

Cinthia Miller  
Owner

O&A Consulting LLC  
Honolulu, HI 96816

SENATE COMMITTEE ON JUDICARY AND LABOR

Tuesday, March 3, 2015, 09:15 AM

State Capitol Conference Room 016

Aloha Chair Keith-Agaran, Vice Chair Shimabukuro, and Members of the Committee on Judiciary and Labor,

I strongly support SB 1279SD1 Technology Employment Covenants or Agreements. As an IT consultant with more than 14 years of working with companies in Hawaii, I have experienced first-hand the negative impacts and fear that non-competition agreements generate for someone who is seeking employment locally.

I started my career in Hawaii working for a small technology startup. I was later offered a job with Microsoft in Hawaii. I was laid off in 2010 and was contractually restrained from seeking employment with most businesses in Hawaii for 1 year through their non-competition agreement, which also applied to businesses outside of Hawaii since they were nationwide. Although my old employer did not enforce said non-compete agreement, I was under continual fear that it would be imposed and I would be forced to move to another state or temporarily change my trade for the 1 year period. In the IT field, 1 year of non-practice heavily hinders your ability to keep up with new technologies and maintain your marketability in a fast-changing industry. Non-competes not only vastly limits employment options in Hawaii technology employees, but also prevents progress in building the pool of talent that is already inadequate to begin with.

I was offered several employment opportunities by existing Hawaii clients that I consulted for through Microsoft. The solicitations of employment by these clients were also prohibited and could have been legally enforced. Under these confining circumstances, I subcontracted to my existing client, Hawaii's leading health insurance company, through a new employer, a small, local consulting firm. This new employer also required a non-competition agreement. Working under two non-competes, I was continually worried that lawful action could be taken against me at any time during the 1 year period.

In 2012, I first experienced the negative impacts of an enforced non-compete when one of my old clients, Hawaii's biggest airline company, requested my services for specific IT needs that very few local consultants specialize in. Under the non-competition agreement with my new employer, I was not able to practice IT consulting outside of their employment, even if the client was my own to begin with. The agreement required me to start any new work by subcontracting through them. I was told that in order to conduct IT consulting independently without any enforcement of their non-compete, I would need to "make them whole". After many uncomfortable conversations and tedious negotiation, my new employer allowed an exception with the new airline client, opening up one small hole in the non-compete but leaving lots of room for potential "make them whole" situations in the future.

This is no way to do business in Hawaii, where there is a limited pool of employers and employees. Throw in restraints on which of those businesses you can work for and you're left with almost no hope in finding stable employment. For employers looking to fill their positions with IT specialists, soliciting even laid-off staff locked into non-competition agreements puts their companies at risk. Outsourcing their work offshore becomes an attractive option.

Supporting the SB 1279SD1 bill will support local businesses and employees in Hawaii and solidifying a path for growth in Hawaii's IT industry. Please help us keep our local talent and provide us an autonomous and cultivating environment to work in.

Thank you for the opportunity to testify.

Cinthia Miller

Owner

O&A Consulting LLC

## Support SB1279SD1

### SENATE COMMITTEE ON JUDICIARY AND LABOR

Tuesday, March 3, 2015, 09:15 AM

State Capitol Conference Room 016

Aloha Chair Keith-Agaran, Vice Chair Shimabukuro, and Members of the Committee on Judiciary and Labor

I am writing in strong support of Bill 1279SD1 that would eliminate restrictive post-employment non-compete agreements on employees of technology businesses.

