connor's various delay tactics, Defendants filed a motion for appellate sanctions, which the Court of Appeals granted. (Dkt. 50, Ex. U).

Because Connor's frivolous appeal resulted in nearly a year of delay, the Court of Appeals remanded to the District Court for a determination of costs and damages pursuant to § 1912. *See*

Fed. R. App. P. 38 advisory committee's note (explaining that Rule 38 and § 1912 can be used interchangeably, the only difference being that § 1912 requires a showing of delay). And the appellate record makes clear that Connor delayed prompt adjudication of this dispute throughout the entire appeal.

Finding no reason to limit the scope of sanctions to the attorneys' fees and costs associated with Connor's motion for panel rehearing, the Court will assess against Connor the attorneys' fees and costs incurred by Defendants in defending against the entire frivolous appeal.

i. Attorneys' Fees

Defendants contend that from October 1, 2018 (the date Connor filed her Notice of Appeal) through June 21, 2019 (the date the Court of Appeals issued its mandate) they incurred $13,636.50 in reasonable and necessary attorneys' fees and $276.27 in expenses defending against Connor's frivolous appeal. (Mot. Sanctions, Dkt.59, at 5). As supporting documentation, Defendants submit an affidavit from Defendants' counsel of record and detailed billing records. (Tschirhart, Dkt. 59-2, at 1–2; Invoices, Dkt. 59-3, at 1–18). Defendants' request for attorneys' fees is based on the following rates: $195 (later $210) per hour for Partners, $175 (later $180) per hour for Senior Associates, and $75 (later $85) for paralegal time. (Tshirhart Aff., Dkt. 59-2, at 1). Defendants' memorandum notes that these fees "are based upon a bargained-for agreement" and represent "the same fees commonly charged for this kind of work by our Firm all over the State of Texas." (Defs.' Fee Calculation Memo, Dkt. 59-4, at 2).

The Court finds that the attorneys' fees requested are reasonable in light of the well-known *Johnson* factors.[2] *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), *abrogated on other grounds by Blanchard v. Bergeron,* 489 U.S. 87 (1989). In defending against Connor's appeal, Defendants' counsel spent nearly a year reviewing and drafting responses to Connor's various requests for extensions of time and other obstinate efforts to deny Defendants a prompt resolution of the dispute. (*See e.g.* Invoice, Dkt. 59-3, at 8–17). Upon examining Defendants' detailed records, the Court finds the time and labor documented to be reasonable in light of the issues involved and the skill required. *See id.* Moreover, the fees charged for the services are consistent with fees charged for such services in the geographic area amongst lawyers with similar experience, reputation, and ability. *See id.* Finally, Connor has not challenged the requested rates and fees; her response to Defendants' attorney's fees motion only contests compliance with W.D. Tex. Loc. R. CV-7(j) and the scope of the Court of Appeals' mandate.[3] While she proffers her own attorneys' fee offer—$525.00—she does not explain why Defendants' requested rates and fees, supported by invoices, affidavits, and memorandum, are unreasonable. Thus, the Court concludes that Defendants are entitled to the $13,636.50 in requested attorneys' fees and $276.27 in requested expenses.

[2] The *Johnson* factors are: (1) the time and labor required to represent the client or clients; (2) the novelty and difficulty of the issues in the case; (3) the skill required to perform the legal services properly; (4) the preclusion of other employment by the attorney; (5) the customary fee charged for those services in the relevant community; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or circumstances; (8) the amount involved and results obtained; (9) the experience, reputation, and ability of the attorney; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), *abrogated on other grounds by Blanchard v. Bergeron,* 489 U.S. 87 (1989).

[3] While Connor objected to one billing entry when the parties met to confer, Defendants "adjusted that particular entry, in response to [Connor's] objection, by reducing it accordingly," (Defs.' Reply, Dkt. 63, at 4), and Connor's Response in Opposition to Defendants' Motion for Attorneys' Fees and Costs, (Dkt. 61), does not raise objections with respect to the requested rates and fees, only to the manner in which these rates and fees were discussed. *See* Pl.'s Resp., Dkt. 61, at 3–4 (objecting to Defendants' "global request for $40,000" as noncompliant with the meet and confer requirements under W.D. Tex. Loc. R. CV-7(j), but raising no other specific objections to the rates and fees incurred).

ii. Costs

The Court of Appeals also remanded this case for a determination of costs. (*See* Fifth Cir, Mandate, Dkt. 49, at 1). "Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs." 28 U.S.C. § 1912. Federal Rule of Appellate Procedure 38 likewise allows for "just damages and single and double costs to the appellee" when an appeal is frivolous. *Garza v. Westergren*, 908 F.2d 27, 29 (5th Cir. 1990) ("[A]n award of attorney's fees and double costs pursuant to Federal Rule of Appellate Procedure 38 is proper, because this appeal is frivolous."). Defendants submitted a Bill of Costs to the Court of Appeals in the amount of $29.40 in taxable costs, (Bill of Costs, Dkt. 50, Ex. W, at 166), and ask the Court to award double costs in the amount of $58.00. (Mot. Att'y Fees, Dkt. 59, at 3–5).

