

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)
)
URSULA MARIE SHARAFINSKI,) CASE NO. 05-50318 HCD
) CHAPTER 7
)
DEBTOR.)

Appearances:

Peter M. Yarbrow, Esq., counsel for debtor, Hains Law Firm, 125 North St. Peter Street, South Bend, Indiana 46617.

MEMORANDUM OF DECISION

At South Bend, Indiana, on November 6, 2006.

This matter was returned to the Bankruptcy Court on remand from the United States District Court for the Northern District of Indiana, South Bend Division (“District Court”). In its Opinion and Order, the District Court vacated the dismissal of Case No. 05-50318, *In re Sharafinski*, by the United States Bankruptcy Court for the Northern District of Indiana, South Bend Division (“Bankruptcy Court”). The Bankruptcy Court held an evidentiary hearing to determine what further proceedings were required by the remand. Based upon the court’s review of the District Court’s Opinion and Order, the record in this case, and the testimony and evidence produced at that hearing, the court again dismisses Case No. 05-50318, *In re Sharafinski*.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(A) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil

Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

A. *The District Court's Opinion and Order*¹

Fred R. Hains, Esq.,² counsel to Ursula Marie Sharafinski, appealed this Bankruptcy Court's dismissal of Case No. 05-50318, *In re Ursula Marie Sharafinski*. Mr. Hains had filed the case electronically on Sunday, October 16, 2005, using the Bankruptcy Court's Electronic Case Filing system ("ECF").³ It was Mr. Hains's position that the party who actually was the debtor in Case No. 05-50318 was Meshack O. Osiro, and the appeal was brought under the name of "Appellant Meshack O. Osiro."

¹ The District Court's Opinion and Order was entered in the District Court by Chief Judge Robert L. Miller, Jr., on May 30, 2006. *See In re Sharafinski*, Cause No. 3:05-CV-810 RM (N.D. Ind. May 30, 2006). The issuance of the mandate on July 26, 2006, rendered the judgment final. On the same day, July 26, 2006, the Bankruptcy Court received the mandate and scheduled an evidentiary hearing on the matter for August 3, 2006. The hearing was held on that date. On August 4, 2006, the court took the matter under advisement.

² Fred R. Hains, Esq., is an experienced attorney admitted to the Indiana bar in 1974. He and Peter M. Yarbrow, Esq., practice law as the Hains Law Firm and are frequent practitioners in this Bankruptcy Court. Mr. Hains completed the court's attorney training program in using the court's ECF system on March 21, 2003. He was registered as an official ECF user and received his password on May 5, 2003. Mr. Yarbrow has not taken the attorney training class; he is not an ECF user.

³ On Sunday, October 16, 2005, one day before the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") became effective, this Bankruptcy Court received 466 new case filings. Of those, 7 were filed by Mr. Hains. The Bankruptcy Court's ECF system reflects the following data concerning filings by Mr. Hains on that Sunday evening:

1. Mr. Hains filed 7 bankruptcy cases between 4:01 p.m. and 8:48 p.m.
2. In the case he filed on behalf of Ursula Marie Sharafinski, the petition of Ursula Marie Sharafinski was filed at 8:19 p.m., and the case was electronically assigned the Case No. 05-50307.
3. In the case he filed on behalf of Meshack O. Osiro, the petition of Ursula Marie Sharafinski again was filed at 8:48 p.m., and the case was electronically assigned the Case No. 05-50318.
4. The Verification of Creditor Matrix and Matrix of Meshack O. Osiro were filed at 9:01 p.m.
5. The signature page of Meshack O. Osiro was filed at 9:03 p.m.

The District Court reviewed three determinations issued by the Bankruptcy Court in Case No. 05-50318: the denial of a request to correct the bankruptcy petition, denial of the motion for reconsideration, and dismissal of the case. *See* R. 31, District Court’s “Opinion and Order,” at 1.⁴ According to the District Court, “Mr. Osiro asks that his case be returned to the bankruptcy court’s docket for further proceedings consistent with the bankruptcy law applicable at the time of his initial filing on October 16, 2005.”⁵ *Id.*

The record in Case No. 05-50318 revealed that Ms. Sharafinski’s petition, Mr. Osiro’s verification of creditor matrix, and Mr. Osiro’s signature page were filed in the Bankruptcy Court (in that order) as three separate documents. The District Court found that “[t]he voluntary petition filed on Mr. Osiro’s behalf . . . contained the name and information of Ursula Sharafinski instead of the name and information of Meshack Osiro.” *Id.* at 2. That court, guided by the Hains Law Firm’s appellate brief, then described the bankruptcy case as it progressed:

Fifteen days later, on October 31, the Bankruptcy Court issued an order in Cause No. 05-50318 that reflected the caption of the case as “In re Ursula Marie Sharafinski, Debtor.” Noting that Ursula Sharafinski hadn’t signed the petition filed in Cause No. 05-50318, the court afforded Ms. Sharafinski three days to file a proper signature. In response, Mr. Osiro filed a “Motion to Correct Scrivener’s Error and to Amend Caption,” explaining that he was, in fact, the debtor in Cause No. 05-50318 and an error had occurred in the filing of his bankruptcy petition. He also filed a motion for additional time to submit the proper document. Mr. Osiro’s motions were denied on November 4. Mr. Osiro filed a “Motion to Alter Order Striking Voluntary Petition and Dismissing Case,” which was denied, as well. Cause No. 05-50318 was dismissed on November 17, 2005. Mr. Osiro claims the bankruptcy court erred in denying his request to correct his petition and dismissing his case.

Id. at 2-3. Based on that record, the district court concluded:

The electronic record of Cause No. 05-50318 reveals that the Notice of Bankruptcy Case Filing designates the “filing party” as Meshack Osiro, and the Notice of Electronic Filing confirms that Meshack Osiro filed a signature page and verification of creditor matrix relating to his Voluntary

⁴ The Bankruptcy Court cites to the Opinion and Order received and filed in this court on July 26, 2006. It is found on the court docket of Case No. 05-50318 at Record (R.) 31.

⁵ The District Court noted that “[n]o appellee’s brief was filed.” R. 31 at 1. Because the Orders appealed by Mr. Hains were orders issued by the Bankruptcy Court that concerned procedural errors in the filing of this case, there was not, and indeed could not be, an appellee in the case. The District Court did not appoint an amicus curiae or invite an amicus brief. *See In re Med General, Inc.*, 672 F.2d 716, 718 (8th Cir. 1982); *see also Martin v. Brown*, 63 F.3d 1252, 1257 n. 8 (3d Cir. 1995).

Petition (Chapter 7). Thus, the order of October 31, 2005 was directed to the wrong person – the order should have been directed to Meshack Osiro, the filing party, not to Ursula Sharafinski. As a result, Mr. Osiro wasn't afforded an opportunity to file a proper document or amend his petition. . . .

R. 31 at 3-4.

The District Court then vacated the dismissal of Case No. 05-50318, which was “based on Ms. Sharafinski’s inactions in Mr. Osiro’s bankruptcy proceedings,” and remanded the case to the Bankruptcy Court “for further proceedings.” *Id.*

B. *Bankruptcy Court Hearing*

The Bankruptcy Court held a hearing on August 3, 2006, to determine what further proceedings were appropriate. (*See* Transcript of Proceedings Before the Honorable Harry C. Dees, Jr., United States Bankruptcy Judge, Thursday, August 3, 2006) (“Tr.”). The court stated that it needed to understand where the mistakes were made in this case. Mr. Yarbro, Esq., an associate of Mr. Hains in the Hains Law Firm, and Nancy J. Wright, Mr. Hains’s paralegal, appeared at the hearing. Mr. Yarbro understood the district court’s Order to say that Mr. Osiro should be able to amend his schedules and to hold a 341 meeting. The Bankruptcy Judge, nevertheless, wished to ask Mr. Hains’s paralegal and two Bankruptcy Court employees what happened in this case, and he told Mr. Yarbro that he could question the witnesses, as well.

Mr. Hains’s paralegal, Nancy J. Wright, was sworn in and took the witness stand. She has worked for Mr. Hains for 14 years, as office manager, paralegal, and manager of payroll and accounts. She and Mr. Hains had taken ECF training in the Bankruptcy Court. With her knowledge of the ECF system, she filed all of Mr. Hains’s bankruptcy cases, including the one at issue. Ms. Wright told the court that she filed many cases on Friday night, all day Saturday and all day Sunday before the new law, BAPCPA, went into effect on Monday, October 17, 2005. She described the procedural steps she took to file Case No. 05-50318, the last case she filed Sunday evening. She stated the ordinary procedure for electronic filing of a case:

It was a barebones bankruptcy. Typically, when we file the entire bankruptcy, it's an upload from the software. And so, when you do an upload, automatically it comes up and says what the name is, and so you know what you've uploaded. This particular case was a barebones, which [meant] you would only file the voluntary petition and the mailing matrix. So, it's different in the ECF system in that when you start the bankruptcy you actually hand-type the name, the address, and all of the essentials. Then after you have put in all of the essentials, then it will ask you to upload the file.

Tr. at 9. Ms. Wright then explained what she did to upload Mr. Osiro's file:

So, when I uploaded the voluntary petition, I did not upload Mr. Osiro's but Mrs. Sharafinski['s] because I had filed hers right before and it automatically defaults to the last one.

Id. She then separately filed the signature page of Mr. Osiro and the verified matrix of Mr. Osiro. She testified that she only filed the first page of Ms. Sharafinski's voluntary petition. Moreover, she said, she had no idea that there had been a mistake because "at the end you can print off exactly what you filed. And when I printed that off, it said 'Meshack Osiro' every time." *Id.* at 10. For that reason, she stated, there was no opportunity to fix the mistake.