Having worked in Hawaii as an IT consultant on several projects, I have both witnessed events and have heard stories of how these agreements have forced other professionals in my industry to shy away from doing business on the islands. Honest working people with talents in this industry are fortunate to have many options for contracting and permanent employment positions all over the globe. These types of covenants certainly make the choice of working in Hawaii a less desirable one. Certainly, people in the technology industry are expected to provide outstanding deliverables for an agreed upon salary. However, expecting those same people to not be able to continue to provide for their families after that engagement is complete goes against every basic hard working principle this country was founded upon. Hawaii is a uniquely beautiful place full of rich heritage and strong principles that should not be shrouded in the negative light of these types of intimidating corporate practices. Open competition and fair trade practices has always provided a solid foundation for growing an economy and harvesting talent. I sincerely hope you will support this bill to provide that type of foundation allowing for Hawaii's continued growth in the technology industry.

Mahalo,

William Kirby  
President  
Radical Synergies LLC

Edward Pileggi  
Lunasoft LLC  
Honolulu, HI 96815

March 2, 2015

SENATE COMMITTEE ON JUDICARY AND LABOR

Tuesday, March 3, 2015, 09:15 AM

State Capitol Conference Room 016

Aloha Chair Keith-Agaran, Vice Chair Shimabukuro, and Members of the Committee on Judiciary and Labor

As a technology professional with over 15 years of experience, I'm strongly in favor of SB 1279SD1 because it would help Hawaii retain technology professionals.

I have first-hand experience with the negative impacts of non-compete agreements. I moved to Hawaii in September 2013 to work for Hawaiian Airlines. While I do enjoy working for Hawaiian Airlines, there is a staffing agency between myself and Hawaiian Airlines that has been treating me unfairly. Unfortunately my options are limited due to the non-compete clause put in place by the staffing agency and as a result I'm faced with either accepting the unfair treatment or moving back to California.

**“Perform services directly on this project at any of the client’s or client’s client...”**

I believe that Hawaii does an excellent job of recruiting talented technology professionals, but it has a difficult time retaining these individuals due in large part to non-compete agreements. Supporting SB 1279SD1 will help alleviate the need for technology professionals to seek employment opportunities outside of Hawaii.

Mahalo,

Edward Pileggi  
Owner & Founder  
Lunasoft LLC

Jeff Hong  
TechMana LLC  
Honolulu, HI, 96813

## SENATE COMMITTEE ON JUDICIARY AND LABOR

Tuesday, March 3, 2015, 09:15 AM  
State Capitol Conference Room 016

### **Aloha Chair Keith-Agaran, Vice Chair Shimabukuro, and Members of the Committee:**

As the Chief Technology Officer of a local software company I strongly support SB 1279 SD1. The bill provides better opportunities for technology professionals, and our brightest keiki, to call Hawaii home.

Hawaii's technology sector remains at the bottom of most rankings in the US. This bill provides targeted support to the industry. We have worked with the Hawaii Association of Broadcasters and Hawaiian Telcom to address their concerns that the bill could unintentionally include their businesses. Both organizations still register their strong opposition to any adjustment to the current enforcement of noncompete agreements in their industries. I respectfully submit these amendments to SB 1279 SD1 for consideration to address their concerns and ensure new opportunities for Hawaii's technology sector.

1. From SECTION 2 subsection (d) remove the clause " with a duration beyond one year"  
(d) Except as provided in subsection (c)(4), any employment contract, post-employment contract, or separation agreement containing a noncompete or nonsolicit clause relating to an employee of a technology business ~~with a duration beyond one year~~ is prohibited. Such agreement shall be void and of no force and effect.
2. Modify the definition "Information technology" to "Information technology development"  
**"Information technology development" means the design, integration, deployment, or support services for software.**
3. Minor changes to the definition "Technology business" and addition of an explicit exemption for broadcasters and any incumbent local exchange carriers.

"Technology business" means a trade or business that derives the majority of its revenue from the sale or license of products or services resulting from its software development or information technology development, or both. "Technology business" excludes any trade or business that is considered by standard business practice as part of the broadcast industry or an incumbent local exchange carrier.

I have attached an SB1279 HD1 Facts sheet for your convenience. Thank you for the opportunity to testify.

