

# **HB 235 HD2 Testimony**

**EDT**



NEIL ABERCROMBIE  
GOVERNOR

BRIAN SCHATZ  
LT. GOVERNOR

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TO THE SENATE ECONOMIC DEVELOPMENT AND TECHNOLOGY COMMITTEE  
THE TWENTY-SIXTH LEGISLATURE  
REGULAR SESSION OF 2011

Date: Wednesday, March 16, 2011  
Time: 1:15 pm  
Conference Room: 016

**TESTIMONY ON HOUSE BILL NO. 235, HD2  
RELATING TO LIMITED LIABILITY COMPANIES**

TO THE HONORABLE CAROL FUKUNAGA & THE HONORABLE GLENN WAKAI,  
CHAIRS AND MEMBERS OF THE COMMITTEE:

Thank you for the opportunity to testify. My name is Tung Chan, Commissioner of Securities of the Business Registration Division (BREG), Department of Commerce and Consumer Affairs ("Department"). The Department opposes this bill and requests that it be held.<sup>1</sup>

This bill creates a new designation of limited liability companies ("LLCs") to be called "ingenuity companies" to exercise the right to exclude conferred by a patent in which it has an interest.

While we appreciate the intent of the bill, we oppose this measure on technical grounds, redundancy and LLC uniform best practices. The bill does not confer any

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<sup>1</sup> House Draft 2 made changes to the fair labor purpose paragraph to clarify the meaning of "fair labor standards" and changed the effective date to July 1, 2030. House Draft 1 made minor changes to the item (6) in the preamble: "(6) The fundamental 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...". House Draft 1 also had a defective date of July 1, 2112.

additional rights upon an LLC with the new designation beyond those already available for LLCs under the existing laws. In fact, IACA, NCCUSL and the ABA drafted the uniform LLC laws to be one of the most flexible entities in the country in order to accommodate a wide array of needs to avoid the proliferation of these types of designations. The goal was to streamline business registration and the attendant bureaucracy.

This bill works directly against these important interests, and instead of limiting the costs and expansion of bureaucracy for businesses, extends it without offering value. For all the legal inconsistencies and costs of implementing the bill, it offers no legal rights that are not already available and accordingly, would appear to be an impractical use of funds.

In the hearing before the House Economic Revitalization & Business Committee, proponents of this bill testified that this measure is necessary to guarantee that a court will grant injunctive relief for patent infringements, referring to a four-part test.

But in fact, the bill does nothing to guarantee injunctive relief as the proponents suggest. The United States Supreme Court in *eBay, Inc. v MercExchange, L.L.C.*, 547 U.S. 388 (2006), was clear in its holding that the district courts, when applying the four-factor equitable test, must exercise discretion instead of automatically issuing a permanent injunction after a finding of infringement has been made. In short, each of the four-factors will need to be examined and found before an injunction can issue regardless of whether this new LLC variation is adopted or not.

If the creation of the new designation is to confer special benefits on these special LLC's in the future, then the creation of the designation now is premature. It is at best imprudent to spend State funds on creating a new designation as a placeholder for possible benefits in the future. It sets a bad precedent and is unjustifiably costly for such a small field of applicants, especially in light of the fact that the broader public would be paying for this designation.

The bill also raises technical concerns. The designation is "irrevocable." If the designation is "irrevocable," and the new LLC does not continue the requisite activity, then what becomes of the entity? Who determines that the designation is no longer viable? Should it be administratively terminated by the Department? The bill is silent with respect to the consequences of not complying with its provisions and makes it confusing and difficult for the public to understand and for the Division to implement.

Finally, this bill is in direct opposition to the purposes of the uniform acts and the best practices of adopting such acts. Hawaii's LLC Act was based on uniform laws and our registry remains one of the best in the nation based in part on our efforts to work with the American Bar Association ("ABA"), the Hawaii State Bar Association ("HSBA"), the International Association of Commercial Administrators ("IACA") and the National Conference of Commissioners on Uniform State Laws ("NCCUSL") in implementing best legal practices. This current bill has not been advocated by any of these organizations and seems to undermine IACA, NCCUSL and the ABA's efforts in drafting uniform LLC laws.

