

STAND. COM. REP. NO.

989

Honolulu, Hawaii

MAR 27 2009

RE: H.B. No. 1503  
H.D. 1  
S.D. 1

Honorable Colleen Hanabusa  
President of the Senate  
Twenty-Fifth State Legislature  
Regular Session of 2009  
State of Hawaii

Madam:

Your Committee on Economic Development and Technology, to which was referred H.B. No. 1503, H.D. 1, entitled:

"A BILL FOR AN ACT RELATING TO LIMITED LIABILITY COMPANIES,"

begs leave to report as follows:

The purpose of this measure is to allow the goals of job creation, labor rights, and environmental protection to be supported by the State's business laws through the establishment of a special class of limited liability companies called "public purpose companies" that would use patent rights to:

- (1) Create and retain desirable jobs within Hawaii and the United States;
- (2) Strengthen labor rights nationally and internationally; and
- (3) Enhance environmental protection nationally and internationally.

Testimony in support of this measure was submitted by one concerned individual. Testimony in opposition of this measure was submitted by the Department of Commerce and Consumer Affairs and Char Sakamoto Ishii Lum & Ching. Written testimony presented to the Committee may be reviewed on the Legislature's website.



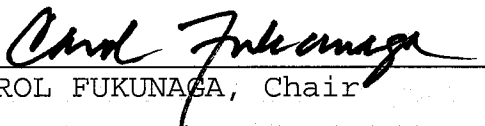
Your Committee finds that the creation of a public purpose company under the protections afforded to limited liability companies in the State of Hawaii will provide a mechanism for individuals and entities to provide benefits to the public and society at large through various activities desired by prospective public purpose companies. Your Committee also finds that the creation of a public purpose company entity in the State of Hawaii will provide a springboard to other jurisdictions to adopt a similar legal entity to support specific public purpose endeavors.

Your Committee has amended this measure by:

- (1) Changing the effective date to July 1, 2050, to promote further discussions; and
- (2) Making technical, nonsubstantive amendments for the purpose of clarity.

As affirmed by the record of votes of the members of your Committee on Economic Development and Technology that is attached to this report, your Committee is in accord with the intent and purpose of H.B. No. 1503, H.D. 1, as amended herein, and recommends that it pass Second Reading in the form attached hereto as H.B. No. 1503, H.D. 1, S.D. 1, and be referred to the Committee on Commerce and Consumer Protection.

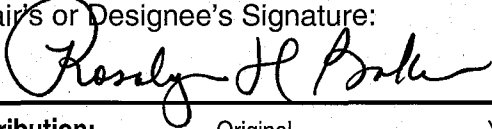
Respectfully submitted on  
behalf of the members of the  
Committee on Economic  
Development and Technology,

  
CAROL FUKUNAGA, Chair



The Senate  
Twenty-Fifth Legislature  
State of Hawaii

**Record of Votes**  
**Committee on Economic Development and Technology**  
**EDT**

Bill / Resolution No.:* <b>HB1503, HD1</b>	Committee Referral: <b>EDT, CPN</b>	Date: <b>3-23-09</b>		
<input type="checkbox"/> The committee is reconsidering its previous decision on this measure. If so, then the previous decision was to: _____				
The Recommendation is: <input type="checkbox"/> Pass, unamended 2312 <input checked="" type="checkbox"/> Pass, with amendments 2311 <input type="checkbox"/> Hold 2310 <input type="checkbox"/> Recommit 2313				
Members	Aye	Aye (WR)	Nay	Excused
FUKUNAGA, Carol (C)	✓			
BAKER, Rosalyn H. (VC)	✓			
HEE, Clayton				✓
IGE, David Y.	✓			
SLOM, Sam			✓	
<b>TOTAL</b>	<b>3</b>	<b>-</b>	<b>1</b>	<b>1</b>
Recommendation: <input checked="" type="checkbox"/> Adopted <input type="checkbox"/> Not Adopted				
Chair's or Designee's Signature: 				
<b>Distribution:</b> Original     Yellow     Pink     Goldenrod File with Committee Report     Clerk's Office     Drafting Agency     Committee File Copy				

\*Only one measure per Record of Votes

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# A BILL FOR AN ACT

RELATING TO LIMITED LIABILITY COMPANIES.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

- 1           SECTION 1. The legislature finds that:
- 2           (1) Intellectual property is an essential source of
- 3                 competitive advantage in a global economy;
- 4           (2) Inventors and other creators of intellectual property
- 5                 are an important engine of sustainable economic
- 6                 growth;
- 7           (3) Whether working independently or employed by
- 8                 corporations, the vast majority of inventors and other
- 9                 creators of intellectual property have neither the
- 10                collective representation, institutional strength, nor
- 11                the financial resources necessary to exercise and
- 12                enforce their property rights;
- 13           (4) Hawaii needs to attract inventors and build its
- 14                reputation as a center of innovation to diversify and
- 15                strengthen its economy;
- 16           (5) Protecting labor and environmental standards in Hawaii
- 17                depends, in part, upon strengthening labor and

1 environmental standards both nationally and  
2 internationally;

3 (6) The right conferred by the grant of a patent is the  
4 right to exclude others from making, using, offering  
5 for sale, or selling the invention in the United  
6 States or importing the invention into the United  
7 States; and

8 (7) This right to exclude can serve a public interest.