The Bankruptcy Judge and Ms. Wright reviewed Record Exhibit 1 together, verifying each step Ms. Wright took in the electronic filing of Case No. 05-50318.⁶ She testified that she had checked off the boxes showing that it was a chapter 7 case, individual and voluntary. She typed in the name of the individual intending to file the case, Meshack O. Osiro, and his address and other information. She then moved to the next screen, which allowed her to attach the debtor's petition. Answering the Judge's questions, she testified that she understood that a bankruptcy case starts with the filing of the petition, and is not commenced by the filing of the

⁶ The following exhibits were admitted *sua sponte* by the court:

- Record Exhibit #1 – Docket Entry 1, Case No. 05-50318 (CM/ECF Notice of Bankruptcy Case Filing with Case Name of Meshack O. Osiro, Case No. 05-50318, and PDF file of Sharafinski, attached);
- Record Exhibit #2 – Verification of Creditor Matrix of Osiro;
- Record Exhibit #3 – signature page of Osiro;
- Record Exhibit #4 – "Bankruptcy Case Opening for Attorneys," attorney training manual;
- Debtor Exhibits A-F – Osiro's petition, verification of creditor matrix, notice of electronic filing of signature page, notice of electronic filing of creditor matrix, notice of automatic stay, verification of creditor matrix;
- Debtor Exhibit G – Hains Law Firm's office listing of ECF activity;
- Debtor Exhibit H – October 28, 2005 Summary of ECF Activity; and
- Debtor Exhibit I – 341 Meeting Notice of Sharafinski.

signature pages, the schedules, the statements, or the attorney fee information. Ms. Wright agreed that she was trained to file a case electronically by highlighting the PDF file⁷ of the petition, opening the PDF file (by right-clicking on the mouse) to verify that it is the correct document to attach, and then, if it is the correct petition, double-clicking to attach the file. However, she admitted that she did not recheck the document to verify that it was Mr. Osiro's.

It was nine o'clock on Sunday evening and I had been there all weekend. So, I did make that error. But the fact that I had filed his signature page shows – would show the Court, I would hope, that it was my intention to file Meshack Osiro's voluntary petition, as well as the fact that I filed his verified mailing matrix.

Id. at 14.

The Judge then listed for Ms. Wright all the documents of Ms. Sharafinski that the court received in the PDF file attached to Case No. 05-50318: her voluntary petition, the verification of the creditor matrix, the statement of financial affairs, summary of schedules, schedules A through J, declaration concerning debtor's schedules, chapter 7 individual debtor's statement of intention, disclosure of compensation of attorney for debtor, the creditor matrix, and the notice to individual consumer debtor, all with the appropriate electronic signatures of Ms. Sharafinski. Ms. Wright responded that she had filed only a barebones bankruptcy for Mr. Osiro, and "when it came up for the upload, I uploaded the PDF voluntary petition [of Ms. Sharafinski] but then I filed his [Mr. Osiro's] signature page for the voluntary petition and I filed his [Mr. Osiro's] verified mailing matrix. No other documents were filed that night on – for that case." *Id.* at 17.

The next person to testify was Michael Robert Stewart, CM/ECF project manager for the Bankruptcy Court. Mr. Stewart, who has been employed by the Bankruptcy Court for 21 years, is in charge of the court's electronic case filing procedures and education programs. Having heard Ms. Wright's testimony and having reviewed the case record in Case No. 05-50318, he identified all the documents filed in that case on October 16,

⁷ A PDF file is an electronic file in portable document format.

2005. He then explained to the court the problem indicated in Exhibit 1, the Notice of Bankruptcy Case Filing.⁸ Mr. Stewart pointed out that the data entered on the top half of the page did not correspond with the name reported on the “original filename” listed at the lower portion of the page. The Notice of Bankruptcy Filing indicates that a PDF file for Ursula Marie Sharafinski was filed in this case.

When the court asked him if the crucial mistake made in this filing was that the PDF document attached to Case No. 05-50318 was Sharafinski’s petition rather than Osiro’s petition, Mr. Stewart agreed. He emphasized that the actual PDF file, which is the petition, governs the filing. He explained that Mr. Hains’s office could have avoided the mistake by reviewing the data and verifying the attachment before electronically filing it.⁹ He described to the court the instructions that were given in the ECF training class to open the PDF file and

⁸ The Notice of Bankruptcy Case Filing automatically is sent to a filer as soon as a bankruptcy case is electronically filed in ECF. The Notice in this case stated:

The following transaction was received from Hains, Fred R. entered on 10/16/05 at 8:48 p.m. EST and filed on 10/16/05

Case Name: Meshack O. Osiro

Case Number: 05-50318

Document Number: 1

Docket Text:

Chapter 7 Voluntary Petition. Fee Amount \$209 Filed by Meshack O. Osiro. (Hains, Fred)

The following document(s) are associated with this transaction:

Document description: Main Document

Original filename: C:\Program Files\TopForm\E-Filing\OUT\Ursula_Marie_Sharafinski \Shara000.pdf

R. 1. The Notice also contained an “Electronic document Stamp” and listed those who would receive the notice electronically and non-electronically. *See id.* The notation “(Hains, Fred)” indicates that the information presented to that point was keyed or typed in by the filer Fred Hains or a staff member. Below “(Hains, Fred)” is an electronic analysis of the transaction generated by the electronic filing system ECF. The court notes that the “original filename” of the “Main Document” is “Ursula Marie Sharafinski,” not “Meshack O. Osiro.”

⁹ Had Ms. Wright clicked on the “document number” or “case number” hyperlinks to review the document before and/or after it was electronically filed, as the court’s ECF training sessions for attorneys and their staff had stressed, Ms. Wright would have seen the Sharafinski petition. She then could have filed a new case for Mr. Osiro with the properly attached Osiro chapter 7 petition before the deadline of midnight on October 16, 2005.

to review it for legibility and accuracy. He stated that Mr. Hains's office could easily have changed the PDF file when it realized that the inputted information was incorrect.

Mr. Stewart gave a brief overview of the ECF attorney training program which is offered to bankruptcy attorneys and their staff. He referred to the procedure manual, Record Exhibit 4, as his teaching material, and noted that it emphasized how to input data, attach documents, double-check work and correct mistakes. He pointed out the warnings given by the ECF system, during the process of filing, to verify information and to replace incorrect data or attachments. He also told the court of the highlighted warning message screen, right before the end of the filing: It advises the filer to ensure that everything is accurate and allows the filer to make any changes at that time, before filing.

Mr. Stewart reported that Mr. Hains's office actually electronically filed the chapter 7 voluntary petition of Ms. Sharafinski, along with her schedules, financial statement and all the other Sharafinski documents in that PDF file. After that, the office filed Mr. Osiro's verification of creditor matrix, creditor matrix, and signature page. Mr. Stewart made clear, however, that those three documents did not commence the filing of the bankruptcy case for Mr. Osiro. When the court asked him to explain that statement, he continued:

Well, pursuant to Title 11 of USC, Section 301, the commencement of a bankruptcy case can only be done by the filing of a voluntary petition with the bankruptcy court. And we did not have a voluntary petition on file for Mr. Osiro.

Tr. at 25. He then told the court how the error was caught in the clerk's office. As part of the court's normal procedures, the case administrator to whom the electronically filed Case No. 05-50318 was assigned went through a very detailed quality control ("QC") checklist. She noted that the data entry naming Osiro as the debtor, which was information typed in by Mr. Hains's office, did not reflect the information on the voluntary petition attached as a PDF file, naming Ms. Sharafinski as the debtor. In fact, Mr. Stewart added, Mr. Osiro did not file a bankruptcy petition with the court on October 16, 2005.

In response to Mr. Yarbrow's questions, Mr. Stewart stated that he is not an attorney but was trained to know what is required to file a bankruptcy petition. He told Mr. Yarbrow that he had looked over the brief that

the Hains Law Firm had filed in the District Court; however, he admitted that he could not testify concerning the case law in that brief. Finally, he answered the court's query:

But you are aware that 11 USC, section 301, which is the – kind of the bedrock of what we operate on, says that to commence a bankruptcy you have to file a petition; right?

Tr. at 28. Mr. Stewart stated that he was aware of that provision. He then stepped down.

Mr. Chris De Toro, Clerk of Court for the United States Bankruptcy Court for the Northern District of Indiana, next testified. He stated that he is an attorney but is not now practicing law in his position as Clerk of this Court. He is the custodian of the court's records. He reviewed the records in this case and confirmed that Mr. Stewart provided an accurate representation of those records. Mr. DeToro said that it appeared that "the filer did something that it had not intended to do" – which was to file another case for Ms. Sharafinski – by filing Ms. Sharafinski's voluntary petition (including the second page which indicated Ms. Sharafinski's electronic signature), her schedules, and all the documents that present "a nearly complete filing on behalf of Miss Sharafinski." Tr. at 30, 31. He noted that the court received several documents bearing Mr. Osiro's name, but that none of the documents was his petition. As a result, the only case that was initiated in the Bankruptcy Court was the case for Ms. Sharafinski. *See* Tr. at 31-32. He compared the filing of an electronic case with the filing of a case in paper and noted the similarities:

[I]f Mr. Hains' firm had come to the clerk's office and told the deputy clerk that they wanted to file a case on behalf of Mr. Osiro but then proceeded to hand to the deputy clerk the petition for Miss Sharafinski, the deputy clerk wouldn't allow the firm to open a case for Mr. Osiro. On the other hand, because the voluntary petition was that of Miss Sharafinski, the deputy clerk would have allowed the firm to open a case on behalf of Miss Sharafinski.

Tr. at 32. For that reason, there is no change in the bankruptcy law, in section 301, he said; one still commences a case by the filing of a petition. In Mr. Osiro's case, no petition for him was filed.

Answering questions raised by Mr. Yarbro, Mr. DeToro affirmed that the electronic case system sends an e-mail to the attorney identified as the filer. He agreed, as well, that data entered by the filer (with Mr. Osiro's name) was input into the court's electronic system and was reflected on the docket. Later, however, the

docket caption was changed (to Ms. Sharafinski's name) to reflect the actual petition that had been filed with the court.¹⁰ *See* Tr. at 36. According to Mr. DeToro, there was a creditor matrix for Mr. Osiro and for Ms. Sharafinski, and there was a signature page for Mr. Osiro and an electronic signature page for Ms. Sharafinski. However, he stated, "the court did receive two petitions for Miss Sharafinski and no petition for Mr. Osiro."¹¹ Tr. at 38.

