

1 David E. Funkhouser III, Esq., Bar No. 022449  
dfunkhouser@spencerfane.com  
2 Jessica A. Gale, Esq., Bar No. 030583  
jgale@spencerfane.com  
3 **SPENCER FANE LLP**  
2415 E. Camelback Road, Suite 600  
4 Phoenix, AZ 85016-4251  
Telephone: (602) 333-5451  
5 Facsimile: (602) 333-5431

6 [Additional counsel appearing on signature page]

7 *Attorneys for Defendant Rocket Mortgage, LLC*

8 **UNITED STATES DISTRICT COURT**

9 **DISTRICT OF ARIZONA**

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

12 Plaintiff,

13 v.

14 Rocket Mortgage, LLC, a Michigan  
15 company,

16 Defendant.

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

**REPLY IN SUPPORT OF ROCKET  
MORTGAGE, LLC’S MOTION TO  
COMPEL ARBITRATION**

**(Oral Argument Requested)**

17 In response to Rocket Mortgage’s Motion to Compel Arbitration (“Motion” or  
18 “Mot.”) (ECF No. 13) and its supporting evidence (ECF No. 13-1 – 13-3), Plaintiff’s  
19 counsel requested that this Court open discovery, stating that there will be “a factual  
20 dispute” regarding the applicability of Rocket Mortgage’s arbitration provision because  
21 Plaintiff “denies visiting the [quickenloans.com] website.” Telephonic Rule 16  
22 Scheduling Conf. Tr. (“Hr’g Tr.”), at 9, 12. Indeed, Plaintiff’s counsel told this Court that  
23 Plaintiff’s opposition to the Motion “would be supported by declarations.” *Id.* at 9. This  
24 Court granted Plaintiff’s request for discovery, in part, ordering *both* parties to disclose  
25 discovery regarding any facts relevant to the Motion. *Id.* at 12-13. In response to that  
26 Order, however, Plaintiff produced *no documents* or other evidence relating to the Motion.  
27 *See* Plaintiff’s Initial Disclosures, attached hereto as Exhibit A. Nor did Plaintiff support  
28 his Opposition (“Opp.”) (ECF No. 26) with the “*declarations*” his counsel told this Court

1 he would provide.

2 In fact, the Opposition contains *no evidence* (none) to dispute any of the record  
3 evidence Rocket Mortgage produced in support of the Motion, including that (a) Plaintiff  
4 visited and made a submission on the quickenloans.com website on June 8, 2022, and (b)  
5 he agreed to Rocket Mortgage’s fully-disclosed Terms of Use and the subject arbitration  
6 provision as part of that visit and submission. The reason is obvious: Plaintiff cannot  
7 dispute (and so must concede) Rocket Mortgage’s evidence supporting the Motion.  
8 *Gonzalez v. City of Glendale*, 2020 WL 5258296, at \*12 (D. Ariz. Sept. 3, 2020) (“What  
9 Plaintiff fails to contest []he concedes.”). Under the applicable authorities cited in the  
10 Motion (the bulk of which Plaintiff ignores in his Opposition), Rocket Mortgage’s  
11 evidence demonstrates that Plaintiff must arbitrate (not litigate) his TCPA claim against it  
12 on an individual basis. *Maldonado v. Nat’l Football League*, 2023 WL 4580417, at \*3  
13 (S.D.N.Y. July 18, 2023). Plaintiff’s Opposition provides no legitimate basis for this  
14 Court to reach any contrary conclusion.

15 Faced with Rocket Mortgage’s evidence, Plaintiff rests his Opposition on two main  
16 arguments. Both are without merit. First, in an attempt to argue that the Terms of Use  
17 were not conspicuously disclosed, he misrepresents the appearance of Rocket Mortgage’s  
18 website at the time of his visit and relies on speculative “facts” found nowhere in the  
19 record evidence before the Court. This misleading argument fails because it is belied by  
20 the actual record evidence Rocket Mortgage has put before the Court.