Mahalo,

A handwritten signature in black ink, appearing to read "Jeff Hong". The signature is fluid and cursive, with a large "H" and "G".

Jeff Hong  
Chief Technology Officer  
TechMana LLC

## Facts About SB 1279

“Prohibits noncompete agreements and restrictive covenants that forbid post-employment competition of employees of a technology business.”

If passed, SB 1279 will:

- Allow IT professionals to utilize their skills without having to leave the state of Hawai'i to find gainful employment.
- Grow jobs, competition, and skills within the IT industry in Hawai'i.

### Who Supports SB 1279

- Local businesses
- Technology Integrators and Startups
- Technology employees
- Department of Education
- Economists

### Why Support SB 1090?

- Current noncompete agreements prohibit technology professionals from working in any capacity at another organization in Hawaii. Therefore organizations seeking to contract individuals or hire skilled professionals have a **limited pool of local talent**.
- Because technology professionals typically have a specific set of skills, noncompete agreements force them to seek work outside of Hawai'i leading to a **“brain drain” of our best and most talented individuals**.
- Current laws around noncompetes **encourages outsourcing technology resources** – funneling money outside of the state -- because local residents are restricted from working for competitors.

### Frequently Asked Questions of SB 1279

**Question:** How do I protect my intellectual property and trade secrets if SB 1279 passes?

**Answer:** The bill allows for non-disclosure agreements and embraces the Uniform Trade Secrets Act **HRS §§ 482B-1 through 482B-9 (2011)**. This approach has provides the right balance between protection of a company's confidential information, and the ability of employees to use their skills with another employer. It has proved successful for Silicon Valley.

**Question:** Does Hawaii's technology industry need help?

**Answer:** Hawaii ranks last in a Brookings Institute study on employment in advanced industries. A Harvard Business Review study on the “Most Innovation Friendly” states found a common thread for Minnesota and California was restrictions on non-compete enforcement. . Hawaii tied for last in this study on innovation friendly states. California

already has huge advantages, this is an easy change to policy that will **give Hawaii's technology community a more level playing field.**

**Question:** Everyone uses technology. Is my business included?

**Answer:** The bill is narrow in scope to only affect "technology businesses". A business must generate the majority of its sales or licensing revenue from its development of software or information technology. The majority of Hawaii's business do not generate any revenue from these activities. Businesses with significant investments in information technology like broadcasters would not be covered in this bill. They spend significant amounts of money on information technology but do not develop it. Companies like airlines and insurance companies develop custom software, but do not obtain sales or licensing revenue from these developments. They obtain the majority of their revenue by providing air transportation or insurance.



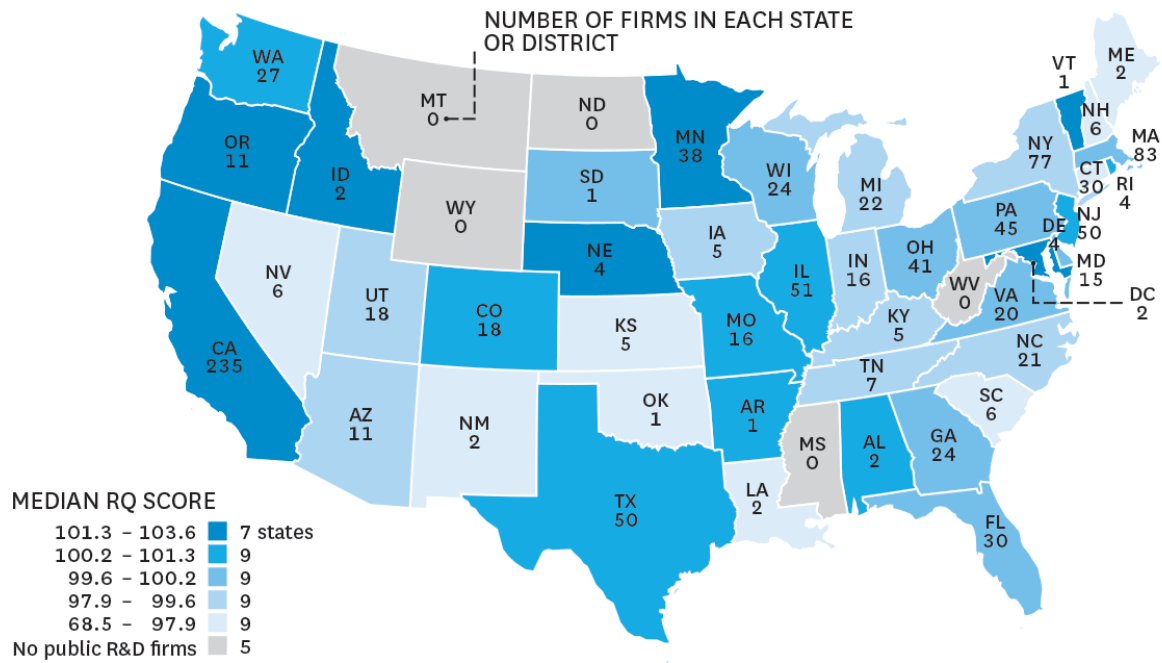
What the Two Most Innovation-Friendly States Have in Common