Mr. DeToro agreed with Mr. Yarbrow that there was an intent to file a bankruptcy case for Mr. Osiro. He also stated that the Bankruptcy Code allows amendments of bankruptcy petitions, but he was not sure "that it contemplated what would happen in this case, which would essentially be the substitution of a different debtor. Because we don't – the court never received a petition for Mr. Osiro that would allow for amendment." Tr. at 38-39. He pointed out that the record did not contain page one of Form B1, the voluntary petition of Mr. Osiro, but it did contain page 2, the signature page, which was submitted separately. He noted that the court's rules, under the Fifth Amended Order, allows for filers to submit a signature page separately.¹² Then the following exchange occurred:

MR. YARBROW: Are you aware that the district court's order refers to Chapter – or Section – case number 50318 as a Chapter 7 bankruptcy filed on Mr. Osiro's behalf?

MR. DeTORO: I understand that that's what the order says.

MR. YARBROW: Does that change your opinion that a bankruptcy was not filed by Mr. Osiro?

¹⁰ Mr. DeToro, later in the hearing, elaborated on the change in the docket caption: "The way the system works, the data that's input through the course of opening the bankruptcy case is the information that's reflected in the docket. So, if there is incorrect information reflected in the docket, then as part of the QC [quality control] process that Mr. Stewart described, the case administrators, [also called] the deputy clerks, would make those corrections. The idea [is] that the information that's contained in the docket should actually – should accurately reflect the document that was filed with the court as the document that has legal effect." Tr. at 41-42.

¹¹ Ms. Sharafinski's voluntary chapter 7 petition was filed properly in Case No. 05-50307 and was filed again in Case No. 05-50318, the case intended for Mr. Osiro.

¹² The Fifth Amended Order Authorizing Electronic Case Filing ("FAO"), issued September 22, 2005, establishes the practices and procedures for the electronic filing of pleadings and papers. It allows a debtor's signature to be indicated by "separately submitting a scanned copy of the originally signed signature page(s) immediately after the electronic filing of the signed document." FAO ¶ 11(c)(i)(C).

MR. DeTORO: It does not change my opinion that the only voluntary petition that the court received in this matter was the voluntary petition for that of Miss Sharafinski.

MR. YARBRO: Okay.

MR. DeTORO: And under Section 301, the only case that would have been commenced would have been that of Miss Sharafinski.

Tr. at 40-41.

Although Mr. DeToro focused on the fact that the court received Ms. Sharafinski's petition, Mr. Yarbrow urged him to recognize that Mr. Osiro's creditor matrix and signature page were filed a few minutes after the petition was filed. Mr. DeToro acknowledged that Notices of Electronic Filing were generated in each of those filings and that the automatic stay notice also was electronically transmitted. *See* Debtor's Exhibit C, D, E. However, he clarified that it was an automated process:

The documents are generated electronically, but the information contained in the documents is – is actually the information that was input by the filer. So, if the filer makes a mistake in the filing, then the information that's contained on all of these documents would reflect that same mistake. . . .[after further discussion] . . . [T]he court will through its QC process change the information contained in the docket to reflect the petition that was actually filed with the court.

Tr. at 44-45 (emphasis added, as spoken in court). Mr. Yarbrow, picking up on that last statement, asked Mr. DeToro further about correcting mistakes:

MR. YARBRO: Okay. But somebody will realize that something's wrong and that it needs to be fixed; is that right?

MR. DeTORO: That's correct.

MR. YARBRO: Okay. Once we get simplified, that's the answer. Same way if I filed my – my petition with your name and information and then I have to fix that too? . . . Anyway, if I make a mistake, I'm supposed to amend it?

MR. DeTORO: That – that's correct.

MR. YARBRO: And the bankruptcy code provides for that?

MR. DeTORO: The bankruptcy code provides for the amendment of petitions. But . . . as the custodian of the court's records, the document that we have on file with the court is the voluntary petition for Miss Sharafinski and all of its related documents.

Tr. at 45-46 (emphasis added, as spoken in court). Both men recognized that there were two matrices of creditors filed in Case No. 05-50318, Mr. Osiro's and Ms. Sharafinski's, and therefore that notices to the creditors on Mr. Osiro's matrix would "have no idea about Miss Sharafinski." Tr. at 46. At that point, Mr. Yarbrow concluded his questions.

The court then asked Mr. DeToro about the District Court's order, which stated that "Mr. Osiro wasn't afforded an opportunity to file a proper document or amend his petition as contemplated by Bankruptcy Rule 1009(a), which provides that a debtor may amend a voluntary petition 'as a matter of course any time before the case is closed.'" ¹³ See Tr. at 47 (quoting R. 31 at 4). It was the Bankruptcy Court's view that the difficulty in this remand order is that Mr. Osiro does not have a filed petition to amend. Mr. DeToro agreed. He reiterated that the only petition on record is Ms. Sharafinski's petition. He made clear that the court did not receive a petition for Mr. Osiro and that a petition that does not exist cannot be amended. See *id.*

The court also asked Mr. DeToro whether this court could rectify the scrivener's error claimed by Mr. Hains's office. Mr. DeToro answered that the Hains Law Firm was not asking to change a mistake in a document but rather to substitute a different debtor and to backdate everything to October 16, 2005. The court asked whether that revision could be done and Mr. DeToro responded: "Not in my understanding of the law and rules, your Honor." Tr. at 48. Mr. Yarbrow then asked whether a different document, a document that says "amended petition," technically could be entered, and Mr. DeToro answered that the ECF system would allow a document to be amended. However, he stated, there was no petition for Mr. Osiro in the court's records and therefore no petition to amend. The court then asked its final question:

¹³ Federal Rule of Bankruptcy Procedure 1009(a) provides:

(a) GENERAL RIGHT TO AMEND. A voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed. The debtor shall give notice of the amendment to the trustee and to any entity affected thereby. On motion of a party in interest, after notice and a hearing, the court may order any voluntary petition, list, schedule, or statement to be amended and the clerk shall give notice of the amendment to entities designated by the court.

Fed. R. Bank. P. 1009(a).

THE COURT: So, what – what Judge Miller is concerned about here on the last page of his remand order about how Osiro wasn't afforded an opportunity to file – to amend his petition pursuant to Rule 1009(a) is impossible to accomplish?

MR. DeTORO: It is, Your Honor. And I think may – in the brief provided to the district court it indicated that the only mistake was actually the first page. And as we actually review the record of the court, we recognize that it was actually a complete petition for Miss Sharafinski and all the related documents.

THE COURT: And not for Mr. Osiro?

MR. DeTORO: And not for Mr. Osiro.

Tr. at 49-50. Mr. Yarbrow had no further questions or witnesses. He then stated to the court: "It seems like the direction you're going in is that we can't amend this petition because Mr. Osiro has no petition." Tr. at 50. When the court agreed that that was the crux of the court's dilemma, Mr. Yarbrow continued with a closing argument:

MR. YARBROW: I don't think that's what Judge Miller said. I think Judge Miller and I think your order in this case stated that the – the petition was intended to be Mr. Osiro's petition. I don't think there's any dispute about that. Judge Miller refers to it as Mr. Osiro's petition, and I'm not inclined to argue with him about that. I think that there's no question that the only mistake was a computer error. That, you know, in the last minutes of the change of law which I –

THE COURT: It was a frantic time.

MR. YARBROW: – I assume this was not the only mistake that was made. And so to deny, you know, Mr. Osiro the relief from the bankruptcy law based on a mistake a paralegal made that he had nothing to do with I think would be a mistake. There's case law recited in our brief that the purpose of these, you know, technical bankruptcy rules is to – is not to deprive somebody of fundamental justice.

I – I think you can – you know, if you want to be hyper technical about it, you can say, yeah, Miss Sharafinski filed two petitions and the second one had some other guy's name on some of the documents. But I think it's obvious that that was not what it was intended to do.

And I think Judge Miller in his footnote – I wish he had been more specific – but, you know, I suppose, if we have to go back and get some more clarification, we can. But I don't know that it's worth the time and the expense on my behalf.

THE COURT: Well, tell me, is there some reason why your office can't file a brand-new petition for Osiro?

MR. YARBROW: I don't know that his relief under the new law is gonna be all that different. I think he's going to have more complete relief under the old law. He won't have to jump through procedural hoops like the counseling and things like that. And I wouldn't want him to do that because of a mistake that essentially me and Mr. Hains made.

And so – I don’t think his creditors are gonna come out one way – a bit different one way or the other. I think it’s gonna be more time for him, more expense for us. Because we made the mistake, we’re footing the bill for this.

And I think if – if you look at the totality of the circumstances rather than, you know, a PDF file that everybody agrees was mistakenly attached and uploaded, that if we were filing in paper would have never happened. The procedure’s essentially the same. But in this case, if it was a paper petition, you wouldn’t have made the same mistake because you would have seen it when you’re carrying it over to the courthouse. So, you know, I think there’s a – probably a technical mistake, but I don’t know that it’s fundamental enough, you know.

And there is some case law in our brief about what are the controlling documents, and there is plenty of case law that says that the signature page and the creditor matrix and the caption which was filed – when we filed, it had Mr. Osiro’s name on it – are what you use. I know there’s a bankruptcy rule that says the petition. I think Miss Wright to this day thinks that she filed that first page with Mr. Osiro’s name on it. She’ll tell me about that, you know, forever. I don’t know if somehow one got switched with the other. But I think there is case law to rely on to say that the petition with that signature page and caption is Mr. Osiro’s petition and he has an opportunity to amend it.

Tr. at 51-54. The court expressed its appreciation to Mr. Yarbrow for presenting his arguments and adjourned the hearing.

C. Brief of Appellant Meshack O. Osiro, filed in District Court

At the hearing, Mr. Yarbrow made frequent references to the brief that the Hains Law Firm filed in the District Court when it appealed the Bankruptcy Court rulings. See “Brief of Appellant Meshack O. Osiro,” R. 5, filed March 8, 2006 in Case No. 3:05-CV-00810-RLM (“Brief” or “Br.”).¹⁴ For that reason, the Bankruptcy Court sets forth the factual bases and legal arguments presented in that Brief to the District Court.