The Court concludes that this case is a textbook example of a scenario where double costs are warranted. Here, Connor's appeal was not only frivolous, but also resulted in significant delay. For nearly a year, Connor prolonged unmeritorious litigation, with no legitimate prospect of success. In continuing to litigate a meritless appeal and leaving no delay tactic unturned, Connor "imposed an unnecessary burden on [the Court of Appeals] and has infringed on the rights of the appellees who are entitled to a prompt adjudication of this dispute." *Hagerty v. Succession of Clement*, 749 F.2d 217, 222 (5th Cir. 1984). Accordingly, the Court determines that Defendants' request for double costs in the amount of $58.00 is warranted. (*See* Dkt. 59, at 5).

B. Motion for Additional Sanctions

In response to this Court's order, (Dkt. 56), Defendants filed a motion requesting additional sanctions in the form of "all of the attorneys' fees and costs incurred by Defendants in the proceedings before this honorable court." (Mot. Add. Sanctions, Dkt. 60, at 2). In the alternative, Defendants ask the Court to sanction Connor by "entering an Order temporarily disbarring [her]

from the practice of law before the Courts in the Western District of Texas for a period of not less than six (6) months." (*Id.* at 2–3). Ultimately, Defendants just want the Court to "fashion a sanction that would deter [Connor] from continuing to use the [c]ourts as a weapon of harassment against them and those who are connected with them." (*Id.* at 2). Defendants provide two possible bases for additional sanctions. First, Defendants contend that Connor, a licensed attorney, could be sanctioned pursuant to 28 U.S.C. § 1927. Second, Defendants contend the Court can sanction Connor pursuant to its inherent authority.

Connor argues that this Court lacks the authority to issue additional sanctions because the Court of Appeals' remand order only allows for an assessment of fees for delay under 28 U.S.C. § 1912, which Connor isolates to fees accrued by the Defendants after she filed a motion for panel rehearing. (Pl.'s Resp., Dkt. 62, at 2). She argues that on remand a trial court cannot deviate from the mandate of the appellate court and that the Court of Appeals' mandate requires this Court to assess fees only for delay under 28 U.S.C. § 1912. (*Id.*).

As previously discussed, the Court finds nothing in the text of the Court of Appeals' remand order that limits sanctions to the delay associated with Connor's motion for panel rehearing. *See infra* Part II.A.2. Moreover, the Court of Appeals' mandate covers appellate sanctions and says nothing about this Court's power to sanction Connor for her unreasonable and vexatious conduct before this Court. Because the pre-filing injunction imposed by this Court, (Order, Dkt. 42, at 9), has not deterred Connor from continuing to harass Defendants with unmeritorious litigation—both in this Court and others—the Court will assess additional monetary sanctions against Connor.

1. Sanctions pursuant to 28 U.S.C. § 1927

Under 28 U.S.C. § 1927, "[a]ny attorney . . . 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." To impose sanctions

pursuant to this provision, the conduct multiplying the proceedings must be both "unreasonable" and "vexatious." *Morrison v. Walker*, 939 F.3d 633, 637–38 (5th Cir. 2019). "Conduct is 'unreasonable and vexatious' if there is evidence of the 'persistent prosecution of a meritless claim' and of a 'reckless disregard of the duty owed to the court.'" *Id.* "An attorney acts with "reckless disregard" of [her] duty to the court when [s]he, without reasonable inquiry, advances a baseless claim despite clear evidence undermining [her] factual contentions." *Id.* at 638.

In support of § 1927 sanctions, district courts often rely on "repeated filings despite warnings from the court, or other proof of excessive litigiousness, to support imposing sanctions." *Procter & Gamble Co.v. Amway Corp.*, 280 F.3d 519, 525 (5th Cir. 2002). Before imposing such sanctions, the court must "make detailed factual findings," including "(1) identifying the sanctionable conduct as distinct from the case's merits, (2) linking the sanctionable conduct and the sanction's size, and (3) identifying the legal basis for each sanction." *Morrison*, 939 F.3d at 638. "To shift the entire cost of defense, the claimant must prove, by clear and convincing evidence, that *every facet* of the litigation was patently meritless, and counsel must have lacked a reason to file the suit and must wrongfully have persisted in its prosecution through discovery, pre-trial motions, and trial." *Procter & Gamble Co.*, 280 F.3d at 526 (emphasis in original).

