

**TESTIMONY OF
WILLIAM H. CLARK, JR.
ON
SENATE BILL 1462
BEFORE
HAWAII STATE LEGISLATURE
SENATE COMMITTEE ON
COMMERCE AND CONSUMER PROTECTION**

February 11, 2011

Senator Baker and members of the Committee:

My name is William H. Clark, Jr. I appreciate this opportunity to provide testimony in support of S.B. 1462 regarding benefit corporations.

I am a partner in Drinker Biddle & Reath LLP and practice in its Philadelphia office in the Corporate and Securities Group. Throughout my career I have been involved in drafting corporation and other entity laws. My experience in that area is summarized in the Appendix.

Recently I have been serving as pro bono counsel to B Lab in connection with its support of the enactment of benefit corporation legislation in various states around the country. Working with Trever Asam and his colleagues in the Honolulu bar, I prepared the first draft of the legislation that has been introduced as S.B. 1462. The legislation that has been introduced in Hawaii is similar to legislation authorizing benefit corporations that has been enacted in Maryland, New Jersey¹, and Vermont. Similar legislation has been introduced, or will be introduced in the next few weeks, in California, Colorado, Michigan, North Carolina, and Pennsylvania. In the course of my work on benefit corporation legislation, I have had the opportunity to participate in meetings of seven different bar

¹ As of February 9, 2011 (the date this testimony was prepared), the New Jersey legislation had passed both houses of the New Jersey legislature unanimously and was awaiting signature by the Governor.

association corporation law drafting committees – in California, Colorado, Maryland, Pennsylvania, Vermont, Virginia, and Washington. S.B. 1462 reflects those discussions with lawyers from around the country, as well as the testimony at the various legislative hearings that have been held and the legislative decisions made in the states that have enacted benefit corporation legislation. As the beneficiary of all of that prior work, S.B. 1462 reflects the “state of the art” and the best thinking of many lawyers and legislators. Thus, I am confident in saying that enactment of S.B. 1462 will be very good for Hawaii and its citizens.

The Legal Reason Why S.B. 1462 is Needed

The purpose of S.B. 1462 is to provide a legal framework for corporations that wish to operate on a for-profit basis, but that also wish – at the same time – to operate in a way that produces benefits for society and the environment beyond the production of goods and services and the provision of gainful employment. S.B. 1462 is necessary because corporation law requires the directors of a corporation to be focused on making the maximum profit for the shareholders. Corporation law is different in this respect from the law governing limited liability companies. The members of an LLC have the freedom to vary the fiduciary duties of the persons managing an LLC. Thus it is not necessary to change the law to permit an LLC to be organized in the way that S.B. 1462 provides for corporations.

Overview of S.B. 1462

The goal of the legislation is to harness the power of the free market for the benefit of society and the environment. It sets up a system of disclosure and private monitoring that does not rely on the government to police the provisions of the bill. S.B. 1462 may be summarized as follows:

- A benefit corporation has a purpose to benefit society and the environment,

while also having the traditional purpose of making a profit for its shareholders.

- The duties of the directors and officers of a benefit corporation are modified to be consistent with those purposes.
- Once a year a benefit corporation must report on its performance during the previous year, and must make that report publicly available so that its employees, customers, other businesses in its industry, and the public generally can evaluate the corporation's performance.
- If a shareholder or director does not think the corporation is pursuing its benefit purpose, the shareholder or director may bring a lawsuit to correct the situation.

Description of the Provisions of S.B. 1462

Being a benefit corporation is purely voluntary. An existing business corporation may elect to become a benefit corporation by a two-thirds vote of its shareholders. Terminating benefit corporation status or changing the type of public benefit to be created by the corporation similarly requires a two-thirds vote.

Every benefit corporation has as one of its corporate purposes the creation of a material positive impact on society and the environment taken as a whole. A benefit corporation may also identify specific public benefits that it is the purpose of the corporation to create.

It is important to emphasize that benefit corporations are for-profit businesses. In particular, passage of S.B. 1462 will have no effect on the taxation of benefit corporations, and a business corporation that elects to become a benefit corporation will continue to be

taxed as a business corporation.

The directors of a benefit corporation are required to consider the following interests and factors when making decisions:

- the ability of the benefit corporation to accomplish its public benefit purpose;
- the shareholders of the benefit corporation;
- the employees and workforce of the benefit corporation and its subsidiaries and suppliers;
- the interests of customers as beneficiaries of the general or specific public benefit purposes of the benefit corporation;
- community and societal considerations, including those of any community in which offices or facilities of the benefit corporation or its subsidiaries or suppliers are located;
- the local and global environment; and
- the short-term and long-term interests of the benefit corporation, including benefits that may accrue to the benefit corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the benefit corporation.

