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OF THE NINTH CIRCUIT

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. SC-14-1132-KiKuJu
)
STEVEN PATRICK SCHLEGEL;)
JOANNE MARIE SCHLEGEL,) Bk. No. 08-13539-PB13
)
Debtors.)

STEVEN PATRICK SCHLEGEL;
JOANNE MARIE SCHLEGEL,
Appellants,

v.) **O P I N I O N**
)

THOMAS H. BILLINGSLEA, JR.,)
Chapter 13 Trustee,)
Appellee.)

Submitted Without Oral Argument
On January 22, 2015¹

Filed - February 25, 2015

Appeal from the United States Bankruptcy Court
for the Southern District of California

Honorable Peter W. Bowie, Bankruptcy Judge, Presiding

Appearances: Daniel J. Winfree on brief for appellants Steven
Patrick Schlegel and Joanne Marie Schlegel; Jenny
Judith Hayag on brief for appellee Thomas H.
Billingslea, Jr., Chapter 13 Trustee.

Before: KIRSCHER, KURTZ and JURY, Bankruptcy Judges.

¹ On November 25, 2014, the parties filed a joint motion to
submit on briefs, which was granted on December 1, 2014.

1 KIRSCHER, Bankruptcy Judge:

2
3 Appellants Steven Patrick Schlegel and Joanne Marie Schlegel
4 ("Schlegels") appeal an order dismissing their chapter 13² case
5 for failing to complete plan payments within the applicable five-
6 year commitment period. This appeal raises for the first time
7 whether a confirmed chapter 13 plan may be dismissed for the
8 debtors' failure to pay both the required plan payment and the
9 approved percentage dividend to unsecured nonpriority creditors
10 during the applicable commitment period. We AFFIRM.

11 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

12 **A. Pre-confirmation events**

13 The Schlegels, as above median income wage earners, filed a
14 chapter 13 bankruptcy case on December 31, 2008. Their Schedule A
15 identified a fee interest in a residence on Casita Way in San
16 Diego, California ("Residence") with a value of \$274,500 and
17 secured claims against it totaling \$434,053. Their Schedule D
18 identified a junior lien on the Residence held by CitiMortgage,
19 Inc. ("CitiMortgage") in the amount of \$156,348. The claims bar
20 date expired on April 30, 2009. CitiMortgage did not file a proof
21 of claim by the claims bar date.

22 In their original chapter 13 plan filed on January 15, 2009,
23 Schlegels proposed monthly plan payments of \$963 for 60 months and
24 a 24% dividend to unsecured nonpriority creditors. The original
25 plan provided in Paragraph 19:

26 _____
27 ² Unless specified otherwise, all chapter, code and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 VALUATION AND RECLASSIFICATION OF LIENS ON REAL PROPERTY
2 The following creditors are anticipated by this plan to
3 be deemed unsecured creditors by operation of 11 USC
4 §§ 506(a) and 1322(b) and Federal Rule of Bankruptcy
5 Procedure § [sic] 3012, and will be subject to motion to
6 that end under Federal Rule of Bankruptcy Procedure
7 § [sic] 9014: [CitiMortgage] Heloc on 3957 Casita Way in
8 approximate amount of \$156,500

9 The chapter 13 trustee, Thomas H. Billingslea ("Trustee"),
10 objected to the original plan and moved to dismiss the case,
11 contending that: "Feasibility of plan at 24% dividend requires
12 evaluation whether to-be-stripped creditors file proof of claim."
13 Ultimately, the bankruptcy court denied confirmation of the
14 original plan.

15 On April 8, 2009, Schlegels filed an amended Motion to Avoid
16 Lien and Reclassify Loan³ with respect to CitiMortgage's junior
17 lien on the Residence ("Motion to Value"). Schlegels sought to
18 value the Residence at \$266,500, which would leave CitiMortgage's
19 junior lien wholly unsecured. After proper service of the Motion
20 to Value, CitiMortgage did not respond.