“But there is one important institutional feature shared by **California** and **Minnesota** that is consistent with the Klepper story: both states **restrict the enforcement of non-compete agreements.**”

<https://hbr.org/2014/12/what-the-two-most-innovation-friendly-states-have-in-common>

**WHICH STATES ARE THE MOST INNOVATION FRIENDLY?**

Mapping the number of public firms conducting R&D and each state’s median RQ score, which measures the effectiveness of R&D investment.



NOTE EXCLUDES AK AND HI, BOTH WITH NO PUBLIC R&D FIRMS.  
SOURCE ANNE MARIE KNOTT AND SHEEWON PARK

HBR.ORG

**California and Minnesota place first. They restrict non-competes.  
Hawaii tied for last place with 5 other states.**

## **Strong Support SB 1279 SD1**

### **Welcoming Technology Businesses**

Hawai'i courts have enforced statewide, multi-year employment covenants not to compete. These provisions force our citizens to leave Hawai'i in order to continue advancing in their fields. Although many professions would benefit from the elimination of covenants not to compete, the unique damage to Hawai'i from enforcement of these contracts to technology professionals merits special consideration.

Protecting intellectual property is vital to growing Hawaii's innovation economy. The adoption of the Uniform Trade Secret Act in Hawai'i provides a means for protecting the legitimate trade secrets of innovation businesses. Covenants not to compete are an obsolete approach to protecting trade secrets. It drives local technology innovators from Hawai'i and forces businesses into expensive searches for talent from outside the State.

Advocating for SB 1279 SD1 has brought together a broad coalition of support for eliminating an avoidable cause of brain drain from our State. We ask your positive consideration of SB 1279 SD1.

Mahalo,

A handwritten signature in black ink, reading "Jeffrey D. Hong". The signature is fluid and cursive, with the first name "Jeffrey" being the most prominent.

