

1 Nathan Brown (SBN: 033482)
Nathan.Brown@BrownPatentLaw.com
2 BROWN PATENT LAW
3 15100 N 78th Way Suite 203
4 Scottsdale, AZ 85260
Telephone: (602) 529-3474

5 [Additional counsel appearing on signature page]

6 *Attorneys for Plaintiff and the putative classes*

7
8 UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF ARIZONA

10 Darren MacDonald, individually and on
11 behalf of all others similarly situated,

12 *Plaintiff,*

13 v.

14 Rocket Mortgage LLC,

15 *Defendant.*
16
17

Case No. 2:23-cv-02558-DJH

**RESPONSE IN OPPOSITION TO
DEFENDANT’S MOTION TO
COMPEL ARBITRATION**

18 The Court should deny Rocket Mortgage’s motion to compel arbitration for the
19 same reason other district courts across the country have denied substantively similar
20 motions by Rocket Mortgage—because notice of the website terms containing the
21 arbitration agreement that Rocket Mortgage seeks to enforce was not reasonably
22 conspicuous on the website Rocket Mortgage claims Plaintiff visited. *See, e.g., Dahdah v.*
23 *Rocket Mortg., LLC*, No. 22-11863, Order [ECF 30] (E.D. Mich. Nov. 17, 2023) [attached
24 as Exhibit 1]; *Daschbach v. Rocket Mortg., LLC*, No. 22-cv-346-JL, 2023 U.S. Dist. LEXIS
25 48139 (D.N.H. Mar. 22, 2023).

26 Regardless of which state’s law applies, the framework for analyzing this issue is
27 the same.
28

1 “‘[T]o be conspicuous in this context, a notice must be displayed in a font size and
2 format such that the court can fairly assume that a reasonably prudent Internet user would
3 have seen it.’” *Daschbach*, 2023 U.S. Dist. LEXIS 48139, at *16-17 (citing *Berman v.*
4 *Freedom Fin. Network, LLC*, 30 F.4th 849, 856 (9th Cir. 2022), applying California law,
5 and finding that the outcome would be the same under New Hampshire law); *see Arciniega*
6 *v. Experian Info. Sols., Inc.*, No. CV-23-00245-PHX-SPL, 2023 U.S. Dist. LEXIS 186549,
7 at *8-9 (D. Ariz. Oct. 10, 2023) (“While Arizona has yet to rule on the enforceability of
8 ‘clickwrap’ agreements, basic contract principles still apply in evaluating them. ... The
9 Ninth Circuit has repeatedly held that ‘clickwrap’ agreements create inquiry notice, and
10 thus an enforceable contract, if ‘(1) the website provides reasonably conspicuous notice of
11 the terms to which the consumer will be bound’ ... *Berman*, 30 F.4th at 856.”); *see also*
12 *Cooper v. QC Fin. Servs.*, 503 F. Supp. 2d 1266, 1285 (D. Ariz. 2006) (“It is well-
13 established among the Arizona courts that ‘if Arizona law has not addressed an issue, we
14 ‘look approvingly to the laws of California’”).

15 “This analysis ‘depends on the design and content of the website and the agreement’s
16 webpage.’” *Daschbach*, 2023 U.S. Dist. LEXIS 48139, at *16 (citing *Nguyen v. Barnes &*
17 *Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014).

18 With regard to Rocket Mortgage’s website here, a user begins by navigating a series
19 of 17 webpages, each with a single, separate question presented in **dark blue, bold font**
20 that the user must answer before clicking a **green** action button that says “Next” in larger
21 font to access the next page. Rocket_MacDonald000002-12 [attached as Exhibit 2].¹ None
22 of these 17 webpages include any reference to the website’s terms that include the
23 arbitration agreement, other than as a standalone hyperlink in the footer, which on each
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26 ¹ This document describing the historic website flow was produced by Rocket Mortgage
27 as part of its initial disclosures. Although Rocket Mortgage originally designated this
28 document confidential, it has since de-designated it.

1 page is below (1) the question, (2) an answer field, (3) the “Next” button, and (4) a page-
2 wide advertisement regarding Rocket Mortgage’s JD Power ratings.

3 When the user reaches the 18th webpage—below (1)-(2) two, separate questions
4 presented in **dark blue, bold font**, (3)-(4) each with its own answer field, (5) a **green** action
5 button that says “Click to See Your Results!” in larger font, (6) a blue, hyperlinked and
6 underlined “Go Back” button presented in the same size font as the questions, and (7) the
7 page-wide advertisement regarding Rocket Mortgage’s JD Power ratings—in unbolded
8 font, multiple font sizes smaller than any of the other relevant text on any of the 18 pages,
9 there is a disclosure that would not be visible unless a user scrolled down the page that
10 states “By submitting your contact information, you agree to our [Terms of Use](#).” Although
11 not underlined like the “Go Back” button above it, the term “[Terms of Use](#)” purportedly
12 linked to the website’s terms containing the arbitration agreement.

13 Drawing all reasonable inferences in Plaintiff’s favor, the only reasonable
14 conclusion to be drawn from Rocket Mortgage’s website is that it was designed to obscure
15 the notice constituting users’ agreement to the terms containing the arbitration agreement.

16 *First*, despite there being 17 prior pages that requested personal information
17 regarding the user implicated by the website’s terms, the notice was presented only on the
18 18th page. *Cf. Daschbach*, 2023 U.S. Dist. LEXIS 48139, at *18 (“The ‘Important
19 Disclosures’ are displayed on the pages for questions 6 through 14.”).

20 *Second*, despite the website’s overall simplicity, the 18th page is relatively more
21 complicated because it is the only page with multiple questions and fine print. *Daschbach*,
22 2023 U.S. Dist. LEXIS 48139, at *24-25 (“Yet when the user reaches the crucial
23 disclosures page, the design changes and the text at the bottom becomes less legible.”).

24 *Third*, despite all of the other relevant language on all 18 pages being in colorful,
25 larger size font—all of which is in bold, except for hyperlinks, which are underlined—the
26 notice is unbolded and in an illegible font size, entirely in black, except for the hyperlinks,
27 which are in blue, but, unlike every other hyperlink on the website, not underlined. *Id.*; *id.*

1 at *19 (“It is obvious to the naked eye that the data fields and text above the ‘see my
2 results!’ button are more conspicuous than the text below the button; they are in larger,
3 black font.”); *id.* at *22-23 (“Despite these aspects of the Website's design and the
4 appearance of the hyperlink, the size and color of the fine print ultimately render the key
5 text insufficiently conspicuous to provide notice. As reproduced above, the text is almost
6 indecipherable to the naked eye. For a user accessing the Website on an iPad, it is likely
7 that the font of the fine print is smaller and even more difficult to read than the screen shots
8 and video offered by Rocket Mortgage. The small size and gray font of the text set against
9 a lighter gray background make it particularly challenging to read. The text is also
10 objectively much smaller than the font and data fields above it, some of which are shown
11 in black font.”); *Dahdah*, Order at 29 (“And, the small gray font stands in contrast to the
12 larger, bolder, black font used for most of the text on all the webpages a user sees during
13 their visit.”); *cf. Daschbach*, 2023 U.S. Dist. LEXIS 48139, at *21 (“Another factor
14 supporting notice is the appearance of the hyperlink that leads users to the ‘Terms of Use.’
15 The link is displayed in blue font and underlined, in contrast to the remainder of the fine
16 print and the background.”).

17 *Fourth*, the green action button stated “Click to See Your Results!” and did not
18 indicate in any way that a user was assenting to the website’s terms. *Berman*, 30 F.4th at
19 858 (“Likewise, the text of the button itself gave no indication that it would bind plaintiffs
20 to a set of terms and conditions. This notice defect could easily have been remedied by
21 including language such as, “By clicking the Continue >> button, you agree to the Terms
22 & Conditions.”).

23 *Fifth*, the page-wide advertisement with photographs regarding Rocket Mortgage’s
24 JD Power ratings near the notice distracted users and drew their attention away from the
25 notice. *Cf. Daschbach*, 2023 U.S. Dist. LEXIS 48139, at *21-22 (“Finally, the Website
26 does not contain other design elements (e.g. other links, images, videos, sounds, etc.) that
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1 could distract the user from the language directing him to the Terms and Conditions.”);
2 *Dahdah*, Order at 28 (“the notices here do not suffer from the ‘distracting’ elements”).

3 *Sixth*, and perhaps most important, the notice was the 8th different section on the 18th
4 page of the website, and was far enough below the green action button that made no
5 reference to the notice such that it could not be seen unless a user happened to scroll down.
6 *Daschbach*, 2023 U.S. Dist. LEXIS 48139, at *20 (“As the user reaches the button, it
7 appears that some of the fine print comes into view, without additional scrolling. This
8 supports a finding of conspicuous notice. To read the remainder of the fine print, however,
9 the user must scroll down further. It is therefore possible for a user to reach the button and
10 click it without fully seeing or reading the fine print, which weighs against notice.”);
11 *Dahdah*, Order at 26 (“Most cases conclude that the placement of the hyperlinked notice
12 to be of critical importance, finding notice sufficient where they are located above or next
13 to the assent button.”); *id.* at 28 (“some scrolling to see the full notice before clicking on
14 the ‘Calculate’ button is required, which suggests that a user is less likely to notice the text
15 and more likely to click the button before reading”).

16 As a result, as in *Daschbach* and *Dahdah*, “it ‘is not indisputable ... that a
17 reasonably prudent internet user would have seen the fine print and hyperlinks.” *Dahdah*,
18 Order at 29 (citing *Daschbach*). And because “‘reasonable minds could disagree’ about
19 the conspicuousness of the notice,” Rocket Mortgage’s motion to compel arbitration should
20 be denied. *Id.*

21 Respectfully submitted,

22 DATED this 22nd day of March, 2024.

23 /s/ Avi R. Kaufman

24 Avi R. Kaufman
25 kaufman@kaufmanpa.com
26 KAUFMAN P.A.
27 237 S Dixie Hwy, 4th Floor
28 Coral Gables, FL 33133
Telephone: (305) 469-5881

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28

Nathan Brown (SBN 033482)
BROWN PATENT LAW
15100 N 78th Way Suite 203
Scottsdale, AZ 85260
Phone: 602-529-3474
Nathan.Brown@BrownPatentLaw.com

Attorneys for Plaintiff and the putative Classes