The estimated IT cost of implementing the bill is \$125,000 to integrate this new LLC into a nine database structure with over a million records in each database. Since the Division does not have the excess funds to implement this new designation, we would have to ask for an appropriation.

For the reasons above, we respectfully ask that this bill be held. Thank you for the opportunity to testify.

**Committee on Economic Development and Technology**

Senator Carol Fukunaga, Chair  
Senator Glenn Wakai, Vice Chair

HEARING DATE:

Wednesday, March 16, 2011  
1:15pm in conference room 016

Testimony supporting House Bill 235  
*Relating to Limited Liability Companies*

Chairman Fukunaga and Vice-Chair Wakai:

My name is Aaron Johnson and I serve as managing member of Ingenuity Underwriters, L3C. I write to you in support of the Ingenuity Companies bill, HB235, currently before your legislature.

Ingenuity Underwriters is a Low-Profit Limited Liability Company (L3C) incorporated under the laws of Michigan. Our purpose is to develop intellectual property-based capital strategies which will lead to the creation and retention of good jobs in the United States. We recognize that broad-based job creation relies on the inventiveness of individuals and businesses. Our approach uses the legal rights granted by the constitution through the US Patent system, to keep manufacturing, service and creative jobs in emerging technologies within the United States and to make the necessary connections among inventors, producers and capital.

Ingenuity Underwriters uses our expertise in evaluating the economic potential and legal hazards of intellectual property to identify opportunities for regional growth. Our partner, Intellectual Property Insurance Services Corp. (IPISC), has over twenty years of experience evaluating the legal, business and economic merits of patents in order to provide insurance solutions to companies with and without patents. We use this experience to identify the latent and underutilized inventive assets of a region to secure good jobs with sustainable business practices.

Ingenuity Underwriters took advantage of the unique legal structure in Michigan because the laws governing an L3C promote socially-minded entrepreneurs who seek to pursue the public good. The motivation of the Michigan state legislature, in creating the L3C structure, is in solid agreement with Ingenuity Underwriters' core public-purpose principals. HB235 now brings the same focus on invention for the public good – the same focus which inspires our efforts – to the Hawaii legislature.

By creating the Ingenuity Company designation, Hawaii has an opportunity, through HB235, to step ahead of an already-growing movement to recognize that the intellectual efforts of our nation's citizens constitute an underutilized economic asset and an engine for growth. Ingenuity Underwriters would welcome the opportunity to continue our national efforts as a Hawaii Ingenuity Company.

Bob Fletcher, president of IPISC, is no stranger to the State of Hawaii. One of the first things that attracted Mr. Fletcher to Hawaii is its premier status as a captive insurance domicile. As you know, in 1987 the Hawaii legislature enacted the captive insurance law, which tasked the Department of Commerce and Consumer Affairs with oversight of what is now a Hawaii success story. Over the past two decades, Hawai'i has become a top ranked captive domicile, measured in terms of the number of captives formed and managed, the supporting infrastructure available and premium underwritten.

Mr. Fletcher, together with Ian Chan Hodges, has been involved in efforts to make Hawaii the epicenter for intellectual property financing and economic development. We view HB235 as an exciting, timely and important step towards that goal. HB235 will provide a catalyst to the innovation industry just as legislation from this body sparked Hawaii's captive insurance market 24 years ago.

Recognizing that the manner in which one chooses to exercise the exclusive rights of a patent can be used to promote environmental standards, basic human rights and sustainable business practices, Ingenuity Underwriters and IPISC seek to form a bridge between America's inventive spirit and the practices which animate our core values.

We recognize that clear, consistent and committed effort is required to fully enlist our nation's patent assets to anchor jobs, foster entrepreneurship, and fund commercial expansion and we couldn't be more enthusiastic in our support of this bill.