21 Second, Plaintiff argues that two decisions denying motions to compel arbitration  
22 brought by Rocket Mortgage in other cases somehow require denial of the Motion here.  
23 But these non-binding decisions—one of which is subject to a pending reconsideration  
24 motion (Rocket Mortgage, LLC’s Mot. for Recons., *Dahdah v. Rocket Mortg., LLC*, No.  
25 4:22-cv-11863 (E.D. Mich. Dec. 1, 2023), ECF No. 32, attached hereto as Exhibit C)—are  
26 readily distinguishable and unpersuasive because each involved entirely *different*  
27 *websites*, a *different* company’s terms of use, and a *different* arbitration clause. *Dahdah v.*  
28 *Rocket Mortg., LLC*, No. 4:22-cv-11863 (E.D. Mich. Nov. 17, 2023), ECF No. 30 and  
*Daschbach v. Rocket Mortg., LLC*, 2023 WL 2599955 (D.N.H. Mar. 22, 2023).

1 Moreover, in each of those cases (and unlike here), the plaintiffs disputed visiting the  
2 third-party websites.

3 In the end, Plaintiff does not (and cannot) overcome that the record evidence and  
4 applicable caselaw demonstrate that the design and content of the Rocket Mortgage  
5 website was more than sufficient to put him on notice of the Terms of Use and to obtain  
6 his affirmative assent of those terms, including the arbitration provision. As such, this  
7 Court should grant the Motion.

8 **I. THE TERMS OF USE WERE CONSPICUOUSLY DISCLOSED.**

9 Plaintiff does not dispute—and so concedes—that when he visited Rocket  
10 Mortgage’s website, he made a submission to request refinance information that involved  
11 navigating through a series of discrete questions and providing information about his  
12 interest in a mortgage loan. Opp. at 2-3. Plaintiff also concedes that the final submission  
13 page of the flow contained a “Communication Consent” notice that stated in black font on  
14 a white background, “By submitting your contact information, you agree to our [Terms of](#)  
15 [Use,](#)” with the phrase “Terms of Use” appearing in blue font and hyperlinking to those  
16 Terms. *Id.* at 3. Plaintiff also does not dispute that the Terms of Use contain an  
17 arbitration provision requiring him to arbitrate (not litigate) the TCPA claim he purports  
18 to assert here. Despite these concessions, Plaintiff argues that he did not receive adequate  
19 notice of the arbitration agreement because “notice of the website terms containing the  
20 arbitration agreement” was purportedly “not reasonably conspicuous on the website.”  
21 Opp. at 1. Each ground he advances in support of this argument is unpersuasive and/or  
22 unsupported by the record evidence.

23 First, Plaintiff asserts that the “Communication Consent” was somehow deficient  
24 to provide conspicuous notice because the text, “By submitting your contact information,  
25 you agree to our [Terms of Use,](#)” appeared only on the final submission page and not on  
26 the preceding pages of the quickenloans.com website flow. Opp. at 3. This argument  
27 fails at its inception because it is belied by the record evidence showing that a link to  
28 Rocket Mortgage’s Terms of Use appears in the footer of each page of the  
quickenloans.com submission flow. ECF No. 26-2. But even setting Plaintiff’s

1 misrepresentation aside, he cites (and Rocket Mortgage’s research has identified) no  
2 authority holding that the conspicuousness inquiry somehow turns on whether the Terms  
3 of Use appear only on the final page of a website submission. To the contrary, numerous  
4 courts have enforced arbitration agreements where the terms of use containing them were  
5 available only on the last page of a multi-page website submission flow like the  
6 quickenloans.com website flow at issue here. Mot. at 9-10 (citing cases); *Lee v. Panera*  
7 *Bread Co.*, 2023 WL 2606611, at \*3-4 (E.D. Mich. Mar. 6, 2023) (citing *Scott v. RVshare*  
8 *LLC*, 2022 WL 866259, at \*3 (M.D. Tenn. Mar. 22, 2022)), *report & recommendation*  
9 *adopted by*, 2023 WL 2603934 (E.D. Mich. Mar. 22, 2023); *Slaten v. Dick’s Sporting*  
10 *Goods, Inc.*, 2024 WL 1136399, at \*4 (C.D. Cal. Feb. 2, 2024). This Court should do the  
11 same here.