9 The purpose of this Act is to require limited liability  
10 companies that opt to be designated a public purpose company by  
11 the director of commerce and consumer affairs to exercise the  
12 right to exclude conferred by any patent for public purposes.

13 SECTION 2. Chapter 428, Hawaii Revised Statutes, is  
14 amended by adding a new section to be appropriately designated  
15 and to read as follows:

16 **"§428- Public purpose company designation; use of the**  
17 **right to exclude; reporting.** (a) Any limited liability company  
18 organized under this chapter may opt to be designated a public  
19 purpose company by the director. Designation as a public  
20 purpose company is irrevocable. A limited liability company  
21 designated a public purpose company by the director shall use  
22 the right to exclude conferred by any and all patents in which

1 it has an interest through assignment or license for the  
2 following purposes:

3 (1) Creating and retaining good jobs within the state as  
4 well as throughout the United States;

5 (2) Strengthening labor rights nationally and  
6 internationally; provided that for purposes of this  
7 paragraph, "labor rights" means the four basic rights  
8 set forth in Article 23 of the Universal Declaration  
9 of Human Rights, as adopted and proclaimed by the  
10 General Assembly of the United Nations on December 10,  
11 1948; and

12 (3) Enhancing environmental protection nationally and  
13 internationally.

14 (b) In addition to any other reporting requirement, each  
15 limited liability company designated a public purpose company  
16 shall file with the director an annual statement of the purposes  
17 for which the company used the right to exclude.

18 (c) Each company that uses the right to exclude authorized  
19 under subsection (a) shall be designated a public purpose  
20 company. The director shall include a list of all public  
21 purpose companies in the state in the department's annual  
22 report."

1 SECTION 3. This Act does not affect rights and duties that  
2 matured, penalties that were incurred, and proceedings that were  
3 begun, before its effective date.

4 SECTION 4. New statutory material is underscored.

5 SECTION 5. This Act shall take effect on July 1, 2050.

**Report Title:**

Limited Liability Company; Patents

**Description:**

Creates an optional "public purpose company" designation for LLCs. Requires an LLC with a public purpose company designation to exercise its right to exclude conferred by any patent it has an interest in for a public purpose. Establishes reporting requirements. Effective 7/1/2050. (SD1)





LINDA LINGLE  
GOVERNOR  
JAMES R. AIONA, JR.  
LT. GOVERNOR

STATE OF HAWAII  
OFFICE OF THE DIRECTOR  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
335 MERCHANT STREET, ROOM 310  
P.O. Box 541  
HONOLULU, HAWAII 96809  
Phone Number: 586-2850  
Fax Number: 586-2856  
[www.hawaii.gov/dcca](http://www.hawaii.gov/dcca)

LAWRENCE M. REIFURTH  
DIRECTOR  
RONALD BOYER  
DEPUTY DIRECTOR

TO THE SENATE COMMITTEE ON  
COMMERCE AND CONSUMER PROTECTION  
THE TWENTY-FIFTH LEGISLATURE  
REGULAR SESSION OF 2009

Thursday, April 2, 2009  
10:00 am  
Conference Room 229

**TESTIMONY ON HOUSE BILL NO. 1503, H.D. 1, S.D.1  
RELATING TO LIMITED LIABILITY COMPANIES**

TO THE HONORABLE ROSALYN BAKER, CHAIR, AND MEMBERS OF THE COMMITTEE:

My name is Tung Chan, Commissioner of Securities and head of the Business Registration Division ("Division"), Department of Commerce and Consumer Affairs ("Department"). The Department appreciates the opportunity to testify on House Bill No. 1503, H.D. 1, relating to limited liability companies. The Department opposes this measure and respectfully requests that the Committee hold the bill.

This bill proposes to establish a special class of limited liability companies ("LLCs") called "public purpose companies"<sup>1</sup>, which "shall use the right to exclude conferred by any and all patents in which it has an interest" for specific public purposes enumerated in the bill. We oppose this measure for the following reasons:

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<sup>1</sup> The original draft of the bill used the term "ingenuity company."