Most Sincerely,

Aaron R. Johnson, PhD



March 16, 2011

Senator Carol Fukunaga  
Chair, EDT  
Senator Glenn Wakai  
Vice Chair, EDT  
Hearing on HB235 HD2  
State Capitol, Conference Room 016

Aloha Chair Fukunaga, Vice Chair Wakai, and Members,

I am submitting my support for House Bill 235 HD2. As a lead economic development organization in the State of Hawaii, Enterprise Honolulu is actively engaged in activities to revitalize our Economy. Enterprise Honolulu, the Oahu Economic Development Board, is in the process of assembling and inventory of innovations that have made world wide impacts and some of the data is shocking. Clearly Hawaii fosters creativity and innovations which come from a perspective of solving problems to care for our people and our home.

One of the key factors for supporting this legislation is that this bill is meant to encourage the deployment in the market place of these creations for their intended purpose and at the same time, include the support of creating and protecting jobs for Hawaii. This integrated approach for this legislation is critical to Hawaii successfully leading the world to policies which cross boundaries of industry and in the process builds healthy community. We look upon this legislation as historical and we pledge our support to assist in finding the best solutions to accomplish what this bill is intended to fulfill.

I ask for your consideration to support HB235 HD2.

Please feel free to contact me directly should you have any questions.

Sincerely,

Pono Shim  
President & CEO  
Enterprise Honolulu, Oahu Economic Development Board



**ENTERPRISE**  
HONOLULU

THE BUSINESS CLIMATE OF PARADISE

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Daniel H. Devaney IV  
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March 15, 2011

VIA EMAIL

Honorable Carol Fukunaga and Committee Members  
Senate Economic Development and Technology Committee  
Hawaii Legislature 2011 Session

Re: Opposition to HB 235: Ingenuity LLC - EDT Senate Hearing 3/16/2011 at 1:15 pm

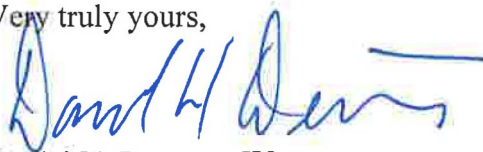
Dear Chair Fukunaga and Committee Members:

As a business lawyer, I have practiced with the Cades Schutte law firm since 1991, have been involved in drafting Hawaii's business organizations laws, and have spoken and written on business law matters. I oppose HB 235 which is set for hearing at 1:15 p.m. on March 16, 2011, before the Senate Economic Development and Technology Committee.

First, HB 235 does not give any power or authority to a Hawaii limited liability company that a company does not already have under current law. Second, allowing a Hawaii LLC to opt to be designated as an "ingenuity company" by the director of commerce and consumer affairs gives to that LLC a public relations benefit without any corresponding benefit flowing to the State or the public at large. Moreover, if it becomes law, HB 235 would result in the State authorizing or blessing the activities of "patent trolls" which the Supreme Court of the United States unanimously criticized in eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006). Third, this 2011 legislative session may be at least the third instance where a bill of this nature has been considered by the Hawaii State Legislature. To my knowledge, no other states have adopted similar legislation. Finally, the implementation and supervision of such a law would be costly and an expense that need not be incurred by the State at this time.

Thank you for your time and consideration of my views on HB 235.

Very truly yours,



Daniel H. Devaney IV

March 15, 2011

**Marc E. Rousseau**  
**c/o Cades Schutte LLP**  
Direct Line: (808) 521-9249  
Direct Fax: (808) 540-5050  
E-mail: mrousseau@cades.com

**VIA EMAIL**

Honorable Senator Carol Fukunaga  
Senate Economic Development and Technology Committee  
Hawaii Legislature

Re: Opposition to HB 235: Ingenuity LLC - EDT Senate Hearing 3/16/2011 at 1:15 pm

Dear Honorable Senator and Committee Members:

My name is Marc E. Rousseau and I am a licensed attorney in the State of Hawaii and a partner in the Corporate Department of Cades Schutte LLP. I am in opposition of HB 235 which is set for hearing at 1:15 p.m. on March 16, 2011 before the Senate Committee EDT.