For the reasons stated below, the Court concludes that Connor's conduct in filing and persistently litigating this lawsuit unreasonably and vexatiously multiplied the proceedings against Defendants and sanctions are thus warranted under § 1927.

i. Reasonableness

This is Connor's third, meritless First Amendment retaliation lawsuit before this Court. In bringing this latest lawsuit, Connor knew that this Court had twice dismissed—and the Court of Appeals had previously affirmed dismissal of—Connor's nearly identical claims. *See McIntyre v. Castro*, No. 1-15-CV-1100 RP, 2016 WL 1714919, at *4 (W.D. Tex. Apr. 8, 2016), *aff'd*, 670 F. App'x 250

(5th Cir. 2016), *reh'g denied* (Dec. 9, 2016) ("*McIntyre I*"); *McIntyre v. Castro*, No. 1:16-CV-490 RP, 2017 WL 1483572, at *3 (W.D. Tex. Apr. 25, 2017), *aff'd in part sub nom. Connor v. Castro*, 719 F. App'x 376 (5th Cir. 2018) ("*McIntyre II*"). By filing this third lawsuit, Connor persistently prosecuted a meritless claim and thus unreasonably multiplied proceedings that should have concluded with the resolution of *McIntyre I*.

ii. Vexatiousness

To impose sanctions pursuant to § 1927, counsel's multiplication of proceedings must be not only unreasonable, but also vexatious. *See Morrison*, 939 F.3d at 637–38. The Court concludes that Connor vexatiously multiplied the proceedings in reckless disregard of the duty owed to this Court. *See id.* This Court's dismissal of *McIntyre I* put Connor on notice that claims for First Amendment retaliation based on a benign litigation status update were meritless. *See McIntyre* I, 2016 WL 1714919, at *4. *McIntyre II* did not remedy these deficiencies and this Court admonished Connor's decision to continue to assert a claim nearly identical to the one previously dismissed, questioned her motivation, and warned of possible future sanctions if she continued to exhibit conduct that "falls short of what this Court expects of its officers." *McIntyre II*, 2017 WL 1483572, at *6. Connor was not deterred. Instead, she filed a nearly identical lawsuit, indifferent to this Court's warnings. (Compl., Dkt. 1). In light of the record as a whole, the Court concludes that Connor pursued this third lawsuit in bad faith and for the improper purpose of harassing and annoying Defendants. Such conduct constitutes a reckless disregard of the duty owed to this Court.

As noted in this Court's previous order, "Connor's extensive and meritless litigation history against Defendants and other Lost Creek directors indicates a commitment to use the courts as a weapon of harassment against them." (Order, Dkt. 42, at 8–9). Despite this Court's two prior dismissals of nearly identical First Amendment retaliation claims against Defendants, she filed a third lawsuit alleging First Amendment retaliation on the basis of the same benign litigation update.

See McIntyre v. Castro, No. 1-15-CV-1100 RP, 2016 WL 1714919, at *4 (W.D. Tex. Apr. 8, 2016), *aff'd*, 670 F. App'x 250 (5th Cir. 2016), *reh'g denied* (Dec. 9, 2016) ("*McIntyre I*"); *McIntyre v. Castro*, No. 1:16-CV-490 RP, 2017 WL 1483572, at *3 (W.D. Tex. Apr. 25, 2017), *aff'd in part sub nom. Connor v. Castro*, 719 F. App'x 376 (5th Cir. 2018) ("*McIntyre II*"); *Connor v. Stewart*, No. 1:17-CV-827-RP, 2018 WL 2994644, at *1 (W.D. Tex. June 14, 2018), *aff'd*, 770 F. App'x 244 (5th Cir. 2019). In doing so, she advanced a "baseless claim despite clear evidence undermining her factual contentions," namely, two prior dismissals and an affirmance by the Court of Appeals. *See id.* Throughout the litigation, Connor made claims that were "not merely meritless" but also made in bad faith for the purpose of harassing Defendants. (*See* Order, Dkt. 42, at 7). Given Connor's repeated efforts to advance allegations against Defendants in bad faith at every step of the litigation, shifting the entire burden of defending this lawsuit onto Connor is not only appropriate, but necessary to deter Connor from harassing Defendants with more meritless litigation in the future.

