The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document was signed electronically on September 21, 2011, which may be different from its entry on the record.

IT IS SO ORDERED.

Dated: September 21, 2011

ARTHUR I. HARRIS
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

In re:	)	Case No. 09-21538
	)	
River Edge Auto Service, Inc.,	)	Chapter 7
Debtor.	)	
_____	)	
	)	Adversary Proceeding
River Edge Auto Service, Inc.,	)	No. 10-1077
Plaintiff,	)	
	)	Judge Arthur I. Harris
v.	)	
	)	
Willoughby Hills Development & Distribution, Inc., *et al.*,	)	
Defendants.	)	

MEMORANDUM OF OPINION[1]

This matter comes before the Court on the motion of creditor Willoughby Hills Development and Distribution Corporation, Inc. ("Willoughby Hills"), for

[1] This opinion is not intended for official publication.

reconsideration of the Court's July 7, 2011, order. The Court has considered the arguments in the motion and reviewed the record of the trial held on June 8 & 9, 2011, including all relevant testimony and evidence. For the reasons that follow, the motion for reconsideration is denied.

JURISDICTION

This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O). The Court has jurisdiction over core proceedings under 28 U.S.C. §§ 1334 and 157(a) and Local General Order No. 84, entered on July 16, 1984, by the United States District Court for the Northern District of Ohio.

DISCUSSION

Although Willoughby Hills captioned its motion as a motion for reconsideration, the Court will treat it as a motion under Bankruptcy Rules 7052, 9023, and 9024, which respectively incorporate Rules 52, 59, and 60 of the Federal Rules of Civil Procedure. Under Rule 59, "a court may alter the judgment based on: "(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice." *Intera Corp. v. Henderson*, 428 F.3d 605, 620 (6th Cir. 2005). *See also Gencorp, Inc., v. American Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999). "To constitute 'newly discovered evidence,' the evidence must have been previously

unavailable." *Gencorp*, 178 F.3d at 834. A motion to alter or amend judgment under Rule 59(e) "is not a substitute for appeal and does not allow the unhappy litigant to reargue the case." *Bollenbacher v. Commissioner of Social Security*, 621 F. Supp.2d 497, 500-01 (N.D. Ohio 2008) (citations omitted). *See also Exxon Shipping Co. v. Baker*, 554 U.S. 471, 486 n.5, 128 S. Ct. 2605, 2617 n.5 (2008) ("Rule 59(e) . . . 'may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.' ") (quoting 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2810.1 pp. 127-28 (2d ed. 1995)).

"The standard for granting a Rule 60 motion is significantly higher than the standard applicable to a Rule 59 motion." *Feathers v. Chevron U.S.A., Inc.*, 141 F.3d 264, 268 (6th Cir. 1998). A Rule 60(b) motion may be granted only for certain specified reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Chevron U.S.A. Inc.,141 F.3d at 268. In order to prevail on a Rule 60(b)(2) motion a "movant must demonstrate (1) that it exercised due diligence in obtaining the information and (2) [that] the evidence is material and controlling and clearly would have produced a different result if presented before the original judgment. In other words, the evidence cannot be merely impeaching or cumulative." *Good v. Ohio Edison Co*., 149 F.3d 413, 423 (6th Cir. 1998) (internal quotations and citations omitted).

Willoughby Hills asks this Court to reconsider its decision based upon the allegations that: 1) Ohio Gas Station 4 could not have given value on July 31, 2009, because it was not incorporated until August 5, 2009; and 2) Ohio Gas Station 4 had actual notice of Willoughby Hills' security interest on August 5, 2009. The Court will analyze each element in turn.

Date of Incorporation

In its motion for reconsideration, Willoughby Hills includes as an exhibit the articles of incorporation of Ohio Gas Station 4, which provide that Ohio Gas Station 4 was incorporated on August 5, 2009. Because of this newly established fact, Willoughby Hills asserts that Ohio Gas Station 4 did not give value until September 1, 2009, when, Willoughby Hills alleges, the newly incorporated company first accepted the contract by tendering a monthly payment. No evidence

of Ohio Gas Station 4's date of incorporation was presented by Willoughby Hills at trial. There is no indication that this evidence is newly discovered or was unavailable prior to trial. Thus, the incorporation date does not qualify as newly discovered evidence under Rule 59(e) or its more demanding counterpart, Rule 60(b)(2).

