SO ORDERED.
SIGNED this 21st day of December, 2017

Suzanne H. Bauknight
UNITED STATES BANKRUPTCY JUDGE

THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

PERRY LEE DUPREE

Debtor

Case No. 3:17-bk-32158-SHB
Chapter 13

MEMORANDUM AND ORDER
REGARDING ATTORNEY'S FEES

Before the Court is the objection of Gwendolyn M. Kerney, Chapter 13 Trustee (the "Trustee"), to the attorney's fee sought by Debtor's counsel, Elliott Schuchardt [Doc. 26], which objection was reserved by the Court at the October 4, 2017 confirmation hearing on Debtor's proposed Chapter 13 plan.

I. Facts and Procedural Posture

In compliance with E.D. Tenn. LBR 3015-3(a), after once continuing the meeting of creditors for two weeks to allow Debtor's counsel to cure several errors, when no action was taken by the date of the continued creditors' meeting, the Trustee timely filed her objection to confirmation of Debtor's proposed Chapter 13 plan on August 24, 2017 (the "Objection").

[Docs. 22, 26, 27.] Five days later, Debtor's counsel filed of an amended Chapter 13 plan [Doc. 32] and amended Debtor's petition, summary of schedules, and Schedules I and J [Docs. 33, 34]. The next day, Debtor's counsel withdrew the amended plan [Doc. 36] and filed another amended plan [Doc. 37], setting the meeting of creditors for September 21[1] and the confirmation hearing for October 4. At the initial confirmation hearing on October 4, the Trustee withdrew her objection to confirmation under 11 U.S.C. § 1325(b)(1)(B) but reserved her objection to counsel's request for the maximum flat fee authorized by E.D. Tenn. LBR 2016-1(b).

Concerning whether counsel should receive the maximum flat fee of $3,750.00, the Trustee raised the following:

> With respect to -- this is, again, with the ongoing posture historically with Mr. Schuchardt's cases. This plan was filed. It was, it was unsigned, the plan was unsigned. It's -- I was advised it was a Best Case issue. I brought these administratives up at the creditor meeting. I did not conduct that creditor meeting, but in sending a paralegal and going over it with her, Schedule I did not list employer information. There were disposable income issues as a result of that. Schedule I was inaccurate. It listed a monthly income of $1,493.82, but the debtor has testified to a weekly salary of 1,128. This salary was in line with paystub information. We needed a child support affidavit. It was brought to Mr. Schuchardt's attention at that meeting. He was asked to look at the Ally Bank claim because the plan provided on the car to be paid directly outside. There was no step-up once that car paid off and it did look like the car would pay off during the life of the case.
>
> So that was part of the disposable income, but moreover, it looked like the plan, car should be paid through the plan and the debtor benefited from a cramdown interest rate 'cause the interest rate was at 9.25. Yet, it was just paying it outside ongoing without a step-up, etc.
>
> And then because of these issues and oversights and seemingly failure to appreciate the bankruptcy law, it was continued. That was continued from August the 9th to August the 23rd. Again, both Mr. Schuchardt and Mr. Dupree were present, but all of the issues that I just outlined to the Court, nothing had been done from the continued date, from August 9th to the 23rd, and resolution of those administrative and/or legal issues. So that's why I filed my objection to confirmation with the request for a current paystub, which was provided.

[1] Because counsel's docket entry for the amended plan noticed the meeting of creditors for Greeneville, Tennessee, the court clerk had to correct the docket entry to reflect the correct location for the meeting of creditors.

. . . .

> With respect to the other matters, Your Honor, I think the history of this case and, comports with the other case that I simply cannot recommend the full fee based on issues that have been before this Court with respect to Mr. Schuchardt's exhibited professionalism, temperament, and seemingly lack of knowledge of the bankruptcy law in, in repeated cases.
>
> But as far as the disposable income, it's resolved. As far as his time, I have no breakdown. I do think that the full fee recognizes that, in addition, you've set forth the factors that you should not make mistakes, you should accurately correct them in a timely manner, etc.
>
> . . . .
>
> This case, since it does have a higher-end vehicle, would fall more in line with 3500 to $3700. If it had been done correctly from the beginning -- and what concerned me was just the apparent, Mr. Schuchardt's lack of knowledge that you could pay this car, if you think it's a 910 claim, you couldn't pay a car and cram down the interest rate.
>
> . . . .
>
> I did tell Mr. Schuchardt at the creditors' meeting but for these other matters that the plan, this was what a plan needed to be to be more in line to the previous fee, but that I still had these reservations.