The powers and authorities that would be bestowed upon an LLC under this proposed law are already within the abilities of what a Hawaii LLC can do right now if it so chooses. Thus, the designation as "ingenuity" is merely a public relations ploy and not a substantive change to current law. We want Hawaii business registration laws to be as uniform as possible so as not to discourage outside investment and capital commitment coming to this state. This bill would simply place the imprimatur of one of the state's regulatory agencies upon the activities of a business and that should be avoided if that business is not operated by the state. It would also divert much needed resources from an already strained but vital agency to the State's economic and business industries.

Very truly yours,

  
Marc E. Rousseau

MARTIN E. HSIA  
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March 15, 2011

**VIA E-MAIL EDTTESTIMONY@CAPITOL.HAWAII.GOV**

Senate Committee EDT

Re: Opposition to HB235 Ingenuity LLC - EDT Senate Hearing Wednesday at 1:15 pm

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Ladies and Gentlemen:

My name is Martin E. Hsia, and I have been a practicing patent attorney in Hawaii since 1986.

I have represented many Hawaii inventors in obtaining US and foreign patents, some of which have generated very substantial revenues for those Hawaii inventors.

This is my testimony in opposition to HB235 Relating to Limited Liability Companies.

HB 235 allows limited liability companies to make an irrevocable election to be designated “ingenuity companies.” A company that makes such an election would then be required to use the rights to exclude granted by US patents to create jobs in Hawaii, uphold fair labor standards, and enhance environmental protection.

A United States patent grants “the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States of America or importing the invention into the United States of America, and if the invention is a process, of the right to exclude others from using, offering for sale or selling throughout the United States of America, or importing into the United States of America, products made by that process . . . .” I have attached the cover of a recently issued United States patent stating the rights granted, for your information.

A US patent therefore only grants the negative right to exclude others. It does NOT grant a positive right to make, use, offer for sale, sell or import the invention. Accordingly, the only way to directly generate money from a US patent is to sell or license this negative right to others.

The patent owner can also use the patent to prevent competitors from making, using,

offering for sale, selling or importing the patented invention, and thereby exclude others from competing with the patent owner's products and processes. If the patent owner's products and processes are profitable, then the patent can protect the profit from being reduced by competition.

Hawaii is not a large manufacturing State, so very few products are made in Hawaii, and very few processes are practiced in Hawaii. Hawaii represents only a small portion of the population of the United States, and therefore represents only a small portion of the nationwide market for products covered by a US patent. Thus, burdening a US patent with restrictions to benefit Hawaii will reduce the potential market for, and value of, the US patent.

As recognized in section 3 of HB 235, most inventors do not have the financial resources to exercise and enforce their intellectual property rights. Accordingly, it would not be appropriate to impose even more burdens on inventors by restricting the manner in which US patents can be used.

HB 235 would irrevocably burden any US patent in which an "ingenuity" company has an interest with various restrictions. These restrictions would impair the value of the US patent to the "ingenuity" company if it ever sought to sell or license the US patent, because:

- (a) the "ingenuity" company could not sell or license any US patent that increases efficiency and productivity of workers, because such devices would not create and retain good jobs;
- (b) an interested purchaser would be discouraged from acquiring the US patent by the tax-advantaged method of acquiring or merging with the "ingenuity" company, because the US patent would remain subject to the "ingenuity" company restrictions;
- (c) the "ingenuity" company could not use the US patent rights for purposes that do not enhance environmental protection, even if the patented invention provides less environmental impact than existing technologies; and
- (d) the "ingenuity" company could not sell or license the US patent to Wisconsin or other States or entities that may have denied, or may in the future deny, collective bargaining rights to workers, which may be a very substantial part of the market for the US patent.

Further, HB 235 imposes an additional regulatory burden on the Business Registration Division at a time when budget deficits require that efficiency and productivity of government services be increased.