12 Second, Plaintiff argues that the Communication Consent did not provide  
13 conspicuous notice because the submission page “is relatively more complicated because  
14 it is the only page with multiple questions and fine print.” Opp. at 3. But again Plaintiff’s  
15 argument is belied by the record evidence. The flow itself—a recreation of which Rocket  
16 Mortgage produced in compliance with the Court’s order to provide discovery relevant to  
17 the Motion—is appended as Exhibit 2 to Plaintiff’s Opposition. ECF No. 26-2. That  
18 Exhibit (at 10), as well as the submission page evidence submitted with the Motion (ECF  
19 No. 13-2), demonstrates that Plaintiff entered two pieces of personal information—one for  
20 mailing address and one for zip code—on the final submission page of the  
21 quickenloans.com flow. Those two fields are similar to a prior page of the flow  
22 requesting first and last name. *Compare* ECF No. 26-2 at 10 *with id.* at 8. The final  
23 submission page simply does not contain “multiple questions.” Beyond this, Plaintiff  
24 again fails to point to (and Rocket Mortgage’s research has not identified) any legal  
25 authority holding or suggesting that having two data fields (as opposed to one) on the  
26 submission page somehow makes the page “complicated” or bears upon the  
27 conspicuousness analysis. Rather, courts have consistently enforced arbitration  
28 agreements disclosed as part of terms appearing on submission pages containing far more  
data fields than two. *See e.g., Scott*, 2022 WL 866259, at \*1 (ten fields).

1 Third, Plaintiff criticizes the font size and color of the Communication Consent,  
2 claiming that “the notice is unbolded and in an illegible font size, entirely in black, except  
3 for the hyperlinks, which are in blue” and the hyperlinks are “not underlined.” Opp. at 3-  
4 4. At the outset, Plaintiff’s criticism is misleading and misses the mark because it relies  
5 upon evidence (ECF No. 26-2) that does not fairly and accurately depict the appearance of  
6 the final submission page to a website user viewing it in real time on an electronic device.  
7 Instead, Plaintiff’s Exhibit 2—like Exhibit 1 to the Amy Courtney Declaration submitted  
8 with the Motion (ECF No. 13-2)—displays the final submission page as copied into a  
9 PDF document, with several inch margins on either side. As Rocket Mortgage explained  
10 in producing this document in compliance with the Court’s Order to provide arbitration-  
11 related discovery, this PDF depicts only the *content* of the final submission page. *See*  
12 Rocket Mortgage’s Initial Disclosures, attached hereto as Exhibit B. Exhibit 2 is not,  
13 however, an .html file that would display the webpage precisely as it would have  
14 *appeared to Plaintiff* on his electronic device at the time of his visit to and submission at  
15 quickenloans.com. For this reason (and because Plaintiff has submitted no evidence of his  
16 own regarding how the quickenloans.com website appeared on his electronic device  
17 during his visit and submission), his criticism of the font size of the Communication  
18 Consent based upon Exhibit 2 is misleading and inaccurate. But even setting this issue  
19 aside, Exhibit 2 provides no support for Plaintiff’s argument because it confirms that,  
20 even in the PDF format, the font size of the Communication Consent is plainly legible, of  
21 a sufficient size, and follows industry best practice of using black text against a white  
22 background with a hyperlink directing users to the Terms of Use in contrasting blue font.  
23 Courts regularly find that disclosures containing black font with blue hyperlinks against a  
24 white background are clear and conspicuous. Mot. at 9-10; *infra* at 7-8. This Court  
25 should reach the same conclusion here.