[Oct. 4, 2017 Tr. [Doc. 42], pp. 2-6.]

The Court then asked counsel how he wanted to approach meeting his obligation under the Local Rule. [*Id.*, p. 6.] Notably, the Court had previously ruled on an objection to counsel's fee in the Chapter 13 case of *Phillip & Juanita Bennett*, No. 3:17-bk-30421-SHB [Doc. 67]. The September 7, 2017 Memorandum and Order in *Bennett* set forth in detail the Court's expectations for a Chapter 13 debtor's counsel to meet the burden to show entitlement to a flat fee under E.D. Tenn. LBR 2016-1(b).

In response to the Court's question, counsel indicated that he had no notice of the nature of the Trustee's objection to the fee and that he wanted to set the matter over for a short hearing at least thirty days out to allow him to obtain the transcript of the Trustee's argument concerning

her fee objection. [Oct. 4, 2017 Tr. [Doc. 42], pp. 6-7.] Counsel informed the Court that he could not imagine it would take longer than ten or fifteen minutes for him to present his response in order to meet his obligation under the Local Rule. [*Id.*, p. 8.]

After receipt of the transcript of the October 4 hearing, counsel filed a motion asking the Court to move the hearing to the Court's afternoon docket because he would likely need more than fifteen minutes to present evidence. [Doc. 44.] The Court granted the motion. [Doc. 45.]

At the beginning of the November 15 hearing, counsel informed the Court that he believed the hearing might take as much as ninety minutes. Due to a scheduling conflict, the Court limited counsel's presentation to approximately 60 minutes.[2]

The Court made clear both in the *Bennett* decision and at the November 15 hearing that counsel's obligation under the Local Rule was to "provide a good faith estimate of the services to be rendered in the case, including [his] hourly rate and other factors that are identified in 11 U.S.C. § 330(a)(3) and (a)(4)." [Nov. 15, 2017 Tr. [Doc. 59], p. 3 (quoting E.D. Tenn. LBR 2016-1(b)(1)).] Such factors include:

> the time spent on services; the rates charged for such services; whether the services are necessary to the administration of or beneficial at the time at which the service is rendered toward the completion of the case; whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and with respect to the professional person, whether the person is Board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and finally, whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases, other than cases in bankruptcy.

[*Id.*, pp. 3-4 (quoting 11 U.S.C. § 330(a)(3)).]

[2] Although the Court initially told counsel that he would be given only fifty minutes (until 3:00 p.m.) for his presentation, the Court extended the hearing to 3:11 p.m., which was sixty-nine minutes after the case was called at 2:02 p.m.

Notwithstanding the Court's statement of the issues that impact the fee question and the Court's express rejection of any notion that counsel's competency in other cases or professionalism in this or other cases could be relevant to the appropriate fee award in this case, counsel spent significant time on those issues. For example, instead of calling Debtor in this case to testify concerning the relevant factors under § 330,[3] counsel called Kimberly Smith, a former Chapter 13 debtor whose case was dismissed in May 2017,[4] to testify about an interaction between counsel and the Trustee after a hearing in January 2017.

Counsel, not the Trustee, attempted to interject that interaction here by introducing at the November 15 hearing the transcript from a show-cause hearing held in a Chapter 7 case (*In re Jennifer Roberts*; Case No. 3:17-bk-31543-SHB) on August 10, 2017.[5] Even after the Court indicated that counsel's professionalism was not a consideration under the standards of § 330, counsel still asked the Court to consider his professionalism for purposes of this fee decision.[6] [Nov. 15, 2017 Tr., pp. 5, 16-17.] The Court, however, does not find counsel's professionalism is an appropriate consideration under § 330. *See In re Grasso*, No. 14-1741, 2014 WL 3389119,

[3] The Court does not intend to imply by this statement that a debtor's testimony is necessary to meet counsel's burden under Local Rule 2016-1(b).

[4] *In re Kimberly Smith*, Case No. 3:16-bk-33804-SHB.