**Jeffrey Hong**  
**Chief Technology Officer**  
**Techmana LLC**

# SB 1279 Supporters

## Technology Industry:

Gordon Bruce – CEO, Pacxa  
Jacob Buckley-Fortin – CEO, eHana LLC  
Matthew Douglass – Co-Founder, VP Platform, Practice Fusion  
Jay Fidell – Founder, ThinkTech  
Cort Fritz – Principle Program Manager, Microsoft  
Jeffrey Hong – Chief Technology Officer, Techmana LLC  
Kiyoshi Kusachi – Senior Manager, Hawaiian Airlines  
William Kirby – President, Radical Synergy LLC  
Chris Lee – Motion Picture Producer, Founder and Director, ACM System  
Burt Lum – Executive Director, Hawaii Open Data  
Sam Martindale – Managing Partner, Architecting Innovation  
Cinthia Miller – Owner, O&A Consulting  
Phillip Moore – VP IT, Hawaiian Airlines  
Jim Takatsuka – Hawaii Account Executive, Microsoft  
Spencer Toyama – Founder, Sudokrew LLC  
Edward Pileggi – Owner, Lunasoft LLC  
William Richardson – General Partner, HMS Hawaii Management Partners  
Aaron Schnieder – Founder, Church Office Online  
John Vavricka – Program Director, RTI International  
CynthiaAnn (C.A) Webb – Executive Director, New England Venture Capital Association

## Academic Faculty:

Professor Hazel Beh - University of Hawaii, Richardson School of Law  
Professor Matt Marx – MIT, Sloan School of Management

## Government:

Steven Levinson - Associate Supreme Court Justice, State of Hawaii, Retired  
Mark Wong - CIO, City & County of Honolulu  
David Wu - CIO, State of Hawaii Department of Education

## Attorneys:

Stanley Chang	Ryan Hew
Nathan Kinney	David Simons
Rock Tang	

*\* All individuals are expressing their personal views and not representing the views of their associated organizations. The views of their organizations are expressed in submitted testimony.*



## SENATE COMMITTEE ON JUDICIARY AND LABOR

Tuesday, March 3, 2015

9:15 a.m.

State Capitol, Conference Room 016

Greetings Chair Keith-Agaran, Vice Chair Shimabukuro, and Members of the Committee on Judiciary & Labor:

My name is Matt Marx. I am the Assistant Professor of Technological Innovation, Entrepreneurship, and Strategic Management at the MIT Sloan School of Management. My research, supported by others in my field, concludes regional “brain drains” are directly related by public policy affecting employee mobility. I strongly support SB 1279 SD1, as a means for Hawaii to retain its top talent.

2014 marked an inauspicious anniversary: 600 years since the first employee non-compete lawsuit was filed. It was in northern England, in the very high-tech industry of clothes-dyeing. An apprentice was sued by his master for setting up his own clothes-dyeing shop in the same town in 1414. The judge, appalled that the master would try to prevent his own apprentice from practicing his profession, threw out the case and threatened the plaintiff with jail time.

Much has changed in 600 years, but employee non-compete agreements still bear painful resemblance to medieval practices. As a professor at the MIT Sloan School of Management, my research focuses on the implications of non-competes for individuals, firms, and regions. I am not alone in this effort; during the last ten years, several scholars have contributed to a body of work including

- Toby Stuart of the University of California at Berkeley
- Olav Sorenson of Yale University
- Mark Garmaise of UCLA
- Mark Schankerman of the London School of Economics
- Lee Fleming of the University of California at Berkeley
- Jim Rebitzer of Boston University
- April Franco of the University of Toronto
- Ronald Gilson of Stanford University
- Ken Younge of Purdue University
- Sampsa Samila of the National University of Singapore
- Ivan Png of the National University of Singapore



My work, as well as that of those of these scholars, has almost universally found non-competes to be detrimental to individual careers and regional productivity. Non-competes, do not, as is often claimed, spur R&D investment by companies. Just to summarize a few points:

- Although it is frequently claimed that non-competes are usually only a year in duration, a survey I conducted of more than 1,000 members of the IEEE engineering organization revealed that fully one-third of these are longer than one year and 15% are longer than two years.
- An article of mine in the *American Sociological Review* reveals that firms rarely tell would-be employees about the non-compete in their offer letter. Nearly 70% of the time, they wait until after the candidate has accepted the job and, consequently, has turned down other job offers. Half the time the non-compete is given on or after the first day at work. At this point it is too late for the employee to negotiate—indeed, I found that barely one in ten survey respondents had a lawyer review the non-compete.
- Several articles including my own with Lee Fleming and Debbie Strumsky in *Management Science*, by Jim Rebitzer and two Federal Reserve economists in the *Review of Economics and Statistics*, by Mark Garmaise in the *Journal of Law, Economics, and Organization* find that non-competes make it difficult for employees to change jobs. Instead, workers are trapped in their jobs with little possibility of moving elsewhere.