Finally, there is no evidence whatsoever that designating a company as an “ingenuity” company would attract inventors to Hawaii, as suggested in section 1(4) of HB 235. Indeed, just the opposite would occur – inventors would see the restrictions imposed on “ingenuity” companies, and the required annual reporting, as additional burdens that discourage innovation in Hawaii, and additional reasons to avoid Hawaii.

Thank you very much for your consideration of this testimony.

Very truly yours,

A handwritten signature in black ink, appearing to read "M. E. Hsia", written in a cursive style.

Martin E. Hsia

The  
United  
States  
of  
America



The Director of the United States  
Patent and Trademark Office

*Has received an application for a patent for a new and useful invention. The title and description of the invention are enclosed. The requirements of law have been complied with, and it has been determined that a patent on the invention shall be granted under the law.*

*Therefore, this*

**United States Patent**

*Grants to the person(s) having title to this patent the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States of America or importing the invention into the United States of America, and if the invention is a process, of the right to exclude others from using, offering for sale or selling throughout the United States of America, or importing into the United States of America, products made by that process, for the term set forth in 35 U.S.C. 154(a)(2) or (c)(1), subject to the payment of maintenance fees as provided by 35 U.S.C. 41(b). See the Maintenance Fee Notice on the inside of the cover.*

*David J. Kappas*

*Director of the United States Patent and Trademark Office*

**Testimony in support of House Bill 235**  
Relating to Limited Liability Companies

COMMITTEE ON ECONOMIC DEVELOPMENT AND TECHNOLOGY  
Senator Carol Fukunaga, Chair  
Senator Glenn Wakai, Vice Chair

HEARING DATE:  
Wednesday, March 16, 2011  
1:15pm in conference room 016

Aloha Chair Fukunaga, Vice-Chair Wakai 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 public purposes. In past sessions this body has received testimony from prominent inventors, entrepreneurs and top labor leaders from around the nation in support of the Ingenuity Company bills.

With the Chair's permission I would like to spend a few minutes providing you with an overview of the benefits of House Bill 235 using a one-page diagram as a visual guide.

Mahalo for your time and consideration.

Ian Chan Hodges

## **Senate Committee on Economic Development and Technology**

Senator Carol Fukunaga, Chair  
Senator Glenn Wakai, Vice Chair  
Wednesday, March 16, 2011  
1:15pm  
State Capitol, Conference Room 016  
in consideration of HB235

### **TESTIMONY IN STRONG SUPPORT OF HB235**

#### *RELATING TO LIMITED LIABILITY COMPANIES*

This measure allows a limited liability company to be designated as an "ingenuity company" by the Director of Commerce and Consumer Affairs. Requires an ingenuity company to use the right to exclude, conferred by a patent in which the company has an interest, to create job opportunities, strengthen labor, and enhance environmental protections.

Aloha Chair Fukunaga, Vice Chair Wakai, and Members of the Committee,

My name is Michael Snyder and I represent a Hawai'i based Renewable Energy Integration and Computer Networking and Security company. Respectfully we submit this testimony as a statement of our support for HB235.

We believe that in this ever increasing competitive global economy that it is imperative for Governments, Businesses and Individuals to work together to protect Intellectual Property and strengthen Patent Holder rights. In addition, if Hawai'i is going to meet its' goals and challenges of having a more sustainable environment, an improved competitive business climate and to create jobs we believe that it is critical to enact legislation such as HB 235.

As an Aeronautical and Aerospace Engineer, and having worked in the Defense, Telecommunications, and Information Technology Industries for almost 40 years, I know the importance and critical role that Intellectual Property and Patents play in keeping the United States at the forefront. If Hawai'i truly wants to be a leader and diversify its economy, please pass HB235 to not only protect Patent Holders rights, create jobs, and protect the environment but to invite entrepreneurs and inventors to do business in Hawai'i and let them know that we are a State that wants to be at the leading edge of 21<sup>st</sup> Century innovations.

