

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

	)	Chapter 11
	)	
In re:	)	Case No. 11-13167 (KG)
	)	
FRIENDLY ICE CREAM CORPORATION, <i>et al.</i> ,	)	Jointly Administered
	)	
Debtors.	)	<b>Re: Docket Nos. 14, 55 and 73</b>
	)	Objection Deadline: 10/17/11
	)	
	)	Hearing Date: 10/24/11, 3:00 p.m.

**OBJECTION OF SPRAGUE ENERGY CORP. TO DEBTORS’ MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS DETERMINING ADEQUATE ASSURANCE OF PAYMENT FOR FUTURE UTILITY SERVICES, AND REQUEST FOR JUDICIAL NOTICE WITH RESPECT TO CERTAIN MATTERS RELATING THERETO**

Sprague Energy Corp., a Delaware corporation and creditor herein (“Sprague”), by and through its undersigned counsel, hereby files this objection and request for judicial notice with respect to certain matters relating thereto (this “Objection”) in response to the Motion For Entry Of Interim And Final Orders Determining Adequate Assurance Of Payment For Future Utility Services (the “Utilities Motion”) [Doc. No. 14] filed by Friendly Ice Cream Corporation and its affiliated debtors (collectively, the “Debtors”) on October 5, 2011. In support of this Objection, Sprague respectfully asserts the following:

**INTRODUCTION**

1. Sprague is one of the largest fuel suppliers and materials handlers in New England, with products including coal, heating oil, diesel fuels, residual fuel oils, gasoline and natural gas.<sup>1</sup>

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<sup>1</sup> See Amendment No. 1 to Form S-1, Registration Statement Under the Securities Act of 1933, Sprague Resources LP, dated Sept. 9, 2011, <http://www.sec.gov/Archives/edgar/data/1525287/000119312511244691/ds1a.htm> (describing Sprague’s business, products, customers, competition, and business risks) (hereafter, the “S-1 Registration Statement”). Sprague Resources LP, which is a Delaware limited partnership, was formed in June 2011

2. Sprague sells natural gas to 64 of the Debtors' business locations in Massachusetts pursuant to the terms of a Natural Gas Sales Agreement between Debtor Friendly Ice Cream Corporation and Sprague dated September 10, 2007, as amended (the "Natural Gas Contract"). A copy of the Natural Gas Contract is attached hereto as **Exhibit B**.

3. Through the Utilities Motion, the Debtors seek entry of interim and final orders prohibiting the Utility Providers named in the Utilities Motion, including Sprague, from altering, refusing or discontinuing services to the Debtors and determining the amount constituting adequate assurance of payment and procedures for modification of such amounts. Utilities Motion, ¶4.

4. Sprague is not a "utility" for purposes of Section 366 of the Bankruptcy Code.

5. Moreover, it is inappropriate of the Debtors to seek – by way of a utility order or otherwise – an injunction prohibiting Sprague from exercising its rights to terminate the Natural Gas Contract pursuant to Section 556 and 561 of the Bankruptcy Code. Both of these sections expressly prohibit any injunction that will prevent a forward contract merchant under a forward contract from terminating that agreement. Because the Natural Gas Contract is a forward contract within the meaning of Section 101(25) of the Bankruptcy Code, the agreement is entitled to the safe harbor treatment afforded it under Sections 556 and 561.

### **JURISDICTION**

6. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

7. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

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"to own and operate the business that has historically been conducted by Sprague Energy Corp." *Id.* at 9. Excerpts from the S-1 Registration Statement describing the nature of Sprague's business, its competition, and the business risks it faces are appended hereto as **Exhibit A**. Page references herein to the S-1 Registration Statement are to the page number appearing at the top right corner of the excerpted page and not to the actual page of the S-1 Registration Statement.

## OBJECTION

### A. Sprague is Not a Utility Subject to Section 366 of the Bankruptcy Code

8. Section 366 of the Bankruptcy Code provides that a utility may not “alter, refuse, or discontinue utility service” to the debtor unless the utility receives “satisfactory” adequate assurance of payment for utility service from the debtor or trustee within 30 days of the petition date. 11 U.S.C. § 366(c)(2).

9. Section 366 of the Bankruptcy Code was enacted to balance a debtor’s need for utility services from a provider that holds a monopoly on such services, with the need of the utility to ensure for itself and its rate payers that it receives payment for providing these essential services. *See In re Hanratty*, 907 F.2d 1418, 1424 (3d Cir. 1990).

10. The Bankruptcy Code does not define the term “utility.” The legislative history of Section 366 of the Bankruptcy Code, however, indicates that Congress intended Section 366 to apply only to those “utilities” that have a special position with respect to the debtor. Utilities may include, for example, “an electric company, gas supplier, or telephone company that is a monopoly in the area so the debtor cannot easily obtain comparable services from another utility.”<sup>2</sup>

11. Consistent with the legislative history, courts that have construed Section 366 have consistently found that Section 366 only applies to traditional “utilities” that enjoy a

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<sup>2</sup> The legislative history to Section 366 of the Bankruptcy Code states, in relevant part:

This section gives debtors protection from a cut-off of service by a utility because of the filing of a bankruptcy case. This section is intended to cover utilities that have some special position with respect to the debtor, such as an electric company, gas supplier, or telephone company that is a monopoly in the area so that the debtor cannot easily obtain comparable service from another utility. The utility may not alter, refuse, or discontinue service because of the nonpayment of a bill that would be discharged in the bankruptcy case.

