VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF WAYNE RICHARD HARTKE
VSB Docket No. 05-053-3993

MEMORANDUM ORDER

This matter came on March 11, 2010, to be heard on the Agreed Disposition of the Virginia State Bar and the Respondent, Wayne Richard Hartke, based upon the Certification of a Fifth District—Section III Subcommittee of the Virginia State Bar. The Agreed Disposition was considered by a duly convened panel of the Virginia State Bar Disciplinary Board consisting of the Rev. W. Ray Inscoe, lay member, Richard J. Colten, Michael S. Mulkey, Raighne C. Delaney, and William E. Glover, presiding.

Seth M. Guggenheim, representing the Bar, and Michael S. Lieberman, substituting for Bernard J. DiMuro, representing the Respondent, Wayne Richard Hartke, presented an endorsed Agreed Disposition, entered into as of March 9, 2010, reflecting the terms of the Agreed Disposition. The court reporter for the proceeding was Tracy J. Johnson, Chandler & Halasz, P.O. Box 9349, Richmond, Virginia 23227, telephone (804) 730-1222.

Having considered the Certification and the Agreed Disposition, it is the unanimous decision of the Board that the Agreed Disposition be accepted, and the Virginia State Bar Disciplinary Board finds by clear and convincing evidence as follows:

1. At all times relevant hereto Wayne Richard Hartke, (hereafter "Respondent"), was an attorney licensed to practice law in the Commonwealth of Virginia.

At all times pertinent to the facts set forth herein, the Respondent represented Life Energy & Technology Holdings, Inc.

2. Prior to November of 2000, Life Energy Technology Holdings, Ltd. (hereafter "Holdings"), a company organized under the laws of the Republic of Ireland, was seeking to merge with, or to acquire, a publicly-traded American firm so that Holdings could be traded on a United States stock exchange.

3. In furtherance of this objective, Holdings approached Anthony, Elizabeth, Mark, and Michael Liberatore, the majority owners and controlling shareholders of Health-Pak, Inc. (hereafter "Health-Pak DE"), a Delaware corporation, whose sole asset was its wholly owned subsidiary, Health-Pak of New York, Inc. (hereafter "Health-Pak NY"), a company in Chapter 11 reorganization bankruptcy.

4 Health-Pak DE and Holdings agreed to merge, and entered into an acquisition agreement dated November 3, 2000, styled "Agreement and Plan of Reorganization." Pursuant to the agreement, Holdings would become a wholly-owned subsidiary of Health-Pak DE, but the controlling shareholders of Holdings would become the controlling shareholders of Health-Pak DE, effectively changing the parties controlling the surviving Health-Pak DE entity.

5. On December 4, 2000, pursuant to these undertakings, Health-Pak DE's name was changed to Life Energy & Technology Holdings, Inc. (hereafter "LETH"). Three of Health-Pak DE's directors, Anthony and Michael Liberatore and William Meola, succeeded to seats on LETH's Board of Directors, pursuant to the acquisition agreement. Consistent with the agreement, the former controlling shareholders of Holdings became the controlling shareholders of LETH, with the right to appoint three directors to LETH's

Board of Directors.

6. During the course of Respondent's representation in 2002 of LETH, which had been renamed from Health-Pak DE effective December 4, 2000, and despite the fact that Anthony and Michael Liberatore were on LETH's Board of Directors, the Respondent did not inform them of the disposition made of Liberatore family members' Health-Pak stock, which had been surrendered in connection with undertakings between LETH and the Liberatore family regarding Health-Pak's merger agreement with Holdings dated November 3, 2000.

7. Further, the Respondent did not advise Anthony and Michael Liberatore that a meeting of the original Holdings Board of Directors was to, and did, take place on December 20, 2002. At that meeting, other member of the Holdings Board proposed and voted upon resolutions and decisions regarding the Liberatores' interests, pursuant to the merger agreement between Health-Pak DE and Holdings dated November 3, 2000.

8. In late 2003, the Respondent further advanced LETH's corporate objectives in a manner adverse to Liberatores' claims by writing a letter to the bankruptcy court located in the State of New York containing corporate LETH allegations regarding the Liberatores' management of, and activities regarding, Health-Pak NY. The Respondent did not consult with the Liberatores before sending the letter directly to the bankruptcy judge.

9. On June 29, 2004, the Liberatores sued the respondent, LETH, and other LETH Directors in the United States District Court for the Eastern District of Virginia for damages arising from conduct related to the transactions between LETH and the Liberatores, and the Respondent's role as LETH's counsel.

10. Following a ten day trial, the jury returned a verdict on April 28, 2005, against both LETH and the Respondent. Neither the President/CEO of LETH, nor the other directors of LETH appeared at or in the trial. Among other things, the jury found LETH to have defrauded the Liberatores and awarded damages in the millions of dollars. It specifically found that Respondent was liable to the Liberatores and assessed damages at $1,360,800.00. The jury also found that the Liberatores were entitled to punitive damages for fraud against the Respondent, and set the award at $10,000.00. The Court denied a post-trial motion, and upheld the jury's verdict. A notice of appeal was filed, but pursuant to a settlement agreement, the appeals were withdrawn.

11. The Respondent maintained following the trial and in the proceedings thereafter initiated by the Virginia State Bar that he had not committed the civil offenses found by the jury and sustained by the trial Court, claiming that relevant exculpatory evidence had been excluded from presentation to the jury. In lieu of the appeal, the Respondent resolved the outstanding judgment against him by entering into a settlement with the Liberatores, pursuant to which, among other undertakings, the Respondent and his wife paid substantial sums of money, and suffered other adverse consequences.

12. Mitigating factors recognized by the American Bar Association applicable to this matter include cooperative attitude toward the Bar proceedings, delay in disciplinary proceedings, and imposition of other penalties.

The Board finds by clear and convincing evidence that Respondent's aforesaid conduct constitutes a violation of the following provisions of the Virginia Rules of Professional Conduct:

RULE 1.13 Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization;

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign or may decline to represent the client in that matter in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

Upon consideration whereof, it is ORDERED that the Respondent shall receive a PUBLIC REPRIMAND, effective, March 11, 2010, and he hereby is so reprimanded.

Pursuant to Part Six, Section IV, Paragraph 13-9E. of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess costs against the Respondent.

It is further ORDERED that a copy *teste* of this Order shall be mailed by Certified Mail, Return Receipt Requested, to the Respondent, Wayne Richard Harke, at his address of record with the Virginia State Bar, 11890 Sunrise Valley Drive, Reston, VA 20191, and by first class, regular mail, to Bernard J. DiMuro, Respondent's counsel, and to Seth M. Guggenheim, Senior Assistant Bar Counsel.

ENTERED this 11th day of March, 2010.

William E. Glover, 1st Vice Chair
Virginia State Bar Disciplinary Board