21 The bankruptcy court revised its tentative ruling⁴ on August
22 28, 2009, entered its order granting the Motion to Value on
23 October 22, 2009 ("Valuation Order") and valued the Residence at
24 \$266,500. The Valuation Order also provided:

25 The Court determines that the Second Trust Deed of
26 Citibank (West) . . . is entirely unsecured under 11

27 ³ Schlegels filed an amended motion after the court informed
28 them that the matter needed to be renoticed for hearing, that they
were seeking improper relief and that they filed an incomplete
declaration with their motion.

⁴ The court issued a revised tentative ruling after
Schlegels' attorney filed an amended certificate of service
establishing proper service of the motion.

1 U.S.C. Section 506(a) given the value of the property and
2 the amount of liens senior to Citibank's (West) lien
3 secured thereby, and avoids Citibank's (West) lien under
4 11 U.S.C. Section 1322(b), contingent on entry of a
confirmation order so providing, and completion of
Debtor's [sic] Chapter 13 Plan and Debtors' resultant
discharge.

5 On October 12, 2009, after the bankruptcy court orally
6 granted the Motion to Value, but before it entered the Valuation
7 Order, CitiMortgage filed a secured proof of claim for its junior
8 lien in the amount of \$155,246.17, which the bankruptcy court
9 rendered unsecured by its Valuation Order, pursuant to § 506(a).
10 Schlegels did not object to CitiMortgage's judicially-determined
11 unsecured claim.

12 Meanwhile, on July 1, 2009, Schlegels had filed an amended
13 chapter 13 plan in which they proposed monthly plan payments of
14 \$812 for 60 months and a 48% dividend to unsecured nonpriority
15 creditors.⁵ The amended plan provided the same "Paragraph 19" as
16 did the original plan, wherein Schlegels stated that CitiMortgage
17 would be treated in their plan as an unsecured creditor.

18 **B. Post-confirmation events**

19 The bankruptcy court eventually confirmed the Schlegels'
20 amended plan on May 5, 2010 (the "Plan"). The confirmation order
21 drafted by Schlegels' counsel stated that consistent with
22 Paragraph 19 of the Plan dated July 1, 2009, and the Valuation
23 Order entered on October 22, 2009, the wholly unsecured lien of
24 CitiMortgage would be treated and paid as an unsecured claim under
25 the Plan. However, the Plan apparently did not take into

26
27 ⁵ Schlegels filed the amended plan after the claims bar date
28 and they calculated the increase in percentage to unsecured
creditors based on the claims filed before the bar date.

1 consideration CitiMortgage's claim when it promised to pay
2 unsecured creditors a 48% dividend, even though CitiMortgage filed
3 its claim months before Plan confirmation.

4 On May 14, 2010, nine days after the entry of the
5 confirmation order, Trustee filed a Notice of Claims Filed and
6 Intention to Pay Claims ("Notice of Claims"). The Notice of
7 Claims, which included CitiMortgage's judicially-determined
8 unsecured claim of \$155,246.17, showed the aggregate total for all
9 unsecured claims as \$219,596. The Notice of Claims also stated:
10 "Pursuant to 11 U.S.C. § 502(a), the claims which have been filed
11 as stated above will be deemed allowed for purposes of
12 distribution and shall be paid unless the debtor or other party in
13 interest files with the court in accordance with Rule 3007, [an]
14 Objection to Claim and Request for Hearing within thirty (30) days
15 of this notice." The record reflects service of the Notice of
16 Claims on both Schlegels and their counsel. No party filed any
17 claim objections.

18 **1. Schlegels' motion for hardship discharge**

19 On December 13, 2013, on the eve of the sixtieth month of the
20 Plan, Schlegels filed a motion for hardship discharge (the
21 "Hardship Motion"). Schlegels contended that several reasons
22 warranted a hardship discharge: (1) Mrs. Schlegel's recent cancer
23 diagnosis and loss of employment; (2) the need of an additional 96
24 months of payments to satisfy the percentage dividend payout of
25 the Plan; and (3) the impracticality of plan modification, given
26 the lapse of nearly five years in the plan. The bankruptcy court
27 scheduled a Hardship Motion hearing on March 5, 2014.