[5] Notably, the Trustee was not involved in the *Roberts* case until counsel called her to testify. The show-cause hearing in the *Roberts* case resulted from counsel's accusation in open court that the Court had engaged in ex parte communications with the attorney for the United States Trustee. [*Roberts* Doc. 21.] The Court required counsel to file a statement signed under penalty of perjury to explain the basis of his accusation, and counsel filed an eight-page affidavit, which contained numerous allegations of improper conduct by the United States Trustee's office, the Chapter 13 Trustee, and the Court. [*Roberts* Doc. 24.] At the subsequent hearing, the Chapter 13 Trustee appeared (presumably because she had been alerted to counsel's accusations stated in the affidavit), and during the nearly three-hour hearing, counsel called her to testify. Following the hearing, the Court ordered counsel to self-report to the Tennessee Board of Professional Responsibility concerning the Court's perception that counsel had violated Tennessee Rules of Professional Conduct. [*Roberts* Doc. 26.]

[6] Although the Court made clear at the November 15 hearing that any accusation made by the Chapter 13 Trustee at the *Roberts* show-cause hearing would not be relevant here, the Court allowed counsel to make his record by offering the *Roberts* hearing transcript and the testimony of his former client concerning the January 2017 incident. [Nov. 15, 2017 Tr., pp. 16, 30.]

at *5 (E.D. Pa. July 11, 2014) ("And this lack of professionalism does not necessarily have anything to do with the actual value provided to the Estate, which is the relevant basis explicitly stated in § 330(a)(4)(A) on which a judge can justify denial or abridgement of a fee application."); *cf. In re Atwell*, 148 B.R. 483, 490 (Bankr. W.D. Ky. 1993) (noting that the factor for "quality of legal services provided and skill of attorney" "relates to the intrinsic quality of the legal services and the professionalism of the attorneys *in a given case*" (emphasis added)).[7]

Despite the Court's time limitation imposed on counsel at the November 15 hearing, he informed the Court at the end of the hearing that he had nothing further in terms of testimony or evidence. [Nov. 15, 2017 Tr. [Doc. 59], p. 53.] Because the Court had limited counsel's presentation time, the Court asked counsel if he wanted to provide any written summary to explain how he had met his burden under the Local Rule, and he asked for thirty days to prepare a summary. [*Id.*, p. 54.] The Court granted counsel thirty days to prepare such a summary or memorandum of law. [*Id.*, p. 55.]

On December 12, counsel filed Debtor's Brief in Opposition to Objection of Chapter 13 Trustee to Fee for Debtor's Counsel [Doc. 76]. In it, he argued the following:

1. "The proposed fee is appropriate under Local Rule 2016-1 and the chapter 13 trustee's own fee guidelines";

2. "Schuchardt's fee is *identical* to that being charged by other professionals in this District"; and

3. "There is no basis for the chapter 13 trustee's objections to the quality of work in this case."

[Doc. 76, pp. 2, 3, 5 (emphasis in original).] Counsel having filed his final argument on December 12, this matter is now ripe for decision.

[7]For this reason, the Court will compartmentalize the issues and will deal with counsel's lack of professionalism separately, in due course.

II. Jurisdiction

Counsel has filed an interlocutory appeal[8] of this Court's denial of his request to order the United States Marshals Service to release a video recording that counsel hopes would show the interaction between him and the Trustee in January 2017. [Doc. 73.] This is the same interaction about which counsel elicited irrelevant testimony from his former client, Kimberly Smith, at the November 15 hearing. At the end of the November 15 hearing, counsel attempted to orally move for the Court to approve the release of the purported video, and the Court informed counsel that he would need to file a motion for the Court to consider. [Nov. 15, 2017 Tr. [Doc. 59], p. 54.]

The next day, counsel filed a Motion for Order Disclosing Video Footage, arguing that the video "will conclusively show that Kerney fabricated this allegation against Debtor's counsel." [Doc. 52, p. 3.] The Court denied counsel's motion for the following reason: "Any video footage of the alleged incident (even if such would prove true either [counsel's] or [the Trustee's] assertions) could not possibly be relevant to the issue of whether [counsel] has met his burden of proof related to his request in this case for a flat fee of $3,750.00 under E.D. Tenn. LBR 2016-1(b) . . . ." [Doc. 57.] Counsel timely appealed. [Doc. 69.]