An officer of a benefit corporation must also consider those interests and factors when an officer has discretion to act with respect to a matter and it reasonably appears to the officer that the matter may have a material effect on the creation of public benefit or on one of the factors or interests I just listed.

The fiduciary duties of directors and officers of a benefit corporation are a significant change from existing Hawaii law. Section 414-221 of the Hawaii business corporation law

permits directors of Hawaii business corporations to consider the interests of corporate constituencies other than the shareholders, but the directors are not required to do so. Since the purpose of a regular business corporation is to maximize the profitability of the corporation for the benefit of its shareholders, it makes sense that the directors would not have a mandatory duty to anyone other than the shareholders. In a benefit corporation, on the other hand, which has the added purpose of creating public benefit, it makes sense that the duties of directors would expand to include interests and factors relevant to the creation of public benefit. In the case of officers, section 414-233 of the Hawaii business corporation law does not include a constituencies provision such as that applicable to directors; and thus officers are not even given the option of considering the interests of constituencies.

Every benefit corporation must have a “benefit director” who is responsible for evaluating the success of the corporation in creating public benefit. A benefit corporation may also have a “benefit officer” with such responsibilities as may be assigned to that position.

Each year the benefit corporation must prepare and distribute to its shareholders a report describing its efforts to create public benefit during the preceding year. The report must be filed with the Department of Commerce and Consumer Affairs, thus making it a matter of public record. The report must also be posted on any public website maintained by the corporation. In a regular business corporation, the corporation’s financial statements will show how the corporation is performing. The annual report on the creation of public benefit is intended to supplement the financial statements and to fill in the rest of the picture on how the corporation has performed.

As I have worked on benefit corporation legislation around the country, I have

repeatedly been impressed with the number of businesses who are supportive of the concept and eager to adopt this new form if it is available to them. I am confident that there will be a very positive response to the enactment of S.B. 1462.

Thank you for your attention. I would be pleased to answer any questions the Committee may have.

Appendix

Experience of William H. Clark, Jr. with Entity Law Drafting Projects

I have served in the following capacities:

- Reporter for the Third Edition of the Model Nonprofit Corporation Act, which was adopted in 2008.
- ABA Reporter for the Model Entity Transactions Act, which was a joint project of the American Bar Association (ABA) and the National Conference of Commissioners on Uniform State Laws (NCCUSL) and authorizes mergers and other transactions involving more than one form of entity.
- Reporter for the Model Registered Agents Act prepared by NCCUSL, which provides uniform rules for agents for service of process for all types of entities.
- Reporter for the Uniform Law Enforcement Access to Entity Information Act prepared by NCCUSL, which is designed to satisfy the requirements of an international body, called the Financial Action Task Force, which was formed by the G-7 countries in 1989 to fight money-laundering and terrorist financing.
- Vice Chair of the NCCUSL drafting committee that is harmonizing all of the uniform unincorporated entity laws so that their language is consistent and they can be integrated into a single code.
- Co-chair of the NCCUSL drafting committee that prepared the Business Organizations Act, which provides a framework states can use to integrate their corporation and other entity laws into a single code.
- ABA Business Law Section Advisor to the NCCUSL drafting committee that prepared the Revised Uniform Limited Liability Company Act.
- ABA Business Law Section Advisor to the NCCUSL drafting committee that prepared the Uniform Statutory Trust Entity Act.
- Member of the Committee on Corporate Laws of the ABA Section on Business Law, which prepares the Model Business Corporation Act, and Chair of several task forces of the Committee which prepared various provisions of the Model Business Corporation Act.
- Co-chair and Reporter for the Title 15 / Business Associations Committee of the Business Law Section of the Pennsylvania Bar Association. For more than 20 years I have been responsible for drafting the Pennsylvania corporation and other entity laws.
- Legislative Counsel to the North Dakota Corporate Governance Council which prepared the first shareholder friendly corporation law in the United States.

Committee on Commerce and Consumer Protection

Senator Rosalyn H. Baker, Chair

Senator Brian T. Taniguchi, Vice Chair

Hearing

Friday, February 11, 2011

8:30 a.m. Conference Room 229

Re: SB 1462 Relating to Public Benefit Corporations

Dear Committee Members,

Thank you.

Your willingness to consider SB 1462 is very much appreciated.

