

MEMO ENDORSED

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Plaintiffs shall respond to the motion to dismiss (Dkt. No. 49) on or before June 27, 2016.

Defendants may file a reply on or before July 5, 2016.

Counsel for the parties should be prepared to address the motion to dismiss at the hearing on July 12, 2016.

So ordered: 6/13/16



J. PAUL OETKEN  
United States District Judge

Re: *Comcast Corp., et al. v. Rovi Corp., et al.*, Civil Action No. 1:16-cv-03852-JPO

The Honorable J. Paul Oetken  
United States District Judge  
Southern District of New York  
40 Foley Square  
New York, New York 10007

Dear Judge Oetken:

We represent Plaintiffs in the above-referenced matter and write briefly in response to Defendants' June 10, 2016 letter concerning their motion to dismiss. (ECF No. 52.)

First, Defendants misstate the holding, and relevance to this case, of the Supreme Court's decision in *Atlantic Marine Construction Company, Inc. v. United States District Court for the Western District of Texas*, 134 S. Ct. 568 (2013). *Atlantic Marine* does not concern the "first filed" rule on which Defendants rely, and it nowhere refers to the "first filed forum." Rather, the Court in *Atlantic Marine* held that "a forum-selection clause *may* be enforced by a motion to transfer under [28 U.S.C. § 1404(a)]," but not by a motion to dismiss under 28 U.S.C. § 1406(a) or Federal Rule of Civil Procedure 12(b)(3). *Id.* at 575 (emphasis added). It did not hold, as Defendants represent, that a motion to transfer is the only proper way to enforce a forum selection clause. To the contrary, neither *Atlantic Marine* nor the first-filed rule renders improper Plaintiffs' efforts to enforce their contractual rights in the parties' agreed upon (and jurisdictionally proper) forum.

Second, Plaintiffs respectfully submit that Defendants' motion to dismiss should be heard on July 12, 2016 or later. Contrary to Defendants' assertion, their motion is not "procedurally dispositive" and does not raise any threshold issue that would obviate the need to hear Plaintiffs' preliminary injunction motion, including because the first-filed rule does not apply where, as here, there are forum selection clauses mandating that litigation take place in New York. Moreover, Defendants are likely to make the same arguments in opposition to Plaintiffs' preliminary injunction motion that they have made in their motion to dismiss. Given that briefing on Defendants' motion will not be complete until July 5, 2016 and the parties already will be before the Court on related issues on July 12, 2016, Plaintiffs respectfully submit that the most efficient course would be to have Defendants' motion to dismiss argued on July 12, 2016 or later, subject, of course, to the Court's availability.

The Honorable J. Paul Oetken

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June 13, 2016

We thank the Court for its consideration.

Respectfully submitted,



Dana M. Seshens