Moreover, the monetary sanctions issued by state courts in similar litigation have not deterred Connor from filing this action, indicating the need for additional monetary sanctions. (*See* Orders, Dkt. 38-2). Even more troubling, Connor recently misrepresented the record in this case in a related state court action, attesting to a state court judge that this Court had dismissed her state law claims, when in fact this Court had merely declined to exercise supplemental jurisdiction over them and remanded them back to Texas state court. (*See* Advisory to the Court, Dkt. 67, at 1–5); *compare McIntyre* II, 2017WL 1483572, at *5 ("In light of the dismissal of Plaintiffs' federal claims, this Court will decline to exercise supplemental jurisdiction. Accordingly, the state law claims against Defendants are properly remanded back to Texas state court.") *with* Connor's Request for Abstract Judgment, Dkt. 67-1, at 1 ("[T]he record clearly indicates that the claims dismissed by the Hon. Karin Crump had already been dismissed by the Western District of Texas, and therefore, the order is subject to collateral attack and injunctive relief."). As this Court has already admonished, "Connor

has the legal training and experience to understand that . . . the state-law portion of Defendants' motion was not adjudicated by this Court, which remanded Connor's state-law claims." (Dkt. 31 at 7). Therefore, Defendants' requested sanctions are also appropriate to deter Connor from misrepresenting this Court's record for the purpose of harassing defendants in an alternate forum.

Finally, Connor's frivolous filings have needlessly diverted this Court's time and resources away from the hundreds of meritorious cases and controversies on its docket. (*See* Order, Dkt. 42, at 8 (discussing the burden that Connor's high volume of motions in this action and previous actions have had on this Court)). Thus, in continuing to prosecute her claims in bad faith, Connor not only saddled Defendants with the burden of defending against frivolous claims, but she also impeded this Court's ability to direct its attention to the meritorious plaintiffs on its docket in need of relief. Connor has imposed a similar burden on the Texas state court system. *See id.* (discussing the burden Connor's litigation tactics have placed on the state court system, particularly the five-hundred-page state court record in *McIntyre II*). Repeated admonitions and the threat of sanctions both by this Court and the Court of Appeals have not deterred Connor from continuing to litigate in bad faith. *McIntyre II*, 2017 WL 1483572, at *6 ("In short, the Court is troubled by Connor's conduct in this litigation . . . the Court will not impose sanctions at this time, should similar concerns arise if this matter is again before this Court, the Court will not hesitate to consider sanctions—whether on motion or on its own initiative."); (*see also* Fifth Cir. Mandate, Dkt. 49, at 2 ("[A]ppellant, a lawyer representing herself pro se, is cautioned that any further prolongation of this case will likely result in additional sanctions."). The Court concludes that severe monetary sanctions are necessary to send the message to Connor that bad faith litigation brought for the purpose of harassment will not be tolerated, especially by an officer of the Court. Thus, this Court will assess the full cost of defending this suit against Connor.

In defending against Connor's baseless claims before this Court, Defendants incurred a total of $28,646.50 in reasonable and necessary attorneys' fees and $435.98 in expenses. (Mot. Add. Sanctions, Dkt. 60, at 6). In reviewing the submitted invoices, affidavit, and memorandum in support of this figure, the Court determines that both the work expended and the rates assessed are reasonable for the geographic area. Because Connor has not disputed the reasonableness of these sums and because the record demonstrates that "every facet" of Connor's third lawsuit was "patently meritless" and brought in bad faith for the improper purpose of harassing Defendants, (*see* Order, Dkt. 42, at 4–9), the Court concludes shifting the entire cost of the defense to Connor is appropriate pursuant to 28 U.S.C. § 1927.[4] *See Procter & Gamble Co.*, 280 F.3d at 526. In addition to these monetary sanctions, the Court reminds Connor that a pre-filing injunction remains in place:

> Connor may not file a civil action against Defendants or other officers of the Lost Creek Municipal Utility District, directly or indirectly, in the Western District of Texas without receiving written leave from a federal district judge for this district. Any future complaint against Defendants or other officers of the Lost Creek Municipal Utility District in this district shall be accompanied by a motion for leave, and no summons shall issue unless leave is granted.

(Dkt. 42 at 9).

To echo the Court of Appeals, "[t]his case is over."

III. CONCLUSION

Accordingly, **IT IS ORDERED** that Defendants' Motion for Attorneys' Fees and Costs, (Dkt. 59), is **GRANTED**.

[4] To the extent Connor's conduct is not covered by one of the other sanctioning provisions, this Court relies on its inherent power to impose attorneys' fees as a sanction for bad-faith conduct. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991) ("There is, therefore, nothing in the other sanctioning mechanisms or prior cases interpreting them that warrants a conclusion that a federal court may not, as a matter of law, resort to its inherent power to impose attorney's fees as a sanction for bad-faith conduct. This is plainly the case where the conduct at issue is not covered by one of the other sanctioning provisions. But neither is a federal court forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules.").

IT IS FURTHER ORDERED that Defendants' Motion for Additional Sanctions, (Dkt. 60), is **GRANTED**.

Defendants are entitled to an award of **$13,636.50 in attorneys' fees**, **$276.27 in expenses**, and **double costs in the amount of $58.00** for the damages incurred in defending against Connor's frivolous appeal.

Defendants are further entitled to **$28,646.50 attorneys' fees** and **$435.98 in expenses** incurred in defending this matter before this Court.

SIGNED on January 27, 2020.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE