

CLERK OF DISTRICT COURT

2011 DEC -1 P 4:54

FILED  
**DONNA HOFFERBER**  
DEPUTY

**RECEIVED**

DEC 06 2011

Legal Services Office  
Montana Dept Of Revenue

**MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY**

MONTANA DEPARTMENT OF  
REVENUE,

Plaintiff,

v.

PRICELINE .COM, INC.;  
LOWESTFARE.COM, INC.;  
TRAVELWEB, LLC; TRAVELPORT,  
INC. (f/k/a CENDANT TRAVEL  
DISTRIBUTION SERVICES GROUP,  
INC.); CHEAPTICKETS, INC.; TRIP  
NETWORK, INC.; ORBITZ, INC.;  
ORBITZ, LLC; EXPEDIA, INC.;  
HOTELS.COM; HOTELS.COM, LP;  
HOTELS.COM, GP, LLC; HOTWIRE,  
INC.; TRAVELNOW.COM, INC.;  
SABRE HOLDINGS CORPORATION;  
TRAVELOCITY.COM, INC.;  
TRAVELOCITY.COM, LP;  
SITE59.COM, LLC; and DOES 1  
through 1000, inclusive,

Defendants.

Cause No.: CDV-2010-1056

**MEMORANDUM AND ORDER  
ON DEFENDANTS'  
MOTION TO DISMISS**

Before the Court is Defendants' motion to dismiss the complaint.

Defendants are priceline.com, Inc., other named online travel service companies

1 (OTCs), and Does 1 through 1000 (Defendants).<sup>1</sup> Plaintiff is the Montana  
2 Department of Revenue (Department).

3 On November 8, 2010, the Department filed this action alleging various  
4 causes of action against Defendants for business practices the Department alleges  
5 are in contravention of Montana's lodging facility use tax, lodging facility sales and  
6 use tax and rental vehicle sales and use tax.

7 Defendants' have moved to dismiss pursuant to Rule 12(b)(6),  
8 M.R.Civ.P., for failure to state a claim upon which relief can be granted.<sup>2</sup>  
9 Defendants assert that the plain language of the statutes relied on by the Department  
10 in support of its action demonstrates that the statutes do not apply to Defendants.  
11 The Court heard argument on the motion on August 24, 2011. The Court concludes  
12 that the motion should be denied.

### 13 STANDARD OF REVIEW

14 In reviewing a motion to dismiss pursuant to Rule 12(b)(6),  
15 M.R.Civ.P., courts must consider the complaint in the light most favorable to the  
16 plaintiff and accept the allegations in the complaint as true. *Goodman Realty, Inc. v.*  
17 *Monson*, 267 Mont. 228, 231, 883 P.2d 121, 123 (1994). A complaint should not be  
18 dismissed under Rule 12(b)(6) unless it appears that the plaintiff can prove no set of  
19 facts in support of his claim which would entitle him to relief. *Wheeler v. Moe*, 163  
20 Mont. 154, 161, 515 P.2d 679, 683 (1973). "In other words, dismissal is justified

---

21  
22 <sup>1</sup> Defendants assert that although the Department's pleadings do not make a distinction between  
23 online travel company defendants and others that do not provide any travel-related services, the  
24 motion to dismiss is being submitted by all defendants, although the arguments focus on the  
25 OTCs.

<sup>2</sup> Citation to any of the Rules of Civil Procedure herein shall be to the amended version, effective  
October 1, 2011.

1 only when the allegations of the complaint itself clearly demonstrate that plaintiff  
2 does not have a claim." *Id.* at 161, 515 P.2d at 683. *See also Buttrell v. McBride*  
3 *Land & Livestock Co.*, 170 Mont. 296, 298, 553 P.2d 407, 408 (1976). For these  
4 reasons, a trial court rarely grants a motion to dismiss for failure to state a claim  
5 upon which relief can be granted.

## 6 DISCUSSION

7 OTC Defendants are internet companies that provide travel information  
8 and secure reservations for travelers for lodging, car rental and airline services.  
9 Through this lawsuit, the Department seeks to apply the lodging facility use tax in  
10 Section 15-65-111, MCA, and the sales tax on lodging and vehicle rentals in  
11 Sections 15-68-102(1)(a) and (b), MCA, to the OTCs. Its complaint also seeks  
12 declaratory and injunctive relief, restitution and "disgorgement of profits" for what it  
13 alleges is an intentional violation and evasion of the applicable tax statutes.