26 Fourth, Plaintiff asserts that a “page-wide” advertisement appeared on the  
27 submission page, which he speculates “distracted users and drew their attention away  
28 from the notice.” Opp. at 4. This assertion is false. The record evidence confirms that  
there is no advertisement—and certainly no “page-wide” advertisement—on the

1 submission page. *See* ECF No. 13-2. There is only a small image displaying Rocket  
2 Mortgage’s “Highest in Customer Satisfaction in the U.S.” awards from J.D. Power that  
3 appears at the bottom of each page of the flow, and *below* the submission button and  
4 Communication Consent on the final submission page. ECF No. 26-2. That small image  
5 is not an advertisement; indeed, the image markets no Rocket Mortgage product or  
6 service. *Id.* In addition, as the small image appears below the Communications Consent  
7 (*id.*), there is no basis for this Court to conclude that it somehow distracted Plaintiff from  
8 the Communications Consent. And Plaintiff (tellingly) presents no evidence that it did.  
9 This is perhaps why Plaintiff rests his argument on his speculation about other users. The  
10 record evidence here is thus distinct from and falls well short of the kind of evidence  
11 courts have relied upon to find a lack of conspicuousness due to distracting ads. In those  
12 cases, unlike here, there was an actual advertisement that appeared above, to the left or the  
13 right of the key consent language or disclosure, or played videos or distracting audio.  
14 *Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849, 857 (9th Cir. 2022) (surrounding  
15 material distracting where it “draw[s] the user’s attention from the most important part of  
16 the page”); *cf. Lee v. DoNotPay, Inc.*, 2023 WL 8242158, at \*5 (C.D. Cal. July 20, 2023)  
17 (no reasonable user would confuse the graphics and quotes on other parts of the webpage  
18 such that they would not understand” they were agreeing to terms and conditions).

18 Finally, Plaintiff asserts that the Communication Consent notice was purportedly  
19 “far enough below the green action button . . . such that it could not be seen unless a user  
20 happened to scroll down.” *Opp.* at 4-5. Plaintiff again provides no evidence to support  
21 this speculative suggestion, and so this Court should not consider it. Plaintiff has not  
22 attested that he needed to scroll to see the Communication Consent on his (undisclosed)  
23 device, and the actual record evidence shows no need to scroll. ECF No. 13-2. The Court  
24 should not rely on (and Plaintiff cannot carry his burden in opposition on) supposition of  
25 facts not within the evidentiary record. *See Flint Farms LLC v. Nationwide Agribusiness*  
26 *Ins. Co.*, 2021 WL 2661450, at \*5 (D. Ariz. June 29, 2021) (Humetewa, J.) (When “no  
27 such finding appears in the record . . . Plaintiff’s assertion cannot be used to defeat  
28 summary judgment.”).

1 As demonstrated in the Motion, federal appeals courts and numerous district courts  
2 routinely hold that disclosures like the Communications Consent on the quickenloans.com  
3 website are clear and conspicuous and provide consumers with reasonable notice as a  
4 matter of law. *See* Mot. at 9-10 (citing cases). Specifically, these authorities—all of  
5 which Plaintiff ignores his in Opposition—support the conclusion here that the use of  
6 black font on a white background, a distinguishable blue hyperlink to the Terms of Use,  
7 close proximity of the submission button to the Terms of Use disclosure, and the absence  
8 of distracting videos or other content, was more than sufficient to provide clear and  
9 conspicuous notice to Plaintiff of Rocket Mortgage’s Terms of Use. Mot. at 8-10; *see*  
10 *also Shirley v. Rocket Mortg.*, 2022 WL 2541123, at \*7 (E.D. Mich. July 7, 2022)  
11 (granting motion to compel arbitration when hyperlinked Terms of Use was “in a blue  
12 contrasting color to the rest of the grey text” and therefore “was readily apparent to a  
13 reasonably prudent Internet user” and distinguishing cases where hyperlinks that “were  
14 not in a different color nor were they in capital letters to distinguish them from the rest of  
15 the text”); *Selden v. Airbnb, Inc.*, 4 F.4th 148, 156 (D.C. Cir. 2021) (affirming decision to  
16 compel arbitration where “sign-up screen placed [plaintiff] on reasonable notice that by  
17 signing up he agreed to the Terms of Service ... [and] [d]irectly below the three buttons, it  
18 stated: ‘By signing up, I agree to Airbnb’s Terms of Service, Privacy Policy, Guest  
19 Refund Policy, and Host Guarantee Terms.’”); *Patrick v. Running Warehouse, LLC*, 2022  
20 WL 10584136, at \*6 (C.D. Cal. Oct. 18, 2022) (compelling arbitration where submission  
21 button appeared “directly above” language stating “By submitting your order you ... agree  
22 to our privacy policy and terms of use”), *aff’d*, 93 F.4th 468 (9th Cir. 2024); *Pizarro v.*  
23 *QuinStreet, Inc.*, 2022 WL 3357838, at \*3 (N.D. Cal. Aug. 15, 2022) (“the Court finds  
24 QuinStreet’s textual notice and Terms of Use hyperlink, when viewed in the context of the  
25 overall design and content of the webpage, are ‘reasonably conspicuous.’ . . . In particular,  
26 the notice and hyperlink appear directly below the ‘See My Rates’ button”) (citation  
27 omitted); *Maldonado*, 2023 WL 4580417, at \*3 (granting motion to compel arbitration  
28 where the hyperlink to the terms of use “appears directly below the ‘Create An Account’  
and ‘Complete Order’ assent buttons”).

1 Faced with the record evidence and these substantial authorities, Plaintiff resorts to  
2 reliance on two inapposite cases, where courts found factually distinct websites to contain  
3 insufficient notice. Opp. at 3-5 (citing *Daschbach* and *Dahdah*). But neither *Daschbach*  
4 nor *Dahdah* involved Rocket Mortgage’s website—instead, both involved different third-  
5 party websites with different flows and terms. See *Daschbach*, 2023 WL 2599955, at \*9  
6 (notice contained gray font text “set against a lighter gray background”); Order at 28,  
7 *Dahdah v. Rocket Mortg., LLC*, No. 4:22-cv-11863 (E.D. Mich. Nov. 17, 2023), ECF No.  
8 30 (notice contained “tiny light gray font” and where “some scrolling to see the full notice  
9 . . . is required”).<sup>1</sup> It is thus not surprising that none of the website elements that the  
10 *Dahdah* and *Daschbach* courts relied upon to deny arbitration in those cases exist here—a  
11 point Plaintiff ignores and which renders the decisions in those cases readily  
12 distinguishable and unpersuasive.

## 13 **II. PLAINTIFF AGREED TO ARBITRATE HIS CLAIMS.**

14 As noted, Plaintiff does not dispute that he submitted his contact and other  
15 information when he clicked the “Click to See Your Results!” submission button on the  
16 quickenloans.com website. Nor does he dispute that the submission page expressly  
17 disclosed that making this submission constituted Plaintiff’s affirmative agreement to the  
18 Rocket Mortgage Terms of Use, including the subject arbitration provision. The  
19 undisputed factual record is, therefore, that Plaintiff visited Rocket Mortgage’s website  
20 (quickenloans.com) in June 2022, submitted his personal information, including his name,  
21 email address, address, and the telephone number that began with 480-540-XXXX, and  
22 requested refinance information from Rocket Mortgage. Mot. at 3; see *Gonzalez*, 2020  
23 WL 5258296, at \*12. The record evidence is also undisputed that in making his  
24 submission, Plaintiff clicked the “Click to See Your Results!” submission button (*id.* at 4-  
25 5) where, proximate to the button, the Rocket Mortgage website expressly disclosed that  
entering his contact information by clicking the “Click to See Your Results!” submission

26 <sup>1</sup> Rocket Mortgage has moved for reconsideration in *Dahdah* in-part on the grounds that  
27 the Court’s conclusion on the need to scroll was erroneous and not based on any facts in  
28 the record. Rocket Mortgage, LLC’s Mot. for Recons. at 5-7, attached hereto as Exhibit  
C. That Reconsideration Motion is pending disposition by the Court and, if it is denied,  
Rocket Mortgage intends to pursue an immediate appeal to the Sixth Circuit.

