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DIVISION II

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STATE OF WASHINGTON
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CASE NO. 37960-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

(Pierce County Superior Court No. 07-2-13859-1)

HOSS MORTGAGE INVESTORS, INC., a Washington Corporation

Plaintiff/Appellant,

vs.

THE SENATOR, LLC, a Washington Limited Liability Corporation,

Defendant/Respondent.

APPELLANT'S REPLY BRIEF

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TABLES

Table of Contents

	<u>Page</u>
Table of Authority	ii
Table of Cases	ii
Table of Court Rules	ii
I. Reply Argument	1
A. Hoss Mortgage Investors Presented Admissible Evidence Showing it Could Fund the Loans.	1
B. The Senator's "Loan Package" Theory Cannot Support Summary Judgment.	2
C. Section E of the Three Applications Cannot Support Summary Judgment Dismissing HMI's Claims as the Parties Have Presented Contradicting Interpretations and Evidence that Must be Weighed by a Trier of Fact.	3

Table of Authority
Table of Cases

<u>Leland v. Frogge,</u> 71 Wn.2d 197, 427 P.2d 724 (1967)	1
<u>Hearst Communications, Inc. v. Seattle Times Company,</u> 154 Wn. 2d 493, 115 P.3d 262 (2005)	2
<u>City of Woodinville v. Northshore United Church of Christ,</u> 139 Wn. App. 639, 162 P.3d 427 (2007)	4
<u>Absher Construction Co. v. Kent School District No. 415,</u> 77 Wn. App. 137, 890 P.2d 1071 (1995)	4

Table of Rules

Civil Rule 56	1
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REPLY ARGUMENT

A. Hoss Mortgage Investors Presented Admissible Evidence Showing it Could Fund the Loans.

In its Brief, The Senator argues that Hoss Mortgage Investors (“HMI”) failed to produce evidence that it could fund the subject loans by arguing that HMI’s evidence, declarations by HMI’s agents, was insufficient. The Senator’s argument though, ignores the role of the Court at summary judgment. Within the confines of summary judgment courts do not weigh the evidence; rather, they determine whether issues of material fact exist. CR 56. As the court in Leland v. Frogge noted, CR 56 does not require that a party submit conclusive evidence or, as The Senator argues, documentary support but rather must present admissible evidence that raises an issue of material fact. Leland v. Frogge, 71 Wn.2d 197, 201, 427 P.2d 724 (1967).

As outlined in HMI’s appellate brief, both Todd Hoss and John Nagle provided affidavits, e.g. admissible evidence, showing HMI had the ability to fund the loans. The Senator does not deny that these affidavits exist nor does it challenge their admissibility. Rather, The Senator argues that the evidence was not sufficient. However, the court’s role at summary judgment is to determine whether issues of material fact exist. The Senator’s argument does not address whether issues of material facts

exist but rather the sufficiency of the evidence that created the issues of material fact. The Senator's brief presents an argument for a trier of fact, not an argument to support summary judgment.

B. The Senator's "Loan Package" Theory Cannot Support Summary Judgment.

The Senator spent a large portion of its brief asserting that the parties intended the loans to be a loan package. The Senator's argument though is nothing more than a statement of its unilateral and subjective understanding of the parties' agreement and cannot serve as the basis for summary judgment.

As noted in HMI's Appellate Brief, courts attempt to determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties. Hearst Communications, Inc. v. Seattle Times Company, 154 Wn. 2d 493, 115 P.3d 262 (2005). Thus, courts interpret what was written and not what one party thought was written. Id.

With its brief, The Senator argues what it thought the contracts stated but fails to cite to any portion of the applications that supports the "loan package" theory. The Senator argues that HMI knew the loans securing The Senator's properties were cross collateralized (Respondent's Brief p. 9) but wholly fails to show how HMI's alleged knowledge caused

the contracts to become a “loan package”. Arguably, The Senator’s discussion of its “package theory” does nothing more than illustrate that summary judgment was not warranted because a trier of fact must determine if the parties intended the loans to be part of a package even though there is nothing in the applications’ language supporting the theory. The Senator’s argument is purely factual and can be resolved by a trier of fact only.

C. Section E of the Three Applications Cannot Support Summary Judgment Dismissing HMI’s Claims as the Parties Have Presented Contradicting Interpretations and Evidence that Must be Weighed by a Trier of Fact.

The Senator’s interpretation of paragraph E of the applications cannot serve as the foundation for summary judgment because the paragraph is subject to different interpretations. Generally, courts ascertain the parties’ mutual intent when interpretation a contract. However, when contractual language is subject to multiple meanings, courts cannot determine the parties intent without first weight evidence. Here, The Senator correctly notes paragraph E is subject to multiple meanings. Accordingly, interpretation of the paragraph cannot serve as the basis for summary judgment because it can be read in two different ways.

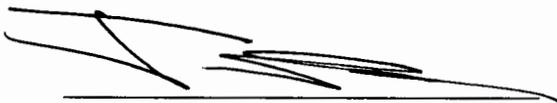
The goal of contract interpretation is to adopt the parties' mutual intent. City of Woodinville v. Northshore United Church of Christ, 139 Wn. App. 639, 651, 162 P.3d 427 (2007). In doing so, a court should consider a party's objective manifestations of intent expressed in the contract itself, not the party's unexpressed subjective intentions. *Id.* When a contract is unambiguous, its interpretation is a issue of law. Absher Construction Co. v. Kent School District No. 415, 77 Wn. App. 137, 141, 890 P.2d 1071 (1995). When interpreting a contract, a court will not read ambiguity into a contract where ambiguity can be avoided by reading the contract as a whole. An ambiguity in a contract is present, however, if a term is reasonably capable of being understood in either of two or more senses. Syrovoy v. Alpine Res., 68 Wn. App. 35, 40, 841 P.2d 1279 (1992). A contract that is found to be ambiguous though, cannot serve as the basis for summary judgment. *Id.*

Here the parties dispute what the meaning of paragraph E of the applications states. The Senator is correct that paragraph E either provides for a time frame in which the loan applicant is obligated to pay fees if it is unable or unwilling to proceed or it does not. (Response Brief p. 13) HMI maintains, and has maintained, the position that paragraph E does not impose any time restrictions on HMI but rather mandates that The Senator must clear title within 30 days. (CP 241-44; CP 321-25; 395-99) Further,

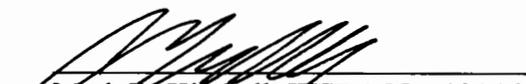
HMI maintains that the language does not allow The Senator to arbitrarily refuse to complete the transaction if the loans were not funded within 30 days. (Id.) To the extent the language “[i]n the event that borrower(s) should fail or refuse to complete the transaction or to clear title to the real property to enable HMI to close the loan within 30 days from the date hereof, borrower(s) shall be liable to HMI for all the following...” (CP 9)(emphasis ours) can reasonably be read to mean otherwise simply illustrates that it cannot serve as the basis for summary judgment.

Respectfully submitted this 30th day of March , 2009.

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WASHINGTON STATE COURT OF APPEALS DIVISION II

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**PROOF OF SERVICE ON PARTIES
OF REPLY BRIEF**

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THE UNDERSIGNED certifies that on March 30, 2009, arrangement of service upon all parties of record of the foregoing Reply Brief was made via ABC Legal Messengers, with provision for delivery no later than March 31, 2009.

Dated this 30th day of March 2009

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