1. Hawaii's LLC Act is based on uniform laws that have been thoroughly vetted by professional business registration law organizations such as the International Association of Commercial Administrators ("IACA") and the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), which study business law trends on a national level. One of the Department's main goals is to maintain uniformity with other states' laws to minimize instances of legal ambiguity, which is detrimental to a healthy business climate. IACA and NCCUSL have not made recommendations to adopt a new class of LLCs like the public purpose company. The proposed designation increases inconsistencies with other business registries around the country. Not having been subject to the legal vetting process of NCCUSL, IACA and the Hawaii State Bar Association ("HSBA"), this bill suffers from technical flaws and undermines uniformity.

2. The bill does not confer any additional rights upon public purpose companies beyond those already available for companies under the existing LLC laws. Although there is actually no legal need for this new designation, the redundancy would inevitably create questions on how public purpose companies differ from the "regular" variety of LLCs, resulting in ambiguity in our own laws.

3. A panel of concurring justices in the U.S. Supreme Court and the U.S. Congress have indicated a trend away from the "right to exclude" activities that this bill advances in regards to patents. These activities are known as "patent trolling".<sup>2</sup> In the seminal case, *eBay Inc v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), the U.S. Supreme Court in a unanimous decision ruled in favor of applying a traditional test to

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<sup>2</sup> <http://www.ecommerce-guide.com/news/news/article.php/3598586>

patents and rejected a presumptive injunction, a test that favors “patent trolling”. The holding makes it more difficult for entities to enforce a right to exclude under a patent if the entity does not create it or use it for itself. Justice Kennedy’s concurrence, joined by Justices Souter, Breyer and Stevens, expressed concern regarding firms that use patents “not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees.”<sup>3</sup> Congress has similarly echoed Justice Kennedy’s concerns and has looked to reform legislation that would curb this type of activity.<sup>4</sup> In light of the concurrence in the eBay case and proposed reforms of the U.S. Congress, adopting this bill without further vetting by the HSBA, NCCUSL and IACA is imprudent at best and at worst may be in conflict with pending reforms in federal law.

4. The text and notes on the bill raise a number of other concerns. It is unclear whether the bill intends to make “public purpose company” a state instrumentality. To create a body corporate like the Hawaii Community Development Authority or the High Technology Development Corporation, specific language granting such status is required and such language is missing here. But at the same time, the bill’s preamble and the name “public purpose company” appear to imbue public purpose companies with governmental authority.

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<sup>3</sup> See *eBay Inc v. MercExchange, L.L.C.*, 547 U.S. at 396 ; see also Lee Anne Fennell, *Adjusting Alienability*, Harv. L. Rev. 1403 at 1414 (2009) (Kennedy’s concurrence concerned about trolls).

<sup>4</sup> See Patents Depend on Quality Act of 2006, H.R. 5096, 109<sup>th</sup> Cong. (2006); Patent Reform Act of 2005, H.R. 2795, 109<sup>th</sup> Cong. (2005); cf. Michale J. Meurer, Controlling Opportunistic and Anti-Competitive Intellectual Property Litigation, 44 B.C. L. Rev. 509, 525-44 (2003) (presenting various ideas to reduce frivolous intellectual property litigation), see Gerard N Magliocca, Blackberries and Barnyards: Patent Trolls and the Perils of Innovation, 82 Notre Dame L. Rev 1809 at n.6 (2007).

5. The bill is silent as to whether the company can engage in activity other than the designated ones, and if so, to what extent. The designation is "irrevocable." If the designation is "irrevocable," and the public purpose company (designated as such) does not continue the requisite activity, then what becomes of the entity? Should it be administratively terminated by the Department? The bill is silent with respect to the consequences of not complying with its provisions.

6. In addition, if, as the House Committee Report No. 604 indicates, "[t]his bill reflects growing efforts in other jurisdictions to make the public good a recognizable goal under our business laws," then are these LLCs actually nonprofits? If so, they should be subject to oversight by the Attorney General's Office under Act 174, SLH 2008 in all the same circumstances where other nonprofits are. The establishment of public purpose companies may have the unintended affect of creating ambiguities with respect to the application of Act 174 and present opportunities for circumvention of its requirements.

7. This measure would result in added administrative costs to develop modifications to our IT and processing systems to recognize public purpose companies as a separate and distinct legal entity, apart from other LLCs, and to accommodate the unusual annual filing statement that is beyond the type of filings the Director accepts for any other entities. The costs are a concern as the bill does not provide for funding. The cost would negatively impact the Department and no provision has been made for it in the Biennium Budget. Recently, we have determined that the cost to add a new

designation starts at approximately \$130,000 and to add a new annual filing field is approximately \$78,000.

8. This bill would also result in increased staff requirements and training expense. The bill states in proposed HRS section 428-\_\_\_(c) that each LLC that engages in the required activities as set forth in the bill "shall be designated a public purpose company." It anticipates that the Director makes a finding or somehow certifies that the company is engaged in the requisite activity before conferring the designation.