I am also currently starting a new venture with Electric Vehicles and supporting infrastructure here in Hawai'i. We will be developing, testing and deploying the latest EV's, Charging Station Network, Energy Storage and Smart Grid Distribution Systems and related Electric Transportation technologies and discoveries. We will synergize Hawaii's unique geography, scale and abundant renewable energy resources as a test bed and platform for new EV products and services while creating scores of good jobs. Because we will be utilizing Patents and proprietary Intellectual Property in our business, we are very interested in becoming one of the first LLC's designated as an "Ingenuity Company". This legislation provides us with an opportunity to lead by example and highlight our, and the State's, commitment to develop new avenues for business growth with the dedication to doing what's right for its' 'aina and people. It is our responsibility to prepare the foundation and provide our keiki with the tools required so that they can lead us into the future. As Galileo said:

*"All truths are easy to understand once they are discovered; the point is to discover them."*

Mahalo Chair Fukunaga, Vice Chair Wakai and Committee Members for your thoughtful consideration.

Very respectfully,

Michael Snyder



Testimony in support of House Bill 235  
*Relating to Limited Liability Companies*

**Committee on Economic Development and Technology**

Senator Carol Fukunaga, Chair

Senator Glenn Wakai, Vice Chair

HEARING DATE:

Wednesday, March 16, 2011

1:15pm in conference room 016

Chair Fukunaga, Vice-Chair Wakai and Members of the Committee:

My name is Pat Choate. Thank you for the opportunity to share my thoughts with you on HB 235 HD2, (Limited Liability Companies: Ingenuity Designation).

In order that you may know from whence my perspective arises, I am a professional economist, who previously served as Director of Research for the Oklahoma Department of Industrial Development, was the first Commissioner of Economic Development of the State of Tennessee, and held a number of senior federal positions at the U.S. Department of Commerce and the Office of Management and Budget. In addition, I was a senior officer at the TRW, Inc, for many years, have authored nine books on economic development and was selected by Ross Perot to be his Vice Presidential running mate in 1996.

The idea contained in this legislation will greatly benefit invention and job investment in Hawaii and eventually all other states.

At its core, this legislation recognizes that the ultimate source of more and better jobs is the innovation by our people. Our Founding Fathers embodied that recognition in the Constitution, securing to authors and inventors the exclusive right for the use of their creations for a set period.

The importance of invention and the protection of the rights of intellectual property owners are reflected by the fact that for 30 years almost 80 percent of the value of the Standard and Poor list of 500 top companies was contained in their tangible assets, such as buildings and machines. Their intangible assets (patents, trade marks, copyright and trade secrets) made up the other 20 percent. Today that ratio is reversed. Intellectual property is the most valuable asset of corporations, particularly those engaged in global competition.

Nationally, the U.S. patent system and the rights it confers on our inventors are under siege. Other governments and many misguided Big Tech corporations are attempting to weaken these rights through radical changes in U.S. patent laws.

Yet, the time for greater U.S. innovation and job creation has seldom been more imperative.

This legislation would allow the State of Hawaii to confer on those companies that request it the “ingenuity company” designation. As such, these companies would strengthen the defenses of their most important assets – their intellectual properties.

The provisions of this legislation are congruent with the obligations of the United States at the World Trade Organization. By allowing investors from any nation to secure “ingenuity company” status and benefits, Hawaii would enhance its attractiveness to global investors. By allowing companies to achieve this status in Hawaii, the State would also encourage an expansion of existing enterprises within the State. In my experience, the expansion of existing enterprises in an area is always the primary source of new job creation.

As the first State to create an “ingenuity company” approach, I envision Hawaii attracting attention and investment, though other states will surely follow your leadership in this arena.

Were I still director of development for the States of Oklahoma or Tennessee, I would be among the first to urge those Legislatures to create something similar.

Thank you.

Pat Choate, PhD  
Director of the Manufacturing Policy Project  
Washington, DC