(1) Summary of the Hains Law Firm’s Brief

The appellate Brief first presented its Statement of the Issues Presented:

¹⁴ The Bankruptcy Court notes that the District Court’s docket states that the Appellant in this case is Ursula Marie Sharafinski and that the Appellant’s Brief, filed on March 8, 2006, is “Appellant’s BRIEF by Ursula Marie Sharafinski.” The Brief, as submitted to the District Court, was entitled “Brief of Appellant Meshack O. Osiro.” See R. 5, Case No. 3:05-cv-00810-RLM, *In re Ursula Marie Sharafinski* (filed December 22, 2005).

1. Whether the Bankruptcy Court erred by finding that Sharafinski was the captioned debtor in Osiro's petition where the Bankruptcy clerk changed the name on the petition and where the Court denied Osiro the opportunity to correct his petition as a result.
2. Whether the Bankruptcy Court erred as a matter of law by construing FAO Para. 9¹⁵ to prohibit Osiro from amending his petition when such interpretation is inconsistent with the Federal Rules of Bankruptcy Procedure and the purposes of the Bankruptcy process.
3. [Whether] [t]he Bankruptcy Court erred as a matter of law in determining that Sharafinski was the proper debtor in this case, when no law supports the Bankruptcy Court's determination, and the Bankruptcy Court found that the petition was filed on Osiro's behalf.

Br. at 1. In the Brief's Statement of the Case, the Hains Law Firm reported that it "mistakenly filed the first page of a voluntary petition belonging to Ursula Maria [sic] Sharafinski." Br. at 1-2. It then asserted that "[t]he Bankruptcy Court's clerk subsequently, and unilaterally, altered Osiro's caption to reflect Sharafinski as the debtor" and that "its clerk had substituted Sharafinski for Osiro on the petition's caption." *Id.* at 2.

In the Brief's Statement of Facts, the Hains Law Firm stated that Mr. Osiro was the intended debtor and that counsel filed "Osiro's petition" through ECF. It described the filer's manual inputting of information for Osiro and the ECF System's generation of a caption indicating Osiro as the debtor. It then stated that the Hains Law Firm's technician uploaded Osiro's signature page, creditor matrix, and verification of creditor matrix. "However, Counsel's technician mistakenly uploaded the front page of a voluntary petition form belonging to Ursula Maria [sic] Sharafinski." *Id.* at 4. Nevertheless, the Hains Law Firm stated in its Brief that it obtained electronic confirmation that "Counsel had successfully filed a complete petition for voluntary bankruptcy on behalf of Osiro." *Id.* The Hains Law Firm concluded its Statement of Facts thus:

Although[,] at the time of filing[,] the caption to Osiro's petition correctly identified him as the debtor, and the petition included a signature page and verification of creditor matrix authenticated by him, as well as a creditor matrix listing Osiro's creditors, the Bankruptcy Court's

¹⁵ FAO Para. 9 is the ninth paragraph of the Fifth Amended Order Authorizing Electronic Case Filing. It states:

The electronic filing of a document in accordance with the court's ECF procedures shall constitute entry of the document on the docket and records kept by the clerk under Fed. R. Bankr. P. 5003. When a document has been filed electronically, the official record is the electronic recording of the document as stored by the court, and the filing party is bound by the document as filed.

clerk unilaterally, and without notice to Osiro, altered the petition's caption to reflect Sharafinski as debtor.

Id. The legal arguments followed.

(2) The Facts in the Brief

Before turning to the Arguments presented in the Hains Law Firm Brief, the Bankruptcy Court finds it necessary to comment on the allegedly factual statements made in the Brief's Statement of the Case and Statement of Facts. It finds that the arguments presented to the District Court by the Hains Law Firm were based upon misinformation.

The first incorrect "statement of fact" was that the Hains Law Firm, through its technician, had inadvertently included Sharafinski's information on the first page of the voluntary petition.¹⁶ Despite this minor mistake, as the Firm described it, the Bankruptcy Court refused to allow it to amend. *See* Br. at 5 ("The Bankruptcy Court denied Osiro's Motion to Amend, and subsequently dismissed his case, on the grounds that Paragraph 9 of its Fifth Amended Order ("FAO Para. 9") prohibited Osiro from amending his petition by removing Sharafinski from the caption and first page of his voluntary petition."); Br. at 8 ("Specifically, the Bankruptcy Court held that FAO Para. 9 prevented Osiro from amending the first page of his voluntary petition, which due to Counsel's clerical error, contained Sharafinski's information."); Br. at 10 ("The petition's sole defect was that it included Sharafinski's information on its first page."); Br. at 11 ("The Bankruptcy Court specifically found that Osiro was the intended debtor in this case, and that Counsel had inadvertently included Sharafinski's information on the first page of the voluntary petition. (Order, 11/30/2005.); Br. at 12 ("However, under the Bankruptcy Court's interpretation, FAO Para. 9 exalts form over substance by binding Osiro to the first page of his petition as filed."); Br. at 13 ("... the Bankruptcy Court determined that Sharafinski was the proper debtor because the first page of the voluntary petition included Sharafinski's, rather than Osiro's information."); Br. at 17 ("Nonetheless, apparently because Counsel mistakenly identified Sharafinski as the debtor on the first page

¹⁶ This description of the Hains Law Firm's electronic filing was never presented to the Bankruptcy Court.

of Osiro's petition, the Bankruptcy Court determined that Sharafinski was the proper debtor and dismissed her petition for want of signature pages authenticated by her.”).

It was clear, from the testimony at the hearing, that there is no truth to that premise. Ms. Sharafinski's entire petition was filed in Case No. 05-50318. The true facts were presented at the hearing, at which Ms. Wright testified that, “when I uploaded the voluntary petition, I did not upload Mr. Osiro's but Mrs. Sharafinski[']s because I had filed hers right before and it automatically defaults to the last one.” Tr. at 9; *see also* Tr. at 17 (“And then when it came up for the upload, I uploaded the PDF voluntary petition [of Ms. Sharafinski], but then I filed his [Mr. Osiro's] signature page for the voluntary petition and I filed his [Mr. Osiro's] verified mailing matrix.”). Both Michael Stewart and Chris DeToro verified her statement that, when Case No. 05-50318 was electronically filed, the only attachment was the PDF file of Ms. Sharafinski's documents: her complete voluntary petition, schedules, and all other required documents. They also testified that Ms. Wright could have discovered the error before transmitting the wrong PDF file. Mr. Yarbrow admitted generally, in his closing statement, first that the paralegal erred and then that he and Mr. Hains made the mistake. Nevertheless, those misstatements by the Hains Law Firm led the District Court to state as “fact” that “[t]he voluntary petition filed on Mr. Osiro's behalf, however, contained the name and information of Ursula Sharafinski instead of the name and information of Meshack Osiro.” R. 31 at 2. There is no doubt that Ms. Sharafinski's entire petition, not just her name and information, not just the first page, was filed in Case No. 05-50318. Therefore the Brief's erroneous premise could not support the legal arguments that followed.

The Brief's second incorrect allegation is twofold: that “the Bankruptcy clerk changed the name on the petition” and that “[t]he Bankruptcy Court's clerk subsequently, and unilaterally, altered Osiro's caption to reflect Sharafinski as the debtor.” Br. at 2. This accusation of court manipulation is repeated throughout the brief. *See, e.g.*, Br. at 4, 6. The first statement is simply untrue, and no evidence was (or could have been) offered in

support of the allegation.¹⁷ The underlying insinuation of the second statement – unilateral alteration of a document without informing the debtor – is equally untrue. As Michael Stewart and Chris DeToro testified, it is standard practice, as part of the quality control checking done by the deputy clerks, to be sure that the debtor whose name is on the petition is the same as the debtor whose name is on the docket report caption. The deputy clerks (and, indeed, all bankruptcy law practitioners) know that a bankruptcy case begins with the filing of the bankruptcy petition. In this case, the petition of Ms. Sharafinski commenced Case No. 05-50318, and the deputy clerk appropriately changed the caption on the docket report to reflect that fact. There is not a shred of evidence or justification to the implication clearly reflected in the Brief that a deputy clerk in this court intentionally altered information filed in this court in order to harm any filer.

As a third point, the Brief also misinformed the District Court by consistently referring to “Osiro’s petition” and by asserting that “Counsel filed Osiro’s petition through the electronic case filing system.” Br. at 3. It is clear, after the hearing, that the debtor Meshack Osiro does not have a bankruptcy petition on file in this court. The court received a signature page, matrix, and verification of matrix bearing his name, but not a petition. Nevertheless, those incorrect references to “Osiro’s petition” led the District Court to misstate, as if it were fact, that “[t]he Bankruptcy Court’s electronic filing system assigned Cause No. 05-50318 to Mr. Osiro’s case and issued a ‘Notice of Bankruptcy Case Filing,’ indicating that Meshack O. Osiro had filed a chapter 7 petition and paid the filing fee.” R. 31 at 2. The fact is that the Hains Law Firm did not file a chapter 7 petition for Mr. Osiro and that the Notice of Bankruptcy Case Filing clearly indicated, by the “Original Filename” information, that the

¹⁷ This accusation of misfeasance or malfeasance on the part of a court employee was not raised in the Bankruptcy Court before the appeal or at the hearing on August 3, 2006. Indeed, the Hains Law Firm admitted that “due to scrivener’s error, the PDF Voluntary Petition of . . . Sharafinski was mistakenly filed.” R. 6 at 2. Consequently, the court’s two witnesses did not address the Brief’s allegation and, indeed, may not have known of it. The record reflects Ms. Sharafinski’s name throughout the 52 pages of PDF documents filed by the Hains Law Firm in Case No. 05-50318, and there is not a scintilla of evidence proffered to support a claim that a clerk changed the name on the petition from Osiro to Sharafinski. The record is clear: The Hains Law Firm attached the wrong PDF file to Case No. 05-50318, and thus Ms. Sharafinski’s petition commenced the case.

petition of Ms. Sharafinski was filed. All bankruptcy attorneys and their staff who completed the court's training program and became official ECF users were taught to read the Notice and to correct misfiled documents.