This is a problem because, insofar as business registration, the Department's functions are purely ministerial: we do not investigate businesses, nor do we determine whether a business is engaged in any specific activity. To require the Director to make a substantive review for this designation takes the Department out of its ministerial role. The Department would have to hire staff and incur unbudgeted expenses.

In conclusion, while this bill confers no rights that LLCs do not already have, it presents a host of legal and operational problems. It is in tension with the direction that the U.S. Supreme Court and Congress are moving on this matter, has not been reviewed by legal experts, undermines uniformity in the laws, contains technical flaws and legal ambiguities, and will impose expenses and other implementation problems. For these reasons, we ask that this bill be held.

Thank you for the opportunity to testify. I will be happy to answer any questions the Committee may have.

**Testimony in support of House Bill 1503**  
Relating to Limited Liability Companies

Senator Rosalyn H. Baker, Chair  
Senator David Y. Ige, Vice Chair  
Committee on Economic Development & Technology

Hearing Date:  
Thursday, April 02, 2009  
10:00 AM in Room 229

Aloha Chair Baker, Vice-Chair Ige and members of the Committee,

My name is Ian Chan Hodges and I have appeared before the legislature in previous sessions to provide testimony in support of creating an entity that would enable Hawaii to champion and support the rights of inventors as well as utilize patents for the public good. You also received testimony from prominent inventors and top labor leaders from around the nation in support of those bills. These proposed entities were designed to protect and utilize the patents of inventors with the understanding that patents can provide a very powerful tool for creating and retaining good jobs in communities impacted by the stresses of the global economy.

In past years the legislature passed a bill chartering the Ingenuity Corporation twice, only to have the bill vetoed by the Governor. I want to thank you for your previous support and I ask you now to pass HB 1503, which has been drafted to address the concerns of the Governor.

Earlier this year I was in Washinton, DC where support for creating a public purpose charter with a focus on patents remains strong and the opportunities for such an entity are growing. For example, 25% of all green tech patents are assigned to entities in the state of Michigan. A series of meetings have been taking place in Detroit over the past three weeks where utilization of Hawaii's public purpose IP LLC statute — should it pass — are under serious consideration. The most recent meeting took place yesterday morning and a key focus of the discussion was hybrid/electric vehicle patents (companies in Michigan control nearly 2/3<sup>rd</sup>s of all US patents of this type) and how Hawaii is strategically placed to utilize these patents to create and retain good jobs locally and nationally.

Finally, while I am supportive of the language currently found in HB 1503 SD1, I would also support amendments (attached) that have been suggested by members of our local nonprofit/environmental/foundation community.

Thank you for the opportunity to submit testimony.

Suggested changes in *blue italics*.

Report Title:

Limited Liability Company; Patents

Description:

Creates an optional "public purpose company" designation for LLCs. Requires an LLC with a public purpose company designation to exercise its right to exclude conferred by any patent it has an interest in for a public purpose. Establishes reporting requirements. Effective 7/1/2050. (SD1)

HOUSE OF REPRESENTATIVES

H.B. NO. 1503

TWENTY-FIFTH LEGISLATURE, 2009

H.D. 1

STATE OF HAWAII

S.D. 2

A BILL FOR AN ACT

RELATING TO LIMITED LIABILITY COMPANIES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. The legislature finds that:

- (1) Intellectual property is an essential source of competitive advantage in a global economy;
- (2) Inventors and other creators of intellectual property are an important engine of sustainable economic growth;
- (3) Whether working independently or employed by corporations, the vast majority of inventors and other creators of intellectual property have neither the collective representation, institutional strength, nor the financial resources necessary to exercise and enforce their property rights;
- (4) Hawaii needs to attract inventors and build its reputation as a center of innovation to diversify and strengthen its economy;
- (5) Protecting labor and environmental standards in Hawaii depends, in part, upon strengthening labor and environmental standards both nationally and internationally;
- (6) The right conferred by the grant of a patent is the right to exclude others from making, using, offering for sale, or selling the invention in the United States or importing the invention into the United States; and
- (7) This right to exclude can serve a public interest.

The purpose of this Act is to require limited liability companies that opt to be designated a public purpose company by the director of commerce and consumer affairs to exercise the right to exclude conferred by any patent for public purposes.

SECTION 2. Chapter 428, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"§428- Public purpose company designation; use of the right to exclude; reporting.  
(a) Any limited liability company organized under this chapter may opt to be designated a public purpose company by the director. Designation as a public purpose company is irrevocable.