In the remainder of my testimony I wish to comment on the “chilling effect” non-competes can have regardless of the best intentions of judges and the possible implications for regional economic performance.

Jay Shepherd of the Shepherd Law Group reports that there were 1,017 published non-compete decisions in 2010. The Bureau of Labor Statistics reported that there were 154,767,000 workers in the U.S. as of June 2010. If the effect of non-competes were limited to the courtroom, simple math would suggest that 0.0007% of workers were affected by non-competes. Yet data from my IEEE survey indicate that nearly half of engineers and scientists are required to sign non-competes (including states where they are unenforceable). Why are 50% of workers asked to sign non-competes when barely a thousandth of a percent of them ever involve a court case? It is because of *the chilling effect*—because non-competes affect worker behavior even in the absence of a lawsuit. Thus it is essential to account for and anticipate how non-competes affect workers outside the courtroom.

In my own research including interviews with dozens of workers, I have rarely if ever come across an actual lawsuit. However, I have seen several instances where workers have taken a *career detour*, leaving their industry for a year or longer due to the non-compete. They took a pay cut and lost touch with their professional colleagues—not because they were sued, but for other reasons. They may have been verbally threatened by their employer; they may not have been threatened but have assumed that if they were sued, they would lose due to the expense of defending themselves; in some cases they felt that they were under obligation to honor the agreement they had signed—no matter how overreaching it might have been.



Non-compete reform is not just about protecting workers; it is also about growing the economy. Some will say it is impossible to operate their business without non-competes. Perhaps it is easier not to worry about people leaving, but one need look no further than California's Silicon Valley or the San Diego biotech cluster for proof that a thriving economy does not depend on non-competes. Non-competes have been banned in California for more than 100 years. Again, I acknowledge that as a manager life is easier when you can rely on employees not leaving for rivals thanks to the non-compete they were required to sign. When I was managing a team of engineers in Boston, I never really worried about people quitting. Whereas when I managed a team in Silicon Valley, I realized that we as a company had to keep them engaged. We had a saying: "you never stop hiring someone." I think it made us a better company, and it made me a better manager.

Non-competes hurt the economy because it is more difficult to start new companies and also to grow those companies. Professors Olav Sorenson of Yale University and Toby Stuart of the University of California at Berkeley published a study in 2003 showing that the spawning of new startups following liquidity events (i.e., IPOs or acquisitions) is attenuated where non-competes are enforceable. Professor Sorenson followed up this study with a more recent article, coauthored with Professor Sampsa Samila at the National University of Singapore. They show that a dollar of venture capital goes further in creating startups, patents, and jobs where non-competes are not enforceable. Their finding is moreover is not just a Silicon Valley story but holds when Silicon Valley is excluded entirely.

Non-competes not only make it more difficult to start a company; they make it harder to grow a startup. One of the randomly-selected interviewees in my American Sociological Review article said that he "consciously excluded small companies because I felt I couldn't burden them with the risk of being sued. [They] wouldn't necessarily be able to survive the lawsuit whereas a larger company would." Also, whereas large companies are able to provide a holding-tank of sorts for new hires to work in a different area while waiting for the non-compete to expire, this is more difficult for smaller firms.

Finally, and perhaps of even greater concern, is that non-competes chase some of the best talent out of a region. I have included my research on a 1985 change in public policy in Michigan to start enforcing noncompetition agreements. My research indicated that the change accelerated the emigration of inventors from the state and moreover to other states that continued not to enforce non-compete agreements. This finding is not simply an artifact of the automotive industry or general westward migration; in fact, it is robust to a variety of tests including pretending that the policy change happened in Ohio or other nearby, mid-sized Midwestern states. Worse, this "brain drain" due to non-compete agreements is greater for the most highly skilled workers. It stands to reason that a change in public policy like SB 1279 SD1 would promote the retention of top talent in Hawaii.