1 button constituted his affirmative agreement to the Rocket Mortgage Terms of Use. *Id.* at  
2 8-9. Plaintiff does not dispute that those Terms of Use require him to arbitrate his TCPA  
3 claims at issue here. The record evidence before the Court is thus that Plaintiff  
4 affirmatively agreed to arbitrate (not litigate) his TCPA claims against Rocket Mortgage  
5 on an individual basis. *Id.* at 3-5.

6 Nevertheless, Plaintiff attempts to avoid being bound by these Terms by  
7 challenging the text on the button itself, arguing that “the green action button stated ‘Click  
8 to See Your Results!’ and did not indicate in any way that a user was assenting to the  
9 website’s terms.” *Opp.* at 4. This argument fails as a matter of fact and law. As a factual  
10 matter, the submission page explicitly stated that making the submission would result in a  
11 contractual agreement: “*By submitting your contact information you agree to our Terms*  
12 *of Use.*” ECF No. 13-2 (emphasis added). As a matter of law, Plaintiff’s reliance on  
13 *Berman* confirms Plaintiff assented to the Terms of Use here through his action in clicking  
14 the submission button. By contrast to the record evidence here, in *Berman*, neither the  
15 button itself nor the disclosure language indicated that making the submission constituted  
16 assent to the terms. *See Berman*, 30 F.4th at 858 (“[T]he notice must explicitly notify a  
17 user of the legal significance of the action she must take to enter into a contractual  
18 agreement. The notice did not do so here. Both webpages stated, ‘I understand and agree  
19 to the Terms & Conditions,’ but they did not indicate to the user what action would  
20 constitute assent to those terms and conditions.”). Rocket Mortgage’s Communications  
21 Consent disclosure, by contrast, is completely consistent with the *Berman* court’s  
22 requirements for assent because it spells out “what action” will constitute Plaintiff’s assent  
23 to the Terms of Use. *See* ECF No. 13-2 (“By submitting your contact information you  
24 agree to our Terms of Use”); *see also Lee v. Ticketmaster L.L.C.*, 817 F. App’x 393, 394-  
25 95 (9th Cir. 2020) (affirming plaintiff had assented to terms of use when disclosure stated  
26 “By clicking ‘Place Order,’ you agree to our Terms of Use.”); *Slaten*, 2024 WL 1136399,  
27 at \*4 (finding assent where disclosure stated that “By placing the order” the consumer  
28 agreed to the terms of use); *Shirley*, 2022 WL 2541123, at \*7-8 (*Berman* standard  
satisfied by hyperlinked terms directly under language stating that “by continuing to click

1 the buttons, [plaintiff] was agreeing” to the terms).

2 As Plaintiff affirmatively agreed to Rocket Mortgage’s Terms of Use when he  
3 clicked on the submission button, an enforceable arbitration agreement exists. *See* Mot. at  
4 10-11.

### 5 **III. ANY DISPUTES OF FACT MUST BE RESOLVED BY TRIAL.**

6 If this Court concludes that any of Plaintiff’s arguments somehow give rise to a  
7 genuine dispute of fact about whether Plaintiff agreed to arbitrate his TCPA claims  
8 against Rocket Mortgage (and it should not), then the required and appropriate remedy is  
9 for the Court to hold the Motion in abeyance and order a limited trial on the existence of  
10 an arbitration agreement. 9 U.S.C. § 4; *Hansen v. LMB Mortg. Servs., Inc.*, 1 F.4th 667,  
11 672 (9th Cir. 2021) (“Section 4 makes clear that “[i]f the making of the arbitration  
12 agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall  
13 proceed summarily to the trial thereof.”) (citation omitted); *accord Three Valleys Mun.*  
14 *Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1141 (9th Cir. 1991); *Boykin v. Fam.*  
15 *Dollar Stores of Mich., LLC*, 3 F.4th 832, 835 (6th Cir. 2021). While he has not proffered  
16 any evidence to dispute the record evidence offered by Rocket Mortgage in support of the  
17 Motion, Plaintiff nonetheless asserts that “reasonable minds could disagree” on the  
18 existence of an agreement to arbitrate. Opp. at 5 (citation omitted). That assertion is not,  
19 however, a basis to deny the Motion. This is because the FAA provides that if the court  
20 concludes that “the making of the arbitration agreement” is in dispute, then the court is  
21 required to “proceed summarily to the trial thereof.” 9 U.S.C. § 4.