1) A public purpose company means a limited liability company organized under this chapter that is organized for a business purpose that satisfies and is at all times operated to satisfy each of the following requirements:

(A) The company:

(i) significantly furthers the accomplishment of one or more charitable or educational purposes within the meaning of Section 170(c)(2)(B) of the Internal Revenue Code of 1986, 26 U.S.C. § 170(c)(2)(B); and

(ii) would not have been formed but for the company's relationship to the accomplishment of charitable or educational purposes.

(B) No significant purpose of the company is the production of income or the appreciation of property; provided, however, that the fact that a company produces significant income or capital appreciation shall not, in the absence of other factors, be conclusive evidence of a significant purpose involving the production of income or the appreciation of property.

(C) No purpose of the company is to accomplish one or more political or legislative purposes within the meaning of Section 170(c)(2)(D) of the Internal Revenue Code of 1986, 26 U.S.C. § 170(c)(2)(D).

2) In addition, a limited liability company designated a public purpose company by the director shall use the right to exclude conferred by any and all patents in which it has an interest through assignment or license for the following purposes:

(A) Creating and retaining good jobs within the state as well as throughout the United States;

(B) Strengthening labor rights nationally and internationally; provided that for purposes of this paragraph, "labor rights" means the four basic rights set forth in Article 23 of the Universal Declaration of Human Rights, as adopted and proclaimed by the General Assembly of the United Nations on December 10, 1948; and

(C) Enhancing environmental protection nationally and internationally.

(b) In addition to any other reporting requirement, each limited liability company designated a public purpose company shall file with the director an annual statement of the purposes for which the company used the right to exclude.

(c) ~~Each company that uses the right to exclude authorized under subsection (a) shall be designated a public purpose company.~~ The director shall include a list of all public purpose companies in the state on the department's website and in the department's annual report."

SECTION 3. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

SECTION 4. New statutory material is underscored.

SECTION 5. This Act shall take effect on July 1, 2050.

## Testimony in strong support of House Bill 1503 Relating to Limited Liability Companies

Senator Rosalyn H. Baker, Chair  
Senator David Y. Ige, Vice Chair  
Committee on Economic Development & Technology

Thursday, April 02, 2009  
10:00 AM, Room 229

Chair Baker, Vice-Chair Ige and Members of the Committee,

I am writing in strong support of HB 1503, and encourage this Committee to adopt the suggested amendments, attached.

My name is James Koshiba and I currently serve as the Executive Director of Kanu Hawaii – a community of 7,000 islanders committed to promoting a more sustainable, compassionate, and resilient local economy. I do not claim to speak for the members of Kanu Hawaii here (though I suspect many of them share my views on this subject). Rather, I am testifying in my individual capacity as a citizen and social entrepreneur.

In the past 10 years, I have worked with a variety of companies that have straddled the line between for-profit and nonprofit arenas – a consulting firm that worked to enhance the impact of nonprofits and schools; a loan fund that financed affordable housing at low interest rates; a venture capital fund that invested to create jobs in impoverished communities; a technology company that headquartered and hired in Hawaiian Homestead neighborhoods.

My support for HB 1503 and proposed amendments is informed by my experience with these and other so-called “social ventures” or “double-bottom-line” companies. Many companies like the ones I’ve described above exist here in the islands – companies that were founded to pursue a social or environmental mission *and* which generate a profit. These companies – some for-profit, some non-profit – struggle to define their activities within the bounds of existing law, precisely because they are “double-bottom-line” ventures – producing both social good and financial returns for investors.

In Hawaii, our strong sense of community responsibility in business leads many island entrepreneurs to become interested in double-bottom-line businesses, hence the presence of such organizations here. Yet, trying to make such a company fit within existing corporate structures has frustrated many a social entrepreneur. Forming a nonprofit affiliate of a for-profit company or a for-profit subsidiary of a nonprofit corporation are occasionally used as solutions, but these are cumbersome and expensive (in terms of time and money) to create. We would have many more such firms if the law created a clear space for them.

Moreover, the failure of existing laws to clearly define a double-bottom-line business also discourages investment. Many trusts, foundations, and high net worth individuals in the islands are interested in investments that produce both a social (or environmental) and financial return. But, without a distinct legal class of companies that fit this criterion, investors are unsure how to identify such opportunities, and can be discouraged from placing capital with them.

An amended HB 1503 would provide an important tool to double-bottom-line businesses, and dual-dividend investors to participate in ventures that do well (economically) and do good (for society and the environment). The absence of this law constrains investment, jobs, and income.

The current economic moment offers a prime opportunity to pass this groundbreaking piece of legislation. I strongly urge you to support this bill.

Mahalo for your consideration.

James Koshiba, Kapalama, Oahu (808) 782-8248

Suggested changes italicized.