28 Trustee objected to the Hardship Motion, contending that

1 Schlegels had failed to establish the necessary elements to
2 support a hardship discharge for the following reasons: (1) at
3 confirmation, the Plan term approximated 158 months, given the 48%
4 dividend, CitiMortgage's allowed unsecured claim and Schlegels'
5 failure to object to CitiMortgage's claim; (2) Schlegels paid a
6 total of \$48,391, approximately 58.5 months of the required 60
7 Plan payments; and (3) the approximate remaining payoff of \$77,780
8 required an additional 96 months to complete. Under the Plan
9 terms, the Schlegels had provided a 10.8% to 15.42% dividend to
10 unsecured nonpriority creditors.

11 **2. Trustee's motion to dismiss**

12 On January 6, 2014, Trustee moved to dismiss the Schlegels'
13 chapter 13 case for failing to complete plan payments within five
14 years from commencement of the case ("Motion to Dismiss"). The
15 attached notice provided:

16 You are further notified that IF YOU FAIL TO REQUEST AND
17 SERVE NOTICE OF HEARING within [the] 28 day period
18 provided by this notice, the Trustee will present [an]
order dismissing this case to the Court for entry without
any hearing or further notice to you.

19 The Schlegels failed to file any opposition to the Motion to
20 Dismiss by the deadline of February 6, 2014.

21 On February 20, 2014, Trustee filed a Statement of Case
22 Status re Non-Contested Motion to Dismiss and Opposition to
23 Debtors' Motion for Hardship Discharge. Trustee maintained that
24 Schlegels: failed to timely oppose the Motion to Dismiss; failed
25 to make all Plan payments; failed to pay off the remaining balance
26 of \$76,960; and failed to pay the percentage dividend, all within
27 the Plan term. Accordingly, he requested the court to enter a
28 non-contested dismissal order. Trustee noted that his periodic

1 and annual reports sent to Schlegels throughout the case from 2009
2 to 2013 should have alerted them to the percentage dividend
3 deficiency.

4 On February 22, 2014, Schlegels' counsel filed a responsive
5 Declaration re Status, asserting that filing an opposition to the
6 Motion to Dismiss would have been redundant considering the
7 pending Hardship Motion. Nonetheless, he asserted that the
8 Schlegels' inability to perform the Plan requirements arose from
9 the allowance of CitiMortgage's claim filed after the claims bar
10 date.

11 **3. The bankruptcy court's ruling on both motions**

12 The bankruptcy court held a hearing on the Hardship Motion on
13 March 5, 2014. Although Schlegels failed to file any written
14 opposition or to request/obtain a hearing date on the Motion to
15 Dismiss, the transcript of the hearing confirms that the court
16 also considered the parties' arguments on the Motion to Dismiss.

17 At the hearing, Schlegels' counsel did not dispute the
18 court's statements that they knew by at least May 2010, based on
19 Trustee's Notice of Claims, that with the monthly payments and the
20 48% dividend required by their Plan, 96 additional monthly
21 payments would be required to complete their Plan given
22 Citimortgage's unsecured claim. Thus, Schlegels had known for
23 nearly four years that they could not fully perform under the
24 terms of the confirmed Plan. Hr'g Tr. (March 5, 2014) 3:13-3:24.
25 Schlegels' counsel stated that they were hoping to secure a
26 financing arrangement during the applicable commitment period to
27 complete all financial obligations of their Plan, but Mrs.
28 Schlegel's health, her loss of employment and the foreclosure of