House Report No. 95-595, 95th Cong., 1st Sess. 350 (1977); *see* Senate Report No. 95-989, 95<sup>th</sup> Cong., 2d Sess. 60 (1978) (emphasis added).

monopolistic position. *See One Stop Realtour Place, Inc. v. Allegiance Telecom, Inc.*, 268 B.R. 430, 436 (Bankr. E.D. Pa. 2001) (telephone company is within the meaning of a utility); *Kiriluk v. Chester Water Auth.*, 76 B.R. 979 (Bankr. E.D. Pa. 1987) (a provider of sewer service is a utility); *In re Gehrke*, 57 B.R. 97 (Bankr. D. Or. 1985) (an electric co-op association is a utility); *Good Time Charlie's Ltd. v. Black*, 25 B.R. 226 (Bankr. E.D. Pa. 1982) (shopping mall that supplied debtor with electricity was a utility). In each case, the debtor was dependent on the services provided by the utility and such services were unavailable from any other source.

12. Sprague is not a utility subject to Section 366 of the Bankruptcy Code. Sprague is not a public service provider. It does not have “ratepayers.” Its sales of natural gas to the Debtors and other natural gas customers are not regulated by state public utilities commissions or the Federal Energy Regulatory Commission. And it does not hold a monopoly with respect to its sales of natural gas.

13. Rather, Sprague is a private natural gas supplier that is subject to vigorous competition from 95 other natural gas suppliers and distributors in Massachusetts alone. Specifically, Sprague competes to supply natural gas with 85 private competitive natural gas suppliers licensed to provide natural gas to Massachusetts customers and 11 natural gas utility providers regulated by MDPU.<sup>3</sup>

14. Unlike a regulated utility, Sprague is free to sell natural gas to whomever it wishes and subject to whatever business terms it determines are appropriate.<sup>4</sup> Similarly, the Debtors are free to purchase natural gas for its Massachusetts locations from the 96 suppliers available to them, and subject to whatever business terms they can negotiate. And while it may

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<sup>3</sup> Lists of the private competitive suppliers and regulated utility providers in Massachusetts, accessed and printed from the MDPU’s public web site on October 13, 2011, are attached hereto as **Exhibit C**. The lists can be accessed through <http://www.mass.gov>, by clicking on “Gas Division,” then “Natural Gas Market Data. *See also* S-1 Registration Statement, Exh. A, at 4, 9-12 and 146, for discussion of Sprague’s market competition generally.

<sup>4</sup> *See* S-1 Registration Statement, Exh. A, at 4, 9-12 and 146.

be more economically advantageous for the Debtors to purchase from one supplier over another, the very fact that the Debtors have a choice among natural gas suppliers with whom they are free to do business makes it apparent that Sprague is not a utility subject to Section 366. *See Darby v. Time Warner Cable, Inc. (In re Darby)*, 470 F.3d 573, 575 (5th Cir. 2006) (The availability in and of itself of other options dictated that a cable service provider was not subject to the terms of Section 366).

15. Finally, “[i]t is well-established that ‘when the statute’s language is plain, the sole function of the courts - at least where the disposition required by the text is not absurd - is to enforce it according to its terms.’” *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000)). Absolutely nothing in the plain language of Section 366 or in its legislative history so much as remotely suggests that Congress intended to make private natural gas suppliers such as Sprague subject to the terms of Section 366.

16. In sum, Section 366 of the Bankruptcy Code has no application to Sprague and the Debtors cannot simply treat Sprague as a utility in order to obtain the considerable benefits afforded debtors by Section 366.

**B. The Injunction Provided for in Section 366 Cannot Override the Protection Afforded Sprague With Respect to the Natural Gas Contract Under Sections 556 and 561 of the Bankruptcy Code**

17. The unambiguous express terms of the Natural Gas Contract provide that it is a “forward contract” within the meaning of the Bankruptcy Code and that the Debtors and Sprague, as parties to the Natural Gas Contract, are each “forward contract merchants” within the meaning of the Bankruptcy Code. Exh. B, §18.

18. Under the Bankruptcy Code, a forward contract is defined as “a contract (other than a commodity contract) *for the purchase, sale or transfer of a commodity*, as defined in section 761(8) of this title, or any similar good, article, service, right or interest which is presently or in the future becomes the subject of dealing in the forward contract trade, or product or byproduct thereof, *with a maturity date more than two days after the date the contract is entered into ....*” 11 U.S.C. § 101(25) (emphasis added).

19. Natural gas is recognized as a commodity under bankruptcy law. *See In re Borden Chemicals and Plastics Operating Ltd.*, 336 B.R. 214, 218 (Bankr. Del. 2006) (“at this point in time, it can hardly be questioned that natural gas is a commodity under the Code”); *see also In re Mirant*, 310 B.R. 548, 565 (Bankr. N.D. Tex. 2004) (“natural gas is a commodity”).

20. With respect to the maturity date requirement of a forward contract, the Bankruptcy Code does not provide a definition of “maturity date;” however, a “commonsense” definition that has been applied in the context of applying the Bankruptcy Code’s definition of “forward contract” is “that it refers to the date on which delivery has occurred and payment . . . is due.” *U.S. Bank Nat’l Ass’n v. Plains Mktg. Canada LP (In re Renew Energy LLC)*, 2011 WL 3793157 at \*4 (Bankr. W.D. Wis. Aug. 24, 2011). Accordingly, the maturity date requirement for a forward contract under Section 101(25) is met where delivery is made more than two days after a contract is entered into. *Id.*

21. The Natural Gas Contract was effective September 10, 2007. Exh. B. The term of the Natural Gas Contract is one initial one year term followed by successive automatically renewing one-year terms unless and until the Natural Gas Contract is terminated by a party. Exh. B, § 12. This Natural Gas Contract term exceeds by far the two-day maturity date threshold set forth in Section 101(25).

22. Finally, a forward contract merchant is a “person whose business consists in whole or in part of entering into forward contracts as or with merchants in a commodity, as defined in section 761(8) of this title, or any similar good, article, service, right or interest which is presently or in the future becomes the subject of dealing in the forward contract trade.” 11 U.S.C. § 101(26). Sprague meets this standard, as its business consists in part of entering into forward contracts as a merchant in natural gas, a commodity.<sup>5</sup>

23. Section 556 of the Bankruptcy Code provides that the exercise of any contractual right of any forward contract merchant “to cause the liquidation, termination, or acceleration of a . . . forward contract . . . **shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by order of a court in any proceeding under this title.**” 11 U.S.C. § 556 (emphasis added).

24. Furthermore, Section 561 of the Bankruptcy Code dictates that the rights of Sprague, as party to a forward contract, to terminate the Natural Gas Contract remain undisturbed by either (i) the automatic stay, or (ii) an “order of a court . . . in any proceeding under this title,” which includes the Interim Order or any final order granting the relief sought in the Utilities Motion that forbids Sprague from altering, refusing, or discontinuing service to the Debtors. *See* 11 U.S.C. § 561(a).

25. Any order approving the Utilities Motion cannot and should not interfere with the rights provided under Sections 556 and 561 of the Bankruptcy Code to Sprague, a forward contract merchant party to a forward contract, should Sprague subsequently choose to exercise them.<sup>6</sup>

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<sup>5</sup> *See* S-1 Registration Statement, Exh. A, at 3.

<sup>6</sup> Nothing contained in this Objection should be construed as a waiver by Sprague of any rights it has under any of Sections 555 through 562 of the Bankruptcy Code, all of which rights Sprague hereby expressly reserves.

### Request for Judicial Notice

26. It is well-established in this circuit that a court may take judicial notice of authentic public disclosure documents filed with the SEC pursuant to Rule 201 of the Federal Rules of Evidence. See *In re NAHC, Inc. Securities Litigation*, 306 F.3d 1314, 1331 (3d Cir. 2002); *Oran v. Stafford*, 226 F.3d 275, 289 (3d Cir. 2000). To minimize or entirely avoid the need to bring witnesses and have lengthy testimony regarding the nature of Sprague's business, including the competitive environment in which it operates, Sprague requests that this Court take judicial notice of the S-1 Registration Statement and the information contained therein.

27. Courts may also take judicial notice of facts that are "not subject to reasonable dispute" as they "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Accordingly, courts have taken judicial notice of information provided by state agency websites. *Coleman v. Dretke*, 409 F.3d 665, 667 (5th Cir. 2005) (allowing judicial notice of state agency website); *Global Computer Enterprises, Inc. v. United States*, 88 Fed. Cl. 52, 70 n. 30 (2009) (facts subject to judicial review include material available on the internet); cf. *Victaulic Co. v. Tieman*, 499 F.3d 227, 236 (3d Cir. 2007) ("private corporate websites, particularly when describing their own business, generally are not the sorts of 'sources whose accuracy cannot reasonably be questioned'" under Rule 201(b)) (emphasis added).

28. Accordingly, Sprague requests that this Court take judicial notice of the information provided by MDPU, as set forth on Exhibit C, pursuant to Rule 201(b).

WHEREFORE, Sprague respectfully requests that this Court find Sprague not to be a "utility" subject to 11 U.S.C. § 366 or any order entered with respect to the Utilities Motion,



deny the Utilities Motion generally as to Sprague, and grant such other and further relief as is just and proper.

DATED: October 17, 2011

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