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TWENTY-FIFTH LEGISLATURE, 2009

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(4) Hawaii needs to attract inventors and build its reputation as a center of innovation to diversify and strengthen its economy;

(5) Protecting labor and environmental standards in Hawaii depends, in part, upon strengthening labor and environmental standards both nationally and internationally;

(6) The right conferred by the grant of a patent is the right to exclude others from making, using, offering for sale, or selling the invention in the United States or importing the invention into the United States; and

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The purpose of this Act is to require limited liability companies that opt to be designated a public purpose company by the director of commerce and consumer affairs to exercise the right to exclude conferred by any patent for public purposes.

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2) In addition, a limited liability company designated a public purpose company by the director shall use the right to exclude conferred by any and all patents in which it has an interest through assignment or license for the following purposes:

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(b) In addition to any other reporting requirement, each limited liability company designated a public purpose company shall file with the director an annual statement of the purposes for which the company used the right to exclude.

(c) ~~Each company that uses the right to exclude authorized under subsection (a) shall be designated a public purpose company.~~ The director shall include a list of all public purpose companies in the state on the department's website and in the department's annual report."

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## **Testimony in strong support of House Bill 1503 Relating to Limited Liability Companies**

Senator Rosalyn H. Baker, Chair  
Senator David Y. Ige, Vice Chair  
Committee on Economic Development & Technology

Thursday, April 02, 2009  
10:00 AM, Room 229

Chair Baker, Vice-Chair Ige and members of the Committee,

I write to you today in strong support of HB 1503, and encourage this Committee to adopt the suggested amendments included below. My name is Joshua Stanbro and I currently serve as the Director for the Environment and Sustainability Program at the Hawaii Community Foundation. While I am testifying as an individual today, and not on behalf of the Foundation, my support for HB 1503 and proposed amendments is directly informed by my decade of experience working within the non-profit and foundation sector.

An amended and approved HB 1503 would provide an important tool to non-profits and foundations to participate in the private sector for public good. Just a few of the potential benefits of establishing a "Public Benefit Company" classification here in Hawaii would be: increased jobs, increased local investing, increased ability for non-profit organizations to tap into renewable energy systems, increased tax revenue for the State of Hawaii, and increased outside interest in Hawaii business and philanthropy.

HB 1503 (with suggested amendments) would provide a valuable new mechanism for local and mainland philanthropic foundations to invest endowment funds in a Public Benefit Company without jeopardizing their IRS status. This could mean a valuable new influx of capital into Hawaii to pursue projects that serve the public good, such as capital-intensive renewable energy systems for non-profits, schools and churches. These projects will provide good-paying jobs for local residents, while benefitting the very groups that benefit society most, yet are least able to afford increased costs in our current economy.

Passing HB 1503 SD1 with suggested amendments (attached) will serve as an important tool for Hawaii's non-profit and foundation community to help do their part to help stimulate our flagging economy. I strongly urge you to support this bill.

Mahalo for your consideration.

Joshua W. Stanbro, Palolo Valley, Oahu (808) 306-5518

Suggested changes italicized.

Report Title:

Limited Liability Company; Patents

Description:

Creates an optional "public purpose company" designation for LLCs. Requires an LLC with a public purpose company designation to exercise its right to exclude conferred by any patent it has an interest in for a public purpose. Establishes reporting requirements. Effective 7/1/2050. (SD1)

HOUSE OF REPRESENTATIVES

H.B. NO. 1503

TWENTY-FIFTH LEGISLATURE, 2009

H.D. 1

STATE OF HAWAII

S.D. 2



A BILL FOR AN ACT

RELATING TO LIMITED LIABILITY COMPANIES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. The legislature finds that:

(1) Intellectual property is an essential source of competitive advantage in a global economy;

(2) Inventors and other creators of intellectual property are an important engine of sustainable economic growth;

(3) Whether working independently or employed by corporations, the vast majority of inventors and other creators of intellectual property have neither the collective representation, institutional strength, nor the financial resources necessary to exercise and enforce their property rights;

(4) Hawaii needs to attract inventors and build its reputation as a center of innovation to diversify and strengthen its economy;

(5) Protecting labor and environmental standards in Hawaii depends, in part, upon strengthening labor and environmental standards both nationally and internationally;

(6) The right conferred by the grant of a patent is the right to exclude others from making, using, offering for sale, or selling the invention in the United States or importing the invention into the United States; and

(7) This right to exclude can serve a public interest.

The purpose of this Act is to require limited liability companies that opt to be designated a public purpose company by the director of commerce and consumer affairs to exercise the right to exclude conferred by any patent for public purposes.

SECTION 2. Chapter 428, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"§428- Public purpose company designation; use of the right to exclude; reporting. (a) Any limited liability company organized under this chapter may opt to be designated a public purpose company by the director. Designation as a public purpose company is irrevocable.