However, because the date referenced in the articles of incorporation is consistent with Mr. Abouhashem's testimony regarding the date he filed his corporate papers, this Court is inclined to modify its prior ruling, in part. The Court may have erred by not considering the significance of the incorporation date, but even accepting August 5, 2009, as the date of incorporation by no means establishes September 1, 2009, as the date when Ohio Gas Station 4 first adopted the contract or otherwise gave value for purposes of Ohio Revised Code § 1309.317. As Willoughby Hills points out, "Some Courts have held that a corporation adopts or assumes a contract made by its promoter when it benefits from such contract with knowledge of its terms." (Docket #45 p. 4) (citing *Illinois Controls, Inc. v. Langham*, 70 Ohio St. 3d 512 (1994)). *See also* Restatement (Third) of Agency, § 4.04, cmt. c (2006) ("A corporation may adopt a contract made by a promoter by accepting its benefits with knowledge of its terms."). In the present case, Mr. Abouhashem was the sole promoter, director, and stockholder

of the newly formed corporation. *See Crye-Leike Realtors, Inc., v. WDM, Inc*., No. 02A01-9711-ch-00287, 1998 WL 651623 at *4 (Tenn. Ct. App. 1998) ("as a general rule, the knowledge of a single promoter cannot be imputed to the corporation, [except] 'where the promoters become directors and stockholders in the corporation or are the *sole or controlling stockholders*.' " (quoting 18 Am. Jur. 2d *Corporations* § 127 (1985) (emphasis added)). Thus, it is apparent that on August 5, 2009, Ohio Gas Station 4 had knowledge of the contract, and began conducting business pursuant to the guidelines of that contract. *See WDM, Inc*., 1998 WL 651623 at *5 (where a corporation tendered payments and license fees by checks drawn on corporate account, accepted goods, and substantially complied with other terms of the franchise agreement, the corporation affirmed and ratified the contract). In all likelihood, Ohio Gas Station 4 adopted the contract on August 5, 2009, immediately upon incorporation, by continuing to operate the gas station – *i.e.*, accepting the benefits of the contract and having full knowledge of its terms. Thus, even if Ohio Gas Station 4 could not give value until it adopted the contract, the Court is unconvinced that adoption occurred as late as Willoughby Hills alleges.

As the Court indicated in its oral ruling, Ohio Gas Station 4 did not receive the property for free. Ohio Gas Station 4 gave value by accepting the obligations

outlined in the contract in return for consideration to support a simple contract – *i.e.*, the receipt of the benefits of the contract. *See* 1 James J. White and Robert S. Summers, *Uniform Commercial Code* § 3-12 (5th ed. 2006) ("almost any purchaser, except a donee, gives value. Satisfaction of an antecedent debt is value. Value itself is rarely a hurdle.").

Affidavit of Mr. Continenza

Willoughby Hills also includes as an exhibit to its motion an affidavit of Anthony Continenza, which provides in pertinent part that "on August 5, 2009 [Mr. Continenza] went to the service station located at 30220 Euclid Avenue, formerly operated by River Edge Auto Service Incorporated and Martin Robbins and approximately $2,300 of beer was turned over to [Mr. Continenza] to be applied to the balance owed by River Edge Automotive Incorporated." Willoughby Hills asserts that Mr. Continenza's visit put Ohio Gas Station 4 on notice of Willoughby Hills' unperfected security interest on August 5, 2009, ten days earlier than the August 15, 2009, date which the Court found in its oral ruling – *i.e.*, the date that Abouhashem and Robbins testified they received a copy of Willoughby Hills' attachment lawsuit by certified mail at the gas station.

The Court rejects this argument for several reasons. First, because the affidavit was used in state court proceedings in 2009, there can be no way, and

Willoughby Hills fails to argue, that this evidence was unavailable at the time of the trial in June of 2011. Second, Mr. Continenza's affidavit establishes only that he visited Ohio Gas Station 4 on August 5, 2009, and left with $2,300 worth of beer. It is a much greater leap in logic for this affidavit to establish that the removal of the beer and any related conversation on August 5, 2009, put Abouhashem (and, therefore, Ohio Gas Station 4) on notice that Willoughby Hills *had a security interest in* the beer or any other personal property that Ohio Gas Station 4 purchased from River Edge.

At trial, Mr. Abouhashem specifically stated that Mr. Robbins gave the beer away without objection from Abouhashem because it was against Abouhashem's religion to sell alcoholic beverages. Mr. Continenza testified that sometime in early August he went to the station and told the apparent manager, in the presence of Mr. Robbins, that he was an agent of Willoughby Hills and was there for the purpose of retrieving beer to pay down a debt owed to Willoughby Hills from River Edge. Mr. Continenza specifically provided "the beer came from Marty. River Edge received a credit toward that beer." In short, nothing established at trial or in the recent affidavit provides a basis for the Court to alter its prior conclusion that August 15, 2009, was the date that Ohio Gas Station 4 was first put on notice of Willoughby Hills' unperfected security interest in personal property

purchased from River Edge.

CONCLUSION

For the reasons stated above, the motion for reconsideration is denied.

IT IS SO ORDERED.