Despite counsel's appeal of the Court's denial of his motion, this Court retains the authority, in its discretion, to continue proceedings in this case. *See* Fed. R. Bankr. P. 8007(e)(1); *cf. In re Breland*, No. 16-2272-JCO, 2017 WL 4857420, at *1 (Bankr. S.D. Ala. Oct. 25, 2017). Counsel has not asked the Court to stay its fee decision, and the Court finds that "to suspend this proceeding while a meritless appeal pends would be unfair and inappropriate." *Ogier v. Daniels*

[8] Counsel failed to file a motion for leave to appeal under Federal Rule of Bankruptcy Procedure 8004(a)(2), but the district court has not yet determined whether it will treat the notice of appeal as a motion under Rule 8004(d).

(*In re Patterson)*, Adv. Proc. No. 16-5059-PWB, 2016 WL 4919947, at *1 (Bankr. N.D. Ga. Sept. 2, 2016).[9]

III. Analysis under E.D. Tenn. LBR 2016-1(b) & 11 U.S.C. § 330

As referenced above, this Court set forth the standard for review of the flat fee in Chapter 13 cases under Local Rule 2016-1(b) in the *Bennett* case. The Court first looks to the statutory standard for a reasonable fee under 11 U.S.C. §§ 329 and 330.[10] To determine what constitutes "reasonable compensation to be awarded," the Court reviews the following statutory factors:

> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

[9] Although counsel has filed numerous motions and the appeal in Debtor's name, such does not appear to be of benefit to Debtor in this case. Instead, it appears to benefit only counsel in his crusade against the Trustee. The most recent example of such crusade occurred when counsel admitted at the November 15 hearing that he had included in the initial proposed Chapter 13 plan a particular treatment for Debtor's car debt to see if the Chapter 13 Trustee "would catch the issue." [Nov. 15, 2017 Tr., pp. 19, 21, 22.] Such appears to be a violation of Federal Rule of Bankruptcy Procedure 9011, which the Court will take up in due course. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 278 (2010) (noting that the "potential for bad-faith litigation tactics" exists for abuse of the Chapter 13 process by the filing of objectionable plans in the hope that no one will object and citing Rule 9011 as a tool for deterrence of such bad-faith tactics).

[10] As made clear by § 330(a), the Court has a fundamental, independent duty to review compensation paid to attorneys, *see Henley v. Malouf (In re Roberts)*, 556 B.R. 266, 280 (Bankr. S.D. Miss. 2016); *In re Parsons*, No. 02-65780, 2006 WL 3064085, at *2 (Bankr. N.D. Ohio Oct. 24, 2006), a duty that this Court takes very seriously and exercises routinely, and it matters not whether any party in interest has objected or raised the issue. The party requesting fees bears the burden of proving reasonableness. *In re Christenberry*, No. 04-36484, 2007 WL 433247, at *2 (Bankr. E.D. Tenn. Feb. 5, 2007) (citations omitted).

11 U.S.C. § 330(a)(3). Compensation is not allowed for "(i) unnecessary duplication of services; or (ii) services that were not (I) reasonably likely to benefit the debtor's estate; or (II) necessary to the administration of the estate." 11 U.S.C. § 330(a)(4).

Notwithstanding the roadmap for compliance with the Local Rule that was set out in the *Bennett* decision, counsel relies almost exclusively on the Trustee's fee guidelines [Doc. 76, pp. 2-5], which the Trustee explained were developed with the local bar after the Local Rules increased the maximum flat fee from $3,000.00 to $3,750.00 effective December 1, 2016, and after the Court stated, on numerous occasions, that not every case would be worthy of the maximum flat fee. [Nov. 15, 2017 Tr., p. 13.] Counsel's citation to thirteen cases in which the Court approved the maximum flat fee is not persuasive, given that more than 1,300 Chapter 13 cases have been filed in the Northern Division between January 1 and November 30, 2017. [Doc. 76, pp. 3-4.] Nor does counsel's assertion of his twenty-five years of experience and his filing approximately 300 consumer bankruptcy cases in the past seventeen years speak to the Local Rule's requirement that counsel base his fee on a "good faith estimate of the services to be rendered in the case, the attorney's hourly rate for such services, and the other factors listed in 11 U.S.C. § 330(a)(3) and (4)." E.D. Tenn. LBR 2016-1(b)(1).