1 their rental property prevented that from happening, hence their
2 need for a hardship discharge. Id. at 3:25-4:9, 4:20-5:1, 5:6-22.
3 In response, the court stated that Schlegels should have filed a
4 timely plan modification, reducing the percentage dividend based
5 upon their circumstances, and should not have waited so late in
6 the Plan's applicable commitment period to request a hardship
7 discharge. Id. at 5:23-6:2, 6:20-7:5. Schlegels' counsel made no
8 argument as to the allowance of CitiMortgage's proof of claim and
9 the court made no observations on the matter. After hearing
10 further argument from the parties, the court orally denied the
11 Hardship Motion. Id. at 11:13-12:3. The bankruptcy court did not
12 make an oral ruling on the Motion to Dismiss.

13 The bankruptcy court entered a form order granting the Motion
14 to Dismiss ("Dismissal Order") on March 7, 2014, for Schlegels'
15 "[f]ailure to fully complete plan payments on or before five (5)
16 years from the commencement of this case." It entered a separate
17 order denying the Hardship Motion on March 5, 2014, but Schlegels
18 did not appeal that order. Schlegels timely appealed the
19 Dismissal Order on March 21, 2014.

20 **II. JURISDICTION**

21 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
22 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C. § 158.

23 **III. ISSUE**

24 Did the bankruptcy court abuse its discretion in dismissing
25 Schlegels' bankruptcy case for failure to complete plan payments
26 within five years?

27 **IV. STANDARDS OF REVIEW**

28 A court's interpretation and application of a local rule is

1 reviewed for an abuse of discretion. United States v. Heller, 551
2 F.3d 1108, 1111 (9th Cir. 2011). We review the bankruptcy court's
3 dismissal of a chapter 13 bankruptcy case under any of the
4 enumerated paragraphs of § 1307(c) for abuse of discretion.
5 Ellsworth v. Lifescape Med. Assocs., P.C. (In re Ellsworth), 455
6 B.R. 904, 914 (9th Cir. BAP 2011). A bankruptcy court abuses its
7 discretion if it applied the wrong legal standard or its findings
8 were illogical, implausible or without support in the record.
9 TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th
10 Cir. 2011).

11 V. DISCUSSION

12 **The bankruptcy court did not abuse its discretion when it**
13 **dismissed the Schlegels' chapter 13 bankruptcy case for**
14 **failing to complete their plan payments within the five-year**
15 **period.**

16 Before we turn to the merits of the bankruptcy court's
17 decision to dismiss Schlegels' chapter 13 case, we address an
18 argument they raise regarding whether the court properly deemed
19 the Motion to Dismiss as "uncontested."

20 The caption of the Dismissal Order, which appears to be a
21 form order submitted by Trustee, reads: "Order on Noncontested
22 Motion Dismissing Chapter 13 Case." A motion to dismiss a
23 bankruptcy case under § 1307(c) is a contested matter subject to
24 Rule 9014(a).⁶ Rule 1017(f)(1). Schlegels contend that Rule
25 9014(a) did not require them to file a response to the Motion to

26 ⁶ Rule 9014(a) provides:

27 In a contested matter not otherwise governed by these rules,
28 relief shall be requested by motion, and reasonable notice
and opportunity for hearing shall be afforded the party
against whom relief is sought. No response is required under
this rule unless the court directs otherwise.

1 Dismiss. This contention is correct, but they also concede that
2 Local Rule 9014-4(f) for the Bankruptcy Court for the Southern
3 District of California directs that failure to file a timely
4 opposition to a contested motion allows the court to deem the
5 parties' silence as consent to granting the motion. Schlegels
6 contend the bankruptcy court erred by concluding they failed to
7 contest the Motion to Dismiss when they otherwise actively sought
8 a hardship discharge.