SB 1462 needs your strong support. Benefit Corporations, also known as "B Corps," are good for business and good for Hawaii. SB 1462 would serve the interests of businesses, shareholders, and consumers by permitting corporations to affirm a commitment to creating public benefits.

Businesses that generate calculable benefits for society can be known, not only for their products and profits but, for their quantifiable good works.

Hawaii should be encouraging and supporting Benefit Corporations.

The enthusiasm and passion that the "B Corp" structure will bring to Hawaii will help to promote the Spirit of Aloha as the way Hawaii does business.

Please strongly support SB 1462.

Sincerely,

Denny McDonough

President of A & R M Systems

Adjunct: Chaminade University, Honolulu, Hawaii

e-mail: denyatarms@aol.com

1000 Bishop Street, Suite 1500, Honolulu, Hawaii 96813 P.O. Box 939, Honolulu, Hawaii 96808
Telephone: (808) 521-9200 Facsimile: (808) 521-9210

COMMITTEE ON COMMERCE AND CONSUMER PROTECTION

Senator Rosalyn H. Baker, Chair
Senator Brian T. Taniguchi, Vice Chair

HEARING

Friday, February 11, 2011
8:30 a.m.
Conference Room 229

Re: SB 1462 Relating to Public Benefit Corporations.
STRONG SUPPORT

Dear Chair Baker, Vice Chair Taniguchi, and Members of the Committee:

My name is Roger Epstein. I am the chairman of the tax department at the Cades Schutte law firm and have been a member of the Hawaii Bar Association for 38 years.

I strongly support passage of SB 1462. I believe it is important that Hawaii join in the national effort to support and encourage business conducted with a commitment to serve its community, employees, suppliers, customers, and other constituents, as well as make a profit. Hawaii has long suffered from a reputation that it is an anti-business state. This bill will demonstrate that we are clearly in favor of businesses which operate in accordance with our aloha spirit.

Hawaii was the last state in the country to provide for limited liability companies (LLCs), and I remember how businesses in Hawaii could not take advantage of this new vehicle for businesses (which are now more regularly used than corporations) during the years they could be used for business in other states, but not in Hawaii. I do not know the reasons for this, but I'd hate to see our community minded entrepreneurs and long-time business people similarly unable to use Benefit Corporations to help our community.

The DCCA asserts this legislation will create a significant burden on their office, that this statute is unnecessary, and will cause confusion. We respectfully disagree with each of these points. The DCCA records registrations of a number of entities. Instead of filing as a corporation or an LLC, a company would merely file as a Benefit Corporation. Thus, DCCA's aggregate ongoing filings will not increase. There will be some internal start up costs to denote "Benefit Corporation" on certain forms. However, every change in the law requires some administrative paperwork revisions, so this cannot be a material factor against adopting improved laws. There is no requirement for DCCA to create a new registration form for Benefit Corporations, as attorneys can prepare client documents as they do now. However, if DCCA chooses to prepare a form document, it is quite a simple matter.

I emphasize that the DCCA will not determine qualifications for a "Benefit Corporation." Certification of "Benefit" status, if at all, will be by outside authorities with the capacity to certify, like B Labs. (This is similar to current nonprofit entities where further qualification of tax exemption is left to the IRS.) Thus, the DCCA will only accept and record the forms as with other entities.

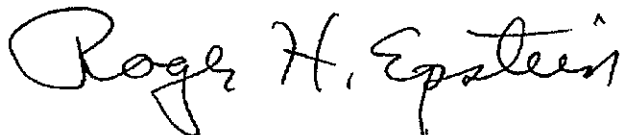
Nor do we see how adding a single additional entity will cause the confusion DCCA suggests would come about if there were the 100 different types of organizations they posture in their testimony.

Finally, I note that I have been active with the World Business Academy for many years and am a founding member of its Hawaii branch, whose mission is to bring more community mindedness to business. I have personally met hundreds of CEO's and senior executives throughout the country, read business consultant books, and represented clients who want to operate their business as a good citizen and have created numerous working models. Now that there will be an entity that facilitates and denotes this approach, I believe it will see substantial use.

In summary, the Benefit Corporation statute is an important element in fostering the movement for better business models. Certification from outside reputable organizations will allow our community to know who has organized themselves in this fashion, perhaps utilizing their services more, and in the long run, perhaps changing our model of all business to be more community minded. This will greatly benefit us all.

Thank you for considering my testimony.

Sincerely,

A handwritten signature in black ink that reads "Roger H. Epstein". The signature is written in a cursive style with a large initial "R" and a distinct "E".

Roger H. Epstein

Attachment: Washington Post article on Benefit Corporation