Indeed, the Trustee acknowledged at the October 4 hearing that, had counsel not committed numerous errors, including his apparent lack of knowledge that his client would be better off by including the car payment inside the plan where the interest rate could be reduced, the "case, since it does have a higher-end vehicle, would fall more in line with 3500 to $3700." [Oct. 4, 2017 Tr., p. 5.] Counsel refers to the issue of the secured-claim treatment in his final brief, arguing that Debtor does not qualify for a crammed-down interest rate on his vehicle. Such a statement is belied by the fact that Debtor's plan was confirmed with a crammed-down

interest rate *because the Trustee suggested to counsel* that he include the vehicle in the plan to reduce the interest rate.

Counsel exhibited the same confusion at the November 15 hearing. Debtor's initial plan proposed to pay for the vehicle outside the plan. [Doc. 2, p. 3.] According to the proof of claim filed by the creditor on August 1, 2017, the claim was fully secured under the provisions of the hanging paragraph of 11 U.S.C. § 1325(a) (known as a 910 claim because the cram-down provisions of § 506 do not apply to a claim for a purchase money security interest securing a debt that was incurred within the 910-day period preceding the date of the filing of the petition). Because Debtor purchased the car in March 2015, with the first of seventy-two monthly payments due in April 2015 [Claim No. 4-1, Pt. 3, p. 1], the debt would have paid out in April 2021, during the life of the sixty-month Chapter 13 plan for this case initiated on July 11, 2017.

The proposal to pay the debt outside of the Chapter 13 plan created two problems. First, when the car loan paid out in full in April 2021, Debtor would have to increase his plan payment (called a "step-up") to comply with the disposable income provisions of § 1325(b)(1)(B). Second, by paying the car loan outside the plan, Debtor had to pay not only the full value and the contractual monthly payment, but he also had to pay the contractual rate of interest, which according to the proof of claim was 9.25%.

The following exchange occurred between counsel and the Court on November 15:

> THE COURT: . . . . Did you discuss with your client before the initial plan was filed that paying for the car outside the plan, which would pay off before the 60th month, would then require a step-up because his disposable income would then increase when the car paid off? Did you discuss that issue with your client that he might need to increase his plan payment at a certain point when the car paid off?
>
> MR. SCHUCHARDT: Yes, we discussed that and that's why we decided to strategically leave it outside the plan to see if Ms. Kerney would catch the issue.

THE COURT: Okay. So when you left it outside the plan you then did not propose a step-up when it paid off, though, did you?

MR. SCHUCHARDT: No, we did not.

THE COURT: And isn't that why Ms. Kerney raised a disposable income objection because the car was going to be paid outside the plan, would pay off before the plan term, and thus, there needed to be a step-up?

MR. SCHUCHARDT: Yes, that's correct.

THE COURT: And so the time, then, that you spent to amend the plan, for whatever reason, either to cure the disposable income objection by, by including a step-up payment or to cure it the way that you cured it, which was to bring the car into the plan, you did that, as you have now told me on at least three occasions, because you wanted to see if Ms. Kerney was going to catch the issue?

MR. SCHUCHARDT: Yes, Your Honor.

THE COURT: Okay. Why should you be paid for the work that was involved, then, in amending the plan, which you just told me that you had to amend because you had laid it out initially to try and catch Ms. Kerney?

MR. SCHUCHARDT: Because I was zealously representing my client's interests. It's in his interest to leave the car outside of the plan to see whether or not Ms. Kerney wanted it in the plan. Once we determined that she knew of the issue and knew of the increase in disposable income, we decided that it wasn't worth fighting the issue.

THE COURT: So you knew going in there'd need to be a, an increase because of the disposable income question, but you just hoped Ms. Kerney wouldn't catch that there was that need?

MR. SCHUCHARDT: Your Honor, there's no Local Rule and there's no statute that requires us to –

THE COURT: Well, disposable income statutory standards would not apply?

MR. SCHUCHARDT: I'm not required to do Ms. Kerney's work for her. I'm allowed, I am required to represent my client. I took the position. We saw whether it would test out and it did not prevail.[11]

[11] This exchange evidences exactly the kind of "bad-faith litigation tactics" referenced by the Supreme Court in *Espinosa*, for which the Court, in due course, will issue a show-cause order as to why counsel should not be sanctioned. *See supra* n. 9.