9 Courts have broad discretion to interpret their local rules.
10 Only in rare cases will an appellate court question the exercise
11 of discretion in connection with the application of the local
12 rules. Qualls v. Blue Cross, 22 F.3d 839, 842 (9th Cir. 1994);
13 Katz v. Pike (In re Pike), 243 B.R. 66, 69 (9th Cir. BAP
14 1999) ("The bankruptcy court has broad discretion to apply its
15 local rules."). Whether or not the bankruptcy court considered
16 the Motion to Dismiss to be "uncontested," the Schlegels fail to
17 state what difference it would make had the bankruptcy court
18 considered the matter "contested." It appears the court
19 considered their oral arguments against dismissal to some extent
20 at the Hardship Motion hearing. Even if not, the court clearly
21 had discretion to deem Schlegels' lack of a written opposition as
22 consent to granting the Motion to Dismiss, as long as it was
23 meritorious. We agree with the bankruptcy court's conclusion that
24 Schlegels failed to contest the Motion to Dismiss.

25 **A. Dismissal under 1307(c)**

26 Section 1307(c) allows the bankruptcy court to dismiss a case
27 for "cause," including a material default with respect to a term
28 of a confirmed plan. See § 1307(c)(6). The decision to dismiss a

1 chapter 13 case under § 1307(c) is a discretionary decision of the
2 trial court. Sievers v. Green (In re Sievers), 64 B.R. 530, 530
3 (9th Cir. BAP 1986).

4 The bankruptcy court dismissed the Schlegels' case under
5 § 1307(c)(6) for failing to complete their plan payments within
6 five years from the commencement of their case. Although
7 Schlegels had made their \$812 monthly plan payments, they had
8 failed to pay their unsecured nonpriority creditors the promised
9 48% dividend. Schlegels contend that the bankruptcy court erred
10 in dismissing their case because they completed all of their
11 payments under the Plan as required by § 1328(a) even if they
12 failed to pay the required percentage dividend. Neither the Ninth
13 Circuit nor this Panel has addressed this precise issue. However,
14 persuasive authority supports the bankruptcy court's decision to
15 dismiss for this reason.

16 **B. Analysis**

17 **1. Authority supporting dismissal of the case**

18 In Roberts v. Boyajian (In re Roberts), 279 B.R. 396, 397-98
19 (1st Cir. BAP 2000), aff'd, 279 F.3d 91 (1st Cir. 2002), a case
20 with nearly identical facts, debtors' confirmed chapter 13 plan
21 promised to pay monthly payments of \$474, to pay filed tax claims
22 and to pay unsecured creditors a 10% dividend. Three years later,
23 the IRS filed a proof of claim for a postpetition trust fund tax.
24 No person filed objections to the IRS's claim and the trustee
25 began making payments on account of the IRS claim. Six years
26 after confirmation, the trustee moved to dismiss on the basis that
27 debtors' plan payments failed to pay both the IRS claim and the
28 10% dividend to unsecured creditors. In response, debtors filed a

1 motion for discharge under § 1328(a)⁷ or for a hardship discharge
2 under § 1328(b). The bankruptcy court dismissed the case and
3 denied debtors' motion.

4 The First Circuit BAP affirmed. The Panel rejected debtors'
5 argument that they had satisfied their obligations under the plan
6 simply because they paid the monthly dollar amount stated in the
7 plan for 60 months. This argument ignored their failure to comply
8 with the other plan terms – to pay any postpetition tax claims and
9 to pay unsecured creditors a dividend of 10%. Id. at 399. The
10 Panel held that debtors' failure to pay the IRS claim or their
11 unsecured creditors as promised in their confirmed plan
12 constituted a material default warranting dismissal under
13 § 1307(c)(6). Id. at 400. The Panel considered debtors' failure
14 to object to the IRS's claim or to seek modification of their plan
15 under § 1329 important in its decision. Id.

16 In another similar case, In re Rivera, 177 B.R. 332 (Bankr.
17 C.D. Cal. 1995), the debtors' plan, confirmed prior to the claims
18 bar date, provided for 36 monthly payments of \$2,300 and a
19 dividend of 65% to unsecured creditors. Id. at 333. Had the
20 allowed claims been limited to those scheduled by the debtors, the
21 \$2,300 monthly payments would have been sufficient to provide the
22 proposed 65% return to creditors within three years. However, the
23 amounts for filed claims substantially exceeded debtors' scheduled
24 debts and debtors had not filed any objections to the claims. As

25
26 ⁷ Section 1328(a) provides in part: "Subject to subsection
27 (d), as soon as practicable after completion by the debtor of all
28 payments under the plan . . . the court shall grant the debtor a
discharge of all debts provided for by the plan or disallowed
under section 502 of this title"

1 a result, the plan failed to pay the 65% dividend by about
2 \$15,000. Id. The trustee moved to dismiss debtors' case under
3 § 1307(c)(6) for a material default in the plan. Debtors
4 responded with a motion for discharge under § 1328(a).

5 The issue before the Rivera court involved which plan
6 provision takes precedence – the percentage dividend to unsecured
7 creditors or the monthly plan payments. Persuaded by the
8 reasoning of In re Carr, 159 B.R. 538 (D. Neb. 1993) and In re
9 Phelps, 149 B.R. 534 (Bankr. N.D. Ill. 1993), the Rivera court
10 found that debtors' payment of less than the percentage dividend
11 required in the plan precluded a discharge. Id. at 334-335. By
12 failing to pay their unsecured creditors the promised 65%
13 dividend, the debtors had not completed their payments under the
14 plan within the meaning of § 1328(a). Id. at 335.

15 In In re Hill, 374 B.R. 745 (Bankr. S.D. Cal. 2007), the
16 bankruptcy court considered two separate cases in one decision
17 involving a husband and wife in one and an individual woman in the
18 other. In each case, the debtors or debtor had a confirmed plan
19 providing for monthly payments and a 100% dividend plus 10%
20 interest to unsecured creditors. Id. at 746-48. In both cases,
21 total claims ended up being more than debtors had accounted for,
22 and the debtors failed to seek amendments to their plans in order
23 to complete them within 60 months, despite the trustee's notices
24 that their plan payments would necessarily exceed the five-year
25 term. In one of the cases, the debtor needed an additional 33
26 months to complete the plan payments; in the other, debtors needed
27 an additional 53 months of plan payments. The trustee moved to
28 dismiss both cases for failure to pay the plan in full within five

1 years.

2 The Hill court acknowledged that failing to complete plan
3 payments within the applicable 36 or 60-month period could
4 constitute cause for dismissal under § 1307(c)(6). Id. at 748-49.
5 However, it opined that dismissal was not absolute, despite the
6 mandate in § 1322 that a plan must not provide for payments over a
7 period that exceeds five years. Section 1322 involved
8 confirmation, not dismissal. Id. at 748. While the court
9 determined that the debtors materially breached a term of their
10 plans within the meaning of § 1307(c)(6) by needing an additional
11 33 or 53 months to complete the plans – i.e., they had failed to
12 pay their unsecured creditors the promised dividend of 100% plus
13 10% interest – it decided not to dismiss the debtors' cases due to
14 their unique circumstances. The debtors or debtor in each case
15 had been consistently performing over the past 60 months, no real
16 property arrearages continued to drag out and no unsecured
17 creditor had complained about not receiving 100% plus 10% interest
18 over the past five years. Id. at 749-50. See also In re Grant,
19 428 B.R. 504, 506-508 (Bankr. N.D. Ill. 2010) (holding that
20 failing to complete plan payments within five years, and where the
21 plan cannot be modified to make completion feasible, constitutes a
22 material default for purposes of § 1307(c)(6); the court also
23 interpreted § 1322(d) as limiting a plan to a maximum of five
24 years and concluded that allowing a plan to continue an additional
25 twelve to eighteen months beyond that would ignore § 1322(d) and
26 Congress' clear intent).