22 To resolve whether the existence of an arbitration agreement is in dispute, this  
23 Court, the Ninth Circuit, and federal courts nationwide have consistently applied the  
24 summary-judgment standard. *E.g., Perry v. NorthCentral Univ., Inc.*, 2011 WL 4356499,  
25 at \*3 (D. Ariz. Sept. 19, 2011) (citing cases); *Three Valleys*, 925 F.2d at 1141 (“Only  
26 when there is no genuine issue of fact concerning the formation of the agreement should  
27 the court decide as a matter of law that the parties did or did not enter into such an  
28 agreement.”) (citation omitted); *Great Earth Cos. v. Simons*, 288 F.3d 878, 889 (6th Cir.  
2002) (“The required showing [for a motion to compel arbitration] mirrors that required to

1 withstand summary judgment”). Under the summary judgment standard, the judge does  
 2 not engage in “the weighing of the evidence” or “the drawing of legitimate inferences  
 3 from the facts.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Coup v.*  
 4 *Scottsdale Plaza Resort, LLC*, 823 F. Supp. 2d 931, 939 (D. Ariz. 2011). Instead, Plaintiff  
 5 bears the burden to show a genuine issue of material fact as to the absence of an  
 6 agreement to arbitrate. *Taleb v. AutoNation USA Corp.*, 2006 WL 3716922, at \*2 (D.  
 7 Ariz. Nov. 13, 2006). Plaintiff has not met his burden because, as noted, he offers no  
 8 evidence showing that there is a dispute of material fact regarding whether an arbitration  
 9 agreement exists. *Perry*, 2011 WL 4356499, at \*4 (plaintiff “bears the burden of proving  
 10 the unenforceability of the arbitration provision”); *supra* 1-2. But if this Court disagrees,  
 11 then any disputes of fact must be resolved by trial before resolution of the Motion. *See*  
 12 *Hansen*, 1 F.4th at 672; *Boykin*, 3 F.4th at 844; *Ehrman v. Cox Commc’ns, Inc.*, 2019 WL  
 13 8331464, at \*8 (C.D. Cal. Nov. 18, 2019); *3501 N. Causeway Assocs., LLC v. Certain*  
 14 *Underwriters at Lloyd’s, London*, 2023 WL 1765920, at \*4 (E.D. La. Feb. 3, 2023); *see*  
 15 *also Perry*, 2011 WL 4356499, at \*3; *Coup*, 823 F. Supp. 2d at 939.

### CONCLUSION

16 For the foregoing reasons, the Motion should be granted or, in the alternative, a  
 17 limited trial should be ordered on the existence of an arbitration agreement.

18 DATED this 12th day of April, 2024.

19 **Respectfully submitted,**

20 /s/ David E. Funkhouser III  
 21 David E. Funkhouser III  
 22 *dfunkhouser@spencerfane.com*  
 23 Jessica A. Gale  
 24 *jpgale@spencerfane.com*  
 25 **SPENCER FANE LLP**

26 /s/ Brooks R. Brown  
 27 Brooks R. Brown (pro hac vice)  
 28 *Bbrown@goodwinlaw.com*  
 W. Kyle Tayman (pro hac vice)  
*ktayman@goodwinlaw.com*  
**GOODWIN PROCTER LLP**

Attorneys for Defendant Rocket Mortgage, LLC

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

I hereby certify that on APRIL 12, 2024, a copy of the foregoing was filed electronically using the Clerk of Court’s CM/ECF system.

By: /s/ Courtney S. Ryan