[Nov. 15, 2017 Tr., p. 23.]

Counsel then argued that the Trustee, by virtue of her suggestion that Debtor include the car payment inside the plan, did not recognize that the debt was a 910 claim. [Nov. 15, 2017 Tr., p. 41.[12]] The Court's eyes were thereby opened to counsel's misunderstanding of the law:

> THE COURT: Okay. So I think I'm getting to the root of the, of the question now.
>
> So is it your understanding, as you stand here today, that it is not an option to cram down an interest rate on a 910 claim?
>
> MR. SCHUCHARDT: Your Honor, I haven't completely researched that issue, but it's my understanding that if it's, the vehicle is purchased within 910 days of the bankruptcy filing date, that the interest rate cannot be crammed down.

[Nov. 15, 2017 Tr., pp. 41-42.] The Court next asked counsel if he did not, in fact, cram down the interest rate in Debtor's confirmed plan. After initially answering that the rate had not been reduced in the plan, counsel then agreed that "we may well have, but it didn't draw an objection." [*Id.*, p. 42.]

While it was surprising to the Court that counsel would assert such an argument at the hearing without having researched the 910 issue,[13] it is utterly shocking that he still has not researched the issue, asserting in his final brief that "Debtor does *not* qualify for a crammed down interest rate on his vehicle." [Doc. 76, p. 5 (emphasis in original).]

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[12] Counsel stated: "Ms. Kerney claimed that it was a cramdownable interest rate during the confirmation hearing. She made that statement without having researched it. She claimed that I was incompetent and I'm responding to the fact that, in fact, it was a 910 claim and could not have been crammed down." [Nov. 15, 2017 Tr., p. 41.]

[13] The Court questioned counsel about why he had not researched the issue when it was squarely in front of him based on the Chapter 13 Trustee's objection on disposable income grounds and her suggestion that Debtor would benefit from paying the car loan inside the plan. Counsel then tried to maneuver out of the problem by stating that he asked Debtor for the loan documents but Debtor "didn't know what the interest rate was." [*Id.*, p. 44.] Counsel informed the Court that he "used what [he] believed was the interest rate" when he filed the amended plan on October 30, 2017. [*Id.*] Counsel, however, either misrepresented the facts to the Court or he failed to competently represent his client because he admitted at the hearing that he failed to review the creditor's proof of claim (which included the loan documents) that had been filed on August 1, well before counsel amended the plan to include the car payment with a crammed-down interest rate. [*Id.*]

The state of the law on this issue is easily found and not new. Simply, inclusion of a 910 claim within a Chapter 13 plan allows a debtor to reduce the interest rate to the *Till*[14] rate. Such was recognized by the Sixth Circuit Bankruptcy Appellate Panel in 2007: "In reported opinions, bankruptcy courts have continued to utilize the *Till* prime-plus analysis to determine present value for 910 day secured claims." *DaimlerChyrsler Servs. N. Am. LLC v. Taranto (In re Taranto)*, 365 B.R. 85, 90 (B.A.P. 6th Cir. 2007).

Thus, it is apparent to the Court that counsel did not competently represent Debtor in this case relating to the central statutory issue raised in the Trustee's objection. First, counsel failed to include a stepped-up plan payment when the plan proposed to pay the vehicle debt outside the plan such that it would pay out before the plan term, thereby increasing Debtor's disposable income, and the failure to include a stepped-up payment made the plan unconfirmable under 11 U.S.C. § 1325(b)(1)(B). And, counsel's motivation for such a maneuver was to see if the Trustee would "catch" the problem. This problem was exacerbated by the fact that Schedules I and J filed in the case were not the documents actually signed by Debtor.[15] [Doc. 76, p. 6.] These deficiencies, in conjunction with counsel's failure to recognize that his client would

[14] In *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004), the Supreme Court interpreted § 1325(a)(5)(B)(ii) "as imposing an interest rate on the secured creditor's claim based on a 'prime-plus' formula, which is based on the then-current prime interest rate plus an adjusted rate for the risk of non-payment." *In re Kimmery*, 516 B.R. 485, 487 (Bankr. N.D. Ohio 2014).

[15] That is, counsel admits in his final brief that the original documents signed by Debtor "show that the document signed by the Debtor contained the *correct information* for the Debtor's schedules." [Doc. 76, p. 6.] This necessarily means that the Schedule I that was actually filed by counsel was not signed by Debtor, even though it contained Debtor's electronic signature affixed by counsel. The filing of documents that were not signed by Debtor constitutes another violation of Federal Rule of Bankruptcy Procedure 9011, which the Court will also address at a future show-cause hearing. *See In re Morton*, No. 3:15-bk-30892-SHB, 2015 WL 5731859, at *13-16 (Bankr. E.D. Tenn. Sept. 30, 2015). The Court also notes that although inadvertent errors in a debtor's statements and schedules are not necessarily grounds for determining that counsel is incompetent, the Court disagrees with counsel's assertion that "the entire system is premised upon th[e] assumption" that schedules may be amended to supplement or correct information. Counsel is correct that schedules may be amended, but the bankruptcy system is premised on the requirement that debtors sign the petition, statements, and schedules under penalty of perjury that the documents are "true and correct." *See Atkinson v. Nucci (In re Nucci)*, Adv. Proc. No. 16-1303, 2017 WL 4286561, at *5 (Bankr. D.N.J. Sept. 26, 2017).

benefit by providing for the secured claim to be paid through the plan so that the interest rate could be reduced, resulted in Debtor having to appear at two extra creditors' meetings. [Docs. 22, 27, 38.]

The lack of competency and other problems, while relevant, do not determine for the Court the issue of whether counsel has met his burden to show that his requested flat fee of $3,750.00 is justified based on a "good faith estimate of the services to be rendered *in this case*." E.D. Tenn. LBR 2016-1(b)(1) (emphasis added). Simply, counsel did not present any evidence about the services that he anticipates might be necessary during the life of this case.

In addition to this Court's decision in *Bennett*, which explained the burden for debtor's counsel under the Local Rule, Judge Rucker set out debtors' counsels' obligations under the Local Rule on October 5, 2017, in *In re Pursley*, No. 1:17-bk-10732-SDR, 2017 WL 4480235 (Bankr. E.D. Tenn. Oct. 5, 2017). There, the Chapter 13 Trustee for the Southern Division objected to debtor's counsel's requested flat fee of $3,250.00 as excessive. In response, counsel submitted evidence of the future work that might be necessary, including the length of the plan and the debtor's health situation, which implicated the possibility of post-petition claims and a modification of the plan or a motion for hardship discharge. *Id.* at *3. Judge Rucker explained:

> In a flat fee situation, the reasonableness analysis considers what the attorney estimates the work to be, the number of hours that will be needed to do it, and the hourly rate at which that attorney is willing to do that work. The analysis may require the application of multiple rates if the work is form based and repetitive so that it can be completed by a paraprofessional under the attorney's supervision, and, therefore, should be charged at a lower rate. There is also work in a chapter 13 [that] justifies a higher rate. Chapter 13 cases present technical and complicated legal issues, and the representation can include adjusting to new disclosures offered by clients after the case has begun, addressing actions taken by aggressive or uninformed creditors, and dealing with problems related to uncooperative employers, governmental agencies, or remote lien holders. An attorney may face legal issues ranging from employment to taxes to domestic relations in the course of working through the debt and property issues in a chapter 13 case. The attorney is often dealing with unsophisticated clients under extreme stress with little

> flexibility in their work schedules to help address their problems. They frequently have health problems that create postpetition expenses and jeopardize their employment. All of these factors make estimation of what time may be required difficult. For that reason, the court acknowledges that an attorney's commitment to be on call to address all of these issues for his client for five years has value, and that a fee of $3,750 or less is presumptively reasonable *but it still requires the court to look at the elements of reasonableness if the fee is challenged.*
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> In summary, the debtor's attorney must carry the burden of showing that his or her fee is based on a good faith estimate of reasonable services that are, and will be, necessary and beneficial to the debtor. If the trustee raises an objection that a chapter 13 case provides no benefit to the debtor, that the hourly rate is excessive, or that the estimated hours are not necessary or beneficial to the debtor, the debtor's attorney may proffer an explanation why his requested fee is a good faith estimate of services that would be allowed under 11 U.S.C. § 330(a)(4)(B). The court will grant the debtor's attorney considerable breadth in their explanation of the benefits to the debtor provided by a chapter 13 filing, including the wishes of their clients and the basis of their good faith estimate. If the fee is $3,750 or less, then the burden will shift to the trustee to show why the fee is not beneficial, the hourly rate is too high, or the estimate of time is for services that are not reasonable or necessary.