27 We agree with the above cases to the extent they hold that,
28 even though a chapter 13 debtor has completed his or her monthly

1 plan payments, failure to pay unsecured creditors the promised
2 percentage dividend constitutes a material default with respect to
3 a term of a confirmed plan. § 1307(c)(6). Because the Schlegels
4 did not seek to continue their Plan payments beyond the 60 months
5 but instead sought a hardship discharge, we do not render any
6 opinion as to whether § 1322(d) limits a bankruptcy court's
7 ability to allow a debtor to continue making plan payments beyond
8 the applicable commitment period.

9 Schlegels argue that under Fridley v. Forsythe (In re
10 Fridley), 380 B.R. 538 (9th Cir. BAP 2007), a plan is "complete"
11 and debtors are entitled to a discharge when they either pay all
12 claims 100% or make 60 months of payments. We disagree with their
13 position. In Fridley, debtors sought an early discharge after
14 making a lump-sum payment in month 14 of their 36-month plan,
15 which satisfied the plan's dollar amount. 308 B.R. at 540. The
16 Panel held that since debtors' plan did not provide for 100%
17 payment to unsecured creditors, they had to commit themselves to
18 the temporal requirement of 36 months and their prepayment did not
19 "complete" their plan for purposes of §§ 1328(a) or 1329. Id. at
20 545. To obtain an early discharge without paying allowed
21 unsecured claims in full, debtors had to follow the § 1329
22 modification procedure. Id. at 544.

23 Fridley did not hold, or even infer, that simply making plan
24 payments for the applicable commitment period without also
25 providing unsecured creditors with the promised percentage
26 dividend entitles a debtor to discharge. Further, that case
27 involved the early completion of plan payments and ultimately
28 discharge, not debtors' failure to complete plan payments within

1 the applicable commitment period and dismissal under § 1307(c).
2 At any rate, Schlegels are no longer even able to modify the Plan
3 as they have made all monthly payments. See § 1329(a).⁸

4 **2. It was proper to allow CitiMortgage's unsecured claim**

5 Schlegels also dispute whether CitiMortgage's "late-filed"
6 claim should have been allowed and paid by Trustee, which claim
7 ultimately caused their Plan to implode and not pay unsecured
8 nonpriority creditors a 48% dividend. Although Schlegels spend a
9 great deal of time arguing this issue, they have never filed an
10 objection to CitiMortgage's claim. Therefore, we fail to see how
11 they can argue this issue on appeal. Without objection,
12 CitiMortgage's claim is deemed allowed, § 502(a), subject to the
13 bankruptcy court's subsequent Valuation Order determining the
14 claim to be unsecured under § 506(a) and the confirmation order,
15 declaring that CitiMortgage will be treated and paid in the Plan
16 as an unsecured nonpriority creditor.

17 Without question, the claims bar date in Schlegels' case was
18 April 30, 2009. The Motion to Value and the avoidance of
19 CitiMortgage's junior lien came later. The Valuation Order, which
20 stripped CitiMortgage's lien and rendered its claim unsecured, was
21 entered on October 22, 2009. Until that point, CitiMortgage was
22 operating in this case as a secured creditor.

23 Secured creditors in a chapter 13 case may, but are not
24 required to, file a proof of claim. See Rule 3002(a). Such

25

26 ⁸ Section 1329(a) provides, in relevant part: "At any time
27 after confirmation of the plan but before the completion of
28 payments under such plan, the plan may be modified, upon request
of the debtor, the trustee, or the holder of an allowed unsecured
claim[.]"

1 creditors may choose not to participate in the bankruptcy case and
2 look to their liens for satisfaction of the debt. Brawders v.
3 Cnty. of Ventura (In re Brawders), 503 F.3d 856, 872 (9th Cir.
4 2007). Secured liens pass through bankruptcy unaffected. Long v.
5 Bullard, 117 U.S. 617, 620-21 (1886); Dewsnup v. Timm, 502 U.S.
6 410, 418 (1992); In re Brawders, 503 F.3d at 872. However, if the
7 lien is avoided and the formerly secured creditor failed to file a
8 secured claim prior to the claims bar date, the creditor may file
9 a proof of claim within 30 days after the order avoiding the lien
10 becomes final. See Rule 3002(c)(3);⁹ Prestige Ltd. P'ship-Concord
11 v. E. Bay Car Wash Partners (In re Prestige Ltd. P'ship-Concord),
12 234 F.3d 1108, 1118 (9th Cir. 2000); Zebley v. First Horizon Home
13 Loans (In re Ong), 469 B.R. 599, 601 (Bankr. W.D. Pa. 2012).

14 The exception under Rule 3002(c)(3) permits a creditor like
15 CitiMortgage, whose unsecured claim arises as the result of an
16 order invalidating its secured claim, to file a proof of claim
17 within 30 days after entry of the order regardless of expiration
18 of the 90-day limitation in Rule 3002(a). As explained in the
19 Advisory Committee Notes to Rule 3002(c):

20 Although the claim of a secured creditor may have arisen
21 before the petition, a judgment avoiding the security
22 interest may not have been entered until after the time
23 for filing claims has expired. Under Rule 3002(c)(3),
24 the creditor who did not file a secured claim may
25 nevertheless file an unsecured claim within the time
26 prescribed. A judgment does not become final for the
27 purpose of starting the 30 day period provided for by
28 paragraph (3) until the time for appeal has expired or,

29 ⁹ Rule 3002(c)(3) provides in part: "An unsecured claim
30 which arises in favor of an entity or becomes allowable as a
31 result of a judgment may be filed within 30 days after the
32 judgment becomes final if the judgment is for the recovery of
33 money or property from that entity or denies or avoids the
34 entity's interest in property."

1 if an appeal is taken, until the appeal has been disposed
2 of.

3 CitiMortgage filed its proof of claim, albeit as a secured
4 claim, on October 12, 2009, after the bankruptcy court had orally
5 granted the Motion to Value, but before the entry of the Valuation
6 Order on October 22, 2009, which deemed the claim unsecured.
7 Thus, its claim was timely filed within the 30 days required under
8 Rule 3002(c)(3). See In re Prestige Ltd. P'ship-Concord, 234 F.3d
9 at 1118 (proof of claim filed before judgment became final
10 considered timely for purposes of Rule 3002(c)(3)when court waived
11 creditor's security interest).

12 Schlegels never objected to CitiMortgage's timely filed
13 claim. Their contention that they had no notice of CitiMortgage's
14 claim defies credulity. Trustee's Notice of Claims sent to
15 Schlegels and their counsel, just days after confirmation,
16 conspicuously listed CitiMortgage's unsecured claim and the amount
17 to be paid. Therefore, Trustee did not err in making payments to
18 CitiMortgage under the Plan.¹⁰

19 VI. CONCLUSION

20 We conclude that the bankruptcy court did not abuse its
21 discretion in granting the Motion to Dismiss, particularly since
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23 ¹⁰ Although not raised by the Schlegels, the bankruptcy court
24 did not engage in any "best interest of creditors" analysis before
25 dismissing their case, which is required. Nelson v. Meyer (In re
26 Nelson), 343 B.R. 671, 675 (9th Cir. BAP 2006). However, on this
27 record dismissal appears to be in the best interest of creditors
28 and the estate. Over the course of 60 months, the unsecured
creditors have not received anywhere near the 48% dividend
required by their Plan. With dismissal and the dissolving of the
stay, these creditors are now free to pursue collection of their
claims against the Schlegels, which would likely result in more
money than if the case had been converted to chapter 7.

1 Schlegels failed to object to CitiMortgage's claim or to modify
2 their Plan to address the claim once filed. By failing to pay
3 their unsecured creditors the promised 48% dividend, they did not
4 complete plan payments within the applicable commitment period.
5 Accordingly, we AFFIRM.

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