The record therefore demonstrates without question that the Hains Law Firm filed Ms. Sharafinski's voluntary petition along with Mr. Osiro's signature page, matrix, and verification of matrix. The testimony at the hearing reflected that Ms. Wright, Mr. Hains and Mr. Yarbrow knew what mistakes were made.

(3) The Legal Arguments in the Brief

After pointing out the faulty premises upon which the brief's Argument section was based, the Bankruptcy Court now recites the Argument of the Hains Law Firm, as presented in its brief:

ARGUMENT

The Bankruptcy Court denied Osiro's Motion to Amend, and subsequently dismissed his case, on the grounds that Paragraph 9 of its Fifth Amended Order ("FAO Para. 9") prohibited Osiro from amending his petition by removing Sharafinski from the caption and first page of his voluntary petition. (Order, 11/30/2005.) FAO Para. 9 provides:

The electronic filing of a document in accordance with the court's ECF procedures shall constitute entry of the document on the docket and records kept by the clerk under Fed. R. Bank. P. 5003. When a document has been filed electronically, the official record is the electronic recording of the document as stored by the court, and the filing party is bound by the document as filed.

Fifth Amended Order Authorizing Electronic Case Filing, Para. 9.

In other words, the Bankruptcy Court construed FAO Para. 9 as conclusively barring Osiro from amending the first page of his petition, because Osiro's counsel inadvertently included Sharafinski's information on that document. (Order 11/30/2005.) The Bankruptcy Court further held that FAO Para. 9 established Sharafinski as the captioned debtor. (Id.; Order 11/02/2005.) However, Osiro appeared in the case caption at the time of filing. Subsequent to filing, the Bankruptcy Court removed Osiro from the caption and placed Sharafinski in his stead.

Br. at 5.

The Hains Law Firm's Brief followed an outline in its expansion of the arguments. The Bankruptcy Court recites the outline of its legal arguments as it was presented in the Brief. In the Discussion below, the court

considers those arguments from the Brief that were relied upon by the District Court in its Order. The Arguments, as outlined, are as follows:

1. The Bankruptcy Court erred by finding that Sharafinski was the captioned debtor in Osiro's petition where the Bankruptcy clerk changed the name on the petition and where the Court denied Osiro the opportunity to correct his petition as a result.

A. The Bankruptcy Court's [*sic*] erred in finding that Osiro's petition was Sharafinski's petition.

B. The Bankruptcy Court erred in its application of its Fifth Amended Order, Paragraph 9.

2. The Bankruptcy Court erred as a matter of law by construing FAO Para. 9 to prohibit Osiro from amending his petition when such interpretation is inconsistent with the Federal Rules of Bankruptcy Procedure and the purposes of the Bankruptcy process.

A. The Court application of FAO Para. 9 is inconsistent with FRBP 1009(a).

B. The Bankruptcy Court's decision would needlessly elevate a rule of form over the purposes of the Bankruptcy Code.

3. The Bankruptcy Court erred as a matter of law in determining that Sharafinski was the proper debtor in this case, when no law supports the Bankruptcy Court's determination, and the Bankruptcy Court found that the petition was filed on Osiro's behalf.

A. In determining who is the proper debtor, the signature pages, caption and creditor matrix should control over the first page of the voluntary petition.

B. Osiro was the intended debtor in this case, thus the Bankruptcy Court's finding that Sharafinski was the proper debtor contravened the Bankruptcy Code's core purpose of assisting the debtor with a fresh start.

Br. at i-ii, 6-17.

DISCUSSION

The District Court vacated the Bankruptcy Court's "dismissal of Case No. 05-50318 based on Ms. Sharafinski's inactions in Mr. Osiro's bankruptcy proceedings." The District Court reasoned:

[T]he [Bankruptcy Court's] order of October 31, 2005 was directed to the wrong person – the order should have been directed to Meshack Osiro, the filing party, not to Ursula Sharafinski. As a result, Mr. Osiro wasn't afforded an opportunity to file a proper document or amend his petition as contemplated by Bankruptcy Rule 1009(a) . . . and Paragraph 7 of the Fifth Amended Order

Ms. Sharafinski's failure to submit her signature in Mr. Osiro's bankruptcy proceeding can't provide the basis for dismissal of Mr. Osiro's case.

R. 31 at 3-4. In determining what further steps to take in this remanded proceeding, therefore, the Bankruptcy Court begins by examining its Order of October 31, 2005. *See* R. 5. The Order was addressed to Ms. Sharafinski, the debtor of record, in the Bankruptcy Court's view, for she was the party whose petition was on file in this court. The Order listed all the documents electronically filed on her behalf – her Voluntary Petition, Schedules A-J, the Statement of Financial Affairs, Statement of Intention, Notice to Individual Consumer Debtor, and Verification of Creditor Matrix. It then noted that the voluntary petition did not reflect that it was signed by the debtor. Because the original signature of the debtor was required by paragraph 11(c) of the court's Order Authorizing Electronic Case Filing, the debtor was directed to file a signature page within three days.¹⁸ *See id.*

The key to understanding this case, on remand, is the fact that the two courts are speaking about different “debtors.” The Bankruptcy Court, relying on the petition in the record, ordered the debtor Ms. Sharafinski to file her signature page.¹⁹ The District Court, relying on the “facts” presented by the Hains Law Firm Brief, believed that Case No. 05-50318 was “Mr. Osiro's case” and that Mr. Osiro was the filer and the debtor. *See* R. 31. According to the District Court, the electronic record in Case No. 05-50318 revealed that:

¹⁸ Paragraph 11(c) of the Fifth Amended Order Authorizing Electronic Case Filing, in pertinent part, provides:

c. Signatures on Petitions, Statements, Schedules and Lists:

i. Debtor's signatures upon the bankruptcy petition, schedules, statements and lists, and any amendment thereto, may be indicated by any of the following methods:

- A. submitting a scanned copy of the originally signed document(s);
- B. attaching a scanned copy of the originally signed signature page(s) to the electronic document; or
- C. separately submitting a scanned copy of the originally signed signature pages(s) immediately after the electronic filing of the signed document.

Fifth Amended Order, United States Bankruptcy Court for the Northern District of Indiana, September 22, 2005.

¹⁹ It bears repeating that Ms. Sharafinski's petition was properly filed and it had a proper electronic signature. However, after the electronic filing of the signed document, she was required to file, separately, a scanned copy of the originally signed signature page. *See Fifth Amended Order* at 4, ¶ 11(c).

1. “the Notice of Bankruptcy Case Filing designates the ‘filing party’ as Meshack Osiro”; and
2. “the Notice of Electronic Filing confirms that Meshack Osiro filed a signature page and verification of creditor matrix relating to his Voluntary Petition (Chapter 7).” *Id.* at 3. The District Court reasoned that those filings should have led the Bankruptcy court to address its Order of October 31, 2005 to Mr. Osiro as the filing party.

The Bankruptcy Court first notes that the Notice of Bankruptcy Case Filing does not designate a “filing party.” There is no category or label naming a “filing party.” It does designate the “original filename” of the case, however, and it is “Ursula Marie Sharafinski.” *See* Ex. 1. The “original filename” is based upon the document electronically filed with the transaction, Ms. Sharafinski’s petition. The Bankruptcy Court reiterates that Mr. Osiro did not file a bankruptcy petition – in this or any other case. The only petition before the court in Case No. 05-50318 is Ms. Sharafinski’s petition. The PDF file uploaded in this case was the Voluntary Petition of Ursula Marie Sharafinski on Official Form 1, the required form for commencing a voluntary case. *See* 2 *Collier on Bankruptcy* ¶ 301.09[1] at 301-21 (Alan N. Resnick & Henry J. Sommer, eds-in-chief, 15th ed. rev’d 2006) (“Official Form 1, the Voluntary Petition, must be used to commence a voluntary case under chapter 7, 11, 12 or 13.”). The filing party, therefore, was Ms. Sharafinski, not Mr. Osiro.

Why did the Bankruptcy Court rely on Ms. Sharafinski’s petition, rather than Mr. Osiro’s signature page, matrix, and verification of creditor matrix, when determining whether Case No. 05-50318 was hers or his? This court, like all bankruptcy courts, usually finds answers to the issues brought before it directly in the Bankruptcy Code. The Code’s first chapter presents general definitions and rules, preliminary information for all practitioners. *See* 11 U.S.C. §§ 101-112. When an attorney files for protection of a debtor under the Bankruptcy Code (or when a debtor himself seeks protection), he turns to the established principles found in chapter 3, subchapter 1, “Commencement of a Case.”²⁰ The initial statutory provision therein, § 301, is the basic first step to knowing what counts when filing a voluntary case in any chapter of the Code. It states:

²⁰ The court notes that there is no Chapter 2 in the Bankruptcy Code.

A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter.

11 U.S.C. § 301.²¹ The definition of “debtor” is related by its terms to § 301; it provides: “The term ‘debtor’ means person or municipality concerning which a case under this title has been commenced.”²²

11 U.S.C. § 101(13). In other words, the petitioner who files a petition with the bankruptcy court begins a voluntary case and is a debtor. *See 2 Collier on Bankruptcy*, ¶ 301.09 at 301-20. The “Terminology” introductory section of the Code offers a helpful definition of a “petition”:

A “petition” is the document which initiates the Title 11 bankruptcy case under either Chapter 7, Chapter 9, Chapter 11, Chapter 12, or Chapter 13. No other document in the Bankruptcy Code or Rules is referenced as a “petition.”

Bankruptcy Code, “Bankruptcy Terminology,” ix.

Because the petition initiates a case, the Bankruptcy Court’s procedures for handling the filing of a bankruptcy case focus on that document. If the petition is not filed, there’s no case. *See In re Bradley*, 342 B.R. 783, 788 (Bankr. N.D. Ind. 2005) (“The bankruptcy case was triggered by the filing of the bankruptcy petition, not by the entry of the docket information input by the attorney.”). That maxim was true before electronic case

²¹ Because Case No. 05-50318 was filed before the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) became effective, the pre-BAPCPA statutes are quoted. However, it is noteworthy that no changes were made to those statutory provisions by BAPCPA. The added language in each of those provisions is not pertinent to the analysis herein.

²² *See also, e.g., Witko v. Menotte (In re Witko)*, 374 F.3d 1040, 1042 (11th Cir. 2004) (“Specifically, the debtor’s filing of a petition with the bankruptcy court commences a voluntary bankruptcy case.”); *Westmoreland Human Opportunities, Inc. v. Walsh*, 246 F.3d 233, 241 (3d Cir. 2001) (“The filing of a voluntary petition in bankruptcy court commences a bankruptcy case and creates a bankruptcy estate comprised of the debtor’s property as of the commencement of the case.”); *In re Garnett*, 303 B.R. 274, 278 (E.D.N.Y. 2003) (discussing the filing of a petition under § 301, stating that “the code is clear with respect to the commencement of a case”); *In re St. Joseph Cleaners, Inc.*, 346 B.R. 430, 434 (Bankr. W.D. Mich. 2006) (“All bankruptcy cases begin with the filing of a petition.”); *In re Tomco*, 339 B.R. 145, 159 (Bankr. W.D. Pa. 2006) (“This Court holds that the operative event which triggers the commencement of a bankruptcy case, and this Court’s jurisdiction, is the filing of a petition.”); *Berge v. Sweet (In re Berge)*, 37 B.R. 705, 706 (Bankr. W.D. Wis. 1983) (“A non-bankruptcy civil ‘case’ is commenced by a complaint and usually ends, if pursued, in a judgment. Fed. R. Civ. P. 3, 54. A bankruptcy ‘case’ commences with the filing of a petition – 11 U.S.C. §§ 301, 302(a), 303(b), Fed.R.Bankr.P. 1002(a), 1003(a), 1004, 1005 – and may include a number of adversary proceedings (commenced by complaint under Fed. R. Bankr. P. 7003) and ‘contested matters’ (begun by motion under Rule 9014).”)

filing, *see, e.g., Thomas America Corp. v. Fitzgerald*, 968 F. Supp. 154, 157 (S.D.N.Y. 1997) (concluding that the bankruptcy case commences with the filing of the petition, not with the notice of commencement of the case), and today with electronically filed cases, *see, e.g., In re Sands*, 328 B.R. 614, 619 (Bankr. N.D.N.Y. 2005) (stating that the petition is electronically filed only when “counsel clicks the ‘next’ tab and the Court’s CM/ECF server receives the transmission,” for only then does the clerk’s office have possession of the petition, and only then is the case filed).

The Bankruptcy Court admits that its perspective concerning case commencements has been rigidly fixed on the voluntary petition as the only document that properly initiates a case. It thus reviews its procedures for receiving a newly filed case in order to understand and to remedy the error the District Court found.

Once the filer transmits the data and PDF file of the voluntary petition (by clicking the “next” button), the court’s CM/ECF server receives the transmission and records the information. The CM/ECF system electronically generates the caption on the docket report from the data that was input by the filer on the “party information” screen. After the petition is filed electronically, the court’s case administrator reviews it.

The Bankruptcy Court’s quality control procedures begin with an examination of the PDF document. Following a checklist used for each new case filed, the case administrator first compares the debtor’s name, address, and social security number on the Voluntary Petition with the name, address, and social security on the caption of the docket report to verify that they are identical. She then confirms that the case is filed in the proper division, that the PDF file is legible, that the signature lines reflect the electronic or the actual signature, and that the bankruptcy chapter is properly indicated. She also determines whether any documents are missing. She examines the docket and matrix and then issues the 341 meeting notice.

In this case, the case administrator found three mistakes. First, the name and other information of the debtor on the Voluntary Petition did not match the caption of the docket report. She therefore changed the caption on the docket report to make it reflect the same name and other information on the Petition. She was trained to recognize that the caption must name as the debtor the party who filed the voluntary petition.

Accuracy in the caption of the bankruptcy petition is of substantive importance – not a mere matter of form. The caption of the case informs a creditor of exactly who filed the bankruptcy, so that a creditor has opportunity to determine whether it has a claim against that Debtor’s estate.

Ellett v. Goldberg (In re Ellett), 317 B.R. 134, 142 (Bankr. E.D. Cal. 2004) (quoting *In re Anderson*, 159 B.R. 830, 838 (Bankr. N.D. Ill. 1993) (citations omitted); see also *Wetherbee v. Willow Lane, Inc. (In re Bestway Products, Inc.)*, 151 B.R. 530, 536 (Bankr. E.D. Cal. 1993) (stating that “the debtor’s identity must be determined on the basis of the petition, schedules, and statements taken as a whole”).

The case administrator also found that Ms. Sharafinski’s actual signature was missing. The Bankruptcy Court therefore issued its Order of October 31, 2005, asking her to file, within three days, her signature page with her hand-written signature on it. *See* R. 5, Order of October 31, 2005. Three days later, no document had been filed.

The case administrator additionally found that documents filed in Case No. 05-50318 had different captions. On November 2, 2005, therefore, the Bankruptcy Court issued an Order to Show Cause. *See* R. 10. It stated that certain documents (the Verification of Creditor Matrix, Matrix, and Signature Pages) were electronically filed in Case No. 05-50318 but that the caption on those documents (*In re Meshack O. Osiro*) did not correspond with the caption in this case (*In re Ursula Marie Sharafinski*). The court gave Mr. Hains, as counsel for the petition filer Sharafinski, eight days to show why the filing of those documents bearing Mr. Osiro’s name should not be stricken. *See id.*

On November 2, 2005, the Bankruptcy Court received from Mr. Hains a Motion to Correct Scrivener’s Error and to Amend Caption. *See* R. 6. It made no reference to the Order of October 31 or to the three-day deadline it imposed on Ms. Sharafinski. Although it used the Sharafinski caption, the Motion was brought to the court by “the Debtor, Meshack Osiro, by Counsel,” and it asked the court to allow counsel to file the PDF format of Mr. Osiro’s voluntary petition and to amend the docket report caption to reflect Mr. Osiro as

the filing debtor.²³ The Motion was not accompanied by a brief in support or by citations to case law. *See* N.D. Ind. L.B.R. B-7007-1(a); *In re King*, __ B.R. __, 2006 WL 1994679 at *1 (Bankr. N.D. Ind. 2006).

The Bankruptcy Court realized that the Hains Law Firm’s technician, a trained ECF user, had been taught to check the PDF file when uploading it and thus could have corrected the error before the electronic filing. The Court also knew that the Notice of Bankruptcy Filing clearly indicated that the Sharafinski PDF file had been uploaded.²⁴ It seemed clear that the Firm’s technician had neither reviewed the document before transmitting the case nor thoroughly reviewed the Notice after transmitting it, and therefore Mr. Osiro’s petition was never filed in the Bankruptcy Court. Once again, the Bankruptcy Court stood firm on its maxim that a petition initiates a bankruptcy case. In a brief order, therefore, the Bankruptcy Court denied Mr. Hains’s Motion to Correct Scrivener’s Error. *See* R. 13, Order of November 4, 2005. In a second brief order issued on the same date, it found that Ms. Sharafinski had duplicate Voluntary Petitions under Case No. 05-50307 and Case No. 05-50318, and it ordered the debtor to show cause why her second chapter 7 voluntary petition, in Case No. 05-50318, should not be dismissed. *See* R. 14. The Order set a hearing on the matter.

²³ The crux of the argument was found in the seventh paragraph of the Motion to Correct Scrivener’s Error:

7. That due to scrivener’s error, the PDF Voluntary Petition of Ursula Maria [*sic*] Sharafinski was mistakenly filed. However, the technician had no knowledge, at the time, that the wrong PDF file had been uploaded since the confirmation of the filing of the Voluntary Petition from the ECF system clearly indicated that a new bankruptcy file had been opened on behalf of Meshack Osiro, under Case No. 05-50318, as shown by the attached Exhibit A.

R. 6 at 2. [Exhibit A was the Notice of Bankruptcy Case Filing.] The Motion pointed out that the signature pages, Verification of Mailing Matrix, and the accompanying matrix of Mr. Osiro were electronically filed in the case, and then contended that “the controlling documents filed in this matter should be the signature pages of Meshack Osiro for the Voluntary Petition and the Verification of Mailing Matrix.” *Id.* at 2, ¶ 11. Mr. Osiro asked the court to allow his counsel “to file the PDF format” of Mr. Osiro’s voluntary petition and to “amend the caption” to reflect Mr. Osiro as the filing debtor. *See id.* at 3. In a separate document, Mr. Osiro asked for an enlargement of time in which to file the petition and other documents. *See* R. 8.

²⁴ The Hains Law Firm did not argue in the Bankruptcy Court, as it had in the District Court, that “[t]he petition’s sole defect was that it included Sharafinski’s information on its first page.” Appellant’s Br. at 10.

The debtor Ms. Sharafinski did not respond to the court's show cause Order of November 2, 2005. She did not present to the court the reason that the Verification of Creditor Matrix, Matrix, and Signature Pages were electronically filed in her case under a caption naming Mr. Osiro as the debtor. The Bankruptcy Court had before it the following electronically filed documents in this case: Ms. Sharafinski's petition, schedules, matrix, verification of matrix, and other supporting documents; and Mr. Osiro's signature page, matrix, and verification of matrix. Because the court's procedures inflexibly were derived from the § 301 mandate that a voluntary case begins with the filing of a bankruptcy petition, the Bankruptcy Court easily concluded that Ms. Sharafinski's petition, rather than Mr. Osiro's separately filed documents, governed the filing of the case. For that reason, it had sought a proper signature page from Ms. Sharafinski, to complete her bankruptcy filings. After debtor Ms. Sharafinski had failed to respond to the court's Order of October 31, 2005, and also to the Orders of November 2 and 4, 2005, the Bankruptcy Court issued an order on November 17, 2005, striking the voluntary petition and dismissing the case for failure to file the appropriate signature page. *See* R. 19.

