[Letterhead]

[Date]

Hon. Chief Justice Tani Cantil-Sakauye and Associate Justices

Supreme Court of California

350 McAllister Street

San Francisco, CA 94102

***Re: Honchariw v. FJM Private Mortgage Fund, et al.*, S277159**

 **Amicus Letter in Support of Petition for Review Cal. R. Ct. rule 8.500(g).**

Dear Chief Justice and Associate Justices:

[Name of Business] does hereby submit this amicus letter pursuant to California Rules of Court rule 8.500(g) in support of the petitioners above referenced petition for review.

**Interest of Amicus Curiae**

[Explanation of nature of your business, particularly in California]. As such, we are directly impacted by the *Honchariw* ruling in the First Appellate District; limiting or completely restricting the use and collection of reasonably calculated and bargained-for interest upon default.

**Good Cause for Granting Review**

The unusual holding of this case provides no lender may charge default interest against the **principal balance** of a loan when the only default is an installment payment default and not a maturity payment default in a **commercial loan**.

Civil Code 1671 requires the court the borrower to demonstrate that there is no reasonable relationship between the default interest rate and the lender’s actual harm.

Below are a few ways my business is damaged when there is a default by Borrower:

[INSERT ONE OR MORE OF THE EXAMPLES BELOW OR OTHERWISE EXPLAIN THE SPECIFIC MONETARY LOSS YOU FACE IF YOUR BORROWER DEFAULTS]

* Reduction in asset value. If a lender sells a non-performing loan, the loan buyer will require a significant discount of the purchase price, where otherwise a lender may have received par value (value of the loan inclusive of all unpaid interest) for a performing loan.
* Increase in cost of funds. When I make a loan to my borrowers I may place those loans on a line of credit where I pledge my loan as collateral to my warehouse line of credit bank. My warehouse lenders require me to remove a defaulted loan from the line of credit, thereby increasing the cost of funds to me. I was able borrow funds from the warehouse provider at a much lower interest rate than the note rate. The difference between the note rate to my borrower and the warehouse line of credit rate to me is my lost profit due to the borrower’s default. Default interest would have defrayed this lost profit.
* Loss of use of funds. While the loan is in default, the lender loses the income stream during the default, foreclosure and potential sale of the foreclosing property. If this case remains law, I will be forced to proceed to foreclosure for all defaults in order to try and receive my principal back as soon as possible rather than negotiating in good faith with the borrower knowing I will not be compensated through default interest.
* Increased internal and accounting costs resulting from the default. When a loan defaults a lender must divert their internal resources from other matters to address the default and attempt to obtain the borrower’s reperformance of its obligations. This includes costs of special servicing, diversion of accounting resources, bringing in loan originators or other relationship parties to attempt to communicate with the borrower. The effort will vary depending on circumstances and is difficult and impractical to measure.
* Impact on the ability to attract other investors. I must raise funds from investors and other capital providers to be able to fund and originate loans. My investors and capital providers require I disclose delinquency and default rates to determine the risk of their investment. A higher default rate would require a higher yield to attract future investors, but without the ability to charge default interest, it becomes difficult to attract investors to account for the risk.

These are just a few examples of the harms that lenders may suffer as a result of the borrower’s default. Since these amounts are hard to ascertain (especially at loan origination), a negotiated default rate is often the only way to compensate the lender for its anticipated loss.

**Conclusion**

The Court of Appeals correctly held that, in the context of a non-consumer loan, the borrower has the burden to show that the default interest charge does not bear a “reasonable relationship” to the lender’s expected loss Yet, instead of then analyzing whether Honchariw met this burden, the Court of Appeals summarily concluded that the mere fact of charging default interest on the entire unpaid principal balance following a payment default is, de facto, a violation of California *Civil Code* § 1671. As the California Law Revision Commission stated in their commentary on the 1977 amendment to § 1671, “*All* circumstances existing at the time of the making of a contract” should be considered when determining whether a liquidated damages provision in a nonconsumer contract is unreasonable.

We believe the case is an incorrect interpretation of both statutory and common law in California. We also believe it contradicts other established lending precedent elsewhere in the country.

Sincerely,

[Name]

[Address]

[City, State and Zip]

[Phone Number]

[Email Address]