1) A public purpose company means a limited liability company organized under this chapter that is organized for a business purpose that satisfies and is at all times operated to satisfy each of the following requirements:

(A) The company:

(i) significantly furthers the accomplishment of one or more charitable or educational purposes within the meaning of Section 170(c)(2)(B) of the Internal Revenue Code of 1986, 26 U.S.C. § 170(c)(2)(B); and

(ii) would not have been formed but for the company's relationship to the accomplishment of charitable or educational purposes.

(B) No significant purpose of the company is the production of income or the appreciation of property; provided, however, that the fact that a company produces significant income or capital appreciation shall not, in the absence of other factors, be conclusive evidence of a significant purpose involving the production of income or the appreciation of property.

(C) No purpose of the company is to accomplish one or more political or legislative purposes within the meaning of Section 170(c)(2)(D) of the Internal Revenue Code of 1986, 26 U.S.C. § 170(c)(2)(D).

2) In addition, a limited liability company designated a public purpose company by the director shall use the right to exclude conferred by any and all patents in which it has an interest through assignment or license for the following purposes:

(A) Creating and retaining good jobs within the state as well as throughout the United States;

(B) Strengthening labor rights nationally and internationally; provided that for purposes of this paragraph, "labor rights" means the four basic rights set forth in Article 23 of the Universal Declaration of Human Rights, as adopted and proclaimed by the General Assembly of the United Nations on December 10, 1948; and

(C) Enhancing environmental protection nationally and internationally.

(b) In addition to any other reporting requirement, each limited liability company designated a public purpose company shall file with the director an annual statement of the purposes for which the company used the right to exclude.

(c) ~~Each company that uses the right to exclude authorized under subsection (a) shall be designated a public purpose company.~~ The director shall include a list of all public purpose companies in the state on the department's website and in the department's annual report."

SECTION 3. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

SECTION 4. New statutory material is underscored.

SECTION 5. This Act shall take effect on July 1, 2050.



Testifier: **Leighton K. Chong**  
**Intellectual Property & Patent Attorney**

Comment to: **Senate Consumer Protection Committee**

Date/ Time: **April 2, 2009**

Measure: **H.B. 1503**

Copies: By Email

I am submitting these comments in opposition to H.B. 1503 which proposes to require the Department of Commerce & Consumer Affairs to register and monitor an optional designation for LLCs formed in Hawaii as an "ingenuity company" if they own patents for the purpose of enforcement, and to require such designated companies to use their patent exclusionary rights for various public policy objectives.

I have been an intellectual property and patent attorney for 35 years, during which I worked for 22 years with law firms in New York City on patent law matters including in enforcement and defense of patent litigation. I returned to Hawaii in 1997 and have continued to practice in intellectual property and patent law, including in assertion and licensing of patent rights. I was the founder and chair of the annual Hawaii Intellectual Property Licensing Conference, and served as Chair of the Intellectual Property & Technology Law (IPTL) Section of the Hawaii State Bar Association (HSBA) during 2006-2007. My comments are submitted as an individual, and do not represent the views or position of the IPTL Section or the HSBA.

The U.S. statutory patent system has been in existence for over 200 years. Patents are sought by inventors to secure exclusive legal rights in their inventions. For a patent to be granted, the invention must meet a high standard of being "new" and "nonobvious" over all published knowledge in Patent Office examination and in any subsequent legal challenges. Once granted, a patent provides the inventor with exclusive rights for a limited term of 20 years from filing within which to try to derive profit from their invention. A principal requirement of the patent system is that the inventor provide a complete disclosure to the public in the patent document of how to do something that was not known before in exchange for grant of a 20-year patent monopoly.

Patent litigation is complex and costly, typically requiring legal costs of millions of dollars on each side to handle a case through trial and possible appeal. In the past decade, investor-backed firms have arisen to fund patent infringement suits on behalf of inventors against large companies where the potential for an award of infringement damages may be large. There are scores of such patent assertion firms active in the U.S. today. They have brought well-publicized patent infringement suits against companies such as Microsoft, eBay, Research in Motion, Boston Scientific, etc. Companies that are the targets of such patent infringement actions have criticized patent assertion firms as "patent trolls" seeking to use lawsuits to extract bounty.

Inventors and small business organizations generally support the activities of patent assertion firms, whereas large corporations that work in technologies where individuals may obtain patent for their inventions seek to limit their activities.

If a Hawaii LLC wished to engage in patent assertion activity, it can do so now without any need to require the State's agency DCCA to certify companies as qualified for an optional "ingenuity company" designation. Moreover, it is impossible to know in advance or even after a patent lawsuit whether the assertion of a patent will serve any of the public purposes required in H.B. 1503, i.e., creating jobs within the state, benefiting the environment, and protecting labor rights. The purposes of H.B. 1503 appear to have no rational relationship to the enforcement of patent rights. I see no reason why the State of Hawaii needs to get involved by certifying what is essentially a private sector activity.