"The Debtor Meshack O. Osiro, the intended party in this cause," then filed a Motion to Alter Order Striking Voluntary Petition and Dismissing Case. R. 22. It stated that "counsel for Meshack O. Osiro, Hains Law Firm, LLP, filed a voluntary petition for bankruptcy on his behalf." *Id.* ¶ 1. The Bankruptcy Court was aware, however, that no voluntary petition was filed for Mr. Osiro. Mr. Hains's Motion also stated that "Mr. Osiro's petition was inadvertently filed under the name of Ursula Marie Sharafinski."²⁵ *Id.* The Bankruptcy Court knew that two Sharafinski petitions has been filed electronically but that no Osiro petition had been filed under any

²⁵ The District Court did not base its decision on the Hains Law Firm's inadvertent misfiling of the voluntary petition, but Mr. Yarbrow argued that the act was excusable neglect. The law is clear that an attorney's failure to attach the proper PDF file does not constitute excusable neglect, because the reason for the error was "within the reasonable control of the movant." *Pioneer Investment Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395, 113 S. Ct. 1489, 1498, 123 L.Ed.2d 74 (1993); *see also Prospal v. Nelson (In re Nelson)*, __ B.R. __, 2006 WL 2135883 at *2-3 (Bankr. N.D. Ind. 2006) (finding that counsel and staff, despite having taken ECF training, were not familiar with how to download orders but nevertheless were responsible for their cases). In addition, "a lawyer's mistake is not a valid basis for equitable tolling." *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999) (citations omitted).

name. Once again, the Hains Law Firm's Motion was not accompanied by a brief in support or by citations to case law. *See* N.D. Ind. L.B.R. B-7007-1(a); *In re King*, __ B.R. __, 2006 WL 1994679 at *1.

On November 30, 2005, the Bankruptcy Court denied the Motion to Alter Order. *See* R. 24. It stated that, pursuant to the Fifth Amended Order Authorizing Electronic Case Filing, "the filing party is bound by the document as filed." *Id.* at 1. The court pointed out that the Hains Law Firm had admitted that Ms. Sharafinski's bankruptcy petition was mistakenly filed in this case; it did not claim an error by ECF or by the court. The court's Order stated that the filing of Mr. Osiro's signature page in a case commenced by Ms. Sharafinski's voluntary petition was not a clerical or scrivener's error, but rather an improper filing in bankruptcy. *See id.* It upheld the previous orders striking the petition and dismissing the case. Mr. Hains appealed that determination.

Having reviewed the procedural history of this case, the Bankruptcy Court now returns to the Order of October 31, 2005, and its dismissal of the case in the Order of November 17, 2005, to determine what further proceedings to implement. Because the Bankruptcy Court knew that Mr. Osiro never filed a petition, it took the single-minded position that Mr. Osiro was not a debtor in this Bankruptcy Court. It recognized that the Hains Law Firm could have provided Mr. Osiro bankruptcy protection by filing his petition correctly or by correcting the mistaken filing on the evening of October 16, 2005. It knew that both Mr. Hains and Ms. Wright were trained to recognize the check points, the warnings, and the reviewing techniques that could have been used to catch the erroneously attached PDF file of Ms. Sharafinski and to attach the proper PDF file of Mr. Osiro under the old bankruptcy law, as they had planned.²⁶

The Bankruptcy Court does not question the sincere intention of the Hains Law Firm to file Mr. Osiro's bankruptcy case. It does not doubt that the electronic filing of the Sharafinski petition twice, once in Case

²⁶ *See Prospal v. Nelson (In re Nelson)*, __ B.R. __, 2006 WL 2135883 at *2 n.3 ("How difficult can it be to activate a hyperlink (via a left mouse click) on an electronic docket or in a notice of electronic filing to open a docket and read it?"); *cf. In re Harris*, 341 B.R. 660, 662 n.1 (Bankr. N.D. Ind. 2006) ("The notice of electronic filing . . . bore the following statement: 'Warning: Case Closed on April 20, 2004.' Why the Credit Union did not immediately realize that its claim had been filed in the wrong case is not explained.").

No. 05-50307 and again in Case No. 05-50318, was an unintended mistake. Nevertheless, Ms. Sharafinski's petition was filed in Case No. 05-50318, the case presently before the court.

The District Court, by telling the Bankruptcy Court that its Order of October 31 "was directed to the wrong person" and that "the order should have been directed to Meshack Osiro, the filing party, not to Ursula Sharafinski," R. 31 at 3, makes clear that this court improperly maintained a tunnel-vision approach by insisting that only a debtor who files a voluntary petition can commence a case and receive bankruptcy protection. This court now weighs what further proceedings, consistent with the District Court's Order, it should take.

The issue that usually comes before a bankruptcy court is whether the party who filed a petition in order to commence a case was eligible to be a debtor.²⁷ It is clear that "putative debtors" who intended but failed to comply with essential requirements of the Bankruptcy Code are not eligible to be debtors.²⁸ However, in this case the Bankruptcy Court has been ordered to accept as a debtor one who did not file a voluntary petition.²⁹ The

²⁷ See, e.g., *In re Elmendorf*, 345 B.R. 486, 497 (Bankr. S.D.N.Y. 2006) (concluding that a "voluntary case is commenced only if an entity *eligible to be a debtor* files a petition with the bankruptcy court"); *In re Thompson*, 344 B.R. 899, 908 (Bankr. S.D. Ind. 2006) (striking petition of ineligible debtor who failed to comply with BAPCPA's credit counseling requirements); *In re Steffens*, 343 B.R. 696, 698 (Bankr. M.D. Fla. 2005) (dismissing case of debtors whose debt amount made them ineligible to qualify under chapter 13); *In re Vitagliano*, 303 B.R. 292, 294 (Bankr. W.D.N.Y. 2003) (finding that case was never commenced by the filing of a petition signed not by the putative debtor but by his mother); *Miller v. First Federal Sav. & Loan Ass'n*, 143 B.R. 815, 820 (Bankr. W.D. Pa. 1992) (dismissing case because putative debtor filed subsequent case within 180 days of prior petition).

²⁸ Another question frequently litigated is at what time a petition is actually filed. See *In re Murphy*, 342 B.R. 671, 674 (Bankr. D.C. 2006) (concluding that, even though counsel opened a docket on one day, "no case was actually commenced until the petition was filed the next day"); *In re Sands*, 328 B.R. 614, 619 (Bankr. N.D.N.Y. 2005) (finding that the petition must be in the Bankruptcy Court Clerk's possession for the case to be filed; "[l]ogging on is not enough").

²⁹ The Hains Law Firm also argued in the district court that "the signature pages, caption and creditor matrix should be given controlling effect in determining whether Osiro is the proper debtor in this case." Br. at 14. However, none of the cases cited in the Brief supports that assertion. See *In re Phillips*, 317 B.R. 518, 523 (8th Cir. B.A.P. 2004) (affirming that attorney violated Rule 9011 by electronically filing a petition representing that the debtor had signed the petition when he had not signed); *In re Lyman*, 166 B.R. 333, 337 (Bankr. S.D. Ill. 1994) (finding that, when creditors are not listed on the matrix, they are not barred from filing a complaint after the bar date); *AM Int'l, Inc. v. Wella Corp. (In re AM Int'l, Inc.)*, 142 B.R. 252, 256 (Bankr. N.D. Ill. 1992) (finding that debtor's notice of bar date to creditors was not sufficiently informative).

Hains Law Firm did not ask simply to exchange some erroneous information on a properly filed petition; it asked to swap PDF files – and therefore to swap debtors. The District Court, by its Order, agrees with the Hains Law Firm that the Bankruptcy Court must allow Mr. Osiro (the appellant in its court, even though he never was a debtor in this court) to change the filed voluntary petition from Ms. Sharafinski to a voluntary petition from Mr. Osiro because in its view he actually was the debtor in Case No. 05-50318. The Bankruptcy Court realizes that the District Court’s vacating of this court’s dismissal of Case No. 05-50318 necessarily creates the reinstatement of Ms. Sharafinski’s duplicate petition. The District Court’s Order of further proceedings, therefore, must require this court to allow the amendment of that voluntary petition so that Mr. Osiro’s petition is substituted for hers. The Bankruptcy Court now considers how or whether it can amend Ms. Sharafinski’s petition in this way.

“A voluntary petition . . . may be amended by the debtor as a matter of course at any time before the case is closed.” Fed. R. Bankr. P. 1009(a). “A failure to conform to the formalities prescribed by the Federal Rules of Bankruptcy Procedure and the Official Form will not, except in unusual circumstances, result in the dismissal of a petition or accompanying papers.” 2 *Collier on Bankruptcy*, ¶ 301.14[1] at 301-40. The rule is permissive; however, it is “tempered by considerations of fairness to parties who have acted in reliance on the originally filed papers.” *Id.* Amendments of petitions are appropriate, for example, to correct scrivener’s errors and to clarify misnomers. *See, e.g., Waterside Apts., Inc. v. Havee (In re R.S. Grist Co.)*, 8 B.R. 790, 793 (Bankr. S.D. Fla. 1980) (allowing amendment of petition to correct misnomer of corporation and when identity of the debtor could be determined with certainty).

However, a petition may not be amended to make such substantive changes as to add a spouse and thereby to create a joint case. *See, e.g., In re Olson*, 253 B.R. 73, 74 (9th Cir. BAP 2000); *In re Buerman*, 295 B.R. 876, 877 (Bankr. W.D. Ark. 2003); *In re Clinton*, 166 B.R. 195, 200 (Bankr. N.D. Ga. 1994). Moreover, “a court might deny leave to amend on a showing of a debtor’s bad faith or of prejudice to creditors.” 2 *Collier on Bankruptcy* ¶ 301.14[1] at 301-40, -41, n.10 (quoting *Doan v. Hudgins (In re Doan)*, 672 F.2d 831 (11th Cir.

1982)). “Finally, the court will dismiss a debtor’s petition for cause where such dismissal is in the ‘best interests of the creditors and debtor’s estate.’” 2 *Collier on Bankruptcy*, ¶ 301.17[4] at 301-47 (citing cases).

Courts have refused to apply a broad construction of Rule 1009(a) and have denied this type of amendment citing two primary concerns: (1) the prejudice to creditors, and (2) the absence of any clear authority to permit such an amendment. . . . [G]ranteeing a motion to add a spouse in this manner [also] raises serious questions as to the appropriate filing date.