Id. (emphasis added). The proof offered by the debtor's counsel in *In re Pursley* was satisfactory to the court to show that counsel had "given thoughtful consideration to the benefits of a chapter 13 for this debtor and the time for the services that [we]re reasonably to be expected to complete the case." *Id.*

Here, counsel unquestionably has not met his burden. As the Court noted above, counsel relied exclusively on his experience and the facts that the Local Rule permits a maximum flat fee of $3,750.00 and that other attorneys have been awarded that maximum fee. At the hearing, counsel submitted a record of his time expended in the case[16] [Trial Ex. 5.], but he failed to offer

[16] The statement reflects services that are not compensable and are charged at an inflated hourly rate. First, as to the hourly rate, this Court has held in numerous cases that the maximum hourly rate for this counsel in a Chapter 7 or Chapter 13 case is $250.00. Given the lack of competence revealed in this case, however, the Court doubts that such an hourly rate is appropriate. Further, much of the services listed in the "invoice" reflect work that would be compensable only at an appropriate paraprofessional rate (the maximum of which this Court will award is $95.00 per hour). For example, the preparation of the petition and schedules on July 10, 2017, and the preparation of amended schedules and an amended plan on August 29, 2017, among others, could be compensable at a paraprofessional rate. [Trial Ex. 5.] The filing of documents, however, is clerical and wholly noncompensable. *See In re D&H Mach. Serv.*,

any evidence that his request for the maximum flat fee was based on a "good faith estimate of the services" that he expects might be necessary to see this case through to discharge.

Accordingly, the Court finds that counsel has failed to meet his burden under E.D. Tenn. LBR 2016-1(b)(1). As a result, the Court denies counsel's request for an award of any flat fee under the Local Rule in this case. Instead, [17] counsel must comply with E.D. Tenn. LBR 2016-1(c), which requires that he file

> a fee application conforming to Fed. R. Bankr. P. 2016(a). The application must include an itemized statement and be supported by contemporaneous time and expense records. The applicant must serve the application or a summary thereof, along with the proposed order, upon the debtor, the trustee, and if the amount sought exceeds $1,000, on all creditors and parties in interest. The application must state the effect, if any, of the requested fee on the dividend to be paid unsecured creditors under the debtor's plan.

IV. Conclusion

For the foregoing reasons, the Court directs the following:

1. Debtor's counsel is denied a flat fee under E.D. Tenn. LBR 2016-1(b).

2. In order to be compensated for his representation of Debtor in this case, Debtor's counsel must comply with E.D. Tenn. LBR 2016-1(c).

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Inc., 557 B.R. 609, 623-24 (Bankr. E.D. Tenn. 2016). Counsel, however, lumped together numerous compensable attorney and paraprofessional tasks, "making it impossible to tell if the time spent on each task was reasonable." *In re McKenzie*, 494 B.R. 329, 334 (Bankr. E.D. Tenn. 2013) (citation omitted). Also, the Court finds noncompensable time expenditures for amending the schedules and plan, as well as time spent to attend the continued meetings of creditors, because counsel's inappropriate attempt to "catch" the Chapter 13 Trustee necessitated such work. Finally, the time expended by counsel for defending his fees is noncompensable as unnecessary or unreasonable under the circumstances. *See Baker Botts LLP v. ASARCO LLC*, ___ U.S. ___, 135 S. Ct. 2158 (2015). Accordingly, the Court does not find the "invoice" helpful to meet counsel's burden, but if the Court were to award a fee based on the "invoice," after excluding lumped and noncompensable entries, the fee would not exceed $425.00 (derived from the services performed on August 9 and 23 totaling 1.7 hours at a maximum hourly attorney rate of $250.00).

[17] The Court perceives that this ruling actually is generous to counsel, given his lack of understanding of the law and what appear to be serious violations of Rule 9011. Instead of awarding counsel a low flat fee commensurate with his performance in this case, the Court will allow counsel to file a fee application to seek whatever fee is actually earned under the provisions of § 330.