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## References

Fallick, Bruce, Charles Fleischman, and James Rebitzer, "Job-Hopping in Silicon Valley: Some Evidence Concerning the Micro-Foundations of a High Technology Cluster," *The Review of Economics and Statistics*, 88 (2006), 472-481.

Garmaise, Mark, "The Ties That Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment," *Journal of Law, Economics, and Organization*, 27(2):376-425.

Gilson, Ronald, "The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete," *New York University Law Review*, 74.

Marx, Matt, Deborah Strumsky, and Lee Fleming, "Mobility, Skills, and the Michigan Non-Compete Experiment," *Management Science*, 55 (2009), 875-889.

Marx, Matt, "The Firm Strikes Back: Non-compete Agreements and the Mobility of Technical Professionals." *American Sociological Review* 76(5):695-712.

M. Marx and L. Fleming. "Non-compete Agreements: Barriers to Entry...and Exit?" in J. Lerner and S. Stern, eds., *Innovation Policy and the Economy* 12. (2012)

Samila, Sampsa, and Olav Sorenson. "Noncompete covenants: Incentives to innovate or impediments to growth." *Management Science* 57.3 (2011): 425-438.

Stuart, Toby E., and Olav Sorenson. "Liquidity events and the geographic distribution of entrepreneurial activity." *Administrative Science Quarterly* 48.2 (2003): 175-201.

Robert "Sam" Martindale  
Architecting Innovation, LLC  
Honolulu, HI, 96813

## **SENATE COMMITTEE ON JUDICIARY AND LABOR**

Tuesday, March 3, 2015, 09:15 AM

State Capitol Conference Room 016

Chair Keith-Agaran, Vice Chair Shimabukuro, and Members of the Committee on Judiciary and Labor:

As the Chief Technology Officer of a software company doing business locally in Hawaii, I strongly support SB 1279SD1. The bill provides better opportunities for technology professionals to call Hawaii home. I have personally seen how noncompetition agreements are used in the technology industry costing jobs and productivity in Hawaii's business community. Furthermore, I have been the victim of noncompetition agreements in the past and in other states, which at one point in my career actually forced me to uproot my family and relocate elsewhere.

In my personal experience, enforcement of these agreements does much more than simply endanger the livelihood of the individual; they directly hinder the growth of the local economy of this beautiful state, discouraging both talented individuals and growing businesses from investing in our economy. I can personally testify that were it not for these restrictions, my own company would be much more willing to shift an increasing amount of resources and business to this state, helping to further grow the economy and talent pool here in Hawaii.

- Encourages broad and indiscriminate use of non-competes across many industries. This causes individuals to leave the State if they want to remain employed in their field.
- Discourages the formation of new businesses and competition in an already small and isolated marketplace.
  - Non-competes prevent innovators from creating businesses.
  - Non-competes and non-solicitation agreements prevent entrepreneurs from staffing locally.
- Discourages the formation of a critical mass of technology professionals in Hawaii
  - Discourages technology professionals from moving to a place of limited employment mobility.
  - Encourages our best local talent to leave because they are driven out by a covenant not to compete.
- Forces Hawaii employers to make expensive searches outside the State to fill a talent void.
  - Discourages the fruits of these searches from creating local roots.



Robert "Sam" Martindale

February 23, 2015

Page 2

I thank you for the opportunity to testify. Please support this bill and encourage Hawaii's technology community to grow.

Mahalo,

A handwritten signature in black ink, appearing to be 'R. Martindale', written in a cursive style.

Robert "Sam" Martindale  
Chief Technology Officer  
Architecting Innovation, LLC