Thank you for consideration of my comments in opposition to H.B. 1503.

Leighton K. Chong



March 27, 2009

Senator Rosalyn H. Baker, Chair  
Committee on Commerce and Consumer Protection  
The Senate  
State of Hawaii

Re: H.B. 1503, H.D. 1, S.D. 1 Relating to Limited Liability Companies - Testimony in  
Opposition

Dear Chair Baker, Vice Chair Ige and Members of the Committee on Commerce and Consumer  
Protection:

I am an attorney who has practiced organizational law for about 30 years. I have been involved  
in the drafting of our business organizations laws numerous times during this period.

I am opposed to H.B. 1503 because it attempts to insert into the Hawaii Uniform Limited  
Liability Company Act provisions of very limited and specialized applicability which attempt to  
promote certain social goals. The Hawaii Limited Liability Act is supposed to govern all limited  
liability companies generally and should not be used as a vehicle to promote specific social  
objectives.

In addition, the objectives of H.B. 1503 can be accomplished without creating another statute and  
more administrative duties for state government. Any company (whether a corporation, limited  
liability company or otherwise) can designate itself as having specific purposes that cannot be  
changed. Furthermore, if that company is an entity or trust organized for public or social goal  
purposes, it will be under the regulation of the attorney general of the State of Hawaii under  
current law. No new responsibilities need to be given to the Department of Commerce and  
Consumer Affairs to organize a company that has certain social goals and responsibilities.

Thank you,

A handwritten signature in black ink, appearing to read 'Ronald', is located below the 'Thank you,' text. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Ronald R. Sakamoto

# SETH M. REISS

ATTORNEY AT LAW

*A Limited Liability Law Company*

3770 LURLINE DRIVE  
HONOLULU • HAWAII 96816  
808 • 521 • 7080  
FAX • 808 • 675 • 5805  
EMAIL • [seth.reiss@lex-ip.com](mailto:seth.reiss@lex-ip.com)

lex-ip.com

INTELLECTUAL PROPERTY AND  
INTERNET LAW

[WWW.LEX-IP.COM](http://WWW.LEX-IP.COM)

March 27, 2009

VIA EMAIL ONLY

[CPNTestimony@Capital.hawaii.gov](mailto:CPNTestimony@Capital.hawaii.gov)

Senate Committee on Commerce and  
Consumer Protection  
Conference Room 229  
Hawai`i State Capital

Re: HB 1503 LLC Designation Bill  
**Testimony Opposing**  
Committee Hearing: Thursday, April 2, 2009, at 10:00AM

Dear Senators Baker, Ige and Committee Members:

I am submitting this brief testimony **in opposition to HB 1503**.

I am an attorney concentrating in intellectual property matters. I am also a registered patent attorney and have been since 1981. I regularly file, prosecute, enforce and transact patents together with other types of intellectual property. I was a founding member and past president of the Intellectual Property & Technology Section of the Hawai`i State Bar Association. This testimony is being submitted on my behalf alone.

HB 1503 appears unclear in its purpose and effect, may not be enforceable and may be unconstitutional.

It is unclear if the legislation purports to preclude companies not electing to be designated LLC's from enforcing the patents they may hold. If it did, the measure would clearly be unconstitutional.

Even simply affecting the manner in which those companies opting to become "public purpose" or "ingenuity" company can enforce their patents, something that the bill clearly purports to do, may render the law unconstitutional. The federal government has the exclusive right to legislate in the area of patents and patent rights. U.S. Constitution, Article I section 8 clause 8.

It is further unclear what benefit could accrue to a company that elects the designation, or how the State could enforce the provisions of the bill if enacted.

Because the bill would limit the manner in which the designated LLC could enforce its patents, and because the bill does not appear to give the LLC any tangible benefits for electing a public purpose company designation, there would appear to be no logical motivation for an LLC to make such an election.

The permissible patent exclusion criteria listed in the bill are vague and subjective, making enforcement difficult and perhaps rendering the statute unconstitutional under due process precepts. There is also no enforcement mechanism enunciated.

As the bill limits what a patent owner can do with its patents, a patent portfolio in the hands of a designated LLC would become less valuable. It is hard to understand, therefore, how the bill will attract inventors or encourage intellectual property creation and exploitation within the State.

The bill, if passed, could send a signal to those in Hawai`i and those on the mainland that the State of Hawai`i is not sufficiently respectful of the rights of patent owners, or simply lacks the sophistication to understand those rights.

I have nothing against the noble social purposes that appear to underlie the bill. However, attempting to affect the manner in which patents can be enforced in the guise of a business entity election would not appear to be a sensible method for furthering these purposes.

Thank you for the opportunity to provide testimony on HB 1503.

Respectfully submitted,

*/s/ Seth M. Reiss*

SETH M. REISS