14 The complaint alleges "the OTC's are 'operators' and 'sellers' under  
15 the statutes because they are a user's sole point of contact for the transaction, they  
16 set the price of the lodging, they control access to the lodging, and they control the  
17 collection of all taxes and fees." Complaint, at 7. It further alleges the OTCs "are  
18 'engaging in business' in Montana because they carry on or cause to be carried on  
19 the sale or rental of lodging at Montana facilities with the purpose of receiving direct  
20 or indirect benefit." Complaint, at 8. The complaint is rife with factual issues that  
21 would typically be addressed in discovery, and the hearing on the motion to dismiss  
22 included a tutorial on how OTCs operate. However, Defendants assert that  
23 discovery is unnecessary because the plain language of the statutes at issue, and the  
24 Department's historical construction of those statutes, demonstrate that the business  
25 practices of the OTCs are not subject to taxation as alleged by the Department. In

1 support of their motion, Defendants filed an affidavit of counsel with an extensive  
2 list of exhibits.

3 The Department contends that Defendants' motion is procedurally  
4 flawed because it is supported with factual matters not appropriate for consideration  
5 in the context of a Rule 12(b)(6) motion. As an example, the Department references  
6 Defendants' argument and exhibit relating to the hearing on House Bill 147 of the  
7 60<sup>th</sup> legislative session, in 2007, which unsuccessfully sought to broaden the  
8 application of the statutes at issue here. Defendants disagree with the Department's  
9 contentions, and maintain they are simply supplying the Court with legal  
10 information of which the Court can take judicial notice. See Rule 202, M.R.Evid.

11 Rule 12(d), Montana Rules of Civil Procedure, states:

12 If, on a motion under Rule 12(b)(6) or 12(c), matters outside  
13 the pleadings are presented to and not excluded by the court, the  
14 motion must be treated as one for summary judgment under Rule 56.  
All parties must be given a reasonable opportunity to present all the  
material that is pertinent to the motion.

15 The Department objects to Defendants' motion being treated as a  
16 motion for summary judgment, asserting it did not receive notice as contemplated by  
17 the rule.

18 In *Plouffe v. State*, 2003 MT 62, ¶ 13, 314 Mont. 413, 66 P.3d 316, the  
19 Montana Supreme Court addressed Rule 12(b)(6) motions as follows:

20 We have recognized that "[a] motion to dismiss under Rule  
21 12(b)(6), M.R.Civ.P., allows the District Court to only examine  
22 whether 'a claim has been adequately stated in the complaint.'"  
23 Furthermore, the District Court's examination is limited to the  
24 content of the complaint. "The effect of such a motion is admitting  
to all the well pleaded allegations in the complaint and it should not  
be dismissed 'unless it appears beyond a reasonable doubt that the  
plaintiff can prove no set of facts which would entitle him to relief.'"

25 (Citations omitted.)

1           The motion to dismiss in *Plouffe* was based on a claim of *res judicata*.  
2 The Supreme Court held it was error for the district court to grant the Rule 12(b)(6)  
3 motion to dismiss without converting it to a motion for summary judgment after  
4 considering facts outside the complaint. In reaching this conclusion, the Supreme  
5 Court stated:

6           [Necessary] facts could not be determined from the allegations of  
7 Plouffe's complaint. The Defendants were obviously aware of that  
8 problem when, on August 23, 2001, they filed a reply brief in  
9 support of their motion to which they attached 151 pages of exhibits.  
10 At that point, the District Court could have either ignored the  
11 Defendants' exhibits and decided the Defendants' motion based on  
12 the rules that pertain to motions to dismiss (which would have  
13 required denial of the motion), or it could have converted  
14 Defendants' motion to a motion for summary judgment pursuant to  
15 Rule 12(b), M.R.Civ.P.

16 *Id.*, ¶ 15. Such a conversion would require that all parties be given reasonable  
17 opportunity to present all material pertinent to such motion by Rule 56. *Id.*

18           The court in *Plouffe* also recognized that asserting judicial notice as a  
19 basis for allowing consideration of matters beyond the complaint did not remedy the  
20 situation because taking judicial notice would require consideration of matters  
21 outside the pleading. *Id.*, ¶ 16.

22           Defendants point out that the proscription in *Plouffe* applies to factual  
23 judicial notice, not judicial notice of the law under Rule 202, M.R.Evid. While Rule  
24 202(f)(1) states that a court "may" take judicial notice of the "laws of this state and  
25 of the United States" at any stage of a proceeding, Defendants' exhibits are not  
limited to those categories. There are materials in the over 200 pages of exhibits  
accompanying counsel's affidavit that are arguably factual. The Court is not going  
to parse out each exhibit to make that determination.

////