In re Buerman, 295 B.R. at 877 (citations omitted).

This Bankruptcy Court has found no cases allowing a petition to be amended so that another debtor’s petition would replace it, and the Hains Law Firm has cited none to this court or to the District Court.³⁰ However, there are cases refusing to allow such swaps:

Although there are many decisions citing this rule [1009(a)] in connection with amendments of schedules, the court could find no reported case dealing with the amendment of a petition. As to petitions it seems likely that the drafters of this rule intended to facilitate corrections of clerical errors and to permit amendments of allegations of jurisdictional facts supporting voluntary or involuntary petitions. No one would seriously argue that the rule would permit an amendment to substitute a new and different debtor. The identity of the debtor and the debtor's estate obviously cannot be a moving target that leaves trustees and creditors guessing whether an amendment may retroactively invoke the automatic stay to protect a totally different entity than the one identified in the original petition.

In re Clinton, 166 B.R. at 198 (emphasis added); *see also Otto v. Biltmore Grande Apartment Trust (In re Biltmore Grand Apartment Bldg. Trust)*, 149 F.2d 685, 685 (7th Cir. 1945) (affirming, in dictum, the dismissal of petitions “asking that the petitioner be substituted as debtor in a proceeding already instituted by another alleged debtor” and affirming the denial of counsel’s request for fees in that matter).

The Hains Law Firm sought to have Mr. Osiro’s petition substituted for Ms. Sharafinski’s as of the original date of the filing of her petition, October 16, 2005. “The filing date of a bankruptcy petition is of fundamental importance to the case since under various Code provisions a number of rights, obligations and deadlines are determined by that filing date.” *In re Woodell*, 96 B.R. 614, 615 (Bankr. E.D. Va. 1988).

³⁰ The Bankruptcy Court reiterates that the Hains Law Firm’s argument in the District Court was based on the misinformation that only the information on the first page of the petition needed to be replaced. It therefore would not have offered case law to support the position that the entire petition of Mr. Osiro must replace the entire petition of Ms. Sharafinski.

The filing of the petition in bankruptcy is significant because it “triggers an automatic stay of actions against the debtor, the creation of an estate, and the appointment of a trustee.” *Leonard v. St. Rose Dominican Hosp. (In re Majewski)*, 310 F.3d 653, 656 (9th Cir.2002) (citation omitted). “The petition is essential to the proper operation of the bankruptcy process, and all parties suffer if a petition is improperly prepared.” *In re Moore*, 283 B.R. 852, 857 (Bankr. E.D.N.C. 2002).

Scott v. U. S. Trustee (In re Doser), 412 F.3d 1056, 1062 (9th Cir. 2005). Only the debts owed at the time of the filing of the petition are subject to discharge under § 727. Once the petition is filed, the automatic stay is entered. The stay is imposed so that the administration of the debtor’s estate can be orderly. See *In re Garnett*, 303 B.R. 274, 277-78 (E.D.N.Y. 2003).

It is clear that a case is commenced by the filing of the petition, and that once a case is commenced, the bankruptcy court has exclusive jurisdiction over the property of the debtor and of the bankruptcy estate. The imposition of the automatic stay concentrates this jurisdiction in the bankruptcy court by preventing any action in another court against either the debtor or the property of the estate. In so doing, the stay prevents creditors with competing claims from filing actions in different courts in order to be first to get a share of the debtor's property. The stay also prevents the confusion and disorder that would result from simultaneous adjudication of the same matters in different courts. It is to further these policies that the stay is imposed once the case is commenced, and while the case is pending.

Id. at 277. In this case, much confusion would result from a claim that the automatic stay has been effective since October 16, 2005. The Bankruptcy Court has not had control over Mr. Osiro’s property interests in the past year; it has not determined entitlements to distributions or established procedures for administering the property and for discharging the debtor. It is hard to imagine a situation more disruptive or prejudicial to creditors than a retroactive substitution of a new and different debtor. See *In re Walker*, 169 B.R. 391, 393 (Bankr. W.D. Tenn. 1994) (refusing to read Rule 1009(a) to permit an amendment of a petition to alter the debtor).

Another bankruptcy court of this district has held that the Bankruptcy Court “does not have the authority to allow the retroactive filing of a case which was not filed earlier because counsel experienced computer problems when the court’s ECF system was otherwise up and running and functioning properly.” *In re Sizemore*, 341 B.R. 658, 660 (Bankr. N.D. Ind. 2006) (Grant, J.). In *Sizemore*, counsel had attempted and failed to file a case on October 16, 2005. When he finally filed the case on February 15, 2006, he asked the court to treat it as though it had been filed on October 16, 2005. That bankruptcy court considered the ways in which

a party could be excused for his error: A party may be relieved from a final judgment under Fed. R. Civ. P. 60(b) or may be granted an extension of time under Fed. R. Bankr. P. 9006(b)(1). However, the court found, those two rules operate and are applied to a case that already was commenced because a petition was filed. *See id.* at 659.

That court also considered whether electronic filing mistakes could be excused:

While the court's order authorizing electronic filing contemplates that relief may be sought from the court if a filing is not timely because of a technical system failure, that provision is largely premised upon the authority found within such things as Rule 9006 and Rule 60 and, as such, operates within the context of a case that already exists. The court acknowledges that if it is closed because of unanticipated events such as weather, or if other local conditions have made the clerk's office inaccessible, some filing deadlines may be suspended. But it is not aware of any authority that would apply this principle to an individual filer who was not able to file a case for reasons that were unique to it, such as where counsel became stuck in traffic en route to the courthouse and, as a result, failed to file before the statute of limitations expired.

Id. at 659-60 (citations omitted). That bankruptcy court, reviewing facts quite similar to those in this case, concluded that it was without authority to allow a retroactive filing of a bankruptcy case.

Last year, this Bankruptcy Court considered a case involving a circumstance like the one presently before it. In *In re Bradley*, 342 B.R. 783 (Bankr. N.D. Ind. 2005), debtor's counsel had electronically filed many voluntary petitions right before BAPCPA became effective. He intended to file a petition for a Mr. Austin, but instead he attached Mr. Bradley's petition as the PDF document to the Austin filing. The case administrator in the bankruptcy court, following the quality control procedures, found that the Bradley petition had been filed twice (once in the *Bradley* case, once in the *Austin* case). When the court ordered Mr. Bradley to show cause why the duplicate case should not be dismissed, debtor's counsel filed a motion explaining the rushed filing circumstances of the pre-BAPCPA weekend and asking to substitute Austin's petition for Bradley's in the *Austin* case. The court conducted a hearing and denied the motion.

The Bankruptcy Court noted that "[b]ankruptcy attorneys are bound by the ECF administrative procedures and by the documents they file through the ECF system." *Id.* at 788. Finding that Bradley's petition, and not Austin's, was filed in that case, it stated that the "case was triggered by the filing of the bankruptcy petition, not by the entry of the docket information input by the attorney." *Id.* The court then denied the motion

to substitute a different real party for the actual debtor whose petition was attached as a PDF document. *See id* at 789. Finally, because the attachment of the wrong PDF file could not be found to be excusable neglect, this court found no justification to excuse the error and allow the substitution of debtors. *See id.* at 790. It dismissed Bradley’s petition as a duplicate filing on the ground that the bankruptcy petition governs the case.

This Bankruptcy Court is caught on the horns of a dilemma. The District Court has vacated the dismissal of Case No. 05-50318 and has remanded it as “Mr. Osiro’s bankruptcy proceedings.” R. 31 at 4. The District Court’s Opinion and Order appears to require that this court reinstate Ms. Sharafinski’s duplicate case, substitute Mr. Osiro’s petition for hers, and then proceed with the bankruptcy case, with Mr. Osiro as the debtor, nunc pro tunc – as if the proceeding could continue today but under the bankruptcy law as it existed before BAPCPA, on October 16, 2005. It is difficult to imagine how that is possible – how the automatic stay would apply to this new debtor, how deadlines would be measured, whether the bill payments Mr. Osiro probably made in the past year would be considered preferential transfers, whether decisions by other courts (if any were rendered) would be null and void.

This Bankruptcy Court has reconsidered its determinations in Case No. 05-50318. After holding a hearing on the matter, it has re-evaluated the reasons for its findings and Orders in light of the underlying bankruptcy law and the record in this case. It has addressed all aspects of the District Court’s Opinion and Order, in its attempt to carry out the remand order. Therefore, in compliance with the District Court’s Order vacating the dismissal of Case No. 05-50318, this Bankruptcy Court now reinstates Case No. 05-50318, *In re Sharafinski*.

After considering what further proceedings would carry out the dictates of the District Court, however, this court concludes that it is bound by the legal principle of 11 U.S.C. § 301 to honor the petition that commenced this case, namely Ms. Sharafinski’s petition. Because it believes that the District Court was misinformed concerning the record in this case, the Bankruptcy Court finds that Case No. 05-50318 is not and cannot be “Mr. Osiro’s bankruptcy proceedings.” It is simply a fact that Mr. Osiro has never filed a bankruptcy

petition in this Bankruptcy Court and therefore has not commenced a case. Without a petition filed by Mr. Osiro, there is no petition of Mr. Osiro to amend.

The Bankruptcy Court, after reviewing every legal and procedural “further proceeding,” finds it impossible to amend the unfiled petition of Mr. Osiro, to substitute his petition for the filed Voluntary Petition of Ms. Sharafinski, or to commence “Mr. Osiro’s bankruptcy proceedings.” The Bankruptcy Court therefore once again dismisses the duplicate Voluntary Petition of Ursula Marie Sharafinski that was filed in Case No. 05-50318.

Conclusion

For the reasons set forth above, the Bankruptcy Court reinstates Case No. 05-50318, *In re Ursula Marie Sharafinski*. For the reasons presented in this court’s Order of November 17, 2005, the voluntary petition of Ursula Marie Sharafinski is stricken and the case is dismissed due to the failure to comply with the court’s Order of October 31, 2005, by filing signature pages.

SO ORDERED.

/s/ Harry